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Pusch Wahlig Workplace Law

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Global Practice Guides

Employment

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2024

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INTRODUCTION

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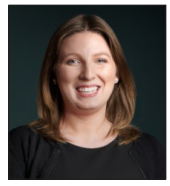
Pusch Wahlig Workplace Law is one of Germany's leading employment law firms. A dedicated team of 70 employment specialists in six locations provides legal advice all over Germany. The practice has particular experience in business restructuring, including mass workforce reductions, as well as reconciliations and social plans. The law firm further advises on compliance, remuneration and works council matters and represents companies in employment litigation, as well as on the implementation of SE structures and employment-related data protection. The mandates originate from a variety of sectors including financial services, technology, FMCG and many more, and the firm advises both large multinational corporations as well as prominent start-ups. As a member of L&E Global, Pusch Wahlig Workplace Law is one of the cornerstones of a leading global alliance of employment law firms and regularly advises clients on cross-border matters.

Contributing Editors

Tobias Pusch is the founder and managing partner of Pusch Wahlig Workplace Law. He advises national and international employers and executives on issues of individual and collective employment law. He has particular experience in corporate acquisitions, restructuring, SE formations, compliance matters, complex court proceedings and negotiations regarding collective bargaining agreements and works agreements, as well as reconciliation of interests and social plans. His clients are DAX-listed and large multinational companies, prominent start-ups and mid-sized companies, as well as top executives. Known for sustainable and innovative solutions, Dr Tobias Pusch is one of Germany's leading employment law specialists.



Teresa Gabele is a managing associate at Pusch Wahlig Workplace Law based in the Berlin office. The scope of her practice includes all issues of individual and collective employment law. She is specialised in drafting employment contracts and termination agreements. In addition, she has particular expertise in matters regarding senior executives, as well as extensive experience in immigration law, especially as it relates to access to the labour market for foreign employees and managers.

INTRODUCTION

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The Chambers Employment Guide 2024 introduces employment law matters across 53 jurisdictions. The Guide contains the latest legal information from around the globe on the main changes in employment law that have been enacted or decided in the past year, general remarks on employment contracts and conditions, non-compete and non-solicitation clauses, the data privacy law, the employment of foreign workers, "new work", the role of unions, termination of employment, employment disputes and dispute resolution.

Employment Law

People are at the core of every company's potential for added value. They manage the ongoing business and develop innovations for future progress and growth. This is why the key component for success in any organisation is how its people work together. The way in which this co-operation is achieved and the framework within which organisations can shape it is regulated by employment law. Due to the relationship of superiority and subordination between employer and employee, the employer enjoys a considerable advantage within this framework. Employment law therefore acts as a balance between the contractual freedom of the parties on the one hand and the protection of employees on the other.

To further redress the disparity between employer and employee, most jurisdictions provide for collective employment law in addition to individual employment law. Individual employment law deals with the legal relationship between the employer and the employee, while collective employment law deals with matters between employers or their coalitions (employers' associations) and trade unions or co-determination bodies (eg, works councils).

Further peculiarities arise in the event of disputes. In employment law, the economic interests of the parties are particularly important. Employers pursue economically calculated goals; employees rely on their employment relationship for their livelihood. In practice, this often requires quick, pragmatic and interest-driven solutions. More than in almost any other field of law, negotiation skills are indispensable in order to succeed in employment law and cannot be replaced by mere legal expertise.

Global Employment Law

Employment law is primarily national law – the scope of application of employment laws is determined by national boundaries. This leads to different practical implementations and regulations in different countries. One advantage of this is that the states concerned can individu-

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ally adapt regulations to their requirements and structures. However, in a world where cross-border relationships, takeovers and international contracts have become common practice, this approach can also lead to difficulties, precisely because regulations are designed and applied individually by each country. It is therefore imperative for managers and HR staff not only to know the local employment law standards, but also to have a more general overview and to be aware of the standards in other countries.

As an aftermath of the global COVID-19 crisis, companies recognised that there was less need than previously for a constant workforce in the office, and they became more receptive towards remote working arrangements. As a result, we have seen a global trend towards more flexible working models. As employees strive to work flexibly around the globe, local employment laws are reaching their limits. At the same time, countries have been concerned with amending legislation to ensure the health and safety of employees taking advantage of these new possibilities.

Current Developments

Several current developments have influenced employment law globally in recent years and will continue to do so in the future.

Flexible work models

Models such as working from home, mobile working, video conferences and desk sharing have been part of the modern world of work since the COVID-19 crisis at the latest. Along with new regulations come a variety of laws that aim to support a healthy work-life balance as the two areas become increasingly blurred. A good example can be found in Belgium, which has implemented a law which foresees the "right to disconnect from work".

Work-life balance

Companies around the world are increasingly concerned with work-life balance as a non-monetary incentive in the competition for the best staff members. Many legislators are supporting this trend with regulations that make it easier to combine family and career, with a particular focus on combating the growing shortage of skilled workers. In Europe, this has been driven mainly by the need to adopt EU directives into national law. These include, for example, the right to paid birthday leave and parental leave in many EU member states, as well as regulations regarding part-time working models and provisions regarding remote working.

Inflation crisis

Rising inflation is also having a global impact. On top of significant financial losses during the COVID-19 crisis, a global slowdown in economic growth – driven in part by the war in Ukraine and the global energy crisis as well as the COVID-19 aftermath – has caused a striking fall in real monthly wages in many countries. The cost of living has increased rapidly, with a particularly significant impact on low-income groups.

While schemes such as short-time work compensation and wage subsidies have largely protected wage levels from the effects of the pandemic, adequate adjustment of minimum wage rates could be an effective tool to help maintain purchasing power and living standards in the current inflation crisis.

Supply chains

There are also developments regarding the fair treatment of staff in supply chains. The global aim is to improve the protection of human rights all the way along global supply chains. To meet this objective, the prohibition in particular of child labour and forced labour is to be enforced

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and controlled, as well as the prohibition of substances that are harmful to people and the environment. As early as June 2011, the Human Rights Council issued the UN Guiding Principles on Business and Human Rights. These principles aim to address violations of human rights in the context of economic activities. In order to effectively implement these values and principles adopted by the UN, the German government, for example, is pushing within its own national legislation for internationally comprehensive standards regarding fair global supply and value chains. The German Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettensorgfaltspflichtgesetz* – LkSG) is the binding implementation of the UN Guiding Principles and came into force in January 2023.

Whistle-blower protection

One of the most significant European and global developments has been the adoption of the Whistleblowing Directive into national law by EU jurisdictions. Although most member states have now implemented the directive, many initially gave employers a period of grace in which to establish internal reporting processes, some of which will soon expire.

Outside Europe, countries are also encouraging employees to report information on violations of laws or regulations they become aware of at work. In Singapore, for example, the Ministry of Manpower recently took steps to raise awareness of the various channels through which workers can report health and safety problems at work, and to provide legal protection for workers who raise concerns.

Transparency

Global developments in the area of transparency – particularly pay transparency – are likely to continue since the entry into force of the EU Pay Transparency Directive in April 2023. Member states have three years to implement the directive into national law, which will lead to significant changes for many member states. There have also been developments in this area outside Europe, including in the US, where New York has become the latest US state to introduce legislation on pay transparency in job advertisements.

Equal pay

There have also been a number of recent developments in case law on equal pay. In Germany, for example, the Federal Labour Court recently rejected an employer's attempt to justify a pay gap between men and women on the basis of pay negotiation variations.

Climate crisis

The climate crisis will have a lasting impact on employment law. The conditions under which work is performed vary in terms of carbon footprint. One example is the efforts by employers to minimise travel distances and the associated CO_2 emissions caused by employees travelling to work. In terms of employment law, this means that regulations regarding remote working or the promotion of climate-friendly means of transport are relevant. The sustainable use of resources and the reduction of transport distances require global production chains to be set up more locally in different locations. A correspondingly closer linkage of operational processes requires global alignment and more flexible options under employment law.

The Guide's Purpose

Employment law is always in a state of flux and is constantly faced with new challenges due to ever-evolving technology and digitalisation, as well as social developments. Thus, new working models are regularly introduced all over the

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world and methods are developed to adapt work to modern lifestyles, the needs of society and the circumstances of everyday life. A variety of measures, which differ from country to country, have not infrequently led to highly divergent and sometimes contradictory results. A comparative view of local employment laws in international relations would thus appear essential in a globalised world of work.

Remaining apprised of new legal developments and maintaining the visibility of these on the horizon continues to be critical for employers. As employment laws differ from country to country, this guide aims to answer the most relevant questions in employment law in its participating countries and to provide an insight into current issues.

ARMENIA

Law and Practice

Contributed by:
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Concern Dialog

Contents

Concern Dialog is a top-tier, full-service law firm, headquartered in Yerevan, Armenia. It has been a trusted partner for businesses and individuals seeking legal counsel and representation since 1998. The firm is renowned for its work in the areas of corporate law, labour law, competition law, tax law, contract law, family law (including child abduction cases), and regulatory issues. Concern Dialog has extensive experience in regulatory matters in TMT, mining, energy, utilities, banking and finance, medical services, real estate, and not-for-profit sectors. In addition to its renowned consulting and transaction practice, the firm's litigation practice is regarded as one of the leaders in Armenia for landmark litigation and arbitration cases. Concern Dialog's membership of the TagLaw and Nextlaw networks, as well as its co-operation with individual law firms from various jurisdictions, allow the firm to provide services to its Armenian clients virtually worldwide. Lawyers of the firm are ranked by Chambers and Partners.

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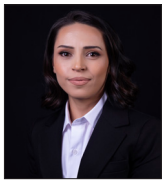

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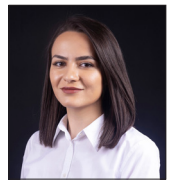

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1. Employment Terms

1.1 Employee Status

In the Republic of Armenia (RA), the Labour Code (the "Code") applies to all employment relationships without distinguishing between blue-collar and white-collar workers. Furthermore, the Code does not provide such definitions.

1.2 Employment Contracts

Indefinite and Definite Contracts

There are two main types of employment contracts: indefinite and definite contracts. Indefinite contracts are considered to be the general rule, whereas definite contracts are the exception. This is because definite contracts are only concluded when the employment relationship cannot be determined as being for an indefinite period, due to the nature of the work to be performed or the conditions of performance. The Labour Code also provides a list of situations in which fixed-term contracts can be established, for example, with seasonal workers, temporary workers (working for a duration of up to two months), replacement employees, foreigners (for the period of validity of the right of residence if the foreigner is required to have residence status to work in Armenia), etc.

Under Armenian labour law, the employment relationship between an employee and an employer is established either by a written employment contract concluded in accordance with the procedure established by labour legislation or by an individual legal act on hiring. The law requires contracts and individual legal acts to be in written form. An employment contract can also be established through mutual exchange between the parties using postal or electronic communication, provided that the method ensures the authenticity of the contract and accurately confirms that it originates from an employment contract party.

Compulsory information

The contract or the individual legal act on employment must include:

- the date and place of signing of the employment contract;
- the name, surname and patronym of the employee;

- the name of the legal person employer or the name, surname and patronym of the natural person employer;
- the workplace;
- the structural or separate division or department or institution of the employer (if applicable);
- the date of starting work;
- the job title and/or work duties, or a reference to the document defining such duties;
- the amount of the gross salary (including taxes paid from the salary, and social or other mandatory payments established by law) and the method of its determination;
- allowances, bonuses, or additional payments given to employees;
- the term of the employment contract (if applicable);
- the duration and conditions of the probationary period (if applicable);
- the work schedule (regular(full-time), part-time, or reduced or aggregated hours) and weekly working hours (except for aggregated hours);
- the type and duration of annual leave;
- the position, name and surname of the signatory of the employment contract; and
- the communication methods between the employer and the employee within labour relations.

Other terms may be included in the employment contract upon the agreement of the parties.

1.3 Working Hours

Standard Hours

In Armenia, the standard working hours are 40 hours per week, and eight hours per day. Nevertheless, the parties have the discretion to have flexible arrangements, while ensuring adherence to the mandatory provisions established by the Code.

There are no specific terms required for part-time contracts; the terms are determined by agreement of the parties.

Maximum Hours

The maximum working hours, including overtime, may not exceed 12 hours per day (including breaks for rest and meals), and 48 hours per week. Working hours for certain categories of employees (healthcare, emergency response and supply services, etc) may be 24 hours per day. But the average work time during the week may not exceed 48 hours, and there must be a minimum of 24 hours of rest between workdays.

An employee under two or more employment contracts, whether with different employers or the same employer, also must not work more than 12 hours per day, including breaks for rest and meals.

Overtime

As a general rule in Armenia, overtime work is allowed only in specific circumstances defined by law.

1.4 Compensation

In Armenia, the minimum monthly salary is AMD75,000 net. Besides the monthly salary, employees may receive additional compensation in the form of allowances, extra compensation, bonuses, or additional payments. However the payment of such bonuses is at the discretion of the employer and can be established in the employment contract or in the internal legal acts of the employer. Moreover, there is no mandatory requirement to provide a 13th pay cheque in Armenia.

When an employee works overtime, the employer must compensate them with additional pay for each extra hour worked, which should be at

least 50% more than the regular hourly rate. For night work, this compensation must not be less than 30% more than the hourly rate for each hour worked.

While the government can establish conditions under which employees may receive allowances, it does not otherwise intervene in the private sector.

1.5 Other Employment Terms

Annual Leave

Employees who work a five-day week must be granted a minimum of 20 working days of annual leave, while those who work a six-day week must be granted 24 working days of annual leave. For annual leave, the employer pays the employee an average wage, which is calculated by multiplying the employee's average daily wage by the number of days of leave granted. As a rule, replacement of annual leave with monetary compensation is not allowed. If the employee avoids or refuses to use the annual leave or a part of it for two-and-a-half consecutive working years, the period of annual leave granted to the employee may be decided by the employer.

Pregnancy and Maternity Leave

Women are entitled to the following types of leave:

- 140 days of leave, comprising 70 days of pregnancy leave and 70 days of maternity leave.
- In cases of difficult delivery, a total of 155 days is allowed, with 70 days allocated for pregnancy leave and 85 days for maternity leave.
- For simultaneous delivery of more than one child, 180 days are granted, divided into 70 days of pregnancy leave and 110 days of maternity leave.

These leaves are calculated and granted to the woman in full. In the event of premature delivery, any unused days of pregnancy leave are added to the maternity leave period.

Additionally, an employee who adopts a newborn or becomes a guardian of a newborn is entitled to leave starting from the day of adoption or appointment until the infant reaches 70 days of age (or 110 days if adopting or becoming guardian of two or more newborns). Similarly, a biological mother who gives birth to a child through a surrogate is entitled to leave from the day of the child's birth until the newborn reaches 70 days of age (or 110 days for the birth of two or more newborns).

The pay for maternity leave is calculated by average monthly salary.

Paternity Leave

Five days of paternity leave is given upon request of the employee within the first 30 days of childbirth. For each day, the employer pays an amount equal to the employee's average daily wage.

Childcare Leave

Childcare leave, intended for caregivers of children up to three years old, is granted upon request to a parent, stepparent, or guardian caring for a child until the child turns three years old. No leave pay is provided aside from any applicable state benefits.

Temporary Incapacity Leave

Temporary incapacity leave is granted for incapacity caused by:

- illness/injury;
- prosthetics;
- the need for sanatorium treatment; and

- the need for care caused by the illness or injury of a family member.

The temporary incapacity benefit is paid at the expense of the employer for the first five working days of temporary incapacity, which is not compensated by the state, and the rest of the pay is at the expense of the state budget of the Republic of Armenia for the time period mentioned in the government's temporary disability paper.

Employee Liability

An employee may be held liable under the law when certain conditions are met: damage exists, the damage stems from illegal activity, there is a direct causal link between the activity and the damage, fault is attributable to the employee, the parties affected by the violation were in an employment relationship at the time, and the occurrence of damage is connected to work-related activities.

An employee is obliged to pay compensation for damage caused to the employer only in the following circumstances:

- damage to or loss of the employer's property;
- overspending of materials;
- compensation paid by the employer for damage caused to a third party by the employee while performing work duties;
- expenses incurred due to damage to the employer's property;
- improper preservation of material values; and
- failure to take deliberate measures to prevent the release of low-quality products, or embezzlement of material or money.

The employee is obliged to compensate the damage caused to the employer in full, although this may not be equal to more than three months' average salary, except for in the following cases:

- the damage was caused intentionally;
- the damage was caused by the employee's criminal activity;
- an agreement on full financial responsibility was signed by the employee;
- the damage was caused by the loss of necessary tools, equipment, special clothing, etc, provided to the employee for work;
- the damage was caused in such a way or to such property as falls under full property liability as defined by law; or
- the damage was caused under the influence of alcoholic beverages, drugs, or psychoactive substances.

2. Restrictive Covenants

2.1 Non-competes

Non-competes are not explicitly regulated in the RA. While increasingly common in practice, questions about their legality and enforceability remain unanswered due to the lack of case law on the matter.

2.2 Non-solicits

Like non-competes, questions regarding the legality and enforceability of non-solicits persist due to the absence of case law and explicit law provisions.

3. Data Privacy

3.1 Data Privacy Law and Employment

Data privacy in employment law is primarily governed by the Labour Code, with additional regulations provided by the Law on "The Protection of Personal Data".

The 16th chapter of the Labour Code establishes how employers should handle, protect, and pro-

cess employees' personal data while outlining employees' rights and the legal implications of non-compliance. In particular, it defines personal data as information required for employment purposes and covers all activities related to handling this data. Employers must process data only for legitimate employment-related reasons, such as compliance with the law or ensuring safety, and must obtain employee consent to process sensitive information. They are also responsible for ensuring data security and informing employees about how their data is managed.

When it comes to protecting and transferring data, it must be handled according to legal standards and not shared with third parties without employee consent, except in specific circumstances. Employees have the right to access their data, request corrections or deletions, and seek legal remedies if their data rights are violated. Violations of data protection rules can result in legal consequences for those responsible.

4. Foreign Workers

4.1 Limitations on Foreign Workers

As an exception to the general rule of indefinite contracts, a fixed-term contract is signed with foreigner workers with the validity period of the right of residence, if the foreigner is required to have residence status in order to work in Armenia.

In addition, termination of such contracts is permissible if the foreign worker's residency status is revoked or invalidated.

4.2 Registration Requirements for Foreign Workers

Foreign workers in Armenia do not face special registration requirements. They can work in the country if they have residence status permitting employment or if they qualify for exceptions under this status.

5. New Work

5.1 Mobile Work

Mobile work itself is not regulated under Armenian law. However, Armenian legislation does permit work to be performed remotely. Remote work can only be established by mutual agreement between the employer and the employee, subject to the nature of the work allowing for remote execution. The procedures and conditions for remote work, including the reimbursement of expenses for necessary equipment and materials, or their acquisition, are determined by a collective agreement, the internal disciplinary rules of the employer, or a written agreement between the parties.

Data Privacy

Armenian legislation does not differentiate between the obligations of employers regarding the processing of personal data whether work is conducted at the workplace or remotely. In all cases, employers must comply with the requirements established by the Labour Code of Armenia and Armenian law on "The Protection of Personal Data".

Occupational Health and Safety

According to the Code, when work is performed remotely, employers are exempt from complying with the standard health and safety requirements for employees, except for the obligation

to provide employees with personal protective equipment.

5.2 Sabbaticals

Armenian legislation does not mandate paid sabbaticals, but employers have the discretion to provide employees with such type of paid leave by including the relevant provisions in their internal acts.

5.3 Other New Manifestations

The concept of "new work" is not currently regulated under Armenian law, and there are no anticipated changes or legislative initiatives expected in this field in the near future. The implementation and use of such practices are at the discretion of the employer.

6. Collective Relations

6.1 Unions

Under Armenian law, unions are established to protect the rights of parties involved in employment contracts. These unions come in two types: trade unions for employees and employers' associations.

Trade Unions

Trade unions have the right to:

- set rules (elect representatives, manage staff) and goals (plan programmes);
- get work information, propose improvements and negotiate contracts;
- monitor labour law compliance and defend employees' rights;
- participate in production planning and suggest workplace changes;
- co-ordinate employee-employer interests and influence government policy; and
- organise strikes (if necessary).

However, despite their legal existence, they are not actively engaged in practice.

Employers' Associations

Employers' associations are non-profit organisations that unite both employer organisations and individual employers. The member organisations are represented by their authorised representatives within the associations. The activities of these associations are regulated by the Code, applicable laws, and their own charter.

6.2 Employee Representative Bodies

Trade unions have the authority to advocate for employees' rights and interests, ensuring their protection in labour relations. Their primary functions include representing employees, and negotiating republican, branch and territorial, and local collective agreements to improve working conditions. Additionally, trade unions have the power to decide and declare strikes.

Trade union organisations are founded by decision of the founding meeting convened on the initiative of its founders (at least three employees). The founding meeting approves the charter of the organisation, and elects management and supervisory bodies. They are registered before the state registry of legal entities of Armenia.

6.3 Collective Bargaining Agreements

Collective bargaining agreements, or collective contracts, regulate employment relations.

A collective contract is a voluntary agreement concluded in writing between an employer and employee representatives, or the employers' union and trade union (bilateral contract). In some cases, it may also involve the Government of the Republic of Armenia (tripartite contract). This agreement regulates labour relations

and related social or economic matters between employees and employers.

There are three levels of collective contracts: republican, branch and territorial, and local (or of the organisation).

Republican Collective Contracts

Republican collective contracts are signed by the Republican Union of Trade Unions, the Republican Union of Employers and the Government of the Republic of Armenia. They include provisions for safety, employment security, broader social benefits, and mechanisms for monitoring and ensuring compliance with their terms.

Branch Collective Contracts

The parties to branch collective contracts are the union of employers of the relevant branch of the economy (production, service, profession) and the branch republican union of trade unions. The parties to territorial collective contracts are the territorial union of employers operating in a certain territory and the territorial union of trade unions. These two parties address crucial areas such as remuneration, working hours, job security during workforce reductions, and opportunities for professional growth, as well as procedures for implementation and dispute resolution.

Local Collective Contracts

A collective contract of the organisation or local collective contract is a written agreement concluded between the employer and the representatives of the employees in the given organisation. The parties can define conditions that are not covered by labour laws or higher-level collective contracts, providing they do not contradict such regulations and, at the same time, do not negatively impact employee conditions specified by those agreements.

7. Termination

7.1 Grounds for Termination

When terminating employment, the employer must provide the employee with factual and legal reasons for the dismissal in the termination order.

The procedure of the dismissal differs based on the grounds for termination.

In cases of dismissal for an employee's non-compliance with the position held or the work performed, reinstatement of the employee to a previous job, or a reduction in the number of employees and/or positions due to production necessity, termination is possible if the employer has offered the employee another job in accordance with their professional training, qualification and state of health, and the employee has refused the offered job, or if no suitable job opportunities are available within the organisation.

In the event of non-compliance of the employee with the position held, the employment contract can be terminated if the employee is unable to perform their work duties due to lack of professional ability or health conditions.

In the event of dismissal for regular non-fulfilment of duties or contravention of internal disciplinary rules without a valid reason, termination is possible if the employee who committed a labour disciplinary violation already has at least two prior active disciplinary penalties. The suitability of the employee's professional abilities to the position held or the work performed is evaluated by the employer, and the suitability of the employee's state of health is determined by a medico-social examination report.

An employer has the right to terminate an employee's contract without giving notice in the event of:

- regular non-fulfilment of the employee's duties or contravention of internal disciplinary rules without a valid reason;
- loss of trust in the employee;
- the employee being at the workplace or performing work functions at the workplace or outside the workplace under the influence of alcohol, narcotics or psychotropic substances;
- the employee not showing up for work during the entire work shift due to a disreputable reason; and/or
- the employee's refusal or avoidance of a mandatory medical examination.

For all other cases, notice is mandatory.

Collective Redundancies

Collective redundancies are possible in case of cessation of activity (liquidation) or reduction of the number of employees or positions. The employer must notify the employees' representative, as well as the State Employment Service, of the number of employees who will be dismissed two months in advance if the employer intends to dismiss more than 10% of the total number of employees, and no fewer than ten employees within a two-month period.

7.2 Notice Periods

Notification

The minimum statutory notice period for terminating an employment contract depends on the grounds for termination.

Two months' notice

Two months' prior written notice is required when:

- the employment contract is terminated on the ground of the liquidation of the employer; and
- there is a reduction in workforce due to changes in volumes of production and/or economic and/or technological and/or work organisation conditions and/or production needs.

For mass terminations the employer must also notify both the government agency responsible for employment in Armenia and the employee representative body.

Three days' written notice

Three days' prior written notice is required when:

- an alien's residence permit is recognised as invalid; or
- an employee fails to perform their duties for more than ten consecutive working days (shifts) or more than 20 working days (shifts) within the last three months as a result of not being allowed to work, in the case stipulated by the Code.

Notice based on period of employment

In cases where the employment contract is terminated because the employee is not suitable for the position held or the work performed, or because of a long-term disability, the notice period varies according to the employee's period of continuous employment as follows:

- continuous employment for a period of up to one year – notice of no less than 14 days;
- continuous employment for a period of up to five years – notice period of 35 days;
- continuous employment for a period of five to ten years – notice period of 42 days;
- continuous employment for between ten and 15 years – notice period of 49 days; and

- continuous employment for more than 15 years – 60 days' notice period.

No prior notice

For terminations where no prior notice is required, refer to question **7.3 Dismissal for (Serious) Cause**.

In all cases, an employer has discretion to terminate employment without prior notice by paying a fine for every due day of notification, calculated based on the average daily salary rate.

Mass dismissal

In the case of liquidation of a company or a reduction in the number of staff, an employer is obliged, no less than two months' prior to the termination of employment contracts, to submit data on the number of employees to be dismissed (by profession and gender and age) to the state body authorised by the Government of the Republic of Armenia in the field of employment and to the employees' representative, if it is planned to dismiss more than 10% of the total number of employees within two months, but not less than ten employees (mass dismissal).

Severance

Employees are entitled to severance pay in the following situations.

A severance payment equivalent to one month's salary must be paid where the employment contract is terminated if:

- the organisation is liquidated (the activity of an individual entrepreneur is terminated);
- the number of employees and/or staff positions is reduced due to changes in volumes of production and/or economic and/or technological and/or work organisation conditions and/or by production needs; and
- the employee is reinstated in a previous position.

In cases where the employment contract is terminated because the employee is not suitable for the position or the work performed, or has a long-term disability, the amount of severance pay the employer has to give to the employee varies according to the employee's period of continuous employment as follows:

- continuous employment for up to one year – ten times the average daily wage;
- continuous employment from one to five years – 25 times the average daily wage;
- continuous employment from five to ten years – 30 times the average daily wage;
- continuous employment from ten to 15 years – 35 times the average daily wage; and
- continuous employment for more than 15 years – 44 times the average daily wage.

In situations other than those listed above, severance pay is at the employer's discretion.

7.3 Dismissal for (Serious) Cause

The legislation does not explicitly define "dismissal for a serious reason". Nevertheless, it stipulates instances where an employment contract can be terminated without giving prior notice to an employee and without the obligation to provide severance pay. These instances include:

- the employee regularly fails to fulfil the obligations reserved for them by the employment contract or the internal regulatory rules, with no good reason;
- the employer has lost confidence in the employee;
- the employee is found to be under the influence of alcohol, narcotics or psychotropic

substances at the workplace or during the performance of their work;
- the employee fails to come to work throughout the entire working day (shift) with no good reason; and
- the employee rejects or evades a mandatory medical examination.

7.4 Termination Agreements

According to Armenian employment law, termination agreements can be mutually agreed upon by the parties involved. One party must propose in writing to terminate the employment contract. If the other party accepts the offer, they must notify the proposing party within seven days.

Upon agreement, the parties sign a written termination agreement detailing the termination period and other conditions, such as compensation.

If the party receiving the termination proposal does not respond within the specified period, the proposal is considered rejected.

7.5 Protected Categories of Employee

An employment contract cannot be terminated by an employer under the following circumstances:

- during the period of temporary incapacity of the employee for work, except when the employee has long-term incapacity for work, defined as temporary disability lasting more than six consecutive months or exceeding 180 days within the last 12 months, excluding maternity leave days;
- during the leave of the employee;
- from the day a pregnant woman notifies the employer of her pregnancy until one month after maternity leave;
- throughout the period of caring for a child of up to one year old, unless the employee consistently fails to fulfil contractual obligations or internal rules, loses the employer's trust without valid reason; is under the influence of alcohol, drugs, or psychotropic substances at work or while performing duties outside the workplace; or rejects mandatory medical examinations;
- after a decision to strike is made, and during the strike, provided the employee participates as prescribed by the Code;
- while fulfilling obligations imposed by the state or local self-government bodies, except as provided by the Code;
- during natural disasters, technological accidents, epidemics, accidents, fires, or other emergencies, or when addressing their immediate aftermath, if the employee is absent due to these circumstances; and
- during unplanned transfers or the provision of vacations in educational institutions (including preschools), when the employee is absent to arrange childcare for a child under 12 years old.

It should be noted that these restrictions do not apply if the employment agreement is terminated due to the liquidation of the legal person employer.

8. Disputes

8.1 Wrongful Dismissal

The grounds for a wrongful dismissal claim are the absence of legal grounds for termination or the violation of the requirements set out in the law, internal or individual acts of the employer or the employment contract.

Damages/Relief

If the court determines the termination to be wrongful, the employee's rights will be restored. In such cases, the employer is liable to pay the average salary for the entire period of forced idle time. If restoration to the previous job is impossible, the court may decide not to reinstate the employee and instead require the employer to pay compensation. This compensation should not be less than the average monthly salary but should not exceed 12 times the average monthly salary.

8.2 Anti-discrimination

Armenian labour law prohibits all kinds of discrimination on the grounds of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion, political or other views, being a national minority, property, birth, disability, age or other circumstances of a personal or social nature.

Burden of Proof

If an employee claims to be a victim of discrimination, the burden of proving the occurrence of the discrimination lies with the employee.

Damages/Relief

The relief in such cases is the same as previously stated – restoration to their previous job or, where this is not possible, compensation equal to the employee's average salary for the entire period of forced idle time.

8.3 Digitalisation

Starting from January 2024, an electronic system was established for civil proceedings in Armenia. With this new amendment, paper documents are being filtered out of the court and the digitalisation of future proceedings is envisaged.

All persons using the system must submit procedural documents (appeal, application, complaint, response, position, petition, etc) to the court only in a digital form through the system (although prior court proceedings will continue in the paper format in which they began), except for information constituting a state secret, which is submitted only in material form.

A person using the system is considered to be:

- a natural person who has performed any action through the system at least once within the framework of a civil case and has not subsequently informed the court examining the case about the impossibility of using the system; and
- legal entities, sole proprietors, state and local governments, respondents in procurement disputes, representative attorneys, bankruptcy trustees, notaries and licensed mediators, regardless of whether they have ever taken any action through the system.

Within the framework of a civil case, the court will conduct the case electronically.

9. Dispute Resolution

9.1 Litigation

There are no specialised employment forums in Armenia.

Under the Armenian Civil Proceedings Code, a class action claim must be jointly presented by a minimum of 20 co-plaintiffs. The court decision will be in accordance with the common procedure.

An appeal against a court decision may be filed by a class action representative.

Class action plaintiffs may litigate their cases in court through a class action representative or representatives, the number of which cannot be more than five. A representative in a class action can be any claimant, non-governmental advocate organisation or lawyer. These equally represent the interests of all plaintiffs.

In a class action, the participation of a representative in the case excludes the participation of the plaintiff in the proceedings, but cannot exclude the right of the latter to become acquainted with the materials of the case, to refuse the claim for their part, or to terminate the powers of the representative on their behalf.

The court must terminate the powers of the representative at the request of the majority of the class action plaintiffs. If some of the plaintiffs, but not the majority, want to terminate the powers of the representative or to change the representative, then the court will separate the proceedings of the case in terms of their claims.

9.2 Alternative Dispute Resolution

Employment disputes may be submitted to arbitration, if there is an arbitration agreement between the employer and the employee, or if arbitration is provided in the collective contract as the method for resolving disputes. Disputes concerning employment contracts are subject to the same time limits as those applicable in the case of submission to the courts.

An arbitration agreement does not limit an employee's right to submit the dispute arising from the employment contract to a court, unless the arbitration agreement was signed after the dispute arose and the parties unconditionally agreed to submit the dispute to arbitration.

9.3 Costs

Both the employee and the employer can claim judicial fees, including attorneys' fees, in court. Judicial fees are distributed among the parties in the case in proportion to the amount of the prevailing claims. The court may require the losing party to reimburse these fees to the prevailing party, either fully or partially.

The court has authority to reduce the attorneys' fees claimed by the prevailing party after considering the factors of the case, such as the complexity, the duration of the proceedings, and the legal activities performed.

AUSTRALIA

Law and Practice

Contributed by:
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People + Culture Strategies

Contents

People + Culture Strategies (PCS) is unique in that it is the only labour and employment law firm in Australia that integrates a full specialist law firm with a management consulting business. PCS was established to be unlike any other legal firm, with an emphasis on working with clients to prevent disputes and legal problems from arising within their organisations, as opposed to being merely a "reactive" provider. PCS is regarded as one of Australia's most innovative professional services firms, servicing employers of all sizes and across all industries, operating purely in labour and employment law and strategy. The firm has a thriving practice in the area of workplace investigations as well as in the provision of bespoke leadership development and compliance programmes. The firm also conducts webinars and seminars, which are not just legal updates but rather, genuine thought-leading events.

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1. Employment Terms

1.1 Employee Status

In Australia, an employee can be employed on a permanent basis (as a full-time or part-time employee) or casual basis. Permanent employees can also be employed for a fixed or maximum term.

The nature of an employee's employment status will dictate some of the terms and conditions of their employment, such as hours of work, leave entitlements and remuneration.

While Australia does not use "blue-collar worker" and "white-collar worker" to define employment status, these terms are widely understood when referring to particular industries.

1.2 Employment Contracts

Every employment relationship in Australia is regarded as being based on a contractual relationship between the employer and employee. There are generally four types of employment contracts.

- Permanent: this is the most common type of contract in Australia. This category of employee is employed on an ongoing basis and can be either full-time or part-time.
- Casual: these contracts are for employees who perform work on an "as needs" basis and they provide no guarantee of ongoing work.
- Fixed or maximum term: these contracts operate for a specific period of time, such as one year. At the end of this time the contract immediately comes to an end and the employee's employment is terminated. Recent legislative changes impose limitations on how fixed-term contracts can be used. Fixed-term contracts made on or after 6 December 2023 cannot be for longer than two years, including any extensions or renewals, unless an exception applies.
- Executive: these contracts are for employees in management positions or performing professional duties. They ordinarily include additional terms such as a restraint of trade.

An employment contract does not have to be in writing, as the relationship can be constituted by a verbal agreement, written agreement or a combination of both. It may be possible to infer that an agreement has been reached, in the absence of documentation, from the parties' conduct, such as commencing work or paying wages.

1.3 Working Hours

Maximum Hours

The National Employment Standards (NES) in the Fair Work Act 2009 (Cth) (FW Act) provide that the maximum weekly hours are 38 hours per week, plus "reasonable additional hours".

"Reasonable additional hours" will be determined by factors including:

- whether the employee receives overtime payments and penalty rates;
- whether the employee receives other compensation for, or remuneration that reflects an expectation of, working reasonable additional hours;
- the nature of the employee's role; and
- the employee's level of responsibility.

Overtime Pay

Employment contracts often stipulate that any reasonable additional hours are compensated for through an employee's total remuneration.

Employees who are covered by a modern award or enterprise agreement will be entitled to over-

time pay in accordance with the relevant industrial instrument. Employees who are not covered by a modern award or enterprise agreement do not receive remuneration for overtime unless their contract of employment provides for these payments. These employees may be required to work reasonable additional hours (as discussed above) over 38 hours per week.

The rate of pay for overtime will vary depending on the terms of the industrial instrument or contract, but overtime is usually paid at a rate of time and a half for the first several hours and double time thereafter. While there is no strict limit on amounts of overtime set out in legislation, some modern awards may prescribe a minimum amount of time between shifts (usually ten hours), which prevents employers from requiring their employees to work successive shifts of overtime within a short period.

Flexible Arrangements

Every modern award contains a flexibility provision that allows an employer and individual employees to agree to vary the application of various terms of the modern award, including the application of overtime rates. This agreement is only valid if it is genuine (ie, without coercion or duress) and must be entered into after the employee has commenced employment with the employer. Any agreement that is entered into must result in the employee being better off overall, at the time the agreement is made, than the employee would have been if no individual flexibility agreement had been made. In addition to this, after 12 months' continuous service, the following may request flexible working arrangements in writing:

- employees who are parents or have responsibility for the care of a child who is school age or younger;
- employees who are a carer as defined in the Carer Recognition Act 2010 (Cth); or
- employees who have a disability, are 55 or older, are pregnant, are experiencing family or domestic violence, or are caring for or supporting an immediate family or household member who requires care or support because of family or domestic violence.

While there are no mandated flexible working arrangements, the typical types of flexible working arrangements are modifications to:

- hours of work (eg, start and end times);
- work patterns (eg, days of work or job sharing); or
- locations of work (eg, working from home).

1.4 Compensation

All employees are entitled to a minimum wage. The minimum wage is provided by the FW Act and is reviewed annually by the Fair Work Commission Expert Panel. As of 1 July 2024, the national minimum wage is AUD24.10 per hour, or AUD915.90 per week.

Modern awards and enterprise agreements also prescribe a separate minimum wage (along with penalties, allowances and other benefits) which may be higher than the national minimum wage. An employee covered by either industrial instrument must be paid at or above the relevant minimum wage.

1.5 Other Employment Terms

The FW Act contains the NES which provide a safety net (or minimum level) of entitlements for employees, regardless of an employee's level of remuneration. The NES apply regardless of whether an employee is covered by a modern award or enterprise agreement, and cannot be

stripped away by any conflicting terms in a contract of employment.

Permanent Employees

The NES for permanent employees are:

- Maximum weekly hours – 38 per week, plus reasonable additional hours.
- Requests for flexible working arrangements – after 12 months' service, certain categories of employees can request a flexible working arrangement.
- Offers and requests to convert from casual to permanent employment – in some circumstances employees can request for their employment status to be converted from casual to permanent.
- Parental leave and related entitlements – after 12 months' continuous service, both parents may take separate periods of 12 months' unpaid parental leave.
- Annual leave – four weeks' paid annual leave per year of service, five weeks' paid leave for shift workers (pro-rata amounts for part-time employees).
- Other leave – employees are entitled to ten days of personal/carer's leave each year (pro rata for part-time employees), two days of compassionate leave per occasion and ten days of paid family and domestic violence leave each year.
- Community service leave – an employee may be absent from work for jury service, a "voluntary emergency management activity" or other community service activities prescribed by the FW Act.
- Long service leave – employees are entitled to long service leave as set out in a modern award, or in its absence, relevant state or territory legislation.
- Public holidays – employees are entitled to be absent from work on a public holiday without loss of pay.
- Superannuation contributions – employers have an obligation to make superannuation contributions to a superannuation fund. The current rate is 11.5%. This will increase to 12% on 1 July 2025.
- Notice of termination and redundancy pay – an employee is entitled to up to four weeks' notice of termination (an additional week is required if the employee is over 45 and has at least two years of continuous service). Employees also have an entitlement under the FW Act to redundancy payment of up to a maximum of 16 weeks' pay.
- Fair Work Information Statement and Casual Employment Information Statement – these contain information about an employee's terms and conditions of employment, as well as their rights and obligations, and must be provided to all new employees.

Casual Employees

Casual employees have some entitlements under the NES. Casual employees are not entitled to paid leave under the NES (except for family and domestic violence leave); however, they may take unpaid forms of compassionate leave, carer's leave, community service leave and public holidays. Casual employees may also be entitled to long-service leave depending on the terms of the relevant state legislation. Casual employees employed on a regular and systematic basis will also be entitled to request flexible working arrangements and take unpaid parental leave.

2. Restrictive Covenants

2.1 Non-competes

In Australia, restrictive covenants are legal and will be upheld by the courts provided they go no further than is reasonably necessary to protect an employer's "legitimate business interests". Restrictive covenants are used by employers to protect their business by preventing employees from engaging in a range of competitive activities during, and after, their employment.

The most common types of restrictive covenants are:

- non-compete covenants;
- non-solicitation covenants; and
- non-dealing covenants.

Non-compete covenants prohibit former employees from approaching clients, working for competitors or establishing their own businesses during the period of restraint.

To be enforceable, restrictive covenants need to be properly drafted and are usually framed by reference to:

- a geographical area;
- a period of time;
- defined industries, businesses or activities that the employee cannot be involved in; and/or
- classes of people (such as customers, clients or employees) with whom the employee is restricted from dealing.

If an employer suspects a former employee is in breach of their post-employment restrictive covenants then, prior to commencing litigation, it is common to write to the former employee to demand the former employee cease and desist from any and all activity. In order to comply with this demand, the employer may require the former employee to provide written undertakings to confirm the former employee's ongoing compliance with the post-employment restrictive covenants.

If a former employee continues to act in breach of their post-employment restraints then an employer can seek enforcement of the restraints by applying for an interlocutory injunction (ie, an order to stop the former employee from breaching the restrictive covenants). Damages may also be available in some cases.

2.2 Non-solicits

Non-solicitation covenants are similar to non-competes except they prevent former employees from pursuing clients, customers and suppliers. They also seek to prevent the solicitation of former employees.

Restrictive covenant clauses are generally used when employing or promoting an individual to a mid, senior or executive position. Employers need to use these clauses carefully and they should be tailored to an individual employee so that they are enforceable and go no further than necessary to protect the interests of the employer.

3. Data Privacy

3.1 Data Privacy Law and Employment

The Privacy Act 1988 (Cth) requires organisations (other than small businesses) to adhere to a set of Privacy Principles (the "Principles") in the collection and management of "personal information". The Principles include the requirement for organisations to take reasonable steps

to protect personal information from misuse, interference, loss or unauthorised access.

An important exception to compliance with the Principles covers the "employee records" of current or former employees but only when used by the employer in relation to their employment. An employee record is defined quite broadly to include personal or health records relating to employment, which can go so far as to capture documents concerning the termination of an employee's employment. This exemption does not cover prospective employees, contractors or employees of other companies (such as labour hire employees or employees of a subsidiary).

4. Foreign Workers

4.1 Limitations on Foreign Workers

It is important that employers ensure that prospective employees have a legal right to work in Australia. Significant penalties may apply to employers who employ individuals who do not have a legal right to work in Australia (including financial penalties and withdrawal of sponsorship status).

The FW Act, and the obligations that arise under it, do not apply to foreign employment relationships. However, the FW Act extends to employees working overseas and employees of a foreign or overseas company who work in Australia, if they are an Australian-based employee.

4.2 Registration Requirements for Foreign Workers

Foreign workers can work in Australia in accordance with the stipulations in their visa. Registration requirements will depend on what type of visa the employee has. For example, an employer who hires a person on a "working holiday maker" visa must register for "pay as you go" withholding tax.

5. New Work

5.1 Mobile Work

There are no specific regulations or restrictions on employees who work remotely from home. Working from home continues to exist in a post-pandemic world, with many employers adopting a hybrid approach to working.

Employers continue to have obligations to employees working from home and key considerations include the following:

- Work, health and safety obligations – employers have a duty to ensure the health and safety of workers regardless of where they are physically located.
- Confidential information – working from home can present a number of challenges for protecting the confidential information of employers. Employers should ensure they have computer, privacy and confidential information policies that are regularly reviewed and updated to address the issues employees face when working from home on a regular basis.

5.2 Sabbaticals

Sabbatical leave is not a statutory entitlement under employment legislation in Australia. However, employers may, at their discretion, agree to an employee's sabbatical.

5.3 Other New Manifestations

For several years the physical workplace, as well as the way people work, have been transforming. Working from home or hybrid working has become an option for many employees. Some

employers have favoured open-plan offices and hot-desking instead of individual offices. The drivers of this change include the desire to increase collaboration between colleagues, the view that these changes increase productivity and the desire of some employees to continue working from home in a post-pandemic world.

There have also been changes to the way people work with the rise of the gig economy. There has been much debate in Australia about the status of these workers and the rights to which they should be entitled. The leading cases have generally classified these workers as independent contractors. There are ramifications resulting from this categorisation as, in Australia, employees have significantly more legal rights.

The government recently brought in a number of legislative reforms for "employee-like" forms of work which are designed to provide this category of workers with more legal rights. These reforms give the FWC powers to make minimum standards orders or guidelines for work performed by "employee-like" or digital platform workers. A minimum standards order might include terms relating to:

- payment terms;
- deductions;
- record-keeping; and
- insurance.

The reforms also provide a framework to enable "employee-like" workers to access consent-based collective agreements. Further, "employee-like" workers will have access to protections against unfair deactivation and unfair termination.

6. Collective Relations

6.1 Unions

Unions in Australia can represent employees to assist in resolving workplace disputes and to act as a representative during bargaining negotiations. Bargaining negotiations occur when an employer and its employees negotiate the terms and conditions of an enterprise agreement which will cover the employees' employment.

6.2 Employee Representative Bodies

Unions are employee representative bodies that represent their members. Unions must operate in accordance with the Fair Work (Registered Organisations) Act 2009 (Cth).

6.3 Collective Bargaining Agreements

Employers may wish to negotiate and implement an enterprise agreement in order to tailor the terms and conditions of employment to the specific requirements of a business. A proposed enterprise agreement must be voted in by the majority of employees.

The process of creating an enterprise agreement in Australia involves a period of bargaining, which must take place in good faith. This means employers should attend and participate in meetings, disclose relevant information, and give genuine consideration to, and respond to, proposals. However, good faith bargaining does not require employers and employees to make concessions during bargaining or to enter into an agreement.

A key element of any enterprise agreement is that it must pass the "better off overall test" to be approved. This requires that at the time the approval application is made, each award-covered employee must be better off overall under

the enterprise agreement than under the modern award.

Recent legislative changes have provided unions and employees with greater scope to compel employers with common interests to come together and negotiate an enterprise agreement. The FWC has also been given greater powers to intervene in bargaining disputes and make a workplace determination if the parties have reached an impasse during the bargaining period.

7. Termination

7.1 Grounds for Termination

An employee's employment can be terminated with notice, summarily without notice, on the basis of redundancy, or because an employment contract has reached the end of a fixed term.

Termination

An employer must take care to ensure that it has a valid reason for terminating an employee's employment if notice is given, particularly if the employee is eligible to make an unfair dismissal claim. If an employee's employment is terminated, an employer may be exposed to an employee making a claim such as an unfair dismissal, general protections application or breach-of-contract claim.

Termination without notice typically occurs if an employee is found to have engaged in "serious misconduct" in their employment with the employer.

Redundancy

A redundancy occurs if an employee's employment is terminated at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour. Ultimately, the processes adopted by an employer in a redundancy situation will depend on the circumstances, including the relative seniority of the employee whose role is being made redundant and the risks for the employer that are attached to the particular process. An employer must also take care to ensure that if the termination of an employee's employment is characterised as a redundancy, it is a "genuine redundancy". Often employees will request that their separation from their employment be characterised as a redundancy because of the concessional tax benefits that flow from a redundancy. In agreeing to this arrangement, an employer assumes a considerable amount of risk, including that it may potentially be in breach of its obligations with respect to withholding tax and therefore could be subject to penalties.

Additional obligations arise where an employer is considering the redundancy of 15 or more employees. In these circumstances, the employer must give written notification to Centrelink (the government agency responsible for providing social security payments and services).

7.2 Notice Periods

Under the NES an employee is entitled to up to four weeks' notice of termination of employment (an additional week is required if the employee is over 45 years old and has at least two years of continuous service). The NES do not require any specific period of notice to be provided by employees. However, it is common that a mutual obligation or other period of notice required by the employee will be contained in an employee's modern award, written contract of employment or letter of offer.

The NES confirm the following notice periods based on an employee's continuous service:

- one year or less – 1 week;
- over one year and up to the completion of three years – two weeks;
- over three years and up to the completion of five years – three weeks;
- five years and over – four weeks; and
- employees who are over 45 years old who have completed at least two years of service – an additional week on top of their notice period.

An employer may make a payment in lieu of notice to an employee if the employer does not require them to work out their notice period.

7.3 Dismissal for (Serious) Cause

Summary dismissal means the termination of the employment of an employee without notice. An employee will typically be summarily dismissed where they are found to have engaged in "serious misconduct" in their employment with the employer. "Serious misconduct" is defined at common law and in legislation. Under the Fair Work Regulations 2009 (Cth), serious misconduct is defined to include:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the employment contract, such as theft, fraud, assault, intoxication at work, or disobedience of lawful and reasonable orders; and
- conduct that threatens the health or safety of others, or the reputation, viability or profitability of the employer.

When an employee is summarily dismissed, the employer is only required to pay the employee for work performed up to the time of dismissal (including any outstanding wages) plus any statutory leave entitlements they have accrued but not yet taken, and superannuation. As there is no requirement to give notice where an employee is summarily dismissed, there is no corresponding requirement to pay notice.

7.4 Termination Agreements

Termination agreements, also known as deeds of release, can be entered into at the discretion of an employer and employee. If an employer negotiates an exit package with an employee which provides the employee with more than their legal entitlements, the employer may choose to enter into a deed of release to protect itself from future claims from the employee.

7.5 Protected Categories of Employee

The general protections jurisdiction in Australia allows an employee to bring a claim against their employer for taking steps that resulted in a detriment or hardship to the employee in circumstances where the employee sought to exercise a "workplace right". These types of claims, commonly referred to as adverse action claims, are often brought where a dismissal is involved.

These provisions also extend to protection from adverse action in relation to an employee's participation in industrial activity (including their choosing not to participate in such activity), discrimination against protected attributes (such as age, sex, race and disability), dismissal due to temporary absence or illness, and coercion.

Employees can also bring claims under state or federal discrimination legislation if they believe their employment has been terminated for a discriminatory reason. There are various categories of discrimination including race, sex, age and disability.

8. Disputes

8.1 Wrongful Dismissal

On termination of employment, eligible employees may make an unfair dismissal application to the FWC on the grounds that their termination was unfair as it was "harsh, unjust or unreasonable". An employee will be eligible to make an unfair dismissal claim if they:

- have served the minimum employment period (which is six months or 12 months if the employer is a "small business");
- are covered by a modern award or enterprise agreement, or alternatively earn less than the high-income threshold (currently AUD175,000 per annum); and
- were dismissed by the employer.

The FWC has discretion to award remedies such as reinstatement of the employee or a payment of compensation if the circumstances are appropriate. The maximum compensation level for unfair dismissal claims is 26 weeks' pay, capped at half of the high-income threshold.

8.2 Anti-discrimination

In Australia, there are four main federal anti-discrimination laws that protect against discrimination on the grounds of race, sex, age and disability. Under each of these grounds, there are a number of sub-categories of protected grounds. For example, the Racial Discrimination Act 1975 (Cth) also contains grounds relating to colour, nationality, descent, ethnic, ethno-religious, national origin, and social origin discrimination. Similarly, the Sex Discrimination Act 1984 (Cth) contains a number of additional grounds, including pregnancy, breastfeeding, sexual activity, marital or domestic status, transgender status, gender identity, sexuality, family and carer's responsibility discrimination.

In addition to the federal legislation, each state and territory has its own anti-discrimination legislation covering a wide range of protected attributes.

Under the federal system an employee can make a complaint to the Australian Human Rights Commission and, if not resolved at conciliation, the claim can progress to the Federal Court or Federal Circuit and Family Court of Australia. These courts will hear the case and, if discrimination is found to have occurred, make any order that they consider appropriate, including orders for injunctions, reinstatement and/or compensation.

The Australian Human Rights Commission Act 1986 (Cth) provides for additional protected attributes at a federal level, including irrelevant medical record, irrelevant criminal record, political belief, religious belief and trade union activity. The burden of proof lies with the complainant, that is, it is up to the complainant to prove that, on the balance of probabilities, they were directly discriminated against based on a protected attribute.

8.3 Digitalisation

The FWC conducts most conciliation conferences by telephone or videoconference. The FWC has discretion as to how it hears cases and this may be via videoconference, "on the papers" or in person. The FWC can also permit a person to give evidence remotely via videoconferencing where it considers this appropriate.

Generally, in-person attendance is required for proceedings in the Federal Court and Federal Circuit and Family Court of Australia.

9. Dispute Resolution

9.1 Litigation

The FWC is a dedicated national workplace relations tribunal that has responsibility for approving enterprise agreements, resolving disputes, adjusting minimum wage and award conditions, resolving unfair dismissal claims and monitoring compliance with workplace laws. There is no requirement to be represented by a lawyer or paid agent. If a lawyer or paid agent wants to represent an employer or employee before the FWC they must seek the permission of the FWC.

Class action claims in the FWC are uncommon, largely because compensation is unavailable or capped in respect of many claims. Class action claims are more common for claims involving underpayments. These claims are brought in the courts and often attract significant media attention.

9.2 Alternative Dispute Resolution

The FWC may arbitrate a matter in some circumstances if the parties cannot come to an agreement during a conciliation conference. The FWC does not have the power to arbitrate automatically in relation to all types of claims and the consent of the parties may be required before the FWC can arbitrate.

If a matter is settled prior to arbitration then it is common for the terms of settlement to be recorded in a written agreement signed by the parties. This is a legal document and the parties are bound by its terms. If the terms of the settlement agreement are breached then the written agreement can be enforced by application to a court.

9.3 Costs

The default position is that parties to an unfair dismissal or general protections proceeding in the FWC cannot claim costs. However, the FWC may order a person to pay the other party's costs if it is satisfied:

- that the person's application or response to an application was made vexatiously or without reasonable cause; or
- that it should have been reasonably apparent that the person's application or response to an application had no reasonable prospect of success.

Trends and Developments

Contributed by:
Joydeep Hor, Chris Oliver and Kirryn West James
People + Culture Strategies

People + Culture Strategies (PCS) is unique in that it is the only labour and employment law firm in Australia that integrates a full specialist law firm with a management consulting business. PCS was established to be unlike any other legal firm, with an emphasis on working with clients to prevent disputes and legal problems from arising within their organisations, as opposed to being merely a "reactive" provider. PCS is regarded as one of Australia's most innovative professional services firms, servicing employers of all sizes and across all industries, operating purely in labour and employment law and strategy. The firm has a thriving practice in the area of workplace investigations as well as in the provision of bespoke leadership development and compliance programmes. The firm also conducts webinars and seminars, which are not just legal updates but rather, genuine thought-leading events.

Authors

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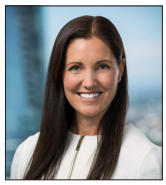

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Introduction

The workplace relations landscape in Australia has undergone unprecedented changes in a short space of time. As employers navigated multiple lockdowns due to the global pandemic and adapted to the complexities of returning to the office and hybrid work models, a change in government brought a new workplace relations agenda.

Significant shifts have occurred in favour of workers, including enhanced rights for independent contractors, casual employees and gig economy workers. The Fair Work Commission (FWC), Australia's workplace relations tribunal, has been given more powers and unions have gained greater influence.

In 2022 the Australian parliament passed legislation known as the "Secure Jobs, Better Pay" reforms. These reforms aimed to improve job security and increase wages by expanding employee entitlements and giving the FWC more powers. Subsequent reforms known as the "Protecting Worker Entitlements" and "Closing Loopholes" reforms have given more flexibility to employees taking parental leave, introduced the right to disconnect from work, criminalised wage theft, given gig economy workers the right to minimum standards and labour hire workers "same job, same pay" entitlements.

Employers have had to consider the broader impact of these reforms on their organisations and have been implementing changes, reviewing systems, reviewing contracts and policies, communicating changes to employees and managers, undertaking audits, and training managers and leaders.

Most of the reforms amend the Fair Work Act 2009 (Cth) ("FW Act"), which is the primary piece of workplace relations legislation in Australia setting out the rights and obligations of employees and employers.

Switching Off: the Right to Disconnect

In August 2024, Australia introduced a significant reform known as the "right to disconnect". This new right has initiated much debate due to the implications for employers, and how they communicate with employees. The right to disconnect provides that an employee will be able to refuse to read, reply or monitor any contact or attempted contact from either their employer or a third party (such as clients or contractors), where that contact is outside of the employee's normal working hours, unless the refusal is unreasonable. The right to disconnect applies to all employees regardless of their seniority, income level or whether they are full-time, part-time or casual employees.

Despite some sensationalised coverage in the media, the right to disconnect does not provide a blanket right for employees to refuse contact from employers or third parties in all circumstances outside of their normal working hours. The refusal must be reasonable.

The FWC has been given powers to resolve disputes between employers and employees in relation to the right to disconnect. Employers and employees are first encouraged to resolve any dispute at a workplace level. However, if necessary, an application can be made to the FWC which has the power to make a binding decision about whether an employee's refusal of contact is unreasonable. The FWC cannot impose any penalties or order compensation.

The reasonableness of an employee's refusal to engage in work-related contact outside of nor-

mal working hours will depend on a range of factors outlined in the FW Act. These include:

- the reason for the contact;
- how the contact is made and the level of disruption it causes the employee;
- the extent to which the employee is compensated to remain available to perform work during the period in which the contact or attempted contact is made;
- the extent to which the employee is compensated for working additional hours outside of the employee's ordinary hours of work;
- the nature of the employee's role and level of responsibility;
- the employee's personal circumstances; and
- any other relevant matters.

Many employers have introduced policies to communicate their expectations of employees and provide guidance to employees and management around the right to disconnect at the conclusion of an employee's normal working hours. These policies focus on employee wellbeing and encourage employees and managers to communicate in relation to their rights and obligations arising from the right to disconnect.

Preventing Sexual Harassment: New Responsibilities for Employers

In recent years there has been an increased focus on addressing sexual harassment in the workplace, leading to significant reforms. Addressing sexual harassment in the workplace gained momentum in 2018 when the government commissioned a national inquiry into sexual harassment and discrimination within Australian workplaces. The inquiry, undertaken by the Australian Human Rights Commission (AHRC), revealed that sexual harassment was widespread and the existing legislative regime was inadequate.

The AHRC's findings culminated in the "Respect@Work" report, which contained 55 recommendations aimed at eliminating sexual harassment in the workplace. These recommendations included giving more powers to the FWC in relation to claims of sexual harassment, extending the timeframe for filing complaints, expanding the definition of sexual harassment, and introducing a positive obligation for employers to eliminate sexual harassment in the workplace.

As a result of the recommendations, reforms have been implemented to amend the Sex Discrimination Act 1984 (Cth) (SD Act) and FW Act. The reforms, coupled with the existing work, health and safety legislation, establish strict regulations with which Australian employers must comply. The aim of the reforms is twofold – (i) to create a workplace environment where sexual harassment is unlikely to happen in the first place; and (ii) to give workers options if harassment does take place.

The most noteworthy reform is the introduction of a positive duty for employers to proactively eliminate sexual harassment in the workplace. The positive duty requires that a person conducting a business or undertaking (which includes employers) must take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as is reasonably practicable. This obligation applies regardless of an employer's size or resources.

To comply with this positive duty, the AHRC has published seven key standards:

1. Leadership awareness – senior leaders must understand their obligations under sex discrimination legislation and maintain up-to-date knowledge.

2. Fostering a safe culture – employers must foster a safe, respectful and inclusive workplace culture.

3. Policy implementation – policies must be effectively implemented, and employees, managers and senior management must be provided with education covering respectful behaviour and unlawful conduct.

4. Risk management – risks must be identified and assessed, with appropriate control and review measures in place.

5. Support systems – support must be available to workers, leaders and managers who experience or witness unlawful conduct.

6. Reporting and response mechanisms – there must be appropriate options for reporting and responding to unlawful conduct.

7. Monitoring and evaluation – there must be monitoring of the nature and extent of any unlawful conduct.

If a person conducting a business or undertaking fails to comply with the positive duty, the AHRC can seek a court order to enforce compliance.

Redefined: the New Employment Status Test

There has been considerable debate in Australia, as in other countries, about employment status and the appropriate test to determine whether a person is an employee or independent contractor. Traditionally, Australia applied a "multifactorial" test, considering the totality of the relationship, as well as how the relationship operated in practice, when determining whether the nature of the relationship was one of employer/employee or principal/contractor. However, the High Court of Australia (HCA) handed down two significant decisions in 2022, shifting the focus to considering only the terms of a valid written contract when determining employment status.

In response, the government announced it would introduce a statutory definition of "employee" and "employer" in the FW Act. In August 2024, the FW Act was amended to define these terms by reference to the "real substance, practical reality and true nature of the relationship between the parties". By introducing a statutory definition, the government essentially reversed the HCA's 2022 decisions. This amendment provides, for the first time, clear guidance on how the FWC will determine employment status.

The issue of employment status is particularly significant in Australia because employees enjoy various benefits that are not provided to independent contractors. These include paid annual leave, long service leave, redundancy payments and protection against unfair dismissal. Given these benefits, it is not uncommon for independent contractors to claim that they are, in fact, employees and seek payment of these employee benefits.

Same Job, Same Pay: But Not for Everyone

As part of the Closing Loopholes reforms, the government introduced the "same job, same pay" amendments. Broadly, these amendments aim to ensure that workers doing the same job for the same business are paid equally regardless of whether they are engaged directly or through a third-party contractor.

However, the right to "same job, same pay" is not automatic. Applications must be made to the FWC for a Regulated Labour Hire Arrangement Order (RLHAO). On application to the FWC, a RLHAO can be made if:

- a labour hire employer supplies (or will supply) one or more of its employees to the host;
- an enterprise agreement, workplace determination or other covered employment agreement applies to the host, and would apply to the labour hire employee if they were employed by the host; and
- the host is not a small business.

There are specific caveats, however, and circumstances in which the FWC must not make the RLHAO. These include:

- if the work performed by the labour hire employer is considered a provision of a service rather than the supply of labour; and
- if it is not fair and reasonable in all the circumstances, having regard to –
  - (a) the pay arrangements that apply to employees of the host and whether they only apply to a particular class or group of employees;
  - (b) whether the instrument has ever applied to an employee of the classification and grade that would apply to the labour hire employee;
  - (c) the rate of pay that would be payable to the labour hire employee if the order were made;
  - (d) the history of industrial arrangements applying to the host and labour hire employer;
  - (e) the relationship between the host and the labour hire employer;
  - (f) whether the arrangement is for the benefit of a joint venture or common enterprise;
  - (g) the terms and nature of the arrangement, including the duration, location of work, the industry and number of employees; and
  - (h) any other matter the FWC considers relevant.

This change will impact a small percentage of employers, as it applies in very specific circumstances. Even where a host employer utilises labour hire employees and there is an enterprise agreement, it does not automatically mean that the labour hire employees must be paid the same amount.

Fair Work Act: Protecting Gig Economy Workers and Independent Contractors

The Closing Loopholes reforms also introduce a new category of workers, known as "regulated workers". A regulated worker is a person who is an "employee-like" worker or a regulated road transport contractor. The new category is designed to capture workers in the gig economy and extend employee-like protections to these workers.

The FWC will have new powers to set minimum terms and conditions for regulated workers. Upon application, the FWC can issue orders establishing minimum standards, including for payment, deductions, insurance and consultation. This group of workers will also be able to access consent-based collective agreements.

Regulated workers gain significantly more rights throughout the term of their engagement and will also have protections if they are unfairly deactivated or unfairly terminated. Regulated workers will now be able to make claims to the FWC for unfair deactivation or unfair termination in a similar way to the existing unfair dismissal regime available to employees.

Independent contractors have also gained the ability to apply to the FWC and seek orders in relation to unfair contract terms. This gives the FWC the power to look at a contract and, if a term of the contract is unfair, amend that term or set aside part, or all, of the contract. The ability

to make a claim will be limited to independent contractors earning below the "contractor high-income threshold".

Wage Theft: a New Criminal Offence

Underpaying employees, known as "wage theft", has gained significant media attention in recent years with many large high-profile employers facing issues of underpayment. Addressing wage theft has been a strategic priority of the Fair Work Ombudsman (FWO) for many years. The FWO is an independent statutory office that is tasked with ensuring compliance with Australian workplace laws. It fulfils an inspectorate role and, in certain circumstances, it will initiate litigation to enforce workplace laws.

While wage theft has been an offence under which employers could face significant penalties, it has not been a criminal offence. The Closing Loopholes reforms changed this, and an employer convicted of intentional wage theft can now face significant penalties (the maximum penalty is AUD7,825,000 or three times the amount of the underpayment). For an individual, the maximum penalty will be ten years' imprisonment and AUD1,565,000 or three times the amount of the underpayment.

This category of punishment will be reserved for the most serious contraventions. Employers who take reasonable steps to rectify an underpayment issue, or who make an honest mistake, will not face criminal prosecution.

The criminalisation of wage theft is expected to commence on 1 January 2025.

Industrial Matters: A Shift In Power

Many of the recent reforms have included changes which give more power to the unions, workplace delegates and the FWC. While the number of employees who are members of a union has significantly decreased over the past 20 years (and is currently around 12% of employees), unions still hold considerable influence in key industries such as education, public administration, health care, mining and manufacturing.

The FWC has been granted unprecedented power to intervene if bargaining between an employer and employees (and their union) reaches a deadlock. The FWC can now intervene and arbitrate an outcome, by making an intractable bargaining declaration, which does not result in employees "going backwards". The change has been seen as effectively handing over control to the FWC to decide the terms of an enterprise agreement where the parties cannot reach agreement. However, the FWC can only intervene where:

- the application for the declaration was made after the end of the "minimum bargaining period". In practical terms, that requires the parties to have been negotiating for at least 9 months;
- the FWC must have already dealt with the dispute, and the party making the application must have participated in the FWC's processes to deal with that dispute;
- there is no "reasonable prospect" of agreement being reached if the FWC does not make the declaration; and
- it is reasonable to make the declaration in all the circumstances, taking into account the views of all the bargaining representatives for the agreement.

Beyond bargaining, the reforms also extend greater rights to workplace delegates (sometimes called union representatives). Workplace delegates are employees who represent a union in a particular workplace. Workplace delegates

rights commenced on 1 July 2024 and give delegates the entitlement to reasonable communication with eligible employees to represent their interests, have access to the workplace facilities and access to paid training.

A new term in all modern awards in relation to workplace delegates has also come into effect. Workplace determinations and enterprise agreements will be taken to include the model award workplace delegates rights term.

Casual Employment

There has been a lot of development to provide casual employees with more job security, employment rights and information.

The definition of "casual employee" has been refined. Similar to the definition of "employee" and "employer", the definition of a "casual employee" is based on the "real substance, practical reality and true nature of the employment relationship". Central to this categorisation is whether the employment relationship can be characterised by an absence of a firm advance commitment to continuing and indefinite work.

The FW Act now offers casual employees a pathway to permanent employment known as the "employee choice pathway". Casual conversion gives an employee access to permanent employment benefits such as annual leave, paid personal/carer's leave and paid public holidays.

Under the new reforms, casual employees can now provide written notice to their employer to change from casual to permanent employment if they have been employed for at least six months (12 months if employed by a small business) and believe they no longer meet the casual employee definition. An employer can only reject the casual conversion request in certain circumstances. Disputes about casual conversion can be dealt with by the FWC after first attempting to resolve the dispute at a workplace level.

Employers are also now required to provide a Casual Employment Information Statement on an ongoing basis. For employers who are not a small business it must be provided when an employee commences as a casual employee, after six months, 12 months and each subsequent twelve months. This statement informs employees about the definition of a casual employee, the pathways to permanent employment and making claims to the FWC regarding casual conversion.

AUSTRIA

Law and Practice

Contributed by:
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Contents

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Edthaler Leitner-Bommer Schmieder & Partner Rechtsanwälte GmbH is a dynamic law firm in Austria that specialises in business law, with locations in Linz, Vienna, Graz, Dornbirn, Budapest and Prague. The firm's labour law expert team consists of two partners, two attorneys and two associates. The firm advises national and multinational corporations, as well as small and medium-sized businesses from all industry sectors on all issues related to labour law. This includes comprehensive advice on individual employment law and collective employment law, representation before all courts and government agencies as well as support when in negotiations with works councils, trade unions, or other interest groups. The firm is currently representing two companies on the issue of the continued validity of the works council's power of representation in the course of a restructuring, as well as two individuals in litigation concerning the infringement of trade and business secrets.

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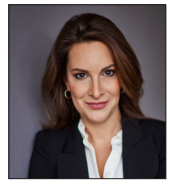

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1. Employment Terms

1.1 Employee Status

Labour law protects different types of workers. The different groups of workers are outlined below.

White-Collar and Blue-Collar Workers

A distinction is made between white-collar workers ("employees") and blue-collar workers. The term "employee" is defined in the Employees Act (*Angestelltengesetz*). A person's white-collar status is contingent upon the nature of their employer and the duties they undertake.

Employees are predominantly employed in the commercial sector or in the higher, non-commercial services sector or in the office sector.

The term blue-collar worker is not defined by law. However, based on case law, any worker not identified as a white-collar employee typically falls under the category of "worker".

Different rules apply to blue- and white-collar workers, especially in the following areas:

- reasons for early termination of the employment relationship;
- in works constitution law (separate works councils for blue- and white-collar workers);
- the eligibility criteria for invalidity/occupational disability pensions; and
- separate collective agreements in many sectors.

Apprentices

Apprentices are persons who, on the basis of an apprenticeship contract, receive technical training in an apprenticeship company to learn an apprenticeship occupation included in the list of apprenticeship occupations and who work within the framework of this training. The Austrian Vocational Training Act (*Berufsausbildungsgesetz*) regulates, among other things, training, the rights and duties of apprentices and persons entitled to apprenticeship, apprenticeship income and entitlements in the event of work incapacity. Unless otherwise stipulated by this law, the provisions of general labour law (eg, leave entitlement) apply to apprentices.

Marginal Employees

A person is considered to be in marginal employment if he or she earns no more than a cer-

tain amount per month in regular employment (employment for one month or for an indefinite period). In 2024, the marginal earnings threshold is EUR518.44 per month. Employees in marginal employment are covered by accident insurance but not insured against unemployment.

The same labour law provisions apply to marginally employed employees as to all other employees. It may be that collective agreements contain special provisions.

1.2 Employment Contracts

The employment relationship is a continuing obligation between employer and employee. A contract of employment is regularly concluded for an indefinite period. A contract of employment may also be limited in time until the expiry of a certain date or until the occurrence of a certain event. The succession of several fixed-term employment contracts is inadmissible unless each fixed-term is justified by an objective reason.

Formal Requirements for Employment Contracts

The conclusion of an employment contract is not bound to any particular form. It can be in writing, verbally or implied. An exception exists only in certain cases.

The employer is obliged by law to issue a service note irrespective of the duration of the employment relationship. The service note must contain certain information specified in the law as follows:

- name and address of the employer;
- name and address of the employee;
- the start of the employment relationship;
- the end date of the employment relationship (in case of fixed-term employment);
- duration of the notice period and date of termination – reference to the termination procedure to be followed;
- usual place of employment – if necessary, reference to changing places of employment – registered office of the company;
- any classification in a general scheme;
- intended use/activity of the employee with the respective employer and brief description of the work to be performed;
- initial remuneration (basic remuneration and other remuneration) and due date of remuneration – remuneration for overtime if applicable and method of payment of remuneration;
- extent of annual leave;
- agreed normal daily or weekly working hours of the employee, unless the employment relationship is one to which the Caretaker Act applies, and, if applicable, information on the conditions for changing shift schedules;
- designation of any standards of collective legal organisation applicable to the employment contract (collective agreement, articles of association, minimum wage scale, fixed apprentice compensation, and works agreement) and reference to the room in the company where these are available for inspection;
- name and address of the employee's social insurance institution and occupational pension fund;
- duration and conditions of an agreed probationary period; and
- if applicable, the entitlement to further training provided by the employer.

Either a service note must therefore be issued or an employment contract containing this information.

In principle, an employment contract only has to contain the statutory minimum content of a service note. In the context of concluding an

employment contract, in practice, additional provisions (beyond the statutory minimum content) are usually made regarding the employment relationship (eg, fixed term, competition clause, and expiry provision).

1.3 Working Hours

General Working Hours Per Day/Week

The statutory normal working time is eight hours per day and 40 hours per week (excluding rest breaks). Many collective agreements provide for a reduced normal working week (eg, 38.5 hours per week). If the normal daily or weekly working hours are exceeded, the employee in principle works overtime.

An extension of normal working hours is possible within the framework of various flexible working time models. Models of flexible working time are, for example, the calculation of working time or flexible working time. In the case of a four-day week, the normal daily working time may be extended to ten hours. The details of flexible working time models can be found in various collective agreements.

Extra Work

In collective agreements that standardise a normal working week of less than 40 hours, the period between the normal working time according to the collective agreement and the statutory normal working time is referred to as extra work (*Mehrarbeit*). The collective agreements determine whether this time is remunerated with a supplement or without.

Overtime

Overtime (*Überstunden*) is generally defined as working hours that exceed the normal daily or weekly working hours. They are permitted in the case of increased work demand – however, the employee has a right of refusal.

Pursuant to the Working Time Act (*Arbeitszeitgesetz*), employees working overtime are entitled to:

- a supplement of 50%; or
- compensation in the form of compensatory time (one overtime hour corresponds to 1.5 hours of compensatory time).

The employer and the employee can agree on how overtime is to be compensated (money, time off in lieu or a combination of both).

The maximum daily working time is 12 hours per day and the maximum weekly working time is 60 hours – but permanently no more than 48 hours per week on a 17-week average. The applicable collective agreement may allow for an extension of the calculation period.

Part-Time Employees

For part-time employees, extra work comprises hours that go beyond their agreed-upon weekly schedule but have not reached the threshold of overtime. The law stipulates that for these additional hours, part-time employees are entitled to a 25% surcharge on their regular hourly wage.

Extra hours are not subject to extra pay:

- if they are compensated by time off in the ratio of 1:1 within the calendar quarter or another fixed period of three months in which they have accrued; or
- in the case of flexitime, the agreed working time is not exceeded on average within the flexitime period.

If collective agreements with shorter normal weekly working hours provide for no or lower bonuses for the extra work (eg, in the case of a collectively agreed normal weekly working time

of 38.5 hours and bonus-free extra work of a further 1.5 hours), this overtime regulation shall also apply to part-time employees.

If several surcharges, eg, the statutory or collective agreement surcharge, are provided for the additional time worked, only the highest surcharge shall be paid. There is not a cumulative addition of these surcharges.

In connection with the organisation and remuneration of working time, the provisions of the applicable collective agreement must always be observed. Collective agreements may contain special provisions.

1.4 Compensation

Minimum Wage Requirements

There is no statutory minimum wage in Austria. Whether there is an entitlement to a certain minimum wage depends primarily on whether a collective agreement is applicable in the respective company. The applicability of the collective agreement results from the employer's affiliation to a contracting association.

If a collective agreement applies in the enterprise, each employee shall be classified according to the scheme of the applicable collective agreement, taking into account previous periods of service. The classification is usually based on the job characteristics, the content of the work and the actual predominant activity.

Where no collective agreement is in force, an administrative body responsible for authorising associations to conclude collective agreements (*Bundeseinigungsamt*) may set a minimum wage under certain conditions. As there is a collective agreement in most sectors, there is only a minimum wage agreement for a few occupational groups (eg, domestic help and caretakers).

Statutory Increases in Minimum Wages

Typically, the minimum remuneration outlined in collective agreements undergoes yearly increases. These increases are negotiated between the trade unions as employee representatives and the respective employer representatives (Austrian Economic Chambers or Liberal Professions Associations). If there is no collective agreement, there is no compulsory entitlement to a wage or salary increase. The employee and the employer must agree on this individually. However, wages or salaries should not be set at an unjustifiably low level that could be considered unethical or exploitative.

Entitlement to Special Payments

Salaries are usually paid monthly 12 times a year. However, there is also the possibility of receiving special payments such as a 13th and 14th salary (Holiday and Christmas bonuses). The entitlement, amount and due date of these special payments are regulated in the respective collective agreement or individual employment contract. With a few exceptions, the law does not provide for these payments. The respective collective agreement may also provide for other payments, such as anniversary bonuses or additional payments to compensate for specific conditions of a job role, such as working in dirty environments, facing potential dangers, or enduring particularly challenging conditions. Otherwise, bonuses, etc, can be contractually agreed between the employer and employee.

1.5 Other Employment Terms

According to the Paid Annual Leave Act (*Urlaubsgesetz*), employees are entitled to five weeks of paid leave (30 working days for a six-day working week or 25 working days for a five-day working week) for each working year (leave year). If the employee is regularly employed for only five or fewer days of the week, the leave entitlement

shall be converted into the corresponding working days. From the 26th year of service with the same employer, the amount of leave increases to six weeks. Under certain conditions, certain periods of previous service may already be taken into account for the leave entitlement.

Leave entitlement generally expires after two years from the end of the leave year in which it arose.

Holiday Pay

During leave, an employee is entitled to continued payment of remuneration (holiday pay), even if no work is performed. Holiday pay includes the basic wage/base salary and other remuneration (eg, bonuses, commissions, allowances and overtime) on average.

Entitlement in the Event of Illness

If an employee cannot work for health reasons that were not their fault or caused through gross negligence, he/she is entitled to continued payment of remuneration for six weeks per working year. The entitlement to continued payment of remuneration increases to up to 12 weeks depending on the duration of the employment relationship. For each additional four weeks, the employee remains entitled to half pay. The other half is covered by social insurance. After the period of continued payment of remuneration, sickness benefits from social insurance are due.

Entitlement in the Event of an Occupational Accident

If an employee is prevented from performing his/her work due to an accident at work or occupational disease, he/she shall retain his/her entitlement to remuneration for up to eight weeks per working year. The entitlement to remuneration shall be increased to ten weeks if the employment relationship has lasted for 15 years without interruption.

Care Leave

An employee shall be entitled to continued payment of remuneration up to the maximum of his/her regular weekly working hours if, after commencement of employment, he/she is absent from work as a result of:

- nursing leave (care required for a close relative, who is ill – living in the same household is not required);
- nursing leave (care for a sick person with whom one is not related but who lives in the same household);
- care leave (care required for one's child, if the responsible caregiver is unavailable); or
- accompanying leave (accompaniment of a child under ten years old by the parents during inpatient hospitalisation).

Legal Entitlement to Time Off to Accompany Children During Rehabilitation

Since 1 November 2023, employees are entitled to up to four weeks' leave per year to accompany their child, who is not yet 14 years old, during rehabilitation. From the notification of the claim until the expiry of four weeks after the end of the rehabilitation leave, the employee is under special protection against termination and dismissal.

Employees are entitled to care leave benefits during this time.

Maternity Leave

Protection period for expecting mothers

As a general rule, expectant mothers are prohibited from working eight weeks before their child's due date. This employment restriction typically continues for eight weeks following the

birth. In the case of premature or multiple births, or caesarean section, the period is extended to twelve weeks. If the pre-birth non-working period is reduced, an equivalent extension is granted post-birth, but up to a maximum of 16 weeks. During this time, they receive a maternity allowance from the Austrian Social Insurance. The employer does not pay any remuneration during the protection period.

Parental Leave

Mothers or fathers are entitled to take parental leave up to the day before their child's second birthday. This is in addition to the maternity leave. It is possible to apply for childcare allowance during maternity leave as mothers or fathers do not receive any remuneration from the employer during that period.

The full entitlement to parental leave of 24 months is only available if both parents take at least two months of parental leave. If only one parent takes parental leave, the duration is reduced to 22 months. There is an exception for single parents: they can still take parental leave until the child's second birthday.

Employee Liability

Employees are only liable to a limited extent for damage they have caused at work. Their financial capacity is taken into account when determining the extent of their liability. For employees to be liable, damage must actually have occurred during the performance of the service. The damage must be the fault of the employee and there must be no grounds for exclusion of liability. The claim must not have lapsed or become time-barred. These provisions are regulated in the Employees' Liability Act (*Dienstnehmerhaftpflichtgesetz*).

2. Restrictive Covenants

2.1 Non-competes

Agreement of Non-compete Clauses Between Employer and Employee

A non-compete clause is an agreement that restricts the employee's employment in favour of the employer for the period after termination of the employment relationship. A non-compete clause can be agreed upon in employment contracts.

The precondition for the admissibility of a non-compete clause is that the employee:

- is of age at the time of the conclusion of the agreement; and
- is entitled to remuneration (excluding special payment components) of more than EUR4,040 gross (for the year 2024) for the last month of the employment relationship.

The restriction of gainful employment contained in the non-compete clause may only relate to the business sector of the relevant enterprise and may not exceed one year. At the same time, it must not deprive the employee of any possibility of gainful employment.

Violation of Non-compete Clauses

If an employee violates a valid non-compete clause, the employer has several options. The employer can:

- claim damages; or
- pursue legal action to ensure the employee ceases the competing activity.

Enforcement of Non-compete Clauses

The non-compete clause may generally only be invoked if:

- the employee terminated the contract without a valid reason;
- the employee resigned without a valid justification;
- the contract was amicably terminated;
- the fixed term ended; or
- the employer dismissed the employee due to the employee's own actions.

The successful assertion of a claim for damages usually fails because the amount of the damage incurred cannot be quantified with the legally necessary clarity. For this reason, it is possible to agree on a contractual penalty. Such a contractual penalty can be claimed in the event of a breach of the non-compete clause without having to prove the occurrence of damage. However, it is subject to the judicial right of moderation and is only effective if it does not exceed six times the net monthly remuneration due for the last month of the employment relationship. The agreement of a contractual penalty excludes claims for injunctive relief or compensation for further damage.

2.2 Non-solicits

In addition to the agreement of a general non-compete clause, non-solicitation clauses with reference to employees and with reference to customers may also be agreed between an employer and employee.

Employee Protection Clause

The term employee protection clause covers agreements according to which the employee may not work with the employer's employees after termination of the employment relationship. Employee protection clauses are usually to be qualified as non-compete clauses and must not restrict the former employee too much.

Customer Protection Clause

An agreed customer protection clause aims to protect the employer's customer base and to prevent the poaching of the existing customer base. Customer protection clauses are generally regarded as non-compete clauses by case law. The statutory provisions on non-compete clauses are therefore to be applied mutatis mutandis.

3. Data Privacy

3.1 Data Privacy Law and Employment

During the employment relationship, employee data is stored, processed and forwarded and further data is collected, eg, during employee checks. Data protection provisions in the context of labour law can be found in both the General Data Protection Regulation (GDPR) and the Austrian Data Protection Act (*Datenschutzgesetz*).

4. Foreign Workers

4.1 Limitations on Foreign Workers

The employment of foreign nationals in Austria is guided by the Act Governing the Employment of Foreign Nationals (*Ausländerbeschäftigungsgesetz*).

Foreign workers can only be employed in Austria under certain conditions. In connection with the employment of workers, every person who does not have Austrian citizenship is considered a foreigner. The employment of foreign workers in Austria is only permissible if they are generally excluded from the scope of application of the Act Governing the Employment of Foreign Nationals or if they have official approval for their employment. The Act Governing the Employment of Foreign Nationals provides for a large number of exemptions for various groups of

persons. Exempted are, for example, persons entitled to asylum, artists or certain executives.

Furthermore, there are – among others – the following possibilities for the official approval of the employment of a foreigner:

- Red-White-Red Card/Blue Card EU – qualified workers from third countries can settle permanently in Austria and work here with the Red-White-Red Card/Blue Card EU; and
- access to the labour market for pupils and students – pupils and students with an appropriate residence permit may also be gainfully employed if this does not interfere with their education as their primary purpose of residence.

The specific type of employment permit that a foreign national must obtain is determined based on their individual circumstances. In addition to the criteria of the Act Governing the Employment of Foreign Nationals, the requirements under immigration law for the residence of a foreign national in Austria must be observed.

4.2 Registration Requirements for Foreign Workers

Foreign workers require a combined work and residence permit allowing employment with a specific employer (eg, Red-White-Red Card), free employment market access (eg, Red-White-Red Card plus, Permanent Residence – EU) or an employment market authority authorisation (employment permit) in addition to their residence permit (eg, students) or visa (seasonal workers). This depends on the specific individual case.

5. New Work

5.1 Mobile Work

In Austria, there are no legal regulations on mobile work, which includes the performance of work outside the company, but not necessarily from home. Legal regulations exist only with regard to working from home but not yet for mobile work in general. Some collective agreements provide for regulations on framework conditions for the arrangement of telework. These may only be applied if they are more favourable than the law.

Due to increasing digitalisation and the associated simplification of conditions for the expansion of telework, working from home has now taken on significant importance. Currently, there is a draft law set to come into effect on 1 January 2025, which aims to transform home office into telework. Home office is understood to mean the regular performance of work at the residence of the employees. This is to be distinguished from telework, which is performed not at the employees' residence, but at other locations outside the company. In the past, the terms telework and home office were often used synonymously and inconsistently; there was no legal definition. Accordingly, the draft law also covers working outside one's own four walls – for example, at relatives' homes, in libraries, and in coffee shops. Unlike the previous regulation, the new regulation's heading reads "Telework", clarifying that the labour law provisions for home office now also apply to work performed outside of homes/houses. Telework is defined as employees regularly performing work – particularly using the necessary information and communication technologies – in their home or in a location of their choice that does not belong to the company (Section 40 Paragraph 4 of the Labor Constitution Act). Thus, in addition to the

home at the primary or secondary residence of the employees and a relative's home, telework locations may also include coworking spaces or other places chosen by the employees (such as internet cafes).

Basic Legal Regulations Regarding Home Offices

- Home office arrangements cannot be unilaterally imposed. Any agreement for working from home must be documented in writing.
- The same data protection provisions apply in the home office as in the office.
- All provisions of labour law (eg, working time regulations) must also be fully applied in the home office.
- The employer shall provide the necessary digital work equipment. If the employee nevertheless provides these work tools, the employer shall pay compensation for the reasonable and necessary costs. The costs may also be paid as a lump sum.
- If the employee uses non-digital tools in the home office, he/she generally should expect reimbursement for any associated costs from the employer.
- Most of the provisions of the Health and Safety at Work Act (*ArbeitnehmerInnenschutzgesetz*) also apply in the home office. These include, for example, regulations on workplace evaluation. If the employer provides technical work equipment (eg, laptops) and work tables and chairs for the home office, they must also ensure that these are ergonomically designed and meet contemporary standards. However, for privacy reasons, neither labour inspectors nor employers can visit employees' homes to check compliance with employee protection without their consent.
- The Employees' Liability Act (*Dienstnehmerhaftpflichtgesetz*) stipulates that, during home office work, any damages to the employer caused by an employee's household members or pets are now also subject to the liability relief.
- Legally, a home office agreement can be terminated with a month's notice, provided there is a just cause for termination.

Austrian Social Security Regulations for Cross-Border Home Office Work

In principle, the "normal" provisions of Regulation (EC) No 883/2004 apply in relation to other EU/EEA states. This means that if the employee works at home for at least 25% of the time, the employee's country of residence is responsible for social insurance. The EU is currently working on a pan-European solution to facilitate cross-border telework.

In the absence of current legal regulations, the framework conditions for mobile work are to be agreed between the employee and the employer. However, the government is currently considering whether the regulations for home office should now also be extended to mobile working.

5.2 Sabbaticals

In Austria, "sabbatical" is not a legally defined term, but a term that has arisen in practice for different forms of professional leave. In Austria, a sabbatical is usually understood as a long-term leave agreed between the employee and the employer.

The following contractual bases are possible as legal bases for long-term leave in the form of a sabbatical.

Agreement on Unpaid Leave

In this context, it should be noted that compulsory insurance continues during unpaid leave of up to one month. This is subject to the condi-

tion that the employment relationship is not terminated during this period. If the unpaid leave is agreed for longer than one month or if the employment is not continued after the end of this month, the insured person shall be deregistered as of the day before the start of the unpaid leave.

Agreement on Educational Leave

Educational leave can be agreed between the employer and the employee from the seventh month of employment onwards for a period of at least two months up to one year without pay. For the period of educational leave, there is an entitlement to a further training allowance in the amount of the notional unemployment benefit from the Austrian Public Employment Service (AMS), provided that the employees taking educational leave meet the eligibility criteria under unemployment insurance law and prove that they are taking part in further training for a certain minimum number of hours per week.

Agreement on a Leave of Absence Without Pay

A leave of absence without pay may be agreed for a period of at least six months up to one year, for which a subsidy from funds of the unemployment insurance or the Austrian Public Employment Service is claimed.

Suspension Agreement

In this case, the employment relationship is terminated and at the same time a re-employment commitment is agreed between the employee and the employer.

These sabbatical variants are only possible by agreement between employer and employee. There is no legal entitlement with the possibility of unilaterally enforcing a sabbatical.

5.3 Other New Manifestations

"Workation"

A new work phenomenon is the "workation" – a mix of work and holiday. This allows employees to work in other parts of the world. However, under Austrian law, there is no explicit legal basis for a workation. Therefore, the legal framework conditions must be carefully examined in each individual case and a contractual agreement on the framework conditions would be recommended.

Obligation to Give Reasons for Terminations

In the course of implementing the EU Transparency Directive by November 2023 and the end of March 2024, specific obligations regarding the justification of dismissals were introduced. In certain legally regulated cases, employees now have the right to receive a justification for dismissals. This is a novelty from an Austrian perspective, as until now, dismissals without justification were always possible. Non-compliance with the justification obligation not only leads to the legal invalidity of the dismissal. However, it is assumed that in the event of a dismissal challenge process, this could be detrimental to the company if the justification obligation is not met.

Right to Secondary Employment

On 28 March 2024, a right to secondary employment was introduced. The employee is entitled to enter into employment relationships with other employers. The employee must not be disadvantaged because of this. The employer may, in individual cases, require the employee to refrain from taking on another employment that is incompatible with working time regulations or detrimental to the performance in the existing employment relationship. Reduction of Normal Working Hours With Full Wage Compensation.

A discussion about a statutory reduction of working hours is currently ongoing in Austria. Some employers in Austria offer reduced working hours with full salary compensation. The idea behind this is that if employees work less but still receive their full remuneration, the employer becomes more attractive. However, there is currently no specific regulation in place regarding this matter for the future.

Dual Leadership

Shared leadership or topsharing is a partnership-based leadership concept with new forms of decision-making and the further development of the job-sharing model for top positions. In this model, two managers are supposed to hold a position together, lead a team on an equal footing and take responsibility together. In practice, this will probably mostly be implemented by agreeing on part-time employment relationships.

Hot-Desking

Hot-desking is an organisational workspace system in which employees no longer have their own, permanently assigned desk, but share desks with other employees. The decision of "where" and "how" work is performed typically falls under the employer's directive power, allowing them to set these parameters unilaterally. However, if a works council exists, it might have a say in shaping the specifics of hot-desking. Introducing this system could trigger certain co-determination rights. While Austria currently lacks extensive case law on this topic, many Austrian companies have already adopted the hot-desking approach.

6. Collective Relations

6.1 Unions

A trade union is an association representing the interests of dependent employees. The unions represent the political, economic and social interests of employees vis-à-vis employers, the state and political parties. The main tasks/rights of trade unions include:

- negotiating collective agreements;
- supra-company co-determination within the framework of the economic and social partnership; and
- providing legal advice to members.

6.2 Employee Representative Bodies

Works Council

As an organ of the workforce, the works council is called upon to safeguard and promote the economic, social, health and cultural interests of the employees. The works council is the body representing the interests of the employees at the company level.

Tasks of the works council

The works council has numerous powers. These range from concluding company agreements, through involvement in terminations, redundancies and transfers, to participation in company supervisory board meetings. The powers of the works council include:

- monitoring and control rights (eg, ensuring compliance with the collective agreement, company agreements and employee protection regulations);
- information rights (eg, on the establishment and termination of employment relationships or on ongoing management matters);
- rights of intervention (eg, to improve working conditions or in-company training); and

- consultation rights (eg, at the request of the works council, the employer must hold joint consultations on a quarterly basis and provide information on important matters).

Establishment of the works council

The works council shall be established on the basis of a works council election. At least five non-family members with voting rights (irrespective of nationality) must be permanently employed in a company for a works council election to take place. All employees who have reached the age of 16 are entitled to vote.

It is up to the workforce, not the employer, to ensure the establishment of a works council by organising and conducting a works council election. Its term of office is five years.

If both the group of blue-collar workers and the group of white-collar workers each include at least five of these employees, separate works councils shall be established.

6.3 Collective Bargaining Agreements

A collective bargaining agreement is an agreement that the trade union usually negotiates annually with the employers' representatives for all employees in a certain sector. There are over 800 collective agreements in Austria. Every year, the trade unions negotiate over 450 collective agreements. A distinction must also be made between white-collar and blue-collar workers in collective agreements, and different collective agreements exist in this respect.

Collective agreements stipulate, among other things, minimum basic salaries and special payments (13th/14th salary) as well as regulations regarding working hours.

7. Termination

7.1 Grounds for Termination

Under Austrian labour law, a distinction is made between termination and dismissal for just cause by the employer when terminating the employment relationship.

Termination of an Employee

An employer's notice of termination is a declaration of intent by the employer addressed to the employee to terminate the employment relationship in compliance with the notice provisions (notice periods and dates). It is not necessary to state a reason for termination when giving notice. However, in certain cases (eg, care leave or part-time care leave), the employee can request a written justification for the termination from the employer within five calendar days of receiving the notice of termination. If they fail to do so, their right to a written justification expires. The employer has five days from receipt of the request to submit the required written justification. The day of receipt of the request for reasons is not counted towards the start of the deadline.

Under certain conditions, the employee may contest the termination before the competent Labour and Social Court, for example on grounds of social hardship or an unlawful motive for termination. In this case, the employer must substantiate and prove the factual justification of the termination (eg, underperformance) in the court proceedings.

Dismissal of an Employee for Just Cause

Dismissal is the immediate ("without notice") termination of the employment relationship by the employer for certain important reasons.

The grounds for dismissal for white-collar workers are listed by way of example in the Employ-

ees Act (*Angestelltengesetz*), and for blue-collar workers in full in the Industrial Code 1859 (*Gewerbeordnung*). There are special grounds for dismissal for employees protected by law. Each dismissal hinges on the employee's gross misconduct, rendering their continued employment untenable for the employer.

As soon as the employer is aware of the reason for dismissal, they must issue the dismissal without delay – ie, usually on the same day.

Mass Redundancies

If a company intends to terminate a significant number of its (older) employees within one month, it must inform the Austrian Public Employment Service (AMS) in writing at least 30 days before the first termination of an employment relationship (the so-called "early warning system"). If the requirements of this early warning system are not met, the terminations issued are invalid.

If the employer intends to terminate a relevant number of employment relationships within the meaning of the early warning system, this constitutes a so-called "change in operations". At the request of the works council, the employer must consult with the works council on the form of the measure.

7.2 Notice Periods

The employer must observe certain notice periods and dates when terminating the employment relationship.

Issuance of the Notice of Termination

The employer's notice of termination is not subject to any special content or form requirements. Some "laws" and collective agreements expressly provide for a written notice, in which case the notice of termination only becomes effective upon delivery.

In the following cases of practical relevance, a specific preliminary procedure must be followed before the notice of termination is issued:

- terminations in companies with an elected works council (informing the works council and waiting for a certain period of time before giving notice of termination);
- terminations that are subject to the early warning system with the obligation to notify the Austrian Public Employment Service (ie, mass redundancies);
- terminations of particularly protected persons, eg, expectant mothers, employees on parental leave, works council members (prior consent of the Labour and Social Court is required); and
- terminations of disabled persons (prior consent of the competent disability committee is required).

Employer's notices of termination issued without observing the preliminary procedure or without the necessary consent are legally invalid.

Notice Periods

The notice period begins on the day following the day on which the notice of termination is given. The notice period is the time between the notice being given and the end of the employment relationship.

The notice periods for white-collar workers are based on the provisions of the Employees Act (*Angestelltengesetz*) unless the collective agreement provides otherwise. The notice periods for blue-collar workers are generally based on the General Civil Code (*Allgemeines bürgerliches*

Gesetzbuch) and the same regulations as above apply.

The notice period to be observed by the employer is extended according to the length of service of the employee. The employer's statutory notice periods are as follows:

- in the 1st and 2nd year of service – six weeks;
- from the 3rd year of service – two months;
- from the 6th year of service – three months;
- from the 16th year of service – four months; and
- from the 26th year of service – five months.

Notice periods for both employers and employees can be extended to up to six months by agreement.

Termination Date

The termination date is the last day of the employment relationship. The statutory termination date for white-collar workers is generally the end of the respective quarter (31 March, 30 June, 30 September and 31 December of each calendar year). It may be agreed in an individual employment contract that the employer may also terminate the employment of white-collar workers on the 15th or last day of a calendar month. However, such agreements are only valid if there are no restrictive special rules under collective agreements.

Claims of the Employee Upon Termination of the Employment Relationship

If the employment relationship is terminated by the employer, a final settlement must be drawn up. This shall in any case include:

- remuneration up to the end of the employment relationship;
- pro rata special payments according to the collective agreement or employment contract until the end of the employment relationship;
- compensation for unused leave; and
- severance pay (old severance pay).

Severance Pay

The old severance pay applies to all employment relationships that began before 1 January 2003, unless a transfer to the new severance pay has been agreed. Employees who have been with the company for an uninterrupted three years, and whose employment has not been terminated under conditions affecting severance benefits, are eligible for a specified severance amount, equivalent to several months' salaries, upon ending their employment.

Since 1 January 2003 there has been a new company pension scheme, which applies to all employees in Austria who have started an employment relationship from that date onwards. Employers contribute by setting aside 1.53% of the gross monthly salary into a personal severance pay account for each employee. To qualify for this severance pay, an employee must generally have contributions spanning three years, considering all prior contribution durations, and their employment must not have been terminated under conditions affecting severance benefits. Upon termination, the employee is either entitled to payment of the severance amount or can dispose of the saved amount in another way.

7.3 Dismissal for (Serious) Cause

The grounds for dismissal for white-collar workers are listed by way of example in the Employees Act (*Angestelltengesetz*), and for blue-collar workers in full in the Industrial Code 1859 (*Gewerbeordnung*). There are special grounds for dismissal for employees protected by law.

A blue-collar worker may, for example, be dismissed immediately if he or she:

- is found to be incapable of the agreed work;
- is guilty of theft, embezzlement or any other criminal offence which renders him or her unworthy of the employer's trust; or
- betrays a trade or business secret.

An employee may, for example, be dismissed immediately if he or she:

- is guilty of an act which renders him or her unworthy of trust;
- is incapable of performing the services promised or appropriate under the circumstances; or
- fails to perform the service for a considerable period of time without a legitimate reason for not doing so.

Each dismissal hinges on the employee's gross misconduct, rendering their continued employment untenable for the employer.

As soon as the employer is aware of the reason for dismissal, they must issue the dismissal without delay – ie, usually on the same day. The employment relationship ends on the day on which the dismissal was issued or served.

In the following cases of practical relevance, a specific preliminary procedure must be followed before the notice of termination is issued.

- Before dismissing certain persons (eg, those performing military or alternative service, expectant mothers and other protected employees or works council members or members of certain other functions), the consent of the competent Labour and Social Court must be obtained immediately after the reason for dismissal has become known.
- In companies with an elected works council, the owner of the company must immediately inform the works council of any dismissal.
- Any decision to dismiss an apprentice must be made in writing.

7.4 Termination Agreements

In the case of a mutually agreed termination, the employer and the employee agree to terminate the employment relationship at a certain point in time.

Neither specific deadlines nor dates need to be observed. Consent is voluntary for both sides.

In principle, there are no formal requirements for a dissolution by mutual consent. The dissolution by mutual consent can be made verbally or in writing. For reasons of proof, the mutual dissolution should be in writing – signed by both the employee and the employer.

There are protective regulations for certain groups of employees; for example, expectant mothers, those performing military or alternative service, and apprentices.

7.5 Protected Categories of Employee

Employees who are subject to special protection against termination/dismissal can only be dismissed/terminated under more difficult conditions. The provisions for protection against termination/dismissal differ greatly for the individual protected groups of employees.

The following employees, among others, are under special protection:

- expectant mothers and mothers and fathers taking parental leave or part-time employ-

ment on the occasion of childbirth (parental part-time work);
- works councillors (substitute members of the works council, members of election committees and candidates under certain conditions);
- persons in positions of trust for persons with disabilities and their deputies;
- employees called up for military or alternative service; and
- disabled employees.

8. Disputes

8.1 Wrongful Dismissal

A dismissal is wrongful if there is no reason for the dismissal or the dismissal was given too late. In case of wrongful dismissal, the employee can file a complaint with the competent Labour and Social Court. This can result in the employee either receiving "termination compensation" for the period up until the employment relationship would have lawfully ended or even reinstatement to their position.

If an employee is terminated (termination in compliance with the notice periods and deadlines) by the employer, the employee may, under certain conditions, challenge the termination by bringing an action before the Labour and Social Court. The termination may be challenged if, among other things, it was motivated by inappropriate reasons or because it was socially unjustified if the employee had been employed for at least six months and the works council did not expressly agree to the termination. A termination is socially unjustified if it affects the employee's essential interests.

If the court rules in favour of the employee in the termination proceedings, the employment relationship is restored retroactively with all rights and obligations. The employee is entitled to retroactive remuneration since the termination of the employment relationship.

8.2 Anti-discrimination

Discrimination in the context of labour law occurs when employees are directly or indirectly discriminated against on the grounds of ethnicity, gender, religion or belief, age or sexual orientation.

Discrimination Claims

Establishment of the employment relationship

If prospective employers flout the principle of equality, leading to an applicant not being hired due to discrimination, the applicant can claim compensation.

Determination of remuneration

If an employee receives less pay than another employee for the same or equivalent work on the basis of a protected characteristic, he or she is entitled to payment of the difference and compensation for the personal injury suffered (non-material damages).

Voluntary social benefits that do not constitute remuneration

Employees are entitled to receive the corresponding social benefit – ie, an additional benefit from the employer connected with the employment relationship (or compensation for pecuniary loss) as well as non-material damages.

In-company education and training

Employees can sue for access to an in-company training measure which they were denied, for example on the grounds of gender, or have a claim for compensation for pecuniary loss and non-material damages.

Career advancement, especially promotions
If a company violates the principle of equal treatment and employees are unable to advance professionally as a result, they are entitled to compensation for pecuniary loss. There is also a claim for non-material damages.

Other working conditions
An employee may not be discriminated against in the provision of working conditions. The discriminated employee is entitled to the same working conditions or to compensation for financial loss. There is also a claim for non-material damages.

Sexual harassment
Employees have a right to compensation from the harasser, regardless of whether it is the employer, a colleague or a customer. In addition, there is a claim for damages against the company if it has not taken reasonable steps to remedy the harassment. In any case, the employee is entitled to reasonable compensation (at least EUR1,000) for the violation of his or her personal dignity.

8.3 Digitalisation
The proceedings before the Labour and Social Court have some special features compared to the proceedings in "general" civil law cases, which are regulated in a separate law.

In response to the COVID-19 pandemic, provisions were temporarily introduced allowing civil case hearings, including evidence sessions, to be conducted via video without necessitating in-person attendance. While this regulation underwent multiple extensions, it eventually expired on 30 June 2023. A new amendment to the Civil Procedure Act (*Zivilprozessordnung*) has now enshrined the use of video conference during hearings in the law, albeit only in limited cases. Legislative guidelines suggest that video hearings should be an exception; notably, with regard to the taking of evidence by video, the existing possibilities are only cautiously expanded.

What effect this change in the law will have on labour court proceedings remains to be seen.

9. Dispute Resolution

9.1 Litigation
In Austria, the regional courts have jurisdiction in the first instance for legal disputes concerning claims under labour contracts or company constitution law. In Vienna, the Labour and Social Court of Vienna has jurisdiction.

The special feature of the composition of the court in labour and social court proceedings is that expert lay judges decide together with professional judges in all instances. The expert lay judges come from both the employers' and the employees' side. They are nominated by the statutory professional or interest groups for five years. Lay judges from the employers' and employees' sides are always equally represented in the proceedings.

In the first instance, there is no obligation to represent or advocate. If persons are unrepresented, the judge has a special duty to give instructions. A special feature of labour law proceedings is that officials and employees may also be represented by the interest groups in court in the first and second instance. As such, the employer may be represented by the Chamber of Commerce, and the employee by the Chamber of Labour.

There is no "class action" under Austrian labour law. However, under labour law it is possible for

the works council (or the employer) to sue for a declaratory judgment on the existence or non-existence of rights or legal relationships affecting at least three employees of the establishment or enterprise. Such declaratory proceedings may, for example, concern questions of classification or claims to allowances. If a judgment is passed on the action for a declaratory judgment, it is only valid between the parties to the proceedings – ie, between the works council and the employer.

9.2 Alternative Dispute Resolution

Agreements specifying a place of jurisdiction for future labour law disputes are only possible to a very limited extent. Only disputes that have already arisen can be brought before an arbitration court. Certain exceptions also exist for managing directors and members of the executive board of a corporation for future individual employment law disputes.

9.3 Costs

As a general rule, the losing party of a court case has to bear not only his/her own costs but also the costs of the other side. There are some exceptions to the general rule in labour law. Specifically, in disputes arising out of the works constitution, for the first two instances and in special declaratory proceedings, one's own costs must always be borne, regardless of the outcome of the case (eg, in proceedings to challenge a termination). It is only when the case reaches the Supreme Court that costs can be reimbursed.

BELGIUM

Trends and Developments

Contributed by:
Filip Saelens, Kris De Schutter, Etienne Pennetreau and Laurie Lougsami
Loyens & Loeff

Loyens & Loeff has a dedicated employment, pensions and benefits practice that offers a unique combination of legal and tax expertise, enabling the firm to provide its clients with innovative and effective solutions. With two partners, a counsel and nine associates, the growing team covers the full employee life-cycle, from hiring to firing and retirement. The firm positions itself as a business partner to its clients, making their lives easier and adding value both to their projects and operations by offering pragmatic solutions to complex national and/or cross-border legal and tax issues. The firm's specialists are recognised for their out-of-the-box approach, their innovative vision on change and transformation, and their empathic leadership in negotiating reorganisation plans, (alternative) remunerations and flexible rewards. The team's service also covers transformation processes, restructuring, collective and high-profile dismissals, top management contracts and compensation, working-from-home policies, whistle-blowing policies, international mobility, pension plan design and pension litigation, etc.

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Restructuring

The uncertain economic climate of the last few years has forced some companies to make in-depth reorganisations to ensure their financial strength, rationalise their production, and improve – among other things – their competitive capacity.

Two years ago, the trend regarding reorganisation was towards softer transformation approaches with future-proof and sustainable solutions, rather than focusing on collective dismissal.

Today, considering some of the latest restructuring announcements, one could ask if the current trend regarding reorganisation is still orientated towards soft transformation approaches or if it is leaning back towards collective dismissals, as the statistics published by the Employment Federal Public Service seem to confirm a rise in the number of collective dismissals since 2022.

Under Belgian law, a collective dismissal is a dismissal justified on economic or technical grounds and affecting a certain number of people over a certain period (in principle, 60 calendar days). If the conditions are met, and collective dismissal rules apply, then a specific procedure must be followed by the employer with several constraints and employees' protection at play, including a strict information and consultation procedure with the union representatives.

An analysis of the above-mentioned statistics published by the Employment Federal Public Service reveals that between January and December 2022, 61 collective dismissal intentions were announced, involving 3,075 employees, whereas between January and December 2023, 83 collective dismissal intentions were announced, involving 7,339 employees. This represents an increase of 26.5% in the number of announcements of intended collective dismissals between 2022 and 2023. This also represents a 138.7% increase in the number of employees involved in these intended collective dismissals between 2022 and 2023. The latest numbers published by the Employment Federal Public Service for the year 2024 provide that, between January and June 2024, 46 intentions of collective dismissal were announced, involving 4,532 employees. Since this is only over a six-month period, it appears to confirm the probability that the overall number of intended collective dismissals in Belgium will again rise between 2023 and 2024.

In this context, we also see a trend whereby some companies use the mechanisms set out in collective labour agreement No 32bis concerning the transfer of workers in the event of the takeover of assets after bankruptcy and in collective bargaining agreement (CBA) No 102 concerning the transfer of undertakings under judicial authority, instead of resorting to outright collective dismissal. These two collective labour agreements provide the possibility for potential buyers taking over (part of) the transferred business to choose which employees will transfer and continue to execute their contract post-transfer. On the other hand, CBA No 102 stipulates that the choice of workers taken over must be objectively motivated and not be based on a prohibited differentiation (eg, discrimination). However, no specific sanction is provided in the event of failure to comply with this rule. Since the principle of non-discrimination is a matter of public policy, it may be assumed that in the event of a breach of this principle, approval of the proposed transfer agreement could be denied. The purpose of these schemes is ultimately to preserve employment by ensuring all or part of the survival of the company's activities.

As is the case for a "regular" transfer of undertaking, the transferred employees' employment conditions will, in principle, automatically transfer. The automatic transfer of rights and obligations has a broad scope including all rights arising from the contract and the individual normative provisions of a collective agreement incorporated into the contract (rights and obligations generated in the employer/employee relationship beyond the period of validity of the collective labour agreement from which they derive). Pension, survivor's and disability plans, on the other hand, are, in principle, not covered by the automatic transfer. The collective employment conditions can however be amended through a collective negotiation. The delicate financial situation of the company being taken over – be it within the framework of bankruptcy or judicial reorganisation – provides negotiations leverage to exercise some pressure on the unions to reduce the terms and conditions of the workers being taken over. In addition, individual working conditions can of course be freely redefined between the contracting parties.

From Warrants to Bonus Pension Plans

From warrants…

Warrants are financial instruments available on the Belgian market which can be used by companies in Belgium as an alternative form of remuneration. The warrants are attributed freely by the employer to the employees and can be sold by the employees after a short blocking period (usually 24 hours), which limits the risk of market fluctuations.

The variable remuneration paid by means of warrants must however not exceed 20% of the employee's remuneration according to the Belgian tax authorities. If warrants exceed 20% of remuneration, the grant will be considered "disproportionate" and will be subject to social security contributions.

Remuneration taken into account for the calculation of the 20% rule = monthly gross remuneration x 12.92 (including holiday pay) + 13th month + variable gross remuneration (including warrants).

For the employees, the free grant of warrants will be taxed based on the last closing price before the offer date at the progressive tax rates (25% up to 50%), plus local taxes (varying from 0% to 9%). Besides that, warrants are, in principle, subject to tax on stock exchange transactions of 0.35% at the time of sale (with a maximum of EUR1,600). The tax is calculated on the sale amount excluding any brokerage fees or exit costs.

Capital gains realised upon the sale of the warrants are usually not taxable, as the employee will be able to claim that the sale took place within the normal management of their private wealth. The warrants are fully tax deductible for corporate income tax purposes.

The main benefit linked to the warrants is that they are not subject to employer and employee social security contributions (as they usually fall within the scope of the Law of 26 March 1999). Moreover, the employer does not need to pay the holiday pay (ie, 15.67% of the gross amount).

...to bonus pension plans

The popularity of warrants can therefore be explained by their more advantageous "employer cost to employee net salary" ratio than a cash bonus, and by the fact that many financial institutions have developed dedicated products (limiting stock market risk to a minimum).

As part of their tax reform project, it was however recently envisaged by the government to remove the possibility of allocating warrants in a way that was parafiscally advantageous. This has not come to fruition, however, and the advantageous regime for warrant plans continues to apply. That said, this system is now clearly in the legislator's sights and could, at any time, be modified in an unfavourable way.

As a result, we are seeing a certain reluctance on the part of companies to introduce new warrant plans, taking this parafiscal uncertainty into account, and leaning towards other alternatives, such as the pension bonus plan. In that instance, a share of a bonus budget or a percentage of the cash bonus is paid into the pension plan.

Given the collective nature of group insurance, the calculation of the premium must be general and identical for all employees belonging to the same category, to avoid discrimination issues. This does not mean that the amount must be similar for all employees in the same category. Distinctions may be made on the basis of objective and measurable criteria. The underlying targets which determine the bonus premium can be individual or collective but they cannot depend on management discretion.

Under the bonus pension plan, only an employer's contribution of 8.86% is due on the premiums, to which must be added insurance tax of 4.4%. A tax of 16.5% will be levied when the scheme member retires early. If the employee remains active until the statutory retirement age or reaches 45 pensionable years, the income tax is reduced to 10% (on the entire reserve, excluding profit sharing). Finally, the 80% rule must be taken into account, which sets certain individual limits.

Developments

Social Criminal Code

The purpose of social criminal law is to punish – by means of criminal penalties or administrative fines – breaches of labour and social security law. These breaches and corresponding sanctions were originally disorganised and scattered across a plethora of laws. In view of the obvious related disadvantages of such lack of organisation, a pressing need arose to codify it all, by means of a Social Criminal Code, which came into force in July 2011.

After more than ten years of practical application of the Code, and in response to certain requests from practitioners, changes were needed to update it and bring it into line with recent developments as part of the reform of the (ordinary) Criminal Code (ordinary law), as well as to make it even more effective in the fight against social fraud.

The main reforms are:

Sanction level

The Social Criminal Code has a specific sanction mechanism. There are four levels of sanctions, corresponding to four levels of seriousness, and all offences are classified within these four categories. Initially, the idea of adding a fifth level of penalty had been considered for the 2024 reform of the Criminal Social Code. However, the legislator abandoned this idea and the penalties remain divided into four levels. However, changes have been made to the amounts of certain fines: the amounts of the criminal fine and the administrative fine for level three penalties have been doubled and the maximum amounts of the criminal fine and the level four administrative fine have been increased. While the general trend is therefore towards greater severity, penalties for certain common offences committed by bona

fide employers will be reduced (eg, the keeping of part-time employment contracts or staff registers), while other offences have been removed (eg, using the proceeds of disciplinary fines for purposes other than benefiting workers).

Time limit for repeat offences

The time limit for repeat offences in criminal or administrative proceedings has been changed. From now on, the one-year time limit for repeat offences will be extended to three years. During this period, if the same offence is detected, the criminal or administrative fine may be doubled.

In the event of criminal prosecution, the new Code provides that the doubling is only possible for the criminal fine and no longer for imprisonment.

Social dumping

The concept of social dumping is not new, but has never before been included as such in legislation. Now, the concept of social dumping has entered the Code and is defined as "a wide range of deliberate abusive practices and circumvention of existing European and/or national legislation, including applicable laws and collective agreements, which allow unfair competition by minimising labour and exploitation costs through illegal means, and leading to the violation of workers' rights and their exploitation".

Aggravating factor

When the offence is punishable by a level four sanction, the fact that it was committed knowingly and wilfully constitutes an aggravating factor that must be taken into consideration by the competent administration when choosing the amount of the administrative fine for the level four sanction, and by the judge when choosing the sanction from among the level four sanctions and when choosing the specific criminal sanctions.

The new provisions of the Social Criminal Code came into force on 1 July 2024. However, certain provisions will take effect at a later date, set by law.

Extra-contractual liability

On 1 July 2024, the Law on Book 6 of the Civil Code was published in the Belgian official gazette. The new Book 6 replaces the old Napoleonic regime and brings the extra-contractual liability law back in line with contemporary needs and demands, as the legislation becomes clearer, more efficient and increases legal certainty. The reform is expected to have a profound impact on both businesses and individuals, including employers and employees.

For employers and employees, the most significant change brought about by Book 6 is the elimination of the quasi-immunity of the auxiliary. Under current law, an affected contracting party can bring an extra-contractual claim against the auxiliary only if the contractual default also constitutes a violation of the general standard of care, and causes more than purely contractual damage. In practice, this meant that the contractual fault also had to constitute a crime. Beyond that, since there is no contract between the auxiliary and the affected party, a contractual claim is inconceivable anyway. In other words, only in very exceptional cases could the auxiliary be addressed – this is the infamous quasi-immunity. This approach was set forth by the controversial 1973 "Stuwadoors judgment" by the Belgian Court of Cassation and is still in effect today. However, the contemporary legislator found this approach unjust, as in some cases the affected party was left out in the cold, with nobody against whom claims could be made.

This explains why, under the new regime, the premise is that an affected party will be able to choose between a contractual claim against its contractor (the employer) or an extra-contractual claim against the auxiliary (the employee). The affected party's options are thereby greatly expanded since the quasi-immunity is eliminated. However, this also means that employees, as auxiliaries, are at greater risk of liability claims. Fortunately, the new legislation is a supplementary law. The parties are therefore free to exclude or limit by contract their extra-contractual liability to a certain extent.

Statutory liability limitations of course also continue to apply. Similar to today, employees can, in principle, only be sued for fraud, serious fault or repeated minor fault.

The new regime is due to come into effect after 1 January 2025. Thus, to avoid unpleasant surprises, it is strongly recommended that existing and future contracts are adapted to this future reality to exclude extra-contractual liability claims as far as possible.

BRAZIL

Law and Practice

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Trench Rossi Watanabe

Contents

Trench Rossi Watanabe has an employment practice which focuses on prevention and advisory, applying the best global business standards. It is highly qualified in advising clients on all employment and compensation-related matters, in compliance with the law, including from a social security and health and safety perspective. The team also has wide experience in the review of employees' and executives' policies and plans, whether short or long term, including equity pay, and international engagements and transfer of employees, as well as related immigration aspects. The team is well qualified to assist in collective bargaining with unions of various sectors. In labour litigation, the team is experienced in acting in individual disputes, class/collective actions, and public-interest civil cases filed by the Prosecution Office. The team is known for its high success rate in disputes, with exceptionally strong performance in preparatory proceedings and public civil investigations filed by the Labour Prosecution Office ("MPT"), or cases initiated by the Regional Superintendence of Labour and Employment ("SRTE").

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Leticia Ribeiro C de Figueiredo has been a partner at Trench Rossi Watanabe since 2013, and is the leader of the employment practice group and the firm's LGBTQIA+ affinity group. Until July 2003, she was primarily involved in M&A and corporate law, with experience in national and international M&A projects and restructurings. Since then, she has worked exclusively in employment law. She has a wide breadth of experience in strategic litigation cases, relevant advisory individual and collective matters (ie, restructuring, equity pay, compensation plans and benefits), as well as employment-related investigations. Additionally, she works in key health and safety and collective-related matters, including union negotiations.

Clarissa Lehmen joined Trench Rossi Watanabe in 2014 and became a partner in 2021. She integrates the employment and compensation practice group, with a focus on employment advisory, assisting companies in strategic matters. Clarissa has a wide breadth of experience in strategic matters, including defining and implementing strategies for labour matters relating to C-level executives, benefits harmonisation, expatriation, outsourcing, due diligence audits related to M&A, retention schemes, stock options and negotiations with labour unions.

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1. Employment Terms

1.1 Employee Status

Brazilian employment laws do not differentiate between blue-collar and white-collar employees for the purposes of labour rights. However, since the 2017 Labour Reform, employees with a college degree who receive monthly salaries greater than or equal to twice the limit of benefits from the National Social Security Institute ("INSS") are, in principle, able to directly negotiate agreements with their employer that may override statutory requirements relating to labour rights such as: vacation usage, work shifts, flexitime arrangements, reduced meal breaks and remote work, among other points. Some labour protections, such as Severance Fund ("FGTS") deposits, minimum wage, 13th salary and vacation pay cannot be subject to negotiation.

1.2 Employment Contracts

Indefinite and Definite Term Agreements

Employment agreements in Brazil are generally for an indefinite term.

The Labour Code sets forth very specific situations when the parties can execute an employment contract for a definite term, namely:

- services whose nature or timeframe justifies setting a term;
- transitory business activities; and
- trial labour contracts.

Trial labour contracts cannot exceed 90 days, and other fixed-term agreements may not exceed two years. Also, fixed-term employment contracts may only be renewed once.

Employers have the burden of proof of the circumstances that authorise the execution of an employment contract for a definite term. Otherwise, the employment relationship will be governed by indefinite term employment contract rules, which are generally more favourable to the employee upon termination.

Intermittent Agreements

It is also possible to execute employment agreements for intermittent work, in which case, the employee may be required to provide services on specific dates upon prior notification.

An intermittent employment agreement must be executed in writing and registered in the employee's Labour Booklet, and must provide the following information:

- identification, signature and domicile of the parties;
- hourly or daily wage (not less than the respective minimum wage), ensuring that night work is compensated at a higher rate than daytime work;
- the place and timeframe for payment of the remuneration; and
- the employee's schedule (which should be provided at least three calendar days in advance).

Once the request to work is received, the employee has 24 hours to respond. If no response is provided, it will be understood that the employee has refused to provide the requested services.

1.3 Working Hours

Regular working hours are limited to eight hours per day and 44 hours per week. This means that if employees work six full days in the week, the daily working hours should be limited to seven hours and 20 minutes per day. On the other hand, if employees work only five days in the week, the daily working hours could be extended to eight hours and 48 minutes (this schedule

would not violate the eight hours per day statutory limit if the employer and employee agree to such schedule in writing – such an agreement is considered an offset). The parties may agree to shorter working hours.

Pursuant to the Brazilian Labour Code, the employee should receive a meal break ranging from one to two hours per day. It is possible to establish other arrangements, but it is necessary to implement a collective bargaining agreement (CBA) or obtain authorisation from the Ministry of Labour and Employment in this regard.

Overtime hours in excess of the above during business days require a minimum payment of 150% of the regular rate. Work on Sundays and holidays requires a permit from the Ministry of Labour and usually a minimum payment of twice the regular rate. CBAs may increase these rates. It is not possible to include overtime wages in the employee's regular compensation.

According to the Labour Code, the employees' regular work schedule may be increased by overtime hours. Overtime hours cannot, however, exceed the legal limit of two hours per day, constituting the limit of ten hours per day as the maximum work schedule allowed. The employer may however negotiate in a CBA to permit more than ten hours of work in a day.

Part-time work is permissible up to a maximum of 30 hours per week with no possibility of overtime, or 26 hours per week, in which case overtime is limited to six hours per week. The compensation of the part-time employee must be proportional to that of employees working full time (ie, 44 hours per week) in the same function.

Overtime Exemptions

As a general rule, employees are eligible to work overtime. The only three categories of overtime exemption are as follows:

- Employees who discharge their function outside of the company premises whose activities are not compatible with fixed working hours, such as sales employees. The amount of time usually spent inside and outside the company's premises is the key element determining whether the employee works externally. In addition, if employees who discharge functions outside the office are required to be present at the company at the beginning or end of each business day or are required to report all their daily activities in detail, then this exception will not apply and the employee will be subject to working time limitations and entitled to overtime pay. Additionally, case law understands that the mere development of activities outside of the company's premises does not automatically place the employee in the exception of working hours control. The lack of control is associated with the impossibility for the employer to inspect the work schedule and not with the performance of external activities. In this sense, it is impossible to control the work schedule if the employer does not effectively have the means to identify the time spent by the employee on the company's behalf since the external nature of the employee's activities allows them to work at their own convenience, on days and times that meet their own interests or needs.
- Employees who discharge management functions, such as officers, directors or managers with actual administration powers. These employees are classified as being "in a position of trust". The employee must actually occupy a position of trust within the com-

pany's organisation and be empowered with true managerial authority.
- Remote workers, which are employees who render services primarily outside of the employer's facilities, through IT and electronic communication tools, in a telecommuting or work-from-home regime, provided that their engagement is "by product" or "by task".

1.4 Compensation

Statutory Requirements

The Local Laws Code provides for a series of minimum benefits that must be granted by the employer to its employees throughout the employment relationship. These include the following.

Christmas bonus (13th salary)

The Constitution provides that all employers must pay a Christmas bonus, which corresponds to one extra salary per year. This payment must be made in two instalments: the first instalment to be paid between February and November of each year, and the second instalment to be paid on or before 20 December. The Christmas bonus must be based on the employee's entire remuneration, not on their base salary; hence, it must include the usual overtime and commissions/bonuses.

Severance Fund ("FGTS")

All employees are entitled to a severance fund. The employer deposits 8% of the employee's monthly compensation into a special bank account for the employee at the Federal Savings Bank, known as the Severance Fund (*Fundo de Garantia do Tempo de Serviço* or FGTS). This fund may be withdrawn by the employee in certain cases, such as upon retirement or purchasing a house, termination without cause, or mutual termination.

Profit sharing

Profit sharing is not mandatory, but it is mandatory that companies in Brazil initiate negotiations with unions for profit-sharing programmes when the applicable CBA provides for this obligation.

When a company has a profit-sharing plan, all company employees are entitled to participate in it, and the company must renegotiate the content of the plan every year with the labour union, should the CBA still contain this requirement. It is possible to provide different targets for employees in different departments, provided that the company has an objective reason for this differentiation.

Profit sharing does not replace or complement the employees' compensation, nor is it a basis for any labour or social security charges. It is subject, however, to income tax withholding from the payment made to employees.

Other benefits

Employers may voluntarily supplement the minimum benefits required by law or provide additional benefits at their discretion. In Brazil, employers usually provide healthcare plans and life insurance policies to their employees. Meal tickets are also commonly provided.

Pursuant to Law No 10,243 of 19 June 2001, the financial result of all fringe benefits granted to employees should be included in their compensation for the purpose of calculating labour rights. This law excludes, however, most usual fringe benefits granted to employees (ie, health insurance, pension fund, life insurance, education, etc) from their remuneration.

Mandatory insurance is generally provided by the state (and funded by social insurance contributions). Employers are not required to take

out private group insurance for their employees unless required by their CBA.

Salary increases

Yearly mandatory salary increases are generally provided for in the CBA executed by and between the labour unions.

1.5 Other Employment Terms

Vacation Requirements

Vacation

In Brazil, after one year of continuous employment, every employee is entitled to an annual 30 calendar days' vacation, in addition to the public holidays occurring during the year. The vacation must be taken in the course of the 12 months following the anniversary date of employment. If the employee does not take vacation in due time, the company must pay twice the respective compensation.

Employees are entitled to sell ten days of their right to vacation to the employer, and the employer must buy back the same. The use of the right of vacation (either 30 days or the balance of 20 days if the employee sells ten days) cannot be divided into more than three separate periods, in which case one period must be of at least 14 days and the other periods must be of at least five days. If the use of vacation is split, this should be formalised in writing, to mitigate the risk of future employee claims (ie, an employee should submit a request for a vacation split in writing and explain the reasons for the request).

Vacation pay

The Federal Constitution also provides that employers must pay an additional one third of the monthly salary as a vacation bonus. This payment must be made before the vacation is taken.

Mandatory Leave

Brazilian employees are entitled to the following leave of absence, which must be paid by the employer:

- sick leave (up to the 15th calendar day of absence);
- sick leave due to work accident/injury (up to the 15th calendar day of absence);
- paid vacation of 30 days after each 12 months of work, with a vacation bonus in the amount of one third of the monthly pay;
- paid maternity leave of 120 days (this leave is initially paid by the employer and later reimbursed by social security);
- paternity leave of five days;
- bereavement leave of two days, provided the deceased is a close relative (parent, grandparent, brother or sister, son or daughter) or is economically dependent on the employee;
- marriage leave of three days, when the employee gets married;
- college exams leave, for as long as the employee is taking tests to enrol at university;
- one day of leave per each 12 months of employment to donate blood;
- two days' leave for voter registration;
- leave to comply with certain military requirements; and
- leave when the employee is called to appear in court.

Note that the costs of maternity leave of 120 days and of sick leave and sick leave due to work accident/injury after the 16th day are borne by social security, and not by the company.

Other Employment Terms

Confidentiality and non-disparagement

It is both legal (allowed) and customary for an employer to include in an employment contract a provision stating that the employee may not

disclose any information acquired during their work for the employer, both during the term of the contract or after its termination.

Non-disparagement clauses are common in employment agreements of high-level employees, and do not demand consideration in exchange – this obligation is also seen as inherent to the employment relationship itself (especially good faith).

2. Restrictive Covenants

2.1 Non-competes

Post-termination Non-compete Obligation

No specific legal provision regulates non-competition and non-solicitation obligations in Brazil. Under the Federal Constitution, a person cannot, in principle, be prevented from performing their profession, in favour of any employer, especially if such a profession is the main source of funds to support the employee and their family.

Brazilian courts have taken two different positions regarding non-competition provisions. While a few courts have recognised the validity of such provisions, provided they are limited to a certain territory (or clients) and to a certain period, and provided they establish payment of compensation to the former employee for the non-competition term, other courts absolutely deny the validity of these provisions due to the constitutional principle of full right to work.

In view of the above, to increase enforceability chances, it is important to provide specific consideration to employees for the non-competition obligation. The amount of compensation due to an employee varies according to the policy adopted by each employer. A monthly remuneration from 75% to 100% of the employee's monthly salary during the period of restriction is reasonable. Generally, it is also reasonable to establish the maximum duration of the restriction to one year.

2.2 Non-solicits

Regarding non-solicitation obligations, a very important aspect in Brazil is to differentiate the non-solicitation of employees from the non-solicitation of clients. While a non-solicitation of employees can be more easily accepted and enforced, as it does not impair the employee's right or ability to work and earn a living, the non-solicitation of clients is often deemed as a type of non-compete restriction – subject to the restrictions discussed above.

Although there are no specific labour laws in Brazil about non-solicitation of employees of a former employer, the Brazilian Civil Code does contain an Article (Article 608) which provides for an indemnity obligation for those who solicit individuals with a binding contract with another party. This principle can be used in the labour courts to rule the matter, but there are actually very limited court precedents on non-solicitation obligations.

3. Data Privacy

3.1 Data Privacy Law and Employment

In August 2018, Brazil passed Law No 13,709/18, the first data protection law in the country. This law stipulates rights, obligations and good practices related to the processing of personal data (ie, information related to an identified or identifiable individual), and creates a national data protection authority, among other topics.

The law applies to individuals and the private and public sectors, provided that the processing

occurs in Brazil or the personal data is obtained from data subjects located in Brazil, despite the location of the controller's headquarters or where the data is stored. If data is processed in a foreign jurisdiction, the law will apply when the processing activities relate to the offering of goods and services to data subjects in Brazil.

The law provides for specific obligations on the part of data controllers (ie, entities responsible for decisions regarding the processing of personal data) and data processors (ie, entities that process personal data on behalf of the controller).

The law also provides for the legal basis for processing personal data. To this effect, among other legal bases established in the law, processing will be lawful:

- if it is required for compliance with the data controller's legal or regulatory obligations;
- if it arises from legitimate interest; or
- when the data subject has given consent to the processing of their personal data for specific purposes.

One of the key aspects of the law is that it creates the National Data Protection Authority (NDPA), which is linked to the Ministry of Justice. The NDPA's authority includes issuing data protection regulations and proceedings, and imposing administrative sanctions in the event of non-compliance. Sanctions for non-compliance include warnings, one-time fines (of up to 2% of the group's gross revenues in Brazil in the last fiscal year excluding taxes, with a cap of BRL50 million), and daily fines (subject to the same cap). Sanctions also include blocking or eliminating personal data, partial or full suspension of the database, and suspension or prohibition to process personal data.

Processing of personal data inside the employment context relies on the same general legal bases provided in the law. The most commonly used are compliance with a legal obligation, performance of a contract and legitimate interest.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Foreign Employees

Aside from the required visa, the engagement of Brazilian and non-Brazilian employees must comply with the same labour regulations. In other words, both Brazilian and foreign workers are entitled to the same labour rights once they are hired as employees by the local entity.

If a non-national is hired by a Brazilian company under a local employment contract, the Brazilian company must apply for a work permit before the employee's arrival in Brazil, producing evidence that two thirds of its employees are Brazilian nationals and two thirds of the payroll is paid to Brazilians. This "2/3 rule" applies to those who apply for visas under an employment agreement (ie, not for non-employee statutory officers).

In addition, the non-national employee is required to evidence an educational background and professional experience in the same area they will work in in Brazil.

Foreign Officers/Executives

If the intention is to pursue an officer visa for a non-national professional, the main migratory requirements refer to the need to indicate the company's by-laws to them and show evidence of corporate foreign investment at the Brazilian company corresponding to BRL600,000 (approximately USD150,000), and a business plan to create ten job positions within two years.

4.2 Registration Requirements for Foreign Workers

Work Visas for Foreign Employees

Foreign nationals entering Brazil to provide technical assistance or professional services pursuant to a co-operation agreement or employment agreement may qualify for temporary residence once their work permit is approved by the Secretariat of Labour.

Upon the work permit approval, the foreigner is required to complete the registration procedure at the Federal Police with jurisdiction over their home address to obtain an ID number for foreigners ("RNM").

Aside from such procedure, foreigners are also required to bear the Individual Taxpayer Registry ("CPF") and the Employment Book ("CTPS"), if hired as employees.

Workers Under Employment Agreements

Most expatriations are intra-company transfers. It is common to pursue temporary visas through employment agreement. The visa is valid for two years and can be extended.

For this work visa, the professional must be on the local payroll and entitled to the same benefits as a local employee. These can include: regular employment benefits, benefits provided by the CBA and labour rights (eg, vacation, Christmas bonus, prior notice and severance payments).

The foreign national must also fulfil specific educational requirements and professional experience that may vary on a case-by-case basis.

5. New Work

5.1 Mobile Work

Brazil has specific regulations on remote work, which apply to all employees who work primarily outside of the employer's facilities (eg, from home), using IT and communication tools, regardless of the frequency of activities developed outside the company's office (occasional or predominant). These requirements include:

- formalisation of telework/remote work through an employment contract or amendment thereto;
- a written agreement (not necessarily an amendment) if the employee or the employer will purchase, maintain or support the instrumental equipment and infrastructure for the remote work, and any reimbursement of expenses connected with this work regime; and
- instructing employees on health and safety conditions while working remotely.

In addition to the above legal requirements, it is also advisable to make sure data privacy and confidentiality aspects are also properly addressed.

5.2 Sabbaticals

Sabbaticals are not legally regulated in Brazil, but are becoming more common. Provided that a clear policy is put in place, employers have flexibility to determine the applicable terms and conditions (paid or unpaid, length, benefits, etc).

5.3 Other New Manifestations

Digital Nomads

Since the COVID-19 pandemic, Brazil has seen the number of digital nomads increase. According to a September 2021 regulation on the relevant immigration implications, digital nomads

are immigrants who, remotely and using IT tools, are able to carry out their work activities for a foreign employer from Brazil.

When classified as a digital nomad entering Brazilian territory, the individual must apply for a temporary (visitor) visa or a residence permit, which will be valid for a period of one year (with possible renewal for one additional year).

Although – in principle – such workers are not subject to local labour laws, companies should be attentive to possible permanent establishment risks.

In Brazil, companies must be aware of several matters when engaging digital nomads: including (without limitation) the territoriality principle, misclassification aspects, compliance with health and safety regulations, cybersecurity and confidentiality of information, health coverage, data privacy issues, immigration matters, payment of overtime surcharges when applicable, and ensuring the right to disconnect, among others.

6. Collective Relations

6.1 Unions

Union Environment and CBAs

In Brazil, the employees' union and the employer's association enter into annual collective bargaining agreements dealing with general employment conditions, the most important of which are salary increases. If no such agreement is entered into, either party can file a collective bargaining claim to commence collective negotiations.

The creation of a union for both employers and employees is dealt with in the Federal Constitution. In Brazil, there are unions representing employees and unions representing employers. Their respective unions represent employers and employees in matters involving collective employment relations. The employees, regardless of their affiliation to the union, are entitled to the labour benefits that are granted in the CBA negotiated between the employers and the employees' union for that specific economic category.

Accordingly, all employment relationships are subject to CBAs.

Unions are organised by certain business activities, such as technology, commercial transactions, metallurgy, and chemical production. The union representing a given company must be of the main activity of the company.

6.2 Employee Representative Bodies

Work Councils

Since the enactment of the Labour Reform in November 2017, a works council, or "commission", must be implemented if the company employs more than 200 employees. The number of representatives depends upon the number of employees. From 200 to 3,000 employees, the commission must be composed of three members. The term of office of the members of the commission will be one year. Members cannot be candidates for the following two years, that is, an employee elected in year one cannot be a member again in years two and three. Instead, the employee can only be a member again in year four.

The duties of the works council or commission include the following:

- to represent employees before the administration of the company;

- to improve the relationship between the company and its employees based on the principles of good faith and mutual respect;
- to promote dialogue and understanding within the work environment in order to prevent conflicts;
- to seek solutions to the conflicts arising from the employment relationship, in a fast and efficient way, aiming at the effective application of legal and contractual rules;
- to ensure fair and impartial treatment of employees, preventing any form of discrimination based on sex, age, religion, political opinion or labour union activity;
- to review specific claims of employees; and
- to monitor the compliance with labour, employment and social security laws and the applicable CBA.

6.3 Collective Bargaining Agreements

See **6.1 Unions**.

7. Termination

7.1 Grounds for Termination

As a general rule, it is possible to terminate an employee without cause at any time (subject to a few exceptions where employees have job security) and for any reason, provided that: (i) the termination is preceded by a written notice of at least 30 days, which (as mentioned in **7.2 Notice Periods**) may vary depending on how long the employee has rendered service to the company; and (ii) the employee receives the mandatory severance payment.

In Brazil, poor performance is not considered a legal basis for termination. Thus, terminations for performance reasons are processed and treated as terminations without cause (ie, upon payment of the applicable severance).

Statutory Severance – Terminations Without Cause

For indefinite term agreements, severance payments due for a termination without cause are as follows:

- pro rata Christmas bonus;
- pro rata vacation with extra payment of one third;
- prior notice;
- 40% of all amounts existing in the employee's severance fund bank account (the FGTS) on the day of termination; and
- a supplemental FGTS payment equal to 8% of the pro rata Christmas bonus, a pro rata vacation payment with an extra payment of one third, and prior notice.

Severance payments are due to the employee within ten calendar days after the date of termination (failure to do so will result in a penalty of one month's salary to the employee).

7.2 Notice Periods

In Brazil, the termination of either a white- or blue-collar employee, without cause, should be preceded by written notice of at least 30 days and, employees with more than one year of work in the same company, are entitled to additional prior notice of three days for each year worked (up to a maximum of 90 days). Payment in lieu of notice is permissible.

For the purposes of calculating severance payments, the employment relationship is only deemed terminated after the end of the notice period. Consequently, all the severance payments due to the employee must include the notice period as a length of service.

7.3 Dismissal for (Serious) Cause

Employee Termination – With Cause

Termination for cause by the employer does not trigger any notice or severance entitlements. Article 482 of the Labour Code specifies each and every action on the part of the employee that may be deemed as a cause for termination, and Brazilian companies cannot create additional causes for termination, apart from those already provided in Article 482 of the Labour Code. These are as follows:

- performance of any dishonest act;
- lack of self-restraint and improper conduct;
- regularly doing business without the permission of the employer, when the same is in competition with the enterprise of the employer and is prejudicial for the employee's activities;
- criminal sentence of the employee, in final judgment, provided that the execution of the penalty has not been suspended;
- sloth by the employee in the execution of their duties;
- usual drunkenness or drunkenness during working hours;
- violation of the company's secrets;
- act of insubordination;
- abandonment of employment;
- act injurious to the honour or reputation of any person, practised during working hours, as well as any physical violence practised under the same conditions, except in case of legitimate defence;
- act injurious to the honour or reputation of the employer or the employee's superiors, as well as any physical violence towards them, except in case of legitimate defence;
- constant gambling;
- practise of acts against national security duly evidenced by administrative investigation; and
- loss of a legally established qualification needed to exercise the employee's profession, such as a driver's licence, due to the employee's intentional misconduct.

Terminations for cause must be carefully assessed by employers in Brazil as they often trigger litigation. Strong evidence and a timely reaction are minimum requirements for this type of termination.

7.4 Termination Agreements

Terminations must be communicated individually and must be formalised in writing with the impacted employees. From a legal perspective, the document that formalises the termination communication is the termination notice/termination letter.

In general, termination agreements are used when the company intends to offer additional benefits (on top of mandatory severance) in exchange for a release of claims which, however, has limited enforceability in Brazil.

The safest approach to having a valid release of claims in Brazil is to submit the private termination agreement to a labour court for ratification. In this case, the company and the employee are required to be represented by different attorneys. A hearing may be scheduled to confirm the intention of both of the parties and court costs are due (up to 2% over the settlement amounts). This process is not automatic and the agreement can take a few months to be ratified, but it is faster than facing a lawsuit on the matter. Besides that, the costs involved in ratifying the agreement are significantly lower than those that would be due in case of a lawsuit.

The main disadvantages in adopting this approach are:

- case records are generally public, so the terms of the agreement between the parties will not be confidential (even though the possibility of requiring confidentiality can be evaluated, depending on the circumstances); and
- courts are allowed to reduce the scope of the release to make it narrower (which may not trigger the intended full release to prevent future disputes between the parties).

7.5 Protected Categories of Employee

The main protected categories of employees are the following:

- pregnant employees (from the date of confirmation of pregnancy up to no less than five months following the birth);
- employees who have labour-related illnesses or have suffered labour accidents;
- employees with roles at labour unions; and
- employees who are elected as representatives of the Labour Accident Prevention Committee (from the date of registration, during their term of office and for one year after the end of their term of office).

Additional categories of job protection may be provided in the relevant CBA.

8. Disputes

8.1 Wrongful Dismissal

Brazil's labour laws do not exhaustively list the causes that may be used by employees as grounds for a wrongful dismissal. As a general rule, a termination may be considered unlawful (thus invalid) when an employee is terminated in a discriminatory matter (see **8.2 Anti-discrimination**), including a termination where the employee belongs to a protected category.

In case of a successful claim on the matter, the court could issue a job reinstatement order, and the employee could also be awarded moral damages (similar to emotional distress). Where reinstatement does not apply (eg, the employee was protected from termination, but wrongful termination was recognised for other reasons), the employee is granted the payment of full severance (applicable to a regular termination without cause, where the termination was implemented for cause).

8.2 Anti-discrimination

As mentioned above, employees treated in a discriminatory matter (upon termination or throughout employment) may bring claims on the matter, seeking the payment of indemnification for moral damages and, in the case of constructive termination claims, also the payment of full severance.

Brazilian laws (mainly in the Federal Constitution) generally prohibit discrimination on the basis of sex, age, colour, family situation, pregnancy or ethnicity. Brazilian anti-discrimination rules cover all aspects of the employment relationship, including recruitment, the provision of terms and conditions of employment, promotion, training and dismissal. They also apply after the end of the employment relationship, for example, when references are provided.

Anti-discrimination Against Stigmatised Diseases

Labour courts in Brazil treat the termination of an employee with "stigmatised diseases" (such as HIV, cancer) as presumptively discriminatory. If the employer cannot prove that the termination was not discriminatory and was conducted due to other reasons (eg, economic reasons, poor performance, role elimination, etc), the employee has the right to be reinstated.

Indeed, Precedent No 443 of the Superior Labour Court sets forth that *"it is presumed as discriminatory the termination of the employee with HIV virus or other serious disease that arouses stigma or discrimination"*.

Although this precedent was initially enacted with specific reference to HIV, it was then amended to provide that other types of serious diseases that can trigger stigma or discrimination also trigger the presumption of discriminatory termination. This means that, whenever such circumstances are presented, termination will be considered as discriminatory/unlawful (triggering reinstatement/indemnification), unless the employer is able to evidence otherwise.

In practice, the recognition of a disease as subject to discrimination (or not) depends on the analysis of the judge over the factual circumstances of the case.

Anti-discrimination Based on Gender, Race, Ethnicity, Origin or Age

In addition, in July 2023, the Brazilian president sanctioned Law No 14.611/2023, aiming to ensure equal payment for women and men who perform the same activities. Among other new provisions, the new law amends Article 461 of the Labour Code to expressly provide for mandatory equal payment and remuneration criteria for women and men who perform the same work or work of equal value. In the case of discrimination on the basis of gender, race, ethnicity, origin or age, in addition to salary differences, the employer will be subject to a fine of ten times the highest monthly salary paid by the employer (doubled if there is recurrence), plus a possible indemnification for moral damages. This fine represents a substantial increase over the previous one provided for in the Labour Code, which was limited to 50% of the maximum social security annual pension.

The Pay Transparency and Remuneration Criteria Report

Law No 14.611/2023 also establishes that companies with 100 or more employees must publish the Pay Transparency and Remuneration Criteria Report (the "Report") on a semi-annual basis. Failure to publish the semi-annual report can trigger administrative fines up to 3% of the company's payroll, limited to 100 Brazilian minimum-wage salaries.

The Report is be prepared by the Federal Government (Labour Department) considering the information regularly provided by companies in *e-Social* and the Declaration of Salary Parity and Compensation Criteria that companies with 100 or more employees must answer and submit in the *Portal Emprega Mais Brasil* website.

If any difference in pay without a legal reason is identified, besides being subject to administrative fines, the company must also develop an action plan within a 90-day deadline for implementation, after the company has been notified by the government of its non-compliance.

Actions to assure gender pay parity

The law states that gender pay parity should be assured by employers by means of the following actions:

- implementation of mechanisms regarding pay transparency and its criteria;
- increase of labour audits on this topic;
- implementation of channels for reporting pay discrimination;
- promotion and implementation of workspace inclusion and diversity programmes that also

encompass training leadership on the matter; and
- promotion and implementation of internal practices to train and advance female employees, with the purpose of ensuring their career progression in equal manner compared to male employees.

8.3 Digitalisation

In Brazil, almost 100% of the ongoing labour lawsuits are in electronic format. All documents and motions are filed electronically to the labour court's system. Court hearings may also be conducted via video, but the judge has discretion to determine whether an in-person proceeding is more appropriate, taking into consideration the parties' arguments (eg, evidentiary hearings where there is a substantial and/or sensitive amount of evidence to be produced).

9. Dispute Resolution

9.1 Litigation

Employment

Brazilian Labour Law, as it pertains to the federal sphere, is governed by specialised courts of first instance ("Labour Courts of the First Stage of Jurisdiction"), as well as regional courts and the superior labour courts, located in Brasília.

The judgment of cases involving individual or collective rights is first heard by the Labour Courts of the First Stage of Jurisdiction, and appeals may be filed to the regional labour courts, the superior labour courts in Brasília and, in special cases, to the Federal Supreme Court itself.

The Constitution imposes a duty on the labour courts to conciliate and adjudicate individual and collective disputes involving employees and employers, as well as any disputes resulting from employment relations or litigation involving the enforcement of labour courts findings, including those relating to collective action.

It should be noted that the complexity of the Brazilian Labour Law gives rise to a large number of judicial actions, as filed by employees against their employers. The Labour Code includes a set of substantive and procedural rules that specifically govern Brazilian Labour Law, and is supplemented by complementary legislation that also impacts upon the administration of the law.

Class Actions

In Brazil, the Public Prosecutor's Office, or the relevant labour union, are granted capacity to file civil class actions against companies that are in breach of labour rights, having not complied with labour legislation.

The union may act as an agent for all employees under its jurisdiction, and enter lawsuits (sort of class or group actions) concerning the collective rights or commonly held rights of those employees. For example, they can sue an employer for health and safety issues affecting all workers in a workplace. The union cannot, however, commence a lawsuit in respect of individual contract rights, such as overtime payments, or salary equalisation.

9.2 Alternative Dispute Resolution

Employment Arbitration

In Brazil, individual employment disputes are still typically handled by the labour courts (which are a part of the Brazilian judicial system) and their jurisdiction will depend primarily on the place where the work was actually performed by the employee.

Until 2017, employment arbitration provisions were often deemed unenforceable since an

employee in Brazil cannot waive the right to bring a claim before the labour court. But after the 2017 employment law reform, arbitration became valid for employment matters in Brazil provided that:

- the employee's compensation is higher than twice the maximum social security benefit (ie, more than roughly BRL15,572.04 per month – as of July 2024); and
- the arbitration is either requested by the employee or expressly agreed between the parties.

In view of the second bullet point above, the arbitration clauses should be in caps lock and in bold letters, to make sure they were clearly reviewed and agreed between the parties.

9.3 Costs

Litigation Costs and Attorney's Fees

In respect of typical litigation expenses, both the employer and the employee can be held responsible for the payment of court costs.

If the employee is granted the benefit of free legal aid, they are not required to pay a preliminary deposit to file appeals, which employer companies/defendants are required to.

Employee exemption from court costs and appeal fees depends on certain conditions being met, such as the claimant having a certificate of poverty prepared with assistance from a lawyer of the labour union that represents the employee's category. In addition, the claimant's salary should be lower than 40% of the highest social security benefit (ie, less than BRL3,114.40 per month – as of July 2024). This is only applicable in cases where the claimant has the benefit of legal aid.

A prevailing employee will typically be awarded attorney's fees. As for prevailing employers, there have been different understandings by different Brazil labour judges, but as a general rule, the employee can be required to pay the attorney's fees if no free legal aid is provided.

BURUNDI

Law and Practice

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Contents

Liedekerke has a labour and employment department that is one of the largest employment teams within a full-service law firm in Belgium, and which is recognised as a leading practice. With a team of nine lawyers – including three partners – it advises and assists clients in all matters touching on labour and employment law. With offices in Brussels, London, Kinshasa and Kigali, and as part of the Lex Mundi global network, the firm can offer seamless services wherever its clients choose to do business. Clients include Belgian, foreign and multinational corporations that are active in numerous industry sectors, such as energy, IT, automotive, retail, hotel, food and logistics. The labour and employment department advises public administrations and has particular experience in (international) transfers of undertaking, collective dismissal and reorganisations, closures, trade union negotiations, compensation and benefits, discrimination law, social crimes and employment fraud.

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1. Employment Terms

1.1 Employee Status

The Burundian Labour Code makes no distinction between blue-collar and white-collar workers. It refers only once to manual or intellectual work, without affecting the status of the worker.

The Burundian Labour Code nevertheless refers to different categories of workers, ie, home workers, temporary workers, workers in the informal sector, displaced workers, day workers and seasonal workers. It also refers to categories of jobs, such as managers, but not predominantly.

1.2 Employment Contracts

Different Types of Employment Contracts

In Burundi, open-ended employment contracts are the most common contracts. However, fixed-term employment contracts can be entered into for the execution of a specific and non-durable task, such as replacement of a worker whose contract is suspended, jobs for which, in certain sectors of activity, it is common practice not to use open-ended contracts (such as agriculture, air and sea transport services, tourism, construction, culture, etc), occasional tasks, temporary and exceptional increase in activity, urgent work necessary to prevent accidents, seasonal jobs, etc. In addition to these circumstances, a fixed-term employment contract can be entered into for the opening of an enterprise or for the launch of a new product, for a duration of one year maximum.

Requirements

Open-ended employment contracts must be in writing, in two copies signed by the parties. The Burundian Labour Code states that an employer may not rely on the absence of a written contract to disprove an employment relationship if there are several relevant indications that an employment relationship exists. This suggests that oral contracts are permitted in Burundi, although it is not recommended for evidential purposes.

Open-ended employment contracts must include at least the following items:

- company name and address, along with the name of the director or manager of the company or undertaking;
- worker's first and last names;
- worker's date and place of birth;
- worker's nationality;
- composition of the worker's family;

- worker's profession;
- place and residence of worker at time of conclusion of contract;
- date of engagement;
- duration of employment;
- job description;
- place of work;
- classification of the worker in the professional hierarchy;
- amount of salary, possibly broken down into base salary, bonuses and various allowances, family benefits and benefits in kind;
- special conditions in the contract;
- signatures of the parties; and
- work permit number for foreign workers or workers from the East African Community.

The employment contract must be drawn up in one of the official languages that the worker is able to understand (Kirundi, French or English).

Specific rules apply to fixed-term employment contracts, which must:

- be in writing;
- mention their term or the duration of the suspension, if entered into for the replacement of a suspended worker; and
- mention the duration of the probation period, as the case may be.

Entry into a fixed-term employment contract is prohibited in the following circumstances:

- within six months after an economic dismissal if it is for a temporary increase in activity;
- to replace a worker whose contract is suspended due a collective labour dispute; and
- to carry out particularly dangerous work.

1.3 Working Hours

Legal Working Time Limits

The maximum working time is in principle eight hours per day and 45 hours per week. Derogations are provided for in very specific cases, such as the recovery of hours following a collective interruption of work due to an accident or force majeure, or in the case of urgent work to prevent imminent danger. Where, as a result of company practice or a collective agreement, working time on certain days of the week is less than eight hours, working time may exceed eight hours on the other days of the week, provided that this does not exceed one hour per day and that weekly working time does not exceed 45 hours. In case of shift work, the working time of each shift may not exceed ten hours per day and the average working hours, calculated over a period of at least 21 consecutive days, may not exceed eight hours per day and 45 hours per week.

Breaks must be at least 20 consecutive minutes in any six-hour working day. In addition, workers must have a rest period of at least ten consecutive hours in each 24-hour period of work and 24 hours off (in principle, every Sunday) per seven-day period of work.

In the event of urgent and exceptional work, the company may extend working hours by 15 hours per week, up to a maximum of 150 hours per year.

Possibility of Flexible Arrangements

Flexible (mutual) arrangements regarding working time are admitted, provided, however, that any hour performed beyond the maximum working hours per day/week will fall under the rules regarding overtime.

Part-Time Contracts

Part-time work is work where the weekly working time is at least one third less than the legal working time or the collectively agreed working time for the sector or company. The employer must consult the workers' representatives on the introduction or extension of part-time work and inform them of the applicable rules and procedures.

Part-time workers must be informed in writing of their specific conditions of employment and the part-time employment contract must mention the following items:

- employee qualification;
- remuneration components;
- weekly duration or, where applicable, monthly duration of work; and
- distribution of working time between the days of the week, or, where applicable, the weeks of the month.

Part-time workers enjoy the same protection as full-time workers and their hourly wage cannot be lower than the hourly wage of a full-time worker in a similar situation, because of their part-time status.

Overtime

Hours worked beyond the legal weekly working time qualify as overtime. Overtime is compensated by a salary increase of 35% for the first two hours worked in excess of the legal weekly working time and of 60% for each subsequent hour. Overtime worked on a weekly rest day or public holiday entitles workers to a 100% increase in salary.

Executives are not entitled to overpay in case of overtime.

1.4 Compensation

Minimum Wage Requirements

To date, there is no minimum wage in Burundi. Wages are therefore freely determined by negotiations between employers and workers.

Thirteenth Month and Variable Remuneration

The Burundian Labour Code does not provide for a thirteenth month to be paid to employees. However, it provides that workers under an employment or apprenticeship contract are entitled to a seniority bonus, equal to 3% of the workers' gross remuneration. The seniority bonus is payable by the employer. Employers must also pay a housing indemnity. Although the amount is not mentioned in the Burundian Labour Code, it is common market practice in Burundi to grant a housing indemnity equal to 60% of the worker's salary.

Government Intervention in Salary Increase

Nothing is mentioned in the Burundian Labour Code in this respect.

1.5 Other Employment Terms

Vacation

Under Burundian law, the employer has the obligation to grant vacation and vacation pay to workers, who cannot renounce their vacation rights. Workers are entitled to 1⅔ working day per full month of service – ie, 20 working days per year. For every four years of service with the same employer, the duration of the paid annual leave is increased by at least one additional working day.

To schedule their holidays, workers must first submit their vacation request in writing to the employer, who must in turn respond in writing. The employer sets the date of the paid annual leave in consultation with the worker, taking into account the needs of the job and the rest

opportunities for the workers. Workers must be informed of the start date of their annual leave at least 15 days in advance.

Workers can accumulate their paid annual leave over a period of two years, upon agreement with their employer. The annual leave can be taken all at once or in instalments, as agreed between the parties.

Paid Leave for Training Purposes

Workers are entitled to paid leave at the employer's expense to participate in internships or sessions exclusively dedicated to work education or trade union training. To benefit from this leave, the union organising the internship or the session must submit the request to the employer at least 15 days in advance, specifying the date and duration of the absence. Workers are entitled to paid leave for the full period of the internship or session.

Incapacity to Work

The worker's incapacity to work due to illness or accident suspends the employment contract. Workers are entitled to a daily allowance paid by social security or, if their employer is not insured, by their employer.

Maternity Leave

Maternity leave under Burundian law consists of a suspension of the employment contract during 12 consecutive weeks, which may be extended to 14 weeks, six of which must be taken after delivery. During this period, the mother is covered by the organisation to which her employer is affiliated for maternity leave and keeps, during her leave, the benefits in kind she received from her employer.

Circumstantial Leave

The worker is entitled, at their request, to paid circumstantial leave. If the right to circumstantial leave arises when the worker is already benefitting from another statutory leave (eg, when they are on annual leave), the circumstantial leave is granted immediately after the last day of the period of statutory leave during which the right to circumstantial leave arose.

The employer is only obliged to pay up to a maximum of 15 days of circumstantial leave per year. Circumstantial leave is as follows.

- Four working days in the event of:
  - (a) the worker's marriage;
  - (b) the birth of a child;
  - (c) the death of the worker's spouse;
  - (d) the marriage or death of the worker's child, father or mother; or
  - (e) the worker's transfer involving a change of location.
- Two working days in the event of the death of the worker's grandparent/s, brother or sister, or parent-in-law.

Confidentiality and Non-disparagement

The Burundian Labour Code states that the workers must refrain from disclosing trade secrets. Also, workers' representatives are bound by a duty of discretion with regard to information they hold by virtue of their mandate. There is no other provision regarding possible restrictions in terms of confidentiality or non-disparagement clauses. Employers are therefore free to include such clauses in employment contracts or settlement agreements.

Workers' Liability

The Burundian Labour Code specifies two situations in which a worker can be held liable, entitling the employer to claim compensation. The

first situation relates to the damages the workers may be liable to pay for the loss suffered by the employer in case of early termination of a fixed-term employment contract before its term, except in case of serious cause on the part of the employer, mutual consent, force majeure, inability to work ascertained by a general practitioner, or death. There are no rules or ceiling for compensation. The amount of damages is left to the discretion of the judge.

The second situation concerns the damages that employees may be required to pay in the event of wrongful termination of the employment contract by the employee or as a result of serious misconduct on the part of the employee. Damages may not exceed an amount equivalent to 36 months of the worker's last salary.

In addition to the above, disciplinary sanctions may be imposed on a worker when they have committed a fault in the exercise of their professional activity. The types of disciplinary sanctions are:

- warning;
- reprimand with a record in the worker's file;
- lay-off for a period not exceeding 15 days; and
- dismissal.

Employers may not take disciplinary action against an employee for a fault of which the employer has been aware for more than two years. Furthermore, the employer may only impose a sanction mentioned in the in-house work rules if the company has such work rules regulations (which is mandatory for companies employing at least 15 workers).

Before imposing a disciplinary sanction, employers must send the worker a letter requesting an explanation. If the employer decides to proceed with a disciplinary sanction, it will be notified in writing by registered letter or by hand-delivered letter with acknowledgement of receipt. The notification must contain the reasons justifying the disciplinary sanction.

The sanctioned employee has the right to appeal the sanction.

If the worker refuses to receive any document relating to the disciplinary sanction, the employer must have it certified by the staff representatives or the head of the local authority where the employee resides or, failing that, by witnesses. Information is also given to the labour inspector.

On the occurrence of a new fault, no previous sanction taken more than two years before this new fault may be invoked in support of a new disciplinary sanction.

2. Restrictive Covenants

2.1 Non-competes

The Burundian Labour Code does not address non-compete clauses. It merely prohibits the workers from engaging in or co-operating with any act of unfair competition.

2.2 Non-solicits

Nothing is set out in the Burundian Labour Code regarding non-solicitation clauses. However, the Code refers to damages that the worker and their new employer may be liable to pay to the former employer if the worker left their company due to the solicitation of the new employer, with a maximum of 36 months of the worker's last salary. Although the Labour Code already sanctions the solicitation of workers, it is recommended that such a non-solicitation clause be included,

usually applicable for a standard period of 12 months following the termination of the employment contract.

3. Data Privacy

3.1 Data Privacy Law and Employment

Nothing related to privacy is mentioned in the Burundian Labour Code. Generally speaking, privacy is mentioned in the Burundian Constitution. Although not expressly stated, it may reasonably be assumed that this provision could be interpreted as applicable within the work sphere.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Foreign workers may not exceed one-fifth of the company's workforce per professional category. However, where there are insufficient numbers of qualified Burundians for a position, the minimum proportion of four-fifths nationals may be lowered in consideration of the special conditions of each company, after an orientation commission set up to issue to work permits has duly noted the insufficiency of Burundians in the qualification(s) considered.

Employers occupying foreign workers are required to pay a tax calculated on the basis of 3% of the worker's gross annual salary. This tax is paid annually from the date of approval of the employment contract.

4.2 Registration Requirements for Foreign Workers

Any foreigner or any citizen of a member state of the East African Community must hold a work permit or a special authorisation, where applicable, to carry out a professional activity in Burundi. The work permit is nominative. It is granted by an orientation commission and is issued by the Labour Inspectorate.

For resident foreigners, the permit is issued at their request. For non-residents, the application is made by their future employer.

Applicants for work permits must provide the following documents:

- a letter of application;
- identity card;
- diploma or certificate;
- two passport photos; and
- curriculum vitae.

Work permits are valid:

- for two years for foreigners with special technical skills;
- for five years for refugees and stateless persons recognised as such by the relevant authorities, and foreigners who have been resident in Burundi for at least 20 years; and
- permanently for foreigners born in Burundi and living there, as well as spouses of Burundian citizens residing in Burundi who have retained their original nationality.

Permanent work permits are also issued to foreign investors or their representatives whose presence in Burundi is justified by the need to monitor the management of their capital.

Foreign workers are required to renew their work permits one month before the expiry date.

5. New Work

5.1 Mobile Work

There is no provision regarding mobile work as such in the Burundian Labour Code. However, the Code rules home-working contracts, ie, where the workers are remunerated to carry out an activity with a view to providing a service either at their home or in other places of their choice. This contract may be a fixed-term or an open-ended employment contract and must be in writing. Home-workers enjoy the same working conditions and social protection as workers working from the company's premises.

5.2 Sabbaticals

There are no regulations on sabbatical leave in Burundi.

5.3 Other New Manifestations

There is nothing specific to be mentioned regarding new manifestations in this jurisdiction.

6. Collective Relations

6.1 Unions

Role of Unions

Workers and employers have the right to form unions to defend their professional interests. The representation of workers in undertakings is ensured by an elected trade union delegation. Every worker or employer, without distinction of any kind, has the right to join or to leave a professional organisation of their choice.

Workers enjoy an appropriate protection against all acts of discrimination tending to prejudice their freedom of association. In this respect, it is prohibited for any employer to subject an employment relationship to any limit based on an affiliation or non-affiliation to any professional organisation and to dismiss a worker or otherwise cause them harm because of their affiliation to a professional organisation and/or participation in trade union activities.

Status of Unions

As to formalities, trade unions must register with the Ministry of Labour and draft articles of association. The Burundian Labour Code states a specific procedure to be followed to set up trade unions.

Employees' and employers' associations are registered with the Minister of Labour and must draft articles of association. They are registered within 45 days of the production of all required documents. Once registered, they enjoy legal capacity, meaning that they can initiate legal proceedings, acquire movable or immovable property and enter into agreements with other unions, companies, enterprises and persons.

6.2 Employee Representative Bodies

Institutions of the Employee Representative Bodies

In Burundi, two kinds of employee representative bodies can be instituted.

- A works council, which must be established within companies employing at least 20 permanent workers. Companies employing fewer than 20 workers can establish a works council, after consultation with the workers or on the basis of a collective bargaining agreement. The number of members of the works council to be elected is to be set by a Ministerial Order, which has not yet been adopted.
- A trade union delegation – a union may appoint one or several trade union delegate(s) to represent it in dealings with the company manager and to manage trade union activities. The number of trade union delegates to

be designated is set by a collective bargaining agreement.
- An occupational health and safety committee, which must be established within companies employing at least 40 workers carrying out high-risk activities, in particular companies in the industrial, public works, construction, mining and quarrying sectors, and 80 workers in commercial or administrative companies. The Labour Inspectorate, after consulting the National Social Security Institute and the Medial Labour Inspectorate, may also impose the creation of this committee in companies with a smaller workforce, where this measure is necessary. Worksites lasting at least 6 months and involving several companies must also set up such a committee.

Missions of the Employees' Representatives Sitting on the Works Council

The employees' representatives must:

- ensure a permanent contact between the employer and the workers;
- pass on the workers' requests and any individual or collective complaints that have not been directly resolved, particularly as regards working conditions, employee protection, the application of collective agreements, job classifications and pay rates;
- communicate to the employer any useful suggestions for improving the organisation and performance of the company, and relating to the application of health and safety regulations and to social welfare;
- refer to the Labour Inspectorate any complaint or claim concerning the application of law;
- negotiate company agreements in the absence of trade union delegates, and give opinions on company regulations and holiday plans; and
- in the absence of an occupational health and safety committee, ensure its mission, ie, ensure compliance with health, safety and hygiene regulations, detect risks to workers' health or safety, study the necessary preventative measures and intervene in the event of an accident.

Elections

The workers' representatives sitting on the works council are elected every two years, by all the workers except those who represent the employer. They can be re-elected.

The works council is composed of the employer or their representative and of workers' representatives, the numbers being fixed as follows:

- three delegates and three alternates for companies employing between 31 and 50 workers;
- four delegates and four alternates for companies employing between 51 and 200 workers;
- five delegates and five alternates for companies employing between 201 and 500 workers; and
- six delegates and six alternates for companies employing between 501 and 1,000 workers.

For companies employing more than 1,000 workers, one additional delegate and alternate are elected for every 500 workers. The delegates are elected from among the employees of the establishment who meet the conditions of eligibility (inter alia, being at least 21 years old and being at the service of the employer for at least one year).

At least 25 days before the elections, the employer must post a notice with the date of the ballot and the number of permanent and alternate

representatives to be elected. Nominations must be submitted at least 20 working days before the date set for the ballot. They must be submitted in writing, dated and signed, to the employer, who will issue a receipt. The list of candidates must be posted at least 15 working days before the date of the ballot.

The employer must send the invites to vote at least five working days before the ballot. The poll is composed of one or two rounds. If, in the first round of voting, the number of votes cast is less than half the number of registered voters, a second round is held under the same conditions, within 30 working days.

Seats are allocated on the basis of one seat per candidate between the candidates with the highest number of votes. If there are several candidates with the same number of votes, the seat is awarded to the candidate with the longest service at the company.

When the counting operations have been completed, the president of the electoral office draws up the minutes of the electoral operations. Election results are posted by the employer the day after the elections at the latest.

6.3 Collective Bargaining Agreements

General Principles

The collective bargaining agreement is an agreement on the conditions and the employment relationship between one or more employers or one or more employers' organisations and one or more workers' organisations or directly with the workers. In any company to which the agreement applies, it must be displayed in a visible place and easily accessible to workers.

Collective bargaining agreement may relate to the following:

- the free exercise of trade union rights;
- salaries applicable by professional category;
- conditions of recruitment and dismissal of workers;
- the length of probation periods and notice periods;
- paid holidays;
- overtime pay arrangements and overtime pay rates;
- seniority and assiduity bonuses;
- travel allowances;
- the general conditions of performance-related pay, where such pay is recognised as possible;
- extra pay for arduous, dangerous or unhealthy work;
- professional training within the scope of the branch of activity; and
- the organisation, management and financing of medical and social services.

To be valid, the collective bargaining agreement must mention mandatory provisions, such as its date, subject, the names and capacities of the contracting parties and signatories.

Collective bargaining agreements may contain provisions that are more favourable to workers than those of the laws and regulations in force but cannot violate the public order. The provisions of a collective agreement prevail over provisions set in individual employment contracts and the in-house work rules.

As to the adoption procedure, all contractors must sign the collective bargaining agreement, which must be drawn up in as many copies as there are parties. The agreement is then submitted to the visa of the Minister of Labour before being filed at the registry of the territorially competent court or, failing that, at the registry of the tribunal de grande instance. Once received, the

court registry will immediately send two copies of the agreement to the Minister of Labour.

The provisions of a collective bargaining agreement apply to all workers in the categories concerned, employed in the company (or companies) covered by the scope of the collective agreement, unless the collective agreement provides otherwise.

Remedy in Case of Breach

Breach of the agreed obligations stated in a collective bargaining agreement entitles the parties to a claim for damages, the terms and limits of which may be stipulated in the collective bargaining agreement.

7. Termination

7.1 Grounds for Termination

Grounds for Termination

Any dismissal must be based on a precise, exact, objective and verifiable reason, of sufficient gravity to make it impossible to continue the employment relationship. It is therefore an a priori motivation regime that governs employment contracts' termination in Burundi.

The Burundian Labour Code distinguishes three types of grounds for dismissal.

- Personal grounds, based on personal factors, such as the employee's state of health resulting in permanent disability, inability to do the job, professional inadequacy or misconduct.
- Grounds relating to the organisation, restructuring, decline in activity or closure of the company, which include a drop in orders or sales over several consecutive quarters, operating losses lasting several months, a significant deterioration in cash flow, technological change, reorganisation of the company to safeguard competitiveness, a merger or a spin-off.
- Economic grounds, when the worker's position is abolished or undergoes a significant transformation. Dismissals based on such a reason are subject to specific rules.

In addition to these general grounds, the Burundian Labour Code lists a number of valid reasons for dismissal, including the following:

- the act of improbity;
- the employee's proven unfitness for the job;
- a serious breach of discipline;
- duly established professional incompetence;
- repeated and unjustified absenteeism; and
- economic necessity making a reduction in the workforce unavoidable.

Termination Formalities

When an employer contemplates dismissing a worker, they must first be informed, in writing, of the alleged reason for the envisaged dismissal and be invited to provide written explanations within two working days. When the decision to dismiss is taken, the employer must notify the dismissal to the worker by registered letter or by letter delivered by hand, stating the reason(s) for the dismissal. A copy of the notification letter must be sent to the competent Labour Inspectorate. The dismissal is effective the day after its notification.

At the request of one of the parties, the termination can also be authorised by the labour court when it has become impossible or intolerable to continue the working relationship. In that case, the court will decide whether a notice period must be performed.

Termination Indemnity

In case of termination without serious cause, workers (except day workers and workers on probation) are entitled to a termination indemnity, the amount of which can be determined by collective bargaining agreements or employment contracts. In any case, the termination indemnity cannot be less than:

- half the average monthly remuneration in cash and, where applicable, the average monthly legal value of benefits in kind, including the housing allowance, for workers with less than three years of service;
- twice the above amount for workers with three to five years of service;
- four times the above amount for workers with five to ten years of service; or
- six times the above amount for workers with more than ten years of service.

Such indemnity must not be confused with the indemnity in lieu of notice, paid when a notice is due but not performed, nor with damages, paid in case of abusive termination of the employment contract.

In the event of an early termination of a fixed-term contract by the employer, the latter must pay damages at least equivalent to the remuneration that the worker would have received until the end of the contract. Similarly, if it is the worker who terminates the contract early, the employer is entitled to damages for the loss suffered, except in specific cases (see **1.5 Other Employment Terms** under "Workers' Liability").

Collective Redundancies

When the employer is planning to dismiss several workers for economic reasons, they must first inform in writing the staff representatives on the works council and the trade union representatives, to hear their opinion and their suggestions on the appropriate measures to be taken. The employer must inform the workers' representatives of the reasons for the contemplated dismissals, the number and categories of workers likely to be dismissed, the criteria to set the dismissals order, the period of notification of the dismissals, the adopted measures to limit the number of dismissals and to facilitate the outplacement of dismissed workers. A copy of this information is sent to the competent Labour Inspectorate.

In deciding the criteria for the order of dismissals, the employers must take into consideration the worker's qualification, professional aptitude, years of service, age and family responsibilities. Also, a disabled worker must be dismissed last.

The workers' representatives will then give their opinion on the contemplated dismissals. Upon reception of this opinion, the employer will organise a meeting with the workers' representatives to present the employer's latest dismissal project and their views on the workers' representatives' observations and suggestions. The workers' representatives can give once more their opinion on the employer's views, and minutes of the meeting will be drawn up and signed by all parties.

The employer will send their finalised project of dismissal to the competent Labour Inspectorate, mentioning the name and qualification of the workers they are planning to dismiss, the planned dates of the dismissal notifications and the measures adopted to facilitate the outplacement of the workers concerned. For a period of one year following their dismissal for economic reasons, the dismissed workers are entitled to priority hiring, without competition, when they meet the profile of the vacancy.

7.2 Notice Periods

General Rules Regarding Notice Periods

The termination of the contract must be notified in writing by the party taking the initiative to the other party. The notice period starts from the day following the notification.

Notice cannot be given when the worker in on annual leave, is absent due to circumstantial leave or when the worker is sick. Should the employer terminate the contract in these circumstances, the notice period to which the worker is entitled will be doubled. Similarly, notice cannot be given when the contract is suspended, unless in the following cases:

- mutual consent;
- serious misconduct;
- when the cause of suspension disappeared and the worker did not return to work; and
- when six months have elapsed from the start of the suspension. (Once this period has elapsed, the employer may terminate the contract with a notice or an indemnity in lieu of notice and a termination indemnity. This does not apply to contracts suspended for occupational accident or occupational disease.)

During the notice period, the employer and the employee remain bound by all their contractual obligations. During the same period, the employee is entitled to one paid day off per week to find a new position.

Duration of the Notice Period

The notice period duration cannot be less than:

- one calendar month for workers with less than three years of service;
- one calendar month and 15 calendar days, for workers with three to five years of service;
- two calendar months, for workers with five to ten years of service; or
- three calendar months, for workers with more than ten years of service.

In the event of termination of the employment contract by the employee, the notice period is equal to half the period of notice that would have applied if the employer had terminated the contract.

Indemnity in Lieu of Notice

In the event of termination of an open-ended employment contract without notice or without the notice having been fully observed, the responsible party must pay the other party an indemnity in lieu of notice equivalent to the remuneration and benefits in kind that the worker would have received if the notice had been performed.

7.3 Dismissal for (Serious) Cause

Under Burundian labour law, a serious cause is a serious breach of contractual obligations or any serious breach provided for in the in-house work rules. Companies define in their in-house work rules the serious breaches that are considered serious cause.

According to the law, workers commit a serious cause when they seriously breach the obligations of the contract, in particular in the following cases:

- act of improbity, assault or serious insults against the employer or their staff;
- material damage intentionally caused to the employer during the performance or the suspension of the contract;
- the worker compromises, by their imprudence, the safety of the establishment, of the

work, of the personnel or of third parties, during the performance of the contract; and
- the worker is guilty of acts of moral or sexual harassment.

Employers commit a serious cause when they seriously breach the obligations of the contract, in particular in the following cases:

- act of dishonesty, assault or serious insult towards the worker, or tolerates, on the part of other workers, similar acts towards the worker;
- material damage intentionally caused to the worker during or during the performance or the suspension of the contract;
- the employer or their representative makes undue reductions or deductions from the worker's salary;
- the employer experiences repeated delays in the payment of the salaries due to the worker; and
- the employer is guilty of acts of moral or sexual harassment.

These lists are not exhaustive.

Any dispute concerning the nature or seriousness of the fault is left to the discretion of the competent court. In case of dismissal for serious cause, the contract is immediately terminated, without notice period nor indemnity of any kind.

7.4 Termination Agreements

The parties to the employment contract may decide to terminate it by mutual consent, provided that it is done in writing. The parties may negotiate the terms of termination. However, they must agree on a severance payment which, when the employer takes the initiative of the termination, cannot be less than the statutory indemnity in lieu of notice and termination indemnity. The Labour Code does not stipulate that the parties must agree on a severance payment when it is the worker who takes the initiative of the termination by mutual consent.

When the mutual consent termination occurs in the context of downsizing of the workforce or job transformation (restructuring) for economic reasons, the workers' representatives must be informed of the negotiations between the parties, and consulted for their observations and suggestions. The Labour Inspectorate must also be informed, in the same way as the procedure for economic reasons (see **7.1 Grounds for Termination** under "Collective Redundancies").

7.5 Protected Categories of Employee

The Burundian Labour Code includes provisions aimed at protecting certain categories of workers against dismissal, for example:

- workers who suffered or refused to suffer moral or sexual harassment or who witnessed or reported such harassment;
- workers who exercised their right to freedom of expression;
- workers who refused to transfer from full-time to part-time work and vice versa;
- women during their maternity leave; and
- workers whose contract is suspended, except specific cases (see **7.2 Notice Periods** under "General Rules Regarding Notice Periods").

Furthermore, it is prohibited for an employer to dismiss a worker or otherwise prejudice them because of their affiliation to a professional organisation and/or participation in trade union (delegation) activities.

Under the Burundian Labour Code, dismissing workers' representatives is not prohibited. However, the dismissal of workers' representatives

is subject to a specific procedure, summarised as follows.

- A request to proceed with the dismissal must be sent to the Labour Inspectorate.
- The Labour Inspectorate organises a conciliation meeting to verify the reason(s) for dismissal:
  (a) where it is proven that there is no professional misconduct, whether or not there is a link between the request for dismissal and the workers' representative mandate, the authorisation to dismiss is refused in the event of non-conciliation; or
  (b) where there is professional misconduct, whether or not there is a link between the request for dismissal and the mandate, and if there is no conciliation, the Labour Inspectorate will draw up non-conciliation minutes and authorise the dismissal.
- The same procedure applies in the event of dismissal for economic reasons.
- The employer may immediately lay off the employee concerned pending the final decision of the Labour Inspectorate. If the dismissal is refused, the lay-off is cancelled and its effects automatically terminated.
- The Labour Inspectorate's motivated decision is handed down within ten days of the application being made. It may be appealed to the Labour Court.
- In the event of gross misconduct or behaviour likely to create a definite and permanent malaise in the company, the employer may immediately suspend the workers' representative's employment contract, pending a final decision on dismissal.
- The dismissal of a workers' representative that has not been approved by the Labour Inspectorate is null and void.

8. Disputes

8.1 Wrongful Dismissal

Grounds for a Wrongful Dismissal Claim

The Burundian Labour Code flags some invalid dismissal grounds:

- trade union activity;
- facts concerning private life which do not seriously harm professional activity;
- facts concerning the worker's political or religious opinions;
- having lodged a complaint or participated in proceedings brought against an employer due to alleged violations of the legislation;
- having lodged an appeal before administrative authorities;
- race, colour, language, religion, gender, political, philosophical or religious opinion, ethnic or social origin, state of physical or mental disability, status of carrier of HIV/AIDS or any other incurable disease;
- absence from work during maternity leave; and
- temporary absence of the worker due to illness or accident before six months have elapsed.

A dismissal based on one of these reasons will be deemed abusive. This list is not exhaustive, which means that an employer should be careful when dismissing an employee and ensure that they have a valid reason for dismissal.

Consequences of a Wrongful Dismissal

Termination of an open-ended employment contract without a valid reason entitles the worker to reinstatement. Failing this, the worker will be entitled to damages fixed by a labour court. The amount of damages is calculated taking into account the worker's years of service, their age and their salary. To do this, one third of the sum

of the years of age and seniority is multiplied by the last monthly remuneration of the worker (with a maximum amount equivalent to 36 months of the worker's remuneration).

8.2 Anti-discrimination

The Burundian Labour Code states four particular discrimination issues:

- occupation of foreign workers;
- part-time workers;
- non-discrimination in salaries for equal jobs; and
- freedom of association.

As to the occupation of foreign workers, where they are legally employed, they enjoy the same rights as national workers. Part-time workers must receive the same protection as full-time workers. Workers doing the same work or work of equal value are entitled to the same salary.

Workers' representatives enjoy an appropriate protection against all acts of discrimination that aim to impair their freedom of association. In this respect, it is prohibited for any employer to subject an employment relationship to (non-) affiliation to any professional organisation and to dismiss a worker or otherwise cause that worker any harm because of their affiliation to a professional organisation and/or participation in trade union activities.

As to freedom of association, workers benefit from appropriate protection against all acts of discrimination tending to infringe freedom of association in matters of employment. In this regard, it is prohibited for any employer to make the employment of a worker conditional on their affiliation or non-affiliation to any trade union or to a specific trade union and to dismiss a worker or to harm them by any other means because of trade union affiliation or participation in trade union activities.

Nothing is mentioned in the Burundian Labour Code concerning the burden of proof. It is reasonable to assume that, without any particular rule, it is the worker who alleges the discrimination who must prove that they are in fact the victim of discrimination. The worker could claim compensation in court.

8.3 Digitalisation

The Burundian Labour Code does not address the issue of digitalisation of employment disputes.

9. Dispute Resolution

9.1 Litigation

In Burundi, there are no specialised employment forums. Employment-related claims can be brought before the Labour Inspectorate for conciliation, or directly brought before labour courts. There is no "class action" as such.

The parties may be assisted or represented by a lawyer, another employer or another worker of the company, a representative of the trade union or the employers' union. The employer may be represented by one of their subordinates or by any person to whom they have given power.

9.2 Alternative Dispute Resolution

In collective disputes, arbitration is a possible alternative to labour courts if the attempted conciliation fails, and is the next step if the attempted mediation fails.

In case of arbitration, the file and the report drawn up by the mediator or the Labour Inspectorate (in case of conciliation) on the status of the

dispute are transferred to the arbitration council, composed of a general director, an employers' representative, a workers' representative and two personalities designated by the Minister of Labour because of their moral authority and expertise in economic and social matters. The employers' and workers' representatives are appointed by the Minister of Labour on the recommendation of the most representative professional organisations.

The arbitration council has the broadest powers to obtain information on the economic situation of the companies and workers involved in the dispute. It must examine the file and draw up an arbitration award within four working days of receiving the file.

In the event of conciliation, the arbitration award is enforced and the minutes of the conciliation are sent to the labour court for enforcement. If conciliation is not reached, the award and the entire file are forwarded to the Minister of Labour, who immediately forwards the file to the labour court, which has eight days to hand down its decision.

9.3 Costs

The Labour Code does not address the issue of awarding attorney's fees or other costs to the prevailing employee or employer.

CANADA

Law and Practice

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Fasken

Contents

Fasken has one of Canada's largest national practices, comprising more than 120 lawyers and offices in each of the major cities across the country – Vancouver, Calgary, Toronto, Ottawa, Montreal and Quebec City – and a growing practice, with employment specialists in Johannesburg, South Africa supported by a network of international contacts. Fasken lawyers advise on all areas of labour, employment, pensions and benefits, human rights, privacy and immigration. Fasken has a long history of representing employers in all aspects of labour law. This service includes offering strategic and tactical advice as well as representing employers before arbitration boards, provincial labour boards, the Canada Industrial Relations Board, various other administrative tribunals and all levels of court in each of the provinces and countries in which the firm operates.

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1. Employment Terms

1.1 Employee Status

Canada is a federal jurisdiction in which the provinces have principal authority over labour and employment matters. However, the federal government has exclusive authority over labour and employment matters in certain important areas, including banking, the postal service, interprovincial transportation, telecommunications and various other sectors that make up part of Canada's national infrastructure.

Labour and employment legislation across Canada does not generally differentiate between blue- and white-collar workers. However, separate requirements or exemptions in respect of matters such as minimum wages, eligibility for overtime, and maximum hours of work are often established for different types of work, including in relation to specific industries or for specific types of employees.

By way of example, in most jurisdictions, supervisory and managerial personnel are exempt from the payment of overtime. Other groups are also excluded from overtime pay provisions in most jurisdictions, including professionals (lawyers, doctors, engineers, etc), domestic workers, teachers, police and IT professionals. Similarly, supervisory and managerial personnel and specified groups are also excluded from maximum hours of work provisions.

In addition, regulations in each jurisdiction establish exceptions to the maximum hours that can be worked in specific industries (eg, tourism).

1.2 Employment Contracts

Definite and Indefinite Contracts

Contracts of employment may be for a definite or indefinite term.

Employees hired on a definite, or fixed-term, employment basis are hired for a specific period of time. In such employment relationships, there is no intent to create an ongoing employment relationship.

The requirement to provide notice of termination, discussed later in this section, may be avoided in certain circumstances by hiring on

a definite-term basis if the term is well defined. An employee hired on a definite-term contract is entitled to be employed for the entire term of the contract unless the contract is terminated for cause or is rendered impossible to perform. As a result (and in the absence of an enforceable clause providing the option to terminate the contract early), if a definite-term employee's employment is terminated before the expiry of the term, the employee will likely be entitled to damages equivalent to the amount the employee was entitled to earn during the remainder of the contract.

By contrast, employees hired on an indefinite basis can generally only be terminated with reasonable notice of termination – or pay in lieu thereof – where the termination is without just cause.

Courts in Canada have found that a series of definite-term contracts leads to a conclusion that the employment relationship has become indefinite. Accordingly, a series of renewals of definite-term contracts will likely be overlooked by courts and not relieve an employer's obligation to provide reasonable notice of termination.

Formal Requirements and Terms

Contracts of employment may be oral or written or a combination of both. Increasingly, employers enter into written employment contracts with non-unionised employees to set out the terms and conditions of the employment relationship. Written employment contracts are especially common between employers and senior, managerial or key employees and where employees are hired for a particular term or to perform a particular task.

There are no specific terms that must be included in a contract of employment. However, any terms set out in the contract must respect the minimum standards set out in the employment standards legislation that has been enacted in each Canadian jurisdiction. Employment standards legislation applies whether or not an employer and employee have set out the terms of their relationship in a contract. However, employment standards are only minimum standards; employers and employees are not prohibited from agreeing to greater rights or benefits in employment contracts.

Express terms set out in written employment contracts typically relate to salary, benefits, vacation entitlement, hours of work, title, job duties, and termination of employment.

Termination

Importantly, unlike the USA, Canada does not allow for "at will" employment. Unless there is an express term providing otherwise, it is an implied term of every employment relationship that the relationship can only be terminated with reasonable notice of termination – or pay in lieu thereof – where the termination is without just cause. Reasonable notice of termination can be significant, particularly for employees in senior positions, older employees, and those with lengthy service with the employer. As a result, employers often use termination clauses in employment contracts to limit the amount of reasonable notice to be provided upon termination. Such clauses are subject to strict analysis in some jurisdictions, whereas courts are not bound by them in others.

To be enforceable, employment contracts must be agreed to at the time of hire. If an employment contract is signed or amended once employment has begun, fresh consideration would be required for the contract to be valid.

1.3 Working Hours

Most jurisdictions limit the number of hours that can be worked in a week. Meal breaks and other shorter breaks during the working day are also typically required by legislation. In most cases, an employee is entitled to an unpaid meal break of at least 30 minutes after having worked five consecutive hours. If an employee is required to remain at their workstation or otherwise be available for work during a break, the employer will be required to pay the employee for the break time. Employment standards legislation also often requires additional rest periods during the work day once an employee has worked a certain number of consecutive hours.

Generally, the same laws apply to employees who perform full-time work and those who perform part-time work. There are no specific terms required for part-time employment contracts.

Employment standards legislation provides for overtime pay once a specific number of hours are worked in a week. In most jurisdictions, overtime is triggered at 40 hours a week and is paid at one-and-a-half times the employee's regular rate of pay. In Alberta and Ontario, overtime begins at 44 hours a week, however, it begins at 48 hours a week in Nova Scotia and Prince Edward Island. Some categories of employees can be excluded from the application of overtime rules – for example, managerial personnel or, in Quebec, employees paid on a basis other than an hourly one.

In some circumstances, the applicable legislation allows employers and employees to enter into "averaging" agreements that allow for hours of work to be averaged over a period of several weeks for the purpose of determining entitlement to overtime pay.

1.4 Compensation

Each jurisdiction in Canada has enacted legislation providing for a minimum wage for most full-time, part-time, and casual employees. The minimum wage is typically adjusted by regulation on an annual basis. The minimum wage for employees employed in the federal jurisdiction is the minimum wage rate established in each province and territory.

In addition to providing employees with their base wage or salary, employers in Canada often provide end-of-year bonuses to employees or offer employees the opportunity to earn performance-related pay to motivate productivity. Grants of shares, stock options and profit-sharing programmes are also common for executive-level employees.

Employers may be liable to provide payment on account of any bonus, performance-related pay, or other perquisite that an employee would have received had they continued to be employed during either the statutory or reasonable notice period (see **7.2 Notice Periods**). Courts will consider whether the applicable perquisite formed part of the employee's compensation package or was simply provided at the employer's discretion on occasion. Carefully drafted employment contracts and policies may serve to limit such payments during any reasonable notice period, so long as statutory requirements are met. Such terms are typically included in executive employment contracts where perquisites may be a significant component of the executive's compensation.

Compensation

Beyond minimum wages, some jurisdictions have enacted legislation regulating executive compensation in the public sector. That legislation typically prescribes requirements for public

disclosure, caps on salary and performance-related pay, signing bonuses, severance payments, etc.

By contrast, executive compensation in the private sector is not specifically regulated by employment law. However, certain corporate, securities and tax laws governing compensation (particularly where compensation includes grants of shares and options) as well as board requirements and shareholder approvals may be triggered and must be considered when determining the compensation of executives.

Equal Pay

Various federal and provincial governments have enacted pay equity legislation to achieve equal pay for work of equal value. Federally regulated public and private sector employers with ten or more employees must develop a pay equity plan to address gender-based pay inequities by September 2024. Provincially, pay equity is legally required in separate pay equity legislation for the public sector in Manitoba, Nova Scotia, New Brunswick and Prince Edward Island and for the public and certain private sectors in Quebec and Ontario.

1.5 Other Employment Terms

Vacation and Vacation Pay

In each Canadian jurisdiction, employees are entitled to paid vacation. Most often, employees are initially entitled to a minimum of two weeks of paid vacation per year. However, employers commonly provide their employees with a total of three to four weeks' paid vacation per year. Many jurisdictions have tiered vacation allotments, whereby employees with three or more years of service can be entitled to three weeks of vacation.

Furthermore, many jurisdictions entitle employees to vacation pay dependent on length of service and usually equal to a percentage of accumulated wages earned per year, such as 4% to 6% for Ontario, British Columbia, and Quebec.

In addition, public holidays are also prescribed by federal, provincial and territorial employment standards legislation. Employees are generally entitled to take public holidays off with regular pay. However, employees can agree to work on a public holiday and will normally be entitled to receive a day off in lieu of the public holiday or be paid at a premium rate for hours worked that day.

The Canada Labour Code was amended to add a tenth paid holiday, designated as the National Day for Truth and Reconciliation, starting in 2021 for employees in the federally regulated sector. Shortly after the federal government created this paid holiday, British Columbia, Prince Edward Island, Manitoba, Yukon and the Northwest Territories followed suit in recognising the National Day for Truth and Reconciliation as a paid holiday provincially.

Required Leaves

Employment standards legislation in each jurisdiction establishes various leaves of absence during which employees' jobs must be protected. Common to most jurisdictions are maternity, parental, adoptive, bereavement and sick leave. Some jurisdictions also provide for reservist leave, jury duty leave, organ donation leave, family obligations leave, emergency personal leave and family care-giver leave for seriously ill family members.

Following a protected leave of absence, the employer is generally required to return the employee to the position that they held at the

start of the protected leave, or to a comparable position if the original position no longer exists. The timing, duration, qualifying periods of employment, proof and notification requirements, as well as rules regarding the employer's obligation to continue benefit-plan contributions applicable for the above-mentioned leaves vary by jurisdiction.

As a general rule, employment standards statutes do not require paid leaves of absence. However, amendments to the federal Canada Labour Code, the Prince Edward Island Employment Standards Act, and the British Columbia Employment Standards Act have created exceptions to this general rule. Other government-provided payments may, however, be available to those on leaves of absence. By way of example, unemployment insurance benefits are provided to those on maternity and parental leave and – in prescribed circumstances – for those on sick leave. Further, where an absence from work is the result of a work-related illness or injury, compensation may be available under the statutory workers' compensation regime administered by each province. However, many employers provide paid leave for periods of certain leaves as part of their benefits programmes or compensation packages – for example, paid maternity or parental leave is common.

In some circumstances, employers could be obliged to provide a longer period of leave than required by statute in order to meet the duty to accommodate imposed by human rights law.

Limits on Confidentiality

At both common law and civil law, employees have an obligation to maintain the confidentiality of the employer's proprietary information and not to disclose or make use of such information for personal advantage. Employment contracts are frequently used to specifically reinforce this obligation. Confidentiality clauses that limit the use and disclosure of non-public, proprietary information about the employer's business, both during and following the end of the employment relationship, are generally enforceable.

Canadian employers are also increasingly beginning to insert non-disparagement clauses in separation agreements with departing employees. These clauses prohibit the former employee from making comments or statements that negatively impact the former employer's reputation, business, management, products, services and/or clients. Non-disparagement clauses that are clearly drafted are generally enforceable.

Employee Liability

Generally, employees will not be found personally liable when acting in the course of their employment within the scope of their authority. Rather, an employer will often be found to be vicariously liable for harm caused to third parties by actions committed by employees in the course of discharging their employment duties, even if an employer has not been negligent or committed other faults.

Canadian courts have identified policy reasons for placing fault and liability on employers rather than employees in such instances, including the employer's power to direct and control its employees, the employer's role in creating the risk of harm to others by creating the circumstances in which the harm occurred, and the employer's ability to pay the harmed third party. However, an employee may be held liable – without incurring vicarious liability for an employer – for actions causing harm to third parties that are not sufficiently connected to their employment or are committed outside of discharging employment duties.

There are instances in which an employee may nevertheless be held personally accountable for their actions that cause harm during the course of their employment, even if such actions are connected to their employment. By way of example, supervisory employees who fail to discharge their responsibility to take reasonable steps to ensure the safety of workers may be found criminally negligent alongside an employer. Indeed, courts have convicted supervisory employees of criminal negligence for deaths and injuries resulting from non-compliance with workplace safety legislation. Further, where an employee engages in certain illegal conduct in the context of their employment (such as discrimination prohibited by human rights legislation), liability may potentially flow to both the employee and employer.

2. Restrictive Covenants

2.1 Non-competes

Generally, Canadian employers can restrict an employee's activities during and after employment through clauses that limit an employee's ability to compete with the employer's business. However, Ontario legislation – effective as of October 2021 – has prohibited employers from entering into non-competition clauses with the vast majority of employees, with narrow exceptions in the context of certain sales of business and for certain executive employees.

During employment, non-competition clauses can prohibit the employee from holding other employment or holding employment that would result in a conflict of interest. Following the end of the employment relationship, employers can seek to restrict a former employee's post-employment activities by limiting or prohibiting competition with the employer's business.

In Canada, courts view restrictive covenants in employment agreements as restraints of trade that are prima facie unenforceable. Unless the employer can prove that the non-competition clause is reasonable between the parties and in the public interest, the clause will not be enforced. A non-competition clause will only be enforceable if it is proportional in time, territory and scope to the former employer's legitimate business interest that is in need of protection.

Typically, non-competition clauses are enforceable only where the former employee subject to the clause held an important customer-facing position or otherwise personifies the business. In such cases, courts are willing to recognise that employment by a competitor or the creation of a similar business is likely to unfairly disrupt the former employer's business.

Like all contractual terms, a non-competition clause will only be valid if consideration was provided at the time the covenant was imposed. If imposed at the point of hire, then the offer of employment is sufficient consideration. However, covenants imposed following the start of employment – for example, upon an employee's promotion within the business – require fresh consideration flowing from the employer to the employee in exchange for the employee's commitment.

2.2 Non-solicits

Employers can restrict a former employee's post-employment activities by limiting or prohibiting the solicitation of the employer's employees or contractors following the end of the employment relationship. Unlike non-competition clauses, courts are more inclined to uphold and enforce non-solicitation clauses – often commenting that such clauses are sufficient in conventional employment situations (ie, where the

former employee is not an executive, director, key employee, or fiduciary). Like all restrictive covenants, the scope of the clause must be reasonable. Non-solicitation clauses of limited duration (ie, six months to 12 months) are more likely to be found to be enforceable.

Limitations or prohibitions on the solicitation of a former employer's customers or suppliers are also commonly used to restrict an employee's post-employment activities. As with non-solicitation of employee provisions, any restrictions will only be enforceable if proportional in time and scope to the former employer's legitimate business interest. Non-solicitation clauses of limited duration (six months to 12 months) and applicable to those customers or suppliers with whom the former employee had contact as a result of their employment are more likely to be found to be enforceable.

3. Data Privacy

3.1 Data Privacy Law and Employment

In Canada, the Personal Information Protection and Electronic Documents Act (PIPEDA) governs the collection, use and disclosure of personal information. However, in the employment context, PIPEDA only applies to federally regulated organisations. PIPEDA requires employers to adhere to the following ten basic principles regarding the collection, use or disclosure of employees' personal information:

- accountability;
- identifying purposes;
- consent;
- limiting collection;
- limiting use, disclosure and retention;
- accuracy;
- safeguards;
- openness;
- individual access; and
- challenging compliance.

Alberta, Quebec, and British Columbia have enacted similar legislation that applies to employees and employers in those provinces. If an individual believes their privacy rights have been violated, a complaint can be filed with the provincial or federal privacy commissioner.

In June 2022, the federal government proposed the Digital Charter Implementation Act 2022 (Bill C-27), which – if passed – would modernise Canada's current federal framework for the protection of personal information in the private sector and introduce new rules for the development and deployment of AI.

General Principles

In some jurisdictions, the general principles relevant to the application of privacy principles to employees are that the collection, use and disclosure of employee personal information must be for the reasonable purposes of managing, establishing or terminating an employment relationship. Additionally, at the time the information is collected, the employer must give notice to the employees of the purposes for which their personal information is being collected, used or disclosed. If notice is not given, the employer will need to obtain employee consent.

Safeguards and Processes

Safeguards and processes must be put in place by employers to prevent unauthorised access, use or disclosure of employees' personal information. Employers must also have privacy processes and procedures in place. Employees are entitled to request access to the personal information collected by their employer and may correct any inaccuracies therein.

In addition, rules regarding the transfer of data across borders are also included in privacy legislation and must be respected. If employees' personal information is to be transferred out of Canada, including to a subsidiary, the same rules of notification and consent apply. In the event of transfers to the USA, any notice given to employees should include a statement that the information may be available to the US government or its agencies in accordance with local laws.

Provincially Regulated Workplaces

For provincially regulated workplaces outside of Alberta, British Columbia, and Quebec, there is no legislation that specifically establishes requirements around employee privacy (except in respect of employees' personal health information). However, Ontario's Employment Standards Act 2000 requires that employers with 25 or more employees on January 1st of any year have a written policy in place with regard to electronic monitoring of employees by March 1st of that year. Courts and adjudicators in all Canadian jurisdictions are increasingly attentive to privacy-related concerns and have begun using common law principles to hold employers and other parties liable for violations of privacy rights.

4. Foreign Workers

4.1 Limitations on Foreign Workers

In Canada, only Canadian citizens and individuals who meet the immigration requirements for permanent residency may engage in employment as of right. Citizens of other countries must obtain a work permit to work in Canada.

Under Canadian law, if an employee is working without a valid permit or other government authorisation, the employer is deemed to have knowledge that the employee is not permitted to work in Canada. Employers can face fines as well as imprisonment for employing such employees.

4.2 Registration Requirements for Foreign Workers

Obtaining a Work Permit

To obtain a work permit in Canada, a person must have their job offer "confirmed" by a government agency (Employment and Social Development Canada) in the area in which the employer conducts business. Through this process, the employer must demonstrate that it has made reasonable efforts to hire a Canadian, that there were no Canadians available who were qualified to perform the job, and that the effect of allowing the foreign worker to work in Canada will enhance employment opportunities in the country or – at least – will not detract from employment opportunities. Thereafter, an immigration officer may issue a work permit for a specific period of time.

Exemptions

There are a number of exemptions to the requirement for a work permit and special rules applicable to certain industries (eg, agriculture) or particular work positions (eg, live-in care-givers). Exemptions or expedited processes for professionals, senior employees of multinational companies, intercorporate transferees, traders and salespersons are also available. In many circumstances, the Canada-United States-Mexico Agreement (CUSMA) provides for special rules applicable as between Canada, Mexico and the USA.

Others may work in Canada as business visitors if they can demonstrate that their business activities are international in scope and that they are not entering the Canadian labour market.

This can be shown if the main source of pay for the work done in Canada originates from outside Canada. Normally, a business visitor will be permitted to work in Canada for six months at a time.

Public Registry for Employers of Foreign Workers

As of December 2020, the government of British Columbia began a public registry of employers who are registered to hire foreign workers. The registry applies to most employers (including individuals) who hire foreign workers, such as those hired under the Seasonal Agriculture Worker Program, the Home Child Care Provider or Home Support Worker pilot, and other programmes that require a Labour Market Impact Assessment. An employer does not need to register if they are an excluded employer – including those who currently employ foreign workers and do not intend to hire more workers – or if they only hire foreign workers under the Provincial Nominee Program or the International Mobility Program. In addition, employers hiring temporary foreign workers as domestic workers (eg, workers who provide services such as childcare, cooking and cleaning in a private home) are required to register the worker with the government of British Columbia within 30 days of hiring them.

5. New Work

5.1 Mobile Work

In Canada, employees do not have a right to work from home. However, employers are increasingly implementing remote work arrangements in their workplaces – whether fully remote or "hybrid" models. In Canadian jurisdictions where an employee's home is considered an extension of the workplace, requirements and duties set out in provincial occupational health and safety statutes apply. Furthermore, employers are required to take reasonable steps to prevent workplace bullying and harassment and address such conduct where it occurs "virtually" under applicable human rights and occupational health and safety legislation.

5.2 Sabbaticals

In Canada, employees do not have a legal right to sabbatical leave. However, Canadian employers may choose to provide their employees with sabbatical leave. Depending on the employer's policy, a sabbatical can either be paid or unpaid. An employer may also implement eligibility requirements in order to take sabbatical leave, such as a certain number of years in service.

5.3 Other New Manifestations

As a direct result of the COVID-19 pandemic, new models of work have increased in prevalence in Canada, including:

- four-day working weeks;
- "hoteling" – a practice associated with telecommuting, whereby telecommuters reserve an office or workstation for their in-office days in lieu of assigning them a permanent work space;
- "flextime" – a type of alternative schedule that gives a worker greater latitude in choosing their particular hours of work or grants the freedom to change work schedules from one week to the next, depending on the employee's personal needs;
- "compressed work week" – an alternative scheduling method that allows employees to work a standard working week of their regular hours over a period of fewer than five days in one week or ten days in two weeks;

- "job-sharing" – the practice of having two different employees performing the tasks of one full-time position; and
- minimum in-office days – the practice of mandating specific days (ie, "anchor" days), or a specific number of days, on which employees are required to attend the workplace for in-person meetings and collaboration.

Employees do not have a legal right to these models of work and, even though Canadian employers are looking to implement flexible models of work in the post-pandemic work environment, many employers are requiring employees to return to the workplace on a regular basis.

6. Collective Relations

6.1 Unions

Each jurisdiction in Canada has labour relations legislation that establishes employees' rights to join a union, engage in a process of collective bargaining and enter into a collective agreement with the employer that defines the terms and conditions of employment in the unionised workplace. Employees' rights to organise and engage in a process of dialogue with their employer are recognised and protected in both labour relations legislation and the Canadian Charter of Rights and Freedoms, which is a part of the Canadian Constitution.

Unions in Canada acquire bargaining rights most commonly through certification or voluntary recognition. Through certification, a union acquires the right to represent a specific group of employees – a "bargaining unit" – by demonstrating to the governing labour board that it has the support of the majority of employees it seeks to represent. In some jurisdictions, a union may be voluntarily recognised by the employer as representative of the employees. Finally, in exceptional circumstances, a union may be certified as representative of the employees by a labour board as a remedy for an unfair labour practice committed by an employer.

Certification Procedures

Two certification procedures are found in Canadian jurisdictions: "card-check" and "mandatory vote" certification. In card-check jurisdictions, a union that presents a sufficient number of signed membership cards may be certified solely on that basis and without an employee vote. In mandatory vote jurisdictions, unions must present a sufficient number of signed membership cards in order to trigger a secret ballot vote; the union will only be certified if it wins the support of more than 50% of employees who cast ballots. Some jurisdictions combine elements of both certification systems.

Entitlement to Unionise

However, not all employees in Canada are entitled to unionise. Indeed, personnel who exercise managerial or supervisory functions or who are employed in a confidential capacity in matters relating to labour relations (for example, HR professionals) are generally excluded from the protections in labour relations legislation. Additionally, certain sectors or industries (eg, the education sector and the agricultural industry) can have separate labour relations legislation that establishes individualised regimes.

6.2 Employee Representative Bodies

Employee representative bodies, most commonly referred to as employee associations in Canada, are generally not regulated and are generally not afforded the same rights and protections as trade unions across the country. Such associations can be instituted by any person, including an employee or the employer.

Even though an employer has no legal obligation to recognise or engage with an employee association, many employers in Canada choose to do so as a means of involving employees in workplace matters and proactively identifying and resolving worker dissatisfaction. However, the right of certain employees to form or become members of an employee association is protected by legislation.

6.3 Collective Bargaining Agreements

The employer has a duty to bargain in good faith with the union, once it has been certified, to reach a collective agreement. The collective agreement defines the terms and conditions of employment for the bargaining unit. The collective agreement reached will apply to all employees in the bargaining unit and not only those who showed support for the union during the certification process. The employer is no longer permitted to negotiate or contract directly with employees in the bargaining unit over terms and conditions of employment.

Certain minimum standards are required in collective bargaining agreements in Canada or, in the absence of such a term, are implied at law. By way of example, most Canadian jurisdictions require that a collective bargaining agreement provide for a minimum term of one year – although employers and unions may agree to a lengthier term. The collective bargaining agreement must also provide that no strikes or lockouts will occur during the term. Additionally, collective bargaining agreements across Canada must include a grievance and arbitration procedure for resolving disputes.

Although parties to a collective bargaining agreement may agree to a variety of terms and conditions of employment, the parties cannot contract out of certain protections, including human rights protections and minimum employment standards. Canadian courts have concluded that those laws are necessarily incorporated into each collective bargaining agreement, even if the express terms of the agreement provide otherwise.

Federal Prohibitions on Replacement Workers

Amendments to the Canada Labour Code – coming into force on 20 June 2025, under Bill C-58: An Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations 2012 ("Bill C-58") – will prohibit employers from using replacement workers in specific contexts. Some examples of these include:

- employees and managers hired after the notice to bargain was given;
- contractors (regardless of hire date), except where the contractors were continuing to do their own work that was substantially similar to work done by striking or locked-out employees before the notice to bargain was given;
- any employee whose normal workplace is a workplace other than that at which the strike or lockout is taking place, including anyone transferred to the strike or lockout location after the notice to bargain was given; and
- any volunteer, student or member of the public.

The prohibition in this regard is subject to exceptions, which include:

- affording employees the opportunity to work before the strike or lockout or to prevent threats to life, health or safety;
- destruction or serious damage to the employer's property/premises; or

- serious environmental damage affecting the employer's property/premises.

Bill C-58 also includes a fine of CAD100,000 per day if an employer is convicted and prosecuted of breaching the above-mentioned prohibition.

7. Termination

7.1 Grounds for Termination

Individual Termination

In a non-union employment relationship, employers can terminate an employee's employment for just cause on a summary basis or, in most jurisdictions in Canada, without cause upon provision of notice of termination or pay in lieu thereof. Except in some jurisdictions, an employer is generally not required to provide a reason for electing to terminate an employee on a "without cause" basis. By contrast, in a unionised workplace, the collective agreement between the union and the employer will almost always provide that employees can only be terminated upon an assertion of just cause.

An employer must provide notice of termination to the employee in writing. During the statutory notice period, an employer must not reduce an employee's wages or alter any term or condition of employment, including contributions to any existing benefits plan. Employees in Nova Scotia, Quebec and the federal jurisdiction who are non-unionised and are non-managerial may resort to a statutory mechanism to challenge their termination if they have the requisite level of service. There are specific procedures to challenge a termination in these circumstances and reinstatement upon a finding of unjust termination is a potential remedy.

An employer's failure to adhere to requirements in employment standards legislation may result in the imposition of fines or orders to compensate employees for losses incurred as a result of the employer's contravention.

In most Canadian jurisdictions, employment standards legislation requiring notice – or pay in lieu thereof – is not automatically applicable where an employee has been laid off on a temporary basis. However, once a lay-off surpasses a specified period of time, it will generally be considered a termination and employer obligations regarding notice of termination will apply.

Mass Termination

Mass terminations attract different statutory treatment. Every jurisdiction, except Prince Edward Island and Alberta, has employment standards legislation imposing obligations on employers where the number of employees dismissed at the same time surpasses a prescribed threshold. The minimum number of dismissed employees required to attract the mass termination notice requirements ranges from ten to 50 employees, depending on the jurisdiction.

The required amount of notice in a mass termination is based on the number of terminated employees, rather than the employee's length of service. In a unionised workplace, the collective agreement established through the bargaining process between a union and the employer will almost always provide a protocol governing employer obligations and employee rights where individual or mass lay-offs occur.

7.2 Notice Periods

In circumstances where an employee is dismissed without cause, written notice of termination – or pay in lieu of notice – must be provided by the employer. Although statutory minimum

notice requirements vary across jurisdictions, in all cases the notice requirement increases according to an employee's length of service.

The common law – as well as civil law in Quebec – prescribes a supplemental "reasonable" notice period, which is typically well in excess of the statutory notice entitlements required by provincial and federal legislation. What constitutes reasonable notice is determined on a case-by-case basis, having regard to the employee's length of service, age, position, and the availability of similar employment. Common law notice periods typically fall within a general range, depending on the nature of employment and the terminated employee's characteristics. The reasonable notice entitlement for a long-service employee can be as much as 24 months.

In Ontario and at the federal level, employment standards legislation creates an entitlement to severance pay for eligible employees. Severance pay is intended to recognise and reward long-term employees for their years of service. Severance pay is not the same as notice of termination, or pay in lieu thereof, and will be in addition to any notice or pay in lieu thereof to which the employee is entitled.

In Ontario, employment standards legislation provides that an employee who has worked for the employer for five or more years is entitled to severance pay if the employer has a payroll of at least CAD2.5 million or has severed the employment of 50 or more employees within a six-month period owing to a total or partial closure of the business. The amount of severance pay is calculated by multiplying the employee's regular weekly wage by the number of years of employment. The maximum amount of severance pay required to be paid in Ontario is 26 weeks.

Mass Termination

Employers are not required to seek government advice or approval for implementing a dismissal or mass lay-off. However, employment standards legislation in most jurisdictions requires that advance written notice be provided to an applicable government authority prior to implementation of a mass lay-off. Such notice provides the local government with the opportunity to offer employees various forms of support, if warranted.

7.3 Dismissal for (Serious) Cause

At common law (and civil law in Quebec), an employee may only be terminated without notice – or pay in lieu thereof – if just cause (or serious reason) is established. Although there is no definition of "just cause" at common law, or "serious reason" at civil law, courts will generally find just cause where an employee's misconduct causes a breakdown in the employment relationship and amounts to a repudiation of a fundamental term of the employment contract. Acts of misconduct such as theft, fraud, disobedience and serious breaches of employer rules or policies will often be found to amount to just cause. By contrast, termination for poor performance will rarely amount to just cause.

Determining Just Cause

The determination of whether an employer does in fact have just cause is a fact-based analysis and is determined on a case-by-case basis, having regard to the misconduct at issue as well as to mitigating factors such as lengthy service. Canadian courts require a contextual approach and the application of the principle of "proportionality" in any determination of cause. Courts will generally examine the nature and circumstances of any misconduct to determine whether an effective balance was struck between the severity of the employee's misconduct and the

employer's imposed sanction of termination. Generally, serious misconduct is required and a single incident of misconduct or mistake will not give rise to cause for termination of employment.

Statutory Mechanisms to Challenge Termination

In addition to civil actions before the courts, employees may resort to statutory mechanisms to challenge an employer's termination. Statutory claims may be subject to a higher standard for assessing just cause. By way of example, Ontario legislation mandates that an employer must prove "wilful" misconduct, disobedience or neglect of duty that is not trivial and has not been condoned by the employer in order to establish just cause for termination. Such a determination is always dependent on the factual circumstances of the particular case. In most cases, serious and deliberate misconduct is required and carelessness or inadvertent misconduct will not give rise to cause for termination of employment.

Evidence Required for Termination

In virtually all unionised workplaces, employees can only be terminated where just cause exists. A similarly high standard exists for the termination of a non-unionised employee.

In most cases, in order to find that the employer had just cause to terminate the employment relationship, a court will require evidence that an employee was provided with warnings to improve their conduct or performance. Employees must also be provided with a reasonable time to improve and, in some circumstances, assistance from the employer to that end. In the exceptional circumstances of a serious single incident, termination for cause may be upheld without prior warnings.

Courts will also consider whether an employer has investigated the alleged misconduct and provided the employee with an opportunity to explain. Finally, courts will not generally allow an employer to rely on conduct that the employer has previously condoned to establish just cause.

Upon termination for cause, employers should advise employees of the reasons for termination and record those reasons in the termination letter. If challenged, employers will generally be required to prove each reason relied upon before an adjudicator will find just cause for termination. Canadian courts have held that it is an implied term of an employment contract that an employer may terminate an employee for cause without any notice. As a result, an employer will not be required to provide an employee with notice of termination or pay in lieu of notice where the employer asserts just cause for termination.

Civil Actions and Statutory Claims

In most jurisdictions, non-unionised employees may challenge a termination for cause by commencing either a civil action or a claim provided for through a statutory mechanism.

In civil actions, employees will claim that the employer did not have just cause to terminate their employment without notice and, as such, that they were wrongfully dismissed. Employees will seek damages for the notice that would have been required if the employer had terminated the employee without asserting just cause. The employer bears the onus of proving cause for termination.

By contrast, in a statutory claim, an employee will generally only be entitled to receive their minimum statutory entitlements if just cause is not established. In some jurisdictions, such as Quebec, an employee credited with two years of

uninterrupted service could also be reinstated in their employment and compensated for any lost wages if the employer does not meet its burden of proving that the termination was made for just cause.

In unionised workplaces, employees must resort to grievance arbitration. If an employer is unable to establish just cause, the employee will – in most instances – be reinstated and compensated for any lost wages.

7.4 Termination Agreements

It is permissible for employment contracts in Canada to contain express termination clauses that govern the parties' rights and obligations on termination. These clauses may be agreed to either prior to or after the termination of the employment relationship. Contractual termination clauses are legally enforceable so long as the provisions do not violate mandatory statutory minimums, including notice periods or pay in lieu of notice requirements. In this regard, it is of note that the Ontario Court of Appeal has found that an unenforceable "for cause" termination clause that violated the Ontario Employment Standards Act 2000 invalidated the contract, resulting in the awarding of common law damages rather than the limited termination entitlements provided for in the contract.

In Quebec, however, civil law provides that an employee may not renounce in advance their right to obtain an indemnity where insufficient notice of termination is given. Therefore, a court would not be bound by a contractual termination clause that would have been agreed at the beginning of the employment relationship and where – given the given nature of the employment, the specific circumstances in which it is carried on and the duration of the period of work – the termination notice previously agreed upon has become unreasonable.

Full and Final Releases

Contractual termination clauses often include "full and final" releases. Under such a release, an employee relinquishes all legal claims against the employer related to their employment in exchange for some form of consideration from the employer (typically, a defined payment or number of payments). Obtaining a release from an employee upon termination does not guarantee that an employee will not commence a future claim against an employer. Rather, the validity of any release signed by an employee who subsequently commences a wrongful dismissal action (or other claim related to their employment) is a determination to be made by an adjudicator.

A release may specifically limit an employee's entitlement to reasonable notice and expressly set out the required period of notice or payment to be made in lieu thereof. A release will only be found to be enforceable if the employer provides the employee with more than their minimum entitlement under employment standards legislation. As individuals cannot release their statutory rights, it is important that releases are carefully drafted.

7.5 Protected Categories of Employee

Under the criminal laws applicable across all Canadian jurisdictions, it is a criminal offence for an employer to discipline, demote, terminate or adversely affect employment with the intent to:

- compel an employee to abstain from providing information to law enforcement authorities concerning an offence that the employee believes has been or is being committed by the employer; or

- retaliate against an employee for making such a disclosure.

Other specific "whistle-blower" legislation has been introduced to protect public sector employees and those who report corporate breaches of securities laws.

Reprisals

Various laws prohibit employer "reprisals" against an employee for specific reasons, including:

- employee requests for employer compliance with legal obligations;
- the exercise of legal rights in connection with one's employment;
- the making of complaints to an employer about workplace issues; or
- the reporting of unlawful conduct to law enforcement officials.

By way of example, workplace health and safety legislation prohibits employers from dismissing or disciplining, imposing a penalty upon, or intimidating or coercing an employee because the employee has raised a health and safety concern.

Similarly, human rights legislation prohibits employers from reprisals against an employee for making a human rights complaint, as discussed in **8.2 Anti-discrimination**. Many large employers in Canada have established confidential hotlines or similar mechanisms that allow an employee to make internal complaints. Employees may also have the option of directing their complaint to a responsible government authority within the particular jurisdiction – many of which have online mechanisms in place to receive complaints.

Furthermore, legislation governing the unionised employment relationship generally protects employees against reprisals for exercising legal rights in connection with a union and collective bargaining. Union officers or representatives (union stewards) enjoy enhanced protections in this respect.

When acting in their official capacity, such representatives are often provided more leeway to refuse to follow management instructions and more leeway to openly oppose management in the course of their duties. However, union representatives are not permitted to make false or malicious statements, or engage in harassing or violent behaviour towards management or other workplace parties.

Workplace Harassment

The Workplace Harassment and Violence Prevention Regulations under the Canada Labour Code require federally regulated employers to develop a prevention policy with regard to workplace violence and harassment, including sexual harassment and sexual violence. This includes an assessment of risk factors, training that will be provided to employees, and resolution processes for employees who witness or experience workplace harassment or violence, among various other requirements. Many provinces require similar workplace policies in accordance with their respective occupational health and safety legislation.

In Quebec, Bill 42: An Act to prevent and fight psychological harassment and sexual violence in the workplace ("Bill 42") clarifies that employers must protect employees from psychological harassment from "any person" and specifically outlines what is to be included in workplace policies to prevent and manage situations of psychological harassment and sexual violence. Bill

42 also grants regulatory power to determine measures to prevent or put a stop to sexual violence. Additionally, Bill 42 adds additional requirements, including mandatory training on sexual violence for arbitrators to whom grievances concerning psychological harassment are referred.

8. Disputes

8.1 Wrongful Dismissal

Where an employee believes that their employer has violated one of the rights described in this chapter, the employee may pursue a statutory or common (or civil) law remedy, depending on the jurisdiction and specific right or entitlement at issue. Arguably the most common type of claim is a civil claim for "wrongful dismissal", in which the employee alleges that the former employer did not provide sufficient reasonable notice of termination under the common law.

In a civil wrongful dismissal claim, the onus is on the employer to prove cause for termination. It is generally accepted to be a difficult onus to discharge. If the employer is unable to establish just cause or point to a valid contractual termination clause that specifically limits the employee's entitlements on termination, then the employee's wrongful dismissal claim will succeed.

Where an employee has made a successful wrongful dismissal claim, the courts are required to determine the amount of reasonable notice that the dismissed employee should have received. The list of factors the court will rely upon in making this determination vary, but often include the characteristics of the former employment, the length of service of the employee, the employee's age, and their re-employment prospects when considering the experience, training and qualification of the particular employee.

Awarding Damages

Although there is no cap on damages awarded to successful employees in wrongful dismissal claims, the range of common (or civil) law notice periods is typically between a few weeks and 24 months. Recently, court decisions reveal a growing trend of awarding periods in excess of 24 months in cases involving very long-serving employees or exceptional circumstances where a long notice period is warranted for aggravating reasons.

In determining the quantum of damages to be awarded in a wrongful dismissal claim, Canadian courts primarily focus on lost wages and benefits. The value of damages will reflect the value of the employee's salary, bonus, healthcare benefits and other associated entitlements an employee would have received but for their wrongful termination. The Supreme Court of Canada has clarified that employees may be entitled to a bonus or payment under incentive compensation plans despite no longer being employed and found that clear language is required to oust the common-law presumption that such payments apply during the reasonable notice period.

Additionally, and unlike statutory notice, dismissed employees claiming reasonable notice through a civil action have a "duty to mitigate" the damages resulting from their dismissal by actively searching for new employment. A court will deduct from a damages award any earnings gained through alternative employment subsequent to the wrongful dismissal and during the reasonable notice period. Where an employee fails to seek alternate employment after their

wrongful dismissal, the court may reduce the damages award accordingly.

Damages for emotional distress or punitive damages are rare, but may be awarded where the employer's conduct was of such an egregious or malicious nature that it warrants judicial sanction. However, the Supreme Court of Canada has repeatedly stated that punitive damages should be awarded with restraint.

8.2 Anti-discrimination

Each jurisdiction in Canada has enacted human rights legislation that protects employees from discrimination on a variety of grounds. Typical protected grounds include race, ancestry, place of origin, colour, ethnic origin, creed/religion, citizenship, sex, sexual orientation, age, record of offences, marital status, family status, and disability. Numerous jurisdictions have human rights legislation that includes protection on the grounds of gender identity and gender expression.

Human rights legislation protects an individual in all aspects of the workplace environment and employment relationship.

In all jurisdictions, human rights legislation permits an employer to use the defence of bona fide occupational requirement. The defence allows an employer to argue that a discriminatory requirement, qualification or factor of employment is reasonable and appropriate, given the nature of the employment or essential duties of the position in question. Whether a specific job requirement constitutes a bona fide occupation requirement is a determination to be made by an adjudicator.

Burden of Proof

The burden of proof rests with an employee to establish, on a balance of probabilities, that an employer discriminated against them on the basis of a protected ground. The employee must show a prima facie case that there is a connection between the negative treatment and a protected ground of discrimination. An employee must only prove that the protected ground was a factor (ie, not that it was the sole or primary factor) in the negative treatment to discharge this burden.

The discharge of the burden possessed by an employee will be impacted by the nature of the discrimination that is claimed. By way of example, when claiming direct (ie, intentional) discrimination, an employee must prove that a protected ground was a factor in an employer adopting a rule or practice. When claiming indirect discrimination (ie, adverse impact discrimination) an employee must prove that a requirement, factor or qualification resulted in an adverse impact on the basis of a protected ground.

If discrimination is proven on a direct or indirect basis, the burden of proof shifts to the employer to defend their conduct based on a statutory exemption or by proving that the negative treatment was not in any way related to a protected ground.

Remedies

The range of remedies available to statutorily enacted employment and human rights tribunals generally tend to be broader than those available in a civil action. As an example, the Ontario Human Rights Tribunal has the ability to award financial compensation, non-financial remedies and public interest remedies. Non-financial remedies may include reinstatement, an offer of employment, a letter of reference as

well as a letter of assurance of future compliance with human rights legislation. Public interest remedies are intended to be an educational tool and to prevent similar future discrimination from occurring. Public interest remedies may include ordering an employer to develop non-discriminatory policies and procedures and to implement mandatory education and training programmes in the workplace.

In recent years, some human rights adjudicators have awarded significant damages for violations of human rights. In a 2021 decision, the British Columbia Human Rights Tribunal awarded significant damages of approximately CAD176,000 for injury to dignity, feelings and self-respect, in addition to more than CAD700,000 in compensation for lost wages. This decision reminds employers of the increasing and significant potential liability for breaches of human rights legislation.

Human rights tribunals generally do not award costs or attorney's fees to the successful party, with many lacking the authority to do so.

8.3 Digitalisation

As a direct result of the COVID-19 pandemic, the Canadian justice system continues to conduct virtual proceedings for hearing matters before the courts and administrative tribunals. Currently, virtual attendance is the default method of attendance in some proceedings, such as case conferences or pre-trial conferences, examinations for discovery, and motions. Trials conducted both by judge alone and by jury, generally, have returned to in-person sittings overall. Labour boards in each jurisdiction in Canada (including the Canada Industrial Relations Board) have also embraced virtual proceedings and many offer the option, presumptively or by request, to attend a proceeding virtually – although resumption of certain in-person proceedings presumptively is also being observed.

9. Dispute Resolution

9.1 Litigation

Many employment disputes in Canada are dealt with by the numerous federal and provincial tribunals established to deal with specific employment issues. As an example, human rights complaints initiated by an employee against their employer are typically dealt with by the human rights tribunal or commission in the province where the employment relationship exists. It is possible for an employee or employer to apply to the superior court in each jurisdiction for a judicial review of a tribunal decision.

The provincial superior court in each province also has jurisdiction over wrongful dismissal claims and other employment-related disputes that relate to a breach of a common law (or, in Quebec, civil law) right, such as the requirement to provide reasonable notice of termination.

Class actions in the employment law context are permissible in Canada. Indeed, during the course of the past decade, there has been a significant increase in the use of class actions as a means of reducing the individual costs of employment litigation. Class actions in the employment context have included mass wrongful dismissal claims, retirement benefits claims, employment discrimination claims and – perhaps most frequently – claims related to the breach of employment standards legislation.

Recently, a growing number of wrongful dismissal cases have been decided by way of a summary judgment motion. Those cases have typically involved straightforward facts that are

in dispute and have centred around notice entitlements and the enforceability of termination provisions.

9.2 Alternative Dispute Resolution

In the non-unionised context, Canadian courts are generally willing to uphold the terms of a pre-dispute arbitration agreement. In most cases, a court will engage in a deferential approach to the jurisdiction of arbitrators, including by finding that a challenge to the validity of a pre-dispute arbitration clause should be determined at first instance by the arbitrator. The courts will be more inclined to scrutinise pre-dispute arbitration agreements where there is an obvious inequality in bargaining positions or where the invocation of the arbitration agreement would be oppressive or amount to an illegal contracting out of an employment standard.

In the unionised setting, disputes between a union and the employer are almost always dealt with through arbitration. Collective bargaining agreements typically specify the arbitral procedure to be engaged in between the parties.

9.3 Costs

The general rule across Canada is that the successful party in a civil lawsuit will be entitled to at least a portion of their costs or attorney's fees to compensate for the time and expense of bringing or defending a legal proceeding. It is rare that any successful party, whether an employer or employee, will be entitled to the full amount of legal fees incurred in a proceeding.

Costs awards, which can include both legal fees and general expenses associated with litigation in some jurisdictions, may typically represent between 40% and 50% of the actual amount of money expended by the successful party. However, a greater proportion (or the entirety) of legal fees may infrequently be awarded in cases where the conduct of the opposing party in the legal proceeding is considered to be egregious or reprehensible.

Some Canadian jurisdictions have special rules regarding costs to encourage settlement between parties. In Ontario and British Columbia, if an employee rejects an employer's written offer to settle a wrongful dismissal claim and the employee receives a judgment at trial that is no more favourable than the terms of the employer's rejected offer to settle, the employer may be entitled to recover their legal costs at a significantly higher rate than would typically be awarded.

In contrast, most tribunals that deal with employment matters do not have the authority to award the successful party costs.

CHINA

Law and Practice

Contributed by:
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King & Wood Mallesons

Contents

King & Wood Mallesons is a leading law firm with exceptional legal expertise and depth of knowledge. The firm provides comprehensive one-stop-shop legal solutions to clients in China as well as internationally. The labour and employment department has six partners and more than 20 attorneys and assistants based in Beijing, Shanghai, Shenzhen, Guangzhou and Suzhou, which enables them to quickly and effectively resolve labour law issues across Mainland China. The firm has provided legal services to more than 300 Fortune 500 companies, multinational companies, large state-owned enterprises and well-known domestic enterprises. Its extensive experience in handling both adversarial and non-adversarial matters as well as direct participation in legislation facilitates a deep and accurate understanding of the complicated and rapid changes in PRC labour and employment laws and policies, as well as the latest HR, management and employment issues.

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Linda Liang is a partner at King & Wood Mallesons with over 20 years of experience in employment and labour law practice. She has experience in handling various employment and labour disputes and has extensively advised on employment and labour law matters. Ms Liang is a board member of the China Labour Law Society, a committee member of the Labour and Social Security Law Committee of the All China Lawyers Association and a vice chair of the Employment and Immigration Law Committee of the Inter-Pacific Bar Association.

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1. Employment Terms

1.1 Employee Status

There is no clear distinction between blue-collar and white-collar workers under PRC employment laws. As long as workers are employed by enterprises, individual economic organisations, private non-enterprise entities, state organs, public institutions or social organisations within the boundary of the PRC, no matter whether they are employed as senior staff or frontline workers, they uniformly hold the status of "employees" as protected by PRC employment laws.

Under the current PRC employment laws, employees can generally be divided into directly employed employees and labour dispatched employees.

- *Directly employed employees:* The employees can be further divided into full-time employees and part-time employees. Full-time employment is the most common form of employment. Part-time employees do not work more than four hours on average per day and 24 hours per week for one employer; they can work for more than one employer simultaneously.
- *Labour dispatched employees:* Labour dispatch is an indirect employment arrangement under which an employee is employed by a dispatch agency and then seconded to work for a company. Labour dispatch applies to temporary, auxiliary or substitutable positions, and the law stipulates that the ratio of the number of dispatched employees versus the number of total employees (direct hires plus dispatched employees) of the company shall not exceed 10%, unless otherwise provided by law.

1.2 Employment Contracts

According to the PRC Employment Contract Law ("Employment Contract Law"), there are three types of employment contract terms:

- a fixed-term contract
- an open-ended contract; and
- a project-based contract expiring at the completion of a specific task or project.

A written employment contract shall be entered into within one month from the date on which the employee commences work; otherwise, the employer shall pay twice the monthly salary to the employee from the second month of the commencement of employment until the date when a written employment contract is concluded. If, after a year from the commencement of the employment, an employer still fails to conclude a written employment contract, an open-ended employment contract will be deemed automatically concluded between the employer and the employee.

The following information must be included in an employment contract:

- the employer's name, address and legal representative/person in charge;
- the employee's name, home address and the number of his/her valid identification card;
- the term of the employment contract;
- the job description and the work location;
- the working hours, rest time and leaves;
- remuneration;
- social insurance;
- labour protection, working conditions and protection against occupational hazards; and
- specific provisions on the protection of the rights and interests of female employees.

Part-time employees may enter into oral agreements with the employer. The employer is not allowed to stipulate a probation period with the employee.

1.3 Working Hours

Working Hours

For full-time employees, there are three types of working hour systems, under which different rules for working hours apply:

- *Standard working hours system:* Employees work no more than eight hours per day and no more than 40 hours per week ("Statutory Standard"), and are entitled to at least one rest day every week. Otherwise, overtime will occur.
- *Comprehensive working hours system:* Generally applicable to certain special industries requiring long shifts (eg, transportation, airlines, fishery industry, offshore oil exploration) and the employer must obtain approval from the competent authorities, unless otherwise provided by local regulations and rules. Working hours are calculated within a certain calculation cycle (month/quarter/year). The average daily working hours and the average weekly working hours must not exceed the Statutory Standard. Otherwise, overtime will occur.
- *Flexible working hours system:* Only applicable to certain job positions (eg, executives, sales personnel, taxi drivers). Similarly, the employer must obtain approval from the competent authorities, unless otherwise provided by local regulations and rules. The employee can perform his/her duties on a flexible schedule, provided that he/she properly completes the work assignment in a timely manner.

Part-time employees are employees who generally work with an employer for no more than four hours per day on average and no more than 24 hours per week in total. There are no special rules/restrictions applicable to working hours for part-time employees.

Overtime

Overtime refers to the working time that the employer arranges or approves the employees to work, which is beyond the Statutory Standard. According to the PRC Labour Law ("Labour Law"), overtime shall not exceed three hours per day or 36 hours per month.

- Under the standard working hours system, the employer shall compensate the employee's overtime work in the following ways:
  - (a) For overtime work during working days, the employer should pay not less than 150% of the employee's normal hourly wage. In general, alternative rest days should not be used to substitute overtime pay for working days.
  - (b) For the overtime work during rest days, the employer can first consider making arrangements for employees to take alternative rest days. If such alternative rest days cannot be arranged, the employer should pay not less than 200% of the employee's normal daily or hourly wage.
  - (c) For the overtime work during a statutory holiday, the employer should pay not less than 300% of the employee's normal daily or hourly wage. In general, alternative rest days should not be used to substitute overtime pay for statutory holidays.
- Under the comprehensive working hours system, for the extra hours worked during the calculating cycle (regardless of whether the extra hours are for work days or rest days), the employer should pay not less than 150%

of the employee's normal hourly wage, and for the extra hours worked on statutory holidays, 300% of the employee's normal daily or hourly wage should be paid.
- Under the flexible working hour system, generally the employees shall not be entitled to overtime pay, but the rules are slightly different among provinces and cities. For example, in Beijing, employees under the flexible working hour system are not entitled to any overtime pay at all. However, in some other cities, if employees work extra hours on statutory holidays, they will still be entitled to overtime pay of not less than 300% of their normal daily or hourly wage.

If an employer does not make overtime payment for its employee's overtime work, the competent labour authorities have the right to order the employer to make such payment within a limited period; if the employer fails to comply with such order, it will be required to pay 150-200% of the outstanding overtime pay.

1.4 Compensation

There is no nationwide minimum wage, and the local government of each region sets its local minimum wage, which is normally updated at least every two years and applies to all employees, regardless of their age, position and experience. The minimum wage generally includes a monthly minimum wage and an hourly minimum wage. The monthly minimum wage applies to all full-time employees, while the hourly minimum wage applies to all part-time employees.

It is not statutorily required for employers to provide bonuses on top of basic salaries; however, it is common to see employers reward employees through various bonuses, eg, the 13th month's salary, year-end bonus, commission, performance bonus. Generally, the issuance of bonuses is solely at the employer's discretion. If it is stipulated in the employment contract or the employer's internal policies to provide a certain bonus to the employee, the employer shall be bound by those stipulations.

Apart from the minimum wage requirements, there are no mandatory requirements on salary increase (although the local government of each region generally issues a salary increase guideline every year, it is only a reference document to guide enterprises to reasonably determine salary increases and is not mandatory). Salary deduction can only be made upon the employee's consent unless on certain statutory grounds (eg, sick leave period).

1.5 Other Employment Terms

Holidays

Generally, holidays in China include 11 days of statutory holiday (New Year's Day, Spring Festival, Labour Day, Mid-Autumn Festival, National Day, etc) for all employees as well as holidays for certain groups of people (eg, a half-day's leave for female employees on Women's Day, and a half-day's leave for 14 to 28-year-old employees on Youth Day).

Leaves

All employees shall be entitled to fully paid statutory annual leave, sick leave and other leaves (maternity leave, childcare leave, etc) in accordance with the PRC laws and the employer's internal policies. The main categories of leave include the following:

- *Statutory annual leave:*
  (a) Any employee whose accumulated service years (including all the prior service years with current and former employers) is more than one year shall be entitled to paid statutory annual leave. The number

of days of statutory annual leave shall be calculated based on the accumulated service years of the employee as follows:
(i) 1 to 10 years – 5 days;
(ii) 10 to 20 years – 10 days; and
(iii) more than 20 years – 15 days.

(b) If the employer fails to arrange the statutory annual leave for an employee due to its operational needs, with the consent of the employee, such statutory annual leave does not need to be arranged by the employer, but the employer shall pay the employee 300% of the wage (including the 100% normal wage and thus 200% shall be additionally made) on a daily basis for the unused statutory annual leave.

- *Sick leave:* Where an employee suffers from illness or a non-work-related injury, the employee has the right to take sick leave to recover from the illness or injury. The minimum salary standard during sick leave required by laws and regulations may be different among provinces and cities, and the commonly used standard is 80% of the local minimum wage. There are also provinces and cities with different sick leave pay standards; eg, Shanghai has its own sick leave and sick pay regulations.
- *Maternity leave:* Female employees who give birth in compliance with PRC birth control policies are entitled to 98 days of maternity leave, of which 15 days may be taken before delivery. The leave can be extended by an additional 15 days under special circumstances such as dystocia and multiple births. Additionally, extra maternity leave is granted by local regulations where the specific length varies from city to city. For example, in Beijing and Shanghai, the total length of maternity leave is 158 days, including a base 98-day period per national law and 60 days granted by local regulations. According to national law, female employees who suffer a miscarriage during the first four months of pregnancy shall be entitled to 15 days of maternity leave, and those who suffer a miscarriage after four months of pregnancy shall be entitled to 42 days of maternity leave.
- *Marriage leave:* An employee is entitled to three days of marriage leave according to the national law. Moreover, all legally married couples will be entitled to additional marriage leave granted by local regulations.
- *Paternity leave:* Paternity leave for male employees is granted by local regulations only. For instance, paternity leave for male employees in Beijing and Shanghai is 15 days and ten days respectively.
- Childcare leave: Childcare leave is granted by local regulations only. For instance, both Beijing and Shanghai have introduced childcare leave which entitles eligible parents to five days of fully paid leave each year until the child reaches three years of age.
- *Elderly care leave:* Elderly care leave is also stipulated in local regulations only. For instance, in Beijing, an employee who is the only child in his/her family is entitled to no more than ten working days of fully paid elderly care leave per calendar year to take care of his/her parent(s) (including legal adoptive parents) who need nursing care due to illness, injury or disability. Shanghai currently does not have elderly care leave.
- *Bereavement leave:* According to the current law, when a parent, spouse or child of an employee of a state-owned enterprise dies, the employee is entitled to take one to three days of bereavement leave. Employers generally refer to this standard in providing bereavement leave to employees.

Confidentiality and Non-defamation

An employer may formulate internal policies, or agree with employees in the employment contract or a separate confidentiality agreement, on relevant matters of confidentiality, including the protection of the employer's trade secrets and other confidential information. The scope of confidential information shall be defined in the agreement at the discretion of the employer. At present, there are no nationwide regulations requiring the payment of compensation for adhering to a confidentiality obligation. Therefore, in practice, employers need not pay their employees in exchange for their complying with the confidentiality requirements. If an employee violates the confidentiality requirements and causes economic losses to the employer, the employer can claim compensation against the employee based on the internal policy, relevant stipulations in the employment contract or the confidentiality agreement.

Similarly, employers can set requirements on non-defamation for employees by formulating policies, or by stipulating relevant requirements in the employment contract or a separate agreement, and claim compensation for any employee violation and losses caused.

2. Restrictive Covenants

2.1 Non-competes

Non-compete is a commonly seen post-termination restrictive covenant for employees so as to protect the confidential information of the employer. Under PRC employment laws, an employer can agree with an employee on non-compete obligations through stipulations in the employment contract or through a separate non-compete agreement. Key stipulations on non-compete include the following.

- *Restricted competitive behaviours:* Working for a competing company that produces the same type of products, engaging in the same type of business as their former employer, establishing their own business to produce the same type of products, engaging in the same type of business, or competing with their former employer in any other way.
- *Scope of employees:* Employees subject to non-compete clauses shall be senior management, senior technicians or other employees under confidentiality obligations.
- *Scope of regions:* The geographical region for non-compete clauses shall be stipulated by the employer and the employee, and is generally limited to the fair and reasonable scope of region that can form an actual competitive relationship with the employer (factors to consider include business coverage and industry characteristics).
- *Non-compete period:* The effective period for non-compete clauses shall be stipulated by the employer and the employee, and shall not exceed two years post-termination.
- *Non-compete compensation:* In order to enforce the non-compete clause, the employer must pay compensation to the employee on a monthly basis throughout the non-compete period. The parties can agree on the compensation amount. According to the national rules, where there is no such agreement on the specific amount, the default amount is 30% of the employee's average monthly salary over the previous 12 months before the termination or expiration of the employment contract for each month. Local rules may have specific requirements on the compensation standard.
- *Liabilities for breach:* Under PRC employment laws, if an employee breaches the non-compete obligations, the employer can claim for the liabilities for breach of contract as agreed

by the parties, including liquidated damages and/or recovery of the non-compete compensation paid by the employer. Meanwhile, the employer can require the employee to continue performing the non-compete obligations for the rest of the non-compete period (if any).

2.2 Non-solicits

PRC employment laws are silent on the topic of non-solicitation; however, non-solicitation clauses are commonly used by employers in practice to prevent former employees from soliciting clients and employees of the employer.

As violating non-solicitation is not a scenario stipulated by the law where the employer can claim for liquidated damages as agreed with the employees, employers can generally only claim for recovery of financial losses suffered due to an employee's breach of a valid non-solicitation obligation. If the employer claims for a breach of non-solicitation by employees, the employer needs to prove the solicitation behaviours and the financial losses incurred.

3. Data Privacy

3.1 Data Privacy Law and Employment

Data Privacy Laws

The PRC Civil Code (effective on 1 January 2021) contains a chapter regarding right to privacy and personal information ("PI") protection. The PRC Cybersecurity Law (effective on 1 June 2017), the PRC Data Security Law (effective on 1 September 2021) and the PRC Personal Information Protection Law ("PIPL", effective on 1 November 2021) collectively constitute the three fundamental and framework laws regulating data security protection in the PRC. Among these laws and regulations, the PIPL provides the most details regarding PI protection, establishing comprehensive and systematic rules on the processing and protection of PI. Employers should also comply with the PIPL when processing the employees' PI; the sections below briefly summarise the key points under the PIPL.

PI Processing Principles

- *Lawful, transparent, accurate and secured:* PI shall be processed in accordance with the principles of legality, legitimacy, necessity, good faith, openness and transparency. In addition, the quality and security of PI shall be guaranteed during the processing.
- *With specified purpose:* PI shall be processed for a specified and reasonable purpose. The processing shall be directly relevant to the processing purpose and in a manner that has the minimum impact on personal rights and interests.
- *Minimised collection:* The collection of PI shall be limited to the minimum scope necessary for achieving the processing purpose and shall not be excessive.
- *With limited retention period:* The retention period of PI shall be the shortest time necessary for achieving the processing purpose, except as otherwise provided by any law or administrative regulation.

Legal Grounds for Processing Employees' PI

According to the PIPL, PI can only be processed based on statutory grounds, among which, the two grounds most related to the employment sphere are:

- the individual's consent has been obtained; and
- the processing is necessary for the conclusion or performance of a contract to which the individual is a contracting party or for conducting human resource management under the employment rules and regulations

legally established and collective contracts legally concluded.

However, the PIPL does not stipulate specific standards for determining what constitutes "necessary for conducting human resource management", and thus, it is suggested that the employers try to obtain consent from the employees for PI needed in the first place.

Consent and Separate Consent

As the key legal ground for processing PI, the PIPL sets out requirements on obtaining "consent". The consent shall be voluntarily and explicitly given by the individual on a fully informed basis. The PI processor shall truthfully, accurately and completely inform individuals of the required matters ("Items to Inform"):

- the name and contact information of the PI processor;
- the purposes and methods of processing the PI, the categories of PI to be processed, and the retention periods;
- the methods and procedures for individuals to exercise the rights provided by the PIPL; and
- other matters that should be notified as provided by laws and administrative regulations.

The PIPL also requires "separate consent" for certain circumstances (eg, sharing PI with third parties, processing sensitive PI, outbound transferring PI), which is a form of consent with higher requirements. The specific requirements and form of separate consent are not specified by the PIPL. Based on the current understanding and practice, to constitute a separate consent, the specific item involving PI processing should be listed as a separate item requesting the individual's specific consent explicitly for this item, instead of being hidden in a package of items pending the individual's joint consent.

Sharing Employees' PI with Third Parties

The most relevant employment-related scenarios include engaging third parties in background checks, recruitment, payroll services and labour dispatch, etc. When sharing employees' PI with third-party processors, apart from the Items to Inform, the employer shall also inform the employees of the recipient's name, contact information, purposes and methods of processing, and categories of PI, and obtain the employee's separate consent.

Outbound Transfer of Employees' PI and SCCs

The outbound transfer of employees' PI is not unusual, especially for multinational employers sharing employees' PI within a global management system. Given the special nature of outbound transfer, the PIPL sets out detailed requirements in this regard. Apart from informing employees of the Items to Inform and additional items, and obtaining separate consent, the PI processor also needs to conduct a PI protection impact assessment and adopt one of the three following legal mechanisms:

- a security assessment organised by the National Cyberspace Department;
- a certification by a specialised agency for protection of personal information in accordance with the provisions of the National Cyberspace Department; or
- a standard contract ("SCC") formulated by the National Cyberspace Department with the overseas recipient (the "SCC Approach").

Among the above outbound transfer mechanisms, detailed rules have been laid out regarding the SCC Approach, and the SCC template has been published. Employers who are eligible to adopt the SCC Approach shall follow the rel-

evant rules for complying with the PI outbound transfer requirements.

The Provisions on Promoting and Regulating the Cross-border Transfer of Data promulgated on 22 March 2024 exempt the PI processor from adopting one of the above three legal mechanisms for PI outbound transfer on certain grounds, including employers' cross-border transfer of employees' PI where it is necessary for conducting human resource management according to the rules and regulations and collective contracts established/concluded in accordance with the law.

Retaining Employees' PI

According to the PIPL, the retention period of PI shall be the shortest time necessary for achieving the processing purpose, though the specific length of the retention period is not specified. It is suggested that employers decide the retention period according to the type of PI and the specific stage in the employment life cycle.

Legal Liabilities

PI processors that violate the PIPL in their PI processing will be subject to the following legal liabilities:

- *Civil liabilities:* Individuals can file lawsuits against PI processors according to the PRC Civil Code claiming an infringement regarding their PI. As provided by the PIPL, the burden of proof for such cases is on the PI processor to prove that it is not at fault. Otherwise, the PI processor shall be liable for damages and other civil liabilities. Where PI processors violate the requirements under the PIPL during PI processing and infringe the rights and interests of multiple individuals, the People's Procuratorate, consumer organisations prescribed by the laws, and organisations determined by the state cyberspace authorities may file lawsuits.
- *Administrative liabilities:* Competent PI protection authorities can also issue orders for rectification and warnings, and confiscate unlawful income against PI processors for violations of the PIPL. In the case of failure to rectify, legal liabilities include fines, rectification and confiscation of unlawful income.
- *Criminal liabilities:* The PIPL refers to the PRC Criminal Law for relevant behaviours constituting crimes. According to the PRC Criminal Law, fines and/or up to seven years of imprisonment can be imposed for illegally acquiring PI, or illegally selling or providing PI to third parties.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Foreigners working in the PRC should abide by laws and regulations such as the Law on the Management of the Entry and Exit of the PRC, and the Regulations on Management of Foreigners Working in China. According to these regulations, for foreigners to work legally in China, the following requirements shall be met:

- they have reached the age of 18 and are in good health;
- they have professional skills and work experience required by the job;
- they do not have a criminal record;
- they have a definite employer; and
- they have a valid passport or other international travel document.

In addition, for foreign workers to work legally in China, the prior approval of competent labour administrative authorities, a work permit and a residence permit shall be obtained. Failure to

obtain the valid permits will lead to penalties for both the employer and employee, and detention may be imposed on the foreign employee. These rules do not apply to foreign employees of foreign embassies, consulates, offices of the United Nations and other international organisations in China, which enjoy diplomatic privileges and immunities.

As a side point, the term of an employment contract between an employer and a foreign worker may not exceed five years. The employer may apply for renewal within 30 days prior to the expiration date, and the employment contract can be renewed upon the labour administrative authorities' approval and completion of the work permit extension procedures.

4.2 Registration Requirements for Foreign Workers

General Registration Requirements

All foreign workers shall obtain valid work permits to work in China, except in very special circumstances, eg, if the duration of stay in China is less than 90 days and the worker enters China for certain reasons including:

- to conduct a trial for sports training in China;
- to purchase machinery or equipment for supporting maintenance, installation, commissioning, disassembly, guidance or training; or
- to be dispatched to domestic branches, subsidiaries or representative offices to complete short-term work.

In other circumstances, the registration can generally be divided into two kinds depending on the duration of the stay (ie, whether it is over 90 days). Generally, there are two kinds of arrangement commonly adopted in practice for employers to have foreign nationals work in China:

- the foreign national is directly employed by a PRC entity, which acts as the employer of that foreign national ("direct hiring"); or
- the foreign national is employed by a foreign entity and then seconded to work in a PRC entity ("international secondment").

To implement the international secondment mode, the foreign worker must be in a managerial or technical position in China, and the foreign entity shall issue a secondment letter, stipulating contents including but not limited to workplace, term, salary and position. The PRC entity shall apply for the work permit with the secondment letter.

Type of Foreign Workers

There are different types of foreign workers permitted to apply for work permits, including high-end talent (Category A), foreign professionals (Category B) and other foreign personnel (Category C). There are specific criteria indicating which category shall apply to each foreign employee when applying for work permits.

Procedures for Obtaining a Work Permit and a Residence Permit for a Foreigner who Comes to Work in China From Abroad

For a PRC employer to hire a foreign employee who comes from abroad, the general procedures for obtaining a work permit and a residence permit are as follows:

- the employer is to register in the "Service System for Foreigners Working in China" and upload the relevant documents required;
- the employee may apply for a Z visa after the work permit notice has been issued and enter China with the work permit notice;
- within 15 days of entry with the work permit notice, the employer should apply for a work permit; and

- the foreign employee shall then apply for a residence permit after receiving the work permit.

5. New Work

5.1 Mobile Work

Mobile work (remote work) is not a new concept and has been widely used during the COVID-19 pandemic period. Post-pandemic, some employers still keep the remote work option open to their employees or adopt a hybrid work mode (onsite and remote).

Work location is a mandatory term in an employment contract, and normally it will be an onsite location. Switching from onsite work to remote work will generally require the mutual consent of both the employer and the employee. In practice, there remain some uncertainties or difficulties related to remote work, mainly those set out below:

- *Employee management:* In the remote work mode, employers may lack adequate channels to monitor employees' working status, and thus supporting policies are suggested to be incorporated during remote work mode, including a request for the employee to check in online through attendance software during his/her normal working hours and retain all remote work software and instant messaging tools online and responsive during working hours.
- *Work-related injury:* For employees who get injured during remote work, there is some uncertainty about how to prove that an injury occurred during work hours, in the workplace and for work-related reasons. According to the judicial practice, if it can be proved that the injury occurred during the working hours required by the employer, and that the employee was working at that time (eg, there is an online record of the work, there is a description of the work in the work log, and there is even an email sent as proof of the work done at the time), it is still likely that work-related injury will be recognised and the employer needs to bear the relevant statutory obligations.
- *IP protection:* In the remote work arrangement, the vast majority of information is transmitted through the internet, and it is more difficult to monitor employees' behaviours and ensure that they do not disclose confidential information from the employer. Therefore, it is suggested that the employer strengthen the confidentiality requirements during remote work periods and co-operate with IT software suppliers to establish a comprehensive mechanism for the protection of the employer's IP during remote work.

5.2 Sabbaticals

Although some universities in China have been trying to implement this kind of leave for teachers, "sabbatical" is not a legal concept stipulated by PRC employment laws, but rather a kind of optional leave granted by universities to teachers. Consequently, there is a lack of stipulations on the terms of employment (salary standard, etc) during the sabbatical period at the national level, and there are no related cases where the attitude of the arbitration commission/court can be seen.

5.3 Other New Manifestations

With the development of the platform economy and the need for more flexible employment, new forms of employment have developed and infiltrated a growing number of industries in the past year; typical new manifestations include delivery persons, online platform taxi drivers

and network anchors. The identification of the relationship between the platform enterprises and the individuals engaged, and the protection of such individuals' rights and interests, are of most concern.

The national and local governments have been issuing regulations and policies governing new forms of employment in recent years. The Ministry of Human Resources and Social Security, together with seven other departments, issued a guiding opinion in 2021, which for the first time introduced a new concept called a "less-than-complete employment relationship" (as opposed to an ordinary employment relationship or a civil law relationship). It also set out comprehensive provisions to ensure platform workers' rights and interests, including reasonable pay, accident insurance participation and vocational training. In 2024, the Ministry of Human Resources and Social Security further issued three guidelines regulating platform employment, including a guideline on working hours, rest and remuneration for platform workers; a guideline on the publication of labour rules for platform enterprises; and a guideline on services to safeguard the rights and interests of platform workers. Local rules and regulations have also been issued, providing more detailed guidance, including allowing work-related injury insurance to be paid separately for individuals under new forms of employment. It will be important to pay attention to any new rules introduced in the future concerning these new forms of employment.

6. Collective Relations

6.1 Unions

According to the Labour Law, trade unions shall represent and safeguard the legitimate rights and interests of employees, and carry out their activities independently in accordance with the law. The Trade Union Law of the PRC ("Trade Union Law") (last revised in 2021) further clarifies the status of a trade union, which is a voluntary organisation formed by employees of their own free will.

Trade unions have the general right to represent and protect the rights of employees. According to the Trade Union Law, specific rights of trade unions include but are not limited to:

- supervising employers' violation of relevant policies, demanding that employers rectify any violations, and ensuring that the employees exercise their right to democratic management in accordance with the law;
- assisting and guiding the employees in signing employment contracts, attending negotiation and signing collective contracts with the employers on behalf of the employees, and filing arbitration or cases on behalf of the employees; and
- providing advice regarding the employers' disposition of employees and reviewing the reason for unilateral termination of employees.

6.2 Employee Representative Bodies

Under PRC employment laws, employees can exercise their right to democratic management through the employee representatives' congress, which has the right to inspect the daily operation of the employer and is responsible for representing the employees' legal interests.

The employee representatives shall be elected by employees; the specific proportion and number shall be determined in accordance with the implementation measures of the employee representatives' congress of the enterprise, or determined by the enterprise through consulta-

tion with the trade union, but shall be no fewer than 30 people.

6.3 Collective Bargaining Agreements

In most cases, employment terms and conditions are agreed and executed individually, but collective bargaining also takes place at both the enterprise level and the industry level. According to PRC employment laws, collective employment contracts shall be concluded between the employer and the trade union that represents employees (for an employer which has not established a trade union, the next higher-level trade union shall guide the representatives elected by the employees to conclude a collective contract with the employer) on matters relating to remuneration, working hours, rest and vacation/holidays, occupational safety and health, insurance and welfare; or specialised collective contracts on matters relating to occupational safety and health, female employees' rights protection, salary adjustment mechanism, etc while requiring that the draft be submitted to the employee representatives' congress or all employees for discussion. Currently, most collective contracts are negotiated at the enterprise level, and collective contracts are more common in enterprises in the manufacturing and retail industries.

The collective contract shall be submitted to the labour administrative department after being concluded, and shall become effective after the lapse of 15 days from the date of receipt by the labour administrative department unless any objections to the contract are raised.

7. Termination

7.1 Grounds for Termination

The PRC employment laws set strict limitations on employment relationship terminations, and there is no concept of "termination at will" for full-time employees. The statutory grounds can be divided as follows.

Non-fault Termination

Termination upon mutual agreement

An employment contract may be terminated upon mutual agreement between the employer and the employee, and the employer is obliged to pay the employee the statutory severance.

Unilateral termination by the employer

An employer is entitled to unilaterally terminate the employment contract with 30 days' prior written notice or one month's salary in lieu, and with statutory severance pay:

- where an employee suffers from an illness or a non-work-related injury and is unable to undertake the original job or other job arranged for them by the employer following completion of the stipulated medical treatment period;
- where the employee is proved incompetent in their job and remains incompetent after receiving training or a position amendment by the employer; or
- where the objective circumstances on which the conclusion of the employment contract was based have undergone major changes and, as a result, the employment contract can no longer be performed, and upon negotiation between the employer and the employee, both parties are unable to reach an agreement on the change of the employment contract.

Unilateral termination by an employee (ie, resignation)

An employee has the right to unilaterally terminate the employment contract by giving his/her employer three days' prior written notice during

the probation period. After completion of the probation period, an employee may terminate his/her employment contract upon 30 days' prior written notice to the employer.

Fault Termination

Unilateral termination by the employer

An employer is entitled to unilaterally terminate the employment contract of an employee without prior notice or any severance pay under any of the following circumstances:

- where the employee is proven to have failed to satisfy the recruitment requirements during the probation period;
- where the employee has seriously violated the internal policies of the employer;
- where the employee has committed serious dereliction of duty or practises graft, causing material damage to the employer;
- where the employee has established an employment relationship with another employer concurrently, which materially affects the completion of his/her tasks with the current employer, or the employee refuses to rectify the matter as demanded by the employer;
- where the employee is prosecuted for criminal liability according to the law; or
- where an employment contract is rendered wholly or partially void when the employee causes the employer to conclude or amend the employment contract against the employer's true intention by means of fraud, coercion or taking advantage of the employer's disadvantaged position.

Unilateral termination by the employee

If any of the following circumstances occurs, an employee may terminate the employment contract immediately and is entitled to statutory severance paid by the employer:

- where an employer fails to provide labour protection or working conditions pursuant to the provisions in the employment contract;
- where an employer fails to pay the remuneration in full and/or on a timely basis;
- where an employer fails to make social insurance contributions for the employee in accordance with the PRC laws;
- where an employer's internal rules and policies violate the law and cause damages to the employee's rights and interests;
- where an employment contract is rendered wholly or partially void when the employer causes the employee to conclude or amend the employment contract against the employee's true intention by means of fraud, coercion or taking advantage of the employee's disadvantaged position; or
- where an employer uses means such as violence, threats or unlawful restriction of personal freedom to coerce an employee to work, or where an employer gives orders which violate safety rules or force an employee to engage in dangerous operations which endanger the employee's safety.

End of Employment

An employment contract will be ended when any of the following occurs:

(a) the term of the employment contract expires;
(b) the employee starts to take his/her pension entitlement or the employee reaches legal retirement age;
(c) the employee is dead or declared dead or missing by the People's Court of the PRC;
(d) the employer is declared bankrupt;
(e) the employer has its business licence revoked, is ordered to close down or decides on early dissolution; or

(f) any other situation stipulated by applicable PRC laws.

Under circumstances (a), (d) and (e), the employer shall pay the employee statutory severance.

Economic Layoffs

If an employer is reducing its workforce by 20 persons or more, or by 10% or more of the total number of its employees, the termination ground of economic layoff can be invoked under any of the following circumstances:

- restructuring pursuant to the PRC Enterprise Bankruptcy Law;
- serious difficulties in production and/or business operations;
- the employer switches production, introduces a major technological innovation or revises its business method and, after the amendment of employment contracts, still needs to reduce its workforce; or
- other major changes in the objective economic circumstances relied upon at the time of execution of the employment contracts, rendering them unable to be performed.

Before the layoffs, the employer has to follow the procedural requirements as stipulated in the Employment Contract Law as follows:

- to explain the circumstances to its trade union or all of its employees 30 days in advance;
- to consider the opinions of the trade union or the employees; and subsequently
- to report the layoff plan to the competent labour authorities.

7.2 Notice Periods

Notice Period

Whether prior notice is necessary depends on the specific statutory ground for the termination. As per **7.1 Grounds for Termination** for the circumstances listed under "Unilateral termination by employer" in the "Fault Termination" section, an employee must be given 30 days' prior written notice or one month's salary in lieu of notice. An employee shall also give prior notice to the employer upon resignation.

In the case of economic layoffs, an employer shall explain the situation to the trade union or all of its employees 30 days in advance (which can be regarded as a form of prior notice) and seek their opinions before reporting the proposed layoffs to local administrative authorities.

Additionally, though not required by the Employment Contract Law, some local regulations in cities such as Beijing require the employer to give prior notice (or salary in lieu of notice) to employees when the term of an employment contract expires and the employer decides not to renew it.

Severance

Please refer to **7.1 Grounds for Termination** and the list of termination grounds on which the employee is entitled to severance pay.

Generally, statutory severance is calculated as one month's salary for every year of service of the employee. Since the Employment Contract Law took effect on 1 January 2008, statutory severance pay must be calculated in two parts:

- *For the service period before 1 January 2008:* Statutory severance pay will be calculated in accordance with the applicable laws and regulations before 1 January 2008 (these can

vary from the calculations that apply after 1 January 2008).

- *For the service period after 1 January 2008:* Statutory severance pay will be one month's salary for every year of service (any period of six months or more but less than a year will be counted as one year), and half a month's salary for a service period of less than six months. The one month's salary is calculated based on the employee's average monthly salary during the 12 months prior to termination. However, when the average monthly salary of an employee exceeds three times the social average monthly remuneration issued by local government at the locality of the employer, the employee's average monthly salary shall be capped at three times of the social average monthly remuneration, and the length of service years shall be capped at 12 years.

Procedural Requirements for Termination

The requirements to be observed include:

- notifying the trade union of the ground for termination (for grounds of unilateral termination by the employer);
- delivering the termination notice to the employee and making the statutory severance payment if needed (for grounds of unilateral termination by the employer);
- registering the termination with the labour authorities if so required by local regulations, and assisting with the social insurance and housing fund transfer for the employee; and
- issuing an employment termination certificate to the employee.

7.3 Dismissal for (Serious) Cause

Under PRC employment laws, dismissal for serious cause is generally understood as Article 39 of the Employment Contract Law; see **7.1 Grounds for Termination**, "Unilateral termination by the employer" in the "Fault Termination" section. Among the circumstances listed, the second bullet point, "where the employee has seriously violated internal policies of the employer" is the most commonly used one in practice. For an employer to successfully terminate an employee for serious violation of the employer's internal policies, the following conditions must be met:

- the burden of proof is on the employer to prove relevant disciplinary violation behaviour;
- the company's internal rules and regulations clearly stipulate that the behaviour is a serious violation of discipline, and the company consequently has the right to unilaterally terminate its employment contract; and
- the above-mentioned internal rules and regulations fulfil the democratic and publicising procedures.

The employer also needs to fulfil the procedural requirements as summarised in **7.2 Notice Periods**.

7.4 Termination Agreements

Normally, a written termination agreement will be reached between both parties upon mutual termination of the employment contract. There are no statutory requirements on the format or must-have terms regarding the termination agreement. According to the judicial interpretations, the release clause shall be generally enforceable as long as it does not violate the mandatory provisions of laws and administrative regulations or fall under fraud, duress or exploitation of an unfavourable position.

7.5 Protected Categories of Employee

An employer cannot unilaterally terminate the employment of employees in the following cir-

cumstances (unless termination is based on Article 39 of the Employment Contract Law):

- the employee is engaged in operations that expose him/her to occupational disease hazards and has not undergone a pre-departure occupational health check-up, or is suspected of having contracted an occupational disease and is being diagnosed or is under medical observation;
- the employee has been confirmed as having lost (or partially lost) his/her working capacity as a result of contracting an occupational disease or sustaining a work-related injury with his/her current employer;
- the employee has contracted an illness or sustained a non-work-related injury, and the statutory medical period has not expired;
- the employee is a female employee on pregnancy, maternity or breastfeeding leave; or
- the employee has been working for the employer continuously for at least 15 years and has less than five years before the statutory retirement age.

In addition, if an employee falls into any of the above circumstances, the employment contract shall not be ended upon expiration of his/her employment contract. Instead, his/her employment contract must be extended until the relevant circumstance ceases to exist.

8. Disputes

8.1 Wrongful Dismissal

Employees who consider that they have been wrongfully dismissed may bring a wrongful dismissal claim to the judicial authorities; the grounds generally include:

- substantive violations of the law: the basis (factual basis or the statutory grounds invoked) for unilateral termination cannot be substantiated; or
- procedural violations of the law: including not notifying the trade union and not fulfilling relevant formalities requirements.

If their claim is supported, the remedy will be either reinstatement of employment with back pay or a double severance payment.

8.2 Anti-discrimination

Discrimination is prohibited by PRC employment law. The Labour Law generally provides that people should not be treated unfairly due to race, gender, religion, etc, and women should have equal rights of employment to men. Additionally, the PRC Employment Promotion Law provides that employees are entitled to equal employment, and individuals seeking employment shall not be discriminated against because of ethnicity, race, gender, religious belief, disability, and whether the individuals are from rural places. The PRC Law on the Protection of Rights and Interests of Women, which was newly amended and took effect on 1 January 2023, further ensures equal employment rights for female employees and prohibits discrimination against female employees. There are also specific regulations prohibiting discrimination against individuals who are hepatitis B carriers.

"Equal employment rights disputes" has been listed as a separate cause of action since 2019. Generally, individuals can file "equal employment rights disputes" lawsuits before the court requiring the company to bear the corresponding legal responsibilities. The burden of proof is usually on the individual to prove that the enterprise conducted discriminative actions. Remedies available to employees vary depending on the specific

cause of action, while monetary compensation for economic loss and emotional loss in certain circumstances is the main remedy. Other possible remedies include requiring the enterprise to apologise to the individual publicly.

8.3 Digitalisation

Currently in China, labour arbitration procedures are generally conducted onsite.

However, for court proceedings, online litigation is now widely used, especially since the COVID-19 pandemic. According to the Rules of Online Litigation of People's Courts, the court may rely on the electronic litigation platforms to complete all or part of the litigation procedures of case docketing, mediation, exchange of evidence, questioning, court trial and service online.

The court shall decide whether to conduct an online court trial via video based on the opinions of the parties, the circumstances of the case, social impact, technical conditions and other factors. However, there are also circumstances where online court trials shall not apply, specifically:

- all parties expressly disagree, or any of the parties disagrees with a good reason;
- none of the parties has the technical conditions and capability to participate in an online court trial;
- it is necessary to ascertain identities, verify originals or check physical objects onsite through the court trial;
- the case is difficult and complicated and there is a wide variety of evidence, such that the application of an online court trial is not conducive to finding out the facts and applying laws;
- the case involves national security or state secrets;
- the case has a great social impact and has attracted wide public attention; or
- the court considers that there is any other circumstance that is not suitable for an online court trial.

Besides this, the arbitration committee and people's court in some regions are also trying to provide an asynchronous hearing approach, which refers to hearings where the parties may choose to log on to the online arbitration/court platform at their own discretion within the time period specified by the arbitral committee/court to complete the hearing procedures (defence, investigation, adduction of evidence, cross-examination, etc). Under this approach, the parties may log on to the platform at different times to complete the relevant hearing procedures.

9. Dispute Resolution

9.1 Litigation

In China, most employment-related disputes are resolved under a two-stage framework, ie, labour arbitration followed by litigation. According to the PRC Employment Dispute Mediation and Arbitration Law, before filing an employment dispute with a court, it is mandatory to submit the dispute to the competent local labour arbitration commission, an institution specialising in hearing employment dispute cases. If any party is unsatisfied with the arbitration award, except for certain situations where the arbitration award is final, the party is entitled to bring the lawsuit to the competent people's courts (the first instance court and then the second instance court).

According to the PRC Employment Dispute Mediation and Arbitration Law, where a labour

dispute involves more than ten employees and the employees have the same claim, they may recommend their representatives to participate in the mediation, arbitration or litigation.

9.2 Alternative Dispute Resolution

In addition to arbitration and litigation, an employer and employee are encouraged to consult with each other and to reach a mediation agreement on employment dispute settlement under PRC employment laws. Even if the employment disputes have been submitted to arbitration or litigation, an employer and employee still could negotiate and reach a mediation agreement, as long as the final arbitral award or court decision has not been made. The conciliation is not mandatory and must be based on both parties' voluntary decision. The parties may choose to directly submit their employment disputes to arbitration without any pre-claim conciliation.

In addition, labour supervision is also an available option. According to the Regulation on Labour Security Supervision, any organisation or individual shall have the right to report to the labour supervisory authority (an administrative department responsible for the supervision of labour security administration) any act of violating labour laws, regulations or rules. The labour supervisory authority will accept the reports and complaints, and investigate, correct and impose punishment for any relevant acts.

9.3 Costs

Under PRC law, generally, the arbitration commission/court will not award the prevailing party attorney's fee or other costs. However, there may be special rules; eg, according to a local rule in Shenzhen, where the employee is the prevailing party in a labour dispute arbitration or litigation case, the attorney's fee paid by the employee may be borne by the employer while the maximum amount shall not exceed CNY5,000. The portion exceeding CNY5,000 shall be borne by the employee.

Trends and Developments

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King & Wood Mallesons is a leading law firm with exceptional legal expertise and depth of knowledge. The firm provides comprehensive one-stop-shop legal solutions to clients in China as well as internationally. The labour and employment department has six partners and more than 20 attorneys and assistants based in Beijing, Shanghai, Shenzhen, Guangzhou and Suzhou, which enables them to quickly and effectively resolve labour law issues across Mainland China. The firm has provided legal services to more than 300 Fortune 500 companies, multinational companies, large state-owned enterprises and well-known domestic enterprises. Its extensive experience in handling both adversarial and non-adversarial matters as well as direct participation in legislation facilitates a deep and accurate understanding of the complicated and rapid changes in PRC labour and employment laws and policies, as well as the latest HR, management and employment issues.

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With the continuing uncertainties in the worldwide economy, China is also under the pressure of recurring economic downturn and thus redundancy has been more frequently seen in recent years. To promote and stabilise the economy, China has been launching new measures over the past year, bringing many developments to the market, including the labour market. Among the dynamics in the employment law area, the following are particularly noteworthy: (1) to gradual implementation of postponed retirement policy; (2) the newly amended PRC Company Law and its employment law complications; and (3) redundancy approaches commonly seen in practice and relevant judicial practice trends.

Gradual Implementation of "Postponed Retirement"

With the trends towards an increasingly ageing population and a decline in the working-age population, China is actively taking measures to address the population structure issue, including gradually implementing "postponed retirement". This section aims to provide an overview of the background of postponed retirement, attempts in practice and the newly adopted decision on gradually raising the statutory retirement age.

Current statutory retirement age

According to the current PRC law, the statutory retirement ages for employees are generally 60 for male employees, 55 for female employees in managerial/technical positions, and 50 for female employees in non-managerial/technical positions. In addition to the default rule, the law sets some exceptions for certain groups of employees. For example, the statutory retirement ages are lowered for employees engaged in special types of work harmful to health (eg, work at a high temperature or underground) and employees who become incapacitated due to sickness or non-work-related injuries. There are also special rules for senior experts where the law permits them to raise their statutory retirement ages if certain conditions are met.

By contrast, the statutory retirement ages in most other countries are higher. For instance, the general retirement age in the European Union has been raised to 64, and the general retirement age is 66 in the United States and in the United Kingdom.

Background of the postponed retirement reform

With the increasing population ageing problem in China, there has been a growing gap between the relatively low statutory retirement age and the practical challenges. As a response to address this issue, postponed retirement has been proposed, and the necessity for reform keeps growing. The reasons mainly consist of the following:

- *Rising life expectancy:* The current rule for statutory retirement age in China was established in the 1950s when the average life expectancy was less than 50. According to the latest statistics issued by the National Health Commission, the average life expectancy currently stands at around 78 years, an increase of nearly 30 years. Postponing retirement would be a wise step to adapt to China's current average life expectancy, increase the utilisation of the labour force to a greater extent, and keep pace with the retirement age rules worldwide.
- *Population structure change:* China is currently facing the increasing challenges of an ageing population and a low fertility rate at the same time, leading to a decreased proportion of the population at working age. The proportion of the population over 60 rose from 5.5% in 1964 to 19.8% in 2022, while the rate of new births dropped from 3.4% in 1957 to

0.8% in 2021. The elderly dependency rate has continuously risen for a decade, climbing from 11.9% in 2010 to 19.7% in 2020. These trends will lead to significant changes in population structure. To make better use of the workforce and promote sustainable economic and social development, postponed retirement will be a vital step in response in order to adjust the workforce structure.

- *Pressure on pension budget:* With a growing number of retirees retrieving pensions from the pension fund pool and a relatively smaller workforce contributing to the pool, the pension budget is getting tighter. It is estimated that the pension fund balance will decrease year by year after 2027, and the pension fund will face continuous operating pressure in the foreseeable future. Postponed retirement is a good approach to ease pressure on the pension budget and improve the operation of the social insurance system.

Preparation for Postponed retirement reform

Discussions on the postponed retirement at the national level over the years.

In 2008, a spokesman of the Ministry of Human Resources and Social Security ("Human Resource Ministry") said that relevant departments are considering raising the statutory retirement age when circumstances permit.

In 2013, the third plenary session of the 18th CPC Central Committee passed a decision proposing to establish a fairer and more sustainable social security system, and to study and establish a policy on gradual extension of the retirement age. This was also the first official description of the postponed retirement policy at the national level.

In the following years, postponed retirement has been repeatedly mentioned by relevant authorities. In June 2021, the Human Resource Ministry proposed the principle of "gradual adjustment, flexible implementation, classified promotion and comprehensive consideration" for postponed retirement. Later, at the end of 2021, the State Council proposed, in a notice regarding elderly care service system planning, to "encourage professional and technical personnel to reasonably extend their service years in accordance with the principle of the employer's demands and the voluntariness on the part of the employee".

Then lately, in July 2024, the third plenary session of the 20th CPC Central Committee proposed that the implementation of the gradual policy for the retirement age shall be in a prudent and orderly manner and in accordance with the principles of voluntariness and flexibility.

Attempts in local practice regarding postponed retirement

There have been attempts made in local practice by some regions. Typically:

- Jiangsu was the first region nationwide to make innovative stipulations on postponed retirement applying to all employees and all positions. In an Implementation Measure issued by the Human Resource Department of Jiangsu province, which came into force in March 2022, postponed retirement is permitted for at least one year upon application by the employees, consent of the employers, and filing with the relevant authorities. According to the local rule in Jiangsu, rather than a mandatory rule to raise the statutory retirement age, employees have the say on whether to apply for postponed retirement. However, according to anonymous consul-

tations with relevant authorities in Jiangsu, the application of the rule in practice has not been seen yet, and detailed implementing rules have not been introduced by cities in Jiangsu province. Therefore, we still need to wait for further regulations to be introduced and see what developments take place in future judicial practices in Jiangsu.

- In some regions, although local rules have not been introduced on postponed retirement applying to all employees, there have been rules for certain types of employees. For example, Shandong province issued a notice regarding raising the retirement age for senior experts in enterprises and public institutions in 2020.
- In some other regions, although there have not been rules specifically stipulating postponed retirement, there are rules and practices regarding the extension of social insurance contributions when certain conditions are met, also allowing employees beyond the current statutory retirement ages to continue working and making social insurance contributions. For example:
  (a) In Shanghai, employees with qualifications for professional and technical positions can apply to extend social insurance contributions and postpone the time to start receiving a pension upon consent of the employer and filing with the relevant authorities.
  (b) Similar practices can be seen in Beijing, where the employer may apply to extend employees' social insurance contributions and postpone the time they start receiving pensions, although subject to review and final approval by the relevant authorities.

With the current attempts in local more local rules will be introduced soon.

The newly adopted decision on gradually raising the statutory retirement age at the national level

On September 13, 2024, the Standing Committee of the 14th National People's Congress officially announced the decision on gradually raising the statutory retirement age at the national level. The decision adopted the Measures of the State Council on Gradual Raising of the Statutory Retirement Age ("Measures"), which will come into effect on January 1, 2025. According to the Measures, the statutory retirement age for male employees will be gradually raised from 60 to 63 in the course of 15 years starting 2025, while that for female employees will be raised from 55 to 58 and from 50 to 55, respectively. Below are the relevant key points from the Measures worth noting:

- New Statutory Retirement Ages: Starting from January 1, 2025, for male employees (original statutory retirement age 60), the new statutory retirement age will be gradually raised by one month of every four months' period until it reaches 63. For female employees, if the original statutory retirement age is 55 (for female employees in managerial/technical positions), the new statutory retirement age will be gradually raised by one month of every four months' period until it reaches 58; If the original statutory retirement age is 50 (for female employees in non-managerial/technical positions), the new statutory retirement age will be gradually raised by one month of every two months' period until it reaches 55. For example, under the newly published Measures, a male employee born in January 1970 who originally scheduled to reach the statutory retirement age of 60 in January 2030, will reach the raised statutory retirement age of 61 years and 4 months in May

2031 as the statutory retirement age for male employees raised by one month for every four months from January 1, 2025.

- Flexibility in Retirement Time under the Measures: Despite of the postponement of the statutory retirement age, under the newly published Measures, employees will still have some flexibility regarding their retirement timing. Where an employee has met the minimum contribution period for pension insurance, the employees may voluntarily opt for early retirement, provided that the period for early retirement does not exceed 3 years, and the actual retirement age should not be lower than the original statutory retirement age (ie 60 for male and 50/55 for female). Employees may also, after consultation and reaching agreement with their employer, opt for postponed retirement provided that the period for postponed retirement does not exceed 3 years. For example, a male employee with the new statutory retirement age of 62 can voluntarily choose to retire at a time between the ages of 60 and 62, or, after consultation and reaching agreement with his employer, choose to postpone his retirement at a time between the ages of 62 and 65. The Measures also emphasizes that during the implementation, it is not allowed to illegally force employees to choose the retirement age directly or in a disguised form against their will.
- Increasing the Minimum Contribution Period for Pension Insurance ("Minimum Contribution Period"): The current Minimum Contribution Period for employees to receive pension benefits is 15 years. According to the Measures, starting from January 1, 2030, the Minimum Contribution Period will increase by six months each year, until it reaches to 20 years. For employees who have reached their statutory retirement age while have not met the Minimum Contribution Period, they can satisfy the requirement of the Minimum Contribution Period either by extending the contribution period or by making a one-time contribution in accordance with the relevant laws and regulations.

To sum up, after preparation for postponed retirement reform for years, the newly adopted decision marks the official implementation of China's postponed retirement reform effective from January 1, 2025.

Summary

To sum up, with the official adoption of the decision at the national level on postponed retirement reform, the China's postponed retirement reform has officially entered a new stage. It can be anticipated that more supporting regulations and rules will be released both at the national level and regional level. Both employers and employees are advised to pay ongoing attention to relevant policies and judicial practices.

Newly Amended PRC Company Law and its Employment Law Implications

The newly amended PRC Company Law ("New Company Law") just came into effect on 1 July 2024. The revision this time is the second comprehensive revision of the Company Law since its first promulgation in 1993, introducing substantial changes to various aspects, including capital system, corporate governance structure, senior executives' liabilities, etc.

The New Company Law also has implications for the employment law area. In addition to protecting employees' rights and interests to a higher level, the New Company Law further expands the breadth and depth of employees' participation in the democratic management of the company, and improves the requirements on duties

of directors, supervisors and senior executives. Below we highlight the key implications of the New Company Law to the employment law area.

Strengthening employees' participation in corporate governance

Defining the Employee Representative Congress ("ERC") as the basic form of democratic management system

According to Article 17 of the New Company Law, companies shall, in accordance with the Constitution and relevant laws, establish and improve a democratic management system, with the ERC as the basic form. Democratic management shall be carried out through the ERC or other forms. Compared with the previous Company Law, the New Company Law makes it clear that the ERC shall be the basic form of democratic management.

In addition, according to Article 17, when making a decision on restructuring, dissolution, application for bankruptcy or any other major issue in respect of business operation, or formulating any important regulation, a company shall listen to the opinions of its trade union and listen to the opinions and proposals of the employees through the ERC or by any other means. Among the instances of issues listed, "dissolution and application for bankruptcy" has been newly added by the New Company Law, which also chimes with the change to expand the scope of employees' participation in corporate governance.

Expanding the scope where employee directors are required

To promote the participation of employee representatives in corporate governance, the rules on employee directors have been established since 1993 when the Company Law was first introduced. However, for a long time, the law only stipulated that certain state-owned limited liability companies had to have employee representatives on the board of directors ("BOD"). The New Company Law expands the scope of companies required to have employee directors, specifically:

- for wholly state-owned companies, there shall be employee representatives on the BOD of the company; and
- for limited liability companies with 300 employees or more, except where there is a board of supervisors ("BOS") with employee representatives on the BOS, there shall be employee representatives on the BOD of the company.

In short, according to the New Company Law, for large companies (over 300 employees), an employee director is required unless there is already an employee supervisor.

Setting new requirements for the BOS and employee representatives thereon

The BOS was previously one of the standing supervisory bodies of the company; however, according to the New Company Law, it is no longer a body mandatorily required for a company, and the powers may be exercised by audit committees established under the BOD.

If the company has a BOS, the legal requirements for the proportion of employee representatives on the BOS (no less than one-third) remain the same. However, where the company does not set a BOS (or alternatively a supervisor where permitted by law), the New Company Law does not require the audit committee to include employee representatives; rather, the law only stipulates that employee directors can be included in the audit committee.

A noteworthy point

In view of the above changes, a problem arises where the company has more than 300 employees while there is no BOD (eg, companies with a small number of shareholders) but only an executive director. Does the only director have to be an employee representative?

Some hold the view that the New Company Law only requires an employee director if the company has a BOD. If there is no BOD but only an executive director, it is not reasonable to require that the director shall be an employee representative, as it will interfere with the management of the company. Therefore, to answer the above question, the only director does not need to be an employee representative.

Note that, pursuant to the view above, if a company with more than 300 employees sets only one non-employee director, and the company does not set an employee supervisor, it remains unclear whether the company will face challenges from employees and relevant authorities for limited employee participation in corporate governance.

Enhanced liabilities of directors, supervisors and senior executives

Refining the requirements regarding the duty of loyalty and duty of diligence for directors, supervisors and senior executives

The New Company Law elaborates on the meanings of the duty of loyalty and the duty of diligence:

- *Duty of loyalty:* Directors, supervisors and senior executives shall take measures to avoid the conflict between their own interests and those of the company, and may not seek any improper interests by taking advantage of their powers.
- *Duty of diligence:* When performing their duties, directors, supervisors and senior executives shall, for the best interests of the company, exercise the reasonable care that should be generally possessed by a manager.

The New Company Law further improves the stipulations on connected transactions, acquisition of business opportunities that belong to the company, and competition with the company.

Strengthening the liabilities of directors, supervisors and senior executives regarding capital enrichment

Although capital enrichment is the obligation of shareholders, the New Company Law strengthens the liabilities of directors and supervisors in verifying and urging shareholders' contributions, preventing improper capital reduction or distribution of profits to shareholders, etc.

In addition to the above, the New Company Law provides more detailed rules on the liabilities of directors, supervisors and senior executives in many other aspects, bringing more responsibilities to the directors, supervisors and senior executives when fulfilling their duties.

Summary

The New Company Law has wide-ranging and significant implications for the employment law area. On the one hand, the law sets stricter requirements for companies to protect employees' rights and interests, enhance the democratic management system, ensure employees' participation in corporate governance, and other aspects. On the other hand, the new law imposes more detailed requirements on the responsibilities of directors, supervisors and senior executives, of which individuals serving in relevant positions should be fully aware.

Approaches to Redundancy Commonly Seen in Practice and Relevant Judicial Practice Trends

PRC employment law is more protective to employees than employers and sets strict requirements on employers regarding employment contract termination. Affected by factors including the external economic situation, many employers in China are facing cost pressures and thus are considering adjusting the internal organisational structure and reducing the number of employees. As a result, redundancy has been seen more frequently in practice. Disputes regarding redundancy have also occurred from time to time, and some cases later ended up at courts as unlawful termination, which did not achieve the purpose of cost saving but instead further increased the lawsuits burden. This section aims to introduce the commonly seen approaches to redundancy under PRC employment law and relevant judicial practice trends.

Approaches to redundancy under PRC employment law

Among the statutory termination grounds under PRC law, the grounds that are most relevant to mass layoff generally consist of the following:

(1) termination based on major change to the objective circumstances (Article 40(3) of PRC Employment Contract Law);

(2) economic layoff (Article 41 of PRC Employment Contract Law);

(3) employment contract ending upon dissolution of the employer (Article 44(5) of PRC Employment Contract Law); and

(4) mutual termination (Article 36 of PRC Employment Contract Law).

Approach (3) can only be revoked upon dissolution of the employer and thus the situations to which it applies are limited. Approach (4) is subject to the employees' consent, and even though it is commonly adopted as the final approach to redundancy, there should be another unilateral termination ground as a backup in case the employee does not agree. In light of this, approaches (1) and (2) are generally the two commonly considered unilateral termination grounds in practice for mass layoff.

Termination based on major change to the objective circumstances

According to Article 40(3) of the Employment Contract Law, the following conditions must be met in order to successfully invoke this termination ground:

(1) There has been a major change in objective circumstances resulting in the consequence that an employment contract can no longer be performed;

(2) The employer and the employee could not reach an agreement on amending the employment contract; and

(3) The employer has provided 30 days' prior notice of unilateral termination or made payment in lieu of notice (in the amount of the monthly salary of the month preceding that of the unilateral termination).

Disputes are more likely to arise regarding the first two conditions, and judicial practice also varies from place to place.

Major change to the objective circumstances

In terms of what constitutes a major change in objective circumstances, according to the national rule, situations are defined narrowly to

mainly include force majeure, relocation of the employer, merger, or transfer of assets of the employer.

Some local rules and regulations further specify the situations that constitute a major change in objective circumstances. For example, according to the local regulations of Beijing, "major change to the objective circumstances" mainly include: (1) a force majeure event due to a natural disaster such as earthquake, fire or flood; (2) significant changes due to legal, regulatory or policy shifts leading to relocation, asset transfers or restructuring; and (3) changes in the business scope of government-authorised business.

When considering redundancy, many employers will argue that organisational restructuring and the removal of positions/departments also constitute "major change to the objective circumstances". Local practices vary on this point:

- According to the judicial practice in Beijing, situations not explicitly listed by local regulations are generally not deemed as "major change to the objective circumstances". The arbitrator/judge in Beijing will generally not support the employer's claim that organisational restructuring and the removal of positions/departments constitute "major change to the objective circumstances". Rather, they have tended to hold that organisational restructuring and removal of positions/departments are measures taken by the employers on their own initiative.
- However, in judicial practice in Shanghai, similar situations might be considered as "major change to the objective circumstances".

Failure to reach agreement on amendments to the employment contract

If there is a major change in objective circumstances, the employer has to try to reach an agreement with the employee on amending the employment contract, often by providing another reasonable position (same pay level, similar responsibilities) within the employer to the employee, and only after the employee refuses to accept the position can the employer proceed to unilaterally dismiss the employee. Judicial practice may also vary regarding the reasonableness of the alternative position. Factors that will generally be considered include the salary standard, working location, job responsibilities, etc.

Economic layoff

Article 41 of the PRC Employment Contract Law contains the requirements for economic layoff. According to Article 41, when the production and operation of an employer face severe difficulties, and if it is necessary for the employer to terminate at least 20 employees, or if the employer terminates fewer than 20 employees but they account for at least 10% of all employees, the employer should inform and consult the trade union or all the employees 30 days in advance of the layoff. Prior to layoff, it is also required that the employer should file the economic layoff plan and other required documents to the local labour bureau, and if the filing is accepted by the local labour bureau, the employer can then proceed to unilateral termination based on economic layoff.

In recent years, employers have grown much more interested in exploring the possibilities of utilising economic layoff.

Below we look at two of the conditions for economic layoff that can best demonstrate the new developments and judicial practice trends.

An employer needs to have a required economic circumstance

There are four economic circumstances that will allow an employer to conduct economic layoff, and the employer's situation must fall under one of the circumstances in order to be considered eligible. Judicial practices in different regions may vary on the standards applied to specific circumstances. For example, with respect to "severe difficulties in operations", in some cities (such as Shanghai), it is required that an employer should have been in a deficit for the last three years in a row before being considered as having severe difficulties in operations, while in other cities, the requirements may not be as strict.

Filing to the local labour bureau should be accepted

Filing with the local labour bureau is a procedural requirement for implementing economic layoff; if the filing submitted by the employer to the local labour bureau is not accepted, the employer will not be able to implement economic layoff. The severity of the filing review varies from place to place in practice. For example, the redundancy plan will be strictly reviewed by the authorities in Shanghai, where the probability of acceptance is very low. The review in Beijing is comparatively loose, and the employers might only need to provide the relevant financial statements, audit reports and other supporting documents.

The acceptance of filing by the local labour bureau does not guarantee the lawfulness of economic layoff (since the local labour bureau for acceptance will not carry out substantive examination of the materials). Even if a filing had been accepted by the local labour bureau, arbitrators and judges would still consider and determine whether the termination is lawful or not, once challenged by employees. However, that being said, in practice, if the filing to the local labour bureau is accepted, this can increase the success rate of economic layoff when employees challenge it through arbitration and litigation.

Summary

With many constantly evolving factors and requirements in practice, termination based on major change to the objective circumstances and economic layoff are quite research-worthy topics. When considering mass layoff in practice, employers are advised to select an appropriate approach according to their actual situations and also the local practices, and ensure that the termination is in line with PRC law requirements.

Conclusion

The issues addressed in this article, including the postponed retirement reform, the employment law implications of the newly amended Company Law, together with commonly seen approaches to redundancy and relevant practices, represent just a snapshot of the ongoing trends and developments in PRC employment law. Employers are encouraged to consider these topics carefully and stay focused on further changes and developments to ensure ongoing compliance and effective management.

CYPRUS

Law and Practice

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Contents

Chrysostomides Advocates & Legal Consultants advises on appointments, terminations, redundancies, employee rights in mergers and transfers of undertakings, employee share option schemes, matters related to maternity leave, advice on HR issues, equality and diversity, anti-discrimination legislation, disciplinary proceedings, data protection and provident/pension funds. It assists employers and employees with the development and management of pension programmes that meet all the relevant legislative and regulatory requirements, while at the same time taking into consideration any tax repercussions. The firm assists organisations (companies of foreign interests) in hiring non-EU citizens in executive positions, as well as with the relocation of workers in the context of business relocations, guiding clients through the procedures leading to the granting of the relevant permits, and family reunification. It also assists EU employees in registering and obtaining permits, under a more simplified procedure.

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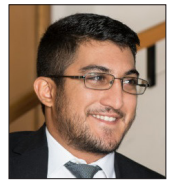

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1. Employment Terms

1.1 Employee Status

There is no statutory distinction between blue-collar and white-collar workers in Cyprus.

The only distinction is between employed and self-employed individuals for the purposes of social security contributions and payments.

Although there are legal provisions safeguarding fixed-term employees from abuse vis-à-vis indefinite-term employees, and likewise, part-time employees vis-à-vis full-time employees, these "categorisations" do not constitute separate employee status.

1.2 Employment Contracts

Employees must (and are entitled to) receive in writing or electronically, within seven calendar days from the commencement of their employment, the following information at a minimum:

- the identities of the parties to the employment relationship;
- the place of work – where there is no fixed or main place of work, the principle that the worker is employed at various places or is free to determine their place of work – and the registered place of the business or, where appropriate, the domicile of the employer;
- either:
  - (a) the title, grade, nature or category of work for which the worker is employed; or
  - (b) a brief specification or description of the work;
- the date of commencement of the employment relationship;
- in the case of a fixed-term employment relationship, the end date or the expected duration thereof;
- the duration and conditions of the probationary period, if any;
- the remuneration, including the initial basic amount, any other component elements, if applicable, indicated separately, and the frequency and method of payment of the remuneration to which the worker is entitled;
- if the work pattern is entirely or mostly predictable, the length of the worker's standard working day or week and any arrangements for overtime and its remuneration and, where applicable, any arrangements for shift changes; and

- if the work pattern is entirely or mostly unpredictable, the employer must inform the worker of:
  (a) the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours;
  (b) the reference hours and days within which the worker may be required to work; and
  (c) the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation of the employment relationship.

Employees must also (and are entitled to) receive in writing or electronically, within one calendar month from the commencement of their employment, the following information:

- in the case of temporary agency workers, the identity of the user undertakings, when and as soon as they are known;
- the training provided by the employer, if any;
- the amount of paid leave to which the worker is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;
- the procedure to be observed by the employer and the worker, including the formal requirements and the notice periods, where their employment relationship is terminated or, where the length of the notice periods cannot be indicated when the information is given, the method for determining such notice periods;
- any collective agreements governing the worker's conditions of work or in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of such bodies or institutions within which the agreements were concluded; and
- where it is the responsibility of the employer, the identity of the social security institutions receiving the social contributions related to the employment relationship and any protection relating to social security provided by the employer.

The only distinction between written contracts for fixed-term and indefinite-term employees is that fixed-term contracts need to also state the anticipated duration.

Otherwise, the legal framework for fixed-term contracts does not mandate any additional terms to be in writing, but it is intended to prevent abuse and discrimination. By way of example, where successive fixed-term contracts exceed 30 months of continuous employment, the employee may then be considered to be an indefinite-term employee, unless certain objective circumstances apply, as provided by law.

1.3 Working Hours

Working hours legislation provides that the number of weekly working hours should not exceed 48, including overtime, over a four-month reference period. Employment in excess of 48 hours triggers a number of obligations, including reporting. At the same time, the minister of labour and social insurance has discretion to prohibit or restrict individual businesses from exceeding the 48 hours of work per week.

There are, however, special provisions in relation to certain professions, particularly in the retail sector, the tourism sector, and among mining and clerical staff. For example, pursuant to a ministerial decree, clerical staff, which includes administrative staff, secretaries, junior staff and

messengers, must not work in excess of 44 hours per week in total or eight hours per day, which in both cases does not include mealtimes.

Employees are entitled to a minimum of 11 continuous hours of rest per day, 24 continuous hours of rest per week and either two rest periods of 24 continuous hours each or a minimum of 48 continuous hours within every 14-day period.

Night workers should not, on average, exceed eight working hours per day within a period of one month or any other period specified in a contract. Night workers whose work is hazardous or physically or mentally demanding should not exceed eight hours of night work (although certain derogations are permitted).

Managing executives or persons with autonomous decision-making powers, family staff, and employees in religious institutions are exempted from the limitations on working hours, subject to principles of general health and safety.

Flexible arrangements are possible, provided working hour restrictions are followed.

There are no specific overtime regulations, and overtime is usually regulated by individual or collective agreement (with a few exceptions regulated by law, such as in the retail sector), provided that the working hours' ceiling is adhered to.

Finally, there are no specific additional terms that need to be mentioned in a part-time contract, over and above those mentioned in **1.2 Employment Contracts**. However, the legal framework for part-time contracts is intended to prevent abuse by guaranteeing certain minimum rights, such as the number of statutory leave days and right of access to collective employee representation.

1.4 Compensation

In general, apart from the minimum standards of protection set out below, salaries are not regulated by law and can be negotiated by the employer and the employees (or their representatives) through individual or collective agreements.

Minimum Wage

Exclusions

By decree of the Council of Ministers, which came into force on 1 January 2023 and was later amended by a decree which came into force on 1 January 2024, the minimum wage has been set for all employees working in the Republic of Cyprus, excluding the following categories:

- domestic workers;
- agricultural and livestock workers;
- maritime workers;
- employees that benefit from more favourable arrangements by law, contract, practice or custom;
- employees in the hotel industry covered by the Decree on Minimum Wage in the Hotel Industry of 2023; and/or
- any employee who receives training or education provided for by law, practice or custom to obtain a diploma and/or to practise a profession.

Working hours

The above decrees also provide that the working hours of the employees must remain as they were at the time the decrees came into force, as determined either by collective agreement, or by a written agreement between the employer and the employee.

Adjustments
A readjustment mechanism has also been instituted and it will operate every two years, commencing as from 2024.

In the case of seasonal workers under 18 years of age, whose duration of work does not exceed two consecutive months, the minimum wage may be reduced by 25%. Further, the minimum wage for employees whose food is covered by the employer may be reduced by 15%, and when accommodation is covered by the employer, by a further 10%. The employee nevertheless retains the right to terminate such an arrangement by providing 45 days' notice to the employer.

The minimum wage for full-time employment is set at EUR900 per month, which increases to EUR1,000 after six months of continuous employment with the same employer.

There is also an additional decree concerning minimum wages for different job positions within hotels. Depending on the job position, the minimum wage varies between EUR932 and EUR1,147 per month and/or between EUR5.66 and EUR6.97 per hour.

Overtime pay
Overtime pay is not generally regulated by law in Cyprus but by individual or collective agreement. There are a few exceptions regulated by law, such as the retail and hospitality industry sectors.

Executive compensation
There is also no general regulatory requirement or limitation on executive compensation in Cyprus. It is, however, possible for contracts of executives in the financial industry to be subject to approval by the Central Bank of Cyprus or the Cyprus Securities and Exchange Commission, depending on the type of financial institution.

1.5 Other Employment Terms

Annual Leave
The minimum holiday entitlement per year is 20 working days for employees working five days a week and 24 working days for employees working six days a week, provided that the employee has already worked for at least 48 weeks within the year, which will be paid through the Central Holiday Fund to which each employer contributes.

When employers opt to pay the annual leave directly to the employees and provide more beneficial terms than the law – that is, at least 21 or 25 working days respectively – they can apply to be exempted from having to pay contributions to the Central Holiday Fund.

If the employee has worked for a period shorter than 50 weeks, they are entitled to the pro rata amount of holiday pay. Annual leave may be accumulated for two years, only if this is agreed between the employer and the employee. The above are only the statutory minimums, and the parties are free to agree to more generous terms for the employee.

Sick Leave
The number of sick leave days, and whether these will be paid or unpaid by the employer, is a contractual matter. If there is no provision within the contract of employment (or collective agreement), a sickness allowance is in any case payable by the Social Insurance Fund for any period longer than three days over which an employee is unable to work. The weekly entitlement is 60% of the weekly average of basic insurable earnings within the previous year and is increased by one third for the employee's first dependant

(including a spouse, whether or not in employment) and one sixth for each child or another dependant. The maximum number of days for which sick pay is payable is 156 days for every period of interrupted employment. This can be extended for a further period of 156 days during the same period of interrupted employment, provided that the insured is eligible to receive an incapacity pension but is not expected to remain permanently incapacitated from working.

The above provisions do not apply to employees in hotels and catering services where they are legally entitled to sick leave with full pay from their employers, for a specific number of days, depending on their period of employment. Any sickness allowance from the social insurance fund due to illness, as described above, is deducted from the benefits payable to the employee pursuant to this paragraph.

Maternity Leave

Employees may also take maternity leave of up to 22 continuous weeks (for the birth of the mother's first or second child) and 26 continuous weeks (for the birth of the mother's third child or more children). Female employees who are about to adopt a child under the age of 12 years are entitled to 20 consecutive weeks' maternity leave, or where this is their third child or more, 24 weeks' maternity leave, starting immediately from the date on which they begin to care for the adopted child(ren).

A surrogate mother is also entitled to maternity leave of a total of 14 consecutive weeks which must start two weeks before the week of the expected delivery date. In addition to maternity leave, for nine months after childbirth, a female employee is entitled to take one hour off for breastfeeding or for the increased needs of child-raising (either suspend work for an hour or come into work later or leave earlier by an hour each day). In accordance with the law, that time must be considered and paid as normal working time.

In the event of an infant's hospitalisation following delivery, either due to premature birth requiring an incubator, or another health issue, additional maternity leave of one week for every 21 days that the infant requires hospitalisation is granted. The beneficiary must provide a certificate from a registered physician of the appropriate specialty and a certificate from the hospital where the infant is hospitalised to receive this additional leave.

If further hospitalisation after the first 21 days is required, and this exceeds another 11 days' hospitalisation, an additional week of maternity leave will be granted. Additionally, if hospitalisation continues beyond 63 days, an extra week of maternity leave will be granted for every 14 days of hospitalisation.

The extended maternity leave is granted for a continuous period, of either 22 weeks or 26 weeks, depending on the case. It increases by four weeks for each additional child born from the same delivery and may not exceed a maximum of eight weeks. Whether the above is paid or unpaid by the employer is a contractual matter. If there is no provision in the contract of employment (or collective agreement), a maternity allowance is in any case payable by the Social Insurance Fund.

Paternity Leave

An employee who has a child either through natural maternity or by surrogacy or by the adoption of a child up to 12 years old, has the right to paternity leave of two continuous weeks. The leave can be taken during the period that starts

from the week of the childbirth or adoption and ends two weeks after the end of the maternity leave.

Whether the above is paid or unpaid by the employer is a contractual matter. If there is no provision in the contract of employment (or collective agreement), a paternity allowance is in any case payable by the Social Insurance Fund.

Parental Leave

Employees who have completed six months or more of continuous employment with the same employer can claim parental leave for up to 18 weeks in total, for each child, on the grounds of childbirth or adoption, for the purpose of caring for and bringing up the child. In the case of a widow/widower or single parent, parental leave may be extended to 23 weeks and this may be taken at any time until the completion of the eighth year of the child's life (with slight differences for adoptive children) and up to the 18th year of age of the child, in the case of children with disabilities. Parental leave may be taken over a minimum of one day and a maximum of five weeks per calendar year.

Whether the above is paid or unpaid by the employer is a contractual matter. If there is no provision in the contract of employment (or collective agreement), parental allowance is in any case payable by the Social Insurance Fund, provided that the parent:

- has worked for at least 12 months during the preceding 24 months;
- has completed six months of continuous employment with the same employer; and
- does not receive full pay from the employer.

Force Majeure

The employee is entitled to seven days' leave per year without pay on the grounds of a force majeure. These grounds must relate to urgent family reasons in the case of sickness or accident to a member of the employee's family, which requires the immediate presence of the employee.

Carer's Leave

The employee may take unpaid carer's leave of up to five days per year, in order to provide personal care or support to a relative or a person that resides in the same household who needs significant care or support due to a serious medical reason. The employee must notify the employer in due time and provide the relevant medical certificate substantiating the need for such leave.

Flexible Work Arrangements

Parents of children up to eight years old, and carers, have the right to request flexible work arrangements, such as remote work and reduced or flexible working hours, provided that they have worked continuously for the same employer for at least six months. In the case of short-term fixed-term contracts, they can all be taken into account in the calculation of six months. The employer must consider such request and reply to the employee in writing within a month. The employer may take into account both their needs and the needs of the employee and may approve the request and agree with the employee over the period in which these arrangements will apply, or postpone implementation of such flexible work arrangements, or reject the request. However, before any postponement or rejection, the employer must consider the representations of the employee and notify the employee in writing of the decision, justifying the grounds of postponement or rejection.

Confidentiality

There is an implicit duty of confidentiality on employees which arises from common law and can be further regulated by contract. The duty of confidentiality may implicitly and contractually extend beyond the term of the employment relationship, unless the disclosed information has come to the public domain by other means and without the input or fault or unlawful action of the employee. Employers can pursue their rights and claim damages through civil action for breach of confidence.

Statutory trade secrets law also protects employers against the unlawful obtainment, use and disclosure of trade secrets (including by action against the employees). There are exceptions where the employee's use of this information falls within their rights to expression and information (including respect to freedom of mass media), in case of an offence or tortious behaviour or illegal activity committed by the employer (provided that the employee acted for the protection of the general public interest), or where it was mandated in the course of a lawful exercise of duties according to EU or Cypriot law (ie, where disclosure was necessary for the exercise of such duties), or where the disclosure was for the protection of recognised lawful interests under EU or Cypriot law.

Non-disparagement

There is no explicit duty of non-disparagement, but this may be regulated contractually, as well as dealt with through defamation/libel actions.

2. Restrictive Covenants

2.1 Non-competes

Under Cypriot law, employees owe an implied duty of loyalty and fidelity to their employer. Employees should offer their services in a trustworthy and faithful manner.

Notwithstanding the above, the Transparent and Predictable Working Conditions Law of 2023 (Law 25(I)/2023) introduced provisions regarding parallel work, which state that the employer is not allowed to prohibit an employee from undertaking work for other employers, outside of the working hours specified in the contract or employment relationship with said employer, or demonstrate adverse treatment to an employee for this reason. The employer may limit parallel employment by specifying in writing the objective reasons for imposing the limitation. The nature of the objective reasons must be related to issues of safety and health, the protection of business confidentiality, the integrity of the public sector and the avoidance of a conflict of interest.

Regarding post-termination restrictions on competition, the position under Cypriot law is as follows.

Under Section 27 of the Cypriot Contracts Law – Cap 149 ("Cap 149"), any agreement which restricts the freedom to conduct a legitimate profession, trade or business is void unless it falls within the following exceptions:

- a person who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, as long as the buyer or any person deriving title to the goodwill from them carries on a like business therein, provided that such limits appear reasonable to the court, regard being had to the nature of the business;
- partners may, upon or in anticipation of the dissolution of a partnership, agree that some

or all of them will not carry on a business similar to that of the partnership within such local limits as referred to in the preceding bullet point; and
- partners may agree that one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

Given the above, post-termination restrictive covenants in employment contracts are, in most instances, considered to be an unlawful restraint from exercising a lawful profession, trade or business, and to that extent they are declared void and unenforceable.

Case law in Cyprus is relatively scarce on this topic, and it is not possible to fully anticipate how a Cypriot court would assess the circumstances surrounding post-termination, non-competition covenants. However, Section 2 of Cap 149, as amended, provides that Cap 149 should be interpreted in accordance with the principles of legal interpretation in England, and expressions used in it will be presumed to be used with the meaning attached to them under English law, in so far as such interpretation does not contradict the content of the text, and provided that no other meaning is expressly intended.

There were instances where English courts ruled that, under the particular circumstances, post-termination restrictive covenants with limited duration and within very limited geographical borders were reasonable and enforceable. Therefore, it may be assumed that a Cypriot court could possibly determine such a clause enforceable in some instances, but the limitations have to appear reasonable under the circumstances. In examining the reasonableness of a restrictive covenant, the court will take into consideration all the circumstances of the specific case, particularly the geographical area, duration, level of importance of the position of the employee and access to information, and type of restriction.

Despite the above, it is more likely that a Cypriot court would find that the provisions of Section 27 of Cap 149 expressly intend to consider such clauses as void, given the wording of the clause, which directly contradicts the legal interpretation of the matter in England.

Concerning independent consideration, note that for any agreement to constitute a contract, lawful consideration is necessary. Such consideration may consist either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility to be given, suffered or undertaken by the other. If the restrictive covenant is a clause in the employment contract, anything that forms the consideration for the entire contract may also form a consideration for the restrictive covenant. If, however, the restrictive covenant is a separate agreement, the separate agreement will also require consideration, but normally, the employment itself constitutes the consideration for such restrictions.

2.2 Non-solicits

See **2.1 Non-competes**. Furthermore, there are professional bodies that regulate non-solicit provisions through internal rules or codes of conduct. For example, the Cyprus Bar Association prohibits advocates from negotiating or soliciting, directly or indirectly with a colleague's client, unless they have the written authorisation or consent of such colleague.

3. Data Privacy

3.1 Data Privacy Law and Employment

Consent

The processing of the personal data of an employee by an employer is permitted without the need to obtain consent, provided that the processing is necessary for the performance of the employment contract, or in order to take steps at the request of the employee prior to entering into the contract, and/or for compliance with legal obligations to which the employer is subject.

Special Categories of Personal Data

Special categories of personal data (sensitive data) may also be processed, where processing is necessary for the purposes of carrying out the obligations and exercising the specific rights of the employer or of the employee in the field of employment and social security and social protection law. Such processing is permitted in so far as it is authorised by domestic law or collective agreement pursuant to domestic law, and it provides appropriate safeguards for the fundamental rights and interests of the employee.

Employer Obligations

Employers are obliged to inform employees (via a privacy policy, or via internal circulars or any other document) of:

- the identity and contact details of the employer and, where applicable, of the employer's representative;
- the contact details of the data protection officer, where applicable;
- the purposes of the processing for which the personal data is intended, as well as the legal basis for the processing; and
- the recipients or categories of recipients of the personal data, if any.

There are also specific rules on data transfers to third countries.

In addition, the employer must, at the time when the personal data is obtained, provide the employees with the following further information necessary to ensure fair and transparent processing:

- the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;
- the existence of the right to request from the employer access to and rectification or erasure of personal data, or restriction of processing concerning the employee, or to object to processing as well as the right to data portability;
- the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
- the right to lodge a complaint with a supervisory authority;
- whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the employee is obliged to provide the personal data and the possible consequences of failure to provide such data; and
- the existence of automated decision-making, including profiling, and, at least in those cases, meaningful information about the reasoning involved, as well as the significance and the envisaged consequences of such processing for the employee.

Where the employer intends to further process the personal data for a purpose other than that for which the personal data was collected, the employer must provide the employee, prior to

that further processing, with information on that other purpose and with any further relevant information. It is also noted that a record of processing activities needs to be maintained in the offices of the employer.

Employee Monitoring

The Cyprus Commissioner for Personal Data Protection issued a Directive on the Processing of Personal Data in the context of Employment Relationships which covers any employee monitoring, such as monitoring of faxes and emails, web browser history, recording of inbound and outbound calls (frequency, duration, time), CCTV and GPS monitoring. In particular, the following principles must be adhered to in instances of surveillance and monitoring of employees:

- the employer may install electronic surveillance systems at the workplace for legitimate purposes which the employer pursues, provided that these purposes supersede the rights, interests and fundamental freedoms of the employees (it is noted, however, that recording sound, ie, conversations, through a CCTV system is considered as extreme intervention in private life and, in principle, is forbidden in all cases);
- the means/monitoring systems that the employer chooses to install and the data collected, must be proportionate to the objective pursued;
- the employer must choose the least interventionist means of monitoring in order to satisfy the pursued aims;
- the personal data of the employees collected in the course of monitoring will be used only for the purpose for which the monitoring is carried out;
- the personal data of the employees collected in the course of monitoring will be destroyed/deleted once the purpose for which the monitoring is carried out has been fulfilled;
- the employer must in all instances inform the employees, before the monitoring begins, of the purpose, method, duration and the technical specifications of the surveillance;
- continuous monitoring in the workplace must be avoided;
- the use of biometric systems (ie, facial recognition or fingerprinting) by employers for the purposes of validating the time of arrival and departure of employees in the workplace, is prohibited (the employer ought to use less interventionist measures, such as swiping a card);
- secret surveillance is prohibited;
- the employer may choose to prohibit employees from using the equipment of the company/organisation for personal purposes such as sending emails or making outbound telephone calls;
- the employer must inform the employees of how they can use the equipment of the company/organisation, the electronic surveillance methods which will be used and the consequences for employees resulting from the use of such equipment for personal purposes;
- the access of the employer to the content of the personal emails and personal telephone calls of employees is prohibited; and
- employees maintain the right to protection of their private life even in the workplace.

The employers must maintain the balance between this right and the degree to which the surveillance systems interfere with the private life of employees. Additionally, for each type of processing activity that may possibly pose a high risk to the rights and freedoms of employees (especially with the use of new technologies), employers are legally obliged to carry out a Data Protection Impact Assessment (DPIA) for

the purposes of examining and evaluating the implications of the intended processing activities.

Finally, the protection of data and privacy of employees is also safeguarded by Article 15 of the Constitution (right to respect for private and family life), Article 17 of the Constitution (right to respect for and to secrecy of correspondence and other communication, if such other communication is made through means not prohibited by law) and all international instruments to which Cyprus is a party that guarantee the right to privacy, such as the European Convention on Human Rights, the EU Charter of Fundamental Rights and pertinent ILO Conventions, as well as ECJ/CJEU and ECtHR jurisprudence.

4. Foreign Workers

4.1 Limitations on Foreign Workers

The maximum period of stay for all third-country nationals for the purposes of employment is four years, except for the livestock farming and agricultural sectors, where the maximum period has been set at six years. This limitation does not apply in certain cases, such as personnel employed in "companies of foreign interests" (as these are defined under the applicable decisions of the Council of Ministers) and/or in economic sectors of priority, such as academic, R&D, software, biotechnology, pharmaceuticals, etc.

EU/EEA/Swiss nationals may work in the Republic of Cyprus, provided that they comply with a relatively simple and straightforward registration procedure, without any further restrictions. However, non-EU/EEA/Swiss nationals are required to obtain a residence permit with the right to work, prior to any employment in Cyprus.

Labour Market Test

The main precondition for the granting of a permit for the employment of third-country workers, is the inability of the employer to satisfy the needs of its business with local workers (Cypriot or EU/EEA/Swiss nationals). This inability will be ascertained following a "labour market test" conducted by the competent Department of Labour of the Ministry of Labour, Welfare and Social Insurance. Where the annual gross salary of the third-country worker exceeds EUR35,000, no such test is required. The applications for the permit of the non-EU/EEA/Swiss national are submitted to the District Labour Offices, which need to confirm that the criteria for employment of foreigners are being met. Moreover, the interested employer is required to publish the available position via the employment services of the District Labour Offices (where the annual gross salary does not exceed EUR35,000). If there are no Cypriot or EU/EEA/Swiss citizens available and capable of filling the specific positions after two weeks of advertising the available position, the employer submits a special application form for the employment of foreign workers. Once the application is approved and the employment contract stamped, application is then made for the issuance of the pertinent residence permit to the Civil Registry and Migration Department.

Employees in "companies of foreign interests" undergo a much simpler procedure that does not require any application to the Department of Labour, but only to the Civil Registry and Migration Department. The employer is entitled to employ such individuals, under certain conditions, for indefinitely renewable three-year periods. It is noted that after five years of continuous lawful residence the employees have the right to apply for a Long-Term Residence permit and, after seven years of continuous lawful residence, citizenship, under certain conditions. At

least 30% of a workforce need to be Cypriot or EU/EEA/Swiss citizens, while foreign labour can be up to 70%.

Family Reunification

Family members and dependants of Cypriots or EU/EEA/Swiss citizens, who are not Cypriots or EU/EEA/Swiss citizens themselves, generally enjoy the same rights as the Cypriot or EU/EEA/Swiss citizens, but in order to work, they need a residence permit with the right to work. Third-country nationals who reside legally within the areas controlled by the government of the Republic of Cyprus for at least two years, who are holders of a residence permit valid for at least one year, and who have reasonable prospects of obtaining the right of permanent residence, can apply for family reunification.

Spouses or civil partners of more than one year, and dependents, of third-country nationals who are employees in "companies of foreign interests" have immediate right to reunification – spouses or civil partners also have immediate right to work, not only reside, in these cases.

The terms and conditions of employment must be the same for all individuals, whether they are foreign or Cypriot nationals.

4.2 Registration Requirements for Foreign Workers

See **4.1 Limitations on Foreign Workers**.

5. New Work

5.1 Mobile Work

On 1 December 2023, the Regulation of the Organizational Framework of Telework Law of 2023 (Law 120(I)/2023) came into force. While Law 120(I)/2023 states that telework is optional and is agreed in writing between the employer and the employee, either upon hiring or by amending the employment contract or by collective agreement, if telework is part of the employment relationship then the provisions of Law 120(I)/2023 are obligatory and must be followed.

Law 120(I)/2023 expressly states that it is prohibited to discriminate against an employee because they do not consent to telework. It also safeguards that the employment status and/or the employment contract of the employee remain unaffected by the alternation in the mode of work.

Further to the information mentioned in **2.1 Non-competes**, the employer has the obligation, within eight days from the starting date of the telework, to inform the employee in writing about any changes to the working conditions due to the telework, and this information must include at least the following:

- reference to –
  - (a) the right of remote workers to disconnect from the electronic means through which they provide their services remotely using technology;
  - (b) the technical and organisational measures taken to ensure the disconnection of the remote workers from the digital communication and work tools; and
  - (c) prohibition of discrimination against remote workers simply because of exercising their right to disconnect;
- analysis of the costs of remote work, including costs of telecommunications, equipment, and maintenance;
- the necessary equipment and whether the employee will buy it and ask for reimbursement from the employer, or if the employer

will provide the equipment, technical support, maintenance and repairs;
- any restrictions on the use of equipment and possible sanctions in the case of breach;
- any possible agreement on remote work readiness, including timeframes and deadlines by which remote workers must respond;
- risks and measures of protection and prevention on the basis of the written risk assessment;
- an obligation to protect and secure business data and personal data, and the actions and procedures that need to be followed to fulfil this obligation; and
- the supervisor from whom the remote workers will get instructions.

Furthermore, the employer must evaluate the employee's performance in a way that respects the employee's privacy and protects the employee's personal data. Moreover, before implementing systems, technologies, applications, measures or tools, for supervision, time control or evaluation of the performance, effectiveness and efficiency of the employee, the employer must carry out the data protection impact assessment provided for in the provisions of Article 35 of Regulation (EU) 2016/ 679, and proceed with the process of prior consultation with the Personal Data Protection Commissioner in accordance with the provisions of Article 36 of Regulation (EU) 2016/679.

Finally, Law 120(I)/2023 expressly prohibits monitoring employees using a camera or other similar intrusive application to control the performance of the employee.

Any violation by the employer of the provisions of Law 120(I)/2023 constitutes an offence punishable by a fine of up to EUR10,000.

5.2 Sabbaticals

There is no entitlement to sabbatical leave in Cyprus, unless provided for by individual or collective agreement or employer practice or custom. The only regulated forms of leave are annual paid leave, maternity leave, paternity leave, sick leave, parental leave, carer's leave, and leave on the grounds of force majeure, explained in **1.5 Other Employment Terms**, and military leave for military exercises, where an employee is a reserve soldier.

5.3 Other New Manifestations

Aside from remote work, which has picked up widely regardless of the size of the business, the other forms of "new work" that have appeared are desk-sharing and four-day weeks, but these are mostly confined to larger enterprises and, at this stage, it is difficult to deduce more general comments or rules.

6. Collective Relations

6.1 Unions

Article 21 of the Constitution of the Republic of Cyprus protects the right of association, including specifically the right to establish and join a trade union.

Cyprus has a relatively high level of trade union organisation. The main national, multi-sectoral workers' organisations are the Pancyprian Federation of Labour ("PEO"), the Cyprus Workers Confederation ("SEK"), the Democratic Labour Federation of Cyprus ("DEOK") and the Pancyprian Federation of Independent Trade Unions ("POAS").

Other independent sectoral workers' organisations are the Pancyprian Union of Public Servants ("PASYDY"), the Pancyprian Organisation

of Greek Teachers ("POED"), the Organisation of Greek Secondary Education Teachers ("OELMEK") and the Union of Banking Employees of Cyprus ("ETYK").

Trade unions have the right to possess property under their legally registered name, to contract, to appear before the courts either as a plaintiff or as a defendant, and also to proceed with all necessary actions to accomplish their purposes. However, to enjoy these rights, a trade union has to be legally registered as such.

Union elections take place in accordance with the unions' articles of association and relevant rules.

Where a registered trade union wishes to be recognised by the employer for the purposes of negotiating the conclusion of a collective agreement, but the employer refuses to recognise it, the trade union may apply, under certain conditions, to the Registrar of Trade Unions for issuance of an order of recognition, forcing the employer to recognise it as the lawful representative of the employees for said purposes.

In cases of undertakings employing at least 30 employees, a company has a general obligation to inform the employees and/or their representatives and consult them by exchanging views and establishing a dialogue between the employees and/or employee representatives and the employer. In particular, such information and consultation should cover:

- information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
- information and consultation on the situation, structure and probable development of employment within the undertaking or establishment, and on any anticipatory measures envisaged, in particular where there is a threat to employment; and
- information and consultation on decisions likely to lead to substantial changes in work organisation or contractual relations.

Failure to comply with the Establishment of a General Framework for Information and Consultation of Employees Law of 2005 (Law 78(I)/2005) may lead to criminal prosecution and the imposition of a fine.

Cypriot law also provides for the establishment of European Works Councils for the purpose of safeguarding and improving employees' rights to information and consultation in EU-scale undertakings and EU-scale groups of undertakings. However, at the time of writing, there were no active European Works Councils in Cyprus.

6.2 Employee Representative Bodies

See **6.1 Unions**.

6.3 Collective Bargaining Agreements

In relation to collective bargaining agreements (CBAs), there is no general legislative framework regulating the manner in which they are conducted, nor is there a list of core terms that need to be contained therein (other than, of course, minimum statutory obligations). CBAs constitute one of the main policy instruments used to shape labour policy in Cyprus and, as a matter of practice, the negotiations are conducted in a tripartite manner between the employers' organisations, the Ministry of Labour and Social Insurance, and the trade unions. CBAs in Cyprus do not have erga omnes effect, nor are they legally binding; therefore, non-compliance per se may not be the subject of a judicial process, even though the provisions of applicable CBAs in any given case, together with any other

existing practices concerning terms and conditions of employment, are taken into consideration by Cypriot courts as evidence of such terms and conditions. CBAs are only subject to the provisions of the 1977 Industrial Relations Code, which is not legally enforceable but rather a "gentlemen's agreement" between the main employers' associations and trade unions. It lays down the procedures to be followed for the settlement of employment disputes, arbitration, mediation and public inquiry in disagreements over interests and rights.

7. Termination

7.1 Grounds for Termination

There is a default statutory probation period for the first 26 weeks of employment – probation can be extended past six months up to a maximum of 104 weeks with the consent of both parties only in cases of directors, executives, managers and persons in similar positions. Throughout the duration of the probationary period, the statutory provisions relating to notice and protection from termination of employment do not apply, and the employee may be dismissed for any reason and without notice, save where more favourable provisions for the employee are stipulated within the contract of employment.

After the lapse of the probationary period, employees are protected from dismissals. More specifically, a dismissal that cannot be justified under any one of the grounds below is considered unlawful per se:

- unsatisfactory performance (excluding temporary incapacity owing to illness, injury or childbirth);
- redundancy;
- force majeure, act of war, civil commotion or act of God;
- termination at the end of a fixed period;
- conduct rendering the employee subject to summary dismissal;
- conduct making it clear that the relationship between the employer and employee cannot reasonably be expected to continue; and
- committing a serious disciplinary or criminal offence, indecent behaviour, or repeated violation or ignoring of employment rules.

Concerning dismissals due to redundancy, the following circumstances constitute specifically lawful grounds for dismissal due to redundancy:

- the employer has ceased to carry on the business that employs the employee;
- the employer has ceased to carry on the business at the place where the employee was employed; or
- due to any of the following grounds relating to the operation of the business:
  - (a) modernisation, automation or any other change in the methods of production or organisation which reduces the number of required employees;
  - (b) changes in the products or the production methods or the necessary expertise of the employees;
  - (c) abolition of departments;
  - (d) difficulties in placing products on the market or credit difficulties;
  - (e) lack of orders or raw materials;
  - (f) shortage of means of production; or
  - (g) reduction of the volume of work or the business.

Further, an employer may never lawfully terminate the employment agreement for any of the following reasons:

- membership in trade unions or a safety committee established under the Safety at Work Law of 1988;
- activity as an employees' representative;
- filing a complaint in good faith;
- reporting certain types of violations of EU and/or national law (whistle-blowing); or
- participation in proceedings against an employer involving an alleged violation of laws or regulations, civil or criminal.

There is a rebuttable presumption, however, that any dismissal is unlawful until the employer proves the contrary on the balance of probabilities.

Further, an employer must always give the employee a written notice of termination, outlining the grounds for dismissal, with the applicable notice period or payment in lieu of notice.

The notice period is calculated on a graduated scale, according to length of prior service (see **7.2 Notice Periods**).

However, where the grounds of termination are either conduct rendering the employee subject to summary dismissal, or conduct making it clear that the relationship between the employer and employee cannot reasonably be expected to continue, or committing a serious disciplinary or criminal offence, indecent behaviour, or repeated violation or ignoring of employment rules, no notice period is applicable and the employee may be terminated with immediate effect.

In addition, in cases of foreseeable dismissals due to redundancy, the employer is obliged to notify the minister of labour and social insurance at least one month in advance before the anticipated date of termination, including the number of possible redundant employees, the affected sector of the business, the professions and, where possible, the names and family obligations of the affected employees, and the grounds for redundancy. The notice is given by the filing of an official template form (Form YKA 608) with the Social Insurance Services.

Employers who intend to proceed with a collective dismissal due to redundancy are additionally obliged to consult in due time with the workers' representatives to reach an agreement. The employer must notify the minister of labour and social insurance in writing of any intended collective redundancies as soon as possible. Any intended collective redundancies which have been notified to the minister of labour and social insurance will be valid only after the expiry of the period of 30 days accruing from the day of the provision of such a notification.

For the purposes of collective redundancy legislation, the term "collective redundancies" means redundancies made by an employer for one or more reasons not connected with the employees, provided that the number of employees dismissed within a period of 30 days is:

- at least ten, in undertakings which normally employ more than 20 and fewer than 100 employees;
- at least 10% of the number of employees in undertakings that normally employ at least 100 and fewer than 300 employees; and
- at least 30, in undertakings that normally employ at least 300 employees.

The consultations should, at least, cover the following:

- ways and means of avoiding collective redundancies or reducing the number of employees

to be affected and of mitigating the consequences of collective redundancies; and
- the employer must supply, in good time, the employees' representatives with all relevant information to enable them to make proposals during the consultations – the employer has to give in writing, inter alia, the following information:
  (a) the reasons for the planned redundancies;
  (b) the names and occupations of the employees to be made redundant;
  (c) the names and categories of employees normally employed by the employer;
  (d) the period over which the redundancies are to be effected;
  (e) the criteria to be used for selecting the employees to be made redundant; and
  (f) the method of calculating any redundancy payments to the affected employees.

If the termination due to redundancy is genuine, then the employee(s) will receive payment from the state-administered Redundancy Fund (to which all employers contribute) according to their length of service, as mentioned below, provided that the employee(s) has/have completed 104 weeks' continuous employment with the same employer. In particular, the redundancy pay is calculated as follows:

- two weeks' wages for each year of service up to four years;
- two-and-a-half weeks' wages for each year of service from five to ten years;
- three weeks' wages for each year of service from 11 to 15 years;
- three-and-a-half weeks' wages for each year of service from 16 to 20 years; and
- four weeks' wages for each year of service beyond 20 years.

The minister of labour and social insurance imposes a maximum compensation per week by decree.

If an employee is simultaneously entitled to payment out of the Redundancy Fund and payment from the employer by reason of custom, law, collective agreement, contract or otherwise, the employee is paid the whole amount from the Redundancy Fund, and the employer pays any difference between the two payments, if the total amount of payment from the employer is higher than the amount received from the Fund.

In the event that the application for payment from the Redundancy Fund is rejected because the grounds for redundancy were deemed not genuine, the employee has the right to take action against the Fund, as well as against the employer in the alternative, for unfair dismissal and to seek damages.

Finally, concerning internal and appeal procedures, there is no obligation for the employer in the private sector to follow internal disciplinary rules in the private sector (unless the employment contract provides otherwise). However, disciplinary procedures are required regarding employees of government and semi-government bodies or organisations. Nevertheless, even without internal disciplinary procedures, according to case law, dismissal of an employee should always be necessary and reasonable, and must be treated as an employer's "last resort". Given this, before dismissing an employee, the employer should bring to the employee's attention any complaints regarding their efficiency or unsatisfactory conduct or behaviour, and the employer should warn the employee accordingly, to give them the chance to express their views and improve.

7.2 Notice Periods

Notice

The minimum statutory notice which the employer has to give to the employee varies according to the employee's period of continuous employment as follows:

- zero days for up to 26 continuous weeks' employment;
- one week for 26–52 continuous weeks' employment;
- two weeks for 52–104 continuous weeks' employment;
- three weeks for 104–156 continuous weeks' employment;
- five weeks for 156–208 continuous weeks' employment;
- six weeks for 208–260 continuous weeks' employment;
- seven weeks for 260–312 continuous weeks' employment; and
- eight weeks for 312 continuous weeks' employment or more.

A dismissal without notice or payment in lieu of notice can take place only when: (a) the employee's conduct indicates that the relationship between the employer and employee cannot reasonably be expected to continue under the circumstances; (b) the employee committed a serious disciplinary or criminal offence; (c) the employee behaved indecently; or (d) the employee repeatedly violated or ignored employment rules.

An employee who intends to resign should give the employer a minimum period of notice depending on the period of prior service as follows:

- zero days for up to 26 continuous weeks' employment;
- one week for 26–52 continuous weeks' employment;
- two weeks for 52–260 continuous weeks' employment; and
- three weeks for 260 continuous weeks' employment or more.

Severance

Minimum statutory compensation for unlawful dismissal payable by the employer depends upon the period of continuous employment and is calculated in the same way as the compensation for redundancy (see **7.1 Grounds for Termination**). The Industrial Disputes Court will also take into account, at its discretion, the wages and earnings of the employee, length of service, loss of career, circumstances of the termination of employment and the age of the employee.

It is noted that the compensation to which the employee is entitled cannot exceed the equivalent of two years' wages and is payable by the employer in so far as it does not exceed the employee's annual wages, and from the Redundancy Fund to the extent that such compensation exceeds the employee's annual wages. The employer is thus exposed to the payment of damages up to a maximum of one year's wages.

As stated in **7.1 Grounds for Termination**, the employee is not entitled to any compensation from the employer when the dismissal takes place for any of the following reasons:

- unsatisfactory performance (excluding temporary incapacity owing to illness, injury or childbirth);
- redundancy;
- force majeure, act of war, civil commotion or act of God;
- termination at the end of a fixed period;

- conduct rendering the employee subject to summary dismissal;
- conduct making it clear that the relationship between the employer and employee cannot reasonably be expected to continue; and
- committing a serious disciplinary or criminal offence, indecent behaviour, or repeated violation or ignoring of employment rules.

Of course, it is possible for the employer to still pay severance at its discretion or if pre-agreed contractually.

7.3 Dismissal for (Serious) Cause

There is no precise definition of "serious cause", but the following serious causes constitute lawful grounds of dismissal without notice and without compensation, as outlined earlier:

- conduct rendering the employee subject to summary dismissal (which may be connected to committing theft, fraud, damage to company property, serious breach of health and safety regulations, violence, discrimination or harassment against another employee);
- conduct making it clear that the relationship between the employer and employee cannot reasonably be expected to continue; and
- committing a serious disciplinary or criminal offence, indecent behaviour, or repeated violation or ignoring of employment rules.

Only a letter of termination outlining the circumstances/facts that led to this decision to terminate is required to be given to the employee.

However, prior disciplinary procedures or otherwise giving the employee the opportunity to respond would constitute best practice and would be looked at favourably by the court, in the case of a labour dispute. Any prior opportunity given to the employee to be heard would also safeguard the employee's constitutional right to a prior hearing.

7.4 Termination Agreements

Under Cypriot law, it is permissible to obtain releases in connection with termination agreements, but case law suggests that the right to bring a claim can be waived only if such a waiver is clear and unequivocal. In addition, consideration would be necessary for a termination agreement to be valid and enforceable per se.

There are no specific procedures, formalities or specific statutory requirements, however, and termination agreements would therefore be the subject of negotiation between the parties to the employment relationship.

No other limitations are applicable.

7.5 Protected Categories of Employee

On Maternity Leave

In the case of maternity, there is an express protection from dismissal ranging from the start of the pregnancy until five months after the end of the maternity leave. During said period, the employer is not allowed to give any notice of termination or proceed with other actions aimed at the final dismissal of said employee, unless they are guilty of serious misconduct or the business has closed down or the contractual period of employment has ended (apart from instances where non-renewal of the contract relates to the pregnancy, childbirth or maternity leave).

On Paternity Leave

In the case of paternity, there is a statutory protection from termination of employment or granting notice of termination during the period commencing from the date of written notice by the employee of the intention to exercise the right to paternity leave and expiring at the end

of the paternity leave (except in cases of serious offence/misconduct or behaviour which warrants the termination of the employment relationship, or where the undertaking concerned ceased operations, or the termination of a fixed-term contract).

On Parental Leave or Leave on Grounds of Force Majeure

There is statutory protection from dismissal in the case of parental leave or leave on grounds of force majeure, except if the employee is guilty of a serious offence or misconduct, or the undertaking has ceased operations, or the employment contract duration has expired.

On Sickness Leave

In the case of an employee being absent from work on sick leave due to incapacity, during the period of absence plus one quarter of that period upon return (but up to a maximum of 12 months' absence plus one quarter – ie, 15 months), they may be served a notice of termination only on the following grounds:

- conduct rendering the employee subject to summary dismissal; or
- conduct making it clear that the relationship between the employer and employee cannot reasonably be expected to continue, committing a serious disciplinary or criminal offence, indecent behaviour, or repeated violation or ignoring of employment rules.

Whistle-Blowers

The Protection of Persons Who Report Violations of Union and National Law of 2022 (Law 6(I)/2022) requires all private legal entities with 50 or more employees and all public sector legal entities (except local authorities with fewer than 5,000 inhabitants or fewer than 25 employees) to establish reporting channels and procedures for internal reporting and for monitoring. The protection explicitly covers reports on infringements within the scope of EU law, including public procurement, financial services, products and markets and the prevention of money laundering and terrorist financing, product safety and compliance, transport security, environmental protection, radiation protection and nuclear safety, food and feed safety, health and animal welfare, public health, consumer protection, privacy and protection of personal data and the security of network and information systems, infringements affecting the economic interests of the EU, and internal market-related infringements. The same law provides prohibition of any form of retaliation, criminal sanctions, and a number of causes of action.

In addition to the new legislation, whistle-blowers are also protected by their constitutional right to freedom of expression and right of access to the courts. Of course, as also noted earlier, there is an exhaustive list of lawful grounds of dismissal, and dismissal on any other grounds is considered unlawful per se.

Anti-discrimination

Anti-discrimination legislation provides for certain protected characteristics, which include gender, community, language, colour, religion, political or other beliefs, age, sexual orientation, nationality, racial or ethnic origin, and disability (see **8.2 Anti-discrimination**).

Protected categories include both private and public sector employees.

Other

Any dismissal premised on any of the following grounds is considered unlawful per se: (a) trade union membership; or (b) membership of a safety committee under the Safety at Work

legislation; or (c) submission of a complaint or participation in proceedings against an employer because the latter is involved in alleged violation of laws or regulations, or (d) recourse to a competent administrative authority.

8. Disputes

8.1 Wrongful Dismissal

The most common remedy available for unlawful dismissal is a claim for damages. A dismissed employee can bring a claim for damages for unlawful or wrongful dismissal at the Industrial Disputes Court which has exclusive jurisdiction to determine matters arising from the contract of employment and its termination. Minimum statutory compensation for unlawful dismissal payable by the employer depends upon the period of continuous employment and is calculated in the same way as the compensation for redundancy (see **7.1 Grounds for Termination/Redundancy**). The maximum amount of compensation the Industrial Disputes Court is entitled to award is two years of the claimant's salary.

Depending on the circumstances of the case, the court may award any amount between the minimum (calculated in the same way as the compensation for redundancy) and the maximum (two years' wages). Before deciding, the court considers an employee's age, family situation, (loss of) career prospects and all the circumstances of termination. In a case where the maximum amount is awarded, any payment in excess of one year's wages is payable to the employee by the state-administered Redundancy Fund and not by the employer.

Alternatively, an employee has the right to file a claim for breach of contract at the District Courts, if the claim exceeds the equivalent of two years' salary (which is the maximum amount of compensation that can be ordered by the Industrial Disputes Court).

In addition, an employee who was illegally dismissed is entitled to payment in lieu of notice, if notice was not given, which is calculated on the basis of the scale mentioned in **7.2 Notice Periods/Severance**.

In cases of unlawful dismissal, and provided that the employer's total staff exceeds 19 persons, the court is further empowered to order the employer to redeploy the employee. However, this discretionary power is very rarely exercised.

8.2 Anti-discrimination

Cyprus has a multitude of anti-discrimination laws dealing with different forms of discrimination in different sectors; there is no single comprehensive equality statute. The ultimate protection from discrimination derives from Article 28 of the Constitution of the Republic of Cyprus which states that everyone will enjoy the rights and freedoms provided for in the constitution without any direct or indirect discrimination against any person on account of community, race, colour, religion, language, sex, political or other opinion, of national or social origin, birth, wealth, social class, or for any other reason, unless the contrary is determined by an express provision of the constitution. Law 42(I)/2004 and Law 58(I)/2004, which have some overlapping provisions, prohibit any direct or indirect discriminatory treatment or conduct, provision, term, criteria or practice in both private and public sector activities on the grounds of race, community, language, colour, disability, religion, political or other beliefs, national or ethnic origin, or sexual orientation. The protection extends as regards to:

- access to employment, self-employment and work, including selection criteria and appointment terms, regardless of sector of activity at all levels of the professional hierarchy, including promotions;
- access to all kinds and levels of professional orientation, training, education and re-orientation, including obtaining practical professional experience;
- conditions and terms of employment, including provisions on dismissals and remuneration;
- capacity of a member and participation in an employees' or employers' organisation or any organisation where the members exercise a particular profession, including advantages granted by such organisations; and
- social protection, social security and healthcare.

Law 177(I)/2002 and Law 205(I)/2002 prohibit discrimination in the public and private sectors on the basis of gender, including in relation to terms and conditions of remuneration for the same work or work of equal value; ensure equal criteria for men and women; and conditions of employment or access to employment. They provide further protection during maternity, protection from harassment, and ensure active participation and representation. There are certain exceptions under these laws pertaining to residency requirements of third-country nationals and stateless persons, or objectively justified discrimination on certain grounds of religion or age, and affirmative action. They also include pertinent administrative sanctions, criminal sanctions on perpetrators, enforcement mechanisms and whistle-blower protection.

There are additional anti-discrimination laws pertaining to the discriminatory treatment of fixed-term employees vis-à-vis employees of indefinite duration, full-time vis-à-vis part-time employees, persons with disabilities, as well as Law 3/1968 ratifying the International Labour Organisation Convention No 111 concerning Discrimination in Respect of Employment and Occupation of 1958.

In relation to potential claims, it is noted that a prima facie discrimination claim shifts the burden of proof onto the employer.

In the event of discrimination being found, employees are entitled to claim:

- compensatory damages;
- any special damages suffered because of the discrimination;
- reinstatement/re-employment; and
- attorney's fees.

See also **7.1 Grounds for Termination** on minimum damages and **8.1 Wrongful Dismissal** on said claims.

Employees may pursue administrative proceedings before the Ombudsman, who may impose a fine where they identify discrimination on the grounds of gender, religion or beliefs, age, sexual orientation, or racial or ethnic origin.

According to the provisions of the various statutes protecting employees from direct or indirect discrimination, discriminatory behaviour may also constitute a serious criminal offence punishable with imprisonment and/or a fine.

8.3 Digitalisation

While Section 36A of the Cypriot Evidence Law, Cap 9 states that the court may, if it deems it in the interest of justice, allow a witness who is outside the republic to give their testimony via video conference, there is no possibility of

court proceedings via video in employment disputes, where the witness is in the territory of the Republic of Cyprus. Digitalisation in employment disputes has been confined to the submission of pleadings and affidavits, as well as limited communications between the lawyers and the court or the court registry, under the new electronic justice platform.

9. Dispute Resolution

9.1 Litigation

The Industrial Disputes Court has exclusive jurisdiction to hear and decide any disputes arising from the application of the law relating to the termination of employment. However, the employee has the right to apply to a district court in relation to a dispute concerning their employment where the claim is greater than the maximum amount that may be ordered by the Industrial Disputes Court (two years' salary) or for any claim arising during the first 26 weeks of employment (statutory probationary period). Recourse to one court excludes the jurisdiction of the other.

As of 1 July 2023, a third-instance jurisdiction has been added to the Cypriot judicial system – that is, the Industrial Disputes Court or District Court at first instance (as explained above) and the Court of Appeal at second instance, with the Supreme Court at third instance.

There is no provision for class or collective action within the employment statutes and regulations. However, the Civil Procedure Rules provide that, where several persons have the same interest in one cause or matter, one or more of them may be authorised by the court to pursue or defend an action on behalf of, or for the benefit of, all interested persons.

So far, employment claims are filed on an individual basis, and it has not yet been tested whether class or collective actions will be allowed by the relevant provision contained in the Civil Procedure Rules.

9.2 Alternative Dispute Resolution

In the case of a private dispute between employer and employee that relates to termination of employment, annual paid leave, protection of maternity leave, independent claims arising from the employment contract and similar claims, the Industrial Disputes Court has exclusive jurisdiction (with the exception of district court jurisdiction on dismissals where claims exceed two years' wages). It follows that an agreement for arbitration on these matters is unenforceable.

In the case of a dispute between an employer and trade union(s), under the Industrial Relations Code, non-binding mediation by the Department of Labour Relations is possible, but the parties' rights to apply to the court may be reserved. Binding arbitration is also possible where the employer and the trade union(s) agree that the arbitrator's decision will be binding.

9.3 Costs

The general rule is that orders as to litigation costs will usually burden the unsuccessful party to the action. Nevertheless, in practice, in the case of the Industrial Disputes Court specifically, there is a possibility that if the application is rejected, the applicant may be burdened only with their own fees and the employer may still be required to pay its own fees.

DRC

Law and Practice

Contributed by:
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Liedekerke

Contents

Liedekerke has a labour and employment department that is one of the largest employment teams within a full-service law firm in Belgium, and which is recognised as a leading practice. With a team of nine lawyers – including three partners – it advises and assists clients in all matters touching on labour and employment law. With offices in Brussels, London, Kinshasa and Kigali, and as part of the Lex Mundi global network, the firm can offer seamless services wherever its clients choose to do business. Clients include Belgian, foreign and multinational corporations that are active in numerous industry sectors, such as energy, IT, automotive, retail, hotel, food and logistics. The labour and employment department advises public administrations and has particular experience in (international) transfers of undertaking, collective dismissal and reorganisations, closures, trade union negotiations, compensation and benefits, discrimination law, social crimes and employment fraud.

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LIEDEKERKE

1. Employment Terms

1.1 Employee Status

The status of white-collar or of blue-collar workers, whilst often differentiated in other countries, does not exist as such under Congolese law. In fact, the Congolese Labour Code refers from time to time to white-collar or to blue-collar workers but does not make any distinction in the applicable rules. This means that the same rules will apply to all workers of an undertaking, regardless of whether the activity they perform is more manual ("blue collar") or intellectual ("white collar").

Congolese law contemplates only one kind of employment status – that of "worker". The terms "white-collar worker" and "blue-collar worker" have no legal definition.

Despite the fact that Congolese law does not distinguish between white-collar workers and blue-collar workers, it nevertheless makes a distinction between seven categories of workers:

- ordinary labourer;
- skilled worker;
- semi-qualified worker;
- qualified worker;
- highly qualified worker;
- foreman; and
- middle management.

These seven categories entail the application of some specific rules, mostly with regard to salary scales.

1.2 Employment Contracts

Types of Employment Contracts

Under Congolese law, a fixed-term employment contract is a contract entered into in the following cases: for a fixed period, for a specific job or to replace a worker who is temporarily unavailable. Where the contract does not fit into one of these categories, it qualifies as an employment contract of indefinite duration.

Generally speaking, as regards working conditions, workers employed under a fixed-term contract may not be treated less favourably than comparable permanent workers solely on the ground that they are hired for a fixed period (or a specific task, or in order to replace a temporarily unavailable worker), unless difference in treatment is justified by objective reasons. Where justified, their rights may be determined in proportion to the duration of the contract.

Specific rules apply to fixed-term contracts (eg, succession of fixed-term contracts). Specific rules also apply to what is called "daily labour" under Congolese law; that is, contracts concluded on a day-by-day basis. Where such contracts are concluded for more than 22 days of work within a period of two months, the worker will be deemed to have been hired for an indefinite term.

Requirements

Congolese employment law is somewhat ambiguous as to whether there is a requirement to have contracts in writing. It seems that the legislature has left room for oral contracts since the current Labour Code (2002) mentions that a contract that is not in writing will be deemed to have been concluded for an indefinite period of time. However, a Ministerial Decree that pre-dates the current Labour Code of 2002 and was confirmed by a Ministerial Decree of 2011 requires that employment contracts be in writing. In any case, it is strongly recommended that fixed-term employment contracts be in writing in order to avoid any reclassification as open-ended (indefinite) agreements.

When in writing, the employment contracts must include at least the following:

- the name of the employer;
- the employer's identification number at the National Social Security Institute (INSS), now the National Social Security Fund (CNSS);
- surname, given name, post-name(s) and gender of the worker;
- the worker's identification number at the CNSS and, where appropriate, the order number assigned by the employer;
- the date of birth of the worker or, failing that, the presumed year thereof;
- the worker's place of birth and nationality;
- the worker's family situation;
- surname, given name, or post-name(s) of the spouse;
- surname, given name and date of birth of each dependent child;
- the nature and modalities of the work to be performed;
- the amount of the agreed remuneration and other benefits;
- the work place;
- the duration of the commitment;
- the duration of the notice period (dismissal);
- the entry into service date;
- the place and date of conclusion of the contract; and
- the ability to work duly certified by a doctor.

The draft contract must be drawn up in French and submitted to the worker at least two working days before it is signed, together with all the essential documents to which the draft contract refers. Signed copies must be given to the employer, the worker and the authority empowered to endorse the contract.

The employer is required to submit the contract to the National Employment Office (*Office National de l'Emploi*) for approval within 15 days from the date of signature of the contract. Failure to do so entitles the worker to terminate the employment contract at any time, without having to comply with a notice period. The worker can also claim damages. In the event the National Employment Office refuses to approve the agreement, the latter ends automatically.

1.3 Working Hours

Legal Working Time Limits

Maximum legal working time may not in any case exceed 45 hours per week and eight hours per day. These hours do not include the time required for the worker to travel to or from the place of work, unless this time is inherent to the work.

Possibility of Flexible Arrangements

Flexible (mutual) arrangements regarding working time are admitted, provided, however, that any hour performed beyond the maximum working hours per day/week will fall under the rules regarding overtime.

Part-Time Contracts

The Congolese Labour Code does not specifically address part-time contracts but there is, in this firm's view, no legal restriction to the signing of a part-time contract. In this case, it is advisable to have a written contract. The general rules of the Congolese Labour Code will apply to part-time contracts.

Overtime

Hours worked in excess of the legal working hours will be considered overtime and the worker will then be entitled to overtime pay.

The overtime pay amounts to a percentage of the corresponding salary:

- 30% for each of the first six hours worked in excess of the statutory weekly working time or the period considered equivalent;
- 60% for each of the following hours; and
- 100% for each hour of overtime performed on the weekly day of rest.

1.4 Compensation

Minimum Wage Requirements

Since 1 January 2019, the daily minimum wage in the DRC has been equal to CDF7,075 for an ordinary labourer function. This minimum wage has not been modified since then.

The tension salariale (ratio) between the ordinary labourer wage and the middle management wage is one to ten.

Thirteenth Month and Variable Remuneration

The Congolese Labour Code does not include any provisions regarding the thirteenth month, nor any specific provision regarding bonuses. Collective bargaining agreements concluded at the company level or the sectoral level may include specific provisions regarding variable remuneration. In addition, the parties to an employment contract may always negotiate their working conditions and the employer may always grant a thirteenth month and/or bonuses, having in mind that workers belonging to the same category of employment should receive the same benefits in order to avoid discrimination issues.

Government Intervention in Salary Increase

Nothing is mentioned in the Congolese Labour Code regarding government intervention in compensation.

1.5 Other Employment Terms

Vacation

Under Congolese law, the employer has the obligation to grant vacation and vacation pay to the workers. The right to vacation pay arises at the end of each year of service counted from date to date. The worker cannot renounce their vacation rights.

The vacation period must be fixed by mutual agreement at a convenient moment for both parties and fall no later than six months after the right arose. The duration of the vacation period varies in accordance with the age of the workers. For workers aged 18 and over, the vacation period must at least be equal to one working day per full month of service. For workers below the age of 18, the period is at least equal to one and a half working days per full month of service. These durations are increased by one working day for every five years of occupation with the same or a substituted employer.

Vacation pay is equal to the corresponding remuneration, all benefits included, as on the day on which they leave for holiday.

Required Leaves

Maternity leave

Maternity leave under Congolese law consists of a suspension of the employment contract during 14 consecutive weeks, of which a maximum of eight weeks can be after the delivery and six before it. During this period, the mother is entitled to two thirds of her pay (benefits included). The employer may not terminate the employment contract during this period.

While a mother is breastfeeding her child, she is entitled to two half-hour rests a day to allow her to breastfeed. These rest periods shall be remunerated as working time.

Incapacity to work

Where the worker is unable to provide their services as a result of sickness or accident, they are entitled to two thirds of their remuneration (benefits included) and to the full family allowances, throughout the period of suspension of the contract, which must not exceed six consecutive months.

Occasional Leave

The Congolese Labour Code provides for the following occasional leave:

- worker's wedding – two working days;
- delivery of the wife – two working days;
- death of spouse or of a first-degree relative – four working days;
- child's wedding – one working day; and
- death of a relative – two working days.

These days are not deductible from the legal minimum vacation and cannot be split. The employer must only pay for occasional leave up to a maximum of 15 working days per year.

Confidentiality and Non-disparagement

Except for the general prohibition of disclosure of trade or business secrets, nothing is provided in respect of limitations on confidentiality or non-disparagement agreements under the Congolese Labour Code. Employers are therefore free to include such clauses in the employment contracts or settlement agreements, although it is not very frequent in practice. There is, however, a confidentiality obligation for workers' representatives who gain knowledge of confidential information in the course of their duties.

Employees' Liability

The Congolese Labour Code specifies three situations in which a worker can be held liable, entitling the employer to claim compensation. The first situation relates to the damage caused to the employer's goods and the equipment made available to the worker (although the worker cannot be held responsible for normal wear and tear on the equipment). The employer may also claim financial compensation for damage resulting from a worker's disclosure of the company's trade or business secrets, or from an act of unfair competition. Finally, the worker can be held liable in the case of termination due to a serious breach by the worker: the employer may claim compensation from the worker for the damage directly caused by the worker's gross negligence.

Disciplinary sanctions can also be imposed on workers, depending on the seriousness of the fault committed whilst performing the contract:

- blame;
- reprimand;
- lay-off, with a maximum of two times 15 days a year, where such a measure is provided for either in the employment contract, a collective bargaining agreement or the company work rules;
- dismissal with notice; or
- dismissal for a serious cause.

2. Restrictive Covenants

2.1 Non-competes

Congolese law prohibits non-compete clauses, except under the following strict cumulative conditions:

- the contract is terminated by the employer for serious cause attributed to the worker, or by the worker without serious cause attributable to the employer;

- the worker has such knowledge of their employer's clientele or business secrets that they could cause serious harm to their former employer;
- the prohibition must relate to the type of activities carried out by the worker at the employer's premises; and
- the duration of the clause may not exceed one year.

The non-compete clause may provide for a contractual penalty to be imposed on the worker who violates the clause.

The Code does not provide for a maximum amount. It merely states that, at the request of the worker, the competent court may reduce the penalty to a reasonable amount, should it be considered excessive.

It is a common practice to include a non-compete clause in employment contracts of workers who could effectively compete with their former employers after the end of their employment contract. Generally, the provision of a penalty amount that does not exceed the equivalent of 50% of the remuneration corresponding to the non-compete period is recommended.

2.2 Non-solicits

Nothing is set out in the Congolese Labour Code regarding non-solicitation clauses. It is, however, advisable to include such a clause, usually applicable for a standard period of 12 months following the termination of the employment contract.

The present authors' firm has never come across such a clause, save under the more standard form of a non-compete clause.

3. Data Privacy

3.1 Data Privacy Law and Employment

Nothing related to privacy is mentioned in the Congolese Labour Code. Generally speaking, privacy is mentioned in the Congolese Constitution. Although not expressly stated, it may reasonably be assumed that this provision could be interpreted as applicable within the work sphere.

In addition, there are a few scattered provisions relating to privacy, such as the Ministerial Order of 8 October 2015, which states: "The processing of personal data concerning job-seekers must be kept secret and respectful of privacy. Processing of personal data concerning job-seekers means the collection, storage, combination and communication of all information about them."

Provisions regarding privacy are therefore not abundant in the DRC. In addition to these few provisions, the international standards – such as the *Organisation pour l'harmonisation en Afrique du droit des affaires* (the Organisation for the Harmonisation of Corporate Law in Africa, or OHADA) rules and those of the International Labour Organization – will apply.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Generally speaking, the Congolese Labour Code sets out that it is prohibited for a foreign or a Congolese company to have more than 15% of its total workforce be foreign workers. A Ministerial Decree of 2005 sets out the quota for the occupation of foreign workers, which varies per sector and per category of employment. The quota is generally around 2% of the total number of workers of each considered category of per-

sonnel (general classification of jobs, foremen and managers) in the undertaking.

The mining sector is a more regulated sector in this respect, with minimum quota of Congolese employees being higher than in other sectors (up to 100% depending on the phases of the mining project and on the employees' level of qualification).

4.2 Registration Requirements for Foreign Workers

Foreigners willing to work in the DRC must be in the possession of a work permit, which will be delivered by the National Commission for the Employment of Foreigners.

5. New Work

5.1 Mobile Work

There are no regulations in the DRC on mobile working, known as teleworking. Companies are therefore free to grant and to organise telework as they deem appropriate. In practice, companies will include provisions regarding telework in their work rules and/or in the employment contracts. It may also be orally agreed upon between the employer and the employee.

5.2 Sabbaticals

There are no regulations on sabbatical leave in the DRC. Sabbaticals are also very rare in practice.

5.3 Other New Manifestations

There are no specific regulations in this respect in the DRC.

6. Collective Relations

6.1 Unions

Role of Unions

Workers and employers have the right to form unions whose sole purpose is the analysis, defence and development of their professional interests and the social, economic and moral progress of their members. The representation of workers in undertakings is ensured by an elected trade union delegation.

Every worker or employer, without distinction of any kind, has the right to join or to leave a professional organisation of their choice. Workers enjoy an appropriate protection against all acts of discrimination tending to prejudice their freedom of association. In this respect, it is prohibited for any employer to subject an employment relationship to any limit based on an affiliation or non-affiliation to any professional organisation and to dismiss a worker or otherwise cause them harm because of their affiliation to a professional organisation and/or participation in trade union activities.

Status of Unions

As to formalities, trade unions must register with the Ministry of Labour and Social Security, and draft articles of association. The Congolese Labour Code states a specific procedure to be followed to set up trade unions.

Trade unions are considered legal entities. Registered trade unions may form a union, confederation or federation.

6.2 Employee Representative Bodies

Competencies of the Employees' Representative Bodies

Generally speaking, the scope of competence of the delegation extends to all working conditions

in the undertaking. More specifically, the union delegation:

- is consulted in respect of the work schedules, the general criteria for hiring, dismissing or transferring workers, the remuneration and the in-house work rules;
- is informed by the employer at least every six months about the undertaking's economic and social situation;
- participates in the solving of disciplinary issues within the undertaking;
- is allowed to propose any measure it considers necessary in the event of failure that could seriously disturb the functioning of the undertaking; and
- is allowed to propose/take measures to ensure technical safety and hygiene in the workplace, and to safeguard the health of all persons in the undertaking or establishment.

In addition, each delegate is individually competent to:

- submit to the employer any individual complaint that has not been directly addressed concerning working conditions and the protection of workers, the application of collective agreements and professional classification;
- ensure the application of the requirements relating to the health and safety of workers, and propose all appropriate measures in this regard;
- be consulted in respect of discipline at work; and
- transfer to the Labour Inspectorate any complaint or claim concerning the legal or regulatory requirements for which the Inspectorate is in charge and that the union delegation has been unable to sort out.

As to their role, the members of the trade union delegation are supervised, trained and monitored in their trade union activities within the undertaking by their respective professional organisations.

Institution of the Employees' Representative Bodies

The Congolese Labour Code provides that the representation of workers in undertakings or establishments of any kind is ensured by an elected delegation. The mandate of the delegates is for three years and is renewable. The latest elections took place in 2023.

As to their institution, the minimum number of delegates is fixed as follows:

- from ten to fewer than 20 workers – one delegate;
- from 20 to fewer than 100 workers – three delegates;
- from 100 to fewer than 500 workers – five delegates;
- from 500 to fewer than 1,000 workers – nine delegates; and
- more than 1,000 workers – nine delegates plus a further delegate per 1,000 additional workers.

In undertakings in which there are fewer than ten workers, one of the workers may be appointed to represent the other workers.

Election of delegates

The members are elected. Any worker – without distinction as to gender, marital status, nationality or age – may be elected provided that the worker meets the eligibility criteria (inter alia, being at the service of the employer for at least six months). Delegates are elected by the per-

sonnel of the employer (there are also some particular conditions).

Elections are organised by the employer, which will first consult the trade union(s) represented in the establishment and the outgoing delegation, if any, on the elections and will take due account of any observations made by them. The election date must be announced at least three weeks in advance and 15 days before the date of the poll; the employer must draw up and post a list of the workers who do not meet the voting conditions. Should the employer fail with respect to a procedural aspect, it is the Labour Inspectorate that will set the date and, if necessary, organise the elections.

The lists of candidates must be filed not later than six working days before the date fixed for the poll.

The poll

The poll will be composed of one or two rounds as the case may be: for the first round, only the trade union or unions legally registered and whose field of activity extends to the undertaking may present candidates. Each list must indicate the name of the organisation filing the list and bear the signatures of its qualified representatives. The poll is closed if the number of valid votes cast is greater than half of the number of registered voters. If not, the election is deemed null and void, and a second ballot is to be held.

The second ballot

For the second ballot, voters may, in conjunction with the trade union, propose new candidates. To be valid, a list filed by electors must bear the names and signatures of a number of electors at least equal to three times the number of delegates to be elected by the electoral college. The election process is closed after the second ballot, irrespective of the number of votes cast.

6.3 Collective Bargaining Agreements

General Principles

The collective bargaining agreement is a written agreement on the conditions and the employment relationship between one or more employers or one or more employers' organisations and one or more workers' organisations. It can be concluded either at a sector or at a company's level. This agreement establishes the individual and collective relations between employers and workers within undertakings and settles the rights and duties of the contracting parties. In any company to which the collective bargaining agreement applies, the latter must be posted in the premises, in a place highly visible and easily accessible to workers.

Collective bargaining agreements may mention provisions more favourable to workers than those of the applicable law but may not derogate from the mandatory legal provisions. The provisions of a collective agreement prevail over provisions set in individual employment contracts and the in-house work rules. To be valid, a collective bargaining agreement must include some mandatory provisions set out in the Congolese Labour Code, such as its date, object and the names and capacities of the contracting parties.

It is drafted in as many originals as there are parties and must be signed by all the contracting parties. Six additional originals are subject to the visa of the Labour Inspectorate. One copy of the agreement is then filed at the clerk's office of the labour court and one copy will be sent to the Ministry of Labour and Social Security for publication in the Official Gazette (*Journal Officiel*). Where a collective agreement has been published in the Official Gazette, the Minister

of Labour and Social Security, on the Minister's own initiative or at the request of a trade union, may extend all or some of its provisions to all employers and workers pertaining to the same professional and territorial sector.

The provisions of a collective agreement apply to all workers of the categories concerned employed in the undertaking(s) covered by the agreement, unless otherwise provided for in the collective bargaining agreement.

Remedies in Case of Breach

Breach of the agreed obligations stated in a collective bargaining agreement entitles the parties to an action for damages, the terms and limits of which may be stipulated in the collective bargaining agreement.

7. Termination

7.1 Grounds for Termination

Any dismissal must be motivated by a valid reason. According to the Congolese Labour Code, a valid reason is a reason based on:

- conduct of the worker (eg, acts committed at the workplace by the worker whilst performing their tasks, acts committed outside the workplace but linked to the performance of the tasks);
- ability (physical or professional) of the worker; or
- the operational needs of the undertaking or economic reasons.

Some potential reasons are flagged in the Code as invalid:

- affiliation or non-affiliation to a union, or participation in union activities outside the working hours, or, with the employer's consent, during the working hours;
- soliciting, exercising or having exercised a worker representation mandate;
- filing a complaint or participating in proceedings against an employer for alleged violation of the law, or bringing an action before the competent administrative authorities;
- race, colour, gender, marital status, family responsibilities, pregnancy, childbirth, religion, political opinion, national or social origin, ethnic group, HIV status; and
- absence from work during maternity leave.

Termination Formalities

Any termination must be notified in writing by the party who takes the initiative to the other party. Where termination is at the employer's initiative, the letter of notification must expressly state the reason for dismissal. There is no motivation regime a posteriori.

Termination of an indefinite employment contract without a valid reason entitles the worker to reinstatement. Failing this, the worker will be entitled to damages fixed by a labour court (with a maximum amount equivalent to 36 months of the worker's remuneration).

Any dismissal based on the operational needs of the company, establishment or service is subject to a specific procedure (complying with a hierarchy of dismissals, informing workers' representatives, verifying compliance with the procedure by the Labour Inspectorate, etc).

Where the employer is considering dismissing on grounds related to the worker's ability or conduct, the employer must, before any decision is taken, allow the person concerned to present a defence.

Collective Redundancies

A Departmental Order sets out a specific procedure to be followed in the case of collective redundancies (called "massive" redundancies in Congolese law).

A lay-off is to be considered collective if, within a period of one month, it leads to the departure of at least:

- three workers for an enterprise that employs no more than ten workers, four workers for an enterprise that employs at most 20 workers;
- ten workers for an enterprise that employs between 21 and 100 workers;
- 30 workers for an enterprise that employs between 101 and 500 workers;
- 50 workers for an enterprise that employs between 501 and 1,000 workers;
- 100 workers for an enterprise that employs between 1,001 and 2,000 workers;
- 200 workers for an enterprise that employs between 2,001 and 4,000 workers;
- 250 workers for an enterprise that employs between 4,001 and 6,000 workers; and
- 300 workers for an enterprise that employs more than 6,000 workers.

To be valid, a collective dismissal needs to be justified either by economic reasons or by the operational needs of the enterprise.

A specific procedure must be followed:

- seeking prior authorisation for the dismissal from the Minister of Labour and Social Welfare;
- consulting the union delegation; and
- following a hierarchy of dismissals where the redundancies are based on economic grounds.

Specific obligations could also be imposed by a collective bargaining agreement concluded at a sectoral and/or the company level.

7.2 Notice Periods

General Rules Regarding Notice Periods

Notice cannot be given during the periods of suspension of the employment contract, except in the following cases:

- sickness or accident, except in the case of an accident at work or occupational disease – the employer may terminate the employment contract after six uninterrupted months of inability, in which case, the employer must pay a termination indemnity corresponding to the notice period due for the termination of open-ended employment contracts;
- exercise of public office or civic obligations – the employer may terminate the employment contract after 12 months' suspension and pay the severance indemnity provided for in the employment contract or in the collective bargaining agreement;
- force majeure – either party may terminate the employment contract after a two-month suspension without compensation; and
- worker's imprisonment – the employer may terminate the employment contract without compensation after three months' suspension or if the worker is subsequently sentenced to a penalty of penal servitude of more than two months.

The termination of the employment contract must be notified in writing by the party taking the initiative to the other party. Where the termination takes place at the initiative of the employer, the letter of notification must expressly state the ground for the termination.

Duration of the Notice Period

The termination of the contract must be notified in writing by the party who takes the initiative to the other party.

Unless the parties or the collective agreement stipulate a longer period, the notice period is equal to 14 working days as from the day after the notification, where the notice is given by the employer to a personnel member of the general classification of jobs. This period is increased by seven working days per full year of continuous service, counted from date to date. For foremen, the notice period is equal to one month, increased by nine working days per full year of continuous service, counted from date to date. For managers, the notice period is equal to three months, increased by 16 working days per full year of continuous service, counted from date to date.

The notice period to be given by the worker is equal to half the notice period that the employer should have given if the employer had taken the initiative of termination. It may in no case exceed this limit.

Collective bargaining agreements concluded at sectoral and/or the company level may provide for different notice periods that are more favourable to the workers.

Parties' Obligations During the Notice Period

During the notice period, the employer and the worker remain bound by all their contractual obligations. During the same period, the worker is entitled to one paid day off per week in order to find a new position.

Indemnity in Lieu of Notice

Termination of an open-ended contract without notice or without full observance of the notice period will entail the payment of an indemnity in lieu of notice, corresponding to the remuneration and benefits in kind that the worker would have received during the (part of the) notice period that was not granted.

Specific Procedure in Dismissals for Economic Grounds or for a Reason Linked to the Conduct or Ability of the Worker

There is a specific procedure to follow in the case of a dismissal based on economic grounds. The employer must inform the workers' representatives and the Labour Inspectorate, which will verify the grounds for dismissal and compliance with the mandatory procedure. Such a dismissal must be authorised by the Minister of Labour.

For a dismissal based on the conduct or on the ability of the worker, it is imperative that the latter must be allowed to defend themselves against the reproaches made before any decision is taken.

Specific Procedure in Dismissals of a Workers' Representative

The dismissal of a workers' representative must be pre-approved by the Labour Inspectorate.

7.3 Dismissal for (Serious) Cause

General Principles

A party is deemed to have committed serious misconduct when the rules of good faith do not allow it to require the other party to continue to perform the contract.

The employer commits serious misconduct when they seriously breach the obligations of the contract, in particular in the following cases:

- they are guilty of an act of dishonesty, sexual or moral harassment, intimidation, assault,

serious insult or tolerate similar acts by other workers;
- they intentionally cause the worker material damage during or in connection with the performance of the contract;
- the safety or health of the worker is exposed to serious dangers or when the employers' morality is at risk;
- they unduly apply reductions or withholdings to the worker's remuneration; or
- they persist in not applying the legal or regulatory provisions in force.

The worker commits serious misconduct when they seriously breach the obligations of the contract, and in particular when they:

- are guilty of an act of improbity, sexual or mental harassment, intimidation, assault or serious verbal abuse of the employer or their workers;
- intentionally cause the employer material damage during or in connection with the performance of the contract;
- are guilty of immoral acts during the performance of the contract; and
- jeopardise the safety of the company, the work or personnel through recklessness.

The party to the contract deciding to put an end to the employment contract for serious cause committed by the other party must notify the other party in writing of their decision within 15 working days after having gained knowledge of the facts it invokes.

For the purpose of investigation, the employer may, within two working days after having gained knowledge of the facts, notify the worker of the suspension (for a maximum of 15 days) of their duties. The notification in writing may be sent either by registered letter through the post office or delivered to the person concerned with acknowledgement of receipt, or, in the event of refusal, in the presence of two witnesses.

Consequences

The employment contract will be immediately terminated, without notice. The party terminating the employment contract for serious cause committed by the other party may seek further compensation (damages) before courts.

7.4 Termination Agreements

Any employment contract may be terminated by a mutual consent agreement. There are no specific requirements involved. There are no statutory requirements for enforceable releases or other limitations on termination agreement terms.

7.5 Protected Categories of Employee

There is no specific regime of protection; eg, entitling the workers to a certain compensation (lump sum) for a dismissal that would have been based on a protected criteria. However, the Congolese Labour Code includes some provisions that aim to protect some categories of workers against dismissal (for instance, women during their maternity leave). The Congolese Labour Code also lists some criteria that are invalid reasons for dismissal (see **7.1 Grounds for Termination**).

It is prohibited for an employer to dismiss a worker or otherwise prejudice them because of their affiliation to a professional organisation and/or participation in trade union (delegation) activities. It is also prohibited to dismiss a worker for their union (non-)affiliation, or participation in union activities outside working hours, or, with the employer's consent, during working hours. Damages can be claimed (a maximum 36 months of remuneration).

8. Disputes

8.1 Wrongful Dismissal

Grounds for a Wrongful Dismissal Claim

The Congolese Labour Code flags some invalid dismissal grounds:

- affiliation or non-affiliation to a union, or participation in union activities outside the working hours, or, with the employer's consent, during the working hours;
- soliciting, exercising or having exercised a worker representation mandate;
- filing a complaint or participating in proceedings against an employer for alleged violation of the law, or bringing an action before the competent administrative authorities;
- race, colour, gender, marital status, family responsibilities, pregnancy, childbirth, religion, political opinion, national or social origin, ethnic group, HIV status; and
- absence from work during maternity leave.

In the event that a dismissal is based on one of these grounds, it will be deemed abusive. The list is non exhaustive, meaning that an employer must be careful when dismissing an employee and make sure that it has a valid ground for dismissal.

Consequences of a Wrongful Dismissal

Termination of an employment contract of an indefinite term without a valid reason entitles the worker to reinstatement. Failing this, the worker will be entitled to damages fixed by a labour court (with a maximum amount equivalent to 36 months of the worker's remuneration).

8.2 Anti-discrimination

The Congolese Labour Code states two particular discrimination issues: pregnancy and affiliation to a union delegation. As to pregnancy, it cannot be a source of discrimination in employment. In particular, it is prohibited to require a woman who applies for employment to submit to a pregnancy test or to present a certificate attesting the state of pregnancy, except for work that is totally or partially forbidden to pregnant or breastfeeding women, or that involves a recognised or significant risk to the health of the woman and the child.

As to the workers' representatives, they enjoy an appropriate protection against all acts of discrimination that aim to impair their freedom of association. In this respect, it is prohibited for any employer to subject an employment relationship to a (non-)affiliation to any professional organisation and to dismiss a worker or otherwise cause that worker any harm because of their affiliation to a professional organisation and/or participation in trade union activities.

Nothing is mentioned in the Congolese Labour Code regarding the burden of proof. It may reasonably be assumed that, without any specific rule thereof, it is the worker who invokes discrimination who must prove that they are effectively a victim of discrimination.

The worker could claim compensation before courts.

8.3 Digitalisation

There are no regulations in the DRC on the digitalisation of employment disputes. There is no possibility of recording or conducting court proceedings via video.

9. Dispute Resolution

9.1 Litigation

There are no specialised employment forms and class actions are not available as such. In the DRC, individual disputes are not admissible before the labour court unless they have first been submitted to the conciliation procedure, at the initiative of one of the parties, before the local Labour Inspectorate. Parties can always be assisted by a lawyer.

9.2 Alternative Dispute Resolution

Under the OHADA Treaty and OHADA Uniform Act on Arbitration (Article 2, indent 1), "Any natural or legal person may resort to arbitration with respect to any rights that may be freely disposed of."

It has been judged by the Appeal Court of Abidjan, Ivory Coast, that conflicts relating to the performance or termination of the employment contract may be subject to arbitration in the OHADA countries (Appeal Court of Abidjan, order number 1435, 27 March 2003 (short proceedings)). However, this decision has been criticised because "arbitration is not compatible with the mandatory rules of employment law".

The OHADA Common Court of Justice (CCJ) found in a judgment of 28 April 2016 that the CCJ has no jurisdiction on disputes in relation to labour law. Hence, the matter is debatable. One can, however, reasonably consider that a worker is free to resort to arbitration, once the dispute has arisen (but not before).

It is worth noting that a uniform act on employment law is expected but still under discussion (which first started in 2006). This uniform act will probably address this topic.

9.3 Costs

A prevailing employee cannot be awarded attorney's fees.

EGYPT

Law and Practice

Contributed by:
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Shehata & Partners

Contents

Shehata & Partners was founded in 1996 and has been driven by a vision to provide unique legal services that cater to the business needs of corporate entities doing business in Egypt. Its core mission is to provide the most trusted and effective legal advice on both dispute resolution and corporate law in Egypt. The firm is result-driven and delivers exceptional services to clients across various practice areas and multiple industries. It continues to achieve the highest client satisfaction rates in the region due to the meticulous implementation of its client-centric approach.

Authors

Ibrahim Shehata of Shehata & Partners has accumulated more than a decade of experience within the Egyptian market. He started his career with Ibrachy & Dermarkar law firm, then moved to Sharkawy & Sarhan law firm. He then went to the US to earn his Master of Laws degree in International Arbitration and Venture Capital from New York University. Ibrahim started his career focusing on corporate law, where he successfully advised several multinational companies on doing business in Egypt. In the last few years, Ibrahim has been one of the key players in the entrepreneurial ecosystem, helping both start-ups and venture capital firms navigate legal issues and guiding them to be more investment-ready.

Salah Mohamed has joined Shehata & Partners as an associate in 2023. He was previously an intern at several top-tier law firms in Egypt. Furthermore, Salah was the first Egyptian law student to be chosen by Google LLC to participate in Google EMEA's Legal Summer Institute. He was also ranked in the top three in the JESSUP competition and participated in different moot court competitions nationally and internationally. Salah is currently actively involved in reviewing and drafting different types of legal contracts, including but not limited to SAFEs, convertible notes, shareholder agreements, term sheets, and employment matters.

Hamza Shehata has recently joined Shehata & Partners as a junior associate. He has a strong academic foundation as a graduate from Cairo University's Faculty of Law English Section. During his internships at top-tier law firms, Hamza gained valuable experience working on corporate, litigation, and arbitration matters, primarily focusing on employment law. Driven by a desire to continue learning and growing as a lawyer, Hamza is dedicated to expanding his expertise and advancing his career as a legal practitioner.

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1. Employment Terms

1.1 Employee Status

In the context of employment, blue-collar and white-collar workers represent two different categories:

- white-collar workers – typically employed in office environments, these workers engage in clerical, administrative, managerial, and executive roles; and
- blue-collar workers – these individuals are involved in manual labour and often work in settings such as factories, construction sites, or other industrial environments.

In this regard, Law No 12 of the Year 2003 (the "Labour Law") defines the employee as any person who performs work in consideration of remuneration for the employer and under the employer's direct supervision. In this regard, there is no clear definition for blue-collar and white-collar workers under Egyptian law. However, the Labour Law provides for a different minimum number of working hours for blue-collars workers in industrial establishments than the regular minimum number of working hours for other workers. In this regard, the minimum number of working hours for blue-collar workers in industrial establishments is 42 hours per week, whilst the minimum number of working hours for other workers is 48 hours per week.

While the Labour Law does not explicitly categorise workers as blue-collar or white-collar, the Labour Law provides a framework that ensures fair working conditions for all employees whether they are blue-collar workers or white-collar workers. In this respect, the Labour Law emphasises the need for adequate working conditions and compensation, particularly for those in physically intensive roles.

1.2 Employment Contracts

The different types of the employment contracts under the Egyptian Labour Law are as follows.

Fixed-Term Employment Contracts

A fixed-term employment contract is simply a contract that expires at the end of its term. The Labour Law does not mention a minimum term for fixed-term contracts. As a result, the parties can agree on the contract's term as they may wish. In addition, there is no requirement to turn a fixed-term employment contract into an unlimited-term employment contract at any time during the employment relationship. Additionally, a fixed-term employment contract may be renewed by the parties expressly for another limited period term(s), as there are no legal constraints on the maximum number of times a fixed-term contract may be extended/renewed by the parties, nor on the maximum total duration of subsequent contracts combined.

Nevertheless, if the term of a fixed-term employment contract expires and its two parties continue to perform it without having a written agreement in place for its renewal, this shall be considered as a renewal of the contract for an indefinite period; namely, the contract will be turned into an unlimited-term contract. However, this does not apply to foreigners' labour contracts.

The main benefit of having a fixed-term employment contract is that the employer is free not to renew the contract once the contract period expires and without paying any compensation to the employee.

Unlimited-Term Contracts

An unlimited-term employment contract is one in which its term is deemed to be uncertain and thus indefinite. For example, if the writ-

ten employment contract does not specify the term of employment, then this is considered an unlimited-term employment contract. Another example is if the fixed-term employment contract has expired, but the employee is still working for the employer without having a written renewal notice in place, then this contract turns into an unlimited-term employment contract as explained above.

An employer cannot terminate this type of employment contract except for (i) the reasons specified under Article (69) of the law or (ii) if the employee is "unfit" for the position. In general, some of these grounds may be difficult for the employer to establish in practice before the Egyptian labour courts.

Contracts for Execution of Specific Works

If the employment contract is concluded for the completion of a specific work, the contract ends with the completion of this work. If this completion takes a period of more than five years, then the employee may not terminate the contract before the completion of such work.

Adding to the above, if the employment contract concluded for the completion of a specific work expires and the two parties continue to implement the contract after the completion of the work, this shall be considered as a renewal of the contract for an indefinite period; namely, the contract turns then into an unlimited-term contract.

Additionally, if the contract concluded for a specific work expires with its completion, it may be renewed by express agreement between the two parties for a similar work or works. If the period of completion of the original work and the works for which the contract was renewed exceeds five years, the employee may not terminate the contract before the completion of these works.

In this regard, the following are the required formalities under the Labour Law for employment contracts.

The Contract Should be in Writing

The employment contract shall be drawn up in three copies: two copies for each of the parties, and one copy to be deposited with the competent social security office. If the contract was drawn up in a foreign language, an Arabic translation shall be attached to each copy of the two copies deposited to the aforementioned governmental authorities.

Therefore, the law demands that the employment contract is concluded in a written format to specifically protect the employee. Nevertheless, in the absence of a formal contract, and in the event of a disagreement, the employee can use any method of proof to prove the existence of a work connection as well as the content of the employment contract itself. The employer, on the other hand, can only prove the employment relationship by written means.

Statutory and Other Important Information

According to the legislation, the employment contract must include the following information:

- the employer's name and workplace address;
- the employee's name, degree of education, profession or specialisation, insurance number, place of residence, and whatever is necessary to prove their identity;
- the nature and type of job subject to the contract; and
- the agreed-upon wage or salary, the method and time of its payment, as well as all the cash and in-kind benefits agreed upon.

In addition, the employer shall give the employee a receipt for the documents and certificates the employer may have received from the employee.

The Contract Must be in Arabic Language

As stated above, the contract must be signed in three Arabic language (or in a bilingual form) copies. If the contract is not written in Arabic, on the other hand, it shall still be considered valid. It will not, however, be admissible in court without a certified translation, and obtaining a certified translation is a time-consuming process.

Another scenario would be if the employee has signed the acceptance of the offer letter. In this case, the employer may forego signing an employment contract. This is assuming that the offer letter contains all of the information required by law to be included in the employment contract. Furthermore, the offer letter must be in Arabic, signed by the employee, and deposited with the relevant social insurance office.

Penalty for Non-compliance

As per Article (246) of the Labour Law, failure to comply with the above-mentioned means of concluding an employment contract will result in a fine of not less than EGP50 and not more than EGP100 per each employee. In the event of a repeat offence, the fine shall be doubled.

1.3 Working Hours

Working Hours – General Rule

As a general rule, employees must not work more than eight working hours per day or 48 hours per week, not including the rest hours. This is according to Article (80) of the Labour Law. Further, pursuant to Article (82), the period from the start of work to its end, and the employee's presence at work, must not exceed ten hours, including breaks. However, this does not include overtime hours.

In addition, under Article (81) of the Labour Law, the total working hours shall include one or more periods for eating and resting, the total of which shall not be less than one hour, and it shall be taken into account in determining this period that the employee shall not work for more than five consecutive hours.

Furthermore, the Labour Law does not have specific provisions for part-time contracts. Terms for part-time work should be outlined in the employment agreement between the employee and the employer, ensuring compliance with the general provisions of the Labour Law.

Working Hours – Exceptions

It is worth mentioning that the 48 hours per week limit is reduced to 42 hours per week for employees working in industrial establishments specified by law. This is according to Article (5) of the Manpower Decree No 113 for 2003.

Moreover, there are cases or works in which it is necessary – for technical reasons or operating conditions – for the employee to continue working without a rest period for five consecutive hours. In this regard, Article (1) of the Ministry of Manpower Decree No 122 for 2003, includes the following works which must continue without a rest period for five consecutive hours:

- works in which the operation continues without interruption with the rotation of employees and work in the system of three shifts per day;
- works in which work continues for two shifts per day, where the written approval of the employee is required;
- working in the offices of establishments in which employees work for a period not exceeding seven hours per day;

- working in the operation of the machines that generate power; and
- work of loading and unloading goods in docks, ports, and storage warehouses.

In this case, the employer or the responsible manager must allow the employee to consume drinks or light foods or rest in a manner determined by the management of the company. This is according to Article (2) of the previously mentioned decree.

In addition, there are certain works that are considered difficult or stressful works in which the employee is granted rest periods, which are calculated from the actual working hours. In this regard, Article (3) of the Ministry of Manpower Decree No 122 for 2003, states that the employees who work in arduous or exhausting work, as described below, shall be granted one or more periods of rest, the total of which shall not be less than one hour, which shall be calculated from the actual working hours:

- managing or supervising machines;
- repairing or cleaning machines while they are running; and
- mixing and kneading operations in the manufacture or repair of electric batteries.

Weekly Rests

With regards to weekly rests, each employee must have a weekly paid holiday of not less than 24 hours, every six continuous days. This is mentioned under Article (83) of the Labour Law.

Overtime Rules

On another note, the overtime hours entitlements generally occur in cases of emergency. Where the employer wishes to make the employees work overtime, the Labour Law requires that the employer requests the written approval of the competent administrative authority to increase the working hours. This is under Article (85) of the Labour Law. In any case, according to Articles (1) and (85) of the Labour Law, the employee is paid for the overtime according to what is agreed upon in the employment contract. Such overtime payment must not be less than their original salary for the overtime hours plus 35% for the daytime working hours and 70% for night working hours (any hours worked between sunset and sunrise).

In all cases, an employee's actual working hours must not exceed ten working hours, in addition to a one hour break.

Moreover, Article (87) of the Labour Law, and Articles (1) and (2) Ministry of Manpower Decree No 113 for 2003 provide the following.

As an exception to the above, preparatory works that are necessary to manage machines and power supply, which would enable a plant to carry out its daily work within the scheduled working hours, have a different method of calculating their employees' working hours and overtime. In addition, complementary works, listed below, also have a different method of calculating the employees' working hours and overtime:

- works necessary to complete the repair of machines when a defect or malfunction occurs thereof, which results in the disruption of work in the upcoming shift;
- works necessary to complete the operations of loading and unloading, the failure of which results in a delay in the export or delivery of products and goods that arrive at unexpected dates; and
- completion of industrial complementary operations that may not be accumulated from a technical point of view without completion.

In the above cases, the maximum actual working hours in the preparatory and complementary works shall be 48 hours per week, and the maximum overtime in these jobs shall be 12 hours per week, without prejudice to the general rules applied to overtime eligibilities.

Accordingly, it shall be considered as an exception to the general rules. In this regard, the normal and overtime working hours conform to the general rules in terms of the weekly maximum, but not to the daily maximum. This means that an employee who works in preparatory or complementary works could exceed the daily rest hour, the actual working hours, and/or the maximum overtime hours in one day, but could not, however, exceed 48 working hours per week, and a maximum of 12 overtime hours per week. These employees are, nevertheless, entitled to a weekly rest according to the general rules of the Labour Law.

1.4 Compensation

Article (34) of the Labour Law empowers the competent authority to set the minimum wage in the private sector. In this regard, the Ministry of Planning and Economic Development and the National Council for Wages have issued Decree No 27 of 2024, which establishes the minimum wage in the private sector at EGP6,000 per month. It must be noted that micro-enterprises employing ten employees or less are exempted from this minimum wage requirement.

Article (34) of the Labour Law stipulates that employees are entitled to an annual increase of a minimum of 7% of their social insurance subscription wage.

Employees' bonuses are subject to the contractual obligations between the employer and employee. In this regard, it is worth mentioning that bonuses shall always be given in exchange for specific performance or condition(s). As a result, employers should take into their consideration that if the bonus is given for unclear reason(s) or if being given it may turn into an acquired right, the employer might become obliged to pay these bonuses regardless of the employee's performance if certain conditions are met.

Furthermore, the 13th-month pay, often referred to as a "13th-month bonus", is an additional annual payment made to employees, typically equivalent to one month's salary. This form of compensation is usually provided at the end of the calendar year or during the holiday season, as a supplementary benefit to the regular salary. In this regard, the Labour Law does not specifically address the 13th-month bonus. However, it is subject to the employer's sole discretion according to the employee's performance during the employment relationship.

1.5 Other Employment Terms

Vacation Entitlements

Annual leave

According to Article (47) of the Labour Law, the employees are entitled to 21 days of paid annual leave after completing one year of service. It is worth mentioning that if an employee has been with the same employer or multiple employers for a period of ten years or has reached the age of 50, the annual leave entitlement increases to 30 days of annual leave.

Rotational leave

The Labour Law specifies a number of areas that should be considered remote, whereby it requires certain stipulations that shall be applied to employees who work in such remote areas, such as additional annual leave, different weekly

rest, and housing and nutrition specifications, as elaborated below.

First of all, in order to consider a workplace (remote) under the Labour Law, it should be far from urbanisation by at least 15 kilometres from the nearest borders of a city or village and the normal/public transportation means do not reach, or it is one of the following areas, hereinafter referred to as (the "Remote Area"). This is according to Article (1) of the Decree of Minister of Manpower No 200 for 2003, and includes: (a) the Governorate of North Sinai, (b) the Governorate of South Sinai, (c) the Red Sea Governorate, (d) the Governorate of Marsa Matrouh, (e) Al Wadi Al Gadeed Governorate, and (f) Toshka, East of 'Oynat Territory.

Employees working in such Remote Areas as defined above, are entitled to seven more days than the regular 21 annual leave days, totaling 28 days per year.

Sick leave

As per Article (54) of the Labour Law, the number of days of sick leave that an employee can take is not determined by the law. In this regard, the appropriate medical authority makes a decision based on the individual circumstances and in accordance with the Social Security Law.

Emergency leave

Pursuant to Article (51) of the Labour Law, employees are entitled to up to six days of paid emergency leave annually, which shall be deducted from their annual leave. This leave can be used for unforeseen emergencies, with a maximum of two consecutive days at a time.

Public holidays

Pursuant to Article 52 of the Labour Law, employees are entitled to public holidays as defined by the competent Minister's decree. The total number of public holidays cannot exceed 13 days. The 11 recognised public holidays include the following.

- The first day of the month of Muharram (Hijri New Year's Day).
- The twelfth day of the month of Rabi' al-Aww-al (the noble birth of the Prophet).
- The first and second days of the month of Shawwal (Eid al-Fitr).
- The ninth, tenth, and eleventh days of the month of Dhu al-Hijjah (standing at Arafat and the first and second days of Eid al-Adha).
- The seventh day of January (Christmas).
- The twenty-fifth of January (Police officers' day).
- Sham El-Nessim day.
- The 25th of April (Sinai Liberation Day).
- May 1st (Labour Day).
- The 23rd day of July (Revolution Day).
- The sixth day of October (Armed Forces Day).

Maternity leave

According to Article (91) of the Labour Law, female employees are entitled to 90 days of paid maternity leave, which can be taken twice during their employment relationship.

Further, female employees must have been employed for at least ten months to qualify for such leave, regardless of employer changes. Additionally, female employees are not permitted to work for 45 days post-birth, even if they have used their two maternity leaves.

Child care leave

As per Article (94) of the Labour Law, female employees in organisations with 50 or more employees are entitled to two years of unpaid childcare leave. This leave can be taken twice during their career.

Pilgrimage leave

According to Article (53) of the Labour Law, employees who have served for at least five years are entitled to a one-month paid leave for pilgrimage or to visit Jerusalem. This leave is granted only once during their career.

Confidentiality, Non-Disparagement, and Employee Liability

Confidentiality

According to Article (56) of the Labour Law, employees have a duty to protect the confidentiality of their employer's trade secrets. This includes refraining from sharing any information related to their work that is considered confidential by nature or has been designated as such in writing by their employer. The specific confidentiality requirements may also be outlined in agreements between the employee and the employer.

Non-disparagement

The Labour Law does not specifically mandate non-disparagement clauses. However, employers may include such terms in contracts to prevent employees from making negative statements about the incorporation.

Employee liability

According to Article (174) of the Egyptian Civil Code, the employer is liable for the damages caused by an unlawful act of its employee when the act performed by the employee was in the course, or as a result, of their employment. Furthermore, the relationship between employer and employee exists even when the employer has not been free to choose their employee, provided that the employer has actual powers of supervision and control over their employee. As a result, employees can be held liable for damages caused by negligence or wilful misconduct.

2. Restrictive Covenants

2.1 Non-competes

If the work entrusted to the employee allows them access to the employer's list of clients or commercial or industrial secrets of the employer, the two parties may agree that after the termination of the contract, the employee may not compete with the employer, nor participate in any project that competes with it. However, under the following conditions which are mentioned under Article (686) of the Civil Code:

- the employee must have full capacity – ie, above 21 years old, at the time of concluding the employment contract; and
- the restriction must be limited in terms of time, place and type of work to the extent necessary to protect the legitimate interests of the employer.

Finally, the employer may not uphold this clause if they terminate the contract or refuse to renew it without providing justification thereof, just as it is not permissible for the employer to uphold the agreement if they forced the employee to terminate the contract.

It is also worth mentioning that if a liquidated damage was agreed upon in the event of a breach of the non-compete clause, and such liquidated damages were exaggerated, making it a means to compel the employee to remain in the business of the employer for a period longer than the agreed period, this liquidated damage could be deemed as invalid, and its invalidity extends also to the non-compete clause as a whole. This is according to Article (687) of the Civil Code.

On another note, as per Article (57) of the Labour Law, an employee is prohibited from carrying out

the following actions by themselves or through others during the employment contract.

- Working for others, whether with or without pay, if performing such work impairs the good performance of their work or is inconsistent with the dignity of the work, or enables or helps a third party to learn the secrets of the establishment or compete with the employer.
- Exercising an activity similar to the activity practiced by the employer, or participating in a similar activity, whether as a stakeholder or an employee.

In this respect, the Economic Court heard a case where the employee had been working with the employer for more than three years, which allowed the employee to know the company's trade secrets and to know the employer's permanent clients. It then came to the knowledge of the employer that the employee had established a company working with the same activity. Therefore, the Court decided in its Decision No 3500, for Judicial Year 2010, hearing dated 26/01/2011 that:

"... what the defendant did is considered illegitimate competition, in addition to his violation of the provisions of the Labour Law in its Article (57), which prohibits the employee from carrying out the same activity as the employer...".

2.2 Non-solicits

Non-solicitation is an agreement that prohibits employees from soliciting or recruiting a company's clients, customers, or employees after the end of their relationship with the company.

Under the Labour Law, non-solicitation is not explicitly addressed as it is subject to the parties' agreement. However, Article (686) of the Egyptian Civil Code stipulates the application of non-solicitation where, if an employee's work nature provides access to the employer's clients or its confidential information, then the parties may agree that the employee shall not use this information for personal gain or in any competing venture/business. Non-solicitation is thus considered an extension of the duty to perform the contract in good faith, ensuring that the employee refrains from soliciting the employer's client(s) or disclosing their confidential information.

3. Data Privacy

3.1 Data Privacy Law and Employment

Starting from the Egyptian Constitution to the Data Protection Law No 151 for 2020 (DPL), employees' privacy and restrictions on the use and disclosure of their data are regulated.

In this regard, the Constitution states under Article (57) that all correspondence, telephone calls, emails, and other forms of communication are protected, and their confidentiality is guaranteed. They may not be confiscated or monitored except by a judicial order, and for a limited time, in accordance with the provisions of the law. Therefore, an employer may not monitor employees' correspondence, as long as it belongs to the employee(s) and is not the employer's property.

In addition, the DPL requires that all data controllers and processors establish a lawful basis for each and every personal data processing activity they perform directly or which is disclosed or revealed by any means, except with the explicit consent of the data subject. Besides, Article (8) of the DPL obliges the legal representative of a legal entity that controls or processes personal data to appoint, within the legal entity and func-

tional structure, a data protection officer (DPO) responsible for the protection of personal data. This DPO must be registered in a special register to be established at the Data Protection Center. The DPO is responsible for implementing the provisions of the DPL, its executive regulations, and the decisions of the Data Protection Center, monitoring the procedures in force within their entity, supervising them, and receiving requests related to personal data in accordance with the provisions of the DPL.

Moreover, the Labour Law obliges the employer to collect and receive all possible identifiable information and documents only in connection with the employee's application for employment.

Hence, the Constitution, the DPL, and the Labour Law regulate employees' personal information and the mechanism for processing and controlling it, where only work-related data should be collected and monitored.

It must be noted that the executive regulations of the DPL have not been issued yet and hence the DPL is not yet in force yet as at the date of writing.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Foreigners may not engage in work except after obtaining a licence to do so from the competent ministry, permitting them to enter the country and reside for the purpose of work. In this regard "work" means every dependent work or any profession or craft, including work in domestic service, and this is according to Article (28) of the Labour Law. In addition, under Article (27) of the Labour Law, a work permit is required whether the employee will work in the private or public sector.

Furthermore, the law applies a ratio between foreign workers and Egyptian employees. In this regard, Article (5) of the Minister of Manpower and Immigration Decree No 146 for 2019 regarding the Conditions and Procedures for Work Permits for Foreigners states that the number of foreign employees in any company (including its branches) shall not exceed 10% of the total number of Egyptian employees insured by the company. Therefore, the law obliges employers to ensure that 90% of their employees are Egyptian nationals. Accordingly, for each hired foreigner, nine Egyptian national employees must be hired against such a foreigner.

If the employer is an Egyptian joint stock company, then the aggregate of all Egyptian employees' salaries must be at least the equivalent of 70% of the aggregate salaries of that company. This indicates that an employer cannot employ one foreign employee to conduct an actual job for a high salary and nine Egyptian employees for a minimal job for a low salary. Moreover, at least 75% of all technical and administrative employees of the above-mentioned company must be Egyptian. This means that the majority of technical and administrative jobs must also be reserved for Egyptians.

Lastly, as an exception to the 9:1 ratio mentioned above, an investment project may employ foreign employees within 10% of the total number of employees in the project. However, this percentage may be increased to a maximum of 20% of the total number of employees in the project, provided that it is not possible to employ national employees with the necessary qualifications.

Moreover, in some strategic projects of special importance that are determined by a decision of the Supreme Council, an exception may be made to the aforementioned percentages, provided that the training of national manpower is taken into consideration.

Additionally, Article (20) of the Minister of Manpower and Immigration Decree No 146 for 2019 regarding the Conditions and Procedures for Work Permits for Foreigners exempts particular categories of employees who will be able to get a work permit and business residence visa without being required to achieve the 9:1 Egyptian to foreigner employee ratio. These categories include, inter alia:

- employees in representative offices and the like; and
- managers of a branch of a foreign company.

4.2 Registration Requirements for Foreign Workers

In order for a foreigner to obtain a work permit, they have to submit all the relevant documents that will be requested by the competent authority and also pay the prescribed fee for such permit. For the avoidance of doubt, fractions of the year are considered as a full year. In this regard, the work permit fees are estimated as follows.

- First – EGP5,000, in the case of approval of the work permit for the first year, and the fee shall be increased by EGP1,000 for each subsequent year until the third year.
- Second – EGP10,000 in the event of approval to renew the work permit starting from the fourth year, provided that the fee is increased by EGP1,000 for each subsequent year until the sixth year.
- Third – EGP15,000 in the case of approval to renew the licence starting from the seventh year, provided that the fee is increased by EGP1,000 for each subsequent year until the tenth year.
- Fourth – EGP20,000 in the case of approval to renew the licence starting from the eleventh year, provided that the fee is increased by EGP2,000 for each following year, with a maximum of EGP50,000.
- Fifth – establishments excluded from the prescribed 10% for foreign workers may be subject to a fee of EGP8,000 for the first year, upon approval by the special committee for exceptions. This fee increases by EGP2,000, up to a maximum of EGP50,000. The Exceptions Committee retains the discretion to reduce fees in cases warranting such a reduction, provided that reasons and justifications accompany the concerned request.

5. New Work

5.1 Mobile Work

The digital transformation and prevalence of online technology have created new work models, the workforce is becoming mobile, and employees are becoming able to do their jobs from anywhere through digital means of communication.

There are some terminologies used for remote work models that have grown globally, and in Egypt, one of those is “Mobile Work”, which depends on making available means of technology and networks allowing employees to have access to the information, clients, and systems they need in order to complete their physical location and without being inside the office.

However, the current provisions of the Labour Law are essentially focused on employees’ physical presence inside the workplace and

do not include provisions regulating flexible or remote work models, so there are some suggestions that many of the provisions of the Labour Law need to be updated to adapt with the global digital revolution.

Consequently, the legal framework for data protection and privacy for employee rights in remote work is still evolving, so currently, there are no explicit laws governing data protection and privacy for remote work arrangements. The enacted Egypt's Personal Data Protection Law No 151/2020 provides a foundation for data protection which may have some potential implications for remote work.

5.2 Sabbaticals

Sabbatical leave is a period of extended leave granted to employees, typically after a certain number of years of service. It is often used for personal development, academic pursuits, research, or rest. Sabbaticals can vary in length and conditions depending on the organisation's policy. Unlike regular vacation leave, sabbaticals are generally longer (ranging from a few months to a year) and may be partially paid or unpaid. Accordingly, Sabbatical leave is not clearly regulated under the Labour Law. However, some applications for sabbatical leave can be seen in the law as annual leave, where the employee could demand their leave to be for a certain period due to their exams only if they had provided what proves the date of the exam and notified the employer 15 days prior to the exam's date. This is mentioned under Article (49) of the Labour Law.

5.3 Other New Manifestations

"New work" refers to modern work practices and organisational models that are designed to adapt to changing technological, social, and economic conditions. This concept emphasises flexibility, employee autonomy, and innovative approaches to traditional work environments.

Desk sharing is a workspace arrangement where employees do not have assigned desks but instead use any available workspace as needed. This system promotes flexibility and efficient use of office space by allowing multiple employees to share the same desk at different times.

The current Labour Law does not address the new manifestations related to new work practices nor those related to desk sharing.

6. Collective Relations

6.1 Unions

The new Labour Unions Law No 213 for 2017 and its Executive Regulations, specifies the role of labour unions and work councils that aim to protect employees' rights and resolve their problems. Currently, these labour unions have the upper hand in governing all employees' rights and requirements to work in a stable and equitable environment. In addition, these unions provide an equal platform where the employer and the employee can engage in discussions to solve some of the common problems in the workplace, including the issue of workplace privacy.

In this regard, trade union organisations have the right to litigate to defend their rights and interests and the collective rights and interests of their members arising from labour relations. These unions may even intervene with their members in all lawsuits related to labour relations, as well as in disputes arising from the application of the provisions of the new Labour Unions Law mentioned above.

Moreover, employees of an establishment shall have the right to form a "Trade Union Committee of the Establishment" with no less than 50 employees joining it, which assumes the following functions:

- to settle individual and collective disputes related to its members;
- to conclude collective labour agreements at the establishment level;
- to participate with the general union to which it is affiliated in preparing draft collective labour agreements;
- to participate in discussing draft production plans in the establishment and assist in their implementation;
- to participate in setting up or amending internal regulations and systems related to the organisation of labour and employees' affairs; and
- implementation of service programmes approved by the general union to which it is affiliated.

It is also important to note that the employer, or its representative, must enable trade union members to carry out trade union activities, such as communicating with employees and holding meetings with them as well as conducting trade union elections at the worksite in a way that does not affect the workflow in the establishment, and obtaining the correct information required for collective bargaining when requested in accordance with the provisions of the Labour Law.

Adding to the above, it is prohibited for the employer, or its representative, to take any action that would disrupt the practice of trade union activities, including carrying out any act that involves material or moral coercion of an employee because of their trade union activity, refraining from employing an employee or terminating their service due to joining a trade union organisation, discriminating in wages or any of its accessories or in-kind benefits among employees due to joining a trade union organisation or practicing trade union activity, or forcing trade union members to change their negotiating positions.

6.2 Employee Representative Bodies

The bodies representing employees in Egypt are the union committees established in each trade union; whereas almost each profession has its own established trade union making sure that its members' rights are reserved in the employment relationship.

The way Egyptian trade unions are instituted is organised through the annexed Unified Procedures Manual for the Establishing Trade Unions Decree No 227/2022 issued by the Minister of Manpower. The institution of unions begins by activist employees spreading awareness among their fellow colleagues of the benefits of trade unions until 50 or more workers become involved, then hold a meeting to discuss unionising. The procedural framework thereafter involves holding a preliminary conference to discuss the initial steps and prepare necessary documents. A committee emerges out of the initial conference preparing a draft for regulations, then an instituting conference is held to discuss what emerged because of the preliminary conference in addition to publicising the regulations at the conference.

As per Article (18) of the Trade Unions and the Protection of the Right to Organize Law No 213/2017, the founding assembly of the trade union under formation shall elect a board of directors for the organisation, which in turn shall elect an executive committee of the trade union. The person selected by the executive committee from

the members of the board of directors shall deposit three copies of the following founding documents with the competent administrative authority, within 15 days from the date of the election of the board of directors by the founding general assembly.

- A list of the founders of the trade union, stating the name, title, national ID number, age, place of residence, profession, and place of work of each member, signed by each member.
- The by-laws of the trade union, with the signatures of the members of its board of directors authenticated on one copy by the competent notary public.
- Minutes of the election of the board members and the selection of the representative of the executive committee for the purpose of deposit.
- Lists of the members of the board of directors and the executive committee, stating the name, title, age, profession, place of residence, and place of work of each member.

Furthermore, for the establishment of a General Trade Union or a Labour Federation, it is required to submit a statement of the number of labour union committees affiliated with the general trade union, their names, and the minutes of their formation, or the number of general trade unions affiliated with the labour federation, their names, and the minutes of their formation, and a statement of the number of workers who are members of the trade union, as the case may be.

6.3 Collective Bargaining Agreements

The Egyptian Labour Law focus has been on individual employment relationships; however, there are provisions under the Labour Law that regulate collective employment relationships, which is where collective bargaining agreements come into place. In this regard, collective bargaining agreements happen through negotiations where each party compromises to the best of their ability so all parties may benefit from the collective employment relationship. Collective Bargaining Agreements are regulated under the Labour Law. Moreover, the recent Decree No 50/2022 passed by the Minister of Manpower and Immigration outlines the process and tiers and procedures for collective bargaining. The decree applies to all workers, including public service employees not working or employed under the state administration, as well as those employed in private, public, public business, investment, and joint sectors, and it excludes military and law enforcement individuals.

Moreover, collective negotiations, as outlined per the previously-mentioned decree, entail discussions either between employers or between a collection of employers and employees facilitated by their unions or organisations with the aim of covering matters in regards to enhancing the terms and conditions of work and employment, resolving any employment conflicts and disputes, and co-operation between the parties in the employment relationship to achieve the social development of the establishment's workers, especially: (i) determining better benefits for workers; (ii) social, cultural, and sports services; (iii) the prevention of accidents and protection of workers from occupational diseases; (iv) organising appropriate health services and first aid in the workplace; (v) amicable procedures to be followed in the event of a collective dispute; (vi) training in the use of modern technology and conversion training; (vii) working hours and overtime; (viii) paid leave; (ix) promotions, transfers, allowances, grants, incentives, and bonuses, etc; (x) bonuses and incentives linked to production.

The Decree articulates and elaborates the five levels of collective negotiations which are as follows.

- The establishment level, which happens between the Union Committee and the employer.
- Multi-branch establishments level, which happens between the competent union organisation, and the representatives (on behalf of the employer) of the headquarters of the establishment.
- Industry level, happening between employers or their organisations participating in a particular industry and representatives of the general trade union according to the professional trade union classification.
- Regional level, taking place between the employers' representatives who engage in activity in both the same industry and in the same geographical scope, and the representatives of the relevant union organisation. However, if there are multiple activities according to the professional classification of trade unions, negotiations shall be between employers or their organisations and representatives of regional federations or general federations.
- National level, happening between the competent General Union and the employers' relevant organisation, or through a system that combines levels or common professions.

As per the fifth Article of the legislation, it is required for the General Trade Union, General Union Committee representatives, and the employer to engage in collective negotiations in companies with over 50 workers. If there is no union present in the business, both the employer and the union representatives must negotiate with the employer and five selected workers chosen by the relevant General Union, at least three of whom are employees from the establishment. If the company has fewer than 50 workers, talks take place between General Trade Union representatives and either the employer itself or representatives of the employer's organisation; whereas each party shall be considered legally authorised to conduct the negotiations and conclude any agreement resulting therefrom; and in the event that one party declines to begin collective bargaining, the other party may ask the competent administrative authority to initiate the negotiation procedures by notifying the employers' organisation or the workers' trade union to begin the collective bargaining agreement on behalf of the party refusing to negotiate, and the relevant trade union shall be considered legally authorised in this case to conduct negotiations and sign the collective agreement.

While negotiations are taking place, the employer is prohibited from taking measures or issuing decisions related to the subject matters under negotiation except in cases of necessity and urgency, and the measure or decision, in this case, shall be on a temporary basis as per the sixth Article of this decree.

In accordance with Article (7), which stipulates the aftermath of the negotiations; after the negotiations take place, any agreements resulting from the negotiations shall be documented through a drafted collective agreement stipulating the terms agreed upon by both parties. However, if negotiations fail and both parties do not come together in agreement, either of them may resort to either the competent administration authority for the affairs of collective bargaining and collective labour agreements at the Ministry of Manpower or the directorates of manpower to attempt to reconcile them and assist them in reaching an agreement; and the administrative authority shall work to strengthen the means and

procedures of collective bargaining in order to encourage constructive and fruitful negotiations and enhance the capabilities of employers and workers' trade union organisations to achieve this.

7. Termination

7.1 Grounds for Termination

Termination by the Employer

The Labour Law stipulates that motivation is required for the termination of an employment contract. The termination occurs after the event has happened and not before, where the termination cannot be based on intuition. Motivations are included in the Labour Law as found in Article (129) where termination would be lawful if an employee is convicted of a felony or for an offence that offends honour, trust, and public morals unless the court issues an order to suspend the sentence, and the verdict must be final. Additionally, Article (124) stipulates that an employment contract is terminated upon an employee's total incapacitation that renders them unable to assume their job roles. However, partial incapacitation is not grounds for termination unless there are no other roles suitable for the employee's capabilities after their partial incapacitation. If the new role is provided under the Social Insurance Law No 148/2019, they shall in this case request being reassigned to that role.

Furthermore, the gravest and most serious grounds for termination are stipulated under Article (69) of the Labour Law; if an employee is proven to have committed any of the nine fundamental breaches stipulated, they would be terminated through the labour court's approval based on the request submitted which details the offending employee's fundamental breach(es). Additionally, the approval of termination is issued within 15 days from the date of the court's receipt of the request as mentioned in **7.3 Dismissal for (Serious) Cause**.

Termination by the Employee

If it is the employee who wishes to terminate the employment contract, they shall do so in accordance with Article (110) by submitting a reasoned notice that includes reasons concerned with their health, social, or economic conditions only.

Collective Redundancies

Articles (196) to (199) regulate collective redundancies, where the Labour Law grants employers the right to partially or completely shut down their business for economic reasons or to downsize, which affects the labour force. The process occurs through submitting a request to shut down or downsize their establishment or activity to a specialised committee formed through a decree issued by the Prime Minister for this purpose.

The request submitted for closure or downsizing shall include the reasons for such, and the number of employees being terminated as well as their job classifications. Accordingly, the committee shall issue its decision within 30 days after the request's submission date, and if the request is approved by the committee, it must include the date of its implementation. Nevertheless, if the request is denied, the employer may in this case choose to appeal the decision in front of another committee. In any case, the downsizing request shall not be submitted by the employer during ongoing mediation or arbitration procedures according to Article (200) of the Labour Law.

Consequently, the employer will be required to pay the employee a reward consisting of their

gross monthly wage for each year spent in service, which is increased to a month-and-a-half for each year spent after the elapse of their first five years. This is according to Article (201) of the Labour Law.

Procedures

There are different paths to follow in terms of procedure unlike the previously mentioned collective redundancies procedures; the first being in compliance with mutual termination agreements, and the second being in compliance with Articles (69) and (71) of the Labour Law. The former is mutual with no outside requisition or external advice, while the latter is one-sided and has to go through litigation procedures as per the above-mentioned Articles. The application is also different for these two manners of carrying out severance pay, notice periods, and financial settlements. Accordingly, if the party wishing to terminate is the employer through a mutual termination agreement, they are bound to pay or settle any financial dues towards their employee, including but not limited to severance pay, unserved notice periods, and unused annual leave days. However, if it is the employee who wishes to resign or if the employee is being dismissed due to one or more of the nine reasons stipulated in Article (69), the employer in this case will not be obliged to pay the financial dues previously mentioned.

7.2 Notice Periods

As per Egyptian laws, notice periods are required to terminate employment contracts, either through the employer or the employee to establish a sense of security and trust in the work environment. If the employer chooses to terminate the employee's contract, they must put into consideration two conditions: the first being to serve a notice period to the employee, and the second is to terminate for either the employee's breach of fundamental obligations or their incompetency while making sure not to abuse the second condition or else they are going to likely face legal consequences, as well as notifying the employee in question with a written notice containing the legitimate reasons of their inadequacy or incompetency. On another note, if it is the employee who wishes to terminate the contractual relation with their employer, they must also serve a notice period, in addition to a written notice containing reasonings related to their health, social, or economic conditions as per Article (110). Moreover, notice periods may not be sent to the employee during their vacation days or else the period shall start on the day after the vacation is over. The notice period is also put on hold in cases where the employee is on sick leave and resumes on the day following the last vacation day as per Article (113). Furthermore, both parties in accordance with Article (114) shall assume their obligations towards one another during the notice period.

It is worth mentioning that notice periods vary depending on whether the employment contract is an unlimited-term employment contract or a fixed-term employment contract, excluding cases where the employee would be incapable of carrying out their job role due to incapacitation, or employees being terminated for reasons stipulated in Article (69), where in both cases the employee would not serve a notice period, and the employer will neither pay compensation in lieu of a notice period, or severance pay, nor financially settle the employee's unused annual leave days, and unlike cases of gross error that require the employer to resort to the labour bureau, notifying it of the employee's fundamental breach and waiting for the bureau's approval, no external advice or representation is necessary to financially settle an employee's dues whether

it may be in regards to mutual termination agreements or severance pay.

Unlimited-Term Employment Contracts

These are defined as employment contracts that do not have a fixed end date, and each party assumes their obligations until one notifies the other of their wish to stop obliging. If the employment contract is an unlimited-term one, and a party wishes to end it, they shall be required to leave a notice period of two months, with the exception of it being three months if the worker has been in service of the employer for a duration that exceeds ten years, in accordance with Article (111) of the Labour Law.

Fixed-Term Employment Contracts

The definition of such is a contract where the employment duration and both parties' obligations have a defined period set and agreed upon, and their obligations end only when the contract has reached its end date or the completion of the certain agreed-upon work in cases of contracts for completion of work. Notice periods for these types of contracts are not explicitly stipulated in the law but are rather a contractual obligation customarily included in employment contracts drafted in Egypt.

Severance Pay

There are no explicit rules in the Labour Law regulating severance pay for employees under the age of 60, whereas employees who have passed the age of 60 (retirement age) are, according to Article (126) of the Labour Law, deserving of a reward made up to be half the latest monthly salary they receive for each year of their first five years spent in service, and a full month's salary for every year thereafter, provided that the employee does not have old-age, incapacity, or death insurance.

It is worth mentioning that severance pay for employees under the age of 60 has been judicially settled according to the Egyptian Court of Cassation, severance pay – also referred to as end-of-service gratuity – is merely a donation in Egypt. It is an additional sum paid to the employee upon termination of their employment relationship, and the employer is not bound or obliged to pay it unless it is explicitly stipulated as a clause in the employee's contract, or in the internal regulations of the establishment, or if there is an established custom of paying it on a general, continuous, and fixed basis.

7.3 Dismissal for (Serious) Cause

Some errors are considered very serious under Egyptian laws, and if an employee commits one of them, their employment shall be terminated by a court order which shall be of an effective nature. Additionally, the dismissal for serious cause is governed by Article (69) of the Labour Law, where the employee has committed an offence so grave that they would be dismissed from resuming their work without assuming the benefit of either a notice period or severance pay or any other financial settlement. In this regard, although not explicit, in practice the judge's discretionary power to determine whether an offence is a fundamental breach or not is mainly measured with respect to the nine fundamental breach cases.

The fundamental breach cases mentioned in Article (69) of the Labour Law are as follows.

- Fraudulent misrepresentation: Where it is proven that the employee has either assumed and impersonated a false identity or submitted forged documents.
- Gross negligence: If it is proven that the employee has committed an error that resulted in grave damage to the employer,

provided that the employer informs the competent authorities – the police in cases of criminal offences and the labour bureau in non-criminal ones – of the incident within 24 hours of becoming aware of it.

- Repeated breach of safety rules: If the employee repeatedly fails to comply with the safety instructions implemented for protecting workers and the establishment, provided that these instructions are written and posted in a conspicuous place, and the employee has been warned in writing but still failed to comply.
- Excessive absenteeism: If the employee is absent without legitimate justification for more than 20 intermittent days within one year or more than ten consecutive days, provided that the dismissal is preceded by a written warning through a registered letter with acknowledgment of receipt after ten days of absence in the first case, and after five days of absence in the second case.
- Disclosure of trade secrets: If it is proven that the employee disclosed the secrets of the establishment at which the employee works, which has led to serious damage to the establishment.
- Competition with employer: If the employee competes with the employer in the same activity or field of business.
- Intoxication or drug use: If during working hours, the employee is found to be in a state of apparent intoxication or under the influence of narcotics.
- Assault and battery: If the employee assaulted the employer or the general manager, or if the employee has committed a serious assault against one of their supervisors during or as a result of work.
- Violation of specific provisions: If the employee fails to comply with the provisions stipulated in Articles (192) to (194) of the fourth book of this law, which stipulate peaceful strike rules.

Procedure

If the employee commits a fundamental breach which resulted from non-criminal gross negligence, the employer may notify the labour bureau within 24 hours of the time where the action was committed in non-criminal cases, or the police in criminal cases. The labour bureau then issues an approval to the request filed to dismiss the offending employee within 15 days of its first hearing regardless of whether the parties attended or not, which is enforced effective immediately. In case of the request being denied by the competent court, the employee assumes their job, and resumes their job functions, and the employer is obligated to pay them or any withheld benefits.

Consequences

When an employee is found guilty of committing any of the nine above-mentioned fundamental breaches, their employment is terminated and they are undeserving of end-of-gratuity pay, otherwise known as severance pay. Generally, in the event an employer terminates an employee, the latter is deserving of an end-of-gratuity pay of two months' wage for each year spent in service of the employer and three months if they have been in service for ten years or longer, which the terminated employee would be deprived of. Their service is also terminated effective immediately with neither a notice period nor pay in lieu of a notice period, in addition to losing their annual leave settlement which is pay in lieu of unused annual leave days.

In addition to Article (69), Article (129) also stipulates serious grounds where an employer may terminate the employment contract without facing penalties or consequences. Termination

would be lawful if an employee is convicted of a felony or an offence that offends and contradicts honour, trust, and public morals, unless the court issues an order to suspend the sentence; whereas Article (67) stipulates that if the employee is charged – not convicted – with a felony or an offence that offends and contradicts honour, trust, and public morals, their employer may temporarily suspend them and notify the labour court mentioned in Article (71) of this law within the three days after the suspension date; if the court finds the suspension adequate, the employee becomes deserving of half their monthly wage from the date of suspension, and if not, they become deserving of their full monthly wage from the date of suspension. If the competent authority does not acquit the case and the employer is deemed innocent, they shall be reinstated to resume their job and have their due financials settled, otherwise it is deemed as unlawful termination. If the charge was maliciously notified through the employer to have the employee suspended, they shall pay the employee all their full unpaid wage during the suspension period.

7.4 Termination Agreements

Termination agreements in Egyptian law are applicable to both fixed contracts and unlimited-term contracts. The purpose is for the employer to dismiss the employee while providing them a termination package without resorting to labour courts. The manner of implementing the termination agreements differs depending on whether the employment contract is a fixed-term or an unlimited-term contract.

Unlimited-Term Contracts

If the termination is abrupt by the employer, they are then required to give the terminated employee gratuity pay which consists of a two-month wage for each year spent in service of the employer and a three-month wage if the employee has spent more than ten years in service. The terminated employee is also eligible for a two-month wage in lieu of notice, and three months as above-mentioned in case of spending ten or more years in service. Lastly, the terminated employee's annual leave days are calculated, and are also financially settled; meaning that they get compensatory pay in lieu of the days that were not taken off on annual leave.

Fixed-Term Contracts

It is customary for fixed-term employment contracts' term to be concluded for a short duration which is usually one year to allow smooth implementation of the termination agreements. In the event an employer wants to conclude a mutual termination agreement with their employee with fixed-term employment contracts, they shall pay the terminated employee the rest of their deserved wage until the end date, which is stipulated in their employment contract, in addition, to pay in lieu of their notice period and the financial settlement of unutilised annual leave days. In any case, the employee shall sign a mutual termination agreement declaring the receipt of all rights, and that the employer owes them nothing further and their contractual relationship has been terminated.

7.5 Protected Categories of Employee

There are three employee categories protected from dismissal; (i) female employees; (ii) union members; and (iii) obligatory military services.

Female Employees

According to Articles (91) and (92) of the Labour Law; female employees are eligible for 90 days of maternity leave in addition to a compensation package that includes their full wage for the duration prior to and following their delivery date, provided that they submit a medical certifi-

cate indicating the probable due date. It is also prohibited for a female worker to be in service during the 45 days following the birth of her newborn. This benefit comes with restrictions, for a female worker is not entitled to maternity leave more than twice for the duration of the worker's employment relationship. Consequently, the Labour Law protects women from terminations, and employers are prohibited from dismissing female employees during their maternity leave.

Union Members

The Labour Law protects workers' right to unionise and participate in union activities. It is stipulated in multiple articles of the law that a worker's participation in a trade union is not a lawful ground for termination, and if a request were to be filed to the labour court requesting an employee's termination on grounds of unionising, it would be denied. It is also stipulated in Article (122) that if an employee is unlawfully terminated, they shall be compensated by the employer. See **8.1 Wrongful Dismissal**.

Obligatory Military Services

It is found in Article (43) of the Military and National Service Law No 127/1980 that men serving their obligatory military service for which the duration is either one or three years, may retain their jobs. The article mandates that employers in government agencies, local government units, public authorities, public sector entities, companies, associations, private institutions, and employers with ten or more employees must reserve the job or position of any employee who is conscripted for national service but may temporarily fill their position until they are fit to assume their role again. The employee has the right to retain their position on condition that they request the re-employment within 30 days of discharge from military service, and the employer must reinstate the employee within 60 days of receiving the request. The law makes sure to protect and secure men serving their country and stipulates that in the event an employee is unfit for their original position due to injuries sustained during military service but is capable of performing other work, they shall be re-employed in a position suitable to their post-military status, in addition to entitling all employees on military service the right to retain promotions, bonuses, and other benefits as if they were actively working. Another added benefit to military-serving employees during their probationary period is that they are considered to have successfully completed it returning to their work post-military service.

8. Disputes

8.1 Wrongful Dismissal

Grounds for Wrongful Dismissal Claims

The Labour Law explicitly sets out the grounds for wrongful dismissal or unlawful termination in Article (120).

- Discrimination against race, sex, social status, family responsibilities, pregnancy, religion, or political views.
- The employee's affiliation to a union or participation in the union's activity in respect to the frameworks of the law.
- An employee assuming representation of their fellow work colleagues or having assumed this role in the past, or planning to assume this role.
- Submitting or filing a complaint against the employer or participating collectively in doing so in protest of violation of laws, regulations, or employment contracts.
- Sequestration of an employee's dues by the employer.

- An employee exercising their right to use leave laid out for them by the law.

Consequences of Wrongful Dismissal

It is also indicated in the same law what consequences an employer who wrongfully dismisses an employee would face in Article (122). In the event an employee is unlawfully terminated on the above-mentioned grounds, they shall resort to the labour court seeking compensation which shall not be less than two months' wage per year spent in service including the employee's rights stipulated by the law which are their annual leave days calculated and financially settled in addition to pay in lieu of their notice period. In the case of union affiliation, the unlawfully terminated employee may request from the court to assume their job as they initially were before the unlawful termination.

8.2 Anti-discrimination

Discrimination is unfavourable and wildly intolerable in Egypt, and the Egyptian legislature has ensured the implementation of laws protecting minorities to ascertain their safety and security in addition to their right to have a peaceful and respectful work environment, the same as their colleagues.

In this regard, it is found in both Articles (35) and (88) of the Labour Law that it is prohibited to discriminate in wages due to sex, origin, language, religion, or belief, as well as it being prohibited to discriminate against women in the workplace.

Penalties

If discrimination in accordance with Article (35) by the employer against the employee is proven, the former shall be subject in accordance with Article (247) to criminal penalties where a fine of minimum EGP100 and maximum EGP500 shall be imposed on them, and if the discriminatory action is proven to have happened due to the fact the claimant is a woman as mentioned in Article (88), then Article (249) stipulates that the perpetrator shall be subject to a fine of minimum EGP100 and maximum EGP200. Nevertheless, the fine shall be multiplied in correlation with the number of violated employees and shall be doubled in case of recidivism.

8.3 Digitalisation

As of late, there have been no new regulations passed regarding the digitalisation of disputes or the attendance of court proceedings virtually. However, the Egyptian government recognises the efficiency and importance of digitalisation and has already taken crucial steps to digitalise a multitude of sectors including implementing electronic litigation for economic courts where it is now possible to access the economic court website and utilise its services, which include filing new lawsuits and being able to follow up on ongoing lawsuits, submitting required documents or memoranda needed to proceed with the lawsuit, and the possibility to pay all court fees and expenses using any electronic payment method, ensuring convenience. The new perk is not only limited to filing the lawsuit, but it also extends to the possibility of electronically filing an appeal.

Moreover, the Egyptian Ministry of Justice has recently implemented a new feature on its website enabling any disputing party to inquire about the court docket, the status of a lawsuit, and the possibility of an appeal which has proven to be very beneficial and convenient to disputing parties, and has proven to be relevant in employment disputes for both employers and employees who may access the website and inquire about their ongoing lawsuit swiftly and expeditiously.

9. Dispute Resolution

9.1 Litigation

Employee Forums

As per Article (71) of the Labour Law, litigation concerning any individual – not collective – employment disputes shall be referred to labour courts, which are composed of one or more divisions of the primary court. These courts shall summon a representative of the relevant trade union, and another representative of the employers' organisation to be present during the dispute's hearing for the purpose of having their professional opinions on the matter, and the court shall proceed with the case regardless of their appearance or absence in court.

The labour court shall promptly issue an enforceable judgment, even if appealed, on an employer's request to terminate an employee within 15 days from the date of the first hearing. If the request is denied, the court orders the reinstatement of the employee and obliges the employer to pay any outstanding dues, and any non-compliance from the employer is considered unlawful termination, making the employee deserving of compensation in accordance with Article (122) of the Labour Law.

Class Action Claims

Egyptian laws primarily focus on individual claims rather than collective or class action claims. Class action lawsuits in employment disputes are when a large group of individuals have one or more of their fellow colleagues affected by the same issue file a single lawsuit and sue their employer in a collective manner on their behalf.

The labour courts in Egypt specialise in individual claims rather than collective ones. In this regard, collective claims as mentioned below in **9.2 Alternative Dispute Resolution** may not be litigated, but only mediated or arbitrated if collective amicable negotiations fail, unlike class action claims which are likely litigated in other jurisdictions.

Legal Representation

Both claimants and plaintiffs (ie, employee and employer) should preferably have an attorney present before the labour court through a notarised Power of Attorney (PoA).

9.2 Alternative Dispute Resolution

Alternative dispute resolutions are only permissible for collective labour agreements as mentioned in the Labour Law, whereas as per Article (169) of the Labour Law, if a dispute arises, the parties are required to amicably settle through the collective bargaining agreements mentioned in **6.3 Collective Bargaining Agreements**, and if the negotiations fail after 30 days from their initiation date, either party may – as per Article (170) – resort to mediation followed by arbitration in case of failure of mediation as follows.

If the parties choose to proceed with mediation, the mediator shall be selected through a list issued by the Minister of Manpower and Immigration of mediators with no personal interest, no previous participation in the dispute, and experienced enough in the disputed matter through a decree issued by the Minister of Manpower and Immigration in consultation with the General Egyptian Trade Union Federation. Accordingly, the competent administrative authority shall determine the costs, the party bearing the costs, and the duration for which the mediator may conclude their mission with a maximum of 45 days.

In accordance with Article (180), the commencement of arbitration proceedings after the failure

of mediation begins upon a formal request submitted by either the employer or the trade union, and if the request is initiated by the workers, it shall then be submitted by the head of the trade union committee or by the competent general trade union, pending the approval of the general trade union's board of directors. The dispute file shall be referred to the arbitration panel through the competent administrative authority within two days of the request's submission date.

Generally, disputes are mediated before being arbitrated, but exceptionally, Article (181) grants either party to disputes arising in vital or strategic establishments the opportunity to resort straight to arbitration without the need to go through mediation first. The competent administrative authority shall refer the dispute to the arbitration panel within a maximum period of one week from the date of filing a request to the arbitration panel, and it must be accompanied by a memorandum detailing the subject matter of the dispute.

9.3 Costs

Filing Fees

In general, the claimant must pay the judicial fees determined by the clerk while submitting their statement of claim. Paying these expenses is necessary for registering the case before the court, taking into account that the Judicial Fees Law No 90 of 1944 (the "Judicial Fees Law"). However, Article (6) of the Labour Law exempts the employees from paying the previously-mentioned judicial fees for filing any labour lawsuits. Exceptionally, if the filing of the labour lawsuit is rejected due to any procedural grounds, the court in this case may charge the claimant to pay all or part of the judicial fees.

Attorney Fees

As per Article (187) of Law No 147/2019 amending Articles in Attorney Law No 17/1983, attorney fees shall be collected to the benefit of the Egyptian Bar Association by the Minister of Justice and are imposed by the court. However, generally speaking, the winning party may request from the losing party the fees they paid their attorney as part of the claimed compensation ("Attorney Fees"), which may be awarded to them by the court. In this regard, it shall be noted that these Attorney Fees are not the actual Attorney Fees that are being paid to the attorneys. In this regard, the said Article provides that the Attorney Fees that shall be paid before the primary and the administrative courts are only EGP75. However, it should be noted that it is permitted to request the actual fees paid by the client to their attorney as part of the components of the claimed compensation, and it may be awarded by the court as compensation according to its absolute discretion.

Losing Party Fees

According to the Egyptian laws and regulations, if the losing party is the employer, such employer will incur the payment of the Attorney Fees and the judicial fees, which relates to the labour dispute. However, if the losing party is the employee, such employee will be exempted from paying any judicial or Attorney Fees.

FRANCE

Law and Practice

Contributed by:
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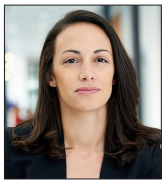
Bredin Prat

Contents

Bredin Prat was founded in 1966 and has offices in Paris and Brussels. The firm now has more than 200 lawyers committed to the highest standards of excellence, to advise its French and international clients in complex or sensitive transactions or contentious matters. Bredin Prat's practice areas include corporate law (M&A, private equity, capital markets, governance), litigation and white-collar crime, competition and EU law, arbitration, tax, employment, financing, restructuring and insolvency, public law, tech law, and financial services and insurance regulatory. Cross-border matters represent more than two-thirds of the firm's work.

Authors



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BREDIN PRAT

1. Employment Terms

1.1 Employee Status

Employees in France are typically divided into three categories:

- blue-collar workers, who are sometimes subdivided into workers (*ouvriers/employés*) and technicians/supervisors (*techniciens* and *agents de maîtrise*);
- executives/managers (*cadres*, who can be assimilated to white-collar workers); and
- senior executives (*cadres dirigeants*).

National collective bargaining agreements, which are negotiated at the industry level and are in principle applicable to all companies in that industry, typically provide for minimum wages for each employee category.

Provided that they perform their work with a certain degree of autonomy and/or responsibility, executives and (subject to specific conditions) technicians/supervisors can be subject to a specific working time arrangement calculated in days worked per year (instead of hours worked per week), called *forfait-jours*. This enables the company to pay a lump-sum salary to the employee regardless of their actual working hours (see **1.3 Working Hours**).

Senior executives (ie, employees with the highest level of responsibility and remuneration within a company) are not subject to working time regulations.

1.2 Employment Contracts

In principle, an employment contract is deemed to exist when a person undertakes to work for and under the direction of another in return for remuneration, even in the absence of a written contract. This definition is articulated around three principles:

- the performance of work, which can involve a wide variety of tasks (manual, intellectual or artistic), in all professional sectors;
- the payment of remuneration in return for the work performed, whether paid in money or in kind, and whether calculated on a time or commission basis; and
- the legal subordination – ie, the authority of the employer who has the power to give orders and instructions, to monitor their execution, and to sanction the employee's failings.

Indefinite-Term Employment Contracts

Indefinite-term employment contracts are the standard form of employment. They do not have to be in written form from a strict legal point of view, but the majority of companies in France execute written contracts.

Any unwritten employment contract is deemed to be an indefinite-term, full-time contract.

Definite-Term Employment Contracts

Definite-term contracts can also be used. Unlike indefinite-term contracts, they must meet the following requirements in particular:

- be executed in writing within two days of the start of the employee's employment;
- be entered into to carry out a specific, temporary task, and only in a limited number of cases provided by the law, such as a temporary increase in activity, the replacement of a temporarily absent employee, or seasonal work;
- have a definite date of termination, which can be a precise date or a specific event, such

as the temporarily absent employee's return date;
- not exceed the maximum length authorised by law (eg, 18 months in the case of a temporary increase of activity, renewable twice as long as the total duration does not exceed 18 months); and
- have neither the purpose nor the effect of permanently filling a job linked to the normal and permanent activity of the company.

Definite-term contracts that do not follow these legal requirements can be requalified into indefinite-term contracts.

Part-Time Employment Contracts

Part-time employment contracts can also be concluded for employees working less than the standard working hours – typically 35 hours a week or 218 days a year (see **1.3 Working Hours**). Among other requirements, these part-time contracts should be in written form and specify the number of hours worked (or days worked per year).

1.3 Working Hours

Standard Working Time

The standard working time arrangement in France is 35 hours a week.

Overtime

Any hour worked beyond this threshold is considered overtime, and is usually compensated with a salary increase of 25% (for the first eight overtime hours) or 50% (beyond the eighth hour), unless an applicable collective bargaining agreement provides for lower compensation, with a minimum of 10%.

Unless provided otherwise by applicable collective bargaining agreements, an employee cannot do more than 220 overtime hours within the same year. Beyond this limit, any overtime hours must be compensated (in addition to salary) by additional days of paid leave. Since January 2019, overtime is exempted from income tax up to EUR7,500 per year, and subject to a reduced rate of social contributions (ie, an exemption from pension contributions within the limit of 11.31% of salary).

Day-Year Scheme (Forfait-Jours)

Employees performing their work with a certain degree of autonomy and responsibilities can be subject to a day-year scheme called *forfait-jours*, under which they must work for a certain number of days per year (no more than 218 days). They receive lump-sum remuneration that covers all their hours of work, without any distinction between ordinary and overtime hours.

This particular scheme is very popular, especially for executives who are thus not subject to the 35-hour week. However, to be valid, this scheme must be provided for in a collective bargaining agreement (whether industry-level or company-level). This agreement should include guarantees ensuring that the employee's working hours and workload remain reasonable, and should provide safeguards in respect of the protection of employee health and safety.

In the absence of such provisions, or if the employer does not comply with them, the day-year scheme could be deemed invalid, and the rules related to overtime would then apply. This gives rise to significant litigation in France, with a three-year limitation period for claims related to compensation. As a consequence, employers are strongly advised to design their day-year schemes carefully.

Part-Time Contracts

Unless otherwise agreed, part-time employees may not work less than 24 hours or more than 35 hours a week (or a pro-rated number of days for *forfait-jours*). A part-time employee may divide their working hours over a week, a month or even a year, as provided in their employment contract.

French Language

Employment contracts, as well as any amendments or schedules to the contracts, must be written in French to be enforceable against the employees. Bilingual contracts are also permissible, providing that the French version prevails.

1.4 Compensation

In France, employees are usually remunerated in cash on a monthly basis, according to the number of hours or days worked.

Minimum Wage

A statutory minimum wage called the SMIC is fixed every year by the French State by reference to the rate of inflation for the past year, based on the retail price index (including tobacco). If inflation exceeds 2% during the year, the SMIC is automatically increased. In principle, no employee working full-time can be remunerated under the SMIC regime.

As of January 2024, this minimum wage was set at EUR1,766.92 (gross) per month and EUR11.65 (gross) per hour. According to the Bank of France, an increase could occur in autumn 2024 as inflation is expected to exceed 2% in the summer months.

In addition, industry-wide national collective bargaining agreements can provide a minimum wage that depends on the employees' status and classification, provided that it is higher than the SMIC.

Additional Compensation

Collective bargaining agreements also commonly provide for supplementary compensation (eg, an individual/company-based performance bonus, a 13th month, seniority or holiday bonus, pension plans, and health and welfare plans). This additional compensation is distinct from the minimum wage, and may be payable to all employees or specifically reserved to certain employee categories (eg, executives or non-executives).

Some employees (usually managers) may receive additional compensation in the form of grants under long-term incentive plans (eg, bonus based on group's performance, phantom shares or restricted/free stocks), subject to their continued employment during the performance period.

Profit-Sharing

In companies that have been employing more than 50 people over the past five years, the implementation of profit-sharing mechanisms to the benefit of employees is mandatory. The amount due to employees is calculated using a legal formula that takes into account the company's net income, added value, wage bill and common equity. Profit-sharing bonuses benefit from favourable tax and social contribution regimes.

The company can also choose to set up profit-sharing schemes at its own discretion. These so-called "voluntary" schemes are subject to the same favourable tax and social contribution regimes as mandatory profit-sharing schemes, and have been increasingly promoted by the government in the past few years.

The new Profit-Sharing Act, applicable as of 1 December 2023, has significantly impacted existing profit-sharing regulations, notably by extending mandatory profit-sharing to companies with fewer than 50 employees and setting up new profit-sharing schemes and bonuses (see the Trends and Developments chapter in this guide).

Annual Negotiation on Compensation

In principle, companies with more than 50 employees and with a trade union delegate are required to negotiate every year with the trade union delegates on the employees' remuneration and the potential increase thereof. Whilst negotiating is mandatory, there is no obligation to reach an agreement.

In 2024, negotiations on salary increases have been focused on inflation. For 2024, salary increases amounted to approximately 3.4% on average, compared to 4.6% in 2023 and 2.8% in 2022.

1.5 Other Employment Terms

Paid Holiday Leave

Under French law, employees have at least five weeks of paid holiday leave per year. In principle, rights to paid holiday leave only accrue during periods in which employees work, or during any period treated as working time (eg, maternity leave or sick leave caused by occupational injury or illness lasting less than one year). Pursuant to a new law dated 22 April 2024, which has brought French law into line with EU regulations, any period of sick leave is now treated as working time (regardless of its cause), with retroactive effect to 1 December 2009. This could create significant liabilities for companies (see the Trends and Developments chapter in this guide).

Employees can also be entitled to additional days off (RTT), which are granted when employees work more than the 35-hour working week or are subject to the specific *forfait-jours* working time ("day-year scheme"), based on a certain number of days worked per year.

Public holidays are in addition to an employee's annual leave entitlement.

Employees can also be entitled to special paid leave for specific events, such as marriage, death of a relative, sickness of a child, etc. Collective bargaining agreements can provide for additional days of paid leave.

Leave of Absence

In addition to holiday leave, employees may benefit from other kinds of paid leave, such as leave for personal reasons, sick leave, family leave, pregnancy leave, and maternity or paternity leave.

In such cases, the employment contract is suspended and the payment of the employee's compensation is covered, usually partly, by public social security funds. Under certain circumstances, collective bargaining agreements can also require companies to supplement this social security indemnity so that the employees receive their full salary.

Obligation of Loyalty and Discretion

Employees are subject to a general obligation of loyalty and discretion towards their employer. As a consequence, they are prohibited from disclosing, whether within or outside the company, confidential information or knowledge obtained in the performance of their duties. They are also prohibited from disclosing manufacturing secrets.

Employee Liability

In principle, employees cannot be held civilly liable for damage caused to their employer in the performance of their work. As a consequence, liability clauses in employment contracts cannot be enforced. By way of exception, an employee may be held civilly liable for gross negligence (*faute lourde*) if they commit serious misconduct with the intention to cause the company harm.

With respect to harm caused to third parties, employees can only be held personally liable for their actions if they acted outside the scope of their professional duties, without authorisation from their employer, and for purposes unrelated to their duties.

2. Restrictive Covenants

2.1 Non-competes

The general obligation of loyalty and discretion applicable to employees in the performance of their duties typically covers confidentiality, professional secrecy and non-disclosure of trade secrets, but also a non-compete undertaking during the execution of the employment contract.

To protect their interests after the termination of an employment contract, companies can provide a specific non-compete clause. These clauses are typically applied to the most senior managers or to employees with specific competitive skills, and usually provide that the employee agrees not to carry out, on their own behalf or on behalf of another employer, an activity similar to that of their employer's business during a certain period of time following the termination of the employment relationship.

To be valid, a non-compete covenant must follow four rules:

- it must be necessary to protect the legitimate interests of the company;
- it must be limited in time (a certain number of months or years, it being noted that more than 12–18 months is unusual, unless there are specific reasons justifying a longer restriction) and space (eg, a region, a country, a continent);
- it must include financial compensation for the employee during the period of the obligation; and
- it must be limited in terms of the prohibited activities (ie, it must be justified by the nature of the employee's duties and must not prevent the employee from finding work corresponding to their qualifications).

Any non-compete clause that does not comply with each of these requirements is null and void, and will not be binding on the employee.

The company can release the employee from their non-compete obligation upon termination of their employment contract (and in any case before the end of the applicable notice period), if it is expressly provided for in the employment contract or in an applicable collective bargaining agreement, or if it is expressly agreed by the employee.

As per case law, an employee who violates their non-compete obligation, even on a temporary basis, may have to refund the non-compete compensation to their former employer and may be held liable for damages.

2.2 Non-solicits

Non-solicit clauses that apply to employees after the termination of their contract (eg, to pro-

hibit them from reaching out to the company's employees, clients or customers) are typically included within non-compete clauses, to which they are often assimilated. As such, they must follow the same rules to be valid, relating in particular to the financial compensation and the limitation in terms of time and space.

In addition, case law limits the scope of clauses prohibiting former employees from soliciting current employees of the company: these non-solicits may only cover "active solicitation" by the former employee. In other words, notwithstanding the non-solicit, employees of the company are still free to apply for a job with the former employee and be hired by them, providing that there was no prior "active solicitation" by the former employee. In addition, these non-solicits should in principle cover only the people employed by the company at the date of termination of the employment contract of the former employee, and be applicable for no more than 24 months.

3. Data Privacy

3.1 Data Privacy Law and Employment

In France, data privacy is notably regulated by the Data Protection Law of 1978 (*loi informatique et libertés*), amended in 2018, implementing the EU General Data Protection Regulation (GDPR) locally. In the context of employment relations, the protection of employees' personal data must be ensured by all the company stakeholders processing employees' personal data (human resources, accounting department, etc).

The obligations to which the employers are subject notably include the following.

- Personal data processing must be carried out lawfully, fairly and in a transparent manner.
- In order to process employees' personal data lawfully, the processing shall rely on a lawful basis. For instance, the processing can be necessary to fulfil a legal obligation or for the purposes of the legitimate interests pursued by the employer. Data processing may also be necessary for the performance of the employment contract.
- The processing of employees' personal data cannot pursue any other objective incompatible with the purpose for which the personal data was initially collected.
- The employees shall be informed about the processing. Furthermore, employees cannot be placed under permanent surveillance, and the implementation of monitoring tools shall respect employees' privacy.
- Therefore, the works council and the data privacy officer (if appointed) must be informed and consulted prior to the implementation of any means of monitoring employee activity and/or tools for collecting their personal information.
- The company cannot consult an employee's conversations on a personal messaging system, nor consult emails and folders labelled as "personal" on their professional computer unless the employee is present or has been duly invited.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Citizens of EU countries, the European Economic Area and Switzerland benefit from provisions relating to the free movement of workers in Europe.

Non-EU citizens must have a valid permit authorising them to work in France. Valid permits include:

- residence permits, which are valid for a period of ten years, are automatically renewable and allow their holder to work in mainland France without any professional limitations; and
- temporary residence permits, which can be issued for precise, professional purposes and whose validity period varies according to the nature of the foreign employee's contract.

4.2 Registration Requirements for Foreign Workers

Before hiring a foreign worker who resides in France, and if the worker is not registered with the national unemployment agency (*France Travail*, formerly known as *Pôle Emploi*), a company must confirm with the local authorities that the worker's permit is valid. This must be done no later than two days before the foreign employee's first day of employment.

If the foreigner does not reside in France, the company must first file a job offer with *France Travail* and look for locally qualified candidates for at least three weeks, unless the job in question is part of the regional "list of high-demand jobs" (*liste des métiers en tension*), in which case posting a job offer is not compulsory. If no unemployed person is qualified (or if there is no requirement to post a job offer), the company can file a request with the Labour Inspection (DREETS) to obtain a work permit for the foreign worker. After obtaining the authorisation, the company will have to pay a tax to the immigration authorities, the amount of which will depend on the level of remuneration and the length and type of the employment contract executed with the foreign worker.

In addition, the company must record the type and reference number of the permit authorising the foreigner to work in France in the employee register. Copies of the relevant documents must also be retained.

The above does not apply to citizens of EU countries, the European Economic Area and Switzerland, who benefit from provisions relating to the free movement of workers in Europe and, as such, do not need a work permit.

The Immigration Act of January 2024 introduced new provisions in respect of foreign workers, including:

- more flexible conditions for regularising the status of illegal workers employed in high-demand areas/jobs;
- new provisions on the granting of multi-annual residence permits for talented or skilled workers; and
- new penalties for companies employing foreigners who are not authorised to work (see the Trends and Developments chapter in this guide).

5. New Work

5.1 Mobile Work

Remote work is relatively flexible in France and has become increasingly popular since the COVID-19 pandemic. Remote work refers to any form of working arrangement whereby work that could have been performed on the employer's premises is carried out by an employee away from these premises on a voluntary basis. In other words, provided that the parties agree to it, work does not have to be performed at the employee's domicile. For example, it could also be performed at a shared co-working space.

Companies can implement remote work by way of:

- a collective bargaining agreement concluded with trade unions at the company level;
- an internal policy issued after consultation of the works council (if any); or
- in the absence of a collective agreement or internal policy, an agreement with the employee.

Industry-wide collective bargaining agreements can provide for specific provisions and guidelines for companies to which the agreements apply.

Regardless of the type of documentation implementing remote work, companies are strongly advised to conclude individual remote-work agreements with the relevant employees to set out each party's rights and duties.

Remote work cannot, in principle, be imposed by the employer, except on a temporary basis in the context of exceptional circumstances, such as a pandemic. Conversely, an employee cannot impose their wish to work remotely on their employer, although an employer's refusal must be justified by objective grounds, such as technical impossibility or organisational requirements.

The tools used by the employees for their work are typically provided by the company and must be used in compliance with the company IT policy. Rules relating to employee privacy must also apply to employees who work remotely.

The company has a duty of care with respect to remote workers' health and safety. It must notably ensure that the workspace and equipment are appropriate, prevent employee isolation, ensure a balance between private and professional life, and control workload.

There are no binding statutory rules governing the compensation of remote work. However, national collective bargaining agreements may provide for the reimbursement of expenses incurred by remote workers. This payment is exempt from social contributions, capped at an amount calculated by reference to the number of days worked remotely.

5.2 Sabbaticals

Sabbatical leave enables an employee to leave the company for a few months to pursue an activity of their choosing, to carry out a personal project, etc, without terminating their employment contract.

Sabbatical leave involves a suspension of the employment contract. However, the employee remains part of the company's workforce, and remains subject to loyalty and non-compete obligations.

Conditions for Sabbatical Leave

Except as otherwise provided in any applicable collective bargaining agreements, employees must fulfil certain conditions to be eligible for sabbatical leave, including:

- they must have at least 36 months of service within the company;
- they must have undertaken a professional activity for at least six years; and
- they must not have taken sabbatical leave in the past six years.

Approval by the Company

Upon receiving a sabbatical request from an employee, the company must notify the employee within 30 days of whether it:

- accepts the request;
- accepts the request but postpones its start date, notably if this is necessary to limit the numbers of employees that would simultaneously be on leave; or
- refuses the request.

If the company does not respond within 30 days, it will be deemed to have approved the sabbatical.

Refusals can be justified if the employee does not fulfil the legal requirements, or if the absence of the employee would have a negative effect on the company's activity. In companies of a significant size (ie, with at least 300 employees), refusals can only be justified if the employee does not fulfil the legal requirements.

Remuneration During Sabbatical Leave

For the duration of the sabbatical leave, the employee is not legally entitled to any remuneration (except as provided by collective bargaining agreement or as agreed between the parties).

Nevertheless, an employee on sabbatical leave may engage in gainful employment throughout the sabbatical period, in particular to compensate them for a reduction or loss of income.

5.3 Other New Manifestations

Flex Office and Desk Sharing

Following the COVID-19 pandemic, companies of all sizes have had to adapt to a global fall in the number of employees working every day in the office and a corresponding rise in remote work. The most popular of these new working arrangements are "flex office" and "desk sharing", which allow employers to reduce the size of their offices and, most importantly, the related costs.

Flex office is the practice of not allocating a specific workstation to an employee, but allowing them to move from one space to another depending on their tasks and missions: a free desk in their own office, a meeting space, a co-working room, a café, etc. This concept should be distinguished from the other popular concept of desk sharing, which means that employees no longer have allocated desks, but can sit wherever they like on company premises.

The implementation of these working arrangements is normally subject to prior consultation of the company's works council (if any), as these arrangements have an impact on employee working conditions.

The Status of "Platform Workers"

As of January 2022, approximately 320,000 people worked as independent contractors for digital platforms in France, especially in the ride-hailing and food delivery sectors. In France, as elsewhere, this new form of work has become increasingly popular, but has also raised a number of legal issues.

These workers are not hired under an employment contract, and as such are not entitled to the benefits usually associated with a salaried employee status, such as paid leave or unemployment insurance. This has led many platform workers to seek the reclassification of their relationship with a digital platform as an employment contract, sometimes successfully, including in front of the French Supreme Court.

In response to this ever-growing number of workers and related disputes, the government enacted several laws to try to regulate relationships between these "independent contractors" and companies using digital platforms and apps to connect with their customers. For instance,

since 2019, digital platforms have had a "social responsibility" towards their contractors, and are required to contribute to their work insurance and training costs. Platform workers may also form and join trade unions through which they can represent their collective interests.

In May 2022, the government organised elections for representatives of platform workers working in food delivery, in order to encourage social dialogue between them and the digital platforms. Since then, several national collective bargaining agreements have been negotiated, particularly on matters relating to:

- the negotiation of collective agreements in the sector;
- the minimum revenue guaranteed to platform workers; and
- the termination of commercial relations between platforms and workers.

At the EU level, a preliminary agreement that introduces a legal presumption of salaried status for platform workers was approved by the European Parliament and the member states within the European Council in February 2024. A formal Directive, approved in April 2024 by the European Parliament, must now be formally approved by the European Council. Following its publication in the EU's Official Journal, member states (including France) will have two years to incorporate its provisions into their national legislation.

6. Collective Relations

6.1 Unions

Trade unions are involved on a daily basis in many areas of labour law in France: collective bargaining, health and safety, working hours, wages, etc. Within this general framework, a specific role is assigned to so-called "representative unions".

To be considered as representative within a company, a trade union must have scored at least 10% at the last employee representative elections and must prove that it meets several criteria, including:

- respecting republican values;
- being independent vis-à-vis the employer;
- applying financial transparency;
- having sufficient influence through its activity and experience; and
- having a certain number of members.

Trade unions can be representative at the national industry level, where their main purpose is the negotiation of national collective bargaining agreements that are applicable to all companies belonging to the same industry.

Trade unions can also be representative at the company level, in which case they negotiate collective agreements applicable to company employees only. In practice, representative trade unions within a company must name union delegates, who have the power to negotiate the company collective bargaining agreements with the employer.

Trade unions and their delegates must not be confused with the works council (or *comité économique et social*, literally "social and economic committee"), which is a distinct employee representative body.

6.2 Employee Representative Bodies

Two main types of employee representative bodies should be distinguished in France: the works council and the trade union delegates.

Works Councils

The works council (*comité économique et social* – literally "social and economic committee") is composed of representatives elected by the employees during employee representative elections that occur, in principle, every four years. Members of the works council are not necessarily members of a trade union, although it is common in bigger companies.

The implementation of a works council is mandatory in companies with at least 11 employees. However, at this threshold, its role is limited. In companies with more than 50 employees, the works council must be informed and/or consulted on many economic, financial and employment matters. Its remit also includes the prevention of professional risks and the improvement of working conditions. An employer must seek and obtain the works council's opinion before taking any binding decision affecting the general running of the company. The works council does not have a veto right.

In companies with several separate establishments, works councils can be set up for each establishment, with one central works council covering the whole company. In addition, in large group companies, group works council can be set up to oversee projects at the group level.

Trade Union Delegates

Trade union delegates are employees chosen by trade unions that are representative within the company (ie, unions that scored at least 10% at the latest employee representative elections, among other requirements). Trade union delegates can negotiate and conclude collective bargaining agreements with the company. They are not members of the works council per se, although they may attend works council meetings, but without taking part in the votes.

Violation of Employee Representative Rights

Failure to respect provisions related to employee representatives and their protection may qualify as a criminal offence (*délit d'entrave*), which is punishable by a fine of up to EUR7,500 for legal representatives of the company (and EUR37,500 for the company itself) and/or one year of imprisonment, depending on the circumstances.

6.3 Collective Bargaining Agreements

Collective bargaining agreements are the result of discussions and negotiations between employers' representative organisations or the employers themselves on one hand, and employees' trade unions on the other hand. They can cover a wide range of matters relating to the employment, professional training and working conditions of employees.

Collective bargaining agreements can be entered into at different levels: at the industry level, at the company or group level, at the level of each establishment or group of establishments, etc. Industry-wide national collective bargaining agreements are very common and their application is, in most cases, mandatory in all companies belonging to the same industry. Agreements negotiated at the company level are also common.

7. Termination

7.1 Grounds for Termination

To terminate an employment contract, the employer must be able to justify its decision by reference to "real and serious" reasons. Such reasons should be documented and based on objective elements (eg, not getting along with a colleague would not be sufficient).

Personal or Economic Reasons

There are two types of reasons for dismissal:

- "personal reasons" are those reasons that are directly related to the employee's personal situation, such as misconduct (wilful or not), refusal to follow orders, lack of competence, etc; and
- "economic reasons" are reasons that are not related to employees themselves, but rather to economic circumstances, such as economic difficulties, decrease of revenues or orders, technological evolutions, reorganisation of the company necessary to maintain its competitiveness, closing down of a company/site, etc.

Procedures to dismiss vary depending on the reason for the dismissal. In particular, a dismissal for economic reasons and a dismissal of employee representatives (who are protected) may require the involvement of the works council. Specific obligations also apply to the dismissal of employees who have been declared unfit for work.

Collective Redundancies

If an employer wishes to dismiss more than one employee for economic reasons, specific collective redundancy provisions may be triggered. The procedures are complex and vary depending on whether or not the company employs more than 50 employees, and on the number of proposed redundancies.

In all procedures, the employer must inform and consult the works council, and send documentation related to the collective redundancy to the Labour Inspection. In addition, within companies employing at least 50 employees, if more than ten redundancies are planned over the same month, the employer will have to follow a specific consultation procedure and negotiate a "social plan" (*plan de sauvegarde de l'emploi*) with the employee representatives, providing for social measures to the benefit of the redundant employees (relating to redeployment leave, training, the prevention of psychosocial risks, additional severance indemnities, etc). The Labour Inspection is also closely involved in these projects and has to approve the social plan before it can be implemented.

7.2 Notice Periods

Notice periods are set by industry-level collective bargaining agreements and the Labour Code. They generally last between one and three months, depending on the employee's status. During the notice period, employees must receive their salary as usual, even if the company exempts them from working during the notice. The contract may be terminated without notice (or payment of notice) in the event of serious misconduct (*faute grave*) or gross negligence (*faute lourde*).

7.3 Dismissal for (Serious) Cause

There is no at-will employment in France. If an employer intends to dismiss an employee, it must at least have cause (ie, a "real and serious reason").

Process to Dismiss

To dismiss an employee, a specific process must be followed:

- the employee must be invited to a pre-dismissal meeting, which must not be held earlier than five working days following the invitation's delivery (or the first attempt to deliver it);
- during the pre-dismissal meeting, the employer will explain the reasons for the proposed

dismissal and give the employee an opportunity to respond;
- if the employer still wishes to dismiss the employee after the pre-dismissal meeting, it can notify the employee of their termination, no earlier than two working days after the pre-dismissal meeting; and
- this termination letter must explicitly mention the grounds for dismissal.

The final decision to dismiss must not be notified before the two working days have elapsed. Any dismissal decided in advance of this is deemed not to have a real and serious reason, which entitles the former employee to damages, usually calculated by reference to their salary and length of service.

Collective bargaining agreements can provide for a more favourable procedure.

Dismissed employees are entitled to a severance indemnity, which is determined by the law or the industry-wide collective bargaining agreement, on the basis of their average remuneration and seniority.

Misconduct

If the cause for dismissal is misconduct, the employer must, in principle, act within two months of learning of such misconduct, and the final decision to dismiss must be notified within one month after the pre-dismissal meeting. In the case of a dismissal for serious misconduct (*faute grave*) or gross negligence (*faute lourde*), the employee is dismissed without any notice or any severance indemnity.

Before initiating dismissal proceedings, or to mitigate operational risks between the employee's invitation to the pre-dismissal meeting and the meeting being held, companies can temporarily suspend the employee by way of "preventative suspension" (*mise à pied conservatoire*). This measure allows companies to carry out investigations on alleged misconduct while temporarily relieving the employee from their duties. Preventative suspension can lead to dismissal if the company finds that the employee's actions are sufficiently "real and serious", or to the employee's reintegration within the company, potentially including reclassification of all or part of the preventative suspension as a "punitive suspension" (*mise à pied disciplinaire*), if a minor misconduct was committed. In this case, remuneration will not be due to the employee during the punitive suspension period.

Economic Reasons

In respect of a dismissal for economic reasons (except for collective redundancies), additional steps must be observed, such as establishing the selection criteria that will be used to determine which employees will be made redundant and attempting to redeploy employees within the company or other group companies in France.

7.4 Termination Agreements

Mutual Termination Agreements

Indefinite-term employment contracts may be terminated by means of a "mutual termination agreement" (*rupture conventionnelle*) between the company and the employee. Under this agreement, both parties agree to terminate the employee's contract on a date of their choice, with the employee being entitled to a severance payment at least equal to the severance indemnity provided by the law or the industry-wide collective bargaining agreement.

Several steps must be followed to conclude a valid mutual termination agreement, including:

- the organisation of one or several meetings to discuss the agreement;
- the execution of a legal form, which can be supplemented by a written agreement; and
- a validation by the Labour Inspection.

The whole process usually takes approximately 40 days.

An individual mutual termination agreement is not a settlement agreement under which the employee waives their right to bring future claims; an employee who has only signed a termination agreement can still file claims in connection with the performance of their employment contract (such as requests for back pay).

Settlement Agreements

When disputes arise in relation to the termination of an employment contract, the parties can settle the dispute by way of a so-called "transaction" or "settlement agreement", whereby the employee waives their right to file an action in relation to their employment contract against payment by the employer of a settlement indemnity.

To be valid, a settlement agreement cannot be concluded before the actual termination of the employment contract. In other words, employers have to be very careful when opening discussions in view of a settlement when the contract has not yet been duly terminated (eg, when such termination is only contemplated or the process is in progress).

7.5 Protected Categories of Employee

In France, some employees benefit from a specific protection against dismissal, including employee representatives (eg, trade union delegates and works council members), pregnant employees, employees on sick leave caused by a work accident or professional illness, employees declared unfit for work (*inapte*) by the occupational doctor, etc. If the provisions relating to the protection of such employees are not followed, their dismissal will be deemed null and void.

Employee Representatives

Employee representatives benefit from a specific legal protection in connection with the performance and termination of their employment contract, including for six months after the end of their tenure (or 12 months for union delegates). Such protection also applies to employees who were candidates in the last employee representative elections but were not elected, and to employees who requested the organisation of such elections.

Aside from dismissals, this protection prevents the company from imposing on these protected employees any substantial change to their employment contracts or any change in their working conditions. In addition, to dismiss a protected employee, regardless of the reason, the company must consult the works council and request authorisation from the Labour Inspection, failing which any dismissal will be deemed null and void.

8. Disputes

8.1 Wrongful Dismissal

A dismissal can be deemed wrongful for many reasons. Most reasons relate to:

- the unjustified nature of the dismissal, whether based on personal or economic grounds, in which case the dismissal will be deemed unfair or without "real and serious reason"; or
- the discriminatory nature of the dismissal, or the violation of regulations relating to pro-

tected employees, or the cancellation of a social plan, in which case the dismissal will be deemed "null and void".

These different grounds for wrongful dismissal have different consequences.

Unfair Dismissal Indemnity

In the event of a dismissal without "real and serious reason", employees are entitled to an indemnity for unfair dismissal, which is fixed by the court within a minimum and maximum amount set by a scale (also called the *Barème Macron*) provided by the Labour Code, which depends on the employee's average salary and their length of service within the company.

Indemnity for Null and Void Dismissal

If the court finds that a dismissal was null and void, the employee is entitled to an indemnity of at least six months of salary, without any upper limit for the judge to consider.

Cases where a dismissal can be deemed null and void include the following:

- violation of a fundamental right;
- dismissal in connection with psychological harassment or sexual harassment;
- dismissal pursuant to a discriminatory measure (based on gender, race, medical history, etc) or following legal proceedings brought by the employee on the basis of anti-discrimination provisions;
- following the denunciation of a crime or offence (especially if the employee is considered a whistle-blower);
- violation of requirements concerning protected employees;
- violation of the provisions concerning the protection of pregnant employees, employees during leave related to birth or adoption of a child and employees who are victims of an accident at work or occupational disease; and
- annulment of the social plan and of the related redundancy procedures.

In addition, the employee has the right to be reinstated within the company (without the employer being allowed to object), and the indemnity (of at least six months of salary) will be awarded in addition to the salary payable to the employee for the period between the dismissal and the ruling on its nullity.

8.2 Anti-discrimination

Definition

The French Labour Code prohibits direct and indirect discrimination – ie, measures that are apparently neutral but result in a particular disadvantage for specific persons compared with others, due to discriminatory criteria. Discrimination is defined to be based on age, race, nationality, origins, gender, sexual orientation, marital status, handicap and disability, religion, pregnancy, home location, and trade union affiliation.

Duty of Care

Employers have a duty of care with respect to their employees' health and safety, and must provide a working environment that is free of discrimination. In particular, they may be held liable for the discriminatory actions of each of their employees if those acts are carried out in the context of their employment, even if it was without the approval or knowledge of the employer.

Burden of Proof

An employee who alleges discrimination on the basis of one or several of the criteria mentioned above has a lighter burden of proof:

- the employee must invoke only facts likely to demonstrate discrimination; and
- conversely, the company has to demonstrate that the difference of treatment observed in the facts brought by the employee is justified by objective non-discriminatory elements.

Claims

If a company is found to have discriminated unlawfully against an employee, the Labour Court can:

- declare the discriminatory act null and void (in particular, a dismissal or a sanction); and
- order the employer to pay damages to the employee.

In addition, an employee who is repeatedly discriminated against by their employer is entitled to claim that they have been constructively dismissed, provided that they can prove that the facts are serious enough, and to claim related compensation on the grounds of unfair dismissal (severance indemnity, indemnity in lieu of notice period, unfair dismissal indemnity of at least six months of salary, etc).

As per the French Criminal Code, refusing to hire an employee or disciplining or dismissing an employee on discriminatory grounds are also criminal offences punishable by up to three years of imprisonment and a fine of up to EUR45,000 (for the company legal representative) or EUR225,000 (for the company itself).

8.3 Digitalisation

While procedures and discussions with the French administrative authorities have become increasingly dematerialised (such as the submission of collective bargaining agreements, collective redundancy documentation or mutual termination agreements through online governmental platforms), dispute resolution in France still typically requires "in person" meetings/proceedings. Conducting court proceedings via video remains very rare, based on exceptional circumstances (such as during the COVID-19 pandemic).

9. Dispute Resolution

9.1 Litigation

Relevant Courts

Individual employment disputes between employers and employees are referred to the relevant Labour Court (*conseil de prud'hommes*), which is a tribunal composed of judges selected by the employee trade unions and the representative employers' organisations at a national level. A judgment panel includes an equal number of employee and employer representatives.

In addition, the Civil Court (*tribunal judiciaire*) has jurisdiction to hear all collective employment disputes, particularly in respect of collective negotiations and strikes, and matters concerning electoral law and elections in the workplace.

Class Actions

Since 2016, certain associations have been allowed to launch class action claims before the Civil Court in a limited number of cases, namely for the breach of provisions relating to:

- discrimination;
- health;
- environment; and
- data protection.

Such class actions may seek to obtain compliance with the law and, if appropriate, the award of damages.

Representation

Representation in front of the Labour Court is not mandatory, and employees sometimes represent themselves or are represented by certified trade union representatives instead of attorneys. However, attorney representation is mandatory in front of the Court of Appeal and the Civil Court.

9.2 Alternative Dispute Resolution

Alternative dispute resolution is not common practice in France; in the event of a dispute, the matter is usually referred to the courts. That being said, in practice, collective labour disputes such as strikes may be resolved by various means other than judicial proceedings, such as arbitration, mediation and conciliation, which constitute alternative dispute resolution.

- Conciliation is an optional alternative dispute resolution method for collective labour disputes whereby the parties try to reach a mutually acceptable settlement of their dispute via a third party. Conciliation takes place before a commission consisting of three members, representing employees, employers and the state. This type of conciliation process must not be confused with the conciliation hearing, which takes place before the Labour Court and is part of the common judicial procedure.
- Mediation is another alternative dispute resolution method, which may be implemented following a failure of the conciliation process or upon request. Unlike the conciliator, the mediator has certain powers (to make enquiries, seek expert opinions, etc). Mediation can be used in collective or individual labour disputes.
- Arbitration is a third alternative dispute resolution method whereby the parties entrust an arbitrator to take a decision either at law or in equity with regard to the dispute. However, case law has specified that arbitration clauses provided in employment contracts are not enforceable against individual employees – ie, employees can still choose to refer their case to the Labour Court instead, even if a clause provides for mandatory arbitration.

9.3 Costs

Courts in France typically order the losing party to pay for the costs of proceedings (*entiers dépens*).

In addition, parties usually make a specific claim for the payment of a lump-sum indemnity pursuant to Article 700 of the Civil Procedure Code, which covers their attorney's fees and other legal fees in whole or in part. In most cases, the losing party is sentenced to pay this indemnity, although its amount may be lowered if the court deems it to be too high, which it is more likely to do when the losing party is the employee.

Trends and Developments

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Bredin Prat was founded in 1966 and has offices in Paris and Brussels. The firm now has more than 200 lawyers committed to the highest standards of excellence, to advise its French and international clients in complex or sensitive transactions or contentious matters. Bredin Prat's practice areas include corporate law (M&A, private equity, capital markets, governance), litigation and white-collar crime, competition and EU law, arbitration, tax, employment, financing, restructuring and insolvency, public law, tech law, and financial services and insurance regulatory. Cross-border matters represent more than two-thirds of the firm's work.

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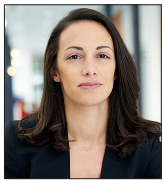

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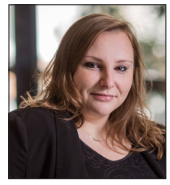

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BREDIN PRAT

Employment in France: an Introduction

There have been three major developments in French employment law and practice in the past year:

- the alignment of French law with EU regulations in respect of the acquisition of rights to paid leave by employees on sick leave;
- the final publication of the French Profit-Sharing Act; and
- the 2024 French Immigration Act.

Acquisition of Rights to Paid Leave During Periods of Sick Leave

A new French law dated 22 April 2024 (the "EU Compliance Act") has brought French law into line with European legislation, by:

- providing for the acquisition of rights to paid leave during any period of sick leave;
- setting a carry-over period for paid leave not taken due to illness; and
- introducing an obligation for the employer to give employees information on their paid leave entitlement.

Provisions that were not compliant with European Union law

Under French law, employees acquire 2.5 days of paid leave per month, up to a maximum of 30 working days (ie, five weeks) per year, provided that they work or are on a type of leave that is treated as work (such as maternity, paternity or adoption leave, national holidays, sick leave caused by occupational injury or illness lasting less than one year, etc).

Historically, Article L. 3141-5 of the French Labour Code provided that sick leave not caused by occupational injury or illness and sick leave caused by occupational injury or illness lasting more than one year were not treated as working time. In practice, this meant that employees who were on sick leave for more than one year did not acquire any paid leave.

These provisions were not compliant with:

- Article 7 of EU Directive 2003/88/EC of 4 November 2003;
- Article 31, paragraph 2, of the Charter of Fundamental Rights of the European Union; and
- case law of the European Court of Justice (ECJ), which consistently rules that employees on sick leave and employees actively

working should be treated equally, and has sanctioned member states (including the French State) on several occasions for violation in this respect.

This non-alignment of French law with applicable EU law led to numerous calls for reforms and legal disputes in France, culminating in two rulings of the French Supreme Court on 13 September 2023, in which it disregarded French regulations that were contrary to EU law and ruled that employees could acquire rights to paid leave during any period of sick leave, regardless of its cause or duration.

These latest rulings prompted the French government to propose a bill to bring national law into line with EU law, which was approved by the National Assembly and the Senate and came into force on 24 April 2024.

New rules under the 2024 EU Compliance Act

Impact on accrued rights to paid leave

All periods of sick leave, regardless of their cause, allow employees to accrue rights to paid leave, subject to certain conditions set forth by the law, as follows:

- for sick leave due to non-occupational injury or illness, employees earn two working days' leave per month (not 2.5), up to a maximum of 24 working days per year; and
- for sick leave due to occupational injury or illness, employees earn 2.5 working days' leave per month (ie, 30 working days if absent for the entire year).

At the end of the period of sick leave (whether due to occupational injury or illness, or not), the employer must inform the employee of the number of days of paid leave they have, and the date by which these days may be taken. This information must be provided within one month of the employee's return to work, by any means that provides proof of the date of receipt – eg, by means of the payslip.

Impact on period during which paid leave may be taken

The new Act also introduces a carry-over period of 15 months for employees who are unable to take all or part of their paid leave during the usual period (which is typically of 12 months), due to sick leave. The 15-month period begins on the date on which the employee, after returning to work, receives the information on the number of leave days they have and the date by which these days may be taken.

The carry-over period may be set at more than 15 months by means of a collective bargaining agreement.

Retroactivity of the 2024 EU Compliance Act

The new provisions apply for the future, but also for the past, subject to the conditions set forth below.

Retroactivity to 1 December 2009

The new provisions are applicable to the period from 1 December 2009 to 24 April 2024, subject to final court rulings regarding the same subject matter, or subject to more favourable contractual stipulations being in force on the date when the rights to paid leave were acquired. However, the additional rights to paid leave acquired between 1 December 2009 and 24 April 2024 cannot exceed 24 working days of leave per year, after taking into account days already acquired for the same year.

The Act does not extend this retroactivity rule to sick leave lasting more than one year caused by occupational injury or illness. However, some

legal commentators consider that employees impacted by such sick leave could still seek additional days of paid leave based on the rulings of the Supreme Court of 13 September 2023. Potential litigation on this matter will have to be monitored closely.

Statute of limitations

For current employees, any action to claim additional paid leave due to past periods of sick leave must be brought within two years of the EU Compliance Act coming into force (ie, by 23 April 2026 at the latest), failing which the claim will be time-barred.

However, the Act is silent on the case of employees whose employment contracts have been terminated. Some authors consider that the three-year statute of limitations applicable to wage claims should apply as from the date of termination of their employment contract. However, it could also be argued that this three-year period should apply only as from the date on which the employees had knowledge of their right to additional paid leave – eg, as from the entry into force of the EU Compliance Act.

This unresolved point will likely give rise to litigation in the coming years.

Practical consequences of the EU Compliance Act

These new provisions put a significant financial burden on companies, and have already had practical effects, such as:

- many employees have, including through their trade union or works council representatives, demanded that their employer comply with the new provisions and add the required number of days to their paid leave counters (for periods of sick leave dating from as long ago as 1 December 2009);
- actions brought before the lower courts by current and former employees claiming the additional days of paid leave for past periods of sick leave (or payment of damages in lieu thereof) have been successful in a significant number of cases; and
- as part of the certification of annual financial statements, statutory auditors have started to request that companies book provisions for potential paid leave claims (although the law does not provide for such a requirement).

In the context of M&A transactions, specific caution is therefore advisable on these matters, including:

- conducting specific due diligence to assess a company's practices and potential risks;
- seeking explicit representations and warranties and/or specific indemnities to cover potential liabilities; and/or
- negotiating relevant price adjustment mechanisms.

Explicit waivers of claims should also be included in individual settlement agreements concluded with employees.

The Profit-Sharing Act

On 10 February 2023, under the aegis of the French government, employer representative bodies and employee trade unions concluded a national interprofessional agreement on the sharing of company profits with employees. Following this agreement, the government announced its intention to transpose it into law and put a bill before Parliament to this effect. After several rounds of debates in the National Assembly and the Senate, the final Profit-Sharing Act was adopted on 29 November 2023, and

then completed by two Decrees, dated 29 June 2024 and 5 July 2024.

Existing profit-sharing schemes

French law provided for several profit-sharing mechanisms before the adoption of the Profit-Sharing Act, including the following in particular.

- "*Participation*": a profit-sharing scheme allowing part of the company's profits to be redistributed to employees. The amounts to be shared with employees are determined using a statutory formula based on the company's taxable profits. Its implementation is compulsory in companies with 50 or more employees and sufficient profits, but smaller companies can also set up such a scheme on a voluntary basis.
- "*Intéressement*": a non-mandatory profit-sharing scheme, which gives employees a financial stake in the company's results or performance. When set up in companies that are also subject to mandatory "*participation*" schemes, "*intéressement*" can be implemented in lieu of "*participation*", provided it is at least as favourable as the "*participation*" statutory formula.
- Profit-sharing bonuses ("*primes de partage de la valeur*"), which were created in 2018 following the *gilets jaunes* (yellow vests) movement with a view to supporting employees' purchasing power. Such bonuses must be set up either by collective agreement or by a unilateral decision of the employer after consultation of the works council (if any).

All these mechanisms are subject to favourable social security and tax treatments (especially deductibility from corporate income tax, exemption from social security contributions and "CSG-CRDS" welfare taxes, and exemption from employee income tax), to encourage companies to implement them, including on a voluntary basis.

Amendments and new provisions introduced by the Profit-Sharing Act

Encouraging profit-sharing in small companies

Companies with fewer than 50 employees can voluntarily set up a profit-sharing scheme that may be less favourable than the statutory formula applicable to bigger companies (either by adhering to an industry-level collective agreement or by negotiating at a company-wide level). Employee trade unions and unions representing the employers at the level of each industry must have opened negotiations in this respect by 30 June 2024 at the latest.

From 1 January 2025, companies with between 11 and 49 employees must implement at least one profit-sharing scheme if they are profitable (ie, if they have had net income equal to at least 1% of turnover for three consecutive years). Companies that already have a profit-sharing scheme in place are not affected. This provision is introduced on an experimental basis from 1 January 2025 to 30 November 2028.

Introducing new measures triggered by an increase in company value or exceptional profits

A new obligation to negotiate the introduction of an additional bonus mechanism in respect of exceptional profits applies to companies with 50 or more employees and subject to mandatory "*participation*". The definition of "exceptional profits" agreed by the employer and employee representatives must take into account the size of the company, its business sector, profits made in case of buy-back of the company's own shares, and past profits or past external exceptional events. Companies that already have a "*participation*" or "*intéressement*" agreement

must have started negotiating on this issue by 30 June 2024 at the latest.

A new optional scheme known as the "company value-sharing plan" ("*plan de partage de la valorisation de l'entreprise*") has been introduced. This plan would be set up for a duration of three years. If the company's value increases during the three years of the plan, employees would be entitled to a "company value sharing bonus". This plan may also be set up at the group level.

Facilitating the grant of profit-sharing bonuses and free shares

Specific provisions are also included with respect to existing mechanisms, to introduce more flexibility and simplify their implementation.

- Allocation and payment of the profit-sharing bonus is more flexible, as companies can now grant two profit-sharing bonuses per year (as opposed to one previously), which can be paid in several instalments, capped at one payment per quarter, and subject to an annual cap of EUR3,000 (or EUR6,000 in certain circumstances). Employees may choose to invest this bonus in an employee savings plan. In companies with fewer than 50 employees, the bonus is exempt from tax and social security contributions, and exempt from income tax until 31 December 2026 for employees earning less than three times the minimum wage (ie, EUR5,300.76 gross per month in 2024).
- Advances on the "*participation*" and "*intéressement*" bonuses can be made, subject to the relevant schemes providing for the possibility of such advances and subject to the agreement of the employee. "*Intéressement*" schemes can be tailored to benefit employees with lower salaries by setting a minimum and/or maximum salary to be used as the basis for calculating the "*intéressement*" bonus, when such bonus is proportional to the employees' salary.
- Companies are allowed to grant a greater number of free share awards to employees (eg, the cap was raised from 10% to 30% of the company's share capital if the free share plan is only open to certain employees, and from 30% to 40% of the company's share capital if the free share plan is open to all employees).
- Employees have three more opportunities allowing them to release funds held in an employee savings plan, which are otherwise locked up for five years:
  (a) to purchase a vehicle (including e-bikes) powered by electricity, hydrogen or both;
  (b) to finance energy-saving renovations to their home; or
  (c) to support caregiver activity provided by them or their partner/spouse.
- Company savings and retirement plans must include at least one green and socially responsible fund meeting the criteria for financing the energy and ecological transition or socially responsible investment. The authorised labels have been specifically listed in a Decree of 29 June 2024 and notably include SRI funds.

The 2024 Immigration Act

The Immigration Act was published on 27 January 2024, after a year of intense parliamentary debate and after a decision of the French Constitutional Council that censured several controversial measures included in the initial draft. Its main provisions relating to employment law are summarised below.

Facilitating the regularisation of the status of illegal workers employed in high-demand areas/jobs

The Immigration Acts opens up a new, more accessible route to status regularisation through work, by allowing the issuance of a one-year temporary residence permit to an illegal worker who meets certain criteria, including:

- having worked in a high-demand area and/or in a high-demand job for at least 12 months in the past 24 months;
- currently working in such high-demand area/job; and
- having been living in France for the past three years without interruption.

This procedure applies on an experimental basis until 31 December 2026.

New provisions on the granting of residence permits and work permits

Multi-annual residence permits (up to four years) can now be granted to talented or skilled workers, subject to a minimum salary (approximately EUR54,000 per year), who have at least the equivalent of a Master's degree or, under certain conditions, are recruited by an "innovative company" or in the context of an intragroup mission.

The Immigration Act also provides that the renewal of a multi-annual residence permit is subject to proof that the foreign worker resides in France on a habitual basis.

More severe penalties for companies employing non-authorised workers

The Immigration Act overhauls the range of penalties applicable for employing a foreigner who is not authorised to work. It creates an administrative fine, which is paid as many times as there are illegal workers employed (for 2024, this was up to a maximum of EUR20,750, or EUR62,250 in the case of a repeated offence), and abolishes the company's special contribution that was previously payable to the French Immigration Office (OFII) and the contribution to the cost of returning the foreign worker to their country.

The entry into force of these provisions is subject to a Decree, which has not yet been published.

In addition, the amount of the criminal fine has been increased, as follows:

- from EUR15,000 to EUR30,000 for the legal representative of the company;
- from EUR75,000 to EUR150,000 for the company as a legal person; and
- from EUR100,000 to EUR200,000 if the offence is committed as an organised gang.

Such fine is payable as many times as there are illegal workers employed.

As labour and employment law is a key area of concern for politicians, the uncertain political context in France following the parliamentary elections of June-July 2024 may lead to various changes in the applicable regulations. The situation will have to be monitored closely.

GERMANY

Law and Practice

Contributed by:
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Pusch Wahlig Workplace Law

Contents

Pusch Wahlig Workplace Law is one of Germany's leading employment law firms. A dedicated team of 70 employment specialists in six locations provides legal advice all over Germany. The practice has particular experience in business restructuring, including mass workforce reductions, as well as reconciliations and social plans. The law firm further advises on compliance, remuneration and works council matters and represents companies in employment litigation, as well as on the implementation of SE structures and employment-related data protection. The mandates originate from a variety of sectors including financial services, technology, FMCG and many more, and the firm advises both large multinational corporations as well as prominent start-ups. As a member of L&E Global, Pusch Wahlig Workplace Law is one of the cornerstones of a leading global alliance of employment law firms and regularly advises clients on cross-border matters.

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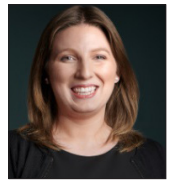
Tobias Pusch is the founder and managing partner of Pusch Wahlig Workplace Law. He advises national and international employers and executives on issues of individual and collective employment law. He has particular experience in corporate acquisitions, restructuring, SE formations, compliance matters, complex court proceedings and negotiations regarding collective bargaining agreements and works agreements, as well as reconciliation of interests and social plans. His clients are DAX-listed and large multinational companies, prominent start-ups and mid-sized companies, as well as top executives. Known for sustainable and innovative solutions, Dr Tobias Pusch is one of Germany's leading employment law specialists.



Teresa Gabele is a managing associate at Pusch Wahlig Workplace Law based in the Berlin office. The scope of her practice includes all issues of individual and collective employment law. She is specialised in drafting employment contracts and termination agreements. In addition, she has particular expertise in matters regarding senior executives, as well as extensive experience in immigration law, especially as it relates to access to the labour market for foreign employees and managers.

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1. Employment Terms

1.1 Employee Status

In Germany, there is no longer a legal distinction between blue-collar and white-collar workers. According to the legal definition, an employee in Germany is someone who is obliged to perform work in personal dependence, bound by instructions and determined by others, Section 611a, Paragraph 1 of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB). This is to be distinguished from a service contract, which is intended for managers or freelancers, for example.

The status of employee is associated with far-reaching protection rights.

1.2 Employment Contracts

Under the principle of freedom of contract, employers and employees are, in principle, free to negotiate employment contracts. German employment law recognises fixed-term and permanent employment contracts. If the fixed term has not been expressly agreed upon in writing before the start of employment, the employment contract is automatically concluded for an indefinite period.

Agreements between employers and employees can, in principle, be made orally or in writing; written contracts are only mandatory in exceptional cases. However, the German Proof Act provides for the obligation on the part of the employer to verify and document employment. This means that the essential terms and conditions of employment must be set out in writing and signed by the employer.

All legal actions which serve the purpose of terminating the employment relationship (ie, a termination agreement, a fixed-term contract and a notice of termination) are required to be conducted in writing (wet ink). Violations of this requirement may result in the action being deemed invalid.

1.3 Working Hours

Principle

According to Section 3 of the German Working Hours Act (*Arbeitszeitgesetz* – ArbZG), the maximum working day is eight hours. Working days include Saturdays. Thus, the maximum number of weekly working hours is 48 (six times eight hours).

The daily number of hours can be extended to ten but must be counterbalanced within a period of six calendar months or 24 weeks to the average maximum weekly number of 48 working hours, according to Section 3 of the ArbZG.

Exceptions

Exceptions to this rule are possible to a limited extent. They can be made through a collective bargaining agreement or by the supervisory authority and are governed by Sections 7 and 15 of the ArbZG. For example, it is permissible for collective bargaining agreements to stipulate that working hours may exceed ten in the case of regular and substantial standby duty, or for the period of compensation to be extended to one year.

There are also special provisions for some categories of employees such as minors, pregnant and nursing mothers, and people with severe disabilities.

Part-Time Working Hours

According to Section 2, paragraph 1 of the German Act on Part-Time Work and Fixed-Term Contracts (*Teilzeit- und Befristungsgesetz* – TzBfG), part-time work is anything less than full-time work. There is no specific threshold stipulated for the number of working hours per week to be considered as part-time employment. Any number of hours can be agreed by contract.

Rest Breaks and Rest Periods

A distinction is made between rest breaks and rest periods. The rest period is the time between the end of the working day and the resumption of work. Rest breaks, on the other hand, are (unpaid) breaks during normal working hours.

According to Section 5, paragraph 1 of the ArbZG, the rest period must be at least 11 hours and may not be interrupted. It should be noted that standby or on-call duty is considered working time and is therefore not permitted during the rest period. In the case of on-call duty, the rest period may be reduced under certain circumstances in accordance with Section 5, paragraph 2 of the ArbZG.

In principle, employees may not work more than six hours without a break. If an employee works between six and nine hours, a rest break of at least 30 minutes must be taken. If they work for more than nine hours, the rest break must be at least 45 minutes (Section 4 of the ArbZG).

The (Electronic) Recording of Working Hours

After the Federal Labour Court (dated 13 September 2022 – 1 ABR 22/21) ruled that employers in Germany were legally obliged to record the working hours of their employees, the Ministry of Labour presented a draft law on 19 April 2023 pertaining to the obligation to record working hours electronically. As of now, the bill is still in the legislative process and has not yet been passed.

1.4 Compensation

Minimum Wage

The introduction of the Minimum Wage Act (*Mindestlohngesetz* – MiLoG) in January 2015 established a statutory minimum wage in Germany. Initially, the minimum wage was EUR8.50 per working hour, and this has since been steadily increased based on the recommendations made by an independent minimum wage commission. The current statutory minimum wage is EUR12.41 per working hour, which increases to EUR12.82 as of 1 January 2025.

The MiLoG generally applies to all employees. However, there are exceptions where the statutory minimum wage does not apply. For example,

minors who have not completed their apprenticeship or apprentices and trainees during a compulsory internship are excluded from the minimum wage requirement. Violations against the obligation to pay minimum wages can result in fines of up to EUR500,000.

Bonus Payment and 13th Month Salary

A bonus payment can either be agreed as a voluntary additional benefit or as a contractually fixed bonus and is paid voluntarily by the employer for work performed. It is paid in addition to the annual salary.

Whether a 13th salary is paid depends on the industry and the employer: there is no general entitlement. A 13th salary can also be paid as a vacation or Christmas bonus. Generally, it is calculated on the basis of the gross salary and is also subject to social security and tax liability.

Supplements

Regular remuneration can be increased by supplements. For instance, higher payments for work on Sundays and public holidays, or night work, are both permissible and common.

Overtime is often compensated by time off in lieu. However, it is also possible to agree on compensation. Under certain conditions, it is permissible to count overtime as compensated for with regular remuneration. However, additional remuneration, including supplements, is possible as well. Overtime can be remunerated at a higher as well as at a lower rate than regular working hours.

1.5 Other Employment Terms

Vacation

Vacation is paid time off. Section 3 of the German Federal Leave Act (*Bundesurlaubsgesetz* – BUrlG) stipulates that employers must grant their employees a minimum number of 24 vacation days per calendar year if they work six days a week. For employees with a five-day week, which is more common in Germany, the statutory leave entitlement is 20 days per year. Deviations from the minimum entitlement may only be made to the benefit of the employee.

The full entitlement for paid leave arises after the employee has been employed for more than six months; before that, the employee is only entitled to partial leave (Section 4 of the BUrlG). If an employee leaves the company during the current calendar year, the leave already taken can be deducted by the new employer (Section 6, paragraph 1 of the BurlG).

Difficulties arise if the statutory minimum leave was not fully claimed in the current calendar year. Pursuant to Section 7, paragraph 3 of the BUrlG, leave days can only be transferred to the next calendar year until the end of March of that following year and only if the full leave could not be taken earlier for operational reasons. Thereafter, the leave entitlement lapses.

However, according to the rulings of the ECJ of 6 November 2018 (Cases C-619/16 and C-684/16) and the Federal Labour Court of 19 February 2019 (Case 9 AZR 541/15), unclaimed leave does not automatically expire at the end of the year: the employer must remind the employee beforehand and thus enable them to claim the leave while it is still possible to do so. This requires the employer to provide explicit information about the scope of the statutory leave, how to claim the leave and under what circumstances the employee might risk forfeiting the leave. HR processes have to be re-designed to meet these requirements.

What might be of particular interest in this context is the fact that the ECJ ruled in its judgment of 22 September 2022 (Case C-120/21) that leave days do not automatically expire after three years if the employer has failed to remind the employee in good time to take that leave. This was subsequently also decided by the Federal Labour Court in its ruling of 20 December 2022 (Case 9 AZR 266/20).

Sick Leave

If an employee is sick, they are entitled to receive paid sick leave from the employer for a period of six weeks according to the Continued Pay Act (*Entgeltfortzahlungsgesetz* – EFZG). This entitlement arises only if the employee has been employed by the company for at least four weeks. After the six-week period of paid sick leave has ended, employees usually qualify for sick pay from their health insurance provider.

Maternity Leave and Parental Leave

Section 3 of the German Maternity Protection Act (*Mutterschutzgesetz* – MuSchG) stipulates special protection periods for mothers before and after childbirth. Usually, expectant mothers are subject to an employment ban six weeks before the calculated date of birth and eight weeks (12 weeks in the case of multiple births/premature births/identified disabilities) after the birth.

If an employee is on maternity leave, their vacation entitlement does not expire (Section 24 of the MuSchG). In principle, the same is true for employees on parental leave. However, according to Section 17, paragraph 1 of the Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz* – BEEG), the employer has the right to reduce the annual leave entitlement by one-twelfth for every full month of parental leave.

Confidentiality and Non-disclosure Obligations

Employees are subject to statutory confidentiality obligations with regard to the trade and business secrets of their employers. This obligation is recognised as a secondary obligation under the employment contract and continues to exist even after termination of the employment relationship. A breach of this obligation during the employment relationship is punishable under Section 23 of the Law on the Protection of Trade Secrets (*Gesetz zum Schutz von Geschäftsgeheimnissen* – GeschGehG).

An obligation to maintain confidentiality that goes beyond the statutory obligation to do so must be stated specifically and unambiguously in the employment contract, according to the Federal Labour Court. Clauses which oblige the employee to keep all business transactions confidential after the termination of the employment relationship are invalid, since, in effect, they would prevent the employee from taking part in any activity for another competitor in the same business sector.

Liability

Employees are generally not exempt from liability for damage caused by them at work, but some provisions must be observed by the parties due to the special characteristics of the employment relationship. In particular, the principle of internal loss adjustment must be taken into account (analogous to Section 254 of the German Civil Code (BGB)), which is based on the understanding that in a long-term employment relationship, it is to be expected that the employee will occasionally make mistakes. Small mistakes, however, can have significant financial consequences for the employee, such as damaging machines worth millions through negligent behaviour. The employer, meanwhile, receives the profit of the

employee's work and thus also has to bear the possible risk of loss which might occur through mistakes or negligent behaviour. Accordingly, liability relief is granted to employees. In order to take advantage of this aspect, liability is allocated between the employer and the employee based on the degree of fault within the scope of the principle of internal loss adjustment.

When an employee injures a colleague during work-related activities, this usually constitutes an occupational accident, and the statutory accident insurance usually pays for the damages (Section 105 of the German Social Code VII (*Sozialgesetzbuch VII* – SGB VII)).

2. Restrictive Covenants

2.1 Non-competes

For as long as the employment relationship exists, employees and other staff members are subject to a statutory non-compete obligation, in accordance with Section 60 et seq of the German Trade Act (*Handelsgesetzbuch* – HGB). The statutory non-compete obligation ends when the employment relationship ends. It does not apply to the period after the termination of the contractual relationship. For this reason, post-contractual non-compete clauses are commonly agreed upon in employment and service contracts. These stipulate that the staff member may not use the knowledge and skills acquired in their previous employment or service relationship in the same business area as their previous employer for a certain period of time.

For such a clause to be effective, the employer must have a legitimate business interest in the non-compete clause. In addition, the non-compete clause must be reasonable in terms of place, time and content. To compensate the staff member for the disadvantages caused by such a clause, the staff member is entitled to a compensation payment of at least 50% of their last contractual remuneration. Furthermore, the non-compete clause must be agreed in writing and the provisions must be formulated clearly and unambiguously in accordance with the principle of certainty. The duration of the post-contractual non-compete clause is limited to a maximum of two years after the end of the contractual relationship.

2.2 Non-solicits

The solicitation of employees and customers by a competitor is fundamental to the principle of open competition and is therefore permitted unless an agreement has been made to the contrary. However, under certain circumstances, solicitation may be anti-competitive pursuant to Section 3 of the German Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* – UWG) or Section 4, Number 4 of the UWG. This may be the case, for example, if an objective assessment of the circumstances shows that the behaviour in question is primarily aimed at impairing the competitiveness of the competitor instead of promoting the competitor's own competitiveness. This is also the case if unfair methods are used or if the behaviour in question impairs the competitor in such a way that they are no longer able to compete adequately on the market of their own accord.

The contractual agreement of non-solicitation clauses is permitted. Employers and staff members may agree that the solicitation of employees within a certain period of time after termination of the contractual relationship is subject to a contractual penalty. The clause must be in writing and may be valid for up to a maximum of two years. Whether a compensation payment is required, is controversial. However,

non-solicitation clauses are often combined with non-compete clauses, which means compensation has often already been paid (see **2.1 Non-competes**).

3. Data Privacy

3.1 Data Privacy Law and Employment

Employers must record and process the personal data of the employee in order to make hiring decisions or, after hiring, in order to implement or to terminate the employment relationship. Data protection in the employment relationship aims to protect the employee's general personal rights. Therefore, employees have a right to be informed about what personal data is processed by the employer for what purpose.

There is not just one single data protection law. There are various provisions regarding data protection obligations. The most important data protection obligations for employers are stipulated in the General Data Protection Regulation (GDPR). The GDPR came into force in all EU member states on 25 May 2018. This regulation applies directly in the member states and thus introduces standardised rules.

The German legislator made use of the opening clause of Article 88, paragraph 1 of the GDPR. In addition to the GDPR, the Federal Data Protection Act (*Bundesdatenschutzgesetz* – BDSG) applies in Germany, which contains a special provision on the employment relationship in Article 26, paragraph 1 of the BDSG and governs the processing of personal data within that relationship.

The GDPR and the BDSG are primarily meant to protect personal data. In employment law, this means, in particular, information contained in an employee's personnel file (eg, application documents, employment agreements, employee master data, sick days and absences, and evaluations).

Data protection regulations are particularly relevant when dealing with personnel files, evaluations and other personal documents of employees. The employer is subject to strict obligations regarding the deletion of data and must keep track of different deletion deadlines in order not to risk a data protection breach.

Employers must also take into account that the transfer of data to third countries, meaning outside the scope of the GDPR, must be viewed critically as it can lead to data protection breaches. Therefore, some tools or business models cannot be implemented without data protection restrictions and checks.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Citizens of the EU or EEA (European Economic Area) member states as well as Swiss citizens can freely take up employment in Germany. They require neither a residence permit nor a special work permit under immigration law. These people are therefore employed in Germany under the same rules as German employees.

A further group of people who are allowed to commence employment without restrictions in Germany are those whose application for asylum has been granted.

In contrast, non-EU/non-EEA/non-Swiss citizens require a valid residence permit to commence employment in Germany. This permit must be obtained in advance. The employment

of a worker without such a permit is considered illegal and is subject to fines. An employer who employs a non-EU citizen must therefore check in advance whether the person has a residence permit that allows them to work in Germany and must keep a copy of this permit for the duration of the employment. In certain cases, the employer is also obliged to inform the Foreigners Authority about the end of employment of a non-EU citizen.

4.2 Registration Requirements for Foreign Workers

For citizens of EU/EEA member states and Swiss citizens only, the general obligation to register with the residents' registration office applies, as is the case for all residents in Germany including German citizens. This also applies to asylum-seekers whose application for asylum has been granted.

Citizens of certain countries may enter Germany without a visa and can apply for a residence permit once they are in the country. Nationals of other countries must apply for their residence permit before entering Germany.

In some cases, the Federal Employment Agency must approve the residence permit. Whether such approval is required and under what conditions it is granted depends on the person's educational qualification, their professional field and the existence of concrete job offers.

5. New Work

5.1 Mobile Work

Mobile working means that employees are not tied to a fixed office at home or to the employer's office space. They perform their work on a mobile basis at self-determined and often varying locations outside the company.

Mobile working must be distinguished from working from home or teleworking in particular. Unlike mobile working, working from home is tied to a fixed workplace within the employee's private space.

The German Working Hours Act (ArbZG), the German Occupational Health and Safety Act (*Arbeitsschutzgesetz* – ArbSchG) and related occupational health and safety regulations apply to mobile work in the employment relationship. In addition, regulations on mobile work can also be found in some company agreements and collective agreements. While the Workplace Ordinance (*Arbeitsstättenverordnung* – ArbStättV) applies in the context of working from home, it does not apply to mobile work, as it would be impossible for the employer to ensure the safety of a table or chair in a café.

Data protection precautions must be observed when working from home as well as in mobile work, just as they are when employees work in the office. The employer must ensure that suitable protective measures are in place.

There is no legal entitlement to mobile working, although this has been debated at a political level as a result of the COVID-19 pandemic. Employers must instead reach a corresponding agreement with their employees or a work agreement with the works council.

5.2 Sabbaticals

There are different types of sabbaticals which can be agreed upon between the employer and employee. The employee can save up a "credit" of working hours in a long-term account and use the accrued hours for a longer leave of absence.

The employee then receives a monthly payment during the sabbatical, which they have earned through preparatory or follow-up work. Alternatively, the employee may voluntarily waive their pay or have their employment converted to part time. It is also possible, but not as common due to social security reasons, to take unpaid leave, terminate the employment relationship with a promise of re-employment, or agree to suspend the employment relationship.

When employers introduce the option of taking a sabbatical, they must consider the implications for social security contributions. Some types of sabbaticals can result in disadvantages for the employee under social security law if the sabbatical exceeds a period of one month. In this respect, the nature of the agreement under employment law is often guided by its effects under social security law.

In the private sector, there is no general entitlement to a sabbatical under employment law. In the public sector, however, there is.

5.3 Other New Manifestations

The workplace is currently facing a fundamental transformation. New technologies, digitalisation, demographic change and increasing globalisation are changing how, where and when we work. The relationship between employers and their employees is being newly defined and offers a wide range of opportunities.

Various "New Work" Models

Agile working

The key component of the concept of agile working is the ability within a company or organisation to react flexibly and swiftly to change. It is shaped by the establishment of short-term goals, feedback, small teams, and quick decision-making processes. In particular, design thinking and holacracy (a style of management where leadership roles are not subject to a traditional hierarchy of command) are among the key approaches to agile working. Instead of relying on homogeneous teams, agile working focuses on interdisciplinarity, and instead of a rigid management style, there is a fixed set of steps to be followed by the teams.

In terms of employment law, agile working leads to the dissolution of operational and hierarchical structures. Besides corresponding adjustments at the level of employment contracts, employers need to take organisational precautions, in particular with regard to the directive powers in the company or the structures under works constitution law. Typically, in this type of work, reporting lines are less clear. Hence, power is not as obviously distributed as in conventionally structured organisations.

The first cases involving agile work have been brought to the German courts, which are particularly involved in assessing these cases in terms of works constitution law. In a recent ruling it was decided that the introduction of agile work may trigger co-determination rights for the works council (ArbG Bonn, dated 6 October 2022 – 3 BV 116/22). Further developments in the assessment of agile work remain to be seen.

Crowd working

Crowd workers offer their services via online platforms and can thus work from anywhere in the world. Companies hire them primarily to perform tasks that require a high volume of work for which in-depth knowledge of corporate structures is not relevant.

The legislative process at the EU level is working to provide a distinct legal framework for crowd work. In this context, the status of crowd work-

ers as employees and the distinction between them and self-employed employees is the subject of some controversy in Germany, and these questions are not always assessed uniformly under current law.

Desk sharing

In this type of work, fixed workstations are not assigned. Instead, all employees can choose which desk to work at. Desk sharing is also accompanied by increased flexibility in working hours. Flexitime is becoming more common, and the decision as to whether to come into the office or work from home is, increasingly, left to the employee.

Challenges Posed by the New Work Models to Germany's Employment Law

Changes in approach to work in Germany have occurred so rapidly in recent years that, in many areas, the country's employment law has not yet been adjusted accordingly. The following areas are particularly challenging.

Entering an employee's home to carry out risk assessment

Before an employee can work from home for the first time, the employer must carry out a risk analysis of the remote workplace, which, inevitably, requires the employer to enter the employee's home to assess its suitability. However, this necessity clashes with the fundamental legal right of the inviolability of the home – a right which allows the resident to grant or refuse access to third parties at their own discretion.

(Work) accidents

A further problem is the assessment of an accident which occurs at a remote workplace. First, it must be determined whether an accident really took place "at work" according to Section 8, paragraph 1 of the German Social Code IX (*Sozialgesetzbuch IX* – SGB IX) or whether it constitutes a "normal" accident within the employee's personal sphere of risk.

In each individual case, it must then be determined whether the activity that caused the accident is covered by insurance and whether it therefore qualifies as a work accident. In other words, it must be determined whether the activity that caused the accident was of a private or business nature. For example, getting up to take laundry out of the washing machine during working hours is considered a private act, while fetching a print-out from the printer for work purposes is considered to be a purely occupational act and is therefore covered by insurance.

Adherence to working hours

As work becomes more flexible, the employer is increasingly losing control over when and for how long employees work. This can be problematic if the employee disregards the legal requirements when planning their working hours. The allocation of working hours cannot be left entirely to the employee: the employer must ensure that the provisions of laws pertaining to working hours are complied with.

The current German Working Hours Act (ArbZG) only recognises two concepts: free time and work time – there is nothing in between. Problems arise, for example, when an employee accesses their email account late in the evening and/or early in the morning and reads and answers incoming emails. It is necessary to assess on a case-by-case basis whether the employee's activity constitutes work time and the legal consequences resulting from this, for example, with regard to mandatory resting periods according to the Working Hours Act.

6. Collective Relations

6.1 Unions

A German trade union is an association of employees representing the economic, social and cultural interests of employees. The aim of trade unions is to safeguard and promote the working and economic conditions of their members. For this purpose, they negotiate collective bargaining agreements. To be able to enforce their demands more effectively, trade unions are allowed to organise strikes. In Germany, however, unions are only allowed to strike on issues that can be defined in collective bargaining agreements. Therefore, strikes cannot be called for political reasons. Employees participating in a strike cannot demand remuneration on the days they are striking. However, if they belong to the union, they receive strike pay.

In addition, the tasks carried out by trade unions also include advising employees in matters of employment law.

In 2022, the gross union density (ratio of total union membership to the number of employees) in Germany was 13.5%, but this varies from sector to sector. Certain business sectors are characterised by comprehensive bargaining agreements that regulate the remuneration structure of almost the entire workforce (eg, aviation). In other sectors, however, the degree of organisation is lower, and the individual negotiation of remuneration is more common (eg, management consulting).

6.2 Employee Representative Bodies

A works council represents the interests of the employees in the operation and can negotiate on their behalf with the employer. For this purpose, the works council is entitled to rights stipulated in the Works Council Constitution Act (*Betriebsverfassungsgesetz* – BetrVG).

Formation of the Works Council

In operations with more than five employees, employees are entitled to convene an election meeting and establish a works council. The works council members are elected by the employees every four years. The employer cannot prevent the unilateral formation of a works council if this is the will of at least a group of employees.

Composition of the Works Council

The number of works council representatives depends on the size of the respective operation. The works council representatives enjoy special protection against dismissals. Furthermore, they must be granted leave of absence for their works council assignments, while receiving their regular remuneration. Costs incurred by the works council, including its advisers if required, must be covered by the employer.

Participation Rights of the Works Council

Works councils in Germany have the following participation rights.

Information and consultation rights

The weakest participation right which a works council is legally entitled to is the right to be informed. As an example, the employer must inform the works council about any issues or changes pertaining to workplace design, work processes and the work environment in general, personnel planning and occupational health and safety.

Works councils also have consultation rights, which have a more significant impact. The works council must be given the opportunity to express its position on certain issues to the employer.

The employer must discuss any planned measures with the works council but may, ultimately, disregard the works council's opinion. The works council's most important right to consultation is its right to be consulted prior to the dismissal of an employee. If this right is disregarded or compromised in any way by the employer, the dismissal is invalid.

Co-determination rights

A particularly extensive participation right which the works council is entitled to is the right to so-called co-determination. At the weaker level, the right of consent, the works council must approve measures taken by the employer after a hearing. Without the works council's consent, the measure is invalid unless consent was unlawfully withheld and replaced by a corresponding resolution in labour court proceedings. The consent of the works council is particularly relevant with regard to personnel measures such as the hiring of employees.

In addition, the works council has an enforceable right to co-determination in certain cases – especially in social matters (eg, how mobile working is implemented or how vacation policies are established). In this context, the works council can demand that the employer enters into negotiations regarding a subject that is affected by the right to co-determination. At the end of the negotiations, a works agreement must be reached.

If no agreement is reached, a so-called conciliation body is convened under a neutral and objective conciliation body chairperson. The decision made by the conciliation body then replaces the required agreement between the employer and the works council.

Employers must take the co-determination rights of the works council into account, particularly in the context of restructuring measures. The works council can request the employer to negotiate a reconciliation of interests in which the background is taken into account and the implementation of the measure is agreed upon. Furthermore, the works council can demand that a social plan be drafted, which, for example, regulates the severance payments to be made to the employees affected. In practice, this leads to prolonged and complex negotiations in the preliminary stages of restructuring measures. It is thus important for employers to take this crucial step into account in their planning.

6.3 Collective Bargaining Agreements

Definition

A collective bargaining agreement is an agreement between employers and trade unions (see **6.1 Unions**). The negotiating party can either be an individual employer or an employers' association which several employers in a particular industry have joined. A collective bargaining agreement defines the rights and obligations of employees and employers. This includes, for example, working conditions such as remuneration, working hours, as well as leave entitlement. The agreed working conditions apply directly and mandatorily to the employees and employers who are members of the respective association and trade union. The employee can therefore automatically claim the provisions of the collective agreement for themselves without negotiating with the employer. If the employment contract contains provisions that are less advantageous than those in the collective agreement, the more favourable provisions of the collective agreement automatically apply ("favourability principle").

Works Agreement

A works agreement, on the other hand, is an agreement between employers and works councils to which all employees of the company are bound. In principle, works agreements define the company's general conditions (eg, working time models, rules of conduct, shift work, etc).

Relationship Between a Collective Bargaining Agreement and a Works Agreement

If works agreements collide with a collective bargaining agreement, the collective bargaining agreement is superior by law. Therefore, no matters can be regulated at a works council level that have already been regulated or are typically regulated in a collective bargaining agreement. The only exception to this is when the collective agreement contains a corresponding opening clause that allows works agreements to be made.

7. Termination

7.1 Grounds for Termination

The Declaration of Termination

The termination must be declared in writing (wet ink), otherwise it is invalid. The electronic form is excluded.

In terms of content, the notice of termination must be clearly recognisable as such. Although employers must adhere to exacting standards regarding the reason for termination, in most cases, they are not required to state those reasons in the letter of termination.

Termination With Notice

The requirements for the reason for termination depend on the type of termination. Dismissals subject to a period of notice are regulated by the German Dismissal Protection Act (*Kündigungsschutzgesetz* – KSchG). However, the KSchG only applies if the employment relationship has existed for at least six months and at least ten employees are employed in the company (at least five employees in old cases). A termination covered by the KSchG can only be justified on one of the following three grounds.

Conduct-related reasons

In the case of a conduct-related termination, the employee must have consistently caused substantial disruption to the company's morale or have breached the terms of the employment contract or have permanently damaged the relationship of trust between the employer and the employee. Since termination may only be the very last means, a prior warning is required in most cases in order to give the employee the opportunity to improve their behaviour. Examples of reasons for dismissal include refusing to work, feigning illness or violating company rules.

Personal reasons

A personal-related termination is justified if the employee no longer meets the required capability or competence to fulfil their obligations under the employment contract. Examples are the lack of a work permit or insufficient physical fitness, as well as illness. In the case of dismissal due to illness, however, there must be a negative health prognosis and the company's interests must be significantly impaired.

Operational reasons

A termination can be justified if it stems from a business decision that leads to a reduction of the workforce and if the employees cannot otherwise be engaged in the company. Employers are not free to decide who is affected by the staff reduction. Instead, a social selection among comparable employees is required, according to which, those who are most likely to find follow-

up employment on the labour market are to be dismissed first. However, certain key staff and high performers can be excluded from the selection process.

Procedure of Termination

Before giving notice of termination, employers must check whether there is any special protection against dismissal (eg, for members of the works council, pregnant women, people with severe disabilities, etc).

Pursuant to Section 102, paragraph 1, sentence 1 of the Works Council Constitution Act (BetrVG), the works council must be consulted prior to any dismissal. If the employer fails to attend the hearing or does not conduct it appropriately, the termination is void.

Procedure Regarding Collective Redundancies

Under the requirement of Section 17 of the KSchG, in the case of collective redundancies, employment agencies must be informed. Furthermore, the works council must be informed in good time about the planned dismissals.

If a mass dismissal notification is required but not carried out by the employer, all dismissals that have been made are void in most cases. The same applies if the works council was not granted the opportunity to participate.

7.2 Notice Periods

Notice Periods

When terminating an employment contract, different periods of notice must be observed, which may result from the employment contract, a collective bargaining or works council agreement, or by law. If no notice period is stipulated, the statutory notice period pursuant to Section 622 of the German Civil Code (BGB) applies. If the statutory notice period is longer than the contractually agreed notice period, the statutory notice period prevails.

The statutory notice period for the termination of employment is four weeks to the 15th or to the end of a calendar month. The longer the employee has worked for the organisation, the longer the statutory notice period becomes, up to a maximum of seven months' notice period to the end of a calendar month for an employment relationship existing longer than 20 years.

Severance

Generally, employees do not have a legal claim to severance pay when their employment relationship ends. However, a claim to severance pay can be regulated, for example, in social plans, collective bargaining agreements, managing director agreements or individual contractual agreements.

The employer can also offer severance pay if the dismissed employee allows the three-week period for an action for protection against dismissal to expire. The expiry of this substantive exclusion period automatically leads to the validity of the termination which can no longer be challenged in court. The standard severance payment which is used as a reference in negotiations provides for 0.5 times the gross monthly salary per year of employment. However, the actual settlement amount always depends on a number of factors which influence the respective bargaining power of the employer/employee, including the chances each side has to win in court, or the use of new legal tech tools which limit the employer's risk to have to grant back pay to the employee, and other variables.

7.3 Dismissal for (Serious) Cause

Pursuant to Section 626, paragraph 1 of the German Civil Code (BGB), termination without prior notice is only permissible if the cause of dismissal is so serious that the parties cannot reasonably be expected to continue the employment relationship for the duration of the period of notice. Otherwise, only an ordinary dismissal can be considered. In order to render the termination legally watertight, employers typically simultaneously issue a termination without notice, along with a termination with notice as of the next possible date.

Employees can only be dismissed without notice two weeks after they have received all the relevant information which justifies the termination.

Before informing employees of the termination, special protection against dismissal must be considered and the works council must be consulted (see **7.1 Grounds for Termination**).

7.4 Termination Agreements

The employment relationship can be terminated by mutual agreement without a period of notice by means of a termination agreement. Like the letter of notice, the termination agreement must be signed by both parties in writing (wet ink). However, it is not necessary for the works council to hold a consultation.

Usually, in return for termination of the employment relationship, the employee receives an agreed severance payment. However, the conclusion of a termination agreement can lead to a 12-week waiting period imposed by the Employment Agency, during which no unemployment benefit can be claimed. Under certain conditions, however, the Employment Agency may waive the waiting period.

The requirement of fair negotiation imposes limits that can lead to the invalidity of the termination agreement. The requirement of fair negotiation is breached if the employer creates or exploits a situation of psychological pressure, thereby making it significantly more difficult or impossible for the employee to make a free and considered decision.

7.5 Protected Categories of Employee

Certain categories of employees are subject to special protection against dismissal. This special protection applies in addition to the existing general protection against dismissal.

Employee Representatives

Members of the works council, youth and trainee representatives and representatives for the severely disabled enjoy special protection against dismissal under Section 15 of the German Dismissal Protection Act (KSchG). The protection against dismissal not only exists for the duration of their mandate, but also for a limited period of time beyond, and partly also for certain functionaries already in the process of establishing the employee representation body. Termination with notice is permitted but requires the approval of the works council according to Section 103 of the Works Council Constitution Act (BetrVG). In the case of dismissals for operational reasons (eg, a plant closure or restructuring), extraordinary dismissals also require compliance with a social phasing-out period.

Severely Disabled Workers

Severely disabled workers enjoy special protection against dismissal under Section 168 of the German Social Code IX (SGB IX). The Integration Office (*Integrationsamt*) must approve any dismissal. However, the employee must have worked for the company for at least six months without interruption, and the degree of disabil-

ity must be officially determined to be at least 50%, or at least 30% in the case of an equivalent status.

Pregnant Women and Mothers

According to Section 17 of the German Maternity Protection Act (MuSchG), dismissal during pregnancy and up to four months after childbirth is generally not permitted. In exceptional cases, the highest state authority for occupational health and safety can approve dismissal if it is not related to pregnancy or childbirth. Permission is rarely granted.

Parental Leave

Dismissal of employees during parental leave is not permitted under Section 18 of the Parental Leave Act (BEEG). In exceptional cases, the supreme state authority for occupational health and safety may agree to a dismissal.

Trainees

Trainees enjoy special protection against dismissal from the end of their probationary period until the end of their training under Section 22 of the German Vocational Training Act (*Berufsbildungsgesetz* – BBiG). The probationary period can be between one and four months. After this period, dismissal with notice without good cause is not permitted.

Special Representatives in the Company

Certain employers must appoint special representatives for specific tasks. For example, special protection against dismissal is conceivable for data protection officers under Section 6, paragraph 4 of the German Federal Data Protection Act (BDSG) or for immission control officers under Section 58 of the German Federal Immission Control Act (*Bundesimmissionsschutzgesetz* – BImSchG).

8. Disputes

8.1 Wrongful Dismissal

An action against an employer's dismissal may be brought on any grounds that render the dismissal invalid. The lawsuit for protection against dismissal can only be focused on the continuation of the employment relationship, not on the payment of a severance.

In general, the claim must be brought within three weeks of receipt of the written notice of termination (Section 4 of the German Dismissal Protection Act (KSchG)). Otherwise, the termination is deemed effective regardless of any errors.

After the claim has been filed, the first step is to try to reach a settlement in a conciliation hearing or even before. It is often possible to reach a settlement agreement on the termination of the employment relationship at the conciliation hearing, including the payment of a severance package.

If no agreement can be reached, the parties have the opportunity to comment on the notice and a second hearing in chambers is scheduled. After the hearing in chambers, the labour court decides whether the employment relationship has been terminated or will continue. A mutual settlement agreement can be made until the legally binding conclusion of court proceedings.

8.2 Anti-discrimination

Discrimination Protection

The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG) provides legal protection against discrimination in the workplace. The law aims to prevent and to eliminate discrimination due to race, ethnic origin, gender, religion or belief, disability, age or sexual identity (Section 1 of the AGG). Any direct or indirect

discrimination can only be justified within a narrow scope.

Burden of Proof

Section 22 of the AGG provides for a reversal of the burden of proof in favour of the plaintiff. If the employee provides circumstantial evidence of discrimination, the employer bears the burden of proving that no discrimination took place.

Claim for Damages and for Compensation

The AGG provides for a claim for damages in cases of discrimination (Section 15, paragraph 1 of the AGG). The employee is also entitled to compensation for pain and suffering pursuant to Section 15, paragraph 2 of the AGG. The claim for compensation does not depend upon the existence of actual damage or upon the employer being at fault. If the employee provides circumstantial evidence of discrimination and the employer is unable to disprove this evidence, the claim for compensation already pertains.

Principle of Equal Treatment Under Employment Law

In addition to the legal protection provided by the AGG, the principle of equal treatment under employment law applies. This means that employees may not be treated less favourably than comparable employees for arbitrary reasons. If unequal treatment arises, the disadvantaged employees could be entitled to equal treatment.

8.3 Digitalisation

The judiciary is undergoing a digital transformation. Court hearings can take place digitally via video conferencing. This option is being used increasingly often. Furthermore, the conversion to an electronic court file is taking place. The first labour courts are managing incoming proceedings exclusively in digital form. The implementation is taking place gradually, however.

Since 1 February 2022, every lawyer has been obliged to set up a so-called special electronic lawyer's mailbox (*besonderes Anwaltspostfach* – beA). Accordingly, lawyers are obliged to communicate with the courts exclusively via this digital mailbox and to submit their correspondence electronically.

9. Dispute Resolution

9.1 Litigation

Labour Court

Labour courts deal with claims arising from the employment relationship. They deal with questions regarding works constitution law and collective bargaining law as well as disputes between employer and employee. Managers and freelancers are not covered by labour jurisdiction but by ordinary jurisdiction.

The procedure before the labour courts differs significantly from ordinary civil proceedings. In employment law disputes, it is mandatory to attend a conciliation hearing with the aim of reaching a settlement between the parties. The courts are also staffed differently. Already at first instance, the judgment is made by a chamber consisting of a professional judge as well as an employee and an employer representative. In addition, the duration of the procedure is reduced in labour courts as the principle of accelerated proceedings applies.

System of Instances

The labour courts are organised in a separate system of instances. In the first instance the decision is made by the labour court, in the second instance by the regional labour court, and

in the last instance by the federal labour court. Only at the constitutional level (Federal Constitutional Court) and European level (GCEU and CJEU) are the same courts responsible as for ordinary civil proceedings.

Class Action Claims

Class action claims, as they are known in the US, are not provided for in Germany. In mass proceedings, each employee must file a claim individually. This results in proceedings with a large number of concurrent cases. However, trade unions are entitled to bring an action for interpretation of a collective bargaining agreement provision themselves. The court's interpretation binds other courts as well as all parties bound by the collective bargaining agreement.

Representation in Court

If representation by lawyers is not required, the parties may conduct the legal dispute themselves. Representation by a lawyer is however mandatory before the regional court and federal court.

9.2 Alternative Dispute Resolution

In principle, arbitration is possible in Germany, but the general provisions on arbitration proceedings do not apply to labour law cases pursuant to Section 101, paragraph 3 of the German Labour Court Act (*Arbeitsgerichtsgesetz* – ArbGG). Exceptions are provided for in Section 101, paragraph 1 and 2 of the ArbGG, according to which, in the case of disputes between parties to a collective bargaining agreement or disputes arising from an employment agreement contract governed by a collective bargaining agreement, the parties may agree that the decision will be taken by an arbitral tribunal. In this case, the parties must comply with the procedural rules set out in Sections 103 et seq of the ArbGG.

Arbitration agreements refer exclusively to the above-mentioned civil disputes. The labour courts have sole jurisdiction over expedited proceedings (eg, dismissal protection proceedings). Legal remedies of execution are also not subject to an arbitration agreement due to the fact that they are a sovereign right by the state.

While the rules of arbitration do not apply to disputes between an employer and the works council, the statutory conciliation board is often defined as an internal company arbitration court. Simply put, the conciliation board is an internal mediation body which – in the cases provided for by law – meets, negotiates and decides when the works council and the employer cannot agree. The employer and works council may also voluntarily establish a conciliation board. The most important rules regarding a conciliation board can be found in Sections 76, 76a of the Works Council Constitution Act (BetrVG).

9.3 Costs

In the first instance at the labour courts, the prevailing party is not entitled to reimbursement of the costs of hiring a lawyer. This is intended in particular to remove any potential structural disadvantage for the employee.

Lawyers are generally remunerated according to the Act on the Remuneration of Lawyers (*Rechtsanwaltsvergütungsgesetz* – RVG). The amount of remuneration depends on the amount in dispute. On the employer side, it is common to agree on an hourly rate regardless of the RVG. The lawyers' fees may therefore vary on the employee's and employer's side.

Only from the second instance onwards must the losing side bear the costs. However, the amount is limited to the remuneration according to the RVG. Accordingly, any fees agreed upon

with the lawyer in excess of the RVG must be borne by each party.

Legal aid is available to the employee or the employer if they cannot afford the costs of the legal dispute due to their personal and economic circumstances, and if the action has a chance of success and no priority legal expenses insurance has been taken out. In such cases, the state covers the legal costs.

For disputes with the works council, the employer must also pay the works council's legal fees. The works council has no financial resources of its own and the state does not reimburse the works council's legal fees.

Trends and Developments

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Pusch Wahlig Workplace Law is one of Germany's leading employment law firms. A dedicated team of 70 employment specialists in six locations provides legal advice all over Germany. The practice has particular experience in business restructuring, including mass workforce reductions, as well as reconciliations and social plans. The law firm further advises on compliance, remuneration and works council matters and represents companies in employment litigation, as well as on the implementation of SE structures and employment-related data protection. The mandates originate from a variety of sectors including financial services, technology, FMCG and many more, and the firm advises both large multinational corporations as well as prominent start-ups. As a member of L&E Global, Pusch Wahlig Workplace Law is one of the cornerstones of a leading global alliance of employment law firms and regularly advises clients on cross-border matters.

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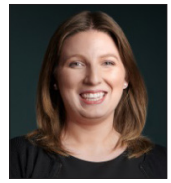
Tobias Pusch is the founder and managing partner of Pusch Wahlig Workplace Law. He advises national and international employers and executives on issues of individual and collective employment law. He has particular experience in corporate acquisitions, restructuring, SE formations, compliance matters, complex court proceedings and negotiations regarding collective bargaining agreements and works agreements, as well as reconciliation of interests and social plans. His clients are DAX-listed and large multinational companies, prominent start-ups and mid-sized companies, as well as top executives. Known for sustainable and innovative solutions, Dr Tobias Pusch is one of Germany's leading employment law specialists.



Teresa Gabele is a managing associate at Pusch Wahlig Workplace Law based in the Berlin office. The scope of her practice includes all issues of individual and collective employment law. She is specialised in drafting employment contracts and termination agreements. In addition, she has particular expertise in matters regarding senior executives, as well as extensive experience in immigration law, especially as it relates to access to the labour market for foreign employees and managers.

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Introduction

Employment law was hugely affected by COVID-19 but, in more recent times, the German legislator has been able to focus more on employment law challenges unrelated to the pandemic. In this respect, the legislator has further developed digitalisation, changed the conditions for parental allowance, re-introduced telephone sick notes and children's sick notes, and more.

Recent court decisions have also required action by the German legislator. These relate, for example, to the remuneration of works council members or – at the European level – to the strengthening of the rights of the European works council.

Furthermore, German employers are facing newly introduced obligations on a domestic and EU-wide level that have come into force in 2024: the Whistleblower Protection Act now requires a reporting centre for companies with 50 or more employees, while supply chain responsibility is growing since the Supply Chain Duty of Care Act now also applies to employers with more than 1,000 domestic employees.

Recent Legislative Changes

Increase in the statutory minimum wage and increase in the mini-job earnings threshold

From 1 January 2024, the statutory minimum wage has been increased to EUR12.41 and it will be further increased to EUR12.82 per hour from 1 January 2025.

As the minimum wage and the mini-job earnings threshold have been linked since October 2022, the increase in the minimum wage has also caused the earnings threshold to rise from EUR520 per month to EUR538 as of January 2024. There is no change to the maximum working hours for mini-jobs, and mini-jobbers can continue to work approximately 43 hours per month.

Parental allowance

One area which has affected families in particular is the change in the conditions they need to meet to be eligible for the parental allowance. Until April 2024, families with a taxable income of over EUR300,000 per annum were not eligible for parental allowance. The coalition government then agreed to lower the income threshold in two stages. Since 1 April 2024, the income threshold has been EUR200,000 for couples and

EUR150,000 for single parents. On 1 April 2025, the threshold will fall to EUR175,000 for couples.

This legislation has been harshly criticised, particularly with regard to women's opportunities in the labour market, the gender pay gap, and the compatibility of family and career.

Increase in child sickness benefit

Parents with statutory health insurance are entitled to child sickness benefits for children up to the age of 12 who also have statutory health insurance. The child sickness benefit usually amounts to 90% of the lost net pay.

This entitlement to child sickness benefits has been extended for the years 2024 and 2025. Parents can now claim 15 days of child sickness benefit per child (instead of the previous ten), while single parents can claim 30 working days per child (instead of 20). The maximum number of annual entitlement days per parent has meanwhile increased to 35 working days (instead of 25) and for single parents it has increased to a total of 70 working days per year (instead of 50).

To receive such child sickness benefits, parents need to provide their health insurance with a doctor's certificate (the so-called "children's sick note") stating that the parent must be absent from work to supervise, look after, or care for a sick child.

Telephone sick note and children's sick note

Telephone sick notes were already possible during the pandemic (for a period of up to seven days) but the regulation expired on 31 March 2023. However, it is now once again possible to report sick by telephone. The prerequisite is that the illness does not present severe symptoms, video consultation is not possible, and the patient is already known to the respective doctor. The initial certificate should certify incapacity for work for a period of no more than five calendar days. If a follow-up certificate is necessary (because the patient is still unable to work after sick leave of five calendar days), the doctor's practice must be visited. Only if the initial certificate was issued during an in-person visit to the doctor's office can the continuation of the parent's incapacity for work be determined by telephone. It is now also possible to submit "children's sick notes" by telephone – in other words, the child's illness can be certified after telephone contact with the parents.

Family start time

Based on a European directive aiming for a better work-life balance for parents, a ten-day so-called "family start time" of fully paid leave for fathers or equivalent non-birthing parents has been planned and should in fact have been transposed into national law as early as 2022. However, a corresponding national draft law has been in the departmental co-ordination phase for months, as the financing of this family start time has not been clarified.

Increase in the equalisation levy for severely disabled employees

In general, all employers with more than 20 employees must employ severely disabled people or employees with a similar impairment in at least 5% (mandatory quota) of their jobs. If this quota is not reached, a compensatory levy must be paid. This compensatory levy was increased as of 1 January 2024. Depending on the percentage of the shortfall on the mandatory quota, employers must pay a compensatory levy of up to EUR720 per job per month. However, failure to fill a position with a severely disabled employee or employee with a similar impairment will no longer be penalised with a fine. Special regula-

tions apply for small businesses with fewer than 20 employees.

Inflation compensation premium

Employers can still pay their employees an inflation compensation premium of up to EUR3,000 until 31 December 2024, to cushion the financial impact of inflation. The payment can be made in several instalments and is exempt from tax and social security contributions.

Whistleblower Protection Act

The Whistleblower Protection Act has been in force since 2 July 2023 and is intended to provide comprehensive protection against retaliation by employers for employees who report grievances that were brought to their attention in the course of their professional activities.

While the obligation to set up internal reporting centres has been in place for larger companies since July 2023, the transition period for setting up internal reporting offices for smaller companies with 50 to 249 employees expired on 17 December 2023. However, violations of the obligation to set up internal reporting offices can now also be subject to fines.

Growing supply chain responsibility

The Supply Chain Duty of Care Act has applied to companies with over 3,000 domestic employees since 1 January 2023. Since 1 January 2024, it has also applied to companies with more than 1,000 domestic employees.

However, the catalogue of obligations under the Supply Chain Duty of Care Act also affects companies that are not directly covered by the scope of the law due to their small size, but whose products and services are part of the supply chain.

For employers, the rules of the Supply Chain Duty of Care Act also impact on labour law. Notably, companies with more than 1,000 employees will now be required to appoint human rights officers and to establish internal complaints offices. Further, works councils will enjoy new participation rights, and economic committees will benefit from increased rights to information.

Pay Transparency Directive

The Pay Transparency Directive came into force in June 2023. The directive must be transposed into national law by June 2026, which will require extensive amendments to the Pay Transparency Act. However, there are no specific legal requirements as yet.

Working Hours Act

In 2019, the European Court of Justice (ECJ, dated 14 May 2019 – C-55/18) ruled that there is an obligation to set up a system for recording working time. This was followed by a decision by the German Federal Labour Court (BAG, dated 13 September 2022 – 1 ABR 22/21), which also established a general obligation to record working hours. Employers are obliged to introduce a system to record the start and end of daily working hours, including overtime, in accordance with an interpretation of Section 3 Paragraph 2 No 1 of the German Occupational Health and Safety Act (ArbSchG), which is consistent with EU law.

However, since the exact requirements for the design of such systems are unknown until the legislator takes action, in April 2023, the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales* – BMAS) presented a draft bill to revise the Working Hours Act. The draft has been widely criticised and is currently stuck in the legislative process, so whether and when there will be a law to revise the Working Hours Act remains to be seen.

Immigration of skilled labour

The Skilled Immigration Act for Qualified Professionals (*Fachkräfteeinwanderungsgesetz* – FWG) was passed in June 2023. It is intended to facilitate the recruitment of skilled workers from third countries and counteract the shortage of skilled labour. Some changes have already been in force since November 2023, while other changes have come into force in the course of 2024.

As in the past, having a qualification which is fully recognised in Germany will be the key requirement for people wishing to immigrate to Germany from countries outside the EU in order for them to be able to work in skilled jobs.

Since November 2023, more academics (skilled employees with a university degree) have been able to obtain the "EU Blue Card" residence permit, as the minimum earnings threshold has been lowered. Also, IT specialists (without a university degree) are able to receive a "Blue Card" provided that they can show evidence of at least three years of comparable professional experience.

In March 2024, new regulations for the recognition of foreign professional qualifications came into force. Even if their qualification is not formally recognised in Germany, skilled workers from third countries are now able to work in non-regulated professions in Germany. The requirements are at least two years of professional experience and a professional qualification recognised by the state in the country of origin after at least two years of training, provided their income is above a certain salary threshold.

From June 2024 on, people from third countries might also be eligible for the so-called "opportunity card" for a job-seeking stay in Germany. If eligible for an opportunity card, a points system will be applied where points can be collected from various categories, for example, language skills, qualifications, and professional experience.

Bureaucratic relief

To reduce the burden on bureaucracy, a draft bill has been introduced which foresees, in particular, changes to the Evidence Act, while other labour laws are also being addressed. The strict written form requirement needed in the past in order to check the validity of certain legal documents is to be replaced in some areas by the electronic form (with an electronic signature). This would eliminate a major hurdle to signing an employment contract digitally, as proof in wet ink would no longer be necessary. However, special precautions would still need to be taken for fixed-term contracts and post-contractual non-compete clauses.

Works council remuneration

Anyone elected to a works council in a company takes on an unpaid honorary position. The Works Constitution Act states that members of the works council are exempt from their professional duties and may not earn less "than the remuneration of comparable employees with customary professional development". They may not be "disadvantaged or favoured because of their work". In the past, this led to significant problems, as, especially for long-serving members of the works council, determining the "correct" remuneration (without disadvantaging or favouring them) could be challenging. In 2023, the German Federal Court of Justice (BGH, dated 10 January 2023 – 6 StR 133/22) added further legal uncertainty when it stated that it can constitute a criminal offence of breach of trust if the employer violates the prohibition on favouritism. As a consequence, this led to preventative cuts to works council remuneration.

The legislator has now remedied this uncertainty regarding the works council remuneration by further specifying these legal requirements with the "Act Amending the Works Constitution Act", and which came into force on 25 July 2024 after publication in the Federal Law Gazette (Bundesgesetzblatt)".

Directive on European Works Councils

On 2 February 2023, the EU Parliament introduced a draft directive on the European Works Council to strengthen the rights of European Works Councils. In particular, information and consultation rights as well as sanction options are to be extended. On 24 January 2024, the European Commission presented a draft amendment to the European Works Councils Directive. The proposal is intended to increase the effectiveness of employee involvement and provides, for example, a new definition of transnational matters, more effective sanctions for breaches of participation obligations, and a balanced gender ratio when renegotiating a participation agreement.

The Commission's proposal is now in the process of being discussed by the European Parliament and the member states, with the adoption of the final directive expected to take place during the legislative period of the next European Commission.

Alternative co-determination

We also see a trend towards implementing alternative co-determination models instead of establishing works councils. Whereas the rules regarding works councils follow, to a large degree, a "one size fits all" model, allowing very little flexibility in terms of tailoring the rights and duties of the works council to the specifics of the respective companies, models for alternative co-determination allow more flexibility for both the employee and the employer. According to recent statistics, a four-digit number of companies in Germany use alternative employee representation models, for instance, the Berlin professional soccer club, Hertha BSC.

GIBRALTAR

Law and Practice

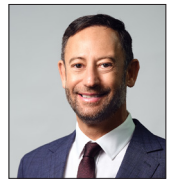
Contributed by:
Nick Cruz, Marc X Ellul, Arcelia María Hernández-Cordero and Sean Gaskin
Ellul & Cruz

Contents

Ellul & Cruz is a full-service Gibraltar law firm founded in 1973. It was born of the merger of Ellul & Co and Cruzlaw in 2024. Ellul & Co was founded by Eric C Ellul in 1973 and Cruzlaw was founded by Nick Cruz in 1996. Led by Marc X Ellul and Nick Cruz, Ellul & Cruz has a broad local practice that includes advice and representation in all employment-related matters. The firm draws clients from a diverse range of industry and service sectors and is instructed in both contentious and non-contentious matters. As advocates, Ellul & Cruz lawyers represent both employers and employees in employment tribunals and through to the court of appeal. The firm's work includes advising on contracts of employment (and drawing them up), company handbooks, discipline and grievance procedures, and unfair, wrongful and constructive dismissal, as well as advising on discrimination, employee rights and bullying. Ellul & Cruz is the Gibraltar member of the Employment Law Alliance, an international network of employment lawyers.

Authors

Nick Cruz is the head of litigation of Ellul & Cruz, where he regularly advises on contentious and non-contentious employment matters. Nick is a highly regarded professional, with more than 30 years' experience of representing clients in varied practice areas. He has a broad legal practice, with a particular focus on dispute resolution and corporate and commercial work. Called to the Bar of England and Wales in 1990 and the Bar of Gibraltar in 1991, Nick remains a practising barrister and regularly represents employers and employees before the Employment Tribunal and Gibraltar's employment appeal courts, including the Supreme Court and the court of appeal.



Marc X Ellul is the managing director of Ellul & Cruz, where he heads the corporate practice. Marc began practising in London in 1993 and established himself in Gibraltar in 1995. During his early career, Marc was a general practitioner, undertaking criminal, civil and admiralty litigation, property, corporate and private client work. He now mainly practises as a corporate, commercial, investment funds, tax and financial services lawyer but also does non-contentious employment work focusing on the business aspects of this practice area.

Arcelia María Hernández-Cordero is a senior associate in Ellul & Cruz's litigation department. She was called to the Bar of England and Wales in July 2014, followed by the Gibraltar Bar in September 2023. During her time in England, Arcelia focused mainly on complex litigation matters and high-value claims in respect of commercial disputes, mortgage mis-selling, credit hire and personal injury claims. Her current practice is diverse, mainly focusing on litigation, dispute resolution and employment matters. She often appears before the Supreme Court of Gibraltar in complex litigation hearings. In her administrative and employment law practice, Arcelia usually acts for employers and public bodies such as the Gibraltar Health Authority.

Sean Gaskin is an associate in the litigation department of Ellul & Cruz. During Sean's early career, as a general practitioner, he was exposed to and involved in commercial litigation, probate matters, landlord and tenant disputes, employment matters, family litigation and several high-profile criminal trials. Currently, Sean has narrowed his focus to litigation with a focus on civil, criminal and employment litigation. He appears regularly before the Supreme Court in civil applications and the Magistrates' Court in criminal matters

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1. Employment Terms

1.1 Employee Status

Self-employed individuals do not have the same rights as employees under Gibraltar law. Self-employed individuals are also responsible for their own tax and social insurance payments, which are normally handled by the employer in respect of the employees.

1.2 Employment Contracts

Employment contracts may be for an indefinite period or for a fixed term. The Fixed Term and Part-Time Employees (Prevention of Less Favourable Treatment) Regulations 2003 aim to prevent fixed-term and/or part-time employees being treated less favourably than similar permanent and full-time employees and limit the use of successive fixed-term contracts.

In order to engage an employee, an employer must be registered as such under the Business Trades and Professions Registration Act 1989 and must also register with the Income Tax Office. In addition, a Notification of Vacancy form must be completed, and all vacancies must be registered with the Department of Employment before seeking to engage a person as a worker.

A Notice of Terms of Engagement must also be completed and submitted to the Department of Employment for all workers. This notice must set out certain terms of the employee's employment, including wages and notice periods. A copy must be given to the employee. Any changes to the employment relationship must be notified to the Department of Employment on a prescribed form.

1.3 Working Hours

The Working Time Act 1999 (WTA) provides specific rules governing the working hours, breaks, and holidays of workers. A person is considered a worker for the purposes of the WTA if such a person is engaged under a contract of employment or provides work or services under a contract that is not a contract for professional services.

There is a 48-hour limit on average weekly working hours, including overtime. The average number of hours worked are calculated by reference to a 17-week period. There are some special case exemptions that allow for a 26-week reference period and possibly a reference period of a full year where a collective or workforce agreement provides for this. It is possible for individuals to opt out of the 48-hour limit, but such agreements are terminable at no more than three months' notice and increase the employer's record-keeping burden. This category is open to wide interpretation and employment contracts frequently include provisions for working hours above the 48-hour limit for professionals and managerial staff. The 48-hour limitation does not apply to those whose working time cannot be measured or predetermined.

Night-Time Work

The normal working hours of a night worker must not exceed an average of eight in each 24-hour period. In the case of a night worker whose activities involve special hazards or heavy, physical or mental strain, there is an absolute limit of eight hours. Night-time means the period between 11pm and 6am. The precise period can be determined in a relevant agreement and, in the absence of such an agreement, it will be construed as 11pm to 6am.

Part-Time Work

Part-time workers have the same rights/entitlements as full-time workers, unless there is an objective justification for the difference in treat-

ment. Part-time workers accrue rights over time in the same way as full-time workers. The duration of the annual holiday of part-time employees is calculated pro rata to that of an employee who works a five-day working week.

Overtime

If an employee is expected to work regular overtime, it is good employment practice to state this clearly in the employee's contract of employment, together with:

- whether overtime is compulsory or voluntary;
- rates of overtime pay;
- when overtime becomes payable;
- any notice arrangements for overtime working; and
- the authorisation process for overtime work.

Overtime rates are a matter for agreement between employer and employee or on an industry-wide basis. There are certain minimum statutory levels and overtime pay varies from business to business.

Typical rates for overtime are:

- weekdays and Saturdays – one-and-a-half times the normal hourly working rate;
- Sundays and public holidays – double the normal hourly working rate (Sunday shop workers may be an exception); and
- Christmas Day and New Year's Eve – double the normal hourly working rate and above.

1.4 Compensation

The Chief Minister, in his capacity as the Minister for Finance, announced in his budget address on 1 July 2024 that the minimum wage would rise by 3%; just above the Gibraltar government's estimate of inflation of 2.6%. This amounts to a rise of 30 pence to GBP8.90 per hour, which – based upon a 37.5 hour week – amounts to GBP333.75 per week. On this same basis, this comes to an annual salary of GBP17,355, which is equivalent to a minimum monthly wage of GBP1,446.25.

All employees in any undertaking, or any branch or department of an undertaking, are entitled to a minimum hourly, weekly and monthly remuneration. This does not include:

- employees who are engaged in a full-time course of education and who are employed during academic holiday periods;
- apprentices or trainees whose service ends at the end of their apprenticeship or traineeship; and
- domestic servants working in private households or seafarers employed on a sea-going vessel registered in Gibraltar.

It is not unusual to reward employees through bonuses in some sectors, such as financial services. Although many bonus schemes are described as discretionary, they are likely to be subject to implied duties and should be operated in a way that does not discriminate or breach the Equal Opportunities Act 2006.

1.5 Other Employment Terms

Annual Holiday Entitlements

The Employment (Annual and Public Holidays) Order 1969 (EAPHO) provides specific rules on the duration of an employee's annual holidays and the related payment.

According to Section 4 of the EAPHO, between January 1st and December 31st each year, an employer is required to allow a holiday to every employee who was employed for a period of four weeks or more during the 12 months immediately preceding January 1st of that year (such

12 month-period is hereinafter referred to as the "qualifying period"). The duration of an employee's annual holiday entitlement is linked to the period of their employment, with the employer during the qualifying period, the employee's continuous service and the amount of working days a week the employee is contracted to work. The duration of an employee's annual holidays are calculated in accordance with the tables set out in Schedule 2 of the EAPHO. The duration of the annual holiday of part-time employees is calculated pro rata to the full-time employees' entitlement.

Application of annual holiday entitlements

The initial minimum paid annual holiday entitlement is 15 days for employees working at least five days a week, increasing gradually to 25 days for employees who have attained eight years of service. There is no statutory unpaid holiday entitlement.

Employees are entitled to take annual holidays on consecutive days. Any rest days or public holidays that fall during the annual holiday period do not count as days of annual holiday.

An employer is required to give employees a reasonable notice of the commencement date(s) of their annual holiday periods. This notice may be given individually or by the posting of a notice in the place where the employees are employed.

End of employment holiday pay

Where an employee ceases to be employed by an employer, the employer is required to – on termination of the employment – pay to the employee one day's holiday pay in respect of each day of accrued annual holiday to which the employee would have been entitled, minus any days of annual holiday already taken. However, holiday pay is not payable to an employee where:

- the employee is dismissed on the grounds of either dishonesty or misconduct and is so informed by their employer at the time of dismissal; or
- the employee leaves the employment without giving the employer notice of termination of employment in accordance with Section 54(2) of the Employment Act 1932.

Where an employee dies while in the employment of an employer, the amount of any accrued holiday pay to which the employee would have been entitled had a notice to terminate the employment been given to the employer – expiring on the date of their death – is due and payable to the legal personal representative of the employee by the employer.

Nonetheless, the above-mentioned provisions of the EAPHO do not prevent any employer allowing annual or public holiday conditions or the payment of holiday remuneration on terms more favourable than those prescribed.

Sick Leave, Illness and Incapacity

Under the Employment (Sick Pay) Order of 1974, within any period of 12 months (calculated from the first day of an employee being absent from work owing to illness), sick leave is payable as follows: full pay for two weeks and, thereafter, half pay for four weeks. Therefore, after an employee has taken six weeks of sick leave within said 12-month period, they are not entitled to receive any further payments from an employer for any subsequent days of sick leave taken.

Time Off for Urgent Family Reasons

Pursuant to Regulation 29 of the Employment (Maternity and Parental Leave, And Health And

Safety) Regulations 1997 (EMPHS), employees may take five days a year unpaid leave for emergency family reasons such as sickness or accident affecting a member of their immediate family that makes the employee's presence indispensable. "Immediate family" means a child under the age 18, a parent or spouse buy also includes a dependant who has no other means of support or assistance.

Maternity Leave

The law governing maternity leave is set out in Regulations 1 to 18 of the EMPHS. It allows for a period of 14 weeks' unpaid maternity leave, provided that the employee has worked with an employer for at least two years (calculated up to the start of 11 weeks before the expected week of childbirth).

Parental Leave

Regulation 26 of the EMPHS also entitles employees to take four months' parental leave – limited to no more than four weeks in any one year – following the birth or adoption of their child. This can only be taken during the period up to the child's fifth birthday or the fifth anniversary of adoption (as the case may be).

Pension Entitlement

The Private Sector Pensions Act 2019 (PSPA) was enacted in August 2021 to establish a framework for private sector pensions, ensuring that employees in Gibraltar have access to workplace pensions should they wish to do so. The PSPA makes it compulsory for all employers in Gibraltar, starting with the largest (in number of employees), to provide all eligible employees with access to a pension scheme in addition to the existing state pension. Should the employee elect to take up the pension scheme, the PSPA makes it compulsory for both the employer and employee to contribute a minimum amount each week or month (depending on the intervals at which the employee is paid) to the employee's pension fund.

As employers must contribute to the pension scheme on behalf of the employee, this fosters shared responsibility for retirement savings between employer and employee. The employee is required to contribute a portion of their salary to their pension scheme, which may be matched or supplemented by employer contributions.

The requirements of the PSPA will come into effect at different times, depending on an employer's size. This is calculated by the number of employees. The different employer bands and the number of employees (according to which, membership of each band is measured) – as well as when the requirements of the PSPA start to apply to each of the different-sized employers – are:

- enterprise (251 employees or more) – 1 August 2021;
- large (101–250 employees (inclusive)) – 1 July 2022;
- medium (51–100 employees (inclusive)) – 1 July 2025;
- small (15–50 employees (inclusive)) – 1 July 2026; and
- micro (14 employees or fewer) – 1 July 2027.

The Gibraltar Financial Services Commission is appointed as Pensions Commissioner under the PSPA to ensure that the requirements are complied with by employers and by the administrators of pension schemes.

2. Restrictive Covenants

2.1 Non-competes

There are no statutes pertaining to covenants not to compete in Gibraltar.

The types of covenants commonly used in employment contracts are:

- non-solicitation covenants to prohibit a former employee from soliciting the customers or clients of the employer;
- non-dealing covenants to prohibit a former employee from dealing with the customers or clients of the employer;
- non-competition covenants to prohibit a former employee from engaging in a competitive activity within a particular area or a time-scale (or both); and
- non-solicitation or non-poaching of employees covenants to prohibit a former employee from soliciting their ex-colleagues.

Covenants will only be enforceable if they are considered reasonable, taking into account factors such as:

- the nature of an employee's work and what information they had access to;
- whether the "clients" and "employees" are restricted to those with whom the former employee had dealings; and
- the size of an area restriction and its duration (this may be particularly relevant to a jurisdiction as small as Gibraltar).

If restrictive covenants are disregarded or if confidential information is misused, an employer can seek damages against an employee/ex-employee or obtain an injunction restraining them from breaching said covenants or misusing said confidential information. It may also be possible to sue the new employer for inducing a breach of contract or breach of confidence.

2.2 Non-solicits

See **2.1 Non-competes**.

3. Data Privacy

3.1 Data Privacy Law and Employment

Pursuant to the Gibraltar General Data Protection Regulation (GDPR), which came into force on 25 May 2018, data collected, processed, stored and accessed should be restricted to the minimum for each specified purpose and only be kept for as long as necessary. Current legislation in Gibraltar maintains the data protection standards that applied in Gibraltar as a result of EU law (ie, the EU General Data Protection Regulation 2016/679 and the EU Law Enforcement Directive 2016/680) prior to Brexit and the end of the transition period.

Individuals, including employees, have the right to be informed of how their data will be used. They can access, rectify, erase and object to data being held or processed. They also have the new right of portability – that is, the data can be transferred to another organisation on request.

Employers are not able to process data until they show that a legitimate interest or legal basis outweighs the interests or rights of the employee. Any data held on paper or electronically should be available to the individual electronically – free of charge and in a commonly used format – within one month.

Legal Basis

In the employment context, a "legal basis" is needed to justify the processing of each data

category. A legal basis can be a statutory requirement, such as recording for tax purposes, necessary for a legal obligation, or for the performance of the contract (eg, paying the individual or ensuring work is performed). For much employee data, the legal basis will be a "legitimate interest" – for example, capturing data to improve workforce performance or to respond to a dispute.

4. Foreign Workers

4.1 Limitations on Foreign Workers

The Employment Regulations 1994 (the "Employment Regulations") provide that it is an offence to engage a worker other than an entitled worker, as defined in the Employment Regulations, without having first obtained a permit in respect of that worker. "Entitled workers" are defined in Regulation 6(4) and include:

- European Economic Area (EEA) nationals and their family members;
- Swiss nationals;
- persons entitled to seek and take up employment in Gibraltar by virtue of their nationality or residency; and
- persons falling within Section 14(1) of the Immigration, Asylum and Refugee Act, etc.

All other workers must have a work permit to work in Gibraltar. It is as yet unclear what the position of EU workers will be in the future, given that the UK and Gibraltar left the EU on 31 December 2020.

Currently, discussions between the Gibraltar, Spanish and UK governments have meant that there is an expectation that "a Gibraltar solution" will be found that will accommodate the parties' desire for Gibraltar to enters the Schengen area and for free movement to prevail. This is currently the subject of a treaty negotiation between the EU and the UK. In the meantime, the treatment of previously "entitled workers" remains the same.

Work Permit Applications

Where applicable, a work permit must be obtained before employment commences and will only be issued for 12 months at a time. The application is made by the employer to the Director of Employment. The employer must lodge a deposit with the Director of Employment for the amount that would be required to repatriate the employee on termination.

Applications are usually processed within two to three weeks. Failure to obtain a work permit is subject to financial penalties. Non-EU nationals require residency permits if they wish to reside in Gibraltar. A person who is not entitled to reside in Gibraltar and does so without a permit will not be allowed to stay.

Applications must be made to the Civil Status and Registration Office. It takes around four weeks (or, in some cases, more) to obtain a residency permit.

4.2 Registration Requirements for Foreign Workers

As mentioned in **1.2 Employment Contracts**, in order to engage an employee, the employer must be registered as such under the Business Trades and Professions Registration Act 1989 and must also register with the Income Tax Office.

5. New Work

5.1 Mobile Work

Employers and employees may agree on working from home arrangements or for employees to be working while in transit, where this is appropriate for the type of business. Depending on the implementation of the arrangement, this may involve the employer issuing IT equipment or software that – once installed in an employee's premisses or on their private devices – enables them to have the same level of access to the employer's network, systems and resources as they would have if they were in the workplace. Employers must, however, implement appropriate technical and organisational measures to ensure compliance with data protection obligations under the Gibraltar GDPR and the Data Protection Act 2004 (DPA) in respect of the employees working remotely.

As regards the monitoring of working from home arrangements, the employer must ensure that any use of employees' personal data complies with the data protection law and identifies a lawful basis under Article 6 of the Gibraltar GDPR and Article 9 of the Gibraltar GDPR in respect of special categories of personal data, where applicable.

5.2 Sabbaticals

There is no statutory right to request or take a career break or a sabbatical (paid or unpaid) for employees. However, such arrangements may be included in an employment contract or employee handbook as part of the employer's employee retention strategy. A sabbatical would generally be subject to a negotiation between the employer and the employee, rather than a contractual or legal right.

5.3 Other New Manifestations

Gibraltar does not currently have in place extensive regulations regarding new working arrangements such as desk sharing.

6. Collective Relations

6.1 Unions

The law on trade unions is largely governed by the Trade Unions and Trade Disputes Act 1947, which was recently supplemented by the Employment (Trade Union Recognition) Regulations 2023 with regard to the recognition of trade unions by the employers.

In order for a trade union to be able to conduct effective collective bargaining on behalf of its members, it must be registered in accordance with the provisions of the Trade Unions and Trade Disputes Act 1947.

An employee has the following rights in relation to their employer:

- the employee may not be refused employment because of membership or non-membership of a trade union; and
- dismissal for membership of, or for taking part in the activities of, an independent trade union is deemed automatically unfair for the purposes of the Employment Act 1932.

6.2 Employee Representative Bodies

Where an employer is proposing to dismiss as redundant five or more employees at one establishment within a period of 90 days or less, the employer is required to consult about the dismissals all persons who are the appropriate representatives of any employees who may be affected by the proposed dismissals or by measures taken in connection with those dismissals.

The appropriate representatives of any affected employees are the representatives of the trade union (if the employees are of a description in respect of which a trade union is recognised by their employer) or, in any other cases, the employees' representatives elected by the employees in accordance with Section 76(3)(b) of the Employment Act 1932.

6.3 Collective Bargaining Agreements

Collective bargaining agreements are negotiated between trade unions and the employers or employers' associations. Collective bargaining agreements form the basis of an individual's contract of employment, provided certain conditions are met.

7. Termination

7.1 Grounds for Termination

Employees with at least a year of continuous service can only be dismissed for a fair reason, namely:

- a reason related to capability;
- a reason related to conduct;
- redundancy;
- the inability of employee to continue working without contravening the law; or
- some other substantial reason of a kind to justify the dismissal.

The employer has the burden of proving the reason for dismissal.

Redundancy

Redundancy is a potentially fair reason for dismissal, if there is a genuine redundancy situation.

Section 65(7)(c) of the Employment Act 1932 provides that any reference to redundancy or to being redundant shall be construed as a reference to the fact that:

- the employer has ceased (or intends to cease) to carry on the business for the purposes of which the employee was employed by the employer or has ceased (or intends to cease) to carry on that business; or
- the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

The definition of redundancy therefore incorporates three main situations:

- the employer is closing down the business altogether;
- the employer is closing down the business in the place where the employee is employed; or
- the employer no longer needs the employee's skills.

Note that Employee A may be dismissed as redundant even if the requirement for work that they were employed to do remains the same but Employee B's job has diminished or ceased and Employee B takes over Employee A's job. This is colloquially known as "bumping".

Procedure

As mentioned in **6.2 Employee Representative Bodies**, where an employer is proposing to dismiss as redundant five or more employees at one establishment within a period of 90 days or less, the employer must consult about the dismissals all the persons who are appropriate representatives of any employees who may be affected by the proposed dismissals or by measures taken in connection with those dismissals. The consulta-

tion must begin at the earliest opportunity and, in any event, at least 60 days before the first of the dismissals takes effect.

The appropriate representatives of any affected employees are representatives of the trade union (if the employees are of a description in respect of which a trade union is recognised by their employer) or, in any other case, employee representatives chosen by the employees.

The consultation must include consultation about ways of:

- avoiding the dismissals;
- reducing the number of employees to be dismissed; and
- mitigating the consequences of the dismissals.

Further, the consultation must be undertaken by the employer with a view to reaching an agreement with the appropriate representatives.

In determining how many employees an employer is proposing to dismiss as redundant, no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

For the purposes of the consultation, the employer must disclose in writing to the appropriate representatives and to the Director of Employment:

- the reasons for their proposals;
- the number and description of employees whom it is proposed to dismiss as redundant;
- the total number of employees of any such description employed by the employer at the establishment in question;
- the proposed method of selecting the employees who may be dismissed;
- the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect; and
- the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by, or by virtue of, any enactment) to employees who may be dismissed.

The dismissal shall be regarded as unfair if the reason or principal reason for the dismissal of an employee was that they were redundant, but it is shown that the circumstances constituting the redundancy apply equally to one or more other employees in the same undertaking who hold positions similar to that held by the dismissed employee and who have not been dismissed by the employer and that either:

- the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that the employee had exercised – or had indicated an intention to exercise – certain rights (specifically indicated in Section 60(2) and Section 62 of the Employment Act); or
- the employee was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in this case.

Compensation

Subject to certain specified exceptions, if an employee who has been continuously employed for two years is dismissed by reason of redun-

dancy, they are entitled to a redundancy payment.

Where a person's employment is terminated by reason of redundancy, and provided that the total amount of the redundancy payment does not exceed the amount of one year of pay and that no payment will be made to an employee who has not completed one year of service,they shall be paid by their employer by way of compensation:

- for each of the first five completed years of service, two weeks of pay;
- for each of the next five completed years of service, three weeks of pay;
- for each additional completed year thereafter, four weeks of pay; and
- in respect of an employee age 41 years and over, for each completed year of service after the age of 40, two weeks of pay.

However, the foregoing shall not prevent redundancy settlements that are more favourable.

Compromise Agreements

A common way of terminating an employment relationship is to enter into a compromise contract. Effectively an employer will pay an employee an agreed sum of money in return for the employee not bringing or continuing any common law or statutory claims against the employer for any act of discrimination or harassment. For details of the conditions that must be met in order for the compromise agreement to be binding, please refer to **7.4 Termination Agreements**.

7.2 Notice Periods

Minimum statutory notice periods the employer must give vary depending on the employee's length of service. If the employee is paid monthly, notice periods are as follows:

- up to eight years' service – one month;
- between eight and ten years' service – two months; and
- more than ten years' service – three months.

If the employee is paid more often than monthly, notice periods are as follows:

- less than two years' service – one week;
- between two and five years' service – two weeks;
- between five and eight years' service – four weeks;
- between eight and ten years' service – eight weeks; and
- more than ten years' service – 13 weeks.

Employment contracts can provide for longer notice periods and for payment in lieu of notice.

Dismissal Without Notice and Breach of Contract Claims

Employees can be dismissed without notice in cases of gross misconduct. Otherwise, failure to provide appropriate notice will give rise to a claim for wrongful dismissal. Fixed-term employees who are dismissed before the expiry of their contract are entitled to 50% of the sum that would have accrued during the unexpired period of the contract.

The employer must file a Notice of Termination with the Department of Employment within seven days of the dismissal.

To avoid breach of contract claims, the employer must comply with any contractual obligations regarding termination. A fair process must be conducted to avoid claims for unfair dismissal. Although not a statutory requirement, the Employment Tribunal will consider the process followed by the employer.

Different considerations will apply in cases where dismissal is on the grounds of capability or redundancy.

7.3 Dismissal for (Serious) Cause

Generally speaking, an act of gross misconduct is considered to be serious enough to overturn the contract between employer and employee, thus justifying summary dismissal. It is still vital that the employer follows a fair procedure as for any disciplinary offence.

Failure to establish the facts before taking action and failure to hold a meeting with the employee, as well as denying the employee the right to appeal, are highly likely to be considered unfair at an Employment Tribunal and lead to a claim against the employer.

7.4 Termination Agreements

The conditions regulating compromise contracts in respect of complaints presented to the Employment Tribunal for harassment or discrimination are set out in Section 62(2) of the Equal Opportunities Act 2006. The conditions under Section 62(2) are that:

- the contract must be in writing;
- the contract must relate to the particular complaint;
- the complainant must have received advice from a relevant independent adviser as to the terms and effect of the proposed contract and, in particular, its effect on their ability to pursue a legal complaint;
- when the adviser gives the advice, there must be in force a contract of insurance – or an indemnity provided for members of a profession or professional body – covering the risk of a claim by the complainant in respect of loss arising as a consequence of the advice;
- the contract must identify the adviser; and
- the contract must state that the conditions regulating compromise contracts under Section 62(2) are satisfied.

A person is a relevant independent adviser for the purposes of Section 62(2) if:

- they are a qualified lawyer (barrister or solicitor);
- they are an officer, official, employee or member of a trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union; or
- they work at an advice centre (whether as an employee or a volunteer) and have been certified in writing by the centre as competent to give advice in relation to employment and equal opportunities law and as authorised to do so on behalf of the centre.

A person is not a relevant independent adviser in relation to the complainant if:

- they are employed by – or is acting in the matter for – the other party or a person who is connected with the other party;
- in the case of a person within subsection (3)(b) or (c), the trade union or advice centre is the other party or a person who is connected with the other party; or
- in the case of a person within subsection (3)(c), the complainant makes a payment for the advice received from said person.

Any two persons are to be treated as connected if:

- one is a company of which the other (directly or indirectly) has control; or
- both are companies of which a third person (directly or indirectly) has control.

7.5 Protected Categories of Employee

It is unlawful to discriminate against employees on the basis of any protected characteristic under the Equal Opportunities Act 2006. The protected characteristics are as follows:

- gender;
- gender reassignment;
- marital or civil partnership status;
- racial and ethnic origin;
- pregnancy or maternity leave;
- age;
- disability;
- sexual orientation; and
- religious beliefs.

For details of the various forms discrimination may take, please refer to **8.2 Anti-discrimination**.

8. Disputes

8.1 Wrongful Dismissal

Breach of a notice term, whether express or implied, and breach of a contractual disciplinary procedure are examples of grounds for a wrongful dismissal claim. The remedies available for wrongful dismissal are damages and equitable remedies (eg, a declaration). An injunction will only be granted if damages would be inadequate.

8.2 Anti-discrimination

As mentioned in **7.5 Protected Categories of Employee**, legislation in Gibraltar (in particular, the Equal Opportunities Act 2006) forbids discrimination in the workplace on the basis of:

- age or age group;
- disability;
- pregnancy or maternity leave;
- racial or ethnic origin;
- religion or belief;
- sex (including marital or family status); or
- sexual orientation.

Discrimination may take the form of direct discrimination, indirect discrimination, harassment or victimisation. Almost all categories of workers are protected from discrimination including employees, contract workers, past employees or workers and those applying for jobs or in the process of going through recruitment procedures.

Any termination that can be shown to be due to a discriminatory reason will be unlawful.

There is no cap on awards for discrimination or harassment. A successful applicant may be awarded damages, including damages for injury to feelings.

8.3 Digitalisation

The majority of disputes between the employees and employers are brought before the Employment Tribunal and the proceedings are typically held in person. However, the Employment Tribunal has the discretion to implement videoconferencing facilities (if deemed appropriate).

9. Dispute Resolution

9.1 Litigation

Standard forms are available on the Department of Employment website and are required to be completed and sent to the Department of Employment in the event of a termination or a change to employment status. The Employment Tribunal Claim Form (the “Claim Form”) is also available on the Department of Employment website.

An employee may take a claim to the Employment Tribunal if they think someone has treated them unlawfully – for example, their employer, a potential employer or a trade union. Unlawful treatment can include:

- unfair dismissal;
- discrimination; and
- bullying at work.

Making a Claim

A claim has to be made to the Employment Tribunal within three months of employment terminating or of the act constituting the basis of the claim occurring. To make a claim, a Claim Form must be completed and submitted to the secretary of the Employment Tribunal. The Employment Tribunal secretary will send a copy of the Claim Form to the respondent and a blank Response Form for them to complete. The respondent then has an opportunity to file a response. The employee will receive a copy of the response.

Once the Employment Tribunal has accepted a Claim Form and any Response Form, it will appoint a mediator.

9.2 Alternative Dispute Resolution

Arbitration is possible if included in the employment contract. Pre-dispute arbitration agreements are enforceable.

9.3 Costs

The Employment Tribunal may – on its own initiative or on application – make a costs order or a preparation time order, where it considers that:

- a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part thereof) or the way that the proceedings (or part thereof) have been conducted; or
- any claim or response has no reasonable prospect of success.

The Employment Tribunal may also make a costs order or a preparation time order where a party has been in breach of any order or any of the Employment Tribunal (Constitution and Procedure) Rules or where a hearing has been adjourned or postponed on the application of or as a result of the conduct of a party.

GREECE

Law and Practice

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Kyriakides Georgopoulos Law Firm

Contents

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Kyriakides Georgopoulos Law Firm (KG) is the largest law firm in Greece. The firm dates back to the 1930s and is recognised as one of the most prestigious law firms in Greece. KG is the preferred partner for many leading US and European international law firms, and consistently delivers legal services that meet the most demanding international standards of professional excellence and client service. The firm's partners and lawyers are prominent participants in international practice law institutions and networks, including the International Bar Association, the American Bar Association, the Antitrust Alliance, the Employment Law Alliance, the European Employment Lawyers Association, and the International Fiscal Association.

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Ioanna Kyriazi is head of the employment practice at Kyriakides Georgopoulos Law Firm. With more than 20 years of experience, Ioanna represents and guides leading foreign and Greek companies of various industries through the implementation of their HR strategic decisions, advising on all employment-related issues, from recruitment to termination. She has developed strong expertise in complex restructuring projects, individual and collective redundancies, collective bargaining at all levels, industrial relations with unions and works councils, as well as mediation and arbitration. Ioanna also advises the firm's clients on the implementation of innovative forms of employment within the Greek legal environment. She is also an active litigator, representing companies in their employment and social security disputes (individual and collective) before the competent courts.

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Angeliki Sotiropoulou is a member of the employment practice at Kyriakides Georgopoulos Law Firm. Her practice focuses on a wide range of matters arising in the area of employment law, including drafting of employment agreements, company policies and regulations, advising on employee termination matters, flexible employment forms, restructuring projects, business transfers and collective labour law issues. Angeliki advises both domestic and international clients with regards to their day-to-day employment matters, and she also litigates before the Greek courts on a wide range of employment litigation claims.

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1. Employment Terms

1.1 Employee Status

Blue-Collar and White-Collar Workers

Greek labour law distinguishes between blue-collar and white-collar workers based on the nature of the work performed. White-collar workers mainly carry out professional, managerial, or administrative work requiring analytical skills, typically in an office environment, and their duties require specific skills and qualifications, whereas blue-collar workers are those who primarily carry out manual work and are mainly managed or guided by a supervisor.

Typically, a white-collar worker is paid a monthly salary, while a blue-collar worker is paid a daily wage.

Executive Employees

Executive employees are not subject to standard working hours or working days. Consequently, they are not entitled to overtime, Sunday, or holiday pay, etc. For an employee to be considered an executive, they must possess certain powers and fall under one of the following categories:

- they must either:
  - (a) exercise managerial rights in relation to the other employees of the company; represent the company in external dealings;
  - (b) be a member of the company's board of directors or equivalent management body; or
  - (c) be a shareholder or partner holding more than 0.5% of the employer's voting rights;
- be in charge of units or departments or other autonomous organisational units of the company specified in its organisational structure, be instructed to supervise part of the company's essential (and continuous, interrupted or exceptional) operations, and their agreed monthly remuneration is at least four times the prevailing minimum statutory wage; or
- their monthly salary is no less than six times the prevailing minimum statutory wage (currently EUR830 gross).

1.2 Employment Contracts

Different Types of Employment Contracts

Employment contracts can be either fixed term or indefinite term contracts.

Fixed-term contracts are terminated automatically when the contractually agreed term expires. By way of exception, they may be terminated prior to their contractually agreed term for just cause, without any prior notice or severance payment. In the absence of such just cause, the employer is obliged to pay all remuneration due to the employee until the agreed end date.

A fixed-term contract must be in writing and can be renewed no more than three consecutive times during a total period of three years and cannot exceed a maximum duration of three years. A break of more than forty-five calendar days is required in order to avoid the characterisation of consecutive fixed-term contracts as indefinite contracts.

Additional Requirements and Terms to be Included in the Employment Contracts

In general, the employer is obliged to notify the employee in writing regarding the main employment terms and conditions, within either one week or one month of the beginning of the employment relationship, as set out below.

The employment terms or conditions to be notified to the employee by the employer within one week of the beginning of the employment relationship are:

- the full details of the contracting parties;
- the place of work;
- the job position or the employee's specialty, grade, nature or category of work;
- the date of beginning of the employment relationship;
- the date of expiry of fixed term employment contracts or agreed duration;
- the duration and conditions of the probationary period, if any (the parties may agree on a notice period of up to six months);
- any remuneration to which the employee is entitled, and the frequency and method of its payment; and
- daily or weekly working hours, provision regarding the provision of overtime work or additional work and their remuneration and provisions regarding shifts; and
- if the work pattern is entirely or mostly unpredictable, the employer shall inform the employee of:
  (a) the inherent variability of the work schedule;
  (b) the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours;
  (c) the reference hours and days during which the employee may be required to provide services;
  (d) the minimum notice period to which the employee is entitled before the start of a work assignment; and
  (e) the time limit within which the employer retains the right to cancel a work assignment.

The employment terms or conditions to be notified to the employee by the employer within one month of the beginning of the employment relationship are:

- the details of the indirect employer in the case of temporary agency employees;
- the training entitlement provided by the employer, if any;
- the annual leave entitlement, including the method and timing of granting leave;
- the procedure to be followed in case of termination;
- any collective agreements governing the employee's conditions of work and the names of joint bodies or institutions involved in the conclusion of those agreements; and
- the identity of the social security institutions receiving the social contributions attached to the employment relationship and any protection relating to social security provided by the employer.

The employer is obliged to submit to the ERGA-NI platform the standard statutory hiring document, namely the "E.3 Hiring Notification", along with the "Statement of Main Employment Terms" duly signed by the employee, before the start of employment, as well as the employee's employment contract, duly signed by the employee, within seven days of the start of employment.

Any changes to the agreed employment terms should be notified to the employee in writing within the timelines outlined above.

Fixed-term, part-time employment contracts and remote work agreements shall be concluded in writing. Additional requirements, including provisions related to the granting of remote work equipment, the payment of remote work costs and the employee's right to disconnect, shall be notified to employees by the employer in case of a remote work agreement.

Contract Language Requirements

There is no legal requirement for employment contracts to be drawn up in Greek. If the employee has fluent knowledge of a foreign language and is therefore able to fully understand the content of the employment contract, the contract may be drawn up in such foreign language.

1.3 Working Hours

Maximum Working Hours

The statutory working time is eight hours per day, five days per week and 40 hours per week, or 6.40 hours per day during a six-day week, except for specific categories of employees (ie, bank employees, electricians, builders, underage employees, etc), who are employed for fewer hours.

Overwork/Overtime

Legal working hours may be exceeded by five hours per week (one hour/working day on a five-day work basis) due to increased workload, even without the employee's consent. This overtime is called "overwork" and is paid at 120% of the hourly wage (unless an employee's salary is higher than the standard legal wage, and there is an agreement that this excess will cover overwork compensation). For a six-day working week, the 41st to 48th hour is considered overwork and is paid at 120% of the regular hourly wage.

Any work above the 45-hour limit and nine hours daily is considered overtime. An employee can legally work up to 3 hours per day and 150 hours per year of overtime. Every hour of legal overtime is paid at 140% of the hourly wage.

Every hour of overtime that does not comply with the formalities and approval procedures provided for by law is considered "illegal overtime". For every hour of illegal overtime employees undertake, they are entitled to compensation equal to the current hourly wage plus 120%.

In theory, a special permit to work overtime beyond the 150-hour limit may be requested from the Ministry of Labour, but such a permit is rarely granted and must be justified for very specific reasons and due to extraordinary work. However, if such a permit is granted, this overtime is paid at 160% of the hourly wage.

The provision of paid time off instead of paying the statutory overwork or overtime compensation is not allowed.

The parties may agree in the employment contract that the part of the employee's salary exceeding the statutory minimum can be offset by the overwork compensation. However, such contractually agreed offsetting is not allowed for overtime compensation.

Work During Sundays and Public Holidays

Employees are not allowed to work on Sundays or public holidays, unless they are employed by an employer who is exempt by law from such restrictions. The employee's compensation amounts to 175% of the legal hourly wage.

Furthermore, in case of urgent work necessary to prevent potential damage, employees may work on Sundays or on public holidays if permitted by the competent labour authorities. If this procedure is not followed, Sunday work is considered "illegal".

If an employee works for more than five hours on Sunday, he/she is entitled to receive a day off, which the company cannot refuse to grant.

Work During Saturdays

For employees working five days a week, working on Saturdays is considered illegal and employees are entitled to receive 130% of their normal hourly wage.

In order for Saturday work to be considered legal, employees should receive another day off during the same week and said change should be notified to the labour authorities.

Employees of companies that operate on a continuous basis (24/7) with alternating shifts, working a five-day working week, are entitled to work on the sixth day of the week (ie, Saturday), provided that the employer notifies the ERGANI platform regarding work on the sixth day, before the employee starts their employment.

Work on the sixth day of the week cannot exceed eight hours and the employee is entitled to 140% of their hourly wage.

Employees of companies that do not operate, based on the nature of their services, on a continuous basis (24/7), but can operate six days per week (from Monday to Saturday) for 24 hours with alternating shifts, can work on the sixth day of the week only in exceptional cases of heavy workload, provided that the employer notifies the competent labour authorities through the ERGANI platform before the employee starts their employment.

Work on the sixth day of the week cannot exceed eight hours and the employees are entitled to 140% of their hourly wage.

Night Work

Any work from 22:00 until 06.00 is considered night work and is remunerated at 125% of the hourly wage of the employee.

Part-time Contracts

A part-time employment contract should be concluded in writing and notified to the labour authorities through the ERGANI platform.

Part-time employees enjoy the same employment rights as full-time employees.

If additional work beyond the agreed working hours is required, the part-time employee is obliged to fulfil that requirement if he/she is capable of doing so, and the employee should be remunerated at 112% of his/her hourly wage and up to the completion of eight hours of daily work in total. However, employees may refuse this extra work if such additional working hours become a routine practice rather than an occasional requirement.

Work on a Rotation Basis

Another form of part-time employment is work on a rotation basis. Under this arrangement, employees work their full daily hours but only on specific days of the week. Such flexible working arrangement requires a written agreement by the parties and a notification to the labour authorities.

If the employer faces reduced turnover, they can independently decide to implement a rotational working model. However, this can only last up to nine months in a year. Before imposing this, the employer must:

- consult with the legal representatives of their employees, like the union or works council; and
- notify the labour authorities of their decision.

Other Working Time Arrangements

In scenarios where there is no trade union present within a company, or when an agreement

between the trade union and the employer cannot be reached, the employee may individually agree (in writing) with the employer to work an additional two hours beyond the standard eight-hour daily work period. The extra hours worked in the "increased work period" can be compensated for by reducing the hours in another period, granting days off, or even annual leave. The increased and reduced work period may not exceed a total of six months within a period of twelve months (the reference period). Under this arrangement, employees may legally work four days per week (ie, Monday to Thursday with a day off on Friday).

Additionally, the employee may agree with the employer to provide their services under an unpredictable working schedule. In such a case, the employee is obliged to accept to work within the hours requested by the employer, if the following conditions are cumulatively met:

- the work is provided within predetermined hours and reference days, which the employer must necessarily notify to the employee; and
- the employee has been notified by the employer of the assignment in writing or by text message via SMS or email or by any other appropriate means, within a reasonable time, which may not be less than 24 hours prior to the start of work, except in cases that objectively justify a shorter notice period, of which the employer shall notify the employee.

If the above conditions are not met cumulatively, the employee is entitled to refuse to work. In this case, any discrimination against the employee by the employer is prohibited.

If at any time, and in any case before beginning work, the employer "cancels the assignment", the employee is entitled to receive compensation corresponding to the hourly rate of the hours not assigned to him/her.

In any case, the parties are obliged to agree on a minimum number of paid working hours per month, which cannot be less than ¼ of the agreed total number of hours, otherwise the contract is null and void.

1.4 Compensation

Statutory Minimum Salary

As of 1 April 2024, the legal minimum wage is set for unmarried white-collar employees without prior working experience at EUR830.00 per month and for unmarried blue-collar employees without prior working experience at EUR37.07 per day.

Holiday Bonuses

Under Greek law, an employee is entitled to 12 monthly salaries per year plus one monthly salary as a Christmas bonus, half a monthly salary as an Easter bonus, and half a monthly salary as a holiday bonus; in total, 14 monthly salaries per year.

The Christmas Bonus is equal to one month's salary in the case of white-collar workers or to 25 daily wages in the case of blue-collar workers. The Easter bonus is equal to half a monthly salary for white-collar workers or to 15 daily wages for blue-collar workers.

An employee is entitled to receive 100% of the Christmas bonus if he/she continuously worked from 01/05 to 31/12, and 100% of the Easter bonus if he/she continuously worked from 01/01 to 30/04. If an employee has worked fewer days during the above reference periods, he/she is entitled to receive a prorated amount corresponding to the actual days worked.

Voluntary Benefits

Employers sometimes offer voluntary benefits beyond the agreed-upon salary. When there is an explicit provision stating these benefits may not be continuous in the future, they are not considered a part of the regular salary. As confirmed by case law, if the employer has not reserved the right to discontinue the benefit in the future, this benefit is considered an acquired right.

1.5 Other Employment Terms

Annual Leave and Payment

All employees are entitled to a fixed number of paid annual leave days, depending on the years of service with the company, or/and other employers.

First calendar year

Upon joining the company and for the remaining months until the end of that calendar year (December), an employee is entitled to two days of leave per month, up to the maximum amount of days they would be entitled should they have worked at the company for one whole year – ie, up to 20 days for employees working a five-day week and 24 days for employees working a six-day week.

Second calendar year

In the second calendar year, an employee working a five-day week is entitled to 20 days of annual leave. After one full year of service, the employee is entitled to one extra day, bringing their annual leave entitlement to 21 days in total.

Third calendar year

From the third calendar year onwards, an employee is entitled to 22 days of annual leave, which may be taken all at once.

Employees with a minimum of 12 years of experience or who have been working for at least ten years with the same employer are entitled to 25 days of annual leave if they work a five-day week, and 30 days if they work a six-day week.

Maternity Leave

Female employees are entitled to 17 weeks of maternity leave: eight weeks before the baby is born and nine weeks after.

Special maternity protection leave

New mothers, insured by e-EFKA, following the granting of maternity leave, are entitled to special maternity protection leave. This special leave can extend up to nine months. Beneficiaries of this leave also include mothers who have a child through surrogacy, as well as mothers who adopt a child (from the time of adoption until the child reaches the age of eight).

The employer is not obliged to pay any salary to the employee during such leave, since it is a benefit provided by the Greek Public Employment Service (*Dimosia Ipiresia Apasoholisses* or DYPA). During this period, the DYPA pays an allowance to the employee rather than the employer, based on the statutory minimum salary (and not the contractual salary). If the employee does not wish to use the totality of that leave, the rest of the days/months cannot be transferred to another period.

Mothers are entitled to transfer up to seven months of the special maternity protection leave to the father if the father is employed under a fixed or permanent employment contract either on a full- or part-time basis.

Childcare Leave – Reduced Daily Working Hours

Any working parent, even if the other parent is not working, is entitled to childcare leave. This leave allows parents of young children to work

reduced hours for a period of 30 months after the end of maternity leave or the nine-month special protection maternity leave or parental leave.

This leave can be taken as outlined below.

Option 1

Parents are entitled to work one hour less each day with no decrease in regular pay for a period of 30 months – ie, they can choose to come to work later, leave earlier, or take an hour's break during the day.

Option 2

Parents can work two hours less each day for a period of 12 months and one hour less each day for the following 6 months with no decrease in regular pay.

Option 3

The above-mentioned entitlement to reduced daily working hours can be converted into an "equal time continuous paid leave", upon agreement with the employer.

Option 4

Parents can choose to consolidate their entitled reduced hours into complete leave days. These full days off are distributed over weeks.

Other options

This leave can be taken in other ways agreed on by the parties.

Parental Leave

Each working parent who has completed one year of service with the employer and has custody of his/her child is also entitled to parental leave, which can be used until the child reaches eight years old.

Parental leave is granted for a period of four months, either continuously, in part or in another flexible way, upon request of the parent. To avail of this, employees must:

- submit a request to the company, either in writing or electronically, specifying the start and end dates of the proposed leave; and
- ensure the request is made at least a month before the intended start unless there is an urgent need.

The employer shall respond to the request within a month, and shall generally grant the leave request within the requested period, unless this would significantly disrupt the normal operation of the business. In the latter case, the employer shall document in writing the granting of the leave at a different time or suggest alternatives (eg, granting in parts) or other flexible ways of granting (eg, reduced working hours) based on business needs. In any case and in the absence of any other agreement between the parties (eg, a flexible arrangement), the leave needs to be granted by the employer within two months of the request.

Payment during parental leave

Parental leave is not paid by the employer (unless otherwise agreed between the parties).

For the first two months of parental leave, the Greek Public Employment Service (*Dimosia Ipiresia Apasoholises* or DYPA) is obliged to pay the employee a monthly parental allowance, the amount of which is equal to the prevailing statutory minimum wage, as well as the proportion of holiday gifts and bonuses calculated on the basis of the above amount.

Special Leave for Antenatal Examinations and Gynaecological Check-ups

Pregnant employees are entitled to paid absence from work to attend antenatal examinations, where such appointments must take place during working hours.

Female employees are granted one paid day per year for a gynaecological check-up.

Special Leave for Receiving IVF Treatment

An employee receiving IVF treatment is entitled to seven working days of paid leave, subject to providing the relevant medical certificate.

Marriage Leave

Employees are entitled to paid marriage leave of six working days for employees who work six days per week and five days for employees who work five days per week.

Leave Due to Illness of Child or Other Dependent

Working parents are entitled to up to six days of unpaid leave per calendar year in case of the illness of their child or other dependent family member, upon their request. The entitlement to such special leave is increased to eight working days if the employee is responsible for the protection of two children, and to 14 working days if he/she is responsible for the protection of more than two children. This is an individual and non-transferable right.

Leave Due to Serious Illnesses of Children

Working parents are entitled to a special paid parental leave of ten working days to cater to the needs of their children. This applies to children up to the age of 18 who require blood transfusions, dialysis, have a neoplastic condition, or need a transplant. Additionally, this leave is also available for children of any age diagnosed with severe mental disabilities, Down syndrome, or autism.

Leave due to Hospitalisation of Children

Working parents are entitled to a special unpaid parental leave in case of the hospitalisation of their child, regardless of the latter's age, due to illness or accident which necessitates the immediate presence of the parent, for as long as the treatment lasts and in any case not more than 30 working days per year.

Leave for Single Parents

Working parents who have been widowed, and unmarried parents who have the sole custody of a child, are entitled to paid leave of six working days per year. An employee with three children or more is entitled to eight working days of such leave per year.

Absence Due to Reasons of Force Majeure

Employees, whether they are parents or caregivers, have the right to take paid leave from work up to two times a year, with each leave not exceeding one working day. This leave is granted for urgent family matters arising from unforeseen events, such as accidents or illnesses that are validated by a medical professional or hospital, where the employee's immediate presence is essential.

Caregiver's Leave

Employees who live with or care for a person in need and have completed six months of service with an employer are entitled to unpaid caregiver's leave, for up to five working days per calendar year.

Sickness Leave

In case of sickness, an employee is entitled to be remunerated by the employer for the following maximum periods:

- if the employee has been employed by the company for at least one year, he/she is entitled to be remunerated for a maximum of one month of absence due to sickness; after this period, the employer has no obligation to pay the employee any salary for the rest of his/her absence due to sickness; or
- if the employee has been employed by the company for less than a year, he/she is entitled to be remunerated for a maximum of half a month of absence.

The total amount payable by the employer is reduced by the relevant amount paid by the Social Security Fund.

Confidentiality – Non-Disparagement Obligations

The employee has a direct legal obligation to treat with confidentiality any information he/she received during his/her employment that may adversely affect the company if it becomes public. The employee is further obliged to abstain from any disparaging declarations or statements against his/her employer. It is common practice to include similar clauses in the employment contract, determining such obligations in a specific manner.

Employee's Liability

The employee is liable only for the damages which have been intentionally caused to the employer. In case of negligence, the employee may be acquitted by the court or the court may allocate the damages between the parties.

2. Restrictive Covenants

2.1 Non-competes

According to the applicable legal regime, it is prohibited to conclude agreements or establish clauses prohibiting an employee from working for other employers outside the working hours agreed with a particular employer, unless they are justified by objective reasons such as health and safety, protection of business confidentiality, working in competing undertakings or avoiding a conflict of interest. Agreements or clauses prohibiting the provision of work to other employers are void.

Any discriminatory treatment of the employee by the employer because of the provision of work to other employers is prohibited.

No specific legal framework exists for non-compete restrictions for the period following the termination of the employment contract. Greek courts have ruled that for the employer to enforce a non-compete clause, the following requirements must be met:

- the employer should be able to prove that it has a legitimate business interest to protect the clause;
- the scope of the restrictions must be reasonable – said requirement applies to the job position, the needs of the company to provide for the covenant, its term, its geographical limit, the business activity, etc; and
- the employee must receive consideration for his/her loss caused by agreeing to the non-compete clause.

Greek courts have rules that for a non-compete clause to be valid, the employer must offer "reasonable" compensation to the employee, which must be in relation to the restriction imposed (duration, geographic area, activity/business sector, etc). There is no specific formula or amount provided by law; the only condition, which case law provides for, is that the compensation must be "reasonable", which is judged

on a case-by-case basis. In practice, said compensation varies between 50 and 100 percent of the monthly salary of the employee, multiplied by the number of months the restriction clause lasts.

Usually, such clauses are included in the employment agreements of employees in managerial positions, as well as employees who have access to confidential information of the company or deal with important clients or work in a very sensitive function of the company.

2.2 Non-solicits

The employer may enforce a non-solicitation clause under which the employee undertakes that he/she will refrain from soliciting a restricted list of clients or other employees.

There is no specific regulation either allowing or prohibiting such clauses, the enforceability of which will be determined by the same principles as those applicable to non-compete clauses. In practice, there is a limited duration for this type of contractual commitment (up to 12 months). It applies to direct and indirect solicitation of former employees.

3. Data Privacy

3.1 Data Privacy Law and Employment

In the context of employment, the General Data Protection Regulation (EU) 2016/679 (the GDPR) sets forth the requirements for the collection, processing and protection of personal data of employees.

Additionally, Greek Law 4624/2019 enacts supplemental measures for the application of the GDPR, including several derogations from the GDPR related to the processing of employee personal data, specifically regarding consent in the employment context, requirements on the processing of special categories of employee data and requirements on the monitoring of employees through CCTV systems.

The Hellenic Data Protection Authority (the HDPA) has also issued several Directives in relation to Data Protection in the employment sphere, notably Directive 1/2011 on the use of CCTV for the protection of natural persons and goods and Directive 115/2001 on employee monitoring.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Under Greek law there are different provisions applicable depending on whether a foreign national qualifies as an EU/EEA citizen or a non-EU/EEA citizen. In particular:

- EU and European Economic Area (EU/EEA) citizens may freely reside and work in Greece. The only requirement for their lawful residence is the possession of a valid EU citizen passport. EEA/EU nationals, who wish to stay and work in Greece for more than three months are provided with an EU national registration certificate, of indefinite period from the police department of their place of residence.
- Third-country nationals who wish to work in Greece must receive, before travelling to Greece, a visa from the Greek Embassy or the Greek Consulate of their country of residence. Once they enter Greece, they should apply for a residence permit during the validity period of this visa, depending on the category they fall under by law.

4.2 Registration Requirements for Foreign Workers

A basic requirement for the application for a residence/work permit by a non-EU/EEA national is to have already obtained a D-type visa.

Based on a recent newly issued Ministerial Decision, for certain types of residence/work permits, the host entity (ie, the Greek company) shall request from the Greek Ministry of Migration "employment approval" by submitting certain supporting documentation. Once the approval is received and notified to the Greek Consulate, the latter may proceed with the issuance of the requested D visa (by requesting additional documents).

Following the issuance of the requested D visa, the applications for residence/work permits are submitted electronically to the local Directorate for Foreigners and Immigration of the Decentralised Administration, based on the applicant's place of residence in Greece, or to the competent Directorate for Immigration Policy of the Ministry of the Interior.

Upon due submission of the residence application, the applicant receives a certificate confirming submission of the application form for the issuance of a residence permit, which is valid until the official residence permit is issued.

It should be noted that if a non-EU/EEA citizen signs an employment contract without possessing a residence/work permit, the employment contract is invalid, without prejudice to any administrative and/or penal sanctions being imposed on the employer.

5. New Work

5.1 Mobile Work

In accordance with the current legal framework, remote work (regardless of whether this refers to fully remote work or to a hybrid working model) should be mutually agreed between the employer and the employee, in writing.

By exception, remote working may be implemented unilaterally only in specific cases provided by the law: (i) by the employer only for specific reasons related to public health (eg, a pandemic); or (ii) following an employee's request due to serious health issues. In addition to that, parents of children aged up to twelve years old and caregivers have the right to request to work from home.

In any case, during remote work, the employer undertakes to pay minimum remote work costs, which are as follows:

- EUR13 per month for the use of the employee's residence as a workplace;
- EUR10 per month for telecommunications costs; and
- EUR5 per month for the maintenance of work equipment.

If telecommunications costs are covered by the employer through a separate contract signed with a telecommunications provider, the employer is released from the payment of the respective cost to the employee. Similarly, if the work-related equipment is already provided by the employer, the latter is not obliged to pay any maintenance costs to the employee.

If an employee works remotely for less than 22 days per month (ie, because he/she may work at the company's premises, or he/she is on

leave, etc), the employee is compensated with a proportion equal to 1/22 of the above costs per working day (ie, for the days working from home).

With regard to the payment procedure of such amounts, it is clarified that they shall be deposited separately into the employee's bank account and not through normal payroll since they constitute expenses and therefore are not subject to social security contributions and taxes.

Data Privacy Requirements

- In the context of remote work, data protection legislation (ie, the GDPR and Greek Law 4624/2019, as well as relevant decisions, guidelines, directives and other acts of the HDPA) shall apply.
- A ministerial decision is expected to be published in Greece regulating specific data privacy matters in relation to remote work, upon the relevant legal opinion of the HDPA. Such ministerial decision is also expected to include provisions related to monitoring of working hours and compliance with labour legislation in general during remote work, as well as provisions safeguarding business confidentiality and employees' personal data.
- Guidelines 2/2020 of the HDPA have established the appropriate technical measures to be included in remote work procedures applied by the employer.
- If the employer wants to hire employees under a bring your own device (BYOD) policy in the context of mobile work, they must establish an official BYOD policy approved by the most senior management. Appropriate measures must apply to distinguish between the private and professional use of a personal device, especially when monitoring software is in place, and the employer may not access private parts of the personal device. In addition, the employer must implement methods for securely transmitting data between the employee's private device and the employer's network.

Regarding the occupational safety and health issues during remote work, the employer is obliged to inform remote workers with regards to the company's policies on health and safety matters, including:

- information about organisational and technical issues;
- equipment usage guidelines;
- the procedure to be followed if there is an accident during working hours;
- their right to take adequate breaks; and
- their right to disconnect.

From a Greek social security law perspective, employees are insured and therefore pay social security contributions to the Greek Social Security Fund, e-EFKA.

5.2 Sabbaticals

Sabbatical leave is not provided for under Greek labour law. However, unpaid leave of absence can be agreed in writing between the parties for a specific period (up to one year), which can be renewed upon written agreement of the parties. During that period, the employee has no obligation to work, and the employer is exempted from the obligation to pay a salary or social security contributions.

The above-mentioned agreement shall be notified to the employer through the ERGANI electronic platform and a copy of that must be delivered to e-EFKA (the Social Security Fund).

5.3 Other New Manifestations

In the current digital era, there are different kinds of remote work that are considered "new work". Apart from working at home (the typical way of remote working), employees may provide their services through:

- mobile telework – working while commuting or from a cottage or a hotel room;
- satellite centres or call centres – these are independent facilities that are set up by a company to allow employees to work remotely while still being in contact with the main office via telecommunications;
- teleworking centres – these are independent facilities that are set up by a company to allow employees to gather and work using digital means that are provided by the employer; and
- desk sharing – this is a hybrid working model where at least two employees share the same desk at the company's premises on different days.

As of today, no specific regulations exist with respect to the above-mentioned arrangements.

6. Collective Relations

6.1 Unions

Union membership is a fundamental right safeguarded under Article 12 of the Greek Constitution, guaranteeing employees the freedom to come together and collectively advocate for their rights and interests. This constitutional provision is clear, ensuring that no barriers are placed in the way of employees wishing to unionise. In the workplace, the employer is bound by this constitutional mandate. As such, any action, especially a dismissal, against an employee on the basis of their union involvement is strictly prohibited.

In Greece there are three levels of unions. First-level unions are established by employees within a specific business sector, profession, or company. First-level unions may participate in second-level unions, such as federations or labour centres or, in some cases, with both. The federations and labour centres, in turn, may participate in third-level unions such, as a confederation. There are currently two main confederations in Greece: (i) the General Confederation of Greek Employees (*Geniki Synomospondía Ergáton Elládas* or GSEE) for private sector employees and (ii) the Civil Servants Confederation (*Anotati Dioikisi Enoseon Dimosin Ypallilon* or ADEDY), representing public sector employees.

The main rights of unions are their right to collective bargaining and their right to strike. They have statutory information and consultation rights in cases of collective dismissals, transfer of undertakings, employee restructuring projects, corporate changes that might affect employment within the company, changes in the organisation of work, the introduction of new technologies, etc.

6.2 Employee Representative Bodies

Under Greek law, trade unions aim to preserve and promote the labour, financial, insurance, social and collective interests of employees. Firstly, the establishment of a union requires at least 20 employees. Secondly, the members of the union's administration must file a request for recognition with the relevant court. If the court approves the request for recognition, the members of the union must submit, in accordance with Greek law, a petition accompanied by supporting documents through the ERGANI electronic platform of the Ministry of Labour. After that, the union may participate in the collective bargaining consultation process and exercise the right to strike and sign collective bargaining agreements.

Trade union representatives have information, consultation, and negotiation rights. They should be consulted in advance with regards to issues regarding collective dismissals, changes in the legal form of the business, the possible transfer, expansion or limitation of the company's operations, the introduction of new technology, annual planning of investments in health and security measures, any restrictions or other changes to employment conditions. They are also entitled to negotiate with the employer for the conclusion of a collective labour agreement, the establishment or amendment of the internal working regulation or a policy against violence and harassment at work.

Greek law provides for further employee representative bodies as outlined below.

Works Councils

Works councils may be formed in every enterprise that employs at least 50 employees. In the absence of a trade union within the company, a works council can also be formed in a company with more than 20 employees. Works councils are elected from the employees and consist of three, five, or seven members, depending on the number of workers employed in the enterprise.

While their primary function is advisory, their influence extends beyond this. They have a right to be informed and consulted on several aspects that can significantly impact the workforce. This includes, but is not limited to:

- the drafting of the internal working regulation;
- the execution of a health and safety regulation;
- the preparation of informational programs regarding new development methods and new technologies;
- the organisation of educational and training programmes for employees;
- the scheduling of annual leave;
- the planning of social and cultural events; and
- collective dismissals (in the absence of a union), transfer of businesses, and employee redundancies.

Although works councils can exist alongside the trade unions, their position is less powerful than that of a trade union (eg, only in the absence of a trade union does the works council have the right to be informed and consulted regarding collective redundancies, transfers of undertakings, etc).

Works council officials enjoy the same protection provided to trade unions, and employers are not allowed to commit acts or omissions aimed at obstructing the exercise of their rights or interfering in any way with their activities.

However, in practice, works council are not very common in Greece. Employees are mainly represented by trade unions.

European Works Councils

For multinational enterprises, European Works Councils (EWCs) are established for the protection of employees' rights in a broader, multinational form. Employees from all countries in which the enterprise is engaged participate in an EWC.

The Health and Safety Committee or the Health and Safety Representative(s)

This applies to companies with more than 50 employees. The health and safety committee (or the health and safety representative(s) in companies with less than 50 employees), which is elected every two years, is an employees' representative body with an advisory role for health

and safety matters. If there is a works council within the company, the members of the health and safety committee are appointed by the latter. The purpose of the committee is to advise employers on occupational safety and health measures, but it is not responsible for taking these measures. Health and safety committees identify occupational hazards at the workplace and propose measures for their avoidance. In case of serious accidents at work, they can propose appropriate measures to avoid their reoccurrence. In the event of immediate or serious hazards, they can call on the employer to undertake appropriate measures, which may include shutting down machinery and installations or even suspending the production process. Health and safety representatives and members of a health and safety committee are protected against dismissal, and they must not suffer adverse consequences due to their occupational health and safety activities.

6.3 Collective Bargaining Agreements

The types of collective agreements are limited to the following:

- national collective labour agreements (NCLA), which are applicable to all employees in Greece, and currently include only non-monetary terms; such NCLAs include the minimum employment terms for all employees; per the current applicable legal framework, any monetary terms that may be agreed and included in the same will be binding only on employers that are members of the employer's organisations that have signed the NCLAs;
- sectoral collective agreements, which are applicable to employees and employers of the same sector that are members of the respective contracting trade unions; in exceptional cases, a sectoral collective agreement may cover all the employees and employers of the sector even if they are not members of the respective trade union, if it is declared as generally mandatory by a ministerial decision;
- occupational collective labour agreements, which apply to employees of the same occupation; and
- company-level collective labour agreements, which are applicable to the employees of the same company.

A CLA usually sets out the minimum wages and employment conditions of the covered employees (eg, the provision of more favourable terms for working hours, annual leave, employee allowances, etc).

In cases where the provisions of more than one CLA are applicable to an employee, the most favourable one for the employee would prevail as a general principle.

7. Termination

7.1 Grounds for Termination

Termination of indefinite employment contracts does not require the existence of a just cause; however, should the matter proceed to litigation, the employer must demonstrate that the termination was both reasonable and the last viable option.

Generally, the formal requirements for the validity of the termination of an indefinite-term employment contract are the following:

- written notification of the employee;
- simultaneous payment of the severance amount; and
- registration of the employee with the competent social security fund.

In exceptional cases, if the employee has committed a criminal offence and the company has filed a criminal complaint against him/her beforehand, he/she may be terminated without the payment of any severance amount. However, if the employee is acquitted by the criminal court for such a criminal offence, the company will be obliged to pay the statutory severance amount upon the issuance of the court's decision.

The statutory termination document should be signed by the person who is legally authorised by the company to sign employee terminations. In practice, the payroll provider extracts the statutory form (ie, E6 form) from the ERGANI platform and prints it in two originals, to be signed by both parties. If the employee refuses to sign the termination document, the employer should serve this at his/her residence through a court bailiff.

The termination document should be notified electronically to the labour authorities (through the ERGANI electronic platform) by the payroll provider of the company within four working days of the termination date.

The employer is entitled to terminate the employment contract during the first 12 months of employment without notice and severance payment.

Calculation of Severance Payment

The statutory severance entitlement in Greece consists of two elements: (i) the basic severance, which is applicable to all employees on indefinite contracts and (ii) the additional severance, which is applicable to employees who, as of 12/11/2012, have completed 17 years of service with the company.

Basic severance

The actual amount of the statutory severance amount (as well as the respective notice periods) depends on the completed years of service. Such basic severance amount is capped at 12 monthly salaries.

The calculation of the basic severance amount is based on the employee's total regular monthly remuneration of the last month prior to termination. This monthly remuneration is multiplied by 14 (to take into account the Christmas and Easter allowances and the annual leave allowance, as per the Greek legislation), and then divided by 12, in order to produce a monthly average. If the employee receives voluntary benefits (such as a medical plan, pension plan, company car) on a regular basis and without a reservation on behalf of the employer with respect to their discretionary amendment and/or revocation, the respective monthly amounts should also be taken into consideration for the severance calculation.

Additional severance

Employees who completed more than 17 years of service with the same employer as of 12/11/2012 are entitled to an additional severance of one monthly salary per year of service (over the 17 years) and up to 12 monthly salaries. For said additional severance the following factors shall be considered:

- the years of service of the employee until 12/11/2012, irrespective of the actual termination date (with the evaluation period ending on that date regardless of when the actual termination occurs); and
- the employee's regular earnings of the last month under full employment up to EUR2,000; this cap is not applicable if the employee meets the legal requirements for a full pension.

Redundancies

The elimination of job positions in the context of a restructuring and, in general, any type of redundancy, is considered a justified reason for dismissal. However, the employer should be able to prove in a potential litigation that the employee's position was actually made redundant, and that the employee was legally selected for redundancy in accordance with the selection criteria stipulated by the law. The employer should also consider whether there are any other alternatives available before proceeding with the redundancy (eg, to offer another vacant role to the affected employee).

The selection criteria should be implemented for comparable employees (ie, employees who are in the same department, level, job position, etc,) and relate to the performance of the employee, seniority, age, family burdens, the employee's financial status and the possibility of finding a new job. Performance is the prevailing criterion, if it is properly documented.

Collective Dismissals

Specific provisions exist for collective dismissals. If an employer employs between 20 and 150 employees in any calendar month, the collective dismissal procedure will apply if it dismisses more than six employees per calendar month and for companies with over 150 employees, more than 5% of the total workforce and in total more than 30 employees per calendar month.

Specific information and consultation requirements exist for collective dismissals and notifications to the Ministry of Labour. In general, the procedure is bureaucratic and very strict. If the employer fails to fully comply with its statutory obligations, the terminations are considered null and void.

7.2 Notice Periods

The employer's notice period in case of termination of indefinite term contracts is specifically provided for by the law and depends on the employee's completed years of service with the company, as follows:

- from the first completed year of employment and up to two years, the notice period is one month;
- from two to five years, the notice period is two months;
- from five to ten years, the notice period is three months; and
- for more than ten years of service, the notice period is four months.

The employer may opt to terminate the employee either with or without prior notice. In case of termination with the statutory notice, the statutory severance requirement is reduced to 50%.

In practice, termination with notice is not commonly used by employers in Greece since the company would still have to pay the employee's salaries and benefits during the notice period, effectively retaining a disengaged employee for several months.

7.3 Dismissal for (Serious) Cause

Indefinite employment contracts might be terminated without cause. However, given that the employee is entitled to challenge the validity of the termination in court within three months, the employer should be able to rebut the employee's allegations in case of a potential litigation.

In case of dismissal for performance or misconduct, the granting of previous warning(s) to the employee is advisable. The lack of suitable alternatives must be demonstrated in all cases,

to prove that the dismissal was the last viable option.

In cases of redundancies, the employer should follow the selection criteria provided by the law, as described above, and be able to prove that there were no opportunities for redeployment within the company.

7.4 Termination Agreements

For a company to avoid the litigation risks related to a dismissal, it may conclude with the employee a separation agreement, which will include specific waivers/releases regarding the validity of the termination, as well as the non-existence of any claim against the company. Usually, in practice, for an employee to agree to sign such separation agreement, the company should offer, as a motivation, an amount which is higher than the statutory severance. This option is mostly used in cases of redundancies, as well as in cases of terminations of senior executive employees.

Further to the separation agreement, the standard termination form should also be signed by both parties and should be duly notified to the labour authorities electronically in the ERGANI platform within four working days.

7.5 Protected Categories of Employee

There are special protection procedures against dismissal for employees such as:

- war veterans and disabled people with a mandatory employment relationship;
- members of the BoD of a union (for the period during their office and one year after their office);
- employees in military service, pregnant employees and new mothers (during the pregnancy and for a period of 18 months from the birth date); and
- fathers (for a period of six months from the birth date).

Employee representatives (ie, trade union/works council officials) can only be terminated for just cause.

Further, an employer cannot terminate an employee who is on annual leave.

8. Disputes

8.1 Wrongful Dismissal

A termination can be challenged by the employee within three months of the termination date, on the basis that it was illegal and abusive; alternatively, the employee is entitled to claim an additional severance amount within six months of the termination date, if he/she can prove that the severance amount paid to him/her was not correctly calculated.

If the court rules in favour of the employee, the termination will be judged null and void and the employee should be reinstated to his/her previous position in the company and shall continue to receive all his/her salaries due as of the termination date and until a new valid termination takes place; in addition, the employee may also claim moral damages.

Following a recent legal reform, if the termination is not specifically prohibited by the law, both parties (ie, either the employee or the employer) may petition the court, in lieu of reinstatement and payment of all remuneration due from the termination date (if the termination is considered illegal by the court), to order a fixed additional

severance amount, ranging from three monthly salaries to two times the legal severance.

8.2 Anti-discrimination

Any direct or indirect discrimination on grounds of sex, race, national origin, age, disability or chronic disease, religion or belief or sexual orientation in the field of employment is prohibited. Said prohibition is applicable to all employees, including job candidates, to both the private and public sectors, to the conditions for access to employment (including selection criteria and recruitment conditions), to employment terms and conditions (including dismissals and payment), as well as to participation in collective bodies.

Furthermore, "harassment" – namely, conduct that violates the dignity of another person and creates an intimidating, hostile, degrading, humiliating or offensive environment, is considered discriminatory conduct.

Any person who has suffered from discriminatory conduct, in violation of the principle of equal treatment, is entitled to seek legal protection even after the termination of the respective employment relationship.

The burden of proof in case of a discrimination claim lies with the respondent and not the claimant. More specifically, the respondent is obliged to prove the non-existence of any discriminatory conduct, provided that the claimant has presented valid evidence that leads to the presumption that discriminatory conduct has taken place. This obligation does not apply in criminal cases.

Any employer who violates the legal provisions regarding the principle of equal treatment shall also be held liable before the Labour Inspection Authority and face administrative sanctions.

8.3 Digitalisation

A new system of monitoring employees' working time under Greek labour law has been introduced. In accordance with the relevant provisions, all company employers in Greece are obliged to operate an electronic system directly connected with the ERGANI II platform (the electronic platform of the Ministry of Labour) in real time; working time will be monitored using a digital work card. The digital work card will be implemented gradually in different business sectors, considering the particularities and the operational needs of the relevant sectors and following relevant consultation with the employers' and the employees' representatives. At present, it has been rolled out in banks, supermarkets, insurance and security companies, public utility companies, companies of industry and retail sectors.

Based on announcements from the Ministry of Labour, the widespread implementation of the digital work card across all business sectors is anticipated by the end of 2024/early 2025.

9. Dispute Resolution

9.1 Litigation

In general, class actions for employment issues are not a common practice in Greece. However, there have been cases where a company makes a business decision that may directly affect many employees, who therefore decide to file a class action. A typical example of that is a transfer of business. By filing a class action, employees aim to achieve better representation before the courts, reduce court fees and put more pressure on the competent court to issue a decision in their favour.

9.2 Alternative Dispute Resolution

Under Greek law, individual labour law disputes cannot be subject to arbitration. Arbitration is an alternative dispute resolution option applicable mostly in cases of collective labour agreements.

Under Greek law, unilateral recourse to arbitration is allowed as the ultimate dispute resolution measure for collective labour disputes solely in the following cases:

- if the collective dispute refers to companies whose function is vital for the service of basic public needs (eg, state companies or utility services companies); or
- in case of collective disputes arising from the failure of the negotiations of the parties to conclude a collective labour agreement (CLA), the resolution of which is required by an actual cause of general social or public interest related to the function of the Greek economy.

The legal provisions also determine that negotiations are considered to have broken down when the regulatory effect of the existing CLA has expired and all alternative measures of understanding and union activities have been exhausted, and the party requesting the arbitration procedure has dully participated in the mediation procedure.

The application for unilateral recourse to arbitration should fully state how the above conditions have been met. Similarly, the respective arbitration decision should also be fully justified; otherwise, it will be considered null and void.

9.3 Costs

The awarding of attorney's fees to the employee is subject to the relevant request made by the latter in case of litigation. However, the competent judge has discretion in the matter of the allocation of the attorney's fees between the litigant parties. He/she is also free to determine not to award any amount to them due to the complexity of the legal issues brought before the court.

HUNGARY

Law and Practice

Contributed by:
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Szarvas and Partner Law Firm

Contents

Szarvas and Partner Law Firm is a small boutique firm with international clientele. It focuses on legal support of foreign investments in Hungary and on legal compliance of clients doing business in Hungary. Expertise of the firm includes employment, commercial, corporate and data protection laws. The firm specialises in complex advisory and transactional services, when legal support needs to be provided in consideration of tax and accounting aspects and in co-operation with professionals in such areas. Szarvas and Partner is an independent law firm, having smooth co-operation with several independent tax advisers and accounting firms, as well as with law firms in numerous European countries.

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1. Employment Terms

1.1 Employee Status

Blue-Collar and White-Collar Workers

Under Hungarian law, there is no distinction between blue-collar and white-collar workers. Pursuant to the legal definition, an employee in Hungary is a natural person who works under an employment contract.

Other Employee Statuses

Special regulations apply to the public sector. In some cases, the Labour Code is applicable with derogations provided for in sectoral laws. In other cases, the Labour Code is not applicable at all and is replaced by the specific law entirely. Further, student workers and executive employees are subject to special provisions based on their position, such as working hours, liability, termination, remuneration, etc.

1.2 Employment Contracts

Requirements for Employment Contracts

In most cases, employment contracts are concluded for an indefinite period. If the parties wish to conclude the employment contract for a definite term, this must be agreed specifically. The employment contract must be in writing, however, the failure to do so may only be challenged by the employee and even then, only within 30 days of the commencement of the employment. The statutory elements of the contract are: (i) the name of the parties, (ii) the concerned position and (iii) the base salary of the employee. In general, the freedom of contract prevails in employment relationships. Nonetheless, customary but optional provisions are: (i) the place of work, (ii) the working time and scheduling arrangements, and (iii) the trial period at the beginning of the employment. The language of the contract is not regulated by law, however, it is recommended to have at least a bilingual version where Hungarian is the priority language.

Furthermore, the employer shall inform the employee within seven days of the start of the employment of certain working conditions and related information which is usually provided in the form of an employee notification letter.

1.3 Working Hours

Daily and Weekly Working Time

The parties may agree in the employment contract on (i) general full-time employment for eight working hours per day or (ii) part-time for less than eight hours per day (no minimum).

Uneven scheduling is an alternative, in which case the daily working time is scheduled unevenly during the work week. The working hours

shall be considered for a specific period, determined by the parties, and the limits apply to this certain period of time, while the hours are calculated on an average daily basis. The daily working time cannot exceed 12 hours regardless.

The time, however, which the employee actually works on a given day, may be different from the above contractual daily working time and is determined by the working time schedule applicable to the employee on the concerned day (scheduled daily working time). In the case of full-time employment, the minimum scheduled daily working time is four hours, and the maximum is in any case 12 hours in uneven scheduling. The maximum weekly scheduled working time is 48 hours. These figures include overtime as well.

Specific Terms for Part-Time Contracts

In the case of part-time employment, there is no minimum daily working time requirement, therefore the employee can work less than four hours a day. The maximum daily limit is 12 hours in this case too, provided that the scheduling is uneven.

Flexible Working Arrangement

The employer may allow the employee to entirely schedule their own working time. In such a case, no working time scheduling and recording is required. The flexible working arrangement is not negated if the employee is instructed to perform certain tasks (eg, client or staff meeting) at a place and time determined by the employer.

Overtime

Hungarian labour law regulates different categories of overtime. The relevant ones are:

- work ordered in excess of the scheduled daily working time;
- work ordered in excess of the schedulable working hours within a specific period, in case of uneven scheduling of working time frame.

Overtime is in any case scheduled by the employer – eg, by modifying the already-communicated schedule. If the employee requests so, overtime shall be ordered in writing. The maximum of overtime in a calendar year is 250 hours. Upon written agreement of the parties, an additional 150 hours of overtime can be scheduled. Depending on the agreement of the parties, overtime shall be either compensated by the applicable wage supplement or with proportionate paid free time. (General supplement rate is 50% or 100% in case it is scheduled on a holiday.)

1.4 Compensation

Minimum Wage Requirements

The minimum wages are regulated annually by government decree. The general minimum wage is gross HUF266,800 per month in full-time employment in 2024. For jobs requiring at least secondary education, a so-called guaranteed wage minimum applies, in the amount of gross HUF326,000 per month in full-time employment in 2024. For part-time employees, the proportionate amount of the above minimums applies.

Government Intervention, Compulsory Wage Increase

There is no government intervention on top of the above-mentioned minimum wages. On compulsory wage increases, the employer shall make an offer to the employee to adjust the wage after the end of the maternity leave. This should be done on the basis of the average annual wage increase that the employer has implemented during the maternity leave for employees in the same job position as the employee.

Other Benefits

The parties may agree on a bonus scheme, including a 13th-month salary, subject to the discretion of the parties without any limitations, save for the general requirement of equal treatment while specifying the conditions thereof.

1.5 Other Employment Terms

Vacation

The statutory minimum paid leave is 20 working days in a calendar year (proportional amount in case the employment started mid-year). The statutory vacation time is increased with additional days depending on the age (not the seniority) of the employee with up to ten additional working days. There are also additional annual paid leave in special circumstances, such as employees raising children under 16 in their household, young workers or employees receiving disabled or blind benefits, and employees with at least 50% disability. The general rule is that employees are entitled to take, and the employer must grant the vacation days in the year in which they accrue. The absentee pay (equal to the monthly time-based base salary if no other wage elements are applied) is due to the employee during the time of vacation.

Sick Leave

Sick leave is regulated on two levels, depending on the duration of time when the employee is incapable of working. Employees shall be entitled to 15 working days of sick leave per calendar year for the duration of time during which the employee is incapacitated due to illness. For the duration of sick leave, 70% of the absentee pay shall be paid by the employer. For the period of any sick leave exceeding 15 working days, the employee is entitled to sick allowance. Sick allowance is paid for up to one year, provided that the employee had a legal provision of insurance for at least one year prior to sickness. The amount of sick allowance is 60% of the gross daily pay for the period defined by law, but the daily allowance is a maximum of 1/30 of the double of the gross minimum salary, which is HUF17.786,67 per day in 2024.

Maternity Leave and Parental Leave

Mothers are entitled to a continuous 24 weeks' maternity leave, with four weeks falling before the anticipated date of the birth. Out of the 24 weeks, the minimum period of time that needs to be taken as maternity leave is two weeks. Upon the birth of his child, a father is entitled to ten paid working days' leave which shall be taken within two months following the birth or, in case of adoption, following the final resolution approving the adoption. The employee shall be entitled to a parental leave of 44 working days to be taken until the child turns three, provided that the employment relationship exists for at least one year following the birth of the child (or the final resolution approving the adoption). For the first five working days of the parental leave, the employee is entitled to their absentee pay, for the remaining term, for the 40% of their absentee pay.

Additional Annual Paid Leaves in Special Circumstances

The employee shall be entitled to additional vacation days under the following circumstances:

- employees raising one child under 16 in their household: + 2 days (+2 if the child is disabled);
- employees raising two children under 16 in their household: + 4 days (+2 if the child is disabled);
- employees raising more than two children under 16 in their household: + 7 days (+2 if the child is disabled);

- young workers: +5 days; and
- employees receiving disabled or blind benefits and employees with at least 50% disability: +5 days.

Confidentiality and Non-disclosure Obligations

Employees shall maintain confidentiality in relation to business secrets obtained in the course of their work, during and subsequent to the termination of the employment relationship as well. Moreover, employees shall not disclose to unauthorised persons any data learned in connection with their activities that, if revealed, would result in detrimental consequences for the employer or other persons. The requirement of confidentiality shall not apply to any information of public interest or public information, and as such is rendered subject to disclosure requirement.

Liability

Employees are liable for damages caused by any breach of their obligations of the employment relationship stemming from their failure to act as it might normally be expected in the given circumstances. The amount of compensation may not exceed four months' absentee pay of the employee. Compensation for damages caused intentionally or through gross negligence shall cover the full extent of losses. Further, executives bear full liability for damages caused by "simple" negligence too. Employees are not liable for damages considered unforeseeable or that resulted from the employer's wrongful conduct, or that occurred due to the employer's failure to perform its obligations to mitigate the damage.

2. Restrictive Covenants

2.1 Non-competes

The parties may agree that the employee is not allowed to engage in any conduct, for up to two years following the termination of the employment, which could infringe or jeopardise the rightful economic interest of the employer. For such a period, the employer shall pay adequate compensation to the employee, which may not be less than one-third of the base salary the employee would be due for the same period, according to their salary applicable at the time of the termination.

Pursuant to the relevant judicial practice, it is a further condition for the enforceability of the non-compete clause to determine the geographical and activity scope to which the above limitation applies as accurately as possible.

The Labour Code offers the opportunity for the employer to set out default penalty provisions regarding the breach of the non-compete clause (under general civil law rules).

2.2 Non-solicits

Under Hungarian law, non-solicitation and non-compete clauses are not determined separately, but fall under the scope of the same umbrella term of non-competition. Therefore, the same terms apply as set out in **2.1. Non-competes**, as they are regarded the same way from a legal point of view.

Both non-compete and non-solicitation clauses may be added to the employment contract or a separate agreement may be concluded thereon between the parties. Either way, the consent of the employee is required for the introduction of these provisions.

3. Data Privacy

3.1 Data Privacy Law and Employment

The General Data Protection Regulation (GDPR) became mandatory in 2018 in the member states of the European Union, including Hungary. By its general nature, the GDPR also applies to employers' data processing, as well as Act No CXII of 2011 on Informational Self-Determination and Freedom of Information, and the practice of the National Authority for Data Protection and Freedom of Information. Accordingly, the employer shall prepare the relevant data privacy notifications as well as implement internal policies on the relevant processes and communicate those to the employees.

Data Privacy During Recruitment

The Labour Code does not regulate data protection regarding recruitment specifically, however, it notes that the employee may only be requested to provide any declaration or personal data that is essential to the conclusion, performance, or termination of the employment, further, for the assertion of a labour law or related claim. Background checks are not formalised and regulated by law. Either social media checks or contacting former employers for references are allowed only upon the express consent of the candidate. The circumstances of processing personal data during the recruitment shall be communicated to the candidate and the future employee in writing. Upon unsuccessful recruitment, the employer shall ensure the deletion of the candidates' data, in particular their resumes.

Key Issues Regarding Data Privacy During Employment

Based on the statutory provisions of the Labour Code and the practice of the relevant authority, the following are the key issues regulated in respect of data privacy during employment:

- the processing of biometric data of an employee;
- monitoring employees, in particular, CCTV surveillance and monitoring e-mails, regarding which the Labour Code determines the following two cumulative conditions:
  - (a) the employer may solely monitor the employee in connection with the employment relationship; and
  - (b) the employees shall be notified of the above in advance and in writing;
- obtaining the written consent of each employee during the marketing activity of the employer (eg photoshoots, company events, social media, etc);
- compliance and special attention to ensuring adequate safety measures during data transfers, especially in case of transfer outside the EU; and
- ensuring the final deletion of unnecessary data or data the processing of which cannot be supported by legal grounds or the valid legitimate interest of the employer.

4. Foreign Workers

4.1 Limitations on Foreign Workers

As Hungary is a member state of the European Union, as well as a party to the Schengen Treaty, differing immigration and work permit regulations and conditions apply to EU/EEA nationals compared to non-EU/EEA nationals.

Non-EU/EEA individuals are required to obtain a valid work permit to legally work in Hungary. In contrast, citizens of EU and EEA countries have the freedom to be employed freely across the EU and the EEA, subject to notification of employment to the competent authority.

To legally employ foreign workers in Hungary, employers must follow specific registration requirements and procedures to comply with Hungarian labour and immigration laws.

As a general rule, when employing non-EU/EEA individuals, the employer must submit a workforce request to the competent branch office of the employment centre prior to initiating the application procedure.

The employer should indicate the job title, salary, and other relevant information on the form, with particular emphasis on the job title, as it determines the classification of the employment relationship. The workforce request is necessary because the competent office must first ascertain whether there are any available Hungarian workers for the position sought by the employer.

Consequently, a third-country individual can only be employed in Hungary if the employer has submitted a valid workforce request beforehand, no suitable Hungarian worker has been identified for the position since the submission, and the third-country individual meets all other relevant legal requirements.

4.2 Registration Requirements for Foreign Workers

While the Schengen visa procedure and stays under the duration of 90 days are regulated on the EU-level, the regulation of long-term stays of third-country nationals is in the sole discretion of each EU member state.

Foreign nationals from non-EU/EEA countries need to obtain both a work permit and a residence permit to be legally employed in Hungary. Under Hungarian immigration laws, a third-country national is allowed to stay and work in Hungary for more than 90 days within a 180-day period in case:

- they are either granted a residence permit under a title set out in relevant laws (eg, family reunification) after which they can apply separately for a work permit; or
- they obtain a residence permit for the purpose of performing work in Hungary, in the framework of which they obtain the work permit simultaneously with the residence permit, which is the so-called single permit, that can be executed in a single merged procedure.

Guest Worker Permit

Citizens from non-neighbouring countries and outside the European Economic Area can apply for a guest worker residence permit as an option.

However, the law specifies a restricted group of employers eligible to hire guest workers. This group includes employers undertaking investments deemed of national economic importance, those with partnership agreements under the Key Exporter Partnership Programme, and qualified temporary employment agencies.

EU Blue Card

Highly qualified personnel may be hired under special and somewhat favourable terms. The EU Blue Card is a permit that allows one to reside in Hungary and work in a position that demands advanced skills.

White Card

Third-country individuals could receive a White Card residence permit if:

- the individual is in a verified employment relationship in a country outside of Hungary and performs their work using an advanced digital technology solution; or

- they hold a share in a company with a certified profit in a country outside of Hungary and performs their work or manage their company from Hungary using advanced technology.

Generally, each type of permit has limitations on its validity. The duration varies depending on the type of permit. Typically, a work permit is valid for two years and can be renewed. However, for example, the EU Blue Card can have a longer validity period of four years, whereas the White Card has a shorter validity period of one year, which can be renewed only once for an additional year.

5. New Work

5.1 Mobile Work

Teleworking and Home Offices

Teleworking means that the employee works part or all of the working time at a place separate from the employer's premises and the parties include this in a contract. Therefore, the specificity of teleworking is its regularity and the fact that it is stipulated in the contract. Teleworking and home offices are not properly separated under Hungarian law, as the Labour Code has blended the two by implementing a lot more flexibility during the past few years since COVID-19. As opposed to telework, it is not mandatory to stipulate the possibility of home office working in the employment contract, and this is subject to far fewer health and safety rules than teleworking. In practice, the details on home offices are usually regulated by internal policies.

Safety Measures in Teleworking and Home Offices

Teleworking can also be carried out using work equipment provided by the employee, however, the employer must ensure that this equipment is safe and in good condition. In case of those who work with computer equipment, the employer shall inform the employee in writing of the rules concerning safe working conditions in advance. In case teleworking is not carried out by a computer device, the location of work shall be previously certified by the employer as suitable in connection with safety and health. In this case, the employee may not change the working conditions at the location without the employer's consent. Employers are advised to provide employees with rules concerning safe working conditions in case of a home office too, in order to mitigate the safety and health risks of working from home.

5.2 Sabbaticals

Sabbatical (Unpaid) Leave in General

The employer may authorise sabbatical (unpaid) leave at any time at the employee's request. In this case, the agreement of the parties shall prevail. However, employees are entitled to sabbatical leave in some cases and to some extent provided for in the Labour Code. In case the sabbatical leave is based on the parties' agreement, the duration of it shall not be considered for the purposes of entitlement to severance pay if the sabbatical leave lasted at least 30 consecutive days.

Mandatory Cases of Sabbatical Leave and Restrictions

Sabbatical leave shall be granted to the employee in the following cases.

- Childcare – employees are entitled to sabbatical leave until the child reaches:
  (a) the age of three; or
  (b) until the child reaches the age of ten, during the period of receiving childcare allowance, childcare assistance benefits.

- Care of a close relative – at the employee's request, sabbatical leave is granted for the duration of care of a relative in person, for a period of up to two years for the purpose of providing personal care, which is expected to exceed 30 days. The long-term care at home and the reasons for it shall be certified by the doctor of the person in need of care.
- Actual voluntary reserve military service – the employee is entitled to sabbatical leave for the duration of actual voluntary reserve military service.

In these statutory cases, the whole duration of childcare and care of a close relative, and the duration of actual voluntary reserve military service not exceeding three months should be considered for the purposes of calculating severance pay.

5.3 Other New Manifestations

Reduced Regular Daily Working Time

Regular daily working time means that the daily working time in full-time jobs is eight hours. However, the regular daily working time may be reduced in full-time jobs pursuant to the relevant employment regulations or the agreement of the parties. This means that the employee works only, for example, six hours a day, but the salary is the same as in case of regular daily working time and the employment is considered full-time, not part-time.

Four-Day Week

As of recently, more and more companies are experimenting with a shorter work week as opposed to the general five-day week. Hungarian labour law is flexible in this respect, therefore it is entirely up to the parties' agreement to implement such new manifestations, as a deviation in favour of the employee is generally permitted.

6. Collective Relations

6.1 Unions

In Hungary, a trade union is an independent legal entity, serving as an employee representative body.

Under Hungarian law, a trade union is a type of association, meaning it shall comply with the regulations applicable to associations to be recognised as a trade union. Consequently, its legal status is governed by both labour and civil law regulations.

Under the Labour Code, the rights conferred upon trade unions are available exclusively to those with representation at the employer. Whether a trade union has representation at an employer can be determined based on its articles of association. The most important privilege granted to trade unions is that they are exclusively entitled to conclude collective agreements as specified under **6.3 Collective Bargaining Agreements**.

A trade union operates for the benefit of all employees, but its representative rights are only effective concerning its members. It exercises its advocacy rights in matters affecting employees' financial, social, and working conditions.

Additionally, a trade union has informational rights to ensure it has all the necessary information for its representation activities. This includes requesting information from the employer, expressing opinions on employer decisions, and initiating consultations.

6.2 Employee Representative Bodies

In addition to trade unions, another significant employee representative body in Hungary is the works council, which facilitates employees'

participation in management and employer decisions, but it does not have a separate organisational structure.

One of the most notable differences between trade unions and works councils is that while trade unions tend to have a confrontational nature, works councils operate co-operatively with the employer. Additionally, unlike trade unions, works councils are not independent legal entities. The purpose of a works council is to influence the employer's decision-making processes for the benefit of employees.

Employees can elect a works council at any employer, or at any branch of an employer, where the number of employees exceeds 50. If the number of employees exceeds 15 but does not reach 50, employees can elect a works representative instead of a works council. The establishment of a works council is not mandatory.

6.3 Collective Bargaining Agreements

One of the most important rights associated with trade unions is the right to collective bargaining, guaranteed by the Constitution. A collective agreement is an agreement concluded between the employer and the trade union, which regulates the relationship between the parties and the employment conditions of the employees covered by the agreement. The function of the collective agreement is to provide more favourable working conditions for employees, clarify legal provisions, and standardise competition conditions. It is important to note, however, that executives are not subject to collective agreements.

Collective bargaining agreements can be concluded by and between:

- trade unions, having representation of at least 10% of all employees employed by the employer, and the employer;
- associations of trade unions and of employers, usually from the same industry; and
- associations of trade unions and of employers the scope of which is extended to the entire industry by ministerial order, regardless of trade union representation.

Peace Agreement

It is called a peace agreement when, in exchange for better working conditions, the trade unions agree to refrain from striking on issues covered by the collective agreement, so, consequently, any strike conducted during the term of the collective agreement is considered unlawful. This is regulated by Act VII of 1989 on Strikes.

7. Termination

7.1 Grounds for Termination

Termination of an Indefinite-Term Employment Agreement

Both the employer and the employee may terminate an employment contract concluded for an indefinite period by notice.

Notice by the Employer

The notice of termination by an employer shall be in writing and based on true, valid, and justifiable reasons. The justification shall clearly indicate the reasons for the termination and failure to meet this criterion may cause the termination to be deemed as unlawful.

The reasons for the termination need to be related to:

- the operation of the employer (eg, restructuring, downsizing);

- the behaviour of the employee (eg, stealing, attitude problems, incompatibility with colleagues); or
- the skills of the employee (eg, lack of necessary qualifications, "quality change" – ie, hiring a more qualified person for the job).

The notice of termination shall include information that the employee is entitled to initiate legal proceedings within a specified period to challenge the termination and shall indicate how to initiate such proceedings. No reasoning is required if the employee qualifies as a pensioner or as an executive employee.

Notice by the Employee

In case of a notice of termination by an employee, no reasons for the termination need to be included in the notice.

Termination of a Definite-Term Employment Agreement

Upon fulfilment of specific conditions, both the employer and the employee may terminate an employment concluded for a definite period by notice.

Notice by the Employer

A definite-term employment agreement may be terminated by the employer by way of notice if:

- the employer is undergoing bankruptcy or liquidation procedure;
- the reason for the termination relates to the lack of skills or abilities of the employee; or
- the employer cannot maintain the employment relationship for external reasons not attributable to the employer.

The employer (and only the employer) may terminate a definite-term employment with immediate effect without reasoning if the employer pays the employee 12 months' absentee pay (if the remaining term is less than 12 months, the absentee pay due for the remaining term).

Notice by the Employee

The employee may also terminate a definite-term employment relationship by notice, which shall however be based on a justifiable reason. Such reasons shall be related to circumstances:

- which make it impossible for the employee to maintain the employment relationship; or
- which would result in a disproportionate burden on the employee.

Exemption From Work

In case of termination by the employer, the employer shall exempt the employee from the obligation to work for up to one-half of the total notice period ("exemption period"). The purpose of the exemption from work is to enable an employee to seek another job. During the exemption period, an employee shall receive their absentee pay.

Severance Payment

The employee is entitled to a severance payment if the employment is terminated by a notice issued by the employer, as detailed in **7.2 Notice Periods**.

Collective Redundancies

The Hungarian Labour Code specifies that a redundancy qualifies as a collective redundancy if:

- at least ten employees at an establishment of 21–99 employees;
- 10% or more of the workforce at an establishment of 100–299 employees; or
- at least 30 employees at an establishment of 300 or more employees,

are made redundant within a period of 30 days, based on a reason related to the operations of the employer.

Employers shall notify the Hungarian Labour Authority 30 days in advance of any collective redundancies. Any failure to comply with these rules renders all pertinent dismissals void.

The employer shall consult with the works council before implementing collective redundancies. The consultation must cover, among other things, possible ways and means to avoid collective redundancies and to reduce the number of affected employees. If an agreement is reached, it must be documented in writing and submitted to the state employment agency.

7.2 Notice Periods

Notice Period

If the employer terminates the employment relationship by notice, the notice period shall be at least 30 days. This statutory minimum notice period is extended in correlation to the years spent in employment with the same employer. Accordingly, the notice period is as follows:

- less than three years: 30 days;
- at least three years: 35 days;
- at least five years: 45 days;
- at least eight years: 50 days;
- at least ten years: 55 days;
- at least 15 years: 60 days;
- at least18 years: 70 days; and
- at least 20 years: 90 days.

Unless otherwise agreed in the employment agreement, the notice period is a fixed 30-day period in case of termination by the employee. The parties may deviate from the general rules and agree on a longer notice period of up to six months.

In case of terminating a definite-term employment, the notice period may last at a maximum until the end of the definite term.

Trial Period

Either party may terminate the employment with immediate effect and without reasoning during the trial period.

Severance Payment

The employee is entitled to a severance payment if the employment is terminated by a notice of the employer.

Entitlement to severance payment shall only apply upon the existence of an employment relationship with the employer for at least three years at the time when the termination notice is delivered or when the employer is terminated without succession.

The basis of the calculation of the severance payment is the absentee pay. The amount of the severance payment is calculated according to the time the employee has worked for the employer as follows:

- less than three years: zero;
- at least three years: one month's absentee pay;
- at least five years: two months' absentee pay;
- at least ten years: three months' absentee pay;
- at least 15 years: four months' absentee pay;
- at least 20 years: five months' absentee pay; and
- at least 25 years: six months' absentee pay.

If the termination of employment takes place within five years prior to the date when the employee reached the retirement age, the severance payment shall be increased by an amount

of one to three months of absentee pay, depending on the length of the employment.

No severance payment is due if the reason for termination is related to the behaviour or ability of the employee, or if the employee has already become entitled to a pension.

7.3 Dismissal for (Serious) Cause

General Rules

Both the employer and the employee may terminate an employment relationship by notice with immediate effect if:

- any important obligation arising from the employment is materially breached by the other party intentionally or by gross negligence; or
- the other party acts in a way that makes it impossible to maintain the employment relationship.

The parties may neither extend nor limit the scope of the reasons which may serve as a basis for the notice with immediate effect. However, the parties may give specific examples in the employment agreement which may result in a termination by way of a notice with immediate effect within the scope defined above.

A notice of termination shall include the clear and justified reasons of the terminating party. The party terminating the employment by notice with immediate effect shall exercise this right within 15 days after having become aware of the cause for such extraordinary termination, but the latest within a maximum period of one year from the date when the underlying cause has occurred.

If the employee terminates the employment by notice with immediate effect, then:

- the employer must pay to the employee those statutory payments which would be due to the employee if the employer terminated the employment by notice; and
- the employee may claim damages arising as a result of such termination.

No Notice Period

No notice period applies in case of a termination for serious cause; such termination has an immediate effect.

Severance Payment

The employee is entitled to severance payment under the general rules upon a notice with immediate effect issued by the employee. No severance payment is due if the termination with immediate effect was initiated by the employer.

7.4 Termination Agreements

At any time (also during the protected periods), the employer and the employee may agree to terminate the employment by mutual consent. In case of termination by mutual consent, it is up to the parties to agree on all terms and conditions of the termination, including the termination date and the allowances of the employee. The termination agreement does not contain the reasons for termination. No severance payment is due, however, as an incentive, employers often pay an exit allowance in the same amount as the severance payment applicable in case of a termination by notice. Untaken vacation days shall be reimbursed in any case.

7.5 Protected Categories of Employee

Protection Against Termination With Notice

The employer is not entitled to terminate the employment relationship by notice during:

- a human reproduction treatment of the employee, for up to six months from the beginning of such treatment;
- an employee's notified pregnancy;
- the maternity leave;
- the paternity leave;
- the parental leave; or
- the unpaid leave taken for nursing and taking care of children.

Limitations on Termination With Notice

During the period of five years before an employee reaches the retirement age, as well as in case of employees returning to work after maternity leave and having a child or children under the age of three (ie, mothers or single fathers), the employer may only terminate the employment by notice if:

- the employer has no vacant position available at the designated workplace of the employee, that is suitable for the employee based on the employee's skills, education and/or experience, or the employee rejects a job offered by the employer in such position;
- the employee breached, to a material extent, any fundamental obligation arising from the employment wilfully or by gross negligence; or
- the employee acts in a way which renders the maintenance of the employment impossible for the employer.

The employment of those employees who are incapacitated to work due to sickness, caring for a sick child, or a relative, may be terminated by the employer with notice; however, the notice period will only commence once the employee returns to work.

Further, the approval of the trade union or the works council shall be obtained in case of terminated employees who are members thereof.

8. Disputes

8.1 Wrongful Dismissal

Grounds for a Wrongful Dismissal Claim

The Labour Code contains a non-exhaustive list of cases that constitute grounds for a claim of wrongful dismissal. The most common cases for wrongful dismissal claims are the following:

- dismissal without mandatory reasoning, or the reasoning does not comply with the legal requirements;
- dismissal in breach of the prohibition on dismissal (eg, dismissal of a pregnant woman);
- abuse of rights; and
- breach of the requirement of equal treatment.

In addition to the list in the Labour Code, the practice has developed, determining for example, what constitutes an abuse of rights, or what constitutes inadequate reasoning. It is therefore essential to be familiar with the practice and case law of the Hungarian courts in order to determine whether a dismissal is wrongful, and thus what consequences may be applied.

Consequences of Wrongful Dismissal Claim

As a consequence of a wrongful dismissal, the employer shall pay compensation for damages resulting from the wrongful termination of an employment relationship. This compensation for loss of income may not exceed 12 months' absentee pay. In specific cases, the employee is also entitled to severance pay in addition to compensation. On the other hand, the employee can also request the court to reinstate the employment relationship, if it was terminated in viola-

tion of equal treatment, prohibition on dismissal (pregnancy, maternity/paternity leave, etc), or in case the employer did not obtain the approval of a trade union, if necessary. The employee must be compensated for any lost wages, other benefits and for damages in excess in this case too.

8.2 Anti-discrimination

The Labour Code sets out the requirement of equal treatment as a general principle, in particular with respect to remuneration. However, the detailed rules and claims are laid down in a separate law.

Grounds for Claims on Anti-discrimination Grounds

The cases for claims on anti-discrimination grounds are the following.

- Direct discrimination is seen in any provision which has the effect of treating a person or group less favourably based on their sex, race, nationality, disability, religion or belief, etc (hereinafter "protected characteristics").
- Indirect discrimination is seen in any provision which does not constitute direct discrimination and appears to comply with the requirement of equal treatment, however, it places a person or group in a significantly more disadvantaged position based on their protected characteristics than another person or group.
- Harassment is conduct of a sexual or other nature that is offensive to human dignity and is related to a protected characteristic and has the purpose or effect of creating an intimidating, hostile, humiliating, degrading, or offensive environment towards a person.
- Unlawful segregation is any provision that, without being expressively permitted by law, segregates a person or a group from another person or group in a comparable situation on the basis of the protected characteristics.
- Retaliation is any provision that causes, is intended to cause, or threatens to cause legal harm to a person who objects to, initiates, or participates in proceedings on the grounds of a breach of non-discrimination.

Several cases are identified where the requirement of equal treatment in employment law may particularly be breached. Most common cases relate to access to employment, in particular in the advertising of vacancies, recruitment, terms and conditions of employment; to the establishment and termination of an employment relationship; to the application for or taking of paternity leave, parental leave, etc.

Burden of Proof

In proceedings for breach of the requirement of equal treatment, the aggrieved party must establish the probability that (i) the person or group has suffered a disadvantage, (ii) the person or group who have suffered damage had or is believed to have had, at the time of the infringement, a protected characteristic.

In case this probability is established by the aggrieved party, the burden of proof is on the party alleged to have committed the infringement to prove that the circumstances established by the aggrieved party did not exist, or that the requirement of equal treatment has been complied with or was not required to be complied with in relation to the legal relationship in question.

Applicable Damages/Relief

The Labour Code states that the remedy for anti-discrimination must not entail a violation or impairment of the rights of other employees. In case of termination of employment based on discrimination, the same consequences apply as in the case of wrongful dismissal (see **8.1**

Wrongful Dismissal). Also, there is a special type of compensation for damages applicable for the infringement in civil rights cases.

If an official procedure is initiated before the relevant authority, and it has established a violation of the requirement of equal treatment, it can:

- order the cessation of the infringing situation;
- prohibit the future exercise of the infringing conduct;
- order the publication in the public interest of the final decision;
- impose a fine; or
- impose other sanctions provided for by a specific law.

8.3 Digitalisation

Digitalisation of Employment Disputes

In employment disputes, electronic communication with the court or in submissions during litigation is mandatory, save for the case when the employee submits the claim without legal representation. In addition, the possibility of remote hearings via video is also available in Hungarian courts, although the system is not yet set up in every court. Remote hearings can be used for hearing a party, or other person in the proceedings, for the hearing of witnesses, experts and conducting an inspection. However, in civil cases, remote hearings are difficult to conduct and are subject to special conditions if the person to be heard is abroad, making them practically impossible.

9. Dispute Resolution

9.1 Litigation

Specialised Employment Forums

In Hungary, specialised labour courts ceased to exist in 2020. Since then, employment-related claims have been adjudicated by the competent County Court.

Collective Enforcement of Claims

There are two forms of action for the collective enforcement of claims in Hungary: public interest litigation and class actions. These procedures are regulated by the Act CXXX of 2016 on the Code of Civil Procedure and certain sectoral laws.

Class Actions

A class action is a means of enforcing an aggregated private interest. The basis for this action is the decision and explicit declaration of the entitled individuals to have their claims adjudicated jointly in a single lawsuit.

Class actions can only be initiated in certain cases (the law allows it only in three instances, one of them being certain labour disputes), enabling a minimum of ten plaintiffs to assert their claims against the same defendant in a single procedure rather than in separate proceedings, provided that the facts on which the claims are based are substantially the same for all the plaintiffs.

Representations in Court

As a general rule, legal representation is not mandatory in labour disputes, and this also applies to the first instance, second instance and retrial phases. However, in case of class actions, legal representation is mandatory.

9.2 Alternative Dispute Resolution

The basic types of alternative dispute resolution are available in Hungary, namely negotiation, mediation, arbitration and conciliation. However, the law expressly excludes arbitration in labour disputes. Mediation is one of the most common alternative dispute resolution meth-

ods in the field of labour law, however, statistics show these cases are still rare as opposed to, for example, family disputes or other civil law disputes.

Mediation is available during the pendency of the court proceedings, depending on the willingness of the parties. If the parties reach an agreement with the help of a mediator while the litigation is ongoing, they can request court approval of the agreement. A court-approved agreement has the same binding effect as a court ruling.

9.3 Costs

Under the rules of the Act CXXX of 2016 on the Code of Civil Procedure, unless otherwise provided by law, the losing party shall reimburse the prevailing party's litigation costs. During court proceedings, a party may choose to claim the percentage-based attorney's fee calculated in accordance with the relevant decree, based on the value of the claim, or the fee and costs stipulated in the attorney-client engagement letter for the calculation of litigation costs.

In justified cases, the court may reduce the amount of attorney's fees claimed, whether based on the attorney-client engagement letter or the percentage rule, if the court finds that the fee is disproportionate to the legal services provided by the attorney.

INDONESIA

Law and Practice

Contributed by:
Indra Setiawan, Ridzky Firmansyah Amin, Marintan Panjaitan and Tifanny Natalia
ABNR Counsellors at Law

Contents

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ABNR Counsellors at Law

ABNR Counsellors at Law was founded in 1967 and is Indonesia's longest-established law firm. ABNR pioneered the development of international commercial law in Indonesia, following the reopening of the country's economy to foreign investment after a period of isolation in the early 1960s. With more than 100 partners and lawyers (including two foreign counsel), ABNR is the largest independent full-service law firm in Indonesia and one of the country's top-three law firms by number of fee earners, giving it the scale needed to simultaneously handle large and complex transnational deals across a range of practice areas. It also has global reach, as it has been the exclusive Lex Mundi (LM) member firm for Indonesia since 1991. LM is the world's leading network of independent law firms, with members in more than 100 countries.

Authors

Indra Setiawan is a key figure in ABNR's labour and employment practice, and he is listed as a Band 1 lawyer for labour and employment by Chambers Asia-Pacific. He has advised a long list of blue-chip domestic and multinational corporations, as well as Indonesian state-owned enterprises, across the entire spectrum of manpower law. He has in-depth knowledge and extensive experience in developing legal and communication strategies for individual and mass layoffs, and in assisting clients in the execution thereof. He advises clients on the employment aspects of corporate transactions, compliance issues such as workplace fraud, employee transfers and the complex rules governing expatriates and employee benefits.

Ridzky Firmansyah Amin joined ABNR in February 2008 and is currently a partner at the firm. His employment practice within ABNR includes drafting and reviewing employment contracts, employee handbooks and manuals; collective labour agreements; and providing advice and assistance with employment termination and negotiations, including complex employment matters arising from mergers, acquisitions, restructuring and reorganisation. He has also represented clients before the employment authorities and the Industrial Relations Court in employment disputes, including disputes regarding breach of employment agreement and wrongful dismissal.

Marintan Panjaitan joined ABNR in 2012, and she was promoted to associate in 2013 and senior associate in 2022. She has represented and defended clients' interests in various industrial relations cases before the Industrial Relations Court, and regularly provided advice and assistance with manpower and immigration law, including advice on employment contracts, the complex rules governing the employment of expatriates in Indonesia, employment termination policies, strategies and their execution, employee transfer, employee benefits and entitlements, and regulatory and compliance issues.

Tifanny Natalia is a senior associate at ABNR with extensive experience in advising and assisting employers across the entire spectrum of manpower law, including the manpower sector's legal and regulatory landscape, and the drafting of employment contracts and employee handbooks. She also advises on employment termination and has helped numerous clients navigate through the complex requirements for hiring expatriates. Tifanny also assists clients with employment-related matters in corporate transactions, including employee transfers and regulatory compliance.

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1. Employment Terms

1.1 Employee Status

Indonesian employment law does not distinguish between blue- and white-collar workers. The only distinction it makes between employees relates to the type of employment agreement (ie, whether it is permanent or fixed-term). The two types of employment agreements differ in various aspects, including the employee's rights and entitlements, the possibility of probation, the duration of employment and entitlements that accrue upon termination.

1.2 Employment Contracts

An employment agreement for a specified period (fixed-term) must be in writing and in Indonesian (or Indonesian should prevail if the agreement is bilingual). It is established based on either the employment period or the completion of specific work. If based on an employment period, the agreement will have a maximum cumulative period of five years (including any extension thereof). If based on the completion of specific work, the agreement must pertain to work that is either completed in a single assignment or is temporary in nature.

However, an employment agreement for a permanent employee may be made orally or in writing. In the former case, the employer must issue a letter to the employee confirming the permanent employment. The appointment letter must contain:

- name and address of the employee;
- starting date of employment;
- type of work; and
- the wage.

The terms and conditions that must be included in a written employment agreement include:

- name, address and line of business of the employer;
- name, gender, age and address of the employee;
- title or type of work;
- location of workplace;
- the wage and how it will be paid;
- terms of work, stating the rights and obligations of both the employer and employee;
- effective date and validity period of the employment agreement;
- place and date where the employment agreement is made; and
- signatures of the parties.

1.3 Working Hours

Normal working hours are:

- seven hours per day and 40 hours per week for six working days per week; or
- eight hours per day and 40 hours per week for five working days per week.

Flexible-working-hour arrangements are possible subject to consensus between the parties under the employment agreement, employee handbook (also known as company regulation) or collective bargaining agreement.

An employment is considered part-time if the working hours are fewer than seven hours per day and 35 hours per week. Wages for part-time employees may be calculated on an hourly basis.

Overtime work can only be performed on the order of an employer and with the consent of the employee, which must be given in hard copy or digitally. Overtime can be worked for a maximum of four hours per day and 18 hours per week.

Employees subject to overtime work are entitled to receive overtime pay. The amount in overtime pay is based on hourly rates, calculated as 1/173 x monthly wages (basic salary and fixed allowance). Apart from overtime pay, employees must be provided with an adequate opportunity to rest, and, if overtime work is performed for four hours or more, employees must be provided with food and beverages with a calorific value of at least 1,400 kcal.

The working hours that exceed the maximum daily and weekly limits are only applicable in specific sectors and for specific positions, including energy and mineral resources, mining, upstream oil and gas, agribusiness and horticulture, and fisheries.

Exclusion from overtime pay exists for employees in roles such as thinker, planner, implementer or supervisor, whose work hours differ from those of other employees such that they receive a higher wage. These exempted positions must be clearly defined in the employment agreement, employee handbook or collective bargaining agreement.

1.4 Compensation

Minimum wages vary between provinces and only apply to employees with service of less than one year with a particular company. Minimum wages are stipulated by the governor of a province based on the suggestions and considerations of a wages council. The governor of a province may also set minimum wages for cities or regencies (districts).

There is no mandatory 13th month for employees in the private sector. Further, incentives, bonuses or reimbursement of work facilities are based on an agreement between an employer and employee, as well as the employer's policy. No government intervention takes place with respect to determining the procedure for and amount of compensation, pay increases, etc, apart from the minimum wage stipulation.

Additionally, Indonesian employment law recognises a mandatory religious holiday allowance of one month's wages for employees with 12 months of consecutive service. For those with service periods of one to 12 months, the allowance is paid pro rata. The allowance should be paid at least seven days before the religious holiday (Eid or Christmas, depending on the employee's religion or the employer's policy).

1.5 Other Employment Terms

Employees are entitled to paid leave, as further explained in **5.2 Sabbaticals**.

No specific regulations exist on confidentiality or non-disparagement under Indonesian employment law: applicability depends on the agreement between an employer and employee.

There is no specific limitation on employee liability under the law. Pursuant to the Indonesian Civil Code, employers are liable for losses or damage caused by their employees. However, under the employment law, employers may make a deduction of up to 50% from an employee's salary to compensate for loss or damage suffered by the employer subject to provisions in the employment agreement, employee handbook or collective bargaining agreement.

2. Restrictive Covenants

2.1 Non-competes

Indonesian employment law does not specifically regulate non-compete clauses. Non-compete clauses can be agreed in practice by an employ-

er and employee in an employment agreement or termination agreement (as the case may be). Given that there is no specific regulation on non-compete clauses, the validity and enforcement of non-compete clauses are subject to general contract law. They can be enforced should a breach occur.

2.2 Non-solicits

As with non-compete clauses, Indonesian employment law does not expressly contain non-solicitation clauses. The matter can be agreed upon in an employment agreement or termination agreement (as the case may be). The validity and enforcement of non-solicitation clauses are also subject to general contract law. Non-solicitation can be enforced should a breach occur.

3. Data Privacy

3.1 Data Privacy Law and Employment

There is currently no specific data-privacy law or regulation in the employment sphere.

In so far as an individual's private or personal data or information is used, collected, processed, analysed, stored, displayed, sent, shared, destroyed or transferred via electronic media, Law No 27 of 2022 concerning Personal Data Protection (the "PDP Law"), as well as Law No 11 of 2008 on Electronic Information and Transactions (the "EIT Law"), as lastly amended by Law No 1 of 2024, applies. The PDP Law and the EIT Law set the principal standard for the handling of general electronic information and data protection.

The PDP Law stipulates that the processing of personal data must be based on a specific lawful basis, including the following:

- consent;
- contractual necessity;
- compliance with a data controller's legal obligations;
- protection of the vital interests of the data subject;
- public interest, for the provision of public services or for the exercise of lawful authority; and
- legitimate interest.

In this regard, depending on the specific purpose of processing, an employer may or may not be required to obtain express consent, which will require further assessment on a case-by-case basis.

An implementing regulation of the EIT Law is Ministry of Communications and Informatics (MOCI) Regulation No 20 of 2016 on Protection of Personal Data in Electronic Systems ("MOCI Regulation No 20/2016"). Under PDP Law and MOCI Regulation No 20/2016, every company is required to increase awareness and prevention, and implement organisational steps (internal regulations) to protect the personal data of their employees. This can be done by, among other steps, conducting training to prevent failure of protection of personal data managed by human resources, and determining the level of security of personal data by its nature and risks.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Expatriates can only be employed under a fixed-term employment agreement, subject to their work permit. Expatriates cannot be employed for multiple positions in the same company and are prohibited from holding positions that involve responsibility for employment matters.

The holding of multiple positions at different companies is permissible, provided the positions are at the board of director or commissioner level (for a limited liability company); trustee, manager or supervisor level (foundation); or employee level in the context of vocational education and training, the digital economy, or the oil and gas sectors for contractors under co-operation agreements.

4.2 Registration Requirements for Foreign Workers

Registration requirements that apply to the use of foreign workers include:

- a written application to the Ministry of Manpower, outlining the:
  - (a) identity of the employer;
  - (b) reasons for use of the expatriate;
  - (c) role or position of the expatriate in the organisational structure;
  - (d) number of expatriates;
  - (e) periods of use of expatriates;
  - (f) identity of local counterpart employees for transfer of knowledge; and
  - (g) annual work plan for the deployment of expatriates;
- corporate documents of the employer;
- a draft of the expatriate's employment agreement;
- a chart that illustrates the employer's organisational structure;
- an undertaking to facilitate Indonesian language lessons for expatriates; and
- the expatriate's personal data.

5. New Work

5.1 Mobile Work

To date, there are no specific regulations and/or restrictions on mobile work in Indonesia. Consequently, whether or not mobile work is to be performed depends on the agreement between the employer and the employee and/or the employer's policies.

Nevertheless, Law No 13 of 2003 on Manpower, as amended by Law No 6 of 2003 on Stipulation of Government Regulation No 2 of 2022 on Job Creation into Law (the "Manpower Law"), stipulates that an employment agreement must at least include information on the location of the workplace. As such, if a mobile work arrangement is agreed between the employer and the employee, conservatively, it must be specified under the employment agreement or the employee handbook/collective bargaining agreement.

Data privacy regulations in relation to mobile work will follow the general data privacy regulations, as there are no specific data privacy regulations related to mobile work. Please see **3.1 Data Privacy Law and Employment**.

In terms of occupational safety and health (OSH) in relation to mobile work, there are also no specific regulations and/or restrictions in this regard, and general OSH regulations would apply.

Similarly, there are also no specific regulations and/or restrictions for social security in relation to mobile work. Employees engaging in mobile work will also be covered by the Manpower Social Security and the Health Social Security programmes.

What would generally be an issue in a mobile work arrangement in relation to OSH and social security would be how to determine work accidents. Under OSH regulations, employers are required to report every work accident that occurs to the authorities. Work accidents will

further be covered under the social security programme. Generally, work accidents are:

- accidents that occur due to work and/or at the location of the workplace;
- accidents that occur on the way from home to work or through the usual or a reasonable route;
- accidents that occur while carrying out duties or official business travel on orders and/or for the benefit of the employer, or that are related to work;
- accidents that occur during work hours, or during break times in which important and/or urgent work is being performed with the permission or knowledge of the employer;
- sickness due to work; and
- sudden death due to work.

With the above definition of work accident in mind, in a mobile work arrangement, it would be difficult to determine a work accident, which would also affect employers' obligation under the OSH regulations.

5.2 Sabbaticals

Indonesian employment law does not specifically recognise the concept of sabbatical leave.

The types of leave that are recognised in Indonesia are as follows.

- Annual leave – employees are entitled to paid annual leave of at least 12 days upon completion of 12 consecutive months of service.
- Long leave – employees may be provided with paid long leave, as stipulated in the employment agreement, employee handbook or collective labour agreement. Previously, long leave was only given to employees after six years of continuous service. However, the minimum service period has been removed under the Manpower Law.
- Menstrual leave – female employees who are in pain during their menstrual period are entitled to two days of paid menstrual leave (ie, the first and second day of their menstrual period).
- Maternity leave – under the Manpower Law, paid maternity leave lasts for one and a half months before delivery, and for the same duration after delivery, as estimated by an obstetrician or midwife. In practice, however, most employers will allow maternity leave to be taken as a single period of three months after delivery. Maternity leave may be extended if required, as confirmed in a written statement from an obstetrician or midwife either before or just after delivery. In addition, under Law No 4 of 2024 on Maternal and Child Welfare During the First 1,000 days of a Child's Life (the "KIA Law"), maternity leave may be extended for another 3 months in special circumstances, although this must be supported by a doctor's certificate.
- Leave following miscarriage – female employees who suffer a miscarriage are entitled to one and a half months of paid leave, or a period of leave as recommended in the medical statement issued by the relevant obstetrician or midwife.
- Paternity leave – male employees are entitled to two days of paid paternity leave in the event that their wife gives birth or experiences a miscarriage. Under the KIA Law, when the wife gives birth, the leave may be extended by up to 3 additional days, or as agreed.
- Prolonged illness – employees may leave due to an illness of long duration, and a physician's certificate should be presented or required whenever possible. The certificate may be issued by either a private doctor or the employer's doctor. In the event of a pro-

longed illness, the employee is entitled to the payment of wages in the following amount:
(a) first four months – 100% of the wage;
(b) second four months – 75% of the wage; and
(c) third four months – 50% of the wage.

For each consecutive month exceeding the above period until the employer terminates the employment relationship, the employee continues to be entitled to the payment of their wages, but only 25% of the wage. After this period, the employer may terminate employment by paying the stipulated severance package to the employee.

- Religious obligations – employees are entitled to paid leave due to the performance of a religious obligation (such as the Hajj in Mecca). The duration of leave permitted for a religious pilgrimage is determined by the Ministry of Religious Affairs. This obligation to pay wages during leave due to the performance of a religious obligation is applicable only once for each of the employees during their respective service period.
- Additionally, employees are entitled to paid leave in the event of:
  (a) marriage of the employee – three days;
  (b) marriage of the employee's child – two days;
  (c) circumcision of the employee's child – two days;
  (d) baptism of the employee's child – two days;
  (e) death of employee's spouse, parents, in-laws, child or child-in-law – two days; and
  (f) death of a member of an employee's household – one day.

Other than the above, although not stipulated, in practice, employees may also take unpaid leave based on the employer's policies, at the employer's discretion, or subject to an agreement between the employer and the employee, bearing in mind the principle of "no-work-no-pay" that is recognised under Indonesian employment law.

Thus, sabbatical leave may refer to an extended period of leave such as paid long leave, unpaid leave, prolonged illness, and/or leave due to religious obligations, with no specific restrictions other than those pertaining to the particular leave period as well as work benefits and the payment of salary (ie, paid or unpaid).

5.3 Other New Manifestations

There are currently no possible new manifestations in the field of "new work". It is not foreseen that the government will issue any laws or regulations to this effect.

Even so, companies in Indonesia have introduced the usage of certain new practices, such as desk-sharing, clean-desk policy, hybrid/remote working, and/or having an office with open space. As these practices are not regulated, their implementation is subject to each company's internal policies or an agreement between the employer and the employee.

6. Collective Relations

6.1 Unions

Rules related to labour unions are contained primarily in Law No 21 of 2000 on Labour Unions. For a labour union to be recognised, following its establishment, it must:

- register itself in writing with the local office of the manpower agency; and

- notify the employer of its establishment and registration number, which the employer is obliged to accept.

A recognised labour union is entitled to:

- negotiate a collective labour agreement with company management (subject to certain requirements);
- represent employees in industrial relations dispute settlements;
- represent employees in manpower institutions;
- establish an institution or carry out activities related to efforts to improve employee welfare;
- carry out other manpower or employment-related activities that do not violate the prevailing law or regulations;
- establish and become a member of a labour union federation; and
- affiliate or co-operate with an international labour union or other international organisation.

6.2 Employee Representative Bodies

Other than labour unions, Indonesian employment law also recognises bipartite co-operation bodies (BCBs). Employers that employ more than 50 employees are obliged to establish a BCB.

A BCB functions as a communication-and-consultation forum between an employer and representatives of a labour union and employees, to improve industrial relations.

Members of a BCB comprise representatives of the employer and employees/labour union (with equal composition and at least six members).

6.3 Collective Bargaining Agreements

Indonesian employment law recognises collective bargaining agreements as instruments for collective bargaining between one or several registered labour unions and one or several employers or employer organisations. Collective labour agreements are valid for two years from execution and extendable for one year. Collective labour agreements must be registered with the manpower agency with jurisdiction over the work location.

Collective bargaining agreements contain the rights and obligations of the employer, labour union and employees, but in more detail. As a general rule, the quality and quantity of the conditions of employment stipulated in the collective labour agreements must not be less beneficial than those regulated under the prevailing laws and regulations.

Although there are some instances where bargaining takes place at the industry level, the majority of bargaining over collective bargaining agreements takes place within companies.

Additionally, despite the similarities, collective bargaining agreements must be differentiated with an employee handbook. A collective bargaining agreement is drafted and agreed based on negotiations between the employer and the registered labour union(s), while the employee handbook is drafted by the employer but should take into account suggestions from employee/labour union representatives, and stipulate the general rights and obligations of the employer and the employee.

A company may maintain only one of these work rules at a time. Collective bargaining agreements will be prepared if there are any labour union(s) in the company. An employee handbook must

be prepared if the company employs at least 10 employees.

7. Termination

7.1 Grounds for Termination

Employment termination may not be carried out unilaterally by an employer without stating a reason that has been specified in the prevailing manpower law and regulations, employee handbook or collective labour agreement, or the employment agreement. Consequently, to unilaterally terminate an employee, the employer must be able to identify suitable grounds for termination and prepare sufficient/appropriate justification.

The reason for termination of employment must be clearly stated in the written notice for termination (see **7.2 Notice Periods**). An employer may initiate termination of an employee for reasons related to an individual employee, or for business-related reasons.

For Reasons Related to an Individual Employee

Employment may be terminated in the following circumstances:

- at the request of the employee because the employer:
  - (a) assaulted, violently insulted or threatened the employee;
  - (b) persuaded or ordered the employee to act in contravention of the law;
  - (c) did not pay the employee's salary on time for three consecutive months or more;
  - (d) did not perform its obligations to the employee as agreed;
  - (e) ordered the employee to work outside the agreed scope of work; or
  - (f) assigned work that endangered the life, safety, health or morality of the employee, outside the agreed scope of work;
- the existence of a final and binding court decision declaring that the employer did not act as stated in the preceding paragraph, and the employer decided to terminate the employment;
- resignation;
- absence for five consecutive days or more without written notification accompanied by valid evidence, despite being properly summoned by the employer twice;
- violation of the employment agreement, employee handbook or collective bargaining agreements after having received warning letters;
- detention by the authorities for at least six months;
- prolonged illness or disability (for more than 12 consecutive months) due to a work accident;
- reaching retirement age; and
- the employee has passed away.

For Business-Related Reasons

Employment may be terminated in the following circumstances:

- merger, consolidation, acquisition or spin-off of the employer (and where the employee is not willing to continue the employment), or the employer is not willing to accept the employee;
- redundancy, whether or not followed by closure of the employer's business due to losses or their prevention;
- employer permanently closes down the business owing to continuous losses for two years;
- employer permanently closes down the business owing to force majeure;

- employer is under a state of suspension of payment; and
- employer is declared bankrupt.

Other than the grounds for termination listed above, an employment relationship can also be terminated by way of mutual agreement (ie, with the consent of both the employer and the employee) via execution of a Mutual Employment Termination Agreement (META) (see **7.4 Termination Agreements**).

Specifically, for a contract employee employed under a definite-term employment agreement, the employer has the right to terminate the employment (before the expiry of the agreement's term) regardless of the grounds for termination. The employer must pay compensation to the employee, the amount of which is equal to the amount in salary that the contract employee would have received until the expiry of the definite-term employment agreement and (only for an Indonesian contract employee) the compensation at the end of the employment.

There are no procedures for specific grounds for termination that differ according to the number of employees that will be terminated (including collective redundancy/mass termination). All terminations will be implemented with the same procedure.

7.2 Notice Periods

If the employment is terminated unilaterally by the employer, written notification of termination must be served by the employer on the employee and labour union (if the employee is a member) at least 14 business days prior to the intended date of termination, or seven business days prior for termination of an employee during a probationary period. If the employment agreement, employee handbook or collective labour agreement stipulates a longer notice period, the employer must comply with this specified notice period or make payment in lieu of notice, if permissible.

The employee may reject the termination in writing, with reasons for rejection, within seven business days of receipt of the notice of termination.

If, after being notified, the employee rejects termination, settlement must be reached by way of bipartite negotiation. If that fails, it is subject to the industrial relations dispute settlement mechanism provided under prevailing laws and regulations. These include:

- mediation at the local office of the manpower agency or conciliation by a private conciliator; and
- if necessary, court proceedings at the Industrial Relations Court, and, ultimately, at the Supreme Court.

Employees are entitled to a severance package upon termination, comprising severance pay, service appreciation pay and compensation of entitlements. The amount in the severance package depends on the employee's length of service and the reason for termination. The standard computation to calculate the severance package is stipulated in Article 40 of Government Regulation No 35 of 2021 on Fixed-Term Employment Agreements, Outsourcing, Work and Rest Hours, and Termination of Employment (GR No 35/2021). This standard computation of the severance package is then increased by the multiplier specified for each reason for termination. Employees may be suspended on full pay during a termination process.

The Manpower Law and GR No 35/2021 do not regulate the size of the severance package pay-

able under mutual termination. Therefore, the amount paid is subject to mutual agreement between the employer and the employee. In a META, both parties may also waive the notice requirement, and the employer will make a payment in lieu of notice.

For termination of a contract employee before the expiry of the contract, the contract employee will not be entitled to a severance package. The employer, however, shall provide compensation in an amount equal to the amount of salary the employee would have received until expiry of the contract's term, unless the termination is for reasons specified in the employment agreement, employee handbook or collective labour agreement, and may cause termination of the agreement. In addition, for an Indonesian contract employee, the employer must also pay compensation at the end of employment, calculated according to the formula stipulated in GR No. 35/2021.

External advice/authorisation is not required before an employer terminates an employee or serves written notice. However, the employer must report the termination to the Ministry of Manpower or the manpower agency with jurisdiction over the employee's work location. In the event of mutual termination, the META must be registered with the relevant Industrial Relations Court.

7.3 Dismissal for (Serious) Cause

Indonesian employment law recognises termination of employment for a serious violation (gross misconduct). Unlike regular employment termination, termination for gross misconduct does not require a notice of termination or a minimum notice period. Employees terminated for gross misconduct will not be entitled to severance pay or service appreciation pay. Instead, they will be entitled to compensation of entitlements and separation pay in the amount regulated under the employment agreement, employee handbook or collective labour agreement.

As the law is silent on types of gross misconduct, violations considered gross misconduct must be explicitly stipulated in the employment agreement, employee handbook or collective labour agreements.

For reference, GR No 35/2021 provides the following examples of action that can be classified as gross misconduct (to be further stated in the employment agreement, employee handbook or collective labour agreement):

- committing fraud, theft or embezzlement of company goods or money;
- providing false or falsified information that is detrimental to the company;
- being drunk, consuming intoxicating liquor, or using or distributing narcotics, psychotropic or other addictive substances in the work environment;
- engaging in immoral acts or gambling in the work environment;
- attacking, abusing, threatening or intimidating co-workers or employers in the work environment;
- persuading co-workers or employers to commit acts that are contrary to the law and regulations;
- carelessly or deliberately damaging or placing company property in danger, which causes harm to the company;
- carelessly or deliberately placing co-workers or employers in danger at work;
- revealing or divulging company information that should be kept confidential, except in the interests of the state; and

- committing other acts within a company punishable by imprisonment of 5 years or more.

Even though it is not expressly required under the Manpower Law, if the gross misconduct constitutes a criminal act, the Industrial Relations Court may require a final and binding criminal court decision declaring that the employee has indeed committed a criminal act, as proof of the employee's violation, in relation to their termination.

7.4 Termination Agreements

Termination agreements (or a META, as explained above) are permissible under Indonesian manpower laws and regulations, which are usually entered into between the employer and employee if the employment relationship is mutually terminated.

Upon execution, the META must be registered with the Industrial Relations Court having jurisdiction over the META-signing location.

There are no specific requirements or limitations on the terms of a META, as these will be based on the parties' agreement. In general, the META can stipulate the effective date of termination, the amount in the severance package that will be paid by the employer to the employee, and even post-employment termination obligations such as non-solicitation, non-compete and confidentiality provisions that the employee shall adhere to for a certain period, provided they do not contravene the law, general principles and public order.

7.5 Protected Categories of Employee

There is no specific protection against dismissal for particular categories of employee. However, employers are prohibited from terminating an employee for the following reasons:

- prolonged illness not exceeding 12 months;
- fulfilment of a state obligation;
- adherence to a religious obligation;
- marriage;
- pregnancy, giving birth, miscarriage or nursing a baby;
- being related by blood or through marriage to another employee in the company;
- establishing, becoming a member of or managing a labour union;
- participating in labour union activities outside working hours (or during working hours in accordance with an employment agreement, employee handbook or collective labour agreement);
- reporting the employer to the authorities for crimes allegedly committed;
- differences of opinion, religion, political orientation, ethnicity, colour, race, gender, physical condition or marital status; and
- permanent disability, illness due to a work accident or illness due to occupational disease, for which the period of recovery cannot be ascertained (as attested to by a physician).

8. Disputes

8.1 Wrongful Dismissal

Wrongful dismissal is regarded as termination of employment without valid reasons (as stipulated under the Manpower Law) or if the termination is not carried out through proper procedure.

The consequences of wrongful dismissal claims may include the following, subject to the consideration and discretion of the court judges on hearing and examining the industrial relations dispute:

- payment of the maximum amount in the severance package;

- payment of wages during the period between termination and the issuance of a final and binding court decision on the case (Industrial Relations Court or Supreme Court decision); and/or
- annulment of the termination and reinstatement of the employee to their previous position.

8.2 Anti-discrimination

Indonesia has ratified International Labour Organization Convention No 111 of 1958 on Discrimination in Respect of Employment and Occupation. Thus, discrimination regulated in this Convention is sufficient grounds for an anti-discrimination claim. In other instances, it can encompass:

- discrimination over a job opportunity and equal treatment from an employer;
- discrimination in relation to the salary of male and female employees doing the same job; and
- discrimination against an employee with HIV/AIDS.

The burden of proof for anti-discrimination claims follows the general civil procedural law, as it lies with the claimant.

Under the Manpower Law, anyone applying for a job has the same opportunity to obtain the job without being discriminated against on the grounds of gender, ethnicity, race, religion, or political orientation, in accordance with the person's interest and capability. Equal treatment also applies to persons with disabilities.

Further, employees have the right to receive equal treatment without discrimination from their employer, and employers are obliged to provide their employees with equal rights and responsibilities, free from discrimination on the basis of gender, ethnicity, race, religion, skin colour or political orientation.

The Manpower Law imposes administrative sanctions on the violation of the discrimination rules. However, it does not specifically stipulate the damages/relief applicable in an anti-discrimination claim. Nevertheless, under general tort provision in the Indonesian Civil Code, a person who commits an unlawful act that causes harm to another person must compensate that person for the damages caused.

Alternatively, if an employee opts to file an employment termination claim with an Industrial Relations Court, they may receive a severance package should the claim be accepted by that court.

8.3 Digitalisation

An electronic court, or e-court, system has been established in Indonesian courts as a follow-up to Supreme Court Decree No 7 of 2022 on the Amendment to Regulation of the Supreme Court No 1 of 2019 on the Administration of Cases and Legal Proceedings in Courts Via Electronic Means, which stated that the administration and legal proceedings via electronic means shall apply to special civil law cases, including those under the Industrial Relations Court. The regulation of an e-court only applies to court proceedings before the Industrial Relations Court and does not regulate further regarding employment disputes undergoing bipartite negotiation, mediation, conciliation, or arbitration.

In practice, the implementation of the e-court proceedings at the Industrial Relations Court of Jakarta is still in development and is generally subject to the discretion of the judges handling the respective cases.

9. Dispute Resolution

9.1 Litigation

Industrial relations disputes in Indonesia are settled via a three-tier mechanism:

- bipartite meeting;
- mediation at the local office of the manpower agency or conciliation by a private conciliator; or
- court proceedings at an Industrial Relations Court specifically established to hear and examine industrial relations disputes.

An appeal to the Supreme Court may be filed by any of the parties against a decision of the Industrial Relations Court.

There are no specific rules on class action for an employment dispute, nor has this ever been tested via class action. However, in regular Industrial Relations Court proceedings, there is no limitation on the number of plaintiffs. In practice, it could be hundreds in a mass termination case.

Parties to an industrial relations dispute may act on their own behalf, or be represented by attorneys or by a labour union or an employer's organisation of which they are a member.

9.2 Alternative Dispute Resolution

The industrial relations dispute settlement mechanism mandates that the employer, employee and labour union (if relevant) first try to settle the dispute through bipartite and/or mediation proceedings, both of which are also considered alternative dispute-resolution avenues, before commencing proceedings in the Industrial Relations Court.

Arbitration is another possible alternative method for resolving an industrial relations dispute. However, it is only allowed for:

- a dispute regarding the drafting or amendment of the terms and conditions of work (normally in a collective labour agreement negotiation); or
- a dispute between different labour unions in one company.

As a matter of general Indonesian arbitration law, pre-dispute arbitration agreements are enforceable. Nevertheless, agreements to arbitrate, post-dispute, are also recognised.

9.3 Costs

Attorneys' fees cannot be awarded to the other party. As stipulated under Indonesian Civil Procedural Law, attorneys' fees are borne by those who utilise them.

ISRAEL

Law and Practice

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Shibolet & Co.

Contents

Shibolet & Co. has a labour and employment practice which consists of 16 partners and associates. The firm stands out for its highly professional legal specialists, offering tailor-made services that cover every aspect of the employment life cycle, ensuring the creation and maintenance of productive working environments. Understanding the inherently sensitive nature of human resources issues, the firm adopts a holistic approach, supporting daily business activities while handling contentious matters with discretion and strategic insight. Shibolet's team of attorneys responds promptly to a diverse array of workplace challenges, providing comprehensive solutions that meet clients' unique needs. The firm advises clients on a very wide range of fields relating to labour law, with significant expertise in: advising on employment aspects of M&A and investment transactions, providing ongoing legal counsel on a wide range of labour-related matters, drafting employment contracts and related agreements, collective bargaining agreements, handling negotiations and more. The firm caters to hundreds of clients in their labour-law-related matters.

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1. Employment Terms

1.1 Employee Status

In Israel, there is no specific legal definition and/or legal distinction between blue-collar and white-collar workers. However, "workers performing physical work" are entitled to breaks of not less than 45 minutes in any working day of six hours or more. In "white-collar jobs" or jobs that do not require physical work, there is a general exemption from the obligation to give a break; however, it is customary to provide a half-an-hour break per day.

Israeli law distinguishes between different categories of employees: indefinite period of employment vs temporary employees, hourly vs monthly employees, etc.

Blue-collar employees are often subject to collective bargaining agreements.

1.2 Employment Contracts

Are Employment Contracts Mandatory in Israel?

In Israel, there is no legal requirement to execute a written employment agreement but rather to provide the employee with a written notice of employment terms, no later than 30 days from the employment commencement date, which shall detail some specific terms of employment, such as:

- name, address and identification number of the party;
- employment commencement date and term (indefinite or fixed);
- employee's position and the identity of their supervisor;
- salary and benefits;
- employee's regular work hours and primary rest day; and
- pension arrangement and contribution rates to the pension arrangement.

Fixed Term vs Indefinite Term Contracts of Employment

An employer who is a party to a fixed term employment agreement and terminates the employment relations before the end of the fixed term might be obliged to pay the other party monetary compensation due to the violation of the agreement. On the other hand, an employment agreement for an unlimited term may be terminated by either party by giving prior written notice to the other party, as required according to law.

1.3 Working Hours

Length of a Working Day and Week

In Israel, a regular working day in a five-day week shall not exceed 8.6 hours (except for one shortened day per each week, which shall not exceed 7.6 hours), a working week shall not exceed 42 hours and respectively, a working month shall be based on 182 working hours per month.

Maximum Overtime

The maximum overtime authorised beyond said hours is up to 16 additional hours per week whether the employee works a five-day or six-day week, with a maximum of 12 working hours net per day.

Compensation for Overtime Work

The compensation for overtime hours is at least 125% of the ordinary wage for the first two overtime hours on any day and at least 150% for all subsequent overtime hours.

It is common for employers to pay a global monthly compensation for overtime hours.

According to case law, the "Global Compensation for Overtime Hours" has to reflect the actual overtime performed or at least the average overtime performed and should be properly and separately reflected in the monthly payslips.

Global pay is paid whether the employee works the entire average overtime hours for which the overtime pay is paid or not.

Flexible Arrangements

Employees may not waive their mandatory entitlements, and an agreement providing overtime payments that are less than as provided by law is not enforceable. However, in certain cases (although not many), case law has approved an arrangement of a flexible working day according to an agreed upon weekly/monthly scope of working hours (meaning, an agreement according to which an employee will have to complete an agreed upon weekly/monthly number of working hours regardless of the daily hours of work). The enforceability of a flexible working arrangement should be examined on a case-by-case basis, and in the event the parties agreed, in good faith, to adopt such an arrangement, it may be interpreted as a valid arrangement as long as the agreement in this respect is not meant to deprive the employee of the provisions of the protective laws and provided that it meets certain criteria including but not limited to the employee's consent.

In this respect, there are no specific terms for part-time contracts.

1.4 Compensation

The minimum monthly wage is equal to ILS5,880.02 per month and ILS32.30 per hour.

Israel has no legal requirement to grant a 13th-month salary or bonuses. However, to the extent relevant, general collective bargaining agreements may impose other mandatory payments, such as additional compensation for working noon/evening/night shifts. In the private sector, there is no government intervention in salary increase either; however, certain rights are mandatorily calculated upon tenure in a workplace, such as recreation payments and vacation entitlement.

1.5 Other Employment Terms

Vacation and Vacation Pay

Pursuant to the applicable legislation, an employee is entitled to a minimum statutory amount of vacation days per each year of employment, which depends on the employee's tenure in the workplace. Employees must be paid their regular salary for those vacation days.

Parental Leave (Former Terminology Was "Maternity Leave")

The law requires employers to give a female employee who has been working at least 12 months for the same employer or at the same workplace prior to the beginning of the parenting leave, 26 weeks of parental leave, and for an employee who has worked less than 12 months – 15-weeks of parental leave. The employer is strictly prohibited from employing such employees during the parental leave. A male employee may also be entitled to such parental leave, partially (in case the mother waives her right) or entirely (if the father is one of two fathers), depending on certain circumstances. The father may also utilise part of such parental leave, subject to certain terms, and in addition, he may be absent from work for up to a further seven days by using his vacation and sick leave in the event of the birth of his child.

The legislation includes special provisions relating to emergency situations such as hospitali-

sation of the mother and/or the newborn or the birth of more than one child that may entitle the employee to extended parental leave, etc.

Parental Leave Pay

Whether the parental leave is 15 or 26 weeks, as mentioned above, only a partial period of 8–15 weeks entitles with payment, depending on the period of payments made by the employee to the national insurance prior to the date of birth, during which, the National Social Security pays the entitled employee an allowance designed to compensate her for the loss of wage or income during the time she is not working due to the pregnancy and/or the birth.

However, women are entitled to extend their parental leave following the minimum parental leave period, with no pay (unpaid leave of absence), subject to a minimum tenure at the same workplace.

The applicable law stipulates that an absence from work because of parental leave, under the provisions of the law, shall not affect the employee's rights that depend on tenure with the employer. The employer is also required to continue to make social contributions to both the pension and provident fund for the period in which a maternity allowance was paid by the National Social Security (subject to a minimum tenure prior to the date of birth and to payment of employee's contributions in parallel), all at rates, and according to the wage as if the employee continued to work during said period.

Sick Leave

The entitlement period for sick pay shall not exceed a cumulative period of 1.5 days for each full month of employment but no more than 90 days in all, less any period in respect of which the employee received sick pay.

An employee absent from work in consequence of sickness shall receive, subject to said maximum period of entitlement and by submitting a doctor's certificate:

- as of the 4th day of said absence: 100% of the wage the employee would have been entitled to receive during such period had s/he continued to work;
- in respect of the 2nd and 3rd day of said absence as aforesaid: 50% of the wage the employee would have been entitled to receive during such period had s/he continued to work; and
- in respect of the 1st day of absence: no payment.

Bereavement Leave

An employee working at the same workplace for a period of at least three months is entitled to bereavement leave of up to seven days in the event of the death of a first-degree family member (ie, parents, children, spouse and siblings). The employer is required to pay the employee his/her regular wage when absent due to bereavement leave.

Military Leave

An employee called up for reserve duty, including any unexpected reserve duty, such as "Tzav 8" or training reserve duty, who served under such reserve duty in half or full days, is entitled to receive service benefits from the National Insurance Institute. Generally, the employee provides the service order to the employer, the employer files the documents to the National Insurance Institute, pays the employee its regular wage and is then compensated by the National Insurance Institute up to the applicable ceilings and relevant regulations.

Holidays

Israel's official public holidays are eight days of Jewish holidays and Israel's Independence Day (for all Israelis).

Non-Jewish employees may choose to take rest days on days relevant to their religious holidays instead, and a government announcement specifies the official holidays for Christians, Muslims and Druze.

Monthly employees are entitled to regular pay on holidays. Hourly employees are entitled to their average wage received during the three months prior to the holiday if they worked at the same workplace or for the same employer at least three months before the holiday, provided the holiday does not occur on the Sabbath day and the employee was not voluntarily absent from work the day before and the day following the holiday.

Limitations on Confidentiality

Commercial secrets are regulated in Israel by legislation. The law defines a "commercial secret" as follows: "Business information, of any kind, that is not in the public domain and cannot easily be revealed by others lawfully, the secrecy of which grants the owner a business advantage compared to its competitors, all as long as the owner has taken reasonable measures to maintain its secrecy." The business matters that can be defined as commercial secrets are varied: knowledge regarding production processes, technical sketches, models, new ideas, reputation, market surveys, and client/customer lists. The employer alleging the existence of a commercial secret must prove its existence. In the framework of proving the commercial secret, the employer must first demonstrate that there is a secret and that reasonable measures to ensure it remains a secret have been taken. Additionally, the employer must specify the scope of time for which the matter must remain a secret.

When the courts interpret the term "commercial secret", they consider the interests of the public, the public's right to freedom of information, and the question of whether there is any significance to the secret becoming known to all. At times, this consideration overrides the protection of the employer's "commercial secrets". The term "commercial secret" is interpreted narrowly by the courts. The labour courts' premise is that the employee is not using the previous employer's commercial secrets when working with a new employer. The law also provides that in the event that the knowledge that is incorporated in the commercial secret reached a person during the course of their employment with the owner of the commercial secret, and this knowledge became part of their general professional skills, or in the event that the use of the commercial secret is justified for reasons of public policy, such person shall not be deemed liable for theft of a commercial secret.

Employment agreements in Israel usually include broader confidentiality undertakings that protect all information the employees receive from the employer in the framework of their employment.

2. Restrictive Covenants

2.1 Non-competes

There is no specific legislation that regulates non-compete clauses in employment agreements. Although the courts give significant consideration to the "freedom of occupation" principle, this does not completely preclude the validity of clauses that limit the "freedom of occupation". Employment relations entail an enhanced fiduciary duty, which implicitly pro-

hibits competition during employment. It is customary for contractual arrangements to address the requirement to refrain from competition both during the period of employment and following the termination thereof. Non-compete clauses generally appear in personal employment agreements and are less common in collective agreements. In examining the validity of non-compete clauses in employment agreements, the courts balance the various interests: the employee's freedom of occupation as opposed to the employer's interest to protect its property, a principle incorporated in Israeli basic law. According to labour court rulings, even if a non-compete clause exists in an employment agreement, it is not binding, in and of itself, unless it is reasonable and protects the interests of both parties. In the absence of special circumstances, which shall be specified below, the employee's freedom of occupation takes precedence over the non-compete clauses. The labour courts' premise is that the employer's desire that the employee not compete with it, for the sole sake of preventing competition, is not sufficient in and of itself; to this end, the courts have stipulated certain conditions that if at least one of which is met, this might permit the enforcement of the non-compete clause.

Over the last decade, there were only a few cases in which the courts enforced non-compete clauses in employment agreements. These few cases were those who are of the opinion that enforcing a clause that restricts one's occupation is granted mainly in cases in which the employer manages to prove use of a commercial secret.

2.2 Non-solicits

Non-solicitation Clauses

Non-solicitation restriction on employees is not regulated in Israeli legislation and is enforced in rare circumstances, mainly based on the lack of good faith and breach of fiduciary duty by personnel holding senior positions, which vitally harms the interests of the former employer. If a determination is made, it is generally based on the formation of a competing business prior to termination of employment with the former employer.

Non-solicitation of Employees

The labour courts have perceived third parties who cause the violation of the duty of confidentiality or other duties that the employee has towards their employer, as parties that commit the civil wrong of "cause of breach of contract" pursuant to tort laws. In the event of a valid and enforceable non-compete clause, a "poaching" employer may allegedly be considered liable for the tort of "cause of breach of contract". Among other criteria, it will be necessary to prove that the "poaching" company had knowledge of the existence of the contract and was aware that the action taken may possibly breach the contract. According to the elements of said civil wrong, there needs to be a causal connection between the approach by the new employer to the employee and the employee's resignation in a manner that is contrary to that stated in his/her employment agreement.

Non-solicitation of Customers

The matter of non-solicitation of clients and customers is also not regulated in Israeli legislation. The prohibition to solicit clients and customers during the course of the employment relationship also derives from the enhanced fiduciary duty an employee has towards his/her employer. It is customary for contractual arrangements to include a non-solicitation covenant applied during the employment relationship and following the termination thereof. Non-solicitation covenants generally appear in personal employment

agreements and are less common in collective agreements. The circumstances specified above regarding the enforcement of non-competition covenants and the conditions, which, if one of which is met, a non-competition covenant might be enforced, are also relevant to the enforcement of non-solicitation covenants. The enforcement of a covenant regarding the non-solicitation of clients and customers also depends on whether the employer's customer/client list is a protected commercial secret.

3. Data Privacy

3.1 Data Privacy Law and Employment

An employee has the right to privacy in the workplace environment. Opinions delivered by labour courts have made it clear that while an employer has a legitimate right to protect the employer's assets and avoid legal risks, the employer must consider and protect its employees' right to privacy. Consequently, employers' attempts to justify employee surveillance will be construed narrowly.

Unlawful monitoring, unauthorised data use and data breaches pose risks for employers, which may result in civil action and, in some cases, criminal liability.

According to the Israeli regulator, an employer must comply with the following principles.

Consent – an employer must receive an employee's informed and freely given consent for collecting and processing the employee's personal information.

Transparency – an employer must provide its employees with a description of the steps of collecting, maintaining, processing and transferring their personal information to third parties.

Legitimate Purpose – an employer must be able to show a legitimate reason for collecting personal information from its employees.

Right of Access – an employer must allow its employees to access their personal information stored on the employees databases.

Data Collection – collection and retention of personnel information should meet employment purposes and needs, and the employer should routinely review and confirm the legitimacy and scope of data collected.

Data Location Controls – an employer should maintain and update the places where the personal information of employees is stored and processed and also maintain specific access rights and a description of the purposes for collecting and processing the personal information.

Information Security – an employer must deploy adequate procedures to secure employees' personal information and prevent data breach and misuse.

Training – an employer must conduct regular and ongoing privacy and security training to all relevant personnel.

Audits – an employer must make sure that all the employer's personnel and contractors (including outsourcing services) maintain all procedures related to the collection and processing of employees' personal information.

4. Foreign Workers

4.1 Limitations on Foreign Workers

The employer, whether a local entity, foreign entity, or foreign entity registered in Israel, is required to obtain a work permit from the Israeli Ministry of Interior (MOI), and foreign nationals who wish to work in Israel must obtain a B-1 work visa. A work visa is only granted following an application submitted by the applicant (employer or other inviting entity) who has already obtained a work permit for those specific employees (except for a few specific circumstances).

Work permits are issued to a closed list of industries. Currently, the industries in which the employment of foreign workers is allowed are high-tech, industry, agriculture, hotels, caregiving, construction, unique technologies, infrastructure, and national infrastructure projects. However, these days, the Israeli government is working on expanding this list as a response to the severe shortage of foreign workers due to the war. Each industry has unique rules and procedures that apply for the employment of foreigners, obtaining work permits and visas, recruitment, and employee placement practices (both substantive rules and procedural rules), and they differ greatly between industries.

Recruitment of blue-collar foreign employees is done via bilateral agreements (G2G) as a default; however, in some industries, private recruitment (B2B) is allowed under certain terms.

The employment of foreign employees in the construction industry is allowed exclusively by designated workforce companies or by foreign execution companies (foreign construction companies) – who have unique licences.

A foreign employee's work period in Israel is limited to 63 months except for unusual circumstances. Employees will not be allowed to enter Israel for work purposes if there is a concern that they might wish to settle in Israel; blue-collar employees will not be allowed to enter if they have first-degree relatives in Israel.

Foreign employees, in general, are entitled to the same protective rights as Israeli employees – and the limitations on their employment are no different than those that apply to local employees (in terms of work hours, breaks, occupational hazards, etc), except for a few specific additional entitlements such as: entitlement for accommodation at the employer's expense, private health insurance, and other protective provisions. In addition, in certain industries, particular provisions may apply.

4.2 Registration Requirements for Foreign Workers

Registration of foreign employees and other administrative matters relating to their employment (recruitment, entry, compensation and more) are governed by the Israeli Ministry of Interior and are operationally intertwined with the procedures of obtaining (and extending) work permits and visas. For each industry, different practices and regulations apply.

Filing obligations (in terms of tax and the National Insurance Institute law) entailed with the employment of foreign employees are no different than those applicable to the employment of locals, although the specific arrangements may differ.

5. New Work

5.1 Mobile Work

See **3.1 Data Privacy Law and Employment**, which sets the basis for the possibility of an employer to monitor and supervise his employees when they work remotely.

No legislation explicitly relates to mobile work; however, many workplaces are adopting policies relating to mobile work, digital nomads' mobility, work from abroad and so on. According to case law, it is the employer's prerogative to decide whether or not to allow its employees to work remotely, as long as the considerations for such decisions are made in good faith and without prohibited discrimination between employees.

Due to the expansion of remote work after COVID-19, a private bill was submitted to the Knesset in 2022 relating to remote work arrangements in order to regulate said matter through legislation. Since then, policies have been adopted in the public sector as well as in private companies, and although employers mostly tend to prefer that their employees work on the premises, remote work is regulated and common in Israel, mainly in the hi-tech sector, for at least several days during a working month.

5.2 Sabbaticals

This is not relevant in Israel's private sector.

5.3 Other New Manifestations

See **5.1 Mobile Work**.

Iron Swords War

Due to the current Iron Swords war in Israel, there were many changes in employment regulations, such as the addition of new categories of protected employees (protection can be both from termination and from worsening of employment conditions).

Equal Pay for Female and Male Employees

In 2020, an amendment to the law was adopted, which imposed a duty on all public sector employers and on all employers employing more than 518 employees to publish an annual report detailing the average salary gaps between male and female employees.

The first reports for 2021 were published by 1 June 2022. Ahead of this date, updated guidelines were published for employers regarding the manner in which they should prepare their annual reports, detailing the average wage gaps between male and female employees, in accordance with the law.

The main update in the new guidelines is the transparency required, as employers are now obliged to publish a report that must include wage details of all employees employed during the calendar year prior to the publication date. The segmentation within the reports must include all employees at the workplace, specified by gender; there should be a notice to employees about the group to which they belong in the employee segmentation, etc.

Employers with wage gaps are encouraged to adopt an internal plan to implement a process of gradual and adjusted change to reduce the gaps in the manner proposed in the guidelines.

Although said guidelines are considered recommendations, they should at least be seen as a guiding principle concerning how the reports should be prepared.

Gig Economy

The gig economy has been a subject of significant debate globally.

In Israel, the leading lawsuit (class action) concerning the classification of gig workers is still pending as an appeal was filed on the decision of the regional court.

6. Collective Relations

6.1 Unions

The declared goal and purpose of the unionisation process is to improve the employees' employment conditions and secure their employment, including representing the employees in the process of negotiations for a collective bargaining agreement with the employer.

According to the law, a collective agreement may be signed only between the employer or an employer's organisation (on the employer's behalf) and a representative employees' union organisation (on behalf of the employees).

The law defines a representative employee's union, for this matter, as the employees' union organisation comprising, or representing for the purposes of that agreement, the greatest number of organised employees to whom the agreement is to apply, on condition that such number is not less than one-third of the total number of employees to whom the agreement is to apply.

Therefore, in the initial stage of unionisation, at least one-third of the company's employees have to sign a membership form explicitly expressing their will to be represented by a recognised employees' union organisation in order for such organisation to become a "representative employees' union organization" for the purpose of signing a collective agreement.

Whether to join or not is the personal and voluntary choice of each employee, and an employee who wishes to join a trade union is required to sign their written consent. However, if at least one-third of the company's employees join the employees' union organisation, that organisation will be held as the representative union of all the employees employed by said company. This union may demand to negotiate on behalf of all employees of a relevant employer (or to members of a smaller bargaining group, if applicable).

6.2 Employee Representative Bodies

Employee representative bodies represent employees in organised workplaces.

In general, the role of the employee representative body is to act in matters related to the working conditions of each employee (at the individual level) and of all employees at the workplace (at the collective level), to deal with individual issues and to contribute to the promotion of the welfare of the employees, subject to the authority of the employee's organisation.

An employee representative body, local or national, is not a party to a collective agreement (specific or collective). However, it is accepted in the labour relations system in Israel that the representative organisation and the employee representative body at the workplace jointly sign collective bargaining agreements, which expresses the fact that the representative organisation acted on the committee's opinion so that the employee representative body considers itself morally bound to the signed agreement.

An employer is prohibited from dismissing an employee or worsening their employment con-

ditions because of their activity in establishing an employee representative body or employees committee or because of their membership or activity in a committee operating within the framework of an employee's organisation.

6.3 Collective Bargaining Agreements

In Israel, there are two forms of collective bargaining agreements: (i) a special collective agreement covering one workplace or employer or a specific bargaining unit in the employer. A special collective agreement will be negotiated between the employer and the representative union of such employer's employees, and (ii) a general collective agreement, covering a specific industry or the entire workforce. A general collective agreement will be negotiated and executed between the representative employees union in a specific field of business and an employers' organisation in the same field.

All collective agreements have both a contractual and a normative status, such that their provisions, which grant rights to employees, become part of the employee's individual employment agreements, and the employees may not waive such rights.

The Minister of Labor may decide to issue extension orders of general collective bargaining agreements and expand the provisions of general collective bargaining agreements (or parts of such agreement) either to all employers and employees in Israel or to all employers and employees in a specific field of business in Israel. Extension orders' provisions bind employers and employees whether or not they are included in the specific employment agreement.

Examples of general extension orders that have been applied to all employers in Israel relate, for instance, to payment of recreation pay, reimbursement for commuting to work and back and pension.

7. Termination

7.1 Grounds for Termination

Employment relations under Israeli law are not "at will" employment relations since the employer is only allowed to terminate an employee's employment in good faith and due to a priori matter-of-fact reasons, and there are several limitations relating to termination of employment of employees belonging to certain categories as detailed in **7.5 Protected Categories of Employee**.

Before any termination, the procedure that must be followed is a hearing process, which is a case law development. The basis of the hearing process is that employees have the right, prior to the employer deciding whether to terminate their employment, to (i) hear the reasons and considerations of the employer regarding such termination, and (ii) have their position on such reasons, and any other related matter, heard by the employer and genuinely considered by the employer. The hearing process should not be a technical formality but rather a real and authentic opportunity before a termination decision has been made. Case law speaks in terms of "good faith", "open hearts and minds", and being willing and able to be convinced.

Israeli law does not require a specific termination process different from the standard termination process (hearing) in case of redundancy unless such process is specifically required by virtue of a general or specific collective bargaining agreement applicable to the employer.

7.2 Notice Periods

According to Israeli law, there are minimal statutory notice periods required, which begin at one day per month of employment and gradually increase to a maximum of 30 days, as follows.

- Monthly employees:
  (a) during the 1st six months of employment – 1 day per each month of employment;
  (b) as of the 7th month of employment and until the completion of one year of employment – six days, and an additional 2.5 days per each month of employment during said period; and
  (c) as of the completion of one year of employment – 30 days.
- Hourly employees:
  (a) during the 1st year of employment – one day per each month of employment;
  (b) during the 2nd year of employment – 14 days, and an additional one day per every two months of employment during said period;
  (c) during the 3rd year of employment – 21 days, and an additional one day per every two months of employment during said period; and
  (d) following the 3rd year of employment – 30 days.

Severance is also required, according to Israeli law, on top of the notice period. According to the law, a person who has been employed continuously for one year by the same employer or at the same place of employment and has been dismissed by the employer is entitled to severance pay. However, the severance payments are usually already accrued in the employee's pension scheme, which is transferred to the employee's ownership at the end of his/her employment.

7.3 Dismissal for (Serious) Cause

The law determines that an employee may be dismissed without severance payment and/or notice period if the circumstances in which they are dismissed justify denying such rights according to the definition of the term "cause" in the collective bargaining agreement applicable to the largest number of employees.

Courts interpret the term cause narrowly on the assumption that dismissal is a sanction in itself, and therefore, only very severe circumstances are recognised as justifying deprivation of rights (such as theft from an employer or sexual harassment, etc). Based on these rulings, it is highly common that employment agreements include a specific definition of the circumstances that are considered "cause".

In the event that an employer wishes to claim for "cause", they must notify the employee in advance of its intention to revoke severance and/or notice period in order for the employee to be able to be prepared for the hearing and raise his/her claims in this respect as well before the employer reaches any decision in his/her regard.

7.4 Termination Agreements

A termination agreement is permissible, and most of the time, employees will waive their right to a hearing during such a process. A release may be valid subject to certain criteria:

- it should be done in writing;
- the employer must explain to the employee the meaning of such a release and its implications;
- the release is given against an ex-gratia benefit, which is provided beyond the mandatory payments that the employee is entitled to upon termination; and

- all benefits to which the employee is entitled to in connection with the termination of his/her employment should be detailed and explained to the employee prior to the execution of the release.

7.5 Protected Categories of Employee

There are particular categories of protected employees, for example:

Employees on parental leave and for 60 days after their return to work, employees undergoing fertility treatments, employees utilising their mandatory sick leave, employees during their reserve duty and for 30/60 days (under certain circumstances during the "Iron Swords War") after they return to work. Currently, during the war, protection from dismissal is also temporarily given to employees who are absent from work due to evacuation from their homes, their child or sibling being abducted, and employees whose spouses are in reserve duty, etc.

Other restrictions related to discrimination prohibitions are detailed in section **8.2 Anti-discrimination**.

8. Disputes

8.1 Wrongful Dismissal

The grounds for a wrongful dismissal claim can be procedural (for example, the employer did not follow a hearing procedure or did have a hearing meeting but did not fulfil all the requirements related thereto (for example, not providing the employee enough time in advance)) or substantive, which can be a termination for a reason which is not genuine, or termination based on the grounds of discrimination and so on.

The courts apply various sanctions when it has been ruled that termination obligations were improperly implemented, including declaring the termination void (mainly in the public sector unless the law provides otherwise) and/or ordering compensatory damages for bad-faith unlawful termination.

8.2 Anti-discrimination

The law prohibits discrimination in hiring, promotion, determination of employment terms, professional training and/or termination of employment and severance pay based on (among others) gender, disability, sexual orientation, personal status, pregnancy, fertility treatments, IVF and parenting.

In addition, the law guarantees equal pay to women and men employees employed by the same employer in the same workplace for performing equal work (by its nature or equivalent work).

Therefore, the grounds for claims on anti-discrimination may be diverse and numerous as they can be related to a hiring process only or termination, promotion processes and so on, and they are based on various criteria as detailed above.

If an employer requests information from a job candidate or an employee relating to the subject matters based on which discrimination is forbidden, the burden of proof that there was no discrimination lies with the employer.

The courts may order compensatory damages, which vary according to the cause of action.

8.3 Digitalisation

There is no legislation regarding the digitalisation of employment disputes; however, there are

regulations that were published by the Directory of Courts in Israel regarding digital court proceedings, according to which:

(a) A party wishing to have the court proceeding via Zoom shall submit a request to the judge at least three days before the date of the court hearing and if this request is approved by the judge, the court proceeding shall take place via Zoom.

(b) During said video proceedings, all participants shall be present with their cameras open 5 minutes before the proceeding starts, and no participant shall leave the video proceeding or turn off their cameras before it ends. Recording or taking pictures is forbidden without the court's approval.

9. Dispute Resolution

9.1 Litigation

Labour Courts

Matters relating to employment relations in Israel are within the jurisdiction of separate labour courts. These courts are not detached from the general legal system, and their judgments are subject to review by the Supreme Court, which may, in certain (rare) cases, rescind a labour court decision if it finds that the decision was based on a legal error or if rescinding the decision serves justice. The general courts can also formulate policies regarding labour and employment issues because they are entitled to rule on matters relating to employment agreements that are raised in the framework of ordinary claims within the jurisdiction of the general courts.

The labour court system operates in two instances. The higher instance is the National Labor Court. There is one such court in the country. The National Labor Court has first-instance jurisdiction on matters relating to collective agreements and the parties thereto, as well as on claims in which the parties are labour unions. The National Labor Court also serves as an appellate court for Regional Court rulings.

The lower instance is the Regional Labor Courts. All matters not mentioned above are within the jurisdiction of the Regional Courts. The choice of the region in which an action is filed is determined based on geographical considerations, according to the employee's workplace or the place where the work is performed.

The labour courts also have a special and unique composition of judicial panels. Along with the judges, these also include representatives of employees and employers. The number of people on the panel varies, as follows.

- At the National Labor Court, the panel can comprise of up to seven persons – three judges, two employees' representatives, and two employers' representatives. The size of the panel is determined based on the matter being addressed.
- Generally, at the Regional Labor Courts, the panel comprises three persons – a judge, an employee's representative, and an employer's representative.

Class Actions

Class actions are available in labour courts subject to certain exceptions set forth in the law. The process starts with filing a motion to approve the class action.

Representations in Court

In labour courts, representation is a crucial aspect of the judicial process. Employees, employers, unions, and representative bodies

can be represented by lawyers. Lawyers specialising in labour law are commonly engaged for their expertise in navigating the complexities of employment disputes. Unions often play a significant role, particularly in collective disputes, providing support and representation for their members.

During court proceedings, both parties present evidence and arguments, through their lawyers or, less commonly, on their own. The process includes filing claims, participating in pre-trial mediations, and, if necessary, proceeding to court hearings. Decisions from regional labour courts can be appealed to the National Labor Court, ensuring a thorough review of legal and procedural aspects. This system is designed to provide fair and equitable resolutions to employment-related conflicts.

9.2 Alternative Dispute Resolution

As a rule, arbitration is not possible where mandatory rights are involved.

9.3 Costs

The labour courts usually award expenses and attorney's fees to the winning party; however, in order to allow employees access to exercise their rights in the labour courts, the amount of fees and expenses awarded is relatively low, regardless of who the winning party is.

ITALY

Law and Practice

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Contents

Zambelli & Partners has extensive experience in employment law, industrial relations and related litigation, and in-depth knowledge of the legislative and regulatory system governing employment relationships. The firm is made up of professionals with in-court expertise and knowledge of the Italian legislation, in the context of European Union law. As a consultant for industrial, financial and commercial companies and corporate groups, Zambelli & Partners advises clients in matters relating to employment law, trade union law and industrial relations, providing clients with strategic advice, assisting them in the day-to-day management and resolving of labour disputes. The team has successfully addressed many legal disputes relating to labour law issues and has managed reorganisations of companies in the engineering and steel, chemical and pharmaceutical, petrochemical and publishing sectors, as well as finance and credit. The firm also assists top managers in the stages of contractualisation and termination of employment, including any resulting litigation.

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1. Employment Terms

1.1 Employee Status

The main distinction between blue-collar and white-collar workers is as follows:

- Blue-collar workers (*operai*) collaborate with the employer by performing tasks that are primarily related to the company's production process. Examples include factory workers and manual laborers.
- White-collar workers perform organisational/administrative functions (eg, office employees, clerks).

Article 2095 of the Italian Civil Code introduces two additional categories of employees:

- *Quadri*: This category is intermediate between "*dirigenti*" (executives) and "*impiegati*" (middle managers). They consistently perform functions of significant importance for the growth of the company and the achievement of its targets.
- *Dirigenti*: This represents the highest category of employee. As defined by collective agreements, they possess a high degree of professionalism, autonomy and decision-making authority. Their activities are directed towards promoting, co-ordinating and managing the achievement of the company's targets.

1.2 Employment Contracts

The standard employment contract form in Italy is the open-ended or permanent contract. However, Italian legislation allows employers to enter into fixed-term agreements under certain conditions.

According to Articles 19–29 of Legislative Decree No 81 of 15 June 2015, as amended by Law Decree No 87 of 12 July 2018, a fixed-term contract can be freely executed (ie, without any specific reason) only if the duration does not exceed 12 months. For contracts exceeding 12 months (in any case, up to a maximum of 24 months), at least one of the following must apply: (i) conditions established by national/territorial/company-level collective bargaining agreements; (ii) in the absence of the provisions referred to in (i), and in any case only for contracts executed not later than 31 December 2024, technical, organisational or productive reasons identified by the employer; or (iii) reasons related to the replacement of other employees.

The main rules of the fixed-term contract can be summarised as follows:

- The original term can be extended up to four times within the 24-month maximum duration.
- The number of employees employed through fixed-term contracts cannot exceed 20% of the number of employees hired under a permanent contract as of 1 January of each year. Failure to comply with this provision entails the payment of a fine, but the fixed-term agreements remain valid.
- The duration of an employment contract can be validly fixed only if the contract itself is stipulated in written form. Otherwise, the clause regarding the fixed-term of employment is null and void, and the relationship is considered to be for an indefinite period of time.

As for the contracts' formal requirements, as a general rule, there is no obligation for the employment contract to be in writing. However, written form is required for the validity of certain contracts or covenants (eg, fixed-term employment contracts, non-competition agreements or probationary period clauses) or in relation to

the burden of proof (such as in agreements with temporary employees).

Legislative Decree No 104/2022 (*Decreto Trasparenza*), which implements EU Directive 2019/1152, and aims to ensure "transparent and predictable working conditions for employees in Member States", came into force in August 2022. The decree regulates employees' right to information on the essential elements of the employment relationship, working conditions and related protection.

According to the said decree, the employer must provide the employee with information in writing at the date of hiring or at least within seven days after the commencement of the employment relationship, including, but not limited to:

- the identity of the parties;
- the place of work;
- the registered office or domicile of the employer;
- the date of commencement of employment;
- the initial remuneration and the items that compose it with details of the timing and method of payment;
- the employee's contractual category;
- level and job title;
- the specific type of contract (eg, fixed-term), and its duration; and
- the scheduling of normal working hours and any conditions relating to overtime work and its remuneration, etc.

Please note that certain information – ie, the right to receive training provided by the employer, if any; the procedure, form and terms of notice in the event of termination by the employer or employee – may be provided within one month of the commencement of work. It is also permissible to refer to the National Collective Bargaining Agreement (CBA) governing the employment relationship or to other relevant company documents that are routinely delivered or made available to employees, for more detailed information on these matters.

1.3 Working Hours

Working time is regulated by Legislative Decree No 66/2003 and by the CBA applied by the employer as well as by collective agreements entered into at local/company level, if any.

Said decree provides that:

- normal working hours are 40 per week;
- collective agreements may establish shorter normal working hours and define them based on an average over a period not exceeding 12 months; and
- the average working hours cannot in any case exceed 48 hours, including overtime, in each period of seven days, and they are calculated over a period of four months; however, the decree also states that collective agreements can raise said limit up to six months, or twelve months in case of objective or technical reasons, or reasons inherent to the organisation of work, specified in the collective agreements.

Italian law provides working hours restrictions for certain categories of employees. For example, pregnant employees and those with children under one year old cannot work between midnight and 6am.

All work in excess of forty hours per week is considered overtime.

Article 5 of Legislative Decree No 66/2003 provides that the use of overtime must be limited, and usually, it is voluntary. Collective agree-

ments typically provide the conditions for performing overtime work. If collective agreements do not cover when overtime can be required, it is allowed only with the consent of the employee and for a maximum of 250 hours per year.

Finally, overtime is calculated separately. Any increased salary for overtime is typically specified in the collective agreements; alternatively, the agreements may entitle the workers to take additional leave in lieu of increased salary.

1.4 Compensation

According to Section 36 of the Italian Constitution, an employee is entitled to be paid in accordance with the quality and quantity of work performed, and payment must be sufficient to guarantee to the employee and his/her family a free and dignified existence.

There is no national legislation that establishes a minimum wage, which is determined by the CBAs for each category of employee.

Even if there is no CBA applicable to the company, an employee can still commence a lawsuit to challenge the sufficiency of wages paid. According to Section 2099 of the Italian Civil Code, the judge can determine the fair wage by reference to the salary level provided by the CBAs commonly applied in the sector of the company's business or in similar sectors.

An employer and employee, within the individual employment contract, may agree to salary differences which in any case cannot be less than the minimum indicated by the CBA applied to the employment relationship.

The part of pay exceeding the minimum wage or base salary is called the "super minimum".

An additional fixed item of remuneration, named the annual 13th monthly salary, is paid once a year on the occasion of the Christmas holidays. It usually corresponds to one month's remuneration. In addition, CBAs or even individual agreements may establish a further payment of a 14th instalment, usually paid in June.

Salary incentives may be agreed in individual employment contracts or in a collective bargaining agreement. They are typically based on individual and/or company performance, and subject to the rules of the agreed scheme.

Certain employees, especially those at management level, usually receive additional benefits, the most common of which are a company car, mobile phone and laptop, which may be used for either mixed use (ie, business and personal) or exclusively for business purposes.

Fringe benefits – whose value changes according to their nature – are a form of payment in kind, and they are subject to tax, social security contributions and insurance contributions. The relevant amounts and procedures vary according to the benefit.

Finally, adjustments to compensation, such as salary increases, are typically negotiated at the national level through collective bargaining between trade unions and employer associations.

1.5 Other Employment Terms

Article 36 of the Italian Constitution and Article 2109 of the Italian Civil Code provide for employees' right to annual paid vacation. The employee cannot waive this right.

The minimum length of paid vacation is four weeks per year, but the applicable CBA may provide for a longer period.

The four-week period can be used for almost two consecutive weeks at the employee's request, and the other two weeks (or the remaining higher period provided by the applicable CBA) have to be used within the eighteen months starting from the end of the accrued year. For example, vacation accrued but not used in 2024 has to be used by 30 June 2026.

Employees are also entitled to eleven days off as public holidays. Almost all the CBAs provide for a supplementary holiday – patron saint days.

An employee is entitled to leave in the following cases:

- Sickness leave: An employee is entitled to keep his/her job position for a certain period of time that changes accordingly to each collective agreement, and lasts almost 180 days in the space of one year (the "*periodo di comporto*"). This period is a suspension of the employee's contractual obligation to carry out his/her working activity, during which the employee is entitled to receive their full salary. A portion of the salary is paid by the National Institute for Social Security (*Istituto Nazionale Previdenza Sociale,* INPS), and the applicable CBA may require the employer to pay the remaining portion. The CBAs provide the length of such period and the rate of salary to be paid. They may also require that the protected period be included in calculations of length of service for seniority and social security purposes. With regard to executives, sick leave payments are fully borne by the employer. In cases where no CBA applies to the employment relationship, Article 2110 of the Italian Civil Code states that the length of such period is determined with equity.
- Maternity leave: Mothers are entitled to a paid leave of five months (normally two months before and three months after the child's birth), during which employees have the right to an indemnity from the INPS equal to 80% of their salary; however, almost all CBAs provide the obligation for the employer to pay the remaining 20%.
- Paternity leave: Fathers are entitled to a paid leave of ten days, continuous or otherwise (20 days in case of a multiple birth). During maternity leave, the working father can take compulsory leave as an alternative to the mother in the following situations: (i) if she does not benefit from it; (ii) if she dies or she is affected by a serious illness; (iii) if she abandons the newborn baby; or (iv) if the father has exclusive custody of the newborn baby. During this period, which is called alternative paternity leave, the father receives an indemnity as the mother would.
- Parental leave: Each parent, during the child's first twelve years of life, is entitled to parental leave. The total combined leave available to both parents is limited to ten months, except where the father takes at least three months of leave, whether continuously or in segments. In such cases, the total leave available increases to eleven months. The right to parental leave applies to:
  (a) mothers, after maternity leave, for a maximum period of six months;
  (b) fathers, from the birth of their child, for a maximum period of six months, extendable to seven months if at least three months of leave is taken, whether continuously or in segments;
  (c) single parents, for a maximum period of ten months; and
  (d) adoptive parents, within twelve years

from the date of adoption, provided it is before the child turns 18 (during this period, until the child reaches the age of twelve, both parents are entitled to receive an indemnity equal to 30% of their salary for a total of three months each; additionally, until the child turns six, this indemnity may be increased to 80% for one month, to be taken by either parent, while a further three months, shared between the parents, may be taken with the 30% indemnity).

- Marriage: Any employee, except during the trial period, is entitled to special paid leave if they get married. White-collar employees receive fifteen days, while blue-collar employees receive eight days. Almost all the CBAs provide for fifteen days of paid vacation.
- Disability: Disabled employees or those assisting disabled relatives are entitled to three days of paid leave per month.

Other situations granting leave include medical leave (eg, for drug addiction treatment or blood donation), political office, personal reasons, and study/training leave.

Pursuant to Section 2105 of the Italian Civil Code, "an employee cannot engage in business, either for his/her own account or for third parties in competition with his/her employer, or divulge information pertaining to the organisation and methods of production of the enterprise, or use it in such a manner as may be prejudicial to the enterprise". This provision establishes a "duty of loyalty" effective as long as the employment relationship exists. According to case law, this duty of loyalty prevents the employee from disclosing or communicating to a third party any confidential information or trade secrets relating to the business of the enterprise which may have come to his/her knowledge during the employment relationship. Therefore, the confidentiality obligation automatically follows the employment relationship, and it is not necessary to insert a specific clause which provides such an obligation in the employment contract or in subsequent agreements. Disciplinary sanctions (including dismissal) may be applied if the above duties are violated.

In addition, an employer may be able to obtain some relief against an employee who has improperly disclosed or used his employer's or ex-employer's confidential information or trade secrets. Such activity by the employee might be considered a criminal offence under Section 623 of the Italian Criminal Code.

Furthermore, the behaviour of the employee after the termination might be considered to be "unfair competition" pursuant to Section 2598 of the Italian Civil Code (eg, an employee setting up a new company using the confidential information obtained through its previous employer). In this case, the employer can ask the court to issue an injunction to stop the activity in competition.

In addition, an unlawful act or a breach of duties might entail the employee's liability for damages caused to the employer. In this case the employer should prove the damages, the breach of duties as well as the fact that the damage is connected to that breach.

2. Restrictive Covenants

2.1 Non-competes

According to Section 2125 of the Italian Civil Code, the post-employment non-compete covenants may be deemed valid and enforceable only if they:

- are specified in writing;
- set forth a specific consideration in favour of the employee;
- have a limited scope and geographical extent; and
- have a specific duration, that shall not exceed three years (five years for "*dirigenti*").

That said, parties rarely enter into non-compete agreements for such a long period of time, partly because this can lead to enforceability issues. Therefore, the duration normally agreed is between six months and one year from the termination of the employment relationship.

In order to assess the validity of a non-competition covenant, it is necessary to ascertain whether the combination of its terms and conditions, scope and reach unduly restricts the employee's ability to secure alternative employment or infringes upon their right to maintain their professional skills.

Case law indicates that the following conditions need to be considered when making such an evaluation:

- the content of the covenant (particularly with regard to the scope and geographical reach, to be assessed jointly); and
- the skills and experience of the employee.

The assessment must also take into account the amount of consideration paid to the employee for his/her non-competition obligations.

The law does not prescribe a specific amount for this consideration; however, case law requires that the compensation be "congruous" with the restrictions placed on the employee in terms of their right to maintain their professional skills and their ability to work. Therefore the compensation has to be evaluated on a case-by-case basis in light of the other terms agreed (ie, duration, scope, geographical reach and the skills and experience of the employee). From a practical perspective, the compensation should be in the range of 20%-30% (or more) of the monthly salary received by the employee for each month of duration of the obligation.

Non-compete clauses are enforceable provided that the requirements indicated above are met.

The enforceability of the clause does not depend on the reason for termination of employment. In fact, unless it is specified otherwise, it applies to all types of termination, including dismissal for "just cause" (ie, gross misconduct).

2.2 Non-solicits

There is no legal regulation of non-solicitation of employee restraints. Therefore, it is crucial that such restraints are clearly drafted and explicitly define which employees fall within their scope.

Given the absence of any legal regulation on non-solicitation of employee restraints, the restraint can cover any employee of the company or group – regardless of whether the employee had any dealings with them.

There are no requirements in terms of duration of a non-solicitation restraint. However, this restraint is usually inserted in a non-competition agreement and therefore the parties usually agree that this restraint will last for the same duration as the non-competition restraint.

As to the compensation, it is debated whether the above statutory requirement for non-compete agreements would also apply to the non-soliciting covenant.

As for the customers, there is no legal regulation as well. It is simply a matter of enforcing a contractual undertaking. So it is important that the non-solicitation restraint is clearly drafted and states which customers are within the scope of the restraint.

The restraint can potentially cover non-solicitation of customers with whom the employee has had no dealings with previously or prospective customers with whom he/she has dealt with. There are no requirements in terms of duration of a non-solicitation restraint. However, it is common for this restraint to be inserted in a non-competition agreement and therefore the parties usually agree that this restraint will last for the same duration as the non-competition restraint.

3. Data Privacy

3.1 Data Privacy Law and Employment

Italy is currently subject to the Italian Data Protection Act (Law No 196/2003), as amended by Legislative Decree No 101 of 10 August 2018, and the GDPR.

Data protection legislation must apply jointly with the employment laws set out in the Workers' Statute (Law No 300/1970). According to its Section 4, the instruments and equipment that are potentially able to monitor employees are permitted only to the extent they are required for organisational, productive or safety reasons or for the safeguarding of company assets, and provided that their use is agreed with the works council or most representative trade unions or authorised by the Labour Office, depending on the specific case.

Such rules do not apply (thus no agreement or authorisation is needed) to the instruments and equipment used by employees for their work (eg, laptop or mobile phone) or to devices that are used by the employer to register employees' access and attendance at the workplace.

In addition, the data and the information collected through such instruments and equipment can be used for all purposes related to the employment relationship, provided that the employees have been adequately informed of how the instruments can be used and how the controls can be carried out, in compliance with data protection legislation.

From a privacy perspective, the Italian Data Protection Authority (DPA) on 1 March 2007 issued some provisions ("Guidelines applying to the use of email and the internet in the employment contest") requiring data processors to define internal policy for the use of the internet, email and IT equipment and, in general, internal procedures for data protection purposes. The employer should inform employees in advance and unambiguously about any processing operations that may concern them in connection with possible controls. In particular, employers are required to provide information and instructions on the appropriate use of the IT devices supplied and relevant controls (eg, monitoring), if there are any. More specifically, employers must inform their employees about the type of tools being used, as well as the nature of the controls in place.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Every year, the Italian authorities set quotas for the maximum number of regular work permits that may be applied for (so called "quotas").

However, pursuant to Legislative Decree 286/1998 (the so-called Immigration Act), highly skilled individuals or employees who perform specific activities can apply to stay and work in Italy under an "extra quotas" procedure.

As for highly qualified individuals, the law provides that they shall have the proper educational or professional qualifications. Alternatively, they should have a so-called blue card issued by another EU member state or have attended professional, civic, and linguistic training in their home country.

4.2 Registration Requirements for Foreign Workers

EU nationals can stay in Italy up to three months from their arrival with no particular requirements. If the period is longer, they must register with the registry office of the city where they settle.

Non-EU nationals can be hired, but their employment is subject to quotas set by ministry decree (unless they are employed for special activities or are highly qualified employees). The employers shall obtain authorisation from the competent immigration desk, which is typically issued within 60 days from the request. Once hired, non-EU employees must apply for a permit to stay (*permesso di soggiorno*) within eight days of entering Italy with a long-term visa.

5. New Work

5.1 Mobile Work

Smart working, a novel method of conducting the employment relationship, is governed by a mutually agreed upon contract between the parties involved and subject to notification to relevant authorities. This approach allows for flexible work organisation based on phases, cycles, and objectives, without strict constraints on time or location, leveraging technological tools to accomplish work activities.

These activities may be carried out both within and outside company premises, with no fixed location, provided the legal and collective bargaining agreement limits on daily and weekly working hours are observed. The employer assumes responsibility for the safety and functionality of the technological equipment provided to employees for work purposes. In turn, employees are entitled to protection against accidents and occupational illnesses, even while working outside company premises and during commutes between home and chosen work location.

The smart working agreement must be formalised in writing for administrative and evidentiary purposes, addressing the specifics of work performed outside company premises, including equipment usage, managerial control, and potential conduct outside company premises warranting disciplinary action. The agreement must also clearly define rest periods and outline technical and organisational measures to ensure employee disconnection from work-related technology.

The agreement may be established for a fixed or indefinite term. In the latter scenario, termination requires a minimum 30-day notice (90 days for disabled workers). For justifiable reasons, either party may withdraw prior to the expiration of a fixed-term agreement, or without notice for an indefinite-term agreement.

The "National Protocol on Smart Working" by the Ministry of Labour and Social Policies, in conjunction with social partners, elaborates on the

requirements and specifics of individual smart working agreements.

Crucially, smart workers must receive equitable treatment compared to colleagues performing similar tasks and holding equivalent responsibilities within the same company.

5.2 Sabbaticals

While Italian law and CBAs explicitly address leave for specific purposes such as study, personal reasons, or political office, there is no express statutory framework for sabbatical leave. Such time off remains subject to negotiation and ultimately rests within the employer's discretion.

During a sabbatical, employees typically forgo remuneration while retaining their positions, though they do not accrue seniority during this period.

5.3 Other New Manifestations

The emergence of digital platforms and the gig economy is inextricably linked to both globalisation and the digital revolution. While these advancements have enabled sophisticated and technologically advanced work management systems, they have also raised concerns about the lack of protection for gig workers, including limited access to union representation.

Initially, there were two primary perspectives on the legal status of work via digital platforms: one advocating for its autonomous nature and another proposing the creation of a "tertium genus", an intermediate category between subordination and autonomy. Recently, however, both in Italy and across Europe, there has been a growing trend towards classifying gig workers as subordinate employees. This shift is often based on specific indicators, such as the methods of carrying out work, particularly in cases like food delivery riders.

New technologies often allow for increased employer control and direction over workers' activities. In response, the Italian legal system is moving towards ensuring the protections of subordinate work whenever the worker's autonomy is deemed illusory.

6. Collective Relations

6.1 Unions

The Italian Constitution provides the freedom to form or to join trade unions.

In our system, trade unions are considered unincorporated associations that do not need any authorisation or registration to be recognised. The trade unions' associations are governed by their bylaws, which do not need to be checked by any authority.

Workers have the right to establish trade unions, to join them and to take part in union activities within the workplace.

The infrastructure in Italy for collective employee's representation is organised at two levels: inside and outside the company. In particular there are:

- Outside the company: Trade unions, typically organised by industry sector, are the primary entities. Multiple trade unions representing different industries (eg, food, steel, textile) can join forces to form a "Confederation". The major Italian trade union confederations are the General Federation of Italian Trade Unions (*Confederazione Generale Italiana del Lavoro*, CGIL), the Federation of Italian Workers Trade

Unions (*Confederazione Sindacati Lavoratori Italiani*, CISL) and the Italian Work Union (*Unione Italiana del Lavoro,* UIL). Such confederations bring together different national trade unions. In principle, each national trade union brings together the trade unions organised at regional, provincial or municipality level. The trade unions at national level are those involved in the execution of the CBAs. They also have some information and consultation rights.
- Inside the company: the work councils.

The main union organisations within the workplace are the company-level trade union representation (*rappresentanze sindacali aziendali*, RSA) and the unified trade union representation (*rappresentanze sindacali unitarie*, RSU).

6.2 Employee Representative Bodies

In Italy, trade unions have the option to establish either an RSU or RSA within a company. Therefore, a trade union that decides not to establish an RSU maintains the right to set up an RSA (provided that the requirements mentioned below are met). On the other hand, trade unions that wish to participate in the election of an RSU have to formally waive the right to establish an RSA within the same company.

- Section 19 of the Worker's Statute states that an RSAmay be formed through the initiative of the employees in plants with more than 15 employees within the trade union associations that (i) have executed the collective agreement (at any level) applied by the company or (ii) participated in the bargaining process concerning the collective agreement (at any level) applied by the company, even if they did not execute it. The RSA is usually appointed by the territorial trade union associations (without a general election by the workers).
- An RSU can be formed in plants with more than 15 employees. The members of such union organisations are elected directly by the workers. In fact, such union organisations were introduced in order to allow the workers to choose their internal representatives within the works councils in a more democratic manner as compared to the RSA.

The key function of the RSA/RSU is to negotiate with the employers at company level, while also being entitled to specific information/consultation rights (such as in the event of collective redundancy, transfer of business, etc).

6.3 Collective Bargaining Agreements

Collective bargaining agreements in Italy primarily take place at two levels: at industry/national level – the most important one – and at company or, sometimes (very rarely), territorial level.

In Italy, for almost each industry sector there is a national collective bargaining agreement that regulates the individual employment relationship (eg, trial periods, notice periods in case of termination, leave of absence, working time, contractual levels, minimum salaries, annual leave, sickness leave, etc).

Nevertheless, in principle – and with certain limitation by case law – the employer is free not to apply any CBA to its employees or, in any case, to choose the CBA to be applied (ie, it does not have to apply the CBA of the specific sector in which the company operates).

The collective bargaining agreements at company level aim to provide more tailored provisions to suit the type of business and activities carried out by the relevant company, and therefore may

delve into greater detail on certain aspects of the employment relationship (eg, working time, company canteen, disciplinary measures, etc).

7. Termination

7.1 Grounds for Termination

Termination shall be communicated in writing and should contain the relevant reasons. Any termination delivered in the absence of such requirements does not have any effect.

There are various procedures to be followed depending on the type of termination, the size of the company and the date of hiring of the employee.

- Disciplinary procedure: The employer must promptly provide the employee with a written description of the objectionable behaviour or conduct. The employee has the right to respond – orally or in writing – within five days (or a longer timeframe set out in the applicable CBA) through a so-called justification letter. The employer can terminate the employment relationship following (i) the employee's failure to respond within the said five-day period (or longer timeframe set out in the applicable CBA) or (ii) immediately following the receipt of the justification letter.
- Procedure for dismissal for objective reasons: The employer must communicate in advance its intention to proceed with individual dismissal to the Labour Office of the employee's workplace, copying the involved employee and explaining the reasons for the termination. This procedure applies only to the dismissal of employees (not having the role of "*dirigenti*") hired before 7 March 2015 and employed by companies with more than fifteen employees in a single business unit or in more business units within the same municipality (*comune*) or again more than sixty employees across all Italian territory. Within seven days from the receipt of the above communication, the Labour Office summons the parties before the Conciliation Office for a meeting in which the parties will attempt to reach an agreement. The procedure will terminate not later than twenty days from the day on which the Labour Office sent the summons.

Should the parties fail to reach an agreement or, in any case, after seven days have elapsed without any summons by the Labour Office, the employer can serve the dismissal.

Collective Dismissals

Collective dismissals are triggered if all of the following conditions are satisfied: (i) the company employs more than 15 people; and (ii) the company intends to dismiss at least five employees, within 120 days, in the same production unit or in a number of units within the same province.

The employer should notify the staff representatives (if any) and the relevant (external) trade union of the decision to proceed with the collective dismissal. If there are no staff representatives, the notification has to be sent to the trade unions of the sector most representative at a national level. The procedure provided by the law lasts a maximum of 75 days. The first phase of the procedure is carried out with the unions and should be completed within 45 days (23 days if the number of employees involved is less than ten) from the delivery date of the communication starting the procedure.

If the parties fail to reach an agreement, there is another phase before the employment office. This second phase cannot last longer than 30

days (15 days if the number of employees is less than ten).

The dismissals may be served within a period of 120 days from the conclusion of the procedure unless the parties have agreed a longer term.

The collective dismissal procedure applies also to executives (*dirigenti*) but it does not apply to fixed-term workers and temporary workers.

7.2 Notice Periods

The notice period – which is provided only in case of dismissal for justified reason – varies depending on the CBA applied by the employer and on the seniority and level of the employee.

The employer can provide payment in lieu of notice.

In each case of termination (even for resignation or gross misconduct), the employee is entitled to:

- indemnity in lieu of holidays and leave accrued but not used;
- severance pay (the "*trattamento di fine rapporto*", or TFR), that corresponds to about 7.41% of the overall remuneration earned from time to time by the employee during the employment relationship; this amount is typically set aside annually on the company's balance sheet, unless the employee has chosen to transfer it to a specific complementary pension fund; and
- the pro-rata amount of the supplementary monthly salary (if any).

The above amounts are paid on top of the indemnity in lieu of notice (if due by the employer).

There are no specific procedures to be followed for the payment of the above indemnities.

7.3 Dismissal for (Serious) Cause

Dismissal for "just cause" occurs when a situation arises that makes it impossible to continue the employment relationship, even temporarily. The applied CBA usually provides some examples of reasons for dismissal that can be considered a "just cause". Gross misconduct would normally include theft, serious insubordination, unfair competition, disclosure of trade secrets, unjustified and repeated absences as well as any other behaviour which undermines the fiduciary relationship with the employer.

The employer must follow the procedure provided by Section 7 of the Workers' Statute, namely:

- provide the employee with a letter describing the defaults committed by the employee;
- await the justifications, if any, which are to be provided by the employee within five days (or a longer timeframe set out in the applicable CBA); and
- serve the dismissal letter.

The dismissal is effective from the day on which the disciplinary procedure commenced, and the employee is not entitled to a notice period.

7.4 Termination Agreements

Termination agreements usually include waivers from both parties. The agreements leading to termination of the employment relationship by mutual consent of the parties are admissible, on condition that the settlement is signed in front of trade union, labour council or labour court.

Furthermore, according to Section 2113 of the Italian Civil Code, where the subject matter of the waivers/settlement concerns the individu-

al's employment rights arising from mandatory provisions of law or collective agreements or arrangements relating to the employment relationship, such waivers will be invalid unless the agreement is signed before one of the competent above-mentioned bodies. If not signed before such bodies, the waivers/settlements can be challenged by the employee within six months from (i) the date of termination of the employment or (ii) from the date of the settlement if signed post-termination of employment.

The employer does not have to offer the employee consideration in exchange for (i) agreeing to enter into a settlement or (ii) in order to obtain an effective waiver of claims/withdrawal from initiated litigation. However, this is very common in practice as an incentive to obtain the employee's consent to the agreement.

7.5 Protected Categories of Employee

The main protected categories of employees are the following:

- Mothers and pregnant women: Women cannot be dismissed from the beginning of the pregnancy until one year after childbirth; a dismissal within this period would be null and void unless (i) the employer has completely ceased its activity; (ii) there is gross misconduct; or (iii) the termination is due to an unsuccessful probationary period or the expiry of a fixed-term contract.
- Marriage: The above protection also applies to women in the period from the day of the public notification of marriage until one year after the marriage.
- Women: A company cannot make redundant a percentage of women higher than the percentage of women employed in the job category concerned.
- Disabled employees: The dismissal of a disabled employee is voidable if at the time of termination the number of remaining disabled employees is less than the quotas prescribed by law for this category of employees.

There is no legal prohibition against dismissing an employee representative. However, under Section 18 of the Workers' Statute, during the lawsuit brought by the union representative to challenge his/her dismissal, a labour court may, upon joint petition of the dismissed employee and of his/her union, order the immediate reinstatement of the employee on a precautionary basis and before a final decision, where the court deems that the evidence provided by the employer to prove the reasons justifying the dismissal is irrelevant or insufficient. The applicable CBA may provide further protection (eg, the CBA for the metal-mechanic sector sets out that the employee representative cannot be dismissed without the authorisation of the union to which he/she belongs).

8. Disputes

8.1 Wrongful Dismissal

Individual Dismissals

Grounds for termination

Italian labour law requires the termination of the employment contract to be justified based on specific reasons:

- just cause – in case of gross misconduct by the employee which does not allow the continuation of the employment relationship even temporarily;
- subjective justified reasons – whenever the employee breaches a contractual obligation, but the behaviour is not serious enough to warrant dismissal for just cause; and

- objective justified reasons – which concern technical, production-related and organisational reasons.

Remedies in case of unlawful termination

Null and void dismissal

In Italy, a dismissal is considered null and void in the following circumstances:

- if an employer dismisses an employee verbally;
- if the dismissal is motivated by discrimination or retaliation (eg, for an employee exercising their legal rights, such as reporting workplace safety concerns);
- if an employee is dismissed from the beginning of their pregnancy until one year after their child's birth; and
- if an employee is dismissed because they requested parental leave or got married.

In the above cases, the remedies are the reinstatement of the employee plus the payment of backpay from the date of dismissal to reinstatement, with a minimum of five months' salary.

In all other cases, the applicable sanctions for unlawful dismissal depend on the reasons that lead to the termination of employment, the employee's qualification and date of hiring and the company's size, as follows.

Unlawful dismissals for just cause or subjective justified reasons (disciplinary dismissals)

Employees hired before 7 March 2015:

- Small companies employing up to 15 employees:
  (a) Employees may be entitled to be re-hired with a new employment contract, or, alternatively, to receive an indemnity ranging between two and a half and six months' salary.
- Large companies employing more than 15 employees:
  (a) If the "justified subjective reason" or "just cause" is found to be invalid because: (i) the alleged behaviour did not occur; or (ii) a less severe disciplinary action could have been taken on the basis of the applicable CBA, the employee may be entitled to reinstatement and to an indemnity up to 12 months' salary, plus social security contributions. In all other cases, the employee is entitled to the payment of an allowance ranging between 12 and 24 months' salary.

Employees hired from 7 March 2015:

- Small companies employing up to 15 employees:
  (a) The sole remedy applicable would be the payment of an indemnity ranging between three and six months' salary.
- Large companies employing more than 15 employees:
  (a) Employees are entitled to be reinstated solely when it is directly proved that the "material fact" upon which the dismissal was based did not occur. In this case, the reinstatement should be implemented together with the payment of an indemnity up to a maximum amount of 12 months' salary plus social security contributions. In all other cases, the employee will be only entitled to an indemnity, to be established by the labour court between a minimum of six months' salary and a maximum of 36 months' salary.

Dismissals for objective justified reasons (redundancy reasons)

Employees hired before 7 March 2015:

- Small companies employing up to 15 employees:
  (a) The company may be ordered to re-hire the employee with a new employment contract, or, alternatively, pay an indemnity ranging from two and a half to six months' salary.
- Large companies employing more than 15 employees:
  (a) If it is found that the fact on which the termination was based did not occur or is "groundless", the employee is entitled to reinstatement and to an indemnity for the remuneration lost, capped at 12 months' salary, plus social security contributions, deducting aliunde perceptum or aliunde percipiendum, if any. In all other cases, the employee is entitled to an indemnity ranging from a minimum of 12 months' salary to a maximum of 24 months' salary.

Employees hired from 7 March 2015:

- Small companies employing up to 15 employees:
  (a) An employee may be entitled to indemnity with a minimum of three months' salary and up to a maximum of six months' salary.
- Large companies employing more than 15 employees: Employees are entitled to be reinstated solely when it is directly proved that the "material fact" upon which the dismissal was based did not occur. In this case, the reinstatement should be implemented together with the payment of an indemnity up to a maximum amount of 12 months' salary plus social security contributions. In all other cases, an employee can be entitled to at most between six and 36 months' salary.

If an employer unlawfully dismisses an employee based on their physical unsuitability for work, the employee shall be reinstated with the payment of all remuneration lost during the period from dismissal until reinstatement, subject to a minimum of five months' salary, deducting aliunde perceptum or aliunde percipiendum, if any.

Except for the above-mentioned cases, such as retaliatory or discriminatory dismissal, different provisions apply to executives, who, if unlawfully dismissed, are not entitled to reinstatement, but solely to an indemnity depending on the length of service and grounds for dismissal pursuant to the applicable CBA.

Redundancies

A collective dismissal occurs in a large company, staffed with more than 15 employees, when at least five dismissals are served by the employer in a business unit or in more business units located in the same province and within a period of 120 days, due to reduction, transformation or ceasing of activity.

Employees hired before 7 March 2015:

- Law No 223 of 23 July 1991 provides that in the event the employer does not comply with all the steps set forth for the procedure for collective dismissals, the employer shall pay the employee an indemnity ranging between a minimum of 12 months' salary and a maximum of 24 months' salary.
- If selection criteria are violated, the employer shall (i) reinstate the employee unfairly dismissed; and (ii) pay him/her an indemnity equal to the salary due between the date of dismissal and the date of the effective rein-

statement with a maximum of 12 months' salary.

Employees hired from 7 March 2015:

- The employees shall be entitled only to monetary compensation. This compensation ranges from a minimum of six to a maximum of 36 months' salary. The right to reinstatement is limited to cases where the dismissal was communicated orally.
- Even if the employer fails to adhere to the criteria for selecting employees for redundancy, the remedy remains limited to monetary compensation.

Specific sanctions apply to unlawful dismissals related to collective redundancy involving executives. If the dismissal is in breach of either the procedure or the selection criteria, the employer shall pay the executive an indemnity ranging from 12 up to 24 months' salary, unless the applied CBA provides different provisions on the amount of said indemnity.

8.2 Anti-discrimination

Italian legislation contains both a general principle of equality, which prohibits all forms of discrimination, as well as specific provisions against discrimination.

According to the Italian Constitution, all citizens are equal before the law, regardless of sex, race, language, religion, political opinions, personal or social conditions.

The Workers' Statute prohibits employment discrimination. It specifically prohibits:

- Discrimination based on union membership or activity: Employers cannot make hiring decisions, dismissals, job assignments, workplace transfers, disciplinary actions, or any other prejudicial actions based on an employee's union membership, union activities, or participation in strikes.
- Direct and indirect discrimination: Both direct and indirect discrimination are prohibited. Direct discrimination occurs when an individual is treated less favourably due to a protected characteristic. Indirect discrimination involves seemingly neutral provisions or practices that disproportionately impact individuals with a protected characteristic.

It is also unlawful to harass a person, violate his/her dignity or create a hostile, degrading, humiliating or offensive environment due to the person's protected characteristic.

Harassment based on racial or ethnic origin, religion or convictions, disability, age and sexual orientation and sexual harassment constitutes a very serious breach of employment obligations when it occurs within the company, regardless of who commits the harassment. This holds true provided the employer is aware of the harassment and fails to take necessary measures to stop it.

An employee may file a claim for discrimination before the labour court. The court has the authority to order the employer to cease the discriminatory behaviour, to nullify the effects of the unlawful conduct, and to implement measures to prevent future discrimination. Additionally, the court may award damages to the employee, with the amount being determined at its discretion.

8.3 Digitalisation

Since 2014, the Italian Ministry of Justice has been actively involved in the digitisation of documents, document management, and notification processes, in line with both European Union and

Italian regulations, to facilitate the implementation of the telematic civil trial.

As part of these efforts, hearings, including public ones, can now be conducted via remote audiovisual links. This may be ordered by the court when the physical presence of individuals other than the lawyers, parties, public prosecutor, and judge's assistants is unnecessary. The court's decision must be communicated to the parties at least 15 days before the hearing. Any party may request, within five days of this communication, that the hearing be held in person.

The court will then assess the importance of the parties' presence and issue a non-appealable decree within five days. The decree may order the hearing to be held in person for those who requested it, while allowing other parties to participate remotely via audiovisual links.

In addition, on 27 October 2020, the Italian Supreme Court signed a Memorandum of Understanding for the Digitisation of Documents in Civil Trials. This protocol enabled the digital handling of documents that had already been filed in hard copy before the Supreme Court.

9. Dispute Resolution

9.1 Litigation

Labour-related matters are subject to a specific trial which is different from the ordinary trial used for civil and commercial matters. In most cases, employees file employment claims on an individual basis. However, there are instances where multiple employees may collectively pursue a single claim against their employer to secure a common right. Furthermore, specific labour claims can be filed by "collective actors". From this perspective, a trade union can bring a claim for anti-union behaviour and the Counsellor for Equal Opportunities can commence a lawsuit in the event of collective discrimination in the workplace. The labour trial is subject to a strict procedure. In particular, each party is required to include all the argumentation and evidence requests in the first brief submitted to the court.

9.2 Alternative Dispute Resolution

Labour claims may be submitted to arbitration:

- during settlement negotiations, when the parties may jointly delegate the dispute's resolution to the Local Employment Office through arbitration;
- in accordance with the procedures set out by the applicable CBA; and
- before an arbitration court specifically appointed upon agreement between the parties.

In principle, arbitration is optional, so each party has the right to bring an ordinary action before the competent labour court. As a consequence, employers may not compel employees to arbitrate claims.

The dispute may be referred to arbitrators only if the parties:

- enter into an arbitration agreement after the dispute has arisen; or
- enter into an arbitration clause, before the dispute has arisen.

The above arbitration clause is only valid and effective provided that:

- the applicable CBA allows the parties to execute such a clause;
- it is entered into by the parties after the expiry of the probation period, or, if no trial period is

provided, after thirty days of the commencement of the employment relationship;
- the clause is certified by the competent administrative bodies ("*Commissioni di Certificazione*"); and
- it does not concern issues relating to employment termination.

Labour arbitration is informal, designed to achieve conventional effects akin to a settlement. Disputes concerning the arbitrators' decision must be brought before the competent labour court within 30 days of notification. The court will review and interpret the arbitration decision as a contract.

9.3 Costs

The general principle is that the losing party in a lawsuit should pay the legal costs of the counterparty (winning side) for the amount decided by the court. However, under particular circumstances, the court can also "offset" the court costs, effectively leading to each party bearing their own expenses.

In addition, the law stipulates that if the successful party had previously declined a settlement proposal put forth by the court,and the amount of that proposal was equal to or greater than the final judgment award, that party might be ordered to pay legal fees.

Trends and Developments

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De Luca & Partners is an independent law firm dealing exclusively with employment law and court litigation, trade union law, social security law, agency law, safety at work, privacy law and personal data protection, and HROs. Established in 1976 by Vincenzo De Luca, the firm comprises two partners and a total team of 20, serving over 400 national and international client companies across all sectors. It provides comprehensive assistance for both routine HR matters and complex reorganisations, restructurings, and HR M&A transactions, including those with a cross-border element. Based in Milan, the firm maintains a robust network of correspondents throughout Italy and globally. Leading international legal directories consistently recognise De Luca & Partners as a preeminent employment law firm in Italy. Since its inception, the firm has been defined by its unwavering commitment to independence, competence, professionalism, confidentiality, efficiency, proactivity and transparency.

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This article provides a concise overview of key aspects of labour regulations in Italy, covering various topics that shape the employment landscape.

Classification of Sources at a National Level

The employment relationship is regulated by a multitude of sources. At a national level, sources contributing to the formation of labour law can be divided into (i) national and regional legislative law provisions, and (ii) collective and individual contractual ones.

Law provisions

Regarding the first type of sources, basic rules on rights and obligations of employer-employee can be found in the Constitution, the Italian Civil Code (*Codice Civile*), which includes a special section on employment matters, and in the Workers' Statute (*Statuto dei Lavoratori* – ie, Law No 300/1970 as modified by subsequent legislation).

The latter law provision is a fundamental labour law designed to protect workers' rights in Italy, providing comprehensive protection for workers.

It covers various aspects, including workers' privacy, trade union rights, workplace safety and anti-discrimination measures. The statute aims to create a balanced and fair working environment, ensuring that workers' rights are respected and that employers fulfil their legal obligations. The statute has been periodically updated to adapt to changing conditions, but its core principles remain, ensuring continued protection of workers' rights and promoting fair treatment in the workplace.

Collective provisions (NCBAs – national collective bargaining agreements)

Though they are not compulsory, NCBAs are generally applied by employers to govern the employment relationships with their employees. Indeed, according to the most recent data, about 98% of employees in the private sector are covered by a national collective labour agreement. However, the application of an NCBA by a company does not necessarily indicate that the company is unionised. This widespread adoption stems from both Italy's historical tradition and legal framework, which position NCBAs as essential tools for regulating the labour market. Their success lies in the comprehensive rules they establish, tailored to specific industries, covering areas such as holidays, notice periods, illness, misconduct, and minimum salaries.

NCBAs are negotiated by sectoral unions based on the production activity of companies (eg, industrial unions, commercial unions, etc).

The criteria identified by case law for determining the most representative trade union confederations are, in general, (i) the size of the union in terms of numbers; (ii) a significant territorial presence, spread throughout the national territory and not confined to a specific geographical area; and (iii) participation in trade union negotiations and the conclusion of NCBAs.

The NCBA has:

- A regulatory function: It establishes the minimum standards for individual employment relationships, encompassing aspects such as minimum salary, duties, leaves of absence, disciplinary procedures, and termination of employment. Importantly, it also ensures that individual employment contracts cannot contain provisions that are less favourable to workers than those outlined in the collective agreement.
- A mandatory function: It creates binding rights and obligations for the parties involved in the agreement. For instance, it might impose a duty on the employer to provide information to trade unions.

Establishment of the Employment Relationship in Italy: Preliminary Fulfilment

In most instances, the employment relationship is initiated through direct recruitment. Once established, the employer is obligated to provide the employee with comprehensive information about the employment relationship before they commence their duties.

Moreover, the employer must electronically submit this information to the Ministry of Labour no later than the day before the employment relationship begins.

Italian employers, regardless of whether they are foreign or domestic, must also adhere to various periodic obligations, primarily related to social security contributions and tax filings. These obligations apply even if the employment relationship is not governed by Italian law, provided the work is performed within Italy.

Prior to and immediately after hiring personnel, any foreign employer must complete several steps, including:

- registering with the relevant Italian labour authorities (INAIL, INPS, and the local employment office);
- obtaining a tax code for both the company and its legal representatives;
- implementing a compliant monthly payroll system in line with both Italian law and the chosen NCBA; and
- submitting all necessary social security and tax declarations, usually with the assistance of a payroll provider.

Failure to comply with these registration and reporting requirements in a timely manner can result in severe penalties, including a substantial fine for undeclared work.

From a corporate tax perspective, hiring employees in Italy could trigger the establishment of a permanent establishment. It is therefore advisable to consult with a corporate tax expert to mitigate any associated risks.

Management of the Employment Relationship in Italy: Key Rules

Types of employment contracts

The most commonly used employment contracts in Italy are outlined below.

Fixed-term contracts

In this case, the parties agree on the duration of the contract, after which the relationship is terminated without needing to give notice.

Employers hiring fixed-term employees for contracts of up to 12 months are not required to specify the reason for the hire. Should the contract exceed 12 months, the reasons must be specified in the contract.

Should a contract exceeding 12 months be executed without one of the stipulated reasons, or if it surpasses 24 months in duration, it automatically converts into an open-ended contract from the date the 12-month limit is exceeded.

The number of fixed-term contracts entered by each employer may not exceed 20% – or a different percentage provided for by the applicable NCBA – of the total number of permanent employees on 1 January of the year of recruitment. If the limits are exceeded, the employer must pay an administrative sanction.

Temporary employment is prohibited:

- to replace striking workers;
- in production units where, in the previous six months, redundancies have been made as a result of a reduction in the workforce, including workers assigned to the same tasks as those covered by the fixed-term contract (unless the contract is concluded to replace absent workers, is concluded to recruit workers on the "mobility lists", or has an initial duration of no more than three months);
- in production units where there is a suspension of employment or a reduction in working hours with the implementation of shock absorber measures; and
- by companies that have not carried out a health and safety risk assessment.

The relevant contracts are converted into a fixed-term contract if the prohibitions are violated.

Part-time contracts

Part-time work can be defined as work performed for less than the normal working hours laid down by law or by a collective agreement, in relation to a daily, weekly, monthly or annual period.

There are three types of part-time work:

- horizontal part-time (where the reduction in hours is on a daily basis);
- vertical part-time (where the reduction is in relation to predetermined periods of the week, month or year); and
- mixed part-time (a combination of the two above).

The contract must:

- be in writing;
- specify the duration of the service;
- provide normative and economic treatment no less favourable than that of a comparable full-time worker; and
- allow for the conversion of the contract from full-time to part-time by written agreement between the worker and the employer.

In addition, in accordance with the provisions of collective agreements, the parties may agree in

writing on elastic clauses relating to the variation of the time setting of work performance ("flexible clauses"), or clauses relating to the increase of its duration ("elastic clauses").

Open-ended contracts

An open-ended employment contract does not have a predetermined end date. These relationships continue indefinitely until terminated by either the employer or the employee, providing job stability for employees.

Termination usually requires a cause or mutual agreement, and employees are entitled to various protections and benefits under Italian labour law, including severance pay, notice periods and protection against unfair dismissal.

This type of contract is generally preferred by employees because of the long-term stability it provides.

Duties and classification

Duties indicate the set of tasks and specific activities that the employee must carry out. The employee's duties are defined in the employment contract.

The category, on the other hand, designates the professional status of the worker. It expresses the type and professional level of the worker.

The employer is obliged to inform the employee, at the time of recruitment, of the category and duties assigned to him/her in relation to the tasks for which he/she has been recruited.

The determination of the employees' categories is based on Article 2095 of the Civil Code and on NCBAs. The employees are divided into the following four professional categories (from the lowest to the highest):

- Blue-collar employees (operai): This category is fully defined in the NCBAs, and the most important requirement for these workers is their "manual skills".
- White-collar employees (*impiegati*): This category includes persons who are responsible for planning and organising professional activities, excluding manual activities.
- Middle management (*quadri*): This category is made up of intermediate officials positioned between managers and white-collar employees. They may be identified based on their exercise of management and supervisory responsibilities over other employees, although these responsibilities are less extensive compared to those of managers.
- Executives (*dirigenti*): The category of executives includes those employees who occupy a position in the company that requires a high degree of professionalism, autonomy and decision-making power to promote, coordinate and manage the achievement of the company's objectives. At present, there is no legal definition of a manager, and it is therefore up to collective bargaining to define the criteria for belonging to this category, in any case taking into account the duties actually performed and not the formal appointment by the employer.

Furthermore, per NCBA provisions, each white-collar and blue-collar employee is assigned a specific contractual level based on their duties and level of expertise.

In contrast, executives are subject to distinct provisions under the NCBAs for executives, which differ from those applicable to employees in other professional categories. Key distinctions pertain to the regulation of holidays and paid leaves, sickness and injury benefits, notice periods, and protections against dismissal.

Probationary period and "protected" periods

In Italy, an employee can be hired on a probationary period, allowing the employer to assess the employee's suitability before making the employment relationship permanent. However, the probationary period can also benefit the employee, as it offers a chance to evaluate the position and the company. During this period, either party can terminate the contract "at will" without notice or justification, unless a minimum duration has been specified.

The probationary agreement must be in writing. If not, a permanent employment relationship is automatically established, either open-ended or fixed-term depending on the initial agreement. The clause must be included before or at the commencement of the employment relationship.

The maximum legal duration of the probationary period is:

- three months for employees not assigned managerial duties; and
- six months for all other employees.

However, NCBAs may extend these limits based on the employee's category and classification level. The probationary period commences on the actual start date of the employment.

Working time

The maximum length of the working day is set by law.

Legislative Decree No 66 of 2003 establishes the following standards for normal working hours:

- sets the normal working week at 40 hours; collective agreements may fix a shorter period;
- a maximum working week of 48 hours, including overtime; and
- a minimum daily rest period of 11 consecutive hours per 24-hour period, with a minimum rest period of ten minutes every six hours.

Failure to comply with these provisions is punishable by administrative fines.

There are also special provisions for overtime and night work. Our legislation also provides for the right to 24 consecutive hours of rest every seven days, usually coinciding with Sunday.

Employee's economic treatment

Remuneration is the employer's main obligation. In fact, Article 2094 of the Civil Code states that a subordinate worker is one who undertakes, for remuneration, to carry out his/her own intellectual or manual work in the service and under the direction of the employer.

Furthermore, Article 36 Section 1 of the Constitution states that "[w]orkers have the right to remuneration commensurate with the quantity and quality of their work and, in any case, sufficient to ensure a free and dignified existence for themselves and their families".

Please note that the Italian legal system does not have a minimum wage law: this deficiency is compensated by NCBAs.

Under Italian law, remuneration is paid in thirteen monthly instalments. The 13th instalment (*tredicesima*) is paid once a year with the December salary.

Some NCBAs have a 14th monthly payment: this is usually paid in June.

Social Security and Employment Costs

Article 38 of the Italian Constitution, states that "[e]very citizen unable to work and without the necessary means to live has the right to maintenance and social welfare". It also recognises the right of all workers to be provided with adequate means for basic needs in the event of accident, illness, disability and old age, as well as unemployment.

The provision applies to citizens who are self-employed and subordinate workers. These benefits are also available to foreign workers residing in Italy.

JAPAN

Law and Practice

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TMI Associates

Contents

TMI Associates is one of the largest law firms in Japan, with offices in six locations in Japan and overseas branches in China, South-East Asia, the USA, France and the UK. Its labour and employment team is comprised of 71 lawyers, including 17 partners. The firm advises Japanese and multinational clients in various industries across the entire spectrum of employment-related matters, including litigation, M&A, and negotiation with labour unions. The team collaborates with TMI's data privacy, intellectual property and criminal law experts, including former judges and public prosecutors, on matters that intersect with these areas, such as trade secret theft and employee misconduct. The team also regularly works with immigration experts within the firm.

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1. Employment Terms

1.1 Employee Status

Regular Employees

An important distinction in employee status is between (i) indefinite-term, full-time employees (commonly called "regular employees") and (ii) fixed-term and/or part-time employees (commonly called "non-regular employees"). There have been significant differences in employment conditions of regular employees and those of non-regular employees. Recently, new laws have been enacted to address this situation by prohibiting unreasonably different treatment, and many court cases have ensued.

Exempt Employees

Another important distinction is between exempt and non-exempt employees. Managers and supervisors who (i) have personnel and other management authority, (ii) decide at their own discretion when to start and finish their work, and (iii) receive higher salaries, are generally exempt from increased wages for overtime and holiday work. This requires particular attention, as the scope of employees who are considered exempt in Japan is much narrower than in some other countries and, as a result, employees are often incorrectly classified as exempt.

1.2 Employment Contracts

There are no formal requirements for entering into a written employment contract. An employment contract can be entered into orally. Upon hiring, employees must be given a written notification which states core employment terms such as the employment period, terms of renewal (if applicable), initial workplace and scope of changes to it, initial duties and scope of changes to them, working hours, days off, holidays, salary and termination of employment.

1.3 Working Hours

Maximum working hours are eight hours per day and 40 hours per week, in principle. A labour management agreement (an agreement with a major labour union or, if such union does not exist, with an employee who represents the majority of the employees) must be entered into and filed with the Labour Standards Inspection Office every year in order to require employees to work beyond the maximum working hours.

Even with the labour management agreement, overtime hours (the hours exceeding the maximum working hours) generally cannot exceed 45 hours per month and 360 hours per year for normal months. For busy months up to six months per year, this cap may be raised to 100 hours per month including holiday work, 720 hours per year not including holiday work, and 80 hours per month including holiday work on average over any period of two to six months.

Flexibility

Employers who would like to have some flexibility may, depending on the nature of their business, adopt one or more of the following:

- a "flexible working hours system", under which employees decide their own starting and finishing time, and working hours are calculated on a monthly or longer (but not exceeding three months) basis;
- an "irregular working hours system", under which the starting and finishing time is determined by the employer, and the daily or weekly working hours can be longer than the maximum working hours so long as the average weekly working hours are 40 hours or less; and
- a "discretionary working hours system", under which employees who engage in certain work which requires discretion on how to

proceed with the work can decide their own starting and finishing time, and working hours are deemed to be certain hours (eg, normal working hours at the workplace) regardless of the actual working hours.

1.4 Compensation

Minimum Wages and Bonuses

Minimum hourly wages are determined per prefecture (ie, administrative district), in principle. Higher minimum hourly wages apply to certain industries. Prefectural minimum hourly wages are reviewed every year and are in the range of JPY893 to JPY1,113 from October 2023 (JPY1,113 for Tokyo, JPY1,064 for Osaka). A raise in the minimum wage is now under discussion.

There is no statutory obligation to pay bonuses or increase salary. The government does not intervene in the determination of compensation unless the amount is below the minimum hourly wage, determined based on discrimination, or reduced in an illegal manner.

1.5 Other Employment Terms

Annual Leave

Employees whose attendance rate is 80% or more are entitled to ten to 20 days of annual paid leave per year depending on years of service. The number of entitled days is prorated if an employee works on a part-time basis.

Employees who meet certain criteria can take maternity leave (for delivery), childcare leave (up until the child reaches two years of age, at a maximum), childcare leave upon childbirth (up to four weeks within eight weeks from the childbirth) and family care leave (for a family member requiring care). These leaves can be unpaid.

There is no legal obligation to provide paid sick leave for an illness or injury that is not work-related. When employees need to be absent from work due to such an illness, they commonly use annual paid leave. If they have used up annual paid leave, they may receive health insurance benefits which cover a part of their salary.

Employee Liability

Japanese law prohibits prior agreement on liquidated damages in the case of an employee's breach of an employment agreement. In addition, employers are prohibited from offsetting any claims against an employee by withholding salary payments without the employee's voluntary consent. It is, therefore, difficult to set forth a claw-back clause in Japan.

2. Restrictive Covenants

2.1 Non-competes

In Japan, it is possible for employers to adopt non-competition (or non-compete) clauses to restrict an employee's activities for a period of time after the employment has ended. The validity of non-compete clauses is determined on a case-by-case basis. They will be considered void as a violation of public policy if they unreasonably restrict the employee's constitutional right to choose their occupation.

To be enforceable, the non-compete clause must be reasonable in duration, geographic area, and scope of business or activity, and must be necessary to protect the employer's legitimate business interests. Legitimate business interests may include technological and business secrets and information, protection of transaction with business partners, and avoidance of material damage to business operation. The courts also take into account the position of

the employee, including the employee's knowledge of confidential information and relationship with customers or suppliers, and the compensation awarded to the employee.

In many cases, courts have sustained a non-compete clause but narrowly interpreted it by limiting its effect to an extent deemed reasonable. Typically, the courts are reluctant to acknowledge that an employee violated a non-compete clause simply by joining a competitor, and they will require that the employee is engaging in activities that harm the previous employer's interests.

Since an injunction against competing activities directly interferes with an employee's freedom of occupation, an injunction will only be granted when and to the extent it is necessary to prevent the employer's damages. Under the current practice in Japan, the threshold is relatively high, and the courts do not easily grant an injunction based on a non-compete clause.

2.2 Non-solicits

Freedom of Occupation and Business Competition

It is uncommon for Japanese employers to adopt clauses prohibiting the solicitation of former colleagues. The enforceability of such clauses is therefore not widely discussed. In principle, a balance must be sought between the solicited employee's freedom of choice of occupation and the legitimate business interest of the employer. A clause prohibiting an employee from hiring a former colleague, even if there was no solicitation and the colleague applied of his or her own volition, is unlikely to be enforceable.

In cases where employers have sought the liability of former employees for soliciting former colleagues based on tort, the courts have generally focused on the nature of solicitation. For example, if the departing employee solicits many of their team members to leave the current employer and join a competitor, the court will likely find that the nature of the solicitation is malicious, and thus consider the solicitation to be unlawful. Similarly, if a departing employee requests an ex-co-worker to bring the current employer's proprietary information such as cost information, price list or customer list, it is more likely that the solicitation shall be deemed unlawful.

On the other hand, if the solicitation is made based on a personal relationship on an individual basis without involving any disclosure of confidential information, it is less likely to be judged unlawful.

Clauses prohibiting the solicitation of customers are likely to be considered enforceable, as long as they can be shown to be necessary to protect the employer's legitimate business interests, and do not unduly interfere with the employee's freedom of choice of occupation. If the customer voluntarily approaches the ex-employee without solicitation from the ex-employee, the court is unlikely to consider it as a breach of non-solicitation.

3. Data Privacy

3.1 Data Privacy Law and Employment

Information on the Employee and Personal Rights

The Act on the Protection of Personal Information, which sets out rules on the protection of personal information of individuals in general, applies to the employment area as well.

An employer must:

- collect personal information properly;
- publicly announce or inform the employee of the purpose of use of personal information unless it is obvious;
- process personal information within the scope of purpose of use which has been announced or informed;
- obtain the employee's consent when transferring personal information to a third party unless the transfer falls under an exception under the Act;
- in particular, when transferring personal information to a third party located in a foreign country, obtain the employee's consent to such overseas transfer after explaining certain matters such as the legislation on the protection of personal information in that country, unless the transfer falls under an exception under the Act;
- implement safety measures to protect personal information and supervise employees and contractors who handle personal information; and
- administer the employee's request to access, correct, add or delete personal information.

In relation to data privacy, it is advisable to build into the work rules a provision that permits the employer to monitor and search employees' communications and files stored on the employer's computers and systems and other electronic devices.

Employers should also be mindful of the need to adopt rules on handling health information of employees, which became a legal obligation in 2019.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Foreign nationals with a working resident status are permitted to engage only in the type of work and for the term authorised pursuant to their respective resident status.

The "student" resident status and the "family stay" resident status (for those who reside as a family member of a person with a different residence status) are non-working statuses. However, if a foreign national with such status obtains a permit "to engage in an activity other than that permitted pursuant to the resident status granted", the foreign national can work up to 28 hours per week. In addition, those with a student resident status can work up to eight hours per day, 40 hours per week during long-term vacations.

On the other hand, foreign nationals with permanent resident status, special permanent resident status, long-term resident status, and spouses or children of a Japanese national or permanent resident do not have any limitations on the type of work or hours of work, other than such limitations that also apply to Japanese nationals.

If an employer causes a foreign national to work in Japan under any of the following circumstances, the foreign worker and the employer may be subject to imprisonment for up to three years and/or a fine of up to JPY3 million:

- working without a resident status that permits work;
- engaging in work that does not fall within the work permitted under the applicable resident status;
- working after the expiry of the resident status term; or

- working in excess of the hours under the permit "to engage in an activity other than that permitted pursuant to the resident status granted".

It should be noted that the period of imprisonment and the amount of fine scheduled for these violations is set to be increased to up to five years and up to JPY5 million within three years from the promulgation date – ie, by the year 2027.

4.2 Registration Requirements for Foreign Workers

Notifying the Local Authority

Employers are required to notify the name, resident status, period of stay, nationality, etc, of a foreign worker to the local Public Employment Security Office (Hello Work, *harōwāku*) upon the worker's hiring and termination. Punishment for non-compliance is a fine of up to JPY300,000. The notification requirements do not apply to the hiring or termination of foreign nationals with a special permanent resident, diplomatic or public status.

5. New Work

5.1 Mobile Work

General Overview

From the viewpoint of preventing the spread of COVID-19, off-site work using information and communication technology (mobile work) has been recommended, and many companies have introduced mobile work. As long as an employee falls under the definition of worker under the Labour Standards Act, labour standards-related laws and regulations such as the Labour Standards Act, the Minimum Wage Act, the Industrial Safety and Health Act, and the Industrial Accident Compensation Insurance Act, apply to them, even when they engage in mobile work. As a result, the fundamental content of this guide is equally valid in the case of mobile work.

Industrial Safety and Health

As mentioned above, the Industrial Safety and Health Act applies even during mobile work, so an employer is required to take measures to ensure the safety and health of their employees. Specifically, the following measures should be taken:

- establishment of a structure to provide health counselling;
- training for safety and health when employees are hired or when their work is changed;
- medical examinations and measures based on their results;
- medical interview guidance by a physician for employees who work long hours and measures based on the results of that interview to prevent health problems caused by overworking;
- identification of working hours, calculation of overtime and holiday working hours, and provision of information to an industrial physician for the appropriate implementation of medical interview guidance;
- stress check and measures based on the results of it; and
- health education and counselling for employees and other measures necessary to maintain and promote their health.

Compensation for Work-Related Accidents by Insurance

As mentioned above, the Labour Standards Act and the Industrial Accident Compensation Insurance Act apply even during mobile work. Therefore, accidents during such work caused by being under the control of an employer are covered by the industrial accident compensa-

tion insurance as work-related accidents. On the other hand, those caused by non-work-related causes, such as private actions, are not considered work-related accidents and are not covered by the insurance.

Data Privacy

The content set out at **3. Data Privacy** is equally applicable to mobile work. In addition, from the viewpoint of information security, it is desirable not to uniformly judge all operations to be exempted from mobile work, but to consider solutions or to judge each operation individually based on the progress of related technologies, etc. It is also preferable to implement measures using the "Telework Security Guidelines" prepared by the Ministry of Internal Affairs and Communications or to educate employees, so that the employer and the employees do not feel anxious about information security measures.

5.2 Sabbaticals

A system whereby an employer grants a long leave of absence, such as a vacation of one month or more, to their employees who have worked for and contributed to the company for a certain length of time (sabbaticals), is not required by the Japanese law, and is not common.

However, some large companies have introduced "refreshment holidays", which are similar to sabbaticals. Details, such as requirements for taking the leave, length of the leave and whether the employee is paid during the leave, are basically designed by each company with a free hand, since they are not regulated by law in Japan. Some traditional Japanese companies grant one to three weeks of consecutive paid holidays to employees with 10, 20 or 30 years of consecutive service periods.

5.3 Other New Manifestations

Improvements in Employment Conditions for Older Workers

A new trend seen in Japan in recent years is the improvement of employment terms for senior employees, which have been introduced to cope with labour shortages due to the country's low birthrate and increasingly elderly population.

Under Japanese law, companies are legally obliged to select to either:

- raise the mandatory retirement age to 65;
- introduce a system of continued employment until the employees reach the age of 65; or
- abolish the mandatory retirement age as a measure to secure employment for the elderly.

In addition, companies are obliged to "make efforts" to secure employment opportunities for older workers up to the age of 70. Although the violation of this obligation does not immediately lead to sanctions, employers are obliged to make efforts. In recent years, it has been reported in the Japanese media that some large companies, such as Toyota Motor Corporation, have begun rehiring employees over the age of 65 and up to the age of 70 to fulfil this obligation.

The principle of "equal pay for equal work" also applies to post-retirement rehires on a fixed-term basis, therefore, if the working conditions of post-retirement rehires differ from those of regular employees, such differences must not be considered unreasonable in light of the nature of the job, the scope of its change, and other circumstances. In light of this, some companies are improving the employment conditions of post-retirement rehires to get close to those of regular employees.

6. Collective Relations

6.1 Unions

Labour Unions

Labour unions are formed in accordance with the Labour Union Act and have internal rules for the organisation, election of officers and procedures to make decisions.

Traditionally, labour unions are formed in each company (ie, "enterprise unions"). Often, such enterprise unions belong to a higher hierarchy organisation consisting of enterprise unions in the same industry. These enterprise unions, especially if they constitute a majority of employees, have significant bargaining power regarding the employment terms and conditions of employees. Enterprise unions negotiate with employers for an increase in wages and bonuses, typically once a year in March (the "spring labour offensive"). The majority of enterprise unions have union shop agreements which require the employer to terminate non-managerial employees who do not become members of the enterprise union. The rate of unionised employees has dropped over the past few decades: according to a 2023 survey by the Ministry of Health, Labour and Welfare, it is estimated at 16.3%.

In recent years, another type of labour union has become popular. Labour unions which accept local workers of different companies, including managerial-class employees, are called "general unions" and are becoming increasingly active in supporting individual workers. General unions represent individual workers in negotiation with their employers on various matters including dismissal or resignation, change of employment conditions, and other issues in the workplace such as harassment or bullying.

In principle, employers need to participate in collective bargaining with labour unions, including general unions, when requested. Refusing to engage in collective bargaining without a reasonable ground could constitute an unfair labour practice prohibited under the Labour Union Act.

6.2 Employee Representative Bodies

There are two main types of employee representative body in Japan.

The first body is a majority labour union. When an enterprise union constitutes the majority of employees in a workplace, such an enterprise union is authorised to act as an employee representative body for that workplace. Typically, majority labour unions act as parties to labour-management agreements such as an agreement regarding overtime and holiday work hours (the so-called Article 36 Agreement). Also, majority labour unions are entitled, and required, to submit an opinion to the employer regarding the content of work rules when they are adopted or amended.

If there is no majority labour union in a workplace, an employee representative elected by employees acts as an employee representative body for purposes of executing labour-management agreements and submitting an opinion on work rules. The employee representative must be a non-managerial employee, and they must be elected by a majority of the employees in the same workplace by a democratic method such as voting.

6.3 Collective Bargaining Agreements

Procedural Regulations

Collective bargaining agreements (*rodo-kyoyaku*) are often entered into between employers and enterprise unions. They must be executed in writing.

Standards regarding employment conditions set forth by a collective bargaining agreement prevail over work rules stipulated by the employer and terms of individual employment agreements. Any employment condition which is inferior to the standards set forth in a collective bargaining agreement is null and void even if such inferior employment condition is set forth in the work rules or individual employment agreements.

In addition to negotiations for executing or amending collective bargaining agreements, labour unions – general unions, in particular – may request employers to engage in collective bargaining to resolve various individual employment matters such as resignation, dismissal or resignation, change of salary or holidays, and trouble in the workplace such as harassment and bullying. Employers may not refuse collective bargaining without reasonable grounds, and these are interpreted narrowly.

Consequences of non-compliance

If the employer refuses to engage in collective bargaining without reasonable grounds, the union may apply for relief from unfair labour practices to a regional labour committee, which is an independent administrative body established under the Labour Union Act. The regional labour committee conducts an investigation regarding the unfair labour practice. In many cases, the investigation ends in a settlement between the labour union and the employer. If a settlement is not reached, then the regional labour committee issues a decision either to recognise an unfair labour practice and order the employer to attend the negotiation, or to reject the union's petition. The losing party may appeal to the central labour committee or file a lawsuit to challenge the decision.

7. Termination

7.1 Grounds for Termination

An employer can dismiss a non-fixed-term employee only if (i) there are objectively reasonable grounds, and (ii) the dismissal is considered to be appropriate in light of social conventions. In practice, the employer bears the burden of proof to show that a dismissal has "objectively reasonable grounds" and "is appropriate in light of social convention". Japanese courts apply a very strict interpretation of this standard, and they have found many dismissals to be invalid unless there was a significant reason for the dismissal. Therefore, many employers in Japan try to reach an agreement with the employee to terminate employment, rather than to dismiss the employee, in order to avoid the high risks associated with the dismissal and lengthy and costly disputes.

Grounds for Dismissal

Typical examples of grounds for dismissal are:

- an employee's inability to work, or insufficient ability to work, due to illness or injury, or where the employee is performing at a consistently low level in carrying out their duties;
- an employee has committed a material breach of their employment contract or work rules of the company; and
- decisions by the management to restructure the company due to the serious financial ill health of the company and there is a need to reduce the workforce as a result of such restructuring (ie, redundancy).

Redundancy

In a redundancy case, Japanese courts have continuously held that the validity of a dismissal will be determined based on a comprehensive analysis of the following four requirements when

assessing the situation under the above standard:

- there must be a business need to reduce the workforce;
- the employer must make every effort to avoid the dismissal of employees (eg, reduction or suspension of recruitment, transfers, restrictions on overtime, offering voluntary early retirement);
- the selection criteria to determine which employee is to be dismissed are reasonable; and
- the appropriateness of the procedure (eg, whether sufficient explanations and discussion opportunities with the labour union or employees were provided).

The courts weigh the balance of necessity and reasonableness of the dismissal against the damages incurred by the affected employee due to the loss of their employment. A case-by-case analysis is necessary for determining whether these criteria are met.

Other standards apply for fixed-term employees. Employers cannot dismiss employees hired under a fixed-term employment during their term without "unavoidable reasons". This standard is even more strictly interpreted by the courts, compared to the standard for non-fixed-term employees.

Procedures for Dismissal

There are no statutory procedures for lawful dismissal, except for the required notice of 30 days or payment in lieu of such notice, as described in **7.2 Notice Periods**. However, as mentioned above, procedures such as providing sufficient explanation and consultation are given importance in considering the validity of a dismissal due to redundancy. Due process is crucial for disciplinary dismissals, as described in **7.3 Dismissal for (Serious) Cause**. In addition, in a case where a collective bargaining agreement is entered into between an employer and a labour union regarding the termination of employment, the employer must follow the provisions of such agreement.

Further, from an administrative perspective, an employer must notify the Public Employment Security Office in advance if any of the following situations occurs:

- when 30 or more employees are expected to leave or to be dismissed within one month;
- when five or more employees between the ages of 45 and 64 are expected to leave due to the failure to meet the standards of the continuous employment system at retirement age, or due to a cause attributable to the employer, or are expected to be dismissed within one month;
- when an employee who has a disability is dismissed; or
- when withdrawing job offers or postponing the hiring date for new graduates or cancelling or downsizing hiring plans for new graduates.

7.2 Notice Periods

Notice of termination must be given 30 days prior to dismissal, unless the employer's work rules or the employment agreement stipulates that the employer shall give a longer notice period. However, an employer may provide payment equivalent to the particular employee's average wage for 30 days in lieu of such notice. The payment should be made when notifying the employee of the dismissal. An employer may also give a combination of notice and payment, in which case the employer will pay for the number of days short of the requisite 30 days (eg, if the

employee gives ten days' notice, the employer must pay an amount equivalent to 20 days of the employee's average wage).

An employer may dismiss an employee without notice or payment in lieu of notice in the event that the company cannot continue to function due to a natural disaster or another unavoidable cause, or when reasons for dismissal are attributable to the employee. Under these circumstances, the employer must obtain the approval of the administrative office with respect to the reason in question.

In addition, the employer may dismiss, without notice or payment in lieu of notice, employees who are:

- employed on a daily basis and have not been employed consecutively for more than one month;
- employed for a fixed period not longer than two months and have not been employed consecutively for longer than that period;
- employed in seasonal work for a fixed period not longer than four months and have not been employed consecutively for longer than that period; and
- in a probationary period and have not been employed consecutively for more than 14 days.

7.3 Dismissal for (Serious) Cause

Disciplinary Action

Dismissal as a disciplinary action due to an employee's misconduct or illegal act is classified as "disciplinary dismissal". This type of dismissal is different from a "regular dismissal", which is not a sanction but occurs when there is a reason to terminate employment that does not reach the level of a disciplinary dismissal.

As a disciplinary dismissal is a type of disciplinary action, it must follow the procedures and formalities required to conduct disciplinary action. The Labour Standards Act requires employers to state what type of conduct constitutes grounds for disciplinary action and the types of disciplinary action. An employer cannot conduct disciplinary action based on grounds not stipulated in the work rules.

In addition, employees must be given the opportunity to defend themselves against an accusation. This is the minimum procedural requirement. If there are additional procedural requirements set forth in the work rules or a collective bargaining agreement, the employer must follow such procedures to conduct disciplinary action. If the employee violates a material procedural requirement, the disciplinary action may be void as an abuse of the employer's right to impose discipline.

Even in cases where an employer takes disciplinary action based on the provisions of the work rules, if such disciplinary action lacks an objective, justifiable reason or the disciplinary action is considered to be unreasonable in light of social convention, the action may be deemed null and void as an abuse of rights by the employer.

As a general rule, 30 days' prior notice or payment in lieu of such notice must also be provided for disciplinary dismissal, except for cases where the chief of the Labour Standards Inspection Office otherwise approves.

7.4 Termination Agreements

Employers may enter into termination agreements to end an employment relationship with an employee based on mutual consent. There are no specific procedures or formalities required under the law to conclude an enforceable termi-

nation agreement or to include a release clause in such agreement.

However, a waiver of an employee's rights may be deemed invalid if such employee's consent to the waiver was not made under their "free will". The courts will look into whether there is an objective, rational reason that sufficiently supports the existence of the employee's free will. Notably, recent court decisions tend to strictly review the "free will" of the employee, especially in cases where the employee waives a significant portion of their rights. Therefore, it is advisable to provide an accurate and detailed explanation of the content of the waived rights before allowing an employee to sign a release.

In addition, if the manner of the solicitation to resign is coercive, or if there is any undue pressure on the employee to resign, it may constitute an illegal act under Japanese law that may result in claims for damages against the employer. Therefore, it is important to avoid actions or words that can be deemed to constitute threats or harassment or that invite misunderstanding, and also to avoid requiring the employee to attend an unreasonable number of termination-related discussions over a protracted period.

7.5 Protected Categories of Employee

An employer may not dismiss the following employees.

- Employees taking leave for medical treatment with respect to a work-related injury or illness and within 30 days after they return to work from said injury or illness. Only if the period is longer than three years may the employer dismiss the worker by paying compensation of the equivalent of 1,200 days' average salary of the said employee.
- Female employees during their prenatal and postnatal leave (ie, a six-week period before childbirth and an eight-week period after childbirth) and within 30 days after the end of such period.

In addition, an employer is prohibited from dismissing an employee for such reasons as:

- discriminatory reasons based on nationality, creed and social status;
- being a union member or having engaged in proper union activities;
- being female, getting married, becoming pregnant, or giving birth;
- requesting maternity or family care leave or having taken such leave;
- making a declaration of an unlawful situation to the competent authorities; or
- disclosing information in the public interest (under certain conditions).

8. Disputes

8.1 Wrongful Dismissal

Under Japanese law, an employer may only dismiss an employee if (i) there are objectively reasonable grounds and (ii) the dismissal is considered to be appropriate in light of social convention. A dismissal that does not satisfy these requirements will be deemed an abuse of right and thus invalid.

In this regard, a wrongful dismissal claim is available where an employee is dismissed without an objectively reasonable ground. The Japanese courts take a very strict view in determining whether there are facts that substantiate the existence of "an objectively reasonable ground", and many dismissals have been found invalid

unless there was a very significant reason for said dismissal.

If the employee prevails in a litigation claiming a wrongful dismissal, the employee can request to be reinstated and receive payment of unpaid wages from the day following the termination, with late payment interest charged at the rate of 3% per annum.

8.2 Anti-discrimination

The prohibition against discrimination in the workplace is governed by several laws which set forth matters relating to discrimination and harassment. Employees are protected against:

- discrimination with respect to wages, work hours and other working conditions for reasons of nationality, creed or social status (Labour Standards Act);
- discrimination based on gender (Labour Standards Act and Equal Employment Opportunity Law);
- unfair treatment because of pregnancy, giving birth, taking child and family care leave, or similar personal circumstances (Equal Employment Opportunity Law and the Child and Family Care Leave Law); and
- unreasonable discrimination against part-time workers, fixed-term employees, and dispatched workers (Act on Improvement, etc, of Employment Management for Part-Time Workers and Fixed-Term Workers).

There is no statute which explicitly shifts the burden of proof to employers. Therefore, employees who claim that discrimination has taken place bear the burden of proving that discrimination.

Any discriminatory act taken by the employer with respect to an employee's working conditions, transfer, relocation or termination, in violation of any of the above laws, will be invalid. The employer may be subject to administrative guidance, administrative orders, and criminal penalties for such an act, depending on the applicable law. Further, employers may be liable to pay compensation for damages incurred by the employee if discriminatory actions constitute a breach of the agreement with the employee or constitute a tort.

8.3 Digitalisation

Employment issues can be disputed through regular civil procedure lawsuits or through labour tribunal proceedings. The digitalisation of these procedures has already been implemented to some degree. For example, parties are allowed to attend certain court procedures or labour tribunal proceedings via telephone or web but these options have been limited.

With regard to regular civil procedure lawsuits, the law amending the Code of Civil Procedure was enacted on 18 May 2022 and promulgated on 25 May 2022 to promote further digitalisation of the civil procedure. The major changes are as follows:

- complaints can be submitted and received online (the attorneys are obligated to file and receive complaints online);
- the type of procedures which the parties can attend via the web or by telephone was relaxed and expanded;
- the requirement to pursue cross-examinations of witnesses via the web was relaxed; and
- litigation records will be digitalised, and the parties will have access to them via the court's server.

The amendment regarding allowing attendance at certain civil procedures via telephone went into effect as of 1 May 2023. Other amendments

will come into force gradually and will fully be in force within four years from the promulgation date (by the year 2026).

To keep in line with the above, the law implementing similar amendments to labour tribunal proceedings was established on 6 June 2023, promulgated on 14 June 2026, and will fully be in force within five years from the promulgation date (by the year 2031).

9. Dispute Resolution

9.1 Litigation

The labour tribunal procedure (*rodo shinpan*) introduced in 2006 focuses on the resolution of individual employment disputes and has become highly popular. This procedure aims to resolve disputes between the employer and employee, such as dismissal, demotion, reduction of salary, and overtime payment, in an expeditious manner.

The labour tribunal procedure is conducted by a labour tribunal committee composed of one professional judge and two lay judges. The parties can represent themselves, although in many cases parties retain attorneys. The procedure is generally concluded within three hearings which average 70 to 80 days, while regular lawsuit procedures normally take more than a year.

Since this is a procedure with an emphasis on expeditious resolution, the labour tribunal tends to proactively suggest settlement, and so many labour tribunal cases are resolved through amicable settlement. If parties cannot reach an amicable settlement, the labour tribunal makes a decision; however, if either party is dissatisfied with that decision, then the dissatisfied party/parties can file an objection to have the case determined by the district court in a regular lawsuit.

Class action claims are not available in Japan, whether in a labour tribunal or a regular lawsuit.

9.2 Alternative Dispute Resolution

Alternative dispute resolution is possible in employment disputes. The possible procedures are conciliation (*assen*), mediation (*chotei*) and arbitration (*chusai*). Parties are not obliged to engage in any of the alternative dispute resolution procedures before making an official claim in the court.

Examples of Procedure

Conciliation is a procedure where a conciliator acts as an intermediary to have both parties compromise their claims and reach settlement.

Mediation is a procedure in which a mediation committee presents a settlement proposal after hearing facts from both parties and advises both parties to accept such settlement.

Arbitration is a procedure in which an arbitrator or arbitration committee renders an arbitration award to resolve the case after hearing the facts from both parties. Unlike conciliation and mediation, an arbitration award is binding on both parties.

Pre-dispute arbitration agreements under which employers and employees agree to resolve future employment disputes through arbitration are rendered invalid under the Arbitration Act, in light of the view that there are differences in the bargaining power between the employers and the employees, and thus the employees' right to submit their claims to court should not be forfeited by such agreements.

9.3 Costs

A prevailing party to a litigation can demand that the other party bear court costs under the Act Concerning Civil Litigation Costs. However, attorney's fees are not included in the scope of such court costs. Therefore, in principle, each party bears its own attorney's fee, and even a prevailing party cannot require the other party to bear the prevailing party's attorney's fee.

Where a party files a suit against the other party claiming damages based on tort, there is a possibility that attorney's fees will be awarded as a part of damages. However, the court generally only awards a fraction of the attorney's fees even in such a case.

Trends and Developments

Contributed by:
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AI-EI Law Firm

AI-EI Law Firm was established in 2019, mainly by lawyers from Nishimura & Asahi, who set up the Legal Professional Corporation, and it specialises in corporate dispute resolution and labour/employment matters. The name "AI-EI" is derived from the Japanese word "相栄" (pronounced "I-A"), which means mutual prosperity. To realise mutual prosperity with its clients, the firm takes the unrivalled approaches of not only accurately analysing and categorising a large amount of past data (vast experience and knowledge) like "AI" (Artificial Intelligence), but also using the elements of EI (Emotional Intelligence) so that clients' true needs are properly understood. Thus, clients are guaranteed practical solutions that meet the substance of the dispute – not only from the perspective of economic rationality and efficiency required in business, but also with the humanity and sensitivity required in dealing with people who are the subjects and the objects of disputes and labour issues.

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Introduction

In 2024, the Supreme Court of Japan issued two landmark judgments relating to the working hours and transfer order, and the National Diet of Japan has recently enacted important regulations for freelancers that will be enforced in November 2024. This guide aims to provide a comprehensive overview of these crucial updates in Japanese employment law by covering various topics including: overtime regulations; transfer order; non-fixed-term conversion rules; implementation of the new freelance law; harassment regulations; non-compete obligations; and the doctrine of free will.

Overtime Regulations

Employers are generally prohibited from ordering employees to work more than eight hours a day or 40 hours per week, and employers must provide at least one day off per week or at least four days off in a four-week period (Articles 32 and 35 of the Labour Standards Act (Act No 49 of 1947, "LSA")).

An exception to the above principle allows for overtime and holiday work if a labour-management agreement is concluded with a labour union representing a majority of workers or a representative of the majority of workers and reported to the local Labour Standards Inspection Office (Article 36, paragraph 1 of the LSA). This is known as a "36 Agreement", and many Japanese companies have concluded and submitted this agreement.

Until the recent amendment, the upper limit of overtime hours under the 36 Agreement was governed by the notice of the Minister of Health, Labour and Welfare ("MHLW"); however, there was no clear statutory upper limit as long as the 36 Agreement was properly concluded and submitted.

However, with the recent amendments to the LSA in April 2019 (which is part of the Work Style Reform), statutory limits on overtime work were established, along with penalties for violations. Specifically:

The limit on overtime under the 36 Agreement is 45 hours per month and 360 hours per year (Article 36, paragraph 4 of the LSA). In special circumstances, the limit is (i) 720 hours per year, (ii) an average of 80 hours per month over multiple months, (iii) less than 100 hours per month,

and (iv) up to six months per year (Article 36, paragraph 5 of the LSA).

Although the reform was implemented on 1 April 2019, certain occupations (construction, automobile driving and physicians) were given a grace period until 31 March 2024. After this period, the regulations on the upper limit of overtime work apply to these occupations as well. Note that the upper limit for physicians' overtime is not provided by the LSA but by ministerial ordinance, with different levels set for different medical institutions.

Besides, working hours are defined as the time during which employees are under the employer's direction and supervision (Supreme Court Judgment of 9 March 2000, Employee v Mitsubishi Heavy Industries Nagasaki Shipyard, Minshū Vol 54, No 3, p 801), and employers are responsible for managing employees' working hours. If it is difficult to calculate working hours when employees work outside the workplace, the employer may deem that the employees work for the prescribed working hours (Article 38-2, paragraph 1 of the LSA). Recently, the Supreme Court issued a judgment relating to this provision.

In the above-mentioned case, the Tokyo High Court ruled that because the employee working outside the workplace created daily work reports, it was not difficult to calculate working hours (ie, working hours could potentially be calculated and were not "difficult to calculate", so Article 38-2, paragraph 1 of the LSA shall not apply). However, the Supreme Court found that the nature, content and manner of the work, as well as the method and content of instructions and reports, made it difficult to determine the specific working conditions outside the workplace. Without thoroughly examining the accuracy of the daily reports, the High Court's judgment that it was not "difficult to calculate working hours" was deemed erroneous, and the case was remanded for further review (Supreme Court Judgment of 16 April 2024, Employee v CO-OP Globe, Saibansho Jihō, No 1837, p 3).

The introduction of remote work has progressed during and after the COVID-19 pandemic. As work styles diversify, including remote work and telecommuting, discussions have arisen on how to calculate working hours. Therefore, this Supreme Court Judgment and subsequent lower court judgments will likely serve as future references.

Transfer Order

In Japan, Work Rules often include provisions that allow employers to order employees to transfer for business reasons, which become part of the employment conditions and terms of contract. Given that dismissal is not so easy under Japanese law, it has been established that employers may order employees to transfer workplaces at their discretion as long as it does not constitute an abuse of rights (Article 3, paragraph 5 of the Labour Contracts Act (Act No 128 of 2007); Supreme Court Judgment of 14 July 1986, Employee v Toa Paint, Roudou Hanrei, Vol 477, p 6).

However, if there is an agreement between the employer and employee that limits the employee's duties, extent of the employment transfer, or job role to a specific type, such agreements tend to be respected. Recently, the Supreme Court made it clear that if there is an agreement on job limitations, transfer orders exceeding such limitations cannot be issued without the employee's consent (Supreme Court Judgment of 26 April 2024, Employee v Shiga Prefecture Social Welfare Council, Saibansho Jihō, No 1838, p 3),

implying that there is no room to discuss the abuse of rights. Note that this case related to tortious claims for damages and was not about a claim to invalidate the transfer order.

Non-fixed-term Conversion Rule

To prevent unfair termination and protect fixed-term workers, the Non-fixed-term Conversion Rule for fixed-term employees was introduced in April 2013. This rule grants fixed-term employees the right to request conversion to non-fixed-term employment if the total duration of the fixed-term employment contracts with the same employer exceeds five years (Article 18 of the Labour Contracts Act).

Since the introduction of the rule, there have been instances where employers have set limits on contract renewals or have attempted to terminate contracts before the right to conversion arises. Therefore, to ensure the effectiveness of the rule, the need to secure opportunities to apply for conversion, prevent disputes and promote their resolution was recognised.

Consequently, with the amendment of the Ordinance for Enforcement of the LSA and related regulations, effective 1 April 2024, the following have been established: (a) the obligation, at the time of contract conclusion, to clearly state the total contract duration and the upper limit of renewals (Article 5, paragraph 1, item 1-2 of the Ordinance for Enforcement of the LSA); (b) the obligation to clearly state the opportunity to apply for non-fixed-term conversion (same paragraph, item 5); and (c) the obligation to clearly state working conditions after conversion to non-fixed-term contracts (same Article, paragraph 6). Additionally, with the amendment of the related ordinance (Amendment of 22 October 2003, MHLW Notice No 357; 30 March 2023, MHLW Notice No 114), (d) employers are required to explain to workers matters considering the balance of working conditions according to the actual state of employment when determining working conditions after conversion.

Following these amendments, the format of the Notice of Employment published by the MHLW now includes the description of contract renewal, renewal criteria, renewal limit, and change in working conditions after conversion. Furthermore, in relation to the above transfer order, the format of the Notice now includes a description of the scope of changes for place of employment and job duties.

Implementation of the New Freelance Act

Recently, the applicability of labour and employment laws to gig workers has been a topic of debate in various countries. In Japan as well, there is discussion about whether gig workers fall under the definition of "employees" to whom labour and employment laws apply. The criteria for determining whether someone falls under the category of "employee" vary depending on the specific laws, with slight differences between the LSA, which mainly governs employment conditions, and the Labour Union Act (Act No 174 of 1949), which mainly governs labour unions and labour laws.

First, regarding the definition of "employee" under the LSA, the following factors are considered:

- freedom to accept or decline work;
- presence or absence of specific instructions and supervision on how to carry out work;
- degree of time and location restrictions;
- substitutability of labour;
- remuneration in relation to the work performed;

- existence of the nature of business ownership;
- exclusivity; and
- treatment under tax and social insurance laws.

These factors are considered for determining employee status (Ministry of Labour, LSA Study Report, *The Criteria for Determining "Employee" under the LSA*, dated 19 December 1985).

Regarding the definition of "employee" under the Labour Union Act, the following factors are considered:

- incorporation into the organisational structure of the business;
- unilateral and standardised determination of contract terms;
- remuneration as consideration for labour;
- a relationship where the work is performed in response to requests from the employer;
- labour provided under the broad meaning of supervision and control with certain time and location restrictions; and
- the significant nature of business ownership.

These factors are considered for determining employee status under the Labour Union Act (Labour-Management Relations Law Studying Group Report, *The Criteria for Determining "Employee" Status under the Labour Union Act*, dated 25 July 2011).

In a recent case where Uber Japan Co, Ltd refused to engage in collective bargaining based on the argument that Uber Eats delivery drivers do not fall under the definition of "employee" under the Labour Union Act, the Tokyo Metropolitan Government Labour Relations Commission ruled that delivery drivers should be considered "employees" under the Labour Union Act (Tokyo Metropolitan Government Labour Relations Commission, Order of 4 October 2022, Roudou Hanrei No 1280, p 19, Employee v Uber Japan Co, Ltd).

In any case, if employee status is denied, the employee may not receive protection under labour laws. It should also be noted that recent legislation has been enacted to protect independent contractors, ensuring fair transactions and improving working conditions, through the Act on the Improvement of Transactions with Specified Contractors (Act No 25 of 2023, the "New Freelance Act"), and the Act is scheduled to take effect on 1 November 2024.

The New Freelance Act imposes obligations to clearly state transaction conditions (Article 3), pay compensation by the due date (Article 4), accurately display recruitment information (Article 12) and establish harassment prevention measures (Article 14). Considering the fact that long-term contractual relationships will generate economic dependence between the entrustor and freelancer, provisions similar to those of the Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Act No 120 of 1956) are established, prohibiting refusal of acceptance (Article 5, paragraph 1, item 1), reduction of compensation (same paragraph, item 2), return of goods (item 3), unfairly low prices (item 4), coercion to purchase or use services (item 5), unjust requests for economic benefits (paragraph 2, item 1), and unjust changes or redelivery of delivered content (same paragraph, item 2). Additionally, there are obligations to consider childcare and nursing care (Article 13) and to provide notice and reasons for termination (Article 16) for entrustors.

In the case of violations of some provisions, freelancers can report to the relevant government

authorities (Fair Trade Commission, Small and Medium Enterprise Agency or the MHLW). Also, entrustors must not treat freelancers unfavourably for making such reports (Article 6, paragraph 3; Article 17, paragraph 3).

Harassment Regulations

In Japan, in the context of workplace harassment, first, sexual harassment, then, maternity harassment were regulated. After that, a type of harassment called power harassment (which is not commonly categorised as a type of workplace harassment in overseas jurisdictions) has also been regulated.

Employers must take necessary measures for employment management, so that the workers they employ neither suffer any disadvantageous working conditions on the grounds of those workers' response to sexual harassment in the workplace, nor suffer any damage to their work environment due to sexual harassment (Article 11, paragraph 1 of the Act on Equal Opportunity and Treatment between Men and Women in Employment (Act No 113 of 1972) (the "Equal Opportunity Act")).

Maternity harassment is divided into two categories: (i) harassment carried out as an exercise of personnel authority by employers or others; and (ii) harassment by superiors or colleagues unrelated to personnel matters. Employers are directly prohibited from engaging in the former (Article 11-3, paragraph 2 of the Equal Opportunity Act; Article 25, paragraph 2 of the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members (Act No 76 of 1991) (the "Childcare and Family Care Act")), while the latter is further divided into (i) harassment related to the state of pregnancy, childbirth, or other matters related to pregnancy or childbirth that harm the working environment (harassment related to the state of pregnancy or childbirth, under the Equal Opportunity Act), and (ii) harassment related to the use of systems such as pre- and post-maternity leave or childcare leave that harm the working environment (harassment related to the use of systems, under the Equal Opportunity Act and the Childcare and Family Care Act). Accordingly, preventative measures are mandated, in accordance with Article 11-3, paragraph 1 of the Equal Opportunity Act; and Article 25, paragraph 1 of the Childcare and Family Care Act.

Power harassment is defined as "behaviour in the workplace that is based on a superior-subordinate relationship and exceeds the necessary and reasonable scope of work, resulting in harm to the employee's working environment". Employers are obligated to take preventative measures (Article 30-2, paragraph 1 of the Act on Comprehensively Advancing Labour Measures, and Stabilising the Employment of Workers, and Enriching Workers' Vocational Lives (Act No 132 of 1966)).

Accordingly, the issued MHLW Guidelines exist to address these types of harassment, indicating the direction of preventative measures. Specifically, common elements for each type of harassment include:

- clarification and dissemination of employer policies;
- establishment of necessary structures to respond appropriately to employee consultations; and
- a prompt and appropriate post-incident response.

In the case of maternity harassment, the following are also included:

- measures to eliminate the causes and background factors of such harassment.

While there is no exact match between the criteria for a tort claim and those for sexual harassment, maternity harassment and power harassment, many forms of workplace harassment constitute tortious acts; moreover, claims for damages for the consequent mental distress suffered are often filed.

In recent years, there has been active discussion regarding the relationship between LGBTQ individuals, sexual harassment and power harassment. According to the MHLW's guidelines, sexual harassment can occur regardless of the gender, sexual orientation or gender identity of the victim. It has also been suggested that outing (ie, disclosing an employee's sexual orientation, gender identity or related information to other employees without the employee's consent) can be considered power harassment.

In a case involving a transgender employee in the government (ie, MtF or Male to Female, diagnosed with gender identity disorder who was restricted from using certain women's toilets in a building because of discomfort felt by female employees), the Supreme Court ruled that the treatment, based on considerations overly focusing on other employees without considering the specific circumstances of the disadvantages caused by such treatment, lacked reasonable justification and was illegal (Supreme Court Judgment of 11 July 2023, Employee v Government (Ministry of Economy, Trade and Industry), Minshū Vol 77, No 5, p 1171).

Non-compete Obligations

Non-compete obligations are relevant both during employment and after an employee's departure, particularly in the case of directors and employees. This guide focuses on the issues surrounding employees after their termination of employment.

It should be noted that non-compete obligations during the tenure of directors are explicitly provided for by Article 356, paragraph 1, item 1 of the Companies Act (Act No 86 of 2005), and employees are also considered to have such obligations during their employment. In practice, these obligations are often handled as issues of directors' fiduciary duties (Articles 355 and 330 of the Companies Act; Article 644 of the Civil Code (Act No 89 of 1896), etc) and employees' duty of loyalty (Article 3, paragraph 4 of the Labour Contracts Act).

Non-compete obligations after an employee's termination are not automatically generated as part of the employment contract without explicit stipulation; therefore, they generally require inclusion in the employment rules or individual agreements. Furthermore, as they compete with the constitutional right of freedom to choose one's occupation (Article 22, paragraph 1 of the Constitution of Japan), the validity of agreements on non-compete obligations has been subject to cautious judicial scrutiny.

Since the leading case of Employee v Forsaco Japan Ltd (Nara District Court Judgment of 23 October 1970, Hanrei Jihō 624, p 78), it has been recognised that the validity of non-compete obligations should be determined comprehensively considering factors such as the following:

- employer's interests;
- former employee's previous position;
- scope of the restrictions; and
- presence or absence of compensation measures.

However, the above framework of considering these factors for evaluation has not been explicitly adopted in high court judgments (Osaka High Court Judgment of 5 October 2006, Roudou Hanrei No 927, p 23, Employee v A Patent Office; Tokyo High Court Judgment of 27 April 2010, Roudou Hanrei No 1005, p 21, Employee v Mita Engineering).

Conversely, recent high court judgments (eg, Intellectual Property High Court Judgment of 9 October 2019, LEX/DB 25570512, Lock Picking case; Fukuoka High Court Judgment of 11 November 2020, Roudou Hanrei No 1241, p 70, Employee v Legend) have comprehensively considered these factors, the approach of which is similar to Employee v Forsaco Japan Ltd. However, as mentioned earlier, due to competition with the constitutional right of freedom to choose one's occupation, the consideration of these factors does not necessarily lead to a more favourable affirmation of the validity of non-compete obligations.

Doctrine of Free Will

Under Japanese law, the principle of freedom of contract (based on the principle of private autonomy) is recognised as a fundamental concept regarding contracts, and individual will is respected in the formation and determination of contract terms. However, some labour and employment laws are coercive by nature, allowing their application even against the parties' intentions in certain circumstances. There are cases where agreements relating to employment, including their terms and existence, are negated by courts due to the lack of the employee's free will.

In a recent case involving a reduction in retirement benefits through a change in employment rules, where the employee had signed and sealed a document indicating their agreement, the Supreme Court held that determination of the existence of consent should be based not only on the employee's act of accepting the change but also on whether sufficient rationale objectively exists based on the employee's free will, considering the nature and extent of the disadvantages imposed on the employee by the change, the circumstances and manner in which the employee came to perform the act, and the content of information or explanations provided to the employee before the act (Supreme Court Judgment of 19 February 2016, Minshū Vol 70, No 2, p 123, Employee v Yamanashi Prefectural Credit Union). The case was subsequently remanded, and consent was denied due to the lack of free will, as necessary and adequate information was not sufficiently provided to the employee before the act (Tokyo High Court Judgment of 24 November 2016, Roudou Hanrei No 1153, p 5, Employee v Yamanashi Prefectural Credit Union).

Subsequently, the concept of the doctrine of free will has been invoked in litigation cases; however, the scope of applicability of the doctrine of free will is not necessarily clear at present. Currently, there are existing analyses and discussions in scholarly articles that have elaborately examined past precedents and cases (see Hisashi Ikeda, "The Coerciveness of Labour and Employment Law and Employee Expression of Intention", Hōritsu Jihō, No 1186, p 29), implying that the application will not be expanded without limitations.

LUXEMBOURG

Trends and Developments

Contributed by:
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BSP

BSP is an independent full-service law firm based in Luxembourg, and is committed to providing the best possible legal services to its domestic and international clients in all aspects of Luxembourg business law. The firm's lawyers have developed particular expertise in banking and finance, capital markets, corporate law, dispute resolution, employment law, investment funds, intellectual property, private wealth, real estate and tax. In these practice areas, as in others, the firm's know-how and its ability to work in cross-practice teams and to swiftly adapt to new laws and regulations allows it to provide clients with timely and integrated legal assistance vital to the success of their business. Building on the synergy of its different professional experiences and the richness of its diverse cultural background, BSP stands ready to meet its clients' legal needs, no matter how challenging they are.

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Overview of the Main Recent Trends and Developments in Luxembourg Employment Law

Introduction

Luxembourg has long been renowned for its strong and stable legal framework, which is conducive to business relationships while being designed to protect employees and ensure fair working conditions. Recent legislative developments continue to strengthen this framework, reflecting Luxembourg's commitment to aligning with European Union (EU) directives and addressing emerging workplace issues. Given the wealth of news in Luxembourg, the purpose of this section is to present three laws that have recently been adopted and a draft law that has been submitted to the legislature.

1. Law of 29 March 2023 on moral harassment in the context of labour relationships

Moral harassment or bullying has become a pressing problem in many workplaces. Aware of the negative impact of moral harassment on employees' mental and physical health, on their productivity and on the general atmosphere of the workplace, Luxembourg enacted the law of 29 March 2023 (the "Law") to address and mitigate this problem.

Since 9 April 2023, the date of its entry into force, the Law has introduced into the Labour Code several key provisions aimed at preventing and addressing moral harassment in the workplace:

Definition of moral harassment: The Law provides a clear definition of moral harassment, describing it as any conduct that occurs repeatedly and systematically and that undermines the dignity, psychological or physical integrity of a person. The new legislation also provides that an employer and its employees, but also any client or supplier of the company, must refrain from committing any act of moral harassment in the context of work relationships, thus extending the scope of application of the Law to persons outside the employer's premises and organisation.

Employer obligations: Employers must ensure that any act of moral harassment affecting their employees that comes to their attention, ceases immediately. To this end, as a first step, they are required to determine, after informing and consulting with the staff delegation (or the entire staff, as the case may be), preventive measures to protect the employees against moral harassment. In the event of proven mobbing, employers must take all possible measures to put an end to it immediately, and if they fail to do so, a real procedure must be in place for the employee

to refer the matter to the Inspectorate of Labour and Mines.

Reporting channels: The Law mandates the establishment of clear and accessible reporting mechanisms for employees to report instances of moral harassment. These mechanisms must ensure confidentiality and protect the identity of the complainant.

Investigation procedures: Upon receiving a harassment complaint, employers are obligated to conduct a prompt and thorough investigation. The investigation must be impartial and respect the rights of all parties involved.

Protection against retaliation: Like the whistle-blower protection law (see below), the Law prohibits retaliation against individuals who report harassment. Employees who face retaliation are entitled to seek legal remedies.

Penalties: Failure to comply with the relevant obligations of the Law is punishable by a fine of between EUR251 and EUR2,500 (or twice these amounts in the event of a repeat offence within two years).

2. Law of 16 May 2023 on the protection of persons who report breaches of EU law

Directive (EU) 2019/1937, commonly known as the whistle-blower protection directive (the "Directive"), was adopted by the European Parliament and the Council of the European Union to strengthen the protection of individuals who report breaches of EU law. The Directive aims to remove the significant obstacles faced by whistle-blowers, in particular the fear of reprisals and the lack of adequate protection, which have historically discouraged individuals from reporting illegal activities. The purpose of the law of 16 May 2023 (the "Law") is to transpose the Directive into Luxembourg law.

Coming into force on 21 May 2023, the Law introduced a general protective status for whistle-blowers in Luxembourg law, the key elements of which are as follows:

Personal and material scope: Taking up the "very broad" definition of persons eligible for whistle-blower protection in the Directive, the Law provides that all persons, linked in the broadest sense to the organisation concerned by the whistle-blowing, working in the private or public sector, who have obtained information about violations in a professional context, are covered. This includes, for example, self-employed or employed workers, shareholders and members of administrative bodies, paid or unpaid volunteers and interns, persons working under the supervision and direction of contractors, subcontractors and suppliers, whistle-blowers whose employment relationship has not yet begun in cases where information on breaches has been obtained during the recruitment process or other pre-contractual negotiations, as well as third parties who are related to whistle-blowers, such as colleagues or relatives.

The Law also extends the material scope of the Directive to all national law breaches (ie, all violations of national law will be covered, regardless of whether they are classified as administrative, criminal or civil).

Reporting channels: The Law requires the establishment of internal and external reporting channels. Since the Law came into force, private sector legal entities with 50 or more employees, as well as public sector legal entities, including any entity owned or controlled by such entities, such as municipal administrations with more

than 10,000 inhabitants, are required to establish internal reporting and monitoring channels and procedures. Since 17 December 2023, private sector companies with between 50 and 249 employees must also establish internal reporting channels and procedures.

In practice, employers must, among other things:

- establish reporting channels that are designed, established and managed in a secure manner that ensures the confidentiality of the identity of the reporter and any third party referred to, and that prevents access to said channels by unauthorised persons;
- designate an impartial person or department with the ability to follow-up on the reports in a diligent manner; and
- involve a staff delegation in the implementation of these procedures. In companies with fewer than 150 employees, the staff delegation must be informed and consulted. In companies with more than 150 employees, the agreement of the staff delegation is required under the co-decision principle.

External channels provide an alternative for individuals who prefer not to report internally or when internal reporting does not yield results.

Confidentiality and prohibition of retaliation: The Law states that whistle-blowing information must be treated as confidential, so that whistle-blowers can freely and safely speak out. Employers are prohibited from dismissing them or causing them any harm in any way as result of their disclosures. All forms of retaliation, including threats and attempted retaliation, are prohibited against the whistle-blowers.

Support and protection measures: Whistle-blowers are entitled to receive support, including legal advice and psychological assistance. The law also provides for interim relief measures to protect whistle-blowers during legal proceedings.

Penalties: The Law imposes penalties on individuals and organisations that retaliate against whistle-blowers or fail to establish the required reporting channels. For example, an entity that fails to put in place an internal whistle-blowing procedure that complies with the Law is liable to an administrative fine of between EUR1,500 and EUR250,000. In addition, certain competent authorities have the right to request, in writing, from the entity that the alert concerns, or in the event of failure to comply with the obligations to put in place an internal procedure and to carry out an investigation, the communication of all the information they deem necessary. Any entity that fails to comply with this request is liable to an administrative fine of between EUR1,500 and EUR250,000.

3. Law of 24 July 2024 on transparent and predictable working conditions

The law of 24 July 2024 on transparent and predictable working conditions (the "Law") transposes Directive (EU) 2019/1152 into Luxembourg law, which aims to strengthen the transparency and predictability of working conditions throughout the EU.

The Law, which came into force on 4 August 2024, amends certain rules relating to employment contracts, apprenticeship contracts, temporary employment contracts, employment contracts with pupils or students (excluding paid internship contracts), and maritime employment contracts. The purpose of this Law is to amend the mandatory clauses that must be included in the contracts and to regulate certain clauses

such as exclusivity clauses and trial periods. It therefore concerns all employers in Luxembourg.

Prohibition of unfavourable treatment or retaliation: First, the Law introduces the general principle of prohibition of any unfavourable treatment or retaliation against employees who have protested or lodged a complaint or claim to have their rights respected. This prohibition also applies to employee witnesses.

Form and content of the employment contract: For both fixed-term and permanent apprenticeship and employment contracts, employers may send the contract in paper or electronic form as long as the employee can access it, it can be saved and printed, and the employer concerned keeps proof of its transmission or receipt.

In addition, the Law now provides for an extension of the key information that must be given to "employees, apprentices, posted employees, temporary employees, sailors, civil servants, government employees, municipal officials, municipal employees" such as the daily or weekly working hours with the modalities for the provision of overtime, the remuneration including the basic salary and agreed wage supplements, and the length and conditions for applying any trial period (eg, the notice period applicable during the trial period), as well as deadlines for providing this information.

Probationary periods in fixed-term contracts: The Law limits the duration of probationary periods in fixed-term employment contracts to ensure that they are not excessively long. In that respect, any trial period agreed between the parties cannot be shorter than two weeks or longer than a quarter of the fixed term for a fixed-term contract, ie, up to a maximum of six months when the fixed-term contract is entered into for the maximum period, ie, 24 months.

Invalidity of the so-called "exclusivity" clauses: Any clause prohibiting an employee or an apprentice from having another employment relationship with one or more employers outside the normal working hours as agreed in their contract is, as a matter of principle, now null and void. This prohibition therefore applies to so-called "exclusivity" clauses that are not justified by overriding and objective interests (health and safety at work, protection of business confidentiality, integrity of the public service or prevention of conflicts of interest).

Training obligations: If, by virtue of legal, regulatory or administrative provisions or provisions in collective bargaining agreements, the employer must provide training for the employee to carry out the work for which he/she has been hired, it is now provided that this training must be provided free of charge to the employee. The time spent on this training must be considered as actual working time and must take place during working hours.

Procedure for transition to more secure and predictable forms of employment: A new procedure for converting a fixed-term contract to an open-ended contract or a part-time contract to a full-time contract and vice versa has now been introduced. Any employee who has worked for at least six months with the same employer and after the expiry of any trial period agreed in the contract may now make such a request to his/her employer. The employer must respond to the request within a certain period. If the employer refuses, it must state the precise reasons for its refusal in writing. An employer who fails to give a reasoned response to an employee's request is now liable to a criminal fine.

Penalties: Previously there was no criminal sanction if an employment contract did not include the information set out in the Labour Code. One of the main new features of the Law is that employers who fail to comply with their new obligations are now at risk of criminal penalties ranging from EUR251 to EUR5,000 for individuals and from EUR500 to EUR10,000 for juridical persons. A fine will be incurred for each employee affected by the employer's failings. In the event of a repeat offence within two years, the penalties may be up to twice these maximum amounts.

4. Draft law No 8001 on electronic platform workers

The rise of the gig economy and the increasing prevalence of digital platforms have transformed the traditional employment landscape. Many workers now engage in platform-based work, providing services through apps and online platforms. However, this type of work often lacks the protections and benefits associated with traditional employment. Draft law No 8001 (the "Draft Law") aims to establish a new national legal framework to regulate the employment relationship of natural persons who provide services/work via platforms when their usual place of work is located in the territory of Luxembourg.

Tabled on 4 May 2022 and expected to be passed in the coming months, this Draft Law introduces several key provisions to protect electronic platform workers:

Scope of application: The Draft Law is intended to apply to employment relationships involving individuals who provide services/work via a digital platform and who are regarded as employees of the digital platform within the meaning of the new national provisions when their usual place of work is in Luxembourg or when their virtual place of work is in Luxembourg.

Employment status: The text seeks to clarify the employment status of platform workers, distinguishing between employees and self-employed individuals. The Draft Law sets out criteria for determining whether a job is carried out via a platform and creates a presumption of the existence of an employment contract as soon as one or more of the criteria set out is fulfilled. This presumption can be overturned by the platform if it can be demonstrated that there is no employment contract. Nevertheless, when at least three of the criteria set out are fulfilled, the existence of an employment contract within the meaning of Article L.121-1 of the Labour Code is established, without evidence to the contrary being admissible.

The criteria set out in the Draft Law are as follows:

- "The platform advertises itself on the market by offering the service(s) or work."
- "The platform defines the conditions for [the person providing or being willing to provide the service/work] accessing the services/work offered and ordered through it by the beneficiary(ies)."
- "The platform defines the conditions and/or limits for the remuneration for the services/work."
- "The platform receives the payment for the service/work that is to be delivered or has been delivered by the person providing or willing to provide a service/work through it."
- "The platform controls the quality of the work/service provided by the person providing or willing to provide a service/work through it."
- "The platform issues a classification for the people providing or willing to provide a service/work through it."
- "The platform is responsible for the interaction between the beneficiary and the person

providing or willing to provide a service/work through it."
- "The platform may decide to exclude the person providing or willing to provide a service/work through it and no longer grant him/her access to it."

Working conditions: The Draft Law mandates that platform workers must be provided with transparent information about their working conditions, including remuneration, working hours and the terms of their engagement (adapted to the specific working conditions in which they provide their services/work).

In conclusion, the laws and Draft Law presented demonstrate the public authorities' determination to strengthen workers' rights by promoting transparency, safety and fairness in the workplace, while adapting legislation to the new realities of the labour market.

MALAYSIA

Law and Practice

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Contents

Skrine is one of the largest full-service law firms in Malaysia, providing a comprehensive range of legal services to a broad cross-section of the business community in Malaysia as well as abroad. The firm is currently led by 47 partners with over 100 lawyers across the corporate, dispute resolution and intellectual property divisions. The synergy of all three divisions is the basis for the firm's approach to offering effective solutions for fast resolution of cases.

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1. Employment Terms

1.1 Employee Status

In Malaysia, like many other countries, the terms "blue-collar workers" and "white-collar workers" are commonly used to describe different types of employees based on their job roles and the nature of their work.

Blue-collar workers typically engage in manual labour or skilled trade occupations. They are commonly associated with jobs in industries such as manufacturing, construction, agriculture and services that require physical labour. These workers often perform tasks that involve labour using their hands rather than a specific skill or expertise. Examples of blue-collar jobs in Malaysia include factory workers, construction workers, technicians, drivers and cleaners.

White-collar workers are generally associated with executive, professional, managerial, administrative or office-based occupations that require qualifications, knowledge and/or a certain degree of intellect. These workers often work in industries such as finance, information technology, education, healthcare, legal services and the corporate sector. White-collar jobs in Malaysia include professionals like doctors, lawyers, engineers, accountants, teachers, IT specialists, managers and office administrators.

Blue-collar and white-collar workers may be local or foreign or be permanent, fixed-term or part-time employees. Regardless of the type of employment, the terms and conditions of all employees in Malaysia under a contract of service are governed by the Employment Act 1955 (EA), although certain portions of the EA do not apply to employees who earn in excess of RM4,000 and who, regardless of salary, are otherwise performing "blue-collar" type jobs.

1.2 Employment Contracts

Employees in Malaysia, whether local or foreign, may enter into permanent or fixed-term employment contracts. Permanent or fixed-term employees may also work full-time or part-time.

Permanent employees, namely those employed under indefinite contracts, can reasonably anticipate continuous employment until their retirement or voluntary resignation. Their employment contracts may only be terminated for valid reason or just cause and excuse.

The Minimum Retirement Age Act 2012 applies to permanent employees and stipulates a minimum retirement age of 60 years. Accordingly, an employee's contract of employment can only be terminated for reason of age once they reach the age of 60 years.

Fixed-term employees are hired for a specific duration of time and their employment will naturally conclude upon the expiration of the employment contract. Parties may mutually agree to extend the employment after the expiry of the initial fixed-term period. However, repeatedly renewing a fixed-term contract without significant changes in the employment terms and conditions and without any gaps between two consecutive contracts of employment may give rise to a presumption that the fixed-term employee is a de facto permanent employee. This will ultimately impact the amount of compensation that the employee is statutorily entitled to in the event the employee is later dismissed from employment and is successful in a claim of unfair dismissal under Section 20 of the Industrial Relations Act 1967.

All employment contracts in excess of one month must be in writing, but need not be in any specific language. However, the lack of a

written employment contract does not by itself invalidate an employment relationship or contractual terms.

The employment contract should outline the main features of the employment relationship, including the place of employment, work scope, wages, benefits, termination notice, public holiday entitlements, annual and sick leave and wage rates for working overtime or during rest days, to name a few. Any terms and conditions of employment that are less favourable than the requirements under the Employment Act 1955 are, to that extent, immediately void. Employers are free to provide terms and conditions of employment that are more beneficial than the minimum requirements under the Employment Act 1955.

1.3 Working Hours

Under the EA, the maximum working hours for employees per week is 45 hours.

Additionally, an employee:

- may not be required to work more than eight hours a day or more than five consecutive hours without a break of at least thirty minutes; and
- must be provided with at least one whole day of rest each week (rest day).

The agreed working hours between the part-time employee and his/her employer must be stated in the contract. Under the Employment (Part-Time Employees) Regulations 2010, a part-time employee's weekly working hours should be more than 30% but not exceed 70% of the normal weekly working hours of a comparable full-time employee.

Under the EA, employees whose wages do not exceed RM4,000 per month or who, regardless of salary earned, are employed as manual labourers or supervisors of manual labourers, to operate or maintain any mechanically propelled vehicle for the purpose of transporting passengers or goods or for reward or commercial purposes, as domestic employees, or in certain positions on seagoing vessels (collectively, "Covered Employees") are statutorily entitled to receive remuneration, in addition to their regular wages, for working beyond their normal working hours as outlined below:

- Working overtime on a normal working day: For any work carried out in excess of normal hours of work on a normal day of work, Covered Employees are eligible to receive not less than 1.5 times the hourly rate of pay.
- Working on a rest day: Covered Employees are also eligible to receive remuneration for work performed on a rest day as outlined below:
  - (a) for any period of work that does not exceed half the normal hours of work – half the ordinary rate of pay for work done on that day;
  - (b) for any period of work that is more than half but that does not exceed the normal hours of work – one day's wages at the ordinary rate of pay for work done on that day; and
  - (c) for any work carried out in excess of the normal hours of work on a rest day on a rest day – not less than twice the hourly rate of pay.
- Working on a public holiday: If Covered Employers are required to work on a public holiday, they are eligible to receive two days' wages at the ordinary rate of pay in addition to the day's wages, regardless of whether the period of work done on that day is less than

the normal hours of work if they are required to work on public holidays. For any work carried out in excess of the normal work hours on a public holiday, Covered Employees are eligible to receive not less than three times the hourly rate of pay.

A part-time employee who is required to work beyond their normal work hours of work is entitled to overtime pay as follows:

- not less than their hourly rate of pay for each hour or part thereof that exceeds their normal hours of work but does not exceed the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise; and
- not less than one-and-a-half times the hourly rate of pay of the part-time employee for each hour or part thereof that exceeds the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise.

The EA incorporates provisions for flexible working arrangements – ie, enabling employees to request changes in their hours of work, days of work or places of work through a written application to their employer(s). The employer must respond to the employee's application within 60 days of receiving it, either approving or refusing the request in writing. If the employer refuses the application, they are obligated to state the reasons for the refusal. However, there is currently no provision within the EA to challenge the employer's decision or the grounds on which the decision was based. There are also no guidelines as to the way in which an employer may exercise its discretion to allow or reject an application for a flexible working arrangement.

1.4 Compensation

As of 1 May 2022, the Minimum Wage Order 2022 mandates that employers with more than five employees must pay a minimum wage of RM1,500 per month or RM7.21 per hour. If employees are compensated on a daily basis, the corresponding minimum rates apply:

- RM57.69 for employees who work six days a week;
- RM69.23 for employees who work five days a week; and
- RM86.54 for employees who work four days a week.

Bonuses and increments are not required under law and are discretionary and/or contingent upon the agreement made between the employer and the employee.

1.5 Other Employment Terms

Minimum Annual Leave

In Malaysia, the paid time off that employees are entitled to is referred to as "annual leave". Any person who enters into a contract of service irrespective of their wages is statutorily entitled to minimum paid annual leave over 12 months of continuous services as follows:

- 8 days if the employee has been in employment for a period of less than two years;
- 12 days if the employee has been in employment for a period of two years or more but less than five years; and
- 16 days if the employee has been in employment for a period of five years or more.

Employers may however contractually provide for more annual leave days.

Minimum Paid Public Holidays

Employees are statutorily entitled to 11 days of public holidays, five of which must be the following:

- National Day (the anniversary of Malaysia's independence);
- the birthday of the Yang-di-Pertuan Agong (the King's Official Birthday);
- the birthday of the State Ruler or the Yang di-Pertua Negeri, as the case may be, of the state in which the employee works, or Federal Territory Day;
- Labour Day; and
- Malaysia Day.

Employers may determine the remaining six days of public holidays to be afforded to their employees but must provide advance notice of these designated public holidays at the start of each year. Employers may however opt to, and commonly do, provide all gazetted public holidays in Malaysia and the relevant state in which the employer's business is located as paid public holidays, often exceeding the statutory 11 days.

Minimum Paid Sick Leave

Employees are statutorily entitled to (non-hospitalisation) sick leave as follows:

- 14 days if the employee has been in employment for a period of less than two years;
- 18 days if the employee has been in employment for a period of two years or more but less than five years; and
- 22 days if the employee has been in employment for a period of five years or more.

If hospitalisation is necessary, an employee is entitled to 60 days of paid sick leave in addition to the (non-hospitalisation) sick leave entitlement.

Minimum Paid Maternity Leave

Under the EA, female employees are entitled to 98 days of paid maternity leave, provided that:

- the female employee has been employed by the employer for a period of, or periods amounting, in the aggregate, to not less than 90 days during the nine months immediately before her confinement; and
- the female employee has been employed by the employer at any time in the four months immediately before her confinement.

Furthermore, if certified to resume work by a registered medical practitioner, a female employee has the option to begin working at any point during her maternity leave, subject to her employer's consent, irrespective of whether she qualifies for maternity allowance. The EA prohibits an employer from terminating the employment of a pregnant female employee. If a female employee is pregnant or experiencing an illness related to her pregnancy, her employer cannot terminate her employment or issue a notice of termination, except for reasons of wilful breach of contract, misconduct or the closure of the employer's business. It is the employer's responsibility to demonstrate that the termination of the female employee's employment was not based on her pregnancy or a pregnancy-related illness.

Minimum Paid Paternity Leave

The EA also provides for paternity leave entitlement of seven days to married male employees for each confinement up to five confinement periods, irrespective of the number of spouses (Muslim men have the right to marry up to four wives under local law), subject to the employee being employed for at least 12 months and having informed his employer at least 30 days before the expected confinement or as early as possible after the birth. There are no provisions

in law stipulating when paternity leave may be taken, therefore employers may decide on this.

Under Malaysian law, there is no statutory entitlement for childcare leave. Instead, the provision of such leave is determined through contractual agreements between the employer and employee.

2. Restrictive Covenants

2.1 Non-competes

In Malaysia, non-competition clauses cannot be enforced as they contravene Section 28 of the Contracts Act 1950.

2.2 Non-solicits

In Malaysia, non-solicitation clauses are generally enforceable if they are included as part of the terms and conditions of employment.

3. Data Privacy

3.1 Data Privacy Law and Employment

The Personal Data Protection Act 2012 (PDPA) imposes obligations on employers who process personal data to comply with the Personal Data Protection Principles set out in the PDPA. Among other obligations, the employer is required to inform the data subject (ie, the employee) of the personal data that is being processed and obtain the consent of the data subject in most situations where data is collected, processed or disclosed. Consent must be explicitly obtained if sensitive personal data is being processed. The employee also has a right to access and correct their data.

For the purposes of the PDPA, "personal data" is broadly defined as any information that related directly or indirectly to a data subject, who is identified or identifiable from that information.

"Sensitive personal data" is defined as any personal data consisting of information as to the physical or mental health or condition of a data subject, their political opinions, their religious beliefs or other beliefs of a similar nature, and the commission or alleged commission by them of any offence.

The PDPA mandates that the data subject must receive a notice in both Malay and English, informing them about specific aspects concerning the processing of their personal data and/or sensitive personal data, namely:

- that personal data of the data subject is being processed by or on behalf of the data user, a description by or on behalf of the data user and a description of the personal data;
- the purposes for which the personal data is being, or is to be, collected and further processed;
- any information available to the data user regarding the source of the personal data;
- their right to request access to and correction of the personal data and how to contact the data user with any inquiries or complaints in respect of the personal data;
- the class of third parties to whom the data user discloses or may disclose the personal data;
- the choices and means the data user offers the data subject to supply the personal data; and
- where it is obligatory for the data subject to supply the personal data, the consequences for the data subject if they fail to do so.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Employers have the option to hire foreign workers and expatriates as part of their workforce, provided that these employees possess the relevant and necessary work passes allowing them to work in Malaysia for the specific employer. As of now, there is no specific fixed restriction on the number of work passes that can be issued to an employer.

The EA provides that employers must first obtain the approval of the Director General of Labour to employ foreign labour.

Expatriates may work in Malaysia pursuant to Employment Passes, Professional Visit Passes or a Resident Pass-Talent (RP-T), whereas foreign workers who perform low-skilled labour ("Foreign Workers") must obtain a Visit Pass (Temporary Employment) to work in Malaysia. Foreign nationals who are married to locals are permitted to work under their Long Term Social Visit Pass, provided a "Permission to Work" has been obtained.

With effect from 1 January 2021, employers intending to hire new expatriates must follow a new process. They are obligated to advertise the job vacancy (which is intended to be filled by the expatriate) on the MyFutureJobs portal for a minimum of 30 days and conduct interview programmes in an effort to consider local candidates who meet the job criteria. Nonetheless, there are some exceptions to this advertising rule, such as when the expatriate's salary exceeds RM15,000 or if they hold a "C-suite" position.

Foreign Workers may only be employed in certain sectors and may only be sourced from certain countries. Employers are first required to obtain a quota from the Immigration Department of Malaysia and undergo an interview process before they may proceed to hire foreign workers.

4.2 Registration Requirements for Foreign Workers

Employers wishing to employ expatriates must first register themselves on the Expatriate Services Division portal. Employers who wish to hire expatriates must meet the paid-up capital requirement (which varies depending on their level of foreign and local shareholding) in order to be eligible to employ expatriates.

Employers wishing to employ low-skilled foreign labour must register themselves on the Foreign Workers Centralised Management System portal.

5. New Work

5.1 Mobile Work

In Malaysia, flexible working arrangements are available at the discretion of the employer, offering alternatives to traditional office-based work.

The amendments to the Occupational Safety and Health (Amendment) Act 1994 came into force on 1 June 2024. The Act now requires employers to identify emergencies that can happen in their organisation, develop procedures to handle them and implement the procedures in emergencies.

Additionally, the law obliges employers to conduct hazard identification, risk assessment and risk control for tasks performed by their workers. Workers now have the right to remove themselves from the workplace if they believe an imminent danger is present that could cause

death or serious bodily injuries. However, they can exercise this right only after informing their employers about the danger and if the employers fail to take appropriate action to address the issue.

Although the amendment does not explicitly address remote workers, it is believed that employees working from home are similarly protected under this amendment due to the increasing trend of remote work in recent times.

As of now, there are no other regulations or restrictions in relation to remote work, particularly concerning data privacy and social security in Malaysia.

5.2 Sabbaticals

The EA does not encompass provisions for sabbatical leave, and generally, sabbatical leave is not regulated in Malaysia. Consequently, unless explicitly stated in the employment contract, employees do not have an inherent entitlement to sabbaticals.

5.3 Other New Manifestations

Malaysia has not seen any concrete new manifestations in the field of "new work" except in respect of the EA newly providing for flexible working arrangements, which currently remain only a "right of application" rather than a "right to flexible work".

New manifestations such as "hot desking", "job sharing", "reduced work week", menstrual leave, childcare or family leave, wellness days and mental health breaks currently remain unregulated, and are wholly subject to the contract between employer and employee, as some employers offer these as workplace perks.

6. Collective Relations

6.1 Unions

Employers and employees (save for employees who are employed in a managerial capacity, executive capacity, confidential capacity or security capacity) are at liberty to form, join and participate in trade union activities, and an employer may not interfere with or restrain an employee from joining or participating in a trade union. Trade unions are required to register with the Director General of Trade Unions within one month of establishment, and at least seven members must sign the application form for registration.

If a trade union is formed, the Industrial Relations Act 1967 provides a process for the trade union to seek recognition from the employer. Once recognised, the trade union may seek to commence collective bargaining with the employer with a view to conclude a collective agreement with the employer in order to achieve more favourable terms and conditions of employment on behalf of all employees falling within the scope of the collective agreement.

6.2 Employee Representative Bodies

Employee representative bodies are not specifically provided for under Malaysian laws.

6.3 Collective Bargaining Agreements

Only registered and recognised trade unions may enter into collective agreements with employers. These agreements must be in writing and signed by parties to the agreement.

The collective agreement shall set out the terms of the agreement between parties and must set out the following matters:

- the names of the parties to the agreement;

- the period in which the agreement shall continue to be in force, which shall not be less than three years from the date of commencement of the agreement;
- the procedure for termination and modification of the agreement; and
- the procedure for modification.

The terms of the collective bargaining agreement should not be less favourable than, or in contravention of any provision of, any written laws applicable to the class of workers under the collective bargaining agreement.

A signed copy of the collective agreement is to be jointly deposited by the parties to the registrar within one month from the date on which the agreement was entered into. The registrar will then bring it to the notice of the industrial court to take cognisance of the agreement and only upon such awareness will the agreement come into force and be binding upon all parties, inclusive of those employees who were subsequently employed.

7. Termination

7.1 Grounds for Termination

Under Malaysian law, even if an employment contract contains a termination clause, an employee can only be terminated from employment if there is a valid just cause or excuse. However, the term "just cause or excuse" is not specifically defined by legislation. Generally, misconduct, poor performance, redundancy and other similar reasons are considered just causes or excuses for termination. An employee who considers that he/she has been dismissed from employment unfairly may lodge a representation to the Director General of Labour to be reinstated to his/her former position. Parties are then invited to attend mandatory conciliation proceedings following such a representation being lodged. If no amicable solution is reached at the conciliation proceedings, the representation will be referred to the industrial court for adjudication.

Dismissal does not necessitate approval from a government agency. However, in cases of retrenchment or business closure or cessations of employment emanating from voluntary separation schemes, the employer must inform the Labour Department of the termination(s) of employment by submitting a "PK Form".

Employers are obliged to give their employees minimum notice periods as set out under the EA (see **7.2 Notice Periods**). Alternatively, employers may pay the employees compensation in lieu of notice.

7.2 Notice Periods

In cases where termination is not a result of employee misconduct, poor performance or breach of contract – notice of termination must be provided. Alternatively, the employer may opt to pay the employee salary in lieu of notice.

Where a notice period is not specifically provided for in an employment contract or the termination is due to business closure, retrenchment or redundancies, the employer is required to provide a minimum statutory notice period as follows:

- four weeks' notice if the employee has been employed for less than two years on the date on which notice is given;
- six weeks' notice if the employee has been employed for two years or more but less than five years on such date; and
- eight weeks' notice if the employee has been employed for five years or more on such date.

Severance pay is only statutorily payable to Covered Employees in the event of termination of employment (except in cases of misconduct, retirement or voluntary resignation) as follows:

- 10 days' wages for every year of employment if the employee has been employed for a period of less than two years;
- 15 days' wages for every year of employment if the employee has been employed for a period of two years or more but less than five years; and
- 20 days' wages for every year of employment if the employee has been employed for a period of five years or more.

7.3 Dismissal for (Serious) Cause

Summary dismissal typically only applies if the employment contract is terminated on grounds of misconduct, poor performance or breach of contract.

Before an employee is dismissed summarily for misconduct, the following process should generally be followed:

- Step 1 (preliminary investigation): The employer should undertake thorough investigations to ascertain whether there are grounds to allege that an employee has committed misconduct. Investigations may take the form of interviewing the employee alleged to have committed misconduct, witnesses, investigating documentary evidence and conducting forensic investigations, amongst others.
- Step 2 (issuing show cause letter): Once the employer is satisfied that there is a prima facie case of misconduct, the employer should afford the employee a chance to respond to the misconduct. The employer may do so by issuing the employee with a show cause letter, setting out the charges of misconduct accurately and concisely and requiring the employee to answer such charges. It is of the utmost importance that these charges contain specific allegations of misconduct and include all pertinent details, such as the exact date and time the misconduct took place, the nature of the alleged misconduct and the company policies that have been breached. The show cause letter should also include a statement calling upon the employee concerned to submit an explanation in writing within a certain period of time.
- Step 3 (reply to show cause letter): The employee ought to be given a written opportunity to reply to the allegations made against him/her in the show cause letter, and reasonable time for doing so.
- Step 4 (domestic inquiry): If the employer is of the view that serious misconduct appears to have been committed, a domestic inquiry may be conducted. A domestic inquiry is an internal inquiry held by an employer to inquire into allegations of misconduct by an employee to determine if an employee is guilty or innocent of the same and will involve the calling of witnesses and tendering of evidence to prove the employer's case. The process usually begins with the employer issuing the employee with a notice of inquiry, laying down the specific charges of misconduct. The notice of inquiry will also state the date and time of inquiry and inform the employee that he/she is entitled to bring witnesses to support his case. A domestic inquiry is not a requirement under law and the industrial court has held that the failure to hold an inquiry before dismissing an employee is not fatal to the employer's case. A domestic inquiry must however be held if it is within the employer's written policies and procedures. The employ-

er is entitled to depart from the panel of inquiry's findings and recommendations.

In cases of poor performance, the following process should generally be followed before dismissal:

- The employee should be informed of his/her poor performance, and warned that failure to bring his/her performance up to an acceptable level would warrant dismissal from employment.
- The employee must be accorded sufficient opportunity to improve with time and guidance from his/her employer.
- Notwithstanding efforts taken to warn the employee of his/her poor performance and to assist the employee to achieve an expected level of performance, the employee failed to sufficiently improve his/her performance.

The requirements set out above in relation to misconduct and poor performance are specifically laid down in statute but have been expressed by case law to support just cause or excuse for dismissal.

7.4 Termination Agreements

Employers and employees may agree to mutually separate by way of a mutual separation agreement to terminate the employment contract where, as part of the same, the employer offers some compensation in exchange for certain obligations by the employee, including a release of claim or waiver of rights.

Employers may also carry out voluntary separation schemes entailing a termination of employment in which employees are paid some form of compensation in exchange for certain obligations by the employee, including a release of claims or waiver of rights. This is often entered into to avoid mass retrenchments. As part of the voluntary separation scheme, a selected group of employees may be invited to apply for the voluntary separation scheme and the employer has full discretion on who it wishes to select for the voluntary separation.

7.5 Protected Categories of Employee

There are no specific protections against dismissal for particular categories of employees, save for pregnant female employees, as elaborated on in **7.3 Dismissal for (Serious) Cause**.

8. Disputes

8.1 Wrongful Dismissal

An employee who considers that they have been dismissed without just cause or excuse may file a representation for reinstatement under Section 20 of the Industrial Relations Act 1967. If the employee is successful, they may be awarded:

- up to 24 months' last drawn salary in backwages; and
- reinstatement or, in lieu of reinstatement, one month's last drawn salary for each year of service.

A fixed-term employee is only entitled to backwages commensurate with the duration left in the contract of employment if early termination had not occurred.

An employee on probation is entitled to up to 12 months' last drawn salary in backwages.

8.2 Anti-discrimination

All employees have a right to be treated fairly and with mutual trust and respect in the workplace, and discrimination is not permissible. Under the newly amended EA, the Director General may

inquire into and decide any dispute between an employee and his/her employer in respect of any matter relating to discrimination in employment and may also, pursuant to such decision, make an order. An employer who fails to comply with any order of the Director General commits an offence, and shall, on conviction, be liable to a fine not exceeding RM50,000. In the case of a continuing offence, the employer shall be liable to a daily fine not exceeding RM1,000 for each day the offence continues after conviction.

However, "discrimination" is neither defined nor made an offence. The amendments also do not provide any specific remedy that the Director General may afford if the Director General finds that a dispute between employer and employee relates to discrimination in employment.

The law in question is still relatively new, and as a result, there remains uncertainty regarding the burden of proof and potential damages or relief that may apply in such cases. Nonetheless, we can expect ongoing case developments on discrimination in the workplace as legal professionals and courts grapple with its interpretation and application.

It is essential to highlight that the amendments only cover discrimination once the employment relationship has commenced and do not address discrimination as a reason for denying employment or non-employment.

8.3 Digitalisation

At the time of writing, the industrial courts in Malaysia have not implemented any regulations concerning the digitalisation of employment disputes, including the possibility of conducting court proceedings via video. However, this practice has been initiated in civil courts primarily as a response to the COVID-19 pandemic.

9. Dispute Resolution

9.1 Litigation

Employees who lodge a representation for reinstatement pursuant to Section 20 of the Industrial Relations Act 1967 will have their representation heard by the industrial court if conciliation cannot be reached between the parties. Employees have 60 days to file such a representation. Alternatively, employees may also file a civil claim for wrongful termination of the employment contract but any award of damages will be limited to the applicable notice period of termination. Reinstatement is not a remedy that civil courts can grant.

Class action claims are not recognised in Malaysia. Employees may make claims on an individual basis for unjust dismissal. However, the courts may hear the matters together.

9.2 Alternative Dispute Resolution

Parties may agree to private arbitration of employment disputes, but these are very uncommon in Malaysia.

9.3 Costs

The Industrial Court does not award costs.

Trends and Developments

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Lee Hishammuddin Allen & Gledhill

Lee Hishammuddin Allen & Gledhill (LHAG) is one of the largest law firms in Malaysia with more than 90 lawyers, divided into seven practice areas, comprising twenty-four practice groups, each headed by an experienced partner, enabling the firm to offer a market-leading depth and breadth of expertise. It is the only Malaysian firm to have been selected as a member of Multilaw and Interlaw, two prominent global networks of independent law firms. The firm's employment & industrial relations practice group has a consultant and four established, dedicated partners who largely devote their time to advisory and litigation work, respectively. This focus enables the team to offer clients from a broad cross-section of the Malaysian economy, the benefit of profound experience in the specific type of mandate at hand.

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The employment law landscape in Malaysia this year has seen increased coverage of social and welfare protections afforded not only to its local employees but also foreign workers. This progressive shift is demonstrated by key legislative amendments and/or policy enforcement, including the Trade Unions Act 1959 (TUA 1959), Occupational Safety and Health Act 1994 (OSHA 1994), the anticipated tabling of the Gig Workers Commission Bill, and enhancements under the Social Security Organisation (SOCSO).

Trade Unions (Amendment) Act 2024

In Malaysia, the freedom of association is prescribed in the Federal Constitution wherein Article 10 (1) of the Federal Constitution protects workers' freedom to form and join trade unions. Although workers are free to form and join a trade union, this freedom is not absolute. The recognition of trade unions is governed by the TUA 1959 and the Industrial Relations Act 1967 (IRA 1967) which impose several restrictions on the formation of trade unions. Nonetheless, in tandem with the principles of the International Labour Organisation (ILO) Convention on Freedom of Association and Protection of the Right to Organise, the Trade Unions (Amendment) Act 2024, which was gazetted on 12 January 2024, has removed several restrictions which were previously imposed by the TUA 1959.

The former Minister of Human Resources, V. Sivakumar, during the second tabling of the bill said that "[t]he amendment suggested in this bill will encourage the establishment of unions, and it is expected to increase the coverage of collective bargaining among private sector workers in Malaysia" and hoped that the amendment would help create trade unions that are "healthy, mature and progressive in addition to ensuring the quality of the protection of workers' rights in Malaysia by taking into account the principles outlined under international labour standards."

The key amendments to the TUA 1959 include, among others, the definition of trade union or union, the extension of the deadline for registration of a trade union, the limitation of grounds for refusal of registration of a trade union by the Director General of Trade Union (DGTU), the removal of the DGTU's authority to suspend a trade union branch, and the introduction of a statutory prohibition of discrimination against trade union membership.

Before the amendment, a "trade union" or "union" was defined as "any association or combination of workmen or employers… within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries…". The Trade Unions (Amendment) Act 2024, however, has removed the limitation of trade unions/union to a "particular establishment, trade, occupation or industry or within any similar trades, occupations or industries". Further, the restriction of allowing only one union to be set up in any industry, occupation or trade has also been removed. This means that multiple trade unions can be established within a single workplace and a single trade union may include an unlimited variety of members from different workplaces, trades, occupations, industries, and localities.

Before the amendment, the period for an application for registration of a trade union was one month. The Trade Unions (Amendment) Act 2024, however, seeks to extend the aforesaid period for registration to six months, with the maximum extension of time being increased from six months in the aggregate to 12 months in the aggregate. Such provision of more time for the registration process will allow trade unions

to gather necessary documentation and fulfil requirements more thoroughly and accurately.

The Trade Unions (Amendment) Act 2024 also limits the grounds for the DGTU to refuse registration of a trade union to the following:

- If he is satisfied that the objects, rules, and constitution of the trade union conflict with any of the provisions of this Act or of any regulations; or
- If the name under which the trade union is to be registered is –
  (a) identical to that of any other existing trade union, or so nearly resembles the name of such other trade union as, in the opinion of the Director General, is likely to deceive the public or the members of either trade union; or
  (b) in his opinion, would promote feelings of ill-will and hostility between different races, religions or nationalities,

unless the trade union alters its name to one acceptable to the DGTU.

Additionally, where the DGTU refuses to register a trade union on the above grounds, he is required to inform the trade union in writing of his refusal and the grounds for such refusal.

Further, before the amendment, the DGTU was vested with the authority to suspend a trade union branch if it was found to have violated the TUA 1959 or union rules. The Trade Unions (Amendment) Act 2024 has resulted in the removal of this authority. As such, any suspension of a trade union may be carried out by the Minister of Human Resources, with the concurrence of the Minister responsible for internal security and public order.

The Trades Union (Amendment) Act 2024 further stipulates that no membership of a trade union shall be confined to a particular race, religion or nationality, reflecting Malaysia's efforts to eliminate discrimination in the workplace. As at the date of writing, the Trade Unions (Amendment) Act 2024 has not yet come into force.

Occupational Safety and Health

On 1 June 2024, the amendments to the OSHA 1994 came into force. The salient amendments to the OSHA 1994, which include, among others, the following, emphasise Malaysia's commitment to international environmental, social and governance (ESG) standards at the workplace:

- Expansion of the scope and applicability of OSHA 1994 to "all places of work throughout Malaysia, including the public service and statutory authorities": Prior to the amendment, the OSHA 1994 applied only to specific industries, such as manufacturing, mining and quarrying, construction, utilities, finance, insurance, real estate, and business services.
- The introduction of a principal and corresponding duties: A "principal" is defined as "any person who, in the course of or for the purposes of his trade, business, profession, or undertaking, contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal". The amendment has placed a requirement for a principal to ensure the safety and health of any contractor it engages, any subcontractor or indirect subcontractor, and any employee employed by such contractor or subcontractor, so long as such persons are working under the direction of the principal. Specific measures to be taken by the principal include providing and maintaining plants and systems of work, offering information, instruction, training, and

supervision, and maintaining a safe working environment.
- The introduction of new duties for principals, employers and self-employed persons: These duties include conducting risk assessments in relation to the safety and health risk posed to any person who may be affected by their job at the place of work, and to develop and implement procedures to address emergencies that may arise in the course of the employees' work.
- The requirement for an employer with five or more employees to appoint one of their employees to act as an occupational safety and health co-ordinator for places of work that are not included in any class or description of place of work in the Gazette requiring a safety and health officer: Unlike a safety and health officer who is tasked with ensuring compliance with the OSHA 1994, a safety and health co-ordinator is tasked with co-ordinating occupational safety and health issues specifically in the workplace.
- Increased protection afforded to employees as employees may remove themselves from imminent danger at their place of work or the work itself should the same fall within the prescribed situations: An imminent danger is a serious danger which may result in death or serious bodily injury caused by plant, substance, activity, process, practice, procedure or place of work hazard. Employees who exercise their right to remove themselves are also expressly protected from undue consequences and discrimination.
- The maximum fines that may be imposed on employers, self-employed persons, and principals convicted of certain offences have been increased from RM50,000 to RM500,000, while the maximum fines that may be imposed on designers, manufacturers, and suppliers convicted of certain offences have been increased from RM20,000 to RM200,000.
- Directors and specified office bearers, including a director, compliance officer, partner, manager, secretary, or other similar officer of a company, can be jointly or severally liable for offences committed by the company or other relevant body.

In addition to the amendments to OSHA 1994, Malaysia has also, on 11 June 2024, presented its instruments for ratification of the Occupational Safety and Health Convention, 1981 (No. 155) to the Director-General of the ILO for registration during the Occupational Safety and Health Conference of the ILO. Overall, it is clear that Malaysia is dedicated to advancing global human rights standards in occupational safety and health.

Combating Forced Labour

In 2023, the Ministry of Human Resources released a set of guidelines identifying forced labour practices. The said guidelines provide, among others, the following 11 indicators of the elements of a situation of forced labour which reflect the 11 indicators of forced labour released by the ILO:

- abuse of vulnerability: exploiting an individual's vulnerable position, such as economic hardship, lack of education, or immigration status, to compel them to work;
- deception: providing false information or promises to recruit individuals for work under false pretences;
- restriction of movement: imposing restrictions on workers' freedom of movement, such as confiscating passports or identification documents, to control their ability to leave the workplace or return home;

- isolation: isolating workers from their families, communities, or support networks to prevent them from seeking assistance or reporting abuses;
- physical and sexual violence: subjecting workers to physical or sexual violence or threats thereof to coerce them into working or submitting to exploitative conditions;
- intimidation and threats: using threats, coercion, or intimidation to force compliance with work demands or preventing workers from asserting their rights;
- retention of identity documents: withholding workers' identification documents or other personal belongings to restrict their freedom and control their ability to leave the workplace;
- debt bondage: forcing workers to work to repay debts, often through inflated fees, interest rates, or expenses, which may never be fully repaid;
- withholding wages: failing to pay workers their rightful wages or withholding payment to maintain control over them;
- excessive working hours: imposing excessively long working hours or unrealistic production quotas on workers, leading to exhaustion and involuntary servitude; and
- abusive working and living conditions: subjecting workers to harsh or inhumane working and living conditions, including inadequate housing, sanitation, and safety measures, to exploit their labour for profit.

These guidelines align with Malaysia's commitment to effectively identifying and addressing forced labour practices through legislative and policy-driven means, such as the inclusion of forced labour as an offence under the Employment Act 1955, and the National Action Plan on Forced Labour (2021-2025), which follows the "4Ps" strategy: prevention, protection, prosecution, and partnerships, as well as the ratification of the Protocol of 2014 to the Forced Labour Convention in 2022.

Extension of the Invalidity Scheme to Foreign Workers

The Invalidity Scheme under SOCSO offers comprehensive 24-hour coverage to employees, encompassing situations of disability or death arising from any cause unrelated to their employment. Benefits provided under this scheme include invalidity pension, invalidity grant, contract-attendance allowance, survivors' pension, funeral benefits, facilities for physical/vocational rehabilitation and dialysis, and education benefits. In a significant move towards inclusivity, as of 1 July 2024, all foreign workers employed in Malaysia are now mandated to be covered under this scheme, a benefit previously restricted to local employees under the age of 60.

This requirement applies to all employers who employ foreign workers with valid passes or permits issued by the Director General of Immigration for the purpose of working in Malaysia. With the expansion of the coverage of the Invalidity Scheme, employers are required to make contribution payments for both the employer's and foreign workers' share according to the statutory prescribed rate of contribution under the Employees' Social Security Act 1969, as follows:

- Employment Injury Scheme and Invalidity Scheme: for foreign workers who first enter the SOCSO scheme or are first covered below the age of 55 years old.
- Employment Injury Scheme:
  (a) for foreign workers who have reached 55 years old when they first enter the SOCSO scheme; or
  (b) for foreign workers who have reached the age of 60 and are still working.

Previously, foreign workers only had access to the Employment Injury Scheme, which provides protection to an employee against accidents or occupational disease arising out of and in the course of employment. The extension of the Invalidity Scheme therefore underscores the country's commitment to safeguarding the well-being of the workforce that forms the cornerstone of Malaysia's economy, regardless of their nationality. Furthermore, this initiative brings Malaysia in line with international labour standards pertaining to health, safety, and welfare, especially following the country's ratification of the ILO's Occupational Safety and Health Convention, 1981 (No. 155), in June 2024.

Gig Workers Commission Bill

The Gig Workers Commission Bill, aimed at providing a legal framework to protect the rights and welfare of gig economy workers, will be tabled in Parliament by the end of July 2024. As the gig economy continues to grow, with 30% of gig workers participating in platform-based work on a full-time basis, this bill seeks to address the unique challenges faced by these workers. The salient features of the bill include:

- the establishment of a commission to oversee the gig economy, ensuring fair practices and standards across various platforms; this includes monitoring working conditions and payment practices;
- the provision of mechanisms for resolving disputes between gig workers and platform operators, offering a structured approach to address grievances; and
- the provision of statutory protections for essential rights of gig workers, including fair compensation, working hours, and access to benefits such as health insurance and retirement plans.

It is noteworthy that the bill encompasses a wide range of gig work, from ride-sharing and food delivery to freelance services, recognising the diverse nature of the gig economy. With the rise of the gig economy in Malaysia, characterised by its flexibility and accessibility, workers often face job insecurity, lack of benefits, and exploitation. The introduction of this bill marks a significant step towards recognising gig workers as integral to the economy, ensuring they receive protections similar to those in traditional employment.

The Gig Workers Commission Bill represents a proactive approach to modern labour issues, fostering a more equitable working environment for gig economy participants. As the bill moves through the legislative process, it has the potential to significantly enhance the rights and welfare of millions of Malaysians engaged in gig work, promoting fairness and stability in this evolving sector.

Anti-Sexual Harassment Tribunal

In March 2023, several provisions of the Anti-Sexual Harassment Act 2022 (ASHA 2022) came into force. The ASHA 2022 provides for a right of redress for any person who has been sexually harassed, the establishment of the Tribunal for Anti-Sexual Harassment ("Tribunal"), to raise awareness and to prevent the occurrence of sexual harassment, and to provide for related matters. Thus, it expands protections beyond the sexual harassment provisions provided under the Employment Act 1955 (EA 1955), which only covers sexual harassment incidents in the workplace.

The Tribunal serves as an alternative channel to the civil court to handle sexual harassment complaints quickly, easily, and at minimal cost, and recently issued its first award in a case involving physical sexual harassment by a male employer

towards a female employee wherein it ordered the respondent to issue a statement of apology as requested by the complainant. This case marks an important step in utilising the provisions of the Anti-Sexual Harassment Act to provide redress and support to victims, reinforcing the commitment to a safer environment for all individuals.

Flexible Working Arrangements

In April 2024, the Minister of Human Resources announced that the Ministry of Human Resources, in collaboration with Talent Corporation Malaysia Bhd (TalentCorp), is poised to provide consultation services to employers and companies seeking guidance on the implementation of flexible working arrangements at their establishments. Under the Employment Act 1955, employees have the right to submit written requests for flexible working arrangements, which can involve changing their work hours, days, or location. Employers must provide their feedback within 60 days and provide reasons for the rejection of any such application.

The endorsement of flexible working arrangements by the Minister of Human Resources signals official support and guidance from the government regarding the implementation of flexible working arrangements. It also underscores the importance of compliance and transparency in handling employees' requests for flexible working arrangements.

Malaysia's Progressive Wage Policy

The Progressive Wage Policy (DGP) pilot project in Malaysia will involve 1,000 companies and run from June 2024 to August 2024. An assessment will be conducted in September 2024 to evaluate policy readiness before full implementation is considered by the Cabinet. It has also been reported that the DGP is likely to be continued for a year until June 2025.

The DGP targets entry-level and non-entry level workers across various sectors earning between RM1,500 and RM4,999 per month. Employers will benefit from a skilled workforce, leading to increased productivity, competitiveness, and company revenue. Deputy Human Resources Minister Abdul Rahman Mohamad highlighted that the initiative aims to improve private sector wage structures, complementing existing policies such as the Minimum Wage Order and the Productivity Linked-Wage System.

Key features of the DGP include:

- Voluntary participation: Companies can voluntarily register as "Progressive Wage Employers" online to be eligible for incentives, without the creation of new mandatory laws.
- Incentive-based: Registered companies meeting DGP criteria will receive government-determined incentives to help offset increased labour costs.
- Productivity-linked: Participating companies must provide proof of employee skill enhancement through recognised courses and training to boost productivity. This initiative aims to encourage continuous learning and investment in technology and automation.

The DGP implementation relies on three mechanisms:

- Participation criteria: Companies must meet eligibility requirements to become "Progressive Wage Employers".
- Proposed starting salaries and annual increases: The Executive Committee will rec-

ommend starting salaries and annual increases based on the Malaysian Standard Classification of Occupations (MASCO) for different economic sectors and job categories.
- Incentives by worker category: Cash incentives will be provided based on the worker category, distinguishing between entry-level (first-year employees) and non-entry level (employees with over a year of service).

The DGP targets companies in sectors such as manufacturing, construction, wholesale and retail trade, motor vehicle and motorcycle repair, information and communication, and professional, scientific, and technical activities. As at August 2024, 1,094 companies have opened accounts under the DGP pilot project. The government expects to pay out incentives to employers from October 2024.

Conclusion

The recent developments in Malaysia's employment law landscape signify a positive step towards ensuring the wellbeing of both local and foreign workers. The strengthened legal frameworks, improved working conditions, enhanced social protections, and emphasis on fair treatment and inclusivity illustrate the nation's commitment to creating a fair and equitable labour market. As these changes take root, it is anticipated that Malaysia will continue to progress towards becoming a more equitable and inclusive society, where all workers are valued and protected.

MALTA

Law and Practice

Contributed by:
Paul Gonzi, Rebecca Diacono and Mattea Pullicino
Fenech & Fenech Advocates

Contents

Fenech & Fenech Advocates is Malta's oldest law firm and is recognised as a leader in a number of areas, including general commercial law, employment law, data protection, M&A, telecoms, media and technology law, financial services, shipping and maritime law, and aviation law. The full-service firm assists an international client base and has strong relationships with international firms. The employment law department comprises a team with specialisations in employment, discrimination, and health and safety laws, data protection law, immigration, residence, work permits, income tax and social security. The firm draws on the human resources, specific expertise and experience of 30 lawyers and another 70 or so qualified personnel, through its associated corporate services company Fenlex, to service the legal and corporate requirements of clients. The firm's diverse team of lawyers ensures it can deliver comprehensive legal solutions regardless of the specific business or industry sector its clients operate within.

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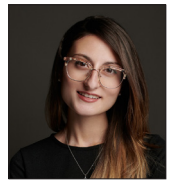

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ADVOCATES

1. Employment Terms

1.1 Employee Status

The Maltese workforce is commonly divided into two main categories: employed individuals and self-employed individuals.

Over the past years, the courts have also cited the term "workers", which broadly incorporates employees, agency workers, contract staff and self-employed persons who are contingent on a single employer.

Employees

The Employment and Industrial Relations Act (EIRA), Chapter 452 of the Laws of Malta, defines an employee as "any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service". Any person, therefore, who is party to an employment contract is deemed to be an employee. The definition in the EIRA also comprises outworkers and other personnel who work under the direction and control of another person, but it excludes professionals and contractors who have no employment contract with the employer.

In turn, employees may be classified into three categories: full-time workers, full-time workers on reduced hours and part-time workers (including casual workers). Under Maltese law, an employee is considered to be a full-timer if such person works an average of 40 hours a week.

The EIRA contains rights and obligations that apply across the board, irrespective of the industry or sector of employment, such as on the protection of wages, rules on termination, rules on discrimination and equal pay.

Wage Regulation Orders (WROs)

Maltese law also establishes various rights and limitations that apply to specific sectors/industries. These sector-specific rules are regulated by means of several sector-specific Wage Regulation Orders (WROs). Typically, these WROs would regulate minimum wages, overtime rates, special allowances and leave entitlements.

One such industry is the wholesale and retail industry, regulated by the Wholesale and Retail

Trades Wages Council Wage Regulation Order, SL 452.63. This applies to wholesale merchants, distributors, importers, exporters, commission agents, wholesale and marketing co-operatives, retailers, lending libraries, auctioneers, hairdressers, consumers' co-operatives and photographic studios, but excludes shops run under the management of a hotel or club (in respect of which a separate WRO applies).

Sector-specific WROs exist for: public transport; cinemas and theatres; printing and publishing; construction; allied industry; private schools; woodworks; hotels and clubs; the beverage industry; food manufacturing; hire of cars; laundry; tobacco industry; seafaring; agriculture; jewellery; clay and glass; travel insurance; plastic; paper and electronics; domestic services; the canning industry; digital platform delivery; and hospitals and clinics. Each WRO will define the sector to which it applies in more detail.

A Professional Offices Wages Wage Regulation Order applies to offices and establishments of architects, engineers, legal advisers, notaries, accountants, auditors, bookkeepers, trade unions, consultants in branches of engineering, architecture, law and accounting, and research and scientific establishments (except labs in private hospitals and market research units and advertising agencies).

Where no WRO applies to an industry (such as the i-gaming industry), other general conditions will apply – and these are primarily regulated by the Minimum Special Leave Entitlement Regulations.

Part-timers are employees who work less than full-timers and who are entitled to pro rata benefits, calculations and payments. Under Maltese law, part-time workers are regulated by means of the Part Time Employees Regulations, SL 452.79. Maltese law also underlines that part-timers are not to be treated less favourably than full-time workers.

Self-Employed Individuals

In Malta, self-employment is not regulated, as such, in that a self-employed person is regulated by the general laws on trade and commerce without the protection of employment laws.

The Employment Status National Standard Order, SL 452.108, serves to protect against the abuse of purported self-employment.

This National Standard Order delineates that when an individual is engaged to provide services and satisfies five out of the eight broadly defined conditions, then that relationship between the client and the individual shall automatically (by operation of the law) be deemed to be an employment relationship, notwithstanding any declaration to the contrary.

Consequently, such individual shall be afforded the relative protections under the EIRA, and the law makes certain assumptions towards protecting that person (eg, that unless otherwise stated, the assumed employment is of an indefinite duration).

The National Standard Order lays down the following conditions:

- The individual depends on one party for which work is performed for at least 75% of their income over a one-year period.
- The individual depends on such party to determine what work is to be done and how it should be carried out.

- The individual performs the work using equipment, tools and machinery provided by such party.
- The individual is subject to a work time schedule or minimum work periods established by such party.
- The individual cannot sub-contract their work to other individuals or substitute themselves when carrying out the work.
- The individual is integrated into the structure of the production process, the work organisation or the company's or other organisation's hierarchy.
- The individual's activity is a core element in the organisation and pursuit of the objectives of such party.
- The individual carries out similar tasks to existing employees or to those formerly undertaken by employees.

Exemptions from such rules may be sought by way of exception. However, the general rule is that an employment relationship cannot be converted into a self-employment relationship except with the authorisation of the relevant authority.

1.2 Employment Contracts

Employment Relationship

The employment relationship in Malta assumes the existence of an agreement, whether such agreement is written or verbal.

Although Maltese legislation does not mandate that a written contract must necessarily be entered into upon engagement, the standard practice is that written agreements are entered into between the employer and the employee. In any event, in terms of the Transparent and Predictable Working Conditions Regulations, SL 452.126, employers have an obligation to provide employees with various criteria relating to their employment, including a basic description of the work to be undertaken. This may be satisfied by a basic letter of engagement, a contract of employment, as well as a collective agreement.

If an employment contract is signed, then Maltese civil law generally applies the norm that the parties to a contract are free to regulate the conditions between them, in so far as the agreement satisfies certain basic rules (such as the capacity of the parties) and regulates a subject which is lawful. Therefore, the terms of a contract are generally deemed to be the law between the parties (lex contractu). However, a fundamental rule enshrined in Maltese employment law is that a contract of employment cannot provide certain conditions which are less favourable to the employee than those specified in employment law. Thus, by way of exception to the norm, the more beneficial minimum conditions provided by the law must always prevail.

Contracts of Employment

The terms of a contract of employment will vary depending on the type of employment relationship which exists, whether for an indefinite period, a fixed period or the completion of a project.

Each type of contract must necessarily satisfy certain conditions and is subject to diverse rules, primarily in relation to termination of such employment and the consequences of same. Details contained in contracts will also typically differ depending on the grade, nature of employment and on the nature of the employer's industry.

Specific legislation also exists to regulate the conditions and limitations of the use of definite (fixed-term) contracts (and their possible auto-

matic conversion into indefinite-term contracts), and the use of part-time employment.

Further rules also apply if the employee is employed to work overseas or is an outworker.

1.3 Working Hours

Working Hours and Overtime

Working hours tend to vary according to the industry in question and may be regulated by sector-specific WROs.

The average normal working week (excluding overtime) is a 40-hour week. In certain cases, normal working hours can exceed 40 hours a week.

As a general standard, working time should not exceed a maximum of 48 hours a week, although an employee may expressly consent to work in excess of 48 hours per week. Such consent may also be revoked, subject to the provision of prior notice.

It is understood that an employer has a right to instruct an employee to work eight hours of overtime per week. This is subject to certain exceptions provided by the law, such as in the case of a pregnant employee, as well as for a period after an employee has given birth or adopted a child.

Workers are generally entitled to a minimum daily rest period of 11 consecutive hours. In certain circumstances, however, the full rest period may not be availed of, provided that equivalent compensatory rest periods are provided to the employee immediately following the corresponding periods worked.

With respect to overtime, employees who are not regulated by sector-specific WROs are covered by the Overtime Regulations, SL 452.110, which lay down a rate of 1.5 times the normal rate for work carried out in excess of 40 hours a week averaged over a four week period, or over the shift cycle at the employer's discretion. Sector-specific WROs may mandate different overtime rates. The rules on overtime for public service and public sector employees differ.

In Malta, it is also common for the employer and employee to agree to a consolidated wage which covers payment for all working hours, including overtime hours. Whether such practice is in line with the Overtime Regulations is contentious and would have to be assessed on a case-by-case basis. This practice remains common, particularly in relation to senior grade employees and C-level executives, whose wages surpass double the national minimum wage.

Flexible Working Time

Through the transposition of the Work-Life Balance Directive, workers with children up to the age of eight years, and carers, have the right to request flexible working arrangements. Under Maltese law, a carer is defined as "any worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of care or support for a serious medical reason".

Flexible working arrangements may include, but are not limited to, remote working, working on reduced hours and flexitime.

Employers must consider and respond to requests for flexible working arrangements within two weeks, providing reasons for any refusal of such requests or for any postponement of such arrangements. Flexible working arrangements may be limited in duration and in such cases the worker shall have the right to request

to return to the original working pattern before the end of the agreed period where this is justified on the basis of a change in circumstances. The employer shall consider and respond to a request for an early return to the original working pattern, taking into account the needs of both the employer and the worker.

Part-Time Contracts

Part-time contracts are regulated by the standard rules applicable to full-time employment, provided that all minimum entitlements are calculated pro rata depending on the hours worked. Part-time employees are protected from being treated less favourably because they work on a part-time basis.

1.4 Compensation

Minimum Wage

For the year 2024, the national minimum wage for full-time employees per week is:

- age 18 years and over – EUR213.54;
- age 17 years – EUR206.76; and
- under 17 years – EUR203.92

Other sector-specific minimum wages regulated by the relevant sector-specific WROs may apply.

The minimum wage is typically adjusted annually to reflect the increase in the cost of living. In 2024, the cost-of-living adjustment for a full-time employee amounted to EUR12.81 per week.

Various WROs impose special overtime rates for work exceeding the normal working hours, or for work carried out on weekends or public holidays. Some WROs also provide special allowances, such as for night work or shift work.

Bonuses and Allowances

All employees are entitled to a statutory bonus and a weekly allowance, twice yearly. A full statutory bonus of EUR135.10 must be paid at the end of June and another in December, while a full weekly allowance of EUR121.16 is payable at the end of March and the end of September.

Employees may also receive a bonus from their employer as part of their remuneration. Bonuses may be guaranteed, discretionary or a combination of both. Guaranteed bonuses are bonuses which have been agreed upon contractually and which must necessarily be paid by the employer. Discretionary bonuses, on the other hand, leave employers with some flexibility in deciding what payments, if any, are to be made to the employee (generally these are calculated on the basis of performance). It is also possible to have a combination of both guaranteed and discretionary bonuses, allowing for a discretionary element within a contractual framework.

The rules on remuneration for public service and public sector employees vary.

1.5 Other Employment Terms

Under Maltese law, employees may avail of a variety of leave entitlements, ranging from annual leave to leave on the occasion of marriage and leave for medically assisted procreation.

Annual Leave Entitlement and Pay

The Organisation of Working Time Regulations, SL 452.87, sets out the minimum leave entitlement and the rules related to carrying forward leave and payments in lieu.

Employees working a 40-hour week and an 8-hour working day are entitled to a minimum statutory leave entitlement of 24 days per annum, as well as an extra day of leave for each

public or national holiday falling on a Saturday or Sunday. Therefore, this means that the yearly leave entitlements will fluctuate depending on the number of public or national holidays falling on a Saturday or Sunday of each calendar year paid at the normal rate of remuneration of such employee. Should an employee's average hours (excluding overtime) calculated over a period of 17 weeks be below or exceed 40 hours per week, the entitlement in hours is to be adjusted accordingly.

Part-time employees and employees who have not completed a full year of service are entitled to paid leave calculated on a pro rata basis.

The Annual Leave National Standard Order, SL 452.115, regulates the procedures.

Other Leave Entitlements

Maltese Law provides for and regulates various other leave entitlements, including sick leave, maternity leave, adoption leave, paternity leave, parental leave, bereavement leave, jury leave and quarantine leave.

Sick leave

The sick leave entitlement granted to employees varies significantly according to the applicable sector-specific WRO. Where an employee is not covered by a specific WRO, such employee is entitled to two working weeks per year (calculated in hours) of sick leave. This sick leave entitlement is to be calculated on the basis of a 40-hour working week and an 8-hour working day.

Payment for sick leave is to be borne by the employer. However, should an employee remain unable to work after having exhausted the full entitlement, such employee shall continue to receive the sickness benefit from the Social Security Department.

Part-time employees are entitled to paid sick leave calculated on a pro rata basis. The entitlement is also calculated proportionally for employees who have not completed a full year of service.

Family leave

Under Maltese law, a pregnant employee may take maternity leave for an uninterrupted period of 18 weeks. The first 14 weeks are to be paid by the employer. Payment for maternity leave beyond the first 14 weeks is not paid by the employer but by the Social Security Department.

Employees may also be entitled to special maternity leave should the conditions required be satisfied.

Similarly, an employee who is the parent of an adopted child is also entitled to an uninterrupted period of 18 weeks of adoption leave. The leave shall commence on the date on which the child passes into the care and custody of the adoptive parent. An employer shall be bound to pay for the first 14 weeks of adoption leave with full wages. However, should the employee choose to take any additional adoption leave beyond the 14 weeks, payment for such additional leave will be obtained from the Social Security Department.

Fathers or equivalent second parents are also entitled to ten working days of paternity leave on full pay on the birth or the adoption of a child.

Furthermore, each parent has the right to be granted paid parental leave on the grounds of birth, adoption, child fostering in the case of foster parents, or legal custody of a child, to enable

them to take care of that child for a period of four months until the child has attained the age of eight years. Two months cannot be transferred between the parents and are to be paid. In this case, an employee wishing to take such leave must have at least 12 months of continuous service with the employer unless a shorter period is agreed to.

Confidentiality Clauses, Non-disparagement Clauses and Employee Liability

Confidentiality and non-disparagement clauses in employment contracts are not expressly regulated in Malta. However, they are common clauses introduced within contracts of employment together with other clauses such as those on intellectual property, non-competition, compliance with policies and processing of personal data.

Although not specifically regulated, it is understood that during employment, employees have an implied duty of confidentiality as well as an implied duty to act in the best interest of the employer. These implied obligations have often been upheld by the Industrial Tribunal and the courts. These obligations also apply following the termination of employment but in a more limited manner.

With certain employees one may also invoke duties of a fiduciary nature regulated by the Civil Code.

With regard to employee liability, Maltese law does not explicitly regulate the liability of an employee during the course of their engagement with the employer. However, general civil law principles of contract and tort are applicable in such circumstances.

The law does impose an obligation on an employee to pay a sum to the employer if the employee abandons fixed-term employment without good and sufficient cause, or if the employee fails to give prior notice of termination from an indefinite-term contract without good and sufficient cause.

2. Restrictive Covenants

2.1 Non-competes

Non-competition clauses effectively seek to prevent an employee from joining a competitor employer or facilitating a competing business during employment or for a defined period after the termination of employment.

Restrictive covenants of this nature do not arise by law, except indirectly in so far as trade secrets are protected, offering limited protection. Therefore, in order to be enforceable, restrictive covenants must necessarily be included in a contract of employment, or in a side letter signed by the employee.

Non-competition clauses applicable during the employment period are standard and there is a general understanding that they should be enforceable. This does not mean that employees can be prevented from undertaking activities for another (non-competing) employer.

Post-termination Restriction Clauses

Conversely, post-termination restriction clauses, including non-competition, are not easily enforceable. Over the past decades, local courts have adopted different interpretations, in some cases dismissing the clauses altogether for being restraints of trade which were deemed to be in breach of public policy, but in other more recent cases enforcing the restraints in so far

as they were warranted, narrowly defined and limited in scope and duration and also, in some cases compensated for. On some occasions, the courts have also enforced a contractual obligation on the former employee to pay a sum by way of pre-liquidated damages, with the courts maintaining that this was not an illegal fine imposed on the employee.

The courts have generally interpreted such clauses restrictively and have emphasised that the limitation of time and industry area imposed have to be reasonable, taking into consideration the small size of Malta and the relatively small market, in that a former employee cannot be forced to leave the country to be able to pursue their vocation/profession. There is no law regulating these types of covenants and therefore there is no maximum period imposed by law. Unlimited periods are not permissible and, typically, restrictions would be for periods of 6 to 12 months from termination.

There is no mandatory obligation to compensate employees for post-termination restrictions. However, compensation is likely to increase the chances of enforceability, as has also been indicated by our courts in recent months.

Therefore, such clauses must be specific in that they must refer to an objective, a time and a place. Should a clause be too vast or too vague, then one might argue that this would be going over and above its original scope, that being the protection of the employer and the business.

The courts have also often highlighted that the employer would need to prove that a loss was or would have been incurred due to the ex-employee moving to a competitor.

2.2 Non-solicits

Non-solicitation clauses effectively seek to prohibit an ex-employee from soliciting clients of the employer and/or from soliciting other employees/workers of the employer to terminate their employment with the employer.

In a similar manner to non-competition clauses, in order to be enforceable, non-solicitation clauses must form part of a contract of employment or be included in a side letter signed by the employee.

Non-solicitation clauses are relatively common in contracts of employment governed by Maltese law and may be enforced through judicial proceedings in so far as they are deemed to be reasonable. The courts have generally interpreted such clauses restrictively and have emphasised that the limitation of time and market imposed have to be reasonable, taking into account Malta's small size and its relatively limited market. The non-solicitation of clients is more likely to be enforced than the non-solicitation of employees (as, on occasion, the courts have suggested that employees cannot be treated as assets of a company).

The Maltese courts have enforced clauses which prohibited a former employee from working with a client of the employer.

3. Data Privacy

3.1 Data Privacy Law and Employment

Protection of privacy rights is enshrined in the Constitution of Malta as well as the European Convention Act (Chapter 319, Laws of Malta), which transposes the European Convention for the Protection of Human Rights and Fundamental Freedoms into Maltese law.

Data protection is primarily regulated by the EU General Data Protection Regulation (GDPR), together with the Data Protection Act, Chapter 586 of the Laws of Malta and subsidiary legislation enacted thereunder.

Except for some basic rules on the processing of personal data in the context of teleworking, which were enacted prior to the GDPR, the Maltese legislature has so far not enacted any data protection law specific to the employment sphere, in that no laws expressly regulating the processing of personal data in the employment context and/or which affect the privacy rights of employees, have been enacted. Therefore, the standard data protection principles and rules apply to the employment context.

Generally, as data controllers, employers are likely to rely on the legal grounds of performance of a contract, a legal requirement or legitimate interest (provided that such interest is not overridden by the rights of others) in order to process employee data.

Employers must essentially ensure that they are processing data in accordance with the principles underlined in the GDPR, namely:

- lawfulness, fairness and transparency;
- purpose limitation;
- data minimisation;
- accuracy;
- storage limitation;
- integrity and confidentiality; and
- accountability.

As data subjects, employees enjoy a degree of privacy and may take advantage of the various rights granted to data subjects under the GDPR. Such rights are not absolute in nature and are subject to certain limitations.

4. Foreign Workers

4.1 Limitations on Foreign Workers

EU/EEA/Swiss Nationals

EU/EEA/Swiss nationals and their family members, as defined, may take up employment and/or self-employment in Malta in the exercise of their EU Treaty rights; there are currently no restrictions on EU/EEA/Swiss nationals' access to the labour market.

Third-Country Nationals

Non-EU/EEA/Swiss nationals (ie, third-country nationals) typically require an employment licence to work in Malta and cannot legally take up employment or self-employment without this licence. An application for an employment licence is generally submitted by the employer to the Expatriates Unit, Identità, through a Single Permit Application (SPA). On completion of a successful SPA, the third-country national would be issued with a Maltese residence permit, which would allow the person to legally work and reside in Malta, subject to certain conditions. For standard SPAs, the processing time of an application takes roughly 12 weeks from the submission of the application and a successful applicant will be issued with a residence permit for a one-year period.

Labour Market Test

In terms of current policy, the employment of third-country nationals by Maltese employers is generally subject to the satisfaction of a Labour Market Test, whereby the employer must demonstrate that an effort was made to first recruit EU/EEA/Swiss nationals for the position, prior to offering the position to the third-country national – this is subject to any applicable exemptions.

Malta Vacancy Exemption List

Due to exigencies in the current market, certain occupations are exempt from the requirement to satisfy the Labour Market Test. The Malta Vacancy Exemption List is issued by Jobsplus and updated from time to time, depending on shortages in the local labour market. It is important to note that unlike the Key Employee Initiative Scheme (see below), when an occupation is on the Malta Vacancy Exemption List, the role is exempt from the Labour Market Test irrespective of the gross annual salary earned by the third-country national or the seniority of the position. The Malta Vacancy Exemption List currently includes the following occupations: accountants, auditors, personal carers, IT consultants and vets.

Key Employee Initiative Scheme and Specialist Employee Initiative

In addition to the Malta Vacancy Exemption List, a third-country national may also submit an SPA under the Key Employee Initiative Scheme (KEI) or the Specialist Employee Initiative (SEI).

The KEI applies to third-country nationals who:

- earn a gross basic salary of at least EUR35,000 per annum; and
- hold a managerial or highly technical position which requires relevant qualifications or adequate experience.

The SEO applies to third-country nationals who:

- earn a gross basic salary of at least EUR25,000 per annum; and
- hold academic qualifications and/or work experience linked to the role being offered.

The KEI and SEI are beneficial as, in addition to being exempt from the Labour Market Test, they provide for a fast-tracked application process, whereby SPAs are processed in around ten to 15 working days from submission of the application. Furthermore, a successful applicant is issued with a one-year residence permit on first submission and on renewal, subject to the discretion of the Expatriates Unit, may be issued with a residence permit for a three-year period.

Residence permit

It is important to note that once an SPA is successfully approved and the third-country national is issued with a residence permit, that residence permit solely allows the third-country national to work in Malta:

- in the specific occupation applied for; and
- with that specific employer.

Should the third-country national change occupation with their current employer and/or change employer, then a new SPA must be submitted. Furthermore, should a third-country national remain in the same position, a renewal application would need to be submitted prior to the expiration of the residence permit.

Nomad Residence Permit

Residency Malta Agency has recently launched the Nomad Residence Permit which allows third-country nationals to relocate to Malta and work remotely from here. The third-country national must be able to work remotely, independent of location, using telecommunication technologies, and may be either employed by a foreign employer or self-employed. In both cases, the Nomad Residence Permit holder cannot provide services to Maltese based clients/businesses.

Successful applicants will be issued with a residence card which is valid for a period of one year and may be renewed. In terms of current

policy, a Nomad Residence Permit may only be renewed three times, for a total stay by the holder of a maximum of four years.

The income generated in Malta by the Nomad Residence Permit holder may be subject to tax in Malta at a reduced flat rate of tax of 10%, subject to certain conditions.

4.2 Registration Requirements for Foreign Workers

EU/EEA/Swiss Nationals

EU/EEA/Swiss nationals who have been residing in Malta for a period of three months must submit a Residence Permit Application to the Expatriates Unit. An EU/EEA/Swiss national is issued with a residence permit for a five-year period. Unlike third-country nationals, EU/EEA/Swiss nationals are not subject to labour market considerations and are not required to change their residence card when changing employer and/or occupation.

In addition to the requirement to apply for a residence card, EU/EEA/Swiss nationals who are employed and working in Malta are generally also required to register for tax and social security purposes. The employer should register the employee with the revenue office for payroll purposes. Furthermore, the employer is required to register the employment with Jobsplus, through the submission of the requisite form.

Third-Country Nationals

As indicated in **4.1 Limitations on the Use of Foreign Workers**, third-country nationals are typically required to apply for an employment licence in order to legally work and reside in Malta, and the most common type of application is the SPA. The documentation required for an SPA depends on the occupation and whether or not the position is exempt from the Labour Market Test. An SPA may be submitted whilst the third-country national is still abroad or already in Malta. In fact, the forms and documentation required depend also on whether the SPA is new – ie, a first-time application – or whether the person is already in Malta and changing jobs, among other matters.

A typical SPA includes:

- the application form, which would need to be endorsed by the employer;
- a lease agreement, registered with the Housing Authority, or a final deed of purchase (should the third-country national own property in Malta);
- a copy of the third-country national's passport (including a copy of a valid visa when submitting a new application); and
- a position description, this being a standard form issued by Jobsplus which addresses a number of questions related to the position being offered to the third-country national.

On completion of a successful SPA, the employer should register the employee with the revenue office for payroll purposes. Furthermore, the employer is required to register the employment with Jobsplus, through the submission of the requisite form.

5. New Work

5.1 Mobile Work

Maltese Law regulates the concept of telework by means of the Telework National Standard Order (S.L 452.104). S.L. 452.104 defines telework as "a form of organising and, or performing work, using information technology, in the context of an employment contract or relationship, where work, which could also be performed at

the employer's premises, is carried out away from those premises on a regular basis".

The National Standard Order delineates conditions which must be adhered to in the case of teleworking, including the need for a telework agreement to be in place containing certain requirements, as well as the need for the employer to take appropriate measures particularly with regard to software, to ensure the protection of data used and processed by the employee carrying out telework. The law obliges the employer to inform the employee carrying out telework of any restrictions on the use of IT equipment, internet or other IT tools and any sanction in case of non-compliance.

S.L 452.104 also stipulates that where monitoring is to be carried out by the employer, both the employee and the employer must agree to such monitoring in the telework agreement, and any such monitoring system must be in proportion to the objective and introduced in accordance with Council Directive 90/270 on the minimum safety and health requirements for work with display screen equipment.

As regards health and safety obligations of the employer when employees are teleworking, telework does not absolve employers of their obligations in terms of law in that employers are still bound by their health and safety obligations towards employees and, therefore, the duty of care must always be exercised irrespective of whether the employee is working remotely or not.

As regards remote working from overseas, employers must also keep in mind tax and social security considerations that may arise and their obligations in this regard.

5.2 Sabbaticals

Maltese law does not provide for sabbatical leave as a statutory leave entitlement granted to employees. There is nothing that prohibits employers from granting sabbatical leave, whether paid or unpaid. Although not highly common in Malta within the private sector, employers would typically impose restrictions during sabbatical leave, such as a prohibition from undertaking paid work.

5.3 Other New Manifestations

Flexible working is one of the most popular new manifestations in the field of employment, whether in the form of variable working hours or remote working. Spurred on by the COVID-19 pandemic, employees have come to expect a level of flexibility from employers. Multi-functional workspaces are also on the rise, in that it is expected that within the next few years, companies will minimise office space and make the remaining places of work more flexible and multi-functional, such as by introducing hot-desking, where employees do not have an assigned seat but rather claim a different open workspace whenever at the office. Also accelerated by the consequences of the pandemic, employers are increasingly prioritising employee wellness, which in turn is expected to decrease high turnover of staff. Furthermore, in an effort to retain talent in a competitive job market, ongoing learning and development opportunities are anticipated to grow. Professionals need to stay up-to-date with the latest advancements in their fields to progress in their careers.

6. Collective Relations

6.1 Unions

The right of assembly and association is a fundamental human right enshrined in the Maltese Constitution.

The formation of trade unions and the process by which a union is recognised by an employer is regulated by law. However, it is generally only employers with a large number of employees and parastatal companies that are unionised or have employee representation.

The responsibilities, privileges and obligations of trade unions in Malta are regulated by means of the EIRA. Trade unions have the power to enter into contracts and, subject to certain restrictions, may sue and be sued. Trade unions also enjoy a certain degree of protection from liability in carrying out their legitimate activities, particularly when acting in contemplation or in furtherance of a trade dispute. However, the EIRA delineates exceptions to industrial disputes relating to essential-service industries.

The EIRA also extends protection to employees who follow directives issued by a union in contemplation or furtherance of a trade dispute.

6.2 Employee Representative Bodies

Where no trade union is recognised within a place of work, the law grants the right to employees to elect an employee representative. This applies to workplaces with more than 50 employees. Employee representatives are not granted any voting or decision-making rights but, in certain instances, are entitled to receive information and engage in consultations with the employer.

6.3 Collective Bargaining Agreements

Collective bargaining agreements are contracts negotiated between trade unions and employers to regulate minimum conditions within a workforce, or sections of the workforce. The EIRA recognises collective agreements in so far as they are duly registered. Clauses in collective agreements cannot provide for conditions which are less favourable than the minimum provided by the law.

Collective agreements generally regulate, among others, employees' terms and conditions of employment, such as employee wages and benefits, employee duties, and health and safety. Such agreements also delineate the duties and responsibilities of the employer and also often lay down the applicable rules for cases that require disciplinary proceedings.

7. Termination

7.1 Grounds for Termination

Termination During Probation

For both definite and indefinite contracts of employment, the law details a probationary period during which both the employer and the employee may terminate employment without providing a reason, although parties may decide to contract out of such a probationary period. One week's notice must be given should the employee have been in employment for more than one month. Special rules apply to employees who are pregnant or on maternity leave or who have suffered a work injury.

Termination of Definite Contracts of Employment

Fixed-term contracts cannot be terminated prior to the expiration of the stipulated term, except on the basis of "good and sufficient cause".

Should either party terminate prior to the lapse of the specified term, the terminating party would be liable to pay the other party half of the wages that would have accrued to the employee in respect of the remainder of the time specifically agreed upon.

Termination of Indefinite Contracts of Employment

With regards to termination of employment following the expiration of a probationary period, if any, an indefinite contract of employment may be terminated by the employer on the grounds of:

- good and sufficient cause;
- redundancy; or
- reaching retirement age.

With regards to the latter, an employer may terminate an employee's employment when the employee reaches pensionable age without giving prior notice or having any other valid reason by law. Pension age in Malta is 62; however, the pensionable age may also vary depending on the employee's birth year.

The term "good and sufficient cause" is not defined by law. However, the law delineates what does not constitute "good and sufficient cause" – eg, termination on the occasion of an employee's marriage.

There is no specific procedure that an employer must follow when terminating for "good and sufficient cause"; however, the Industrial Tribunal generally emphasises that warnings ought to be given to an employee prior to dismissal, particularly if termination is based on issues of performance or conduct, and the employer must demonstrate that they engaged in a due process prior to dismissal.

In such cases, the employer is not required to give the employee advance notice of termination and is also not required to pay the employee any wages relating to such notice period.

With regards to termination of employment by way of redundancy, Maltese law requires employers to follow the last-in-first-out rule, in that the employer must terminate the employment of that person who was last engaged in the class of employment affected by such redundancy. In such cases, the employer must give prior notice of such termination, depending on the employee's length of employment. Should the employee not wish to work the full notice period, the employee may require the employer to pay them a sum equal to one half of the wages due for the unexpired period of notice. If the employer fails to give notice, the employee will be entitled to a payment in lieu thereof.

Furthermore, should the post formerly occupied by the employee who was rendered redundant be made available within a year, that person shall be entitled to be reinstated in that post.

Collective Redundancies

Collective redundancies are regulated by means of SL 452.80. A collective redundancy can arise depending on the size of the workforce and the number of employees to be declared redundant within a period of 30 days.

Consultation with the appropriate representatives must take place at the earliest possible opportunity and is to cover ways and means of avoiding the collective redundancies or reducing the number of employees affected by such redundancies and for mitigating the consequences thereof. Employers must provide the employee representative with a written statement detailing all pertinent information, includ-

ing the selection of the employees who are to be made redundant, as well as the period over which such redundancies are to be carried out. A copy of the written notification and a copy of the written statement must also be provided to the Director of Employment and Industrial Relations.

Unless otherwise authorised, the employer cannot terminate the employment of employees affected by any projected collective redundancy before the lapse of 30 days from notification.

Termination by an Employee of an Indefinite-Term Contract

Employees are entitled to terminate their indefinite contract employment at any time, without assigning any reason, provided that the employee provides the employer with the required notice period.

In such cases, the employer may either allow the employee to work their full notice period or, alternatively, terminate the employment and pay the employee a sum equal to the full wages due for the unexpired period of notice.

7.2 Notice Periods

In cases where the employer terminates an indefinite-term contract on the basis of redundancy, as well as in cases where the employee resigns from their post, the terminating party is obliged to provide the other party with notice of such termination.

Minimum statutory notice periods are based on the length of continuous employment with the employer in that, for example, employees who have been employed for between six months and two years have a notice period of two weeks. The maximum notice period contemplated by law is 12 weeks.

Notwithstanding the minimum notice period by law, in the case of employees with a technical, administrative, executive or managerial post, the parties may agree to longer notice periods.

Should an employee fail to give the required notice, the employee will be liable to pay the employer a sum equal to half the wages that would have been payable in respect of the notice period. Should the employer fail to give the required notice to an employee being made redundant, the employer shall be liable to pay the employee a sum equal to the full wages that would have been payable in respect of the notice period.

Maltese law does not require employers to pay any severance pay over and above the wages covering the relevant notice period. Generally, severance pay is only rewarded if the employer gives enhanced payments or wishes to have a settlement agreement signed.

7.3 Dismissal for (Serious) Cause

Summary dismissal is a form of dismissal whereby the employee is dismissed due to grave misconduct. Although summary dismissals do occur in practice, the courts have held that such dismissals are the exception, not the norm, and that the employer must have good and sufficient cause, which is gross and thus warrants a dismissal rather than a mere warning.

The law does not establish any specific procedure that must necessarily be followed; however, the tribunal generally wants to see that an employee was given the opportunity to defend themselves and have a fair hearing. In recent years, the Court of Appeal has directed the tribunal not to award compensation to employees if such a procedure was not applied, in so far as

there was genuinely good and sufficient cause warranting a dismissal.

In such cases where the employer dismisses the employee summarily, the employer is not required to give the employee advance notice of termination or payment for such notice.

An employee who feels aggrieved by the dismissal has four months within which to file a claim before the Industrial Tribunal. Both parties would then have the right to be represented before the Tribunal and to present their evidence and bring any relevant witnesses forward to testify.

Should the employer fail to prove that the dismissal was based on good and sufficient cause, the Industrial Tribunal may either order reinstatement and/or award monetary compensation. Employees holding a managerial or executive post are not typically reinstated, but are provided with monetary compensation should the dismissal be deemed unfair by the Industrial Tribunal.

7.4 Termination Agreements

Termination agreements are not regulated under Maltese law, although parties may agree to terminate the employment relationship by mutual agreement and/or to settle disputes. In this case, general principles of contract law would apply, as well as the rules on compromise agreements.

7.5 Protected Categories of Employee

Maltese law seeks to protect specific groups of employees from dismissal. This protection applies to terminations connected with individuals who are pregnant or on maternity leave, individuals availing themselves of parental leave, and individuals who are dismissed due to the fact that they are members of a trade union or involved in the activities of a trade union, among others.

The law also explicitly prohibits the termination of employment of an employee on injury leave.

A termination may also be deemed unfair, despite there being good and sufficient cause, if the termination is deemed to be discriminatory.

8. Disputes

8.1 Wrongful Dismissal

Maltese law contemplates the possibility for employees to claim “unfair dismissal”, which would be termination without just cause, or which is discriminatory, or in cases of early termination of fixed-term contracts. The burden to prove that the termination was lawful rests with the employer. Although not expressly regulated by law, the tribunals and courts also recognise the concept of constructive dismissal, whereby the employee would resign in protest and claim compensation for having been forced to abandon the employment; in such cases, the burden of proof would be on the employee.

The law makes no specific reference to the concept of “wrongful dismissal”, that being a claim based in contract law for breach of contract. That being said, in so far as there is a breach of contract, the employee would be able to raise that as a fact corroborating the unfair dismissal, keeping in mind that when a tribunal liquidates compensation for unfair dismissal, it is entitled to take into account all relevant considerations, including damages arising out of a breach of contract. An employee may also raise a claim for damages arising out of breach of contract before the civil courts and may also seek a remedy for the performance of the contract.

In certain cases, employees may also have recourse to the Department of Employment and Industrial Relations, which, in turn, has the competence to investigate and, if need be, prosecute offences committed in breach of employment law.

8.2 Anti-discrimination

Anti-discrimination Grounds

Protection against discrimination is one of the fundamental rights and freedoms enshrined within the Maltese Constitution and it effectively protects persons from being discriminated against in every aspect of work life.

The EIRA broadly defines discriminatory treatment as any distinction, exclusion or restriction which is not justifiable in a democratic society. This includes, but is not limited to, discrimination on the grounds of pregnancy, disability and gender. The list of grounds provided for in the EIRA is non-exhaustive in nature and therefore, although not specifically mentioned therein, age or sexual orientation can also be deemed as grounds on which to claim that treatment was discriminatory, provided that the distinction, exclusion or restriction in question is not otherwise justifiable.

The EIRA also prohibits discriminatory treatment throughout the employment life cycle, in that discriminatory treatment is unlawful at the recruitment stage, during the employment relationship and during termination.

Differential treatment may be justified and is not deemed discriminatory – taking into account the nature of the vacancy to be filled or the employment offered – where a required characteristic constitutes a genuine and determining occupational requirement, or where the requirements are established by applicable laws or regulations.

The law also protects part-timers and fixed-term contract employees from being discriminated against by virtue of their employment status.

Burden of Proof

An employee claiming discrimination must merely establish a prima facie case sufficient to indicate discriminatory treatment. Once the employee succeeds in showing a prima facie case of discrimination, it is then up to the employer to prove the contrary.

Employers are obliged to respond to queries alleging discrimination within a fixed period of time.

Damages and Relief

An employee who alleges that they have been subjected to discriminatory treatment must file a claim before the Industrial Tribunal within four months of the alleged breach. Should an employee succeed in their claim against the employer, the employee will be entitled to monetary compensation. It is worth noting that the parties are free to reach an out-of-court settlement at any point during the proceedings.

There is no statutory formula by which the tribunal determines compensation. However, in determining the amount of such compensation, the tribunal must take into consideration the real damages and losses incurred by the worker who was unjustly dismissed, as well as other circumstances, including the worker's age and skills, that may affect the employment potential of said worker. Employees are expected to mitigate their losses.

8.3 Digitalisation

No regulations have been enacted by the Maltese legislature in relation to the digitalisation of employment disputes, however, in view of the

Industrial Tribunal being able to regulate its own procedures in so far as the principles of natural justice are adhered to, the COVID-19 pandemic has spurred the Industrial Tribunal to be more willing to accept witnesses giving testimony via videoconferencing if they are unable to testify in person.

9. Dispute Resolution

9.1 Litigation

Employment Forums

Employees are entitled by law to raise various complaints should they arise. The competent authority before which a complaint must be brought varies depending on the nature of the claim in question.

The Industrial Tribunal in Malta is the competent forum to hear claims relating to unfair dismissals, trade disputes, and other specialised employment law disputes, such as discrimination, harassment and victimisation.

Employees may also lodge certain claims, mainly contractual, before the civil courts, as well as seek intervention from competent authorities in the event of offences against the law, such as the Department of Employment and Industrial Relations, the Office of the Information and Data Protection Commissioner, as well as the National Commission for the Promotion of Equality.

The EIRA does not expressly cater for class actions to be brought before the Maltese Industrial Tribunal; however, there are instances where a dispute/claim may be filed on behalf of several employees contemporaneously.

The Industrial Tribunal

The Industrial Tribunal is free to regulate its own procedures; however, it is expected to abide by the rules of natural justice and decide the case at hand based on its substantive merits. The Tribunal is vested with the powers of the courts in accordance with the Code of Organisation and Civil Procedure.

The configuration of the Tribunal is determined depending on the issue at hand. In disputes that relate to conditions of employment, the Tribunal is composed of one chairperson, whereas where the situation relates to industrial relations, the Tribunal is composed of a chairperson and two other members who are selected by the chairperson of the tribunal.

Sittings before the Tribunal are generally open to the public, although the Tribunal may decide that a case should proceed behind closed doors.

The process before the Industrial Tribunal begins with an application being filed. The Tribunal then allows time for the defendant to rebut the allegations by means of filing a reply. A practice generally adopted by the Tribunal is that of asking whether the parties have sought to resolve the matter amicably prior to moving forward with proceedings. Following the reply being filed, and provided that the parties have not reached an out-of-court settlement, the parties are then given the opportunity to support their case with evidence and oral and/or written pleadings. It is worth noting that the parties may reach a settlement at any point during the proceedings prior to the final decision.

Although Maltese law delineates that the Tribunal must decide cases within one month, the vast majority of cases are not decided within this period. On average, cases are not determined

before one to two years have passed, and this may be extended in the case of an appeal.

9.2 Alternative Dispute Resolution

The EIRA refers to the exclusive jurisdiction of the tribunal in certain instances, and therefore it is argued that the possibility to arbitrate is limited. While Maltese law does not expressly prohibit pre-dispute arbitration agreements in employment disputes, neither does it provide that pre-dispute arbitration agreements are enforceable; therefore, these may be disputed, particularly in cases where the tribunal is declared to have exclusivity.

9.3 Costs

Prevailing employees are generally reinstated and/or awarded monetary compensation. The tribunal will typically award a token payment towards representation costs, and the parties are otherwise expected to cover their own costs and legal fees.

MEXICO

Law and Practice

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Cannizzo, Ortíz y Asociados, S.C.

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Cannizzo, Ortíz y Asociados, S.C.

Cannizzo, Ortíz y Asociados, S.C. was established in Mexico more than 40 years ago and is an excellent gateway for doing business in Mexico, thanks to its international experience in approaching legal practice and its deep understanding of the Mexican reality. The firm assists its clients with matters relating to employment relationships and the laws regulating them. Its practice comprises both individual and collective matters. It also represents its clients in the negotiation and execution of collective bargaining agreements with labour unions and the corresponding filing before the competent authorities. Its labour and employment team is ready and able to support its clients to be in compliance with the recent amendments to the Federal Labour Law, including the negotiation and execution of bargaining agreements under the new provisions, as well as in the actions required to address the recent amendments to outsourcing regulation in Mexico.

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1. Employment Terms

1.1 Employee Status

Although in practice there is a difference between blue-collar and white-collar employees, this difference does not derive from the law. The Federal Labour Law provides for several types of employees, namely the following:

- Employees in positions of trust (*empleados de confianza*): These are employees who perform management, inspection, supervision and oversight tasks, when they are of a general nature, or the personal work of the employer within the company or establishment. The category of trusted employees depends on the nature of the tasks performed and not on the name given to the position.
- Employees who render their services for a Mexican employer outside the national territory, for whom the Federal Labour Law provides special rights under Article 28.
- The Federal Labour Law contains several chapters addressing the status of various types of employees and providing specific rights and protections to each of them, for example, women workers, workers between the ages of 15 and 18, trusted employees, employees working on ships, aircraft crew, railway workers, auto transport workers, public service freight manoeuvring workers, farm workers, commercial agents, professional sportspersons, musicians and actors, domestic workers, teleworkers, mine workers, workers in hotels, restaurants, bars and other similar establishments, workers in a family industry, doctors, workers in educational institutions, among others.
- Employees employed for a specific task, whether for a fixed term, seasonally or for an indefinite term. See **1.2 Employment Contracts** for more information.

1.2 Employment Contracts

In Mexico, employment relationships may be: (i) for a specific task (*obra determinada*), which may only be agreed upon when its nature so requires; (ii) for a fixed term (*por tiempo determinado)*, which may only be agreed upon when required by the nature of the work to be performed, when the purpose thereof is to temporarily replace another employee, and in other cases provided by the Federal Labour Law (for example, the duration of labour relationships for the exploitation of mines lacking profitable minerals or for the restoration of abandoned mines or mines at a standstill may be agreed upon for a specific task, for a fixed term or for the investment of specific capital); (iii) seasonal (*por temporada*); and (iv) for an indefinite term (*por tiempo indeterminado*). The last of these, in turn, may be subject to a probation period (*prueba*) or initial training (*capacitación inicial*).

In the absence of any express stipulation otherwise, the employment relationship is understood to be for an indefinite term.

In terms of the Federal Labour Law, working conditions must be agreed in writing if there is no applicable collective bargaining agreement in place, and such a document must be executed in at least two counterparts, one for each party. The document must contain at least the following:

- name, nationality, age, sex, marital status, Unique Population Registry Code (*Clave Única de Registro de Población*, or CURP), Federal Taxpayer Registry Code and address of the employee and the employer;
- whether the employment relationship is for a specific task or term, seasonal, or for an indefinite term and, if so, whether it is sub-

ject to an initial training period or probation period;
- the service or services to be rendered, which shall be specified as accurately as possible;
- the place or places where the work is to be performed;
- the duration of the workday;
- the form and amount of the salary;
- the day and place of payment of the salary;
- the specification that the employee will be trained in accordance with the plans and programmes set forth or to be determined in the company;
- other working conditions, such as rest days, holidays and others, agreed upon between the employee and the employer; and
- designation of beneficiaries for the payment of wages and benefits accrued but not collected prior to the death or disappearance of the employee.

The lack of a written labour agreement does not prevent the employee from exercising their rights derived from the applicable labour provisions and from the services rendered and shall not be interpreted as the lack of existence of a labour relationship, as this formality is considered the responsibility of the employer.

1.3 Working Hours

Although the employer and the employee may agree on the duration of the workday, in no case may it exceed the legal limits.

The legal limits are: (i) for a day shift – ie, between 6am and 8pm, eight hours per day; (ii) for a night shift – ie, between 8pm and 6am, seven hours per day; and (iii) for a mixed shift – ie, comprising both day and night shifts, provided that the night period is less than three and a half hours, seven and a half hours per day.

Additionally, during the continuous workday, the employee must be granted a period of rest of at least half an hour, and if the employee cannot leave the place where they render their services during rest or meal hours, the corresponding time will be counted as effective time of the workday.

Regarding overtime, the law provides that the workday may be extended in extraordinary circumstances, but by no more than three hours per day and three times in a week. These hours of extraordinary work must be paid 100% more than the salary corresponding to the hours of the ordinary workday. In the event that the extraordinary work exceeds nine hours per week, the employer must pay 200% more than the salary corresponding to the hours of the ordinary workday, without prejudice to the applicable sanctions for doing so.

Although there is no specific regulation for part-time contracts, according to the law, the employee and the employer may freely allocate the working hours and they may do so in a way that allows the employee to rest on Saturday afternoon, or any equivalent modality.

Following a reform to Article 21, Section IV of the General Law for Preventing, Sanctioning, and Eradicating Crimes in Human Trafficking and for the Protection and Assistance of Victims of These Crimes, which came into effect on 7 June 2024, significant changes shall apply to labour relations. Per the reform, the concept of labour exploitation is expanded to include not only hazardous and unhealthy conditions, disproportionate workloads, and/or wages below the minimum wage but also workdays that exceed those established by the Federal Labour Law. Per this modification, workdays that exceed 48 hours per week, plus the overtime hours established

by the Federal Labour Law, or that exceed the maximum workday established conventionally in contracts, will be subject to severe sanctions for being considered labour exploitation, regardless of whether workers agree and even if they are properly paid for excess hours. This new regulation has determined that a workday involving labour exploitation will be punished with a prison sentence of three to ten years, as well as fines ranging from MXN542,850 to MXN5,428,500. When the individuals affected are members of Indigenous and Afro-Mexican communities, the punishment can range from four to 12 years of imprisonment and fines ranging from MXN759,990 to MXN7,599,900. Employers shall require precise control of working hours to avoid exceeding the limit and becoming subject to such sanctions.

1.4 Compensation

In Mexico, the minimum wage (*salario mínimo*) is the minimum guaranteed amount that an employee is entitled to receive in cash for services rendered in a workday.

The minimum wages in Mexico are determined by the National Minimum Wages Commission (*Comisión Nacional de los Salarios Mínimos*) (made up of representatives of employees, employers and the government), whose most recent resolution was issued on 1 December 2023 and published in the Official Federal Gazette on 12 December 2023. Such resolution contains the general minimum wages (applicable to all employees working in a certain geographic area or areas, regardless of the branches of economic activity, professions, trades or special jobs) and the professional minimum wages (applicable to all employees working in certain branches of economic activity, professions, trades or special jobs in a certain geographic area or areas) in force in two geographic areas into which Mexico has been divided for purposes of the application of such minimum wages: (i) the Northern Border Free Zone (*Zona Libre de la Frontera Norte*) – ie, the 25 km strip south of the US border; and (ii) the rest of the country. The general minimum wage in force for 2024 in the Northern Border Free Zone is MXN374.89, while in the rest of the country it is MXN248.93, which is 20% higher than that of the previous year.

The annual determination of minimum wages, or the revision thereof, in terms of the law, may never be below the inflation accrued during the period elapsed from its last revision.

Wages, in general terms, are protected by legal provisions, including those prohibiting, for example, the minimum wage from being subject to offset (*compensación*), discount or reduction, except in certain cases, and those establishing that the wages that are to be paid in cash must be paid in legal tender and that the currency may not be substituted by merchandise, vouchers, tokens or other items.

Employees are entitled to a Christmas bonus which, pursuant to the Federal Labour Law, must be paid before 20 December to employees who have completed one year of service and must be equal to at least 15 days of salary. Those employees who have not completed one year of service are entitled to be paid the proportional part of the bonus.

Furthermore, employees are entitled to participate in the profits of enterprises (*Participación de los Trabajadores en las Utilidades*, or PTU) in accordance with the percentage determined by the National Commission for the Participation of Employees in the Profits of Enterprises (*Comisión Nacional para la Participación de los Trabajadores en las Utilidades de las Empresas*).

Such percentage, as determined by the Commission, is currently 10% of the employer's annual profits. The basis for the calculation of the annual PTU payable to the employees of an enterprise is determined by the profit of such enterprise as calculated in accordance with the Income Tax Law in Mexico and currently takes into account the taxable profit of the employer during a tax year. However, certain adjustments are made in accordance with Article 16 of the Income Tax Law in order to calculate the basis for PTU (for example, for PTU purposes, dividends received by the company from other corporations are considered as profits, among others). Therefore, there might be a difference between the actual taxable income and the basis for the PTU.

The amount of PTU to be distributed among the employees is divided into two equal shares. The first one takes into account the days worked by each employee during the year, regardless of the amount of their salary, while the second share is distributed in proportion to the amount of the salary paid in relation to the work performed during the year.

Directors, administrators and general managers are not entitled to any PTU payment. Each non-unionised employee is entitled to a PTU payment; however, if their salary is higher than the highest salary of the unionised employees, such highest salary, increased by 20%, shall be taken into account as a maximum limit for the purpose of calculating the PTU payment.

In addition to the foregoing, according to the last reform to the Federal Labour Law dated 23 April 2021, the PTU payable to each employee cannot be higher than (i) three months of their current salary or (ii) the average of the PTU paid to such employee during the last three years, whichever is higher.

The following enterprises have no obligation to pay any PTU: (i) those newly incorporated, in relation to the first year; (ii) those developing new products, in relation to the first two years; and (iii) decentralised public institutions with assistance, charitable or cultural purposes, among others.

Additional incentives such as bonuses or punctuality or attendance premiums are neither mandatory nor regulated by law but can be freely included in employment agreements.

1.5 Other Employment Terms

Vacations

Employees who have rendered their services for more than one year are entitled to an annual period of paid vacation, which in no case may be less than 12 working days, and which will be increased by two working days for each subsequent year of service, until it reaches 20 days. After the sixth year, the vacation period will be increased by two working days for every five years of service. In consequence, the initial annual period of paid vacation was doubled in relation to the modified provisions. On 27 December 2022, reforms to Articles 76 and 78 of the Federal Labour Law regarding vacations were published in the Official Gazette of the Federation. After much controversy, these came into effect on 1 January 2023. Article 76 was modified to increase the vacation period, while Article 78 states that these days may be taken continuously, with the option for the worker to unilaterally decide to distribute the annual period of paid vacation as needed.

The labour law clearly provides that vacations cannot be compensated with remuneration.

Employees are entitled to a bonus (*prima vacacional*) of no less than 25% of the wages payable during the vacation period.

Leave

Pursuant to the Federal Labour Law, women are entitled to the following types of leave.

- A six-week paid leave before and six weeks after childbirth: At the express request of the employee, with the prior written authorisation of the physician of the corresponding social security institution or, if applicable, of the health service provided by the employer, taking into account the opinion of the employer and the nature of the work performed, up to four of the six weeks of leave prior to childbirth may be transferred to after childbirth. This period may be increased up to eight weeks after the childbirth, upon presentation of the corresponding medical certificate, in the event that the child was born with any type of disability or requires hospital medical care.
- In case of adoption of an infant, the woman shall enjoy a six-week paid leave following the day on which she receives the child.

For male employees, the law only sets forth that the employer must grant them paid paternity leave of five working days for the birth of their children and likewise in the case of the adoption of an infant.

With respect to absences due to illness, Mexican labour law distinguishes between non-work-related illnesses, which are generally covered by the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*), and those derived from an occupational accident or occupational illness, which are covered by the employer. In the chapter of the Federal Labour Law called "Occupational Risks" (*Riesgos de Trabajo*) it is clearly set forth what is to be understood by occupational accident and by occupational illness, namely, an occupational accident is any organic injury or functional disturbance, whether immediate or subsequent, or death or disappearance derived from a delinquent act, suddenly produced in the course of or in connection with work, whatever the place and time in which the work is performed (including accidents that occur when the employee is travelling directly from his/her home to the workplace and vice versa), whereas an occupational illness is any pathological condition resulting from the action over a longer period of time of a cause having its origin in the work or in the environment in which the employee must render his/her services.

A reform published in the Official Gazette of the Federation on 4 December 2023, decreed modifications to the Federal Labour Law to expand the list of recognised occupational illnesses from 161 to 194. This reform, which affects Articles 513, 514, and 515, adds 88 new pathologies, including mental disorders, women's health issues, and an expanded list of cancers. Notable additions include stress, anxiety, depression, insomnia, infertility, endometriosis, and COVID-19. A mechanism to update the table every five years or when justified by new studies. These changes aim to align with the World Health Organization's International Classification of Diseases (ICD)-11, which was released in February 2022.

Confidentiality and Non-disparagement Requirements

The Federal Labour Law does not expressly regulate the confidentiality obligations that an employee must comply with before his/her employer; these are usually included in the labour agreements entered into between the

parties. In this type of agreement, it is usually agreed that the confidentiality obligation of the employee will last for a certain term after the termination of his/her employment relationship with the employer.

However, the employee's obligation of confidentiality towards the employer might be interpreted as included in Article 47 of the Federal Labour Law, which provides the employer the right to terminate the employment relationship without liability, among others, if the employee commits, during his/her work, any breach of probity or honesty against the employer, his/her relatives or the management or administrative personnel of the company or establishment, or against the employer's customers and suppliers, as well as if the employee reveals trade secrets or discloses matters of a confidential nature, to the detriment of the company, or similar acts.

In addition, the Federal Law for the Protection of Industrial Property (*Ley Federal de Protección a la Propiedad Industrial*) defines as industrial secrets any information of industrial or commercial application which is kept confidential by the person exercising legal control over it, and implies obtaining or maintaining a competitive or economic advantage over third parties in the performance of economic activities and with respect to which it has adopted sufficient means or systems to preserve its confidentiality and restricted access. Such law could be applied to employees who misappropriate any industrial secret or intellectual property of their employer. Misappropriation is understood as the acquisition, use or disclosure of any industrial secret in a manner contrary to good industrial commercial and service customs and practices, that involves unfair competition. It may also be applied to any third party that acquires, uses or discloses an industrial secret if it knew, or had reasonable grounds to know, that the industrial secret was acquired in a manner contrary to such customs and practices.

Outsourcing

In 2021, a decree was published to amend labour, social security, and tax regulations, prohibiting the outsourcing of personnel, except for specialised services not included in the corporate purpose or main economic activities of the beneficiary of such services. According to such provisions, outsourcing occurs when an employer provides or makes its personnel available to a third party, which benefits from the services rendered by such personnel. The subcontracting of specialised services or works must be formalised through a written contract detailing the services or works and the approximate number of workers involved. If a contractor fails to meet its obligations to its workers, the hiring party will be jointly responsible. Likewise, individuals or entities providing outsourcing services are obliged to be registered before the Ministry of Labour and Social Welfare, and ensure they are up to date on their tax and social security obligations. Article 15 of the Federal Labour Law mandates the registration of individuals or legal entities that provide specialised services (REPSE) for entities or persons to offer such specialised services.

On 21 February 2024, modifications were published in the Official Gazette of the Federation regarding the REPSE, specifically the renewal process, as registrations must be renewed every three years to continue providing specialised services.

2. Restrictive Covenants

2.1 Non-competes

Non-compete clauses – ie, clauses included in a contract by which a person undertakes the obligation not to compete in a certain market or activity with another person, are not provided for in Mexican labour law; however, they may be agreed between the parties in employment agreements or separate non-compete agreements.

The consequence of breaching a non-compete clause is usually the obligation to compensate or indemnify the affected party with the amount of the damages caused to it, with the amount to be determined by the relevant judicial authority. Regarding non-compete obligations, it is important to keep in mind that in Mexico the protection of damages might be limited, contrary to what happens in other countries. In Mexico, it might be difficult to prove liability arising from a non-compete violation and the specific damages arising from this violation. Even when the violation and damages are proved, Mexican courts usually do not impose exemplary penalties or remedies as happens in other jurisdictions.

Given the difficulty of evidencing before the judicial authority a causal relationship between the conduct performed – ie, the breach of a non-compete obligation, and the damages suffered by the affected party, it is usual to include in non-compete agreements stipulations obliging the breaching party to pay a certain amount in the event of breach – ie, pre-quantified damages.

The enforceability of this type of non-compete obligation is usually approached from two perspectives.

- Constitutional, since such obligations have been considered a violation of the right to freedom of work: The Mexican Constitution states that no person may be prevented from performing their choice of work, provided that it is lawful, except by means of a judicial resolution, and that any agreement by virtue of which an individual temporarily or permanently waives the right to pursue a certain profession, industry or trade may not be allowed. Therefore, it will be important to consider certain requirements and characteristics when drafting the non-compete obligations that employers may require, so that they do not constitute a waiver of the right to perform, throughout the national territory, any given profession, industry, work or trade.
- Economic competition, since the obligation not to compete may be considered a monopolistic practice: Regarding this aspect, COFECE, the Mexican antitrust authority, has ruled that non-competition obligations will be valid when they are duly limited as to time, territory, subject matter and persons.

2.2 Non-solicits

Non-solicitation clauses are not provided for in Mexican law; however, they can be legally agreed between the parties in employment agreements or in separate non-solicitation agreements.

The ordinary consequence of breaching a non-solicitation clause is the obligation to compensate or indemnify the affected party with the amount of the damages caused to it, with the amount to be determined by the relevant judicial authority. Regarding non-solicitation obligations, it is important to keep in mind that in Mexico the protection of damages might be limited, contrary to what happens in other countries. In Mexico, it might be difficult to prove the liability derived from a non-solicitation violation and the specific

damages derived from this violation. Even when the violation and damages are proved, Mexican courts usually do not impose exemplary penalties or remedies as happens in other jurisdictions.

Given the difficulty of evidencing before the judicial authority a causal relationship between the conduct performed – ie, the breach of a non-solicitation obligation, and the damages suffered by the affected party, it is common to include in the non-solicitation agreement stipulations obliging the breaching party to pay a certain amount in the event of breach – ie, pre-quantified damages.

The enforceability of this type of non-solicitation obligation, as well as non-compete obligations, may be challenged for their alleged unconstitutionality, since they may be considered as violating Article 5 of the Mexican Constitution, which states that no person may be prevented from performing their work of choice, provided that it is lawful, and such right may only be banned by judicial resolution, when third parties' rights are infringed, or by government order, issued according to the law when society's rights are infringed – ie, to substitute workers participating in a legally declared strike or if the workers against a strike intend to keep working for the duration of the strike.

3. Data Privacy

3.1 Data Privacy Law and Employment

In Mexico, there are different personal data protection laws whose application depends on the data subject being regulated. The private sector is regulated by the Federal Law for the Protection of Personal Data in Possession of Private Parties (*Ley Federal de Protección de Datos Personales en Posesión de Particulares*).

By virtue of the above-mentioned law, those persons processing data have the obligation to protect the personal data they process, to respect the principles set forth in the law, namely legality, consent, information, quality, purpose, loyalty and proportionality, and to respect the right of the individuals whose data is being processed to informational self-determination, as well as to guarantee the exercise of their rights of access, rectification, cancellation and opposition to the processing of their personal data.

It is important to point out that in addition to the obligations towards employees with respect to the protection of their personal data arising from the above-mentioned law, the employer also has the obligation to protect personal data with respect to other data subjects, such as prospective employees, clients, suppliers, partners, shareholders, etc.

4. Foreign Workers

4.1 Limitations on Foreign Workers

In terms of Mexican labour law, except for directors, administrators and general managers:

- in any enterprise or establishment, the employer must employ at least 90% Mexican employees;
- in the categories of technicians and professionals, the employees must all be Mexicans, unless there are not enough Mexicans who possess a given specialism, in which case the employer may temporarily employ foreign employees, in a proportion not exceeding 10% of those engaged in that specialism; in any case, the employer and the foreign

employees will have the joint obligation to train Mexican employees in the relevant specialism; and
- medical practitioners who work in the service of an enterprise must be Mexican.

4.2 Registration Requirements for Foreign Workers

In Mexico, in order to hire foreign employees, an employer must obtain, before the office of the National Immigration Institute (*Instituto Nacional de Migración*) where the employer's establishment is located, an employer's registration certificate (*constancia de inscripción del empleador*) that allows individuals and legal entities to issue job offers to foreign individuals.

In addition to the foregoing, a foreign individual rendering services to a Mexican employer must hold an immigration document evidencing their legal right to stay in the country. The procedure for obtaining such a document is usually carried out by the employer with the intervention of the foreign individual.

The status under which foreign individuals usually stay in Mexico is that of temporary resident (*residente temporal*), which authorises them to stay in the country for a period no longer than four years. Temporary residents may obtain a work permit, subject to an offer of employment, which will give them the right to work in the country and enter and leave the national territory as many times as they wish, as well as the right to preserve the family unit – ie, a foreign individual may enter with, or eventually request access for, their parents, spouse, concubine, children or spouse's or concubine's children, provided they are minors, unmarried, or under their tutelage.

5. New Work

5.1 Mobile Work

On 8 June 2023, the Official Mexican Standard NOM-037-STPS-2023, Teleworking Occupational Safety and Health Conditions (hereinafter the "NOM-037"), was published in the Mexican Official Gazette of the Federation. The purpose of NOM-037 is to establish safety and health conditions in the places where teleworkers perform their duties to prevent accidents, illnesses, or psychosocial risk factors.

Companies will have the following obligations when it comes to teleworking:

- They must maintain an updated list of employees working in this modality, including relevant details such as their name, gender, marital status, job activities, percentage of time dedicated to telecommuting, contact information and agreed-upon work locations.
- Work locations must now be fixed and registered in the Collective Bargaining Agreement or Internal Work Regulations.
- Employers are responsible for ensuring safe and healthy working conditions, including electrical installations, lighting and ventilation, both at the workplace and in remote locations.
- The validation and assessment of potential risks should be carried out by the employer or professionals appointed in the respective field.
- They must develop a comprehensive Telecommuting Policy, which must be implemented, maintained and effectively communicated to employees.
- Employers must address work accident reports from remote employees or their family members, adhering to protocols established by social security institutions.

Employees under NOM-037 are required to allow physical verification or use a checklist to ensure safety and health conditions at their workplace. This includes providing evidence like photos or videos to demonstrate suitable workspaces. Employees who take part in remote work as per the previously discussed criteria will have the same individual and collective rights as in-person employees, meaning they can unionise, engage in collective bargaining and stay connected with colleagues. Employees also have the right to disconnect, complying with designated working hours and avoid work-related activities during vacations or leaves. Furthermore, employers must ascertain that employees have proper lighting, ventilation and necessary tools/furniture for their work activities. Special protection is granted to those employees experiencing domestic violence and to breastfeeding women.

NOM-037 became effective on 6 December 2023 and applies nationwide. The employer will have the option to hire the services of an accredited and approved inspection unit, in accordance with the Law of Quality Infrastructure (*Ley de Infraestructura de la Calidad y su Reglamento*) and its regulation, to assess compliance with NOM-037, in which case a report containing information about the verified remote workplace would be issued. This report will be valid for two years, as long as the conditions existing upon issuance of the report remain unchanged. Non-compliance with safety regulations may result in fines ranging from 250 to 5,000 times the Unit of Measurement and Update (MXN27,000 to MXN5450,000).

5.2 Sabbaticals

Mexican labour regulations do not address sabbatical leaves. Nevertheless, employers and employees may negotiate and establish sabbatical leave arrangements through employment contracts, collective bargaining agreements or internal policies. If employer and employee reach an agreement regarding a sabbatical leave, the details and terms of the sabbatical, such as duration, salary, benefits and job security upon return, should be outlined clearly in the employment contract or a separate agreement.

Alternatively, an unpaid leave could be arranged between employer and employee either through a separate agreement or outlined in company policy, though this option may have certain implications for employee benefits and rights. In any case, any terms and conditions should be outlined and agreed upon by employee and employer.

5.3 Other New Manifestations

Currently, various emerging concepts, such as desk sharing, flexible working hours, remote work, four-day weeks, digital nomadism and sabbaticals are encompassed under the term “new work”. This concept aims to redefine the traditional notion of a workplace in response to technological advancements. Companies often adopt these practices to enhance their appeal and attract talented individuals. However, these new work arrangements require structural changes that deviate from conventional workplace norms and hierarchies.

Although Mexican regulations and legislators have not specifically addressed or regulated these “new work” tools yet, companies and entrepreneurs in Mexico are actively embracing these innovative approaches to work, recognising the potential benefits they offer in terms of employee satisfaction, productivity and overall business performance. Consequently, any benefits associated with “new work” in practice have so far been addressed through employ-

ment contracts that outline the terms and conditions of these arrangements, and/or through the establishment of internal policies to govern their implementation within companies.

6. Collective Relations

6.1 Unions

Labour unions in Mexico are understood as associations of employees that are formed for the study, improvement and defence of their interests. Both employers and employees have the right, without any distinction and without prior authorisation, to form the organisations they deem convenient, as well as to join them, with the only condition of observing their corresponding by-laws.

Both types of unions enjoy protection under the law against any act of interference between them relating to their formation, operation or administration. Any action or measure to promote the formation of employees' organisations with the purpose of placing them under the employer's control is considered an act of interference.

In 2018, Mexico ratified Convention C098 (Right to Organise and Collective Bargaining Convention) of the International Labour Organization concerning the application of the principles of the right to organise and collective bargaining. Derived from the foregoing, an important constitutional reform on labour matters entered into force in Mexico, which, in addition to setting forth new bases for labour justice, amended several provisions on labour union matters, including aspects relating to freedom of association and effective representation, particularly regarding the introduction of a prohibition of employees' unions created or controlled by employers to be used for their own protection, which used to be a common practice. This constitutional reform led to additional secondary reforms of labour provisions in 2019.

Consequently, these reforms necessitated the modification or revision of traditional union structures in Mexico to ensure the protection of employees' freedom of association. The underlying objective of these reforms is to foster a much more active role for employees in union affairs.

6.2 Employee Representative Bodies

The role of employees' unions is to study, defend and improve the interests of their members. Their incorporation must be made before the Federal Centre for Labour Conciliation and Registration (*Centro Federal de Conciliación y Registro Laboral*, or CFCRL). Unions, as well as collective bargaining agreements and the agreements and regulations entered into between employers and employees, must be registered before the CFCRL. A union registers itself by submitting several documents, including a copy of the minutes of the incorporation meeting, a list containing the names, telephone numbers, CURP numbers and addresses of its members, an authorised copy of the by-laws and an authorised copy of the minutes of the meeting in which the board of directors was appointed.

Local and federal conciliation centres are authorised to carry out labour conciliations between employers and unions. Previously, this used to be the competence of the local and federal conciliation and arbitration boards.

6.3 Collective Bargaining Agreements

Pursuant to the Federal Labour Law, a collective bargaining agreement is an agreement entered into between one or more labour unions and one or more employers, or one or more employers' unions, to set forth the conditions under which

work is to be performed at one or more companies or establishments.

If an employer refuses to sign the agreement, its employees may exercise their right to strike.

In order for a labour union to enter into a collective bargaining agreement with an employer, the labour union must first obtain "Evidence of Representation" (*Constancia de Representatividad*), which is issued by the competent labour authority.

Once the above is complied with, the collective bargaining agreement must be approved by the employees.

Once the employees approve the clauses of the collective bargaining agreement, it must be executed in writing, under penalty of nullity, in three counterparts. One copy must be delivered to each of the parties and the other copy must be deposited with the CFCRL.

Collective bargaining agreements are effective from the date and time of presentation of the document, unless the parties have agreed on a different date.

It should be noted that for the registration of an initial collective bargaining agreement or a revision agreement, the CFCRL verifies that its content has been approved through a personal, free and secret vote by the majority of the employees the agreement refers to. In this sense, one of the relevant effects of the reforms of 2019 referred to in **6.1 Unions** is that employees are authorised to join a union, federation or confederation and to be consulted through personal, free, secret and direct voting for, among other things, the union to sign initial collective bargaining agreements, and to approve amendments and revisions to those collective bargaining agreements, as well as to legitimise existing collective bargaining agreements. It is important to note that the legitimisation of collective bargaining agreements is a commitment originally acquired under the US-Canada-Mexico Agreement (USMCA). On 1 May 2023, the deadline to legitimise collective bargaining agreements under the previously discussed relation elapsed. Consequently, any contracts that were not submitted by unions for the legitimisation procedure have been terminated in accordance with Mexican regulation. According to statements made by the Secretariat of Labour and Social Welfare (STPS), only 30,526 collective bargaining agreements were legitimised, resulting in the disappearance of approximately 108,000 contracts which were previously recognised as currently valid collective bargaining agreements. The CFCRL has created a website whereby a comprehensive list of the legitimised collective bargaining agreements in Mexico is available for review.

While the legitimisation period has elapsed, workers still retain the right to enter into collective bargaining agreements; however, they must now follow the process outlined per the new labour model, negotiating a new agreement which must be approved through the workers' personal, free, direct, and secret voting.

7. Termination

7.1 Grounds for Termination

Grounds for Termination

In terms of the Federal Labour Law, there are three main categories of causes of termination of labour relationships.

- The grounds for termination provided by law (Article 53 of the Federal Labour Law), name-

ly: (i) mutual consent of the parties; (ii) death of the employee; (iii) termination of the work or expiration of the term or investment of the capital; and (iv) physical or mental incapacity or manifest inability of the employee, which makes it impossible to perform the work.
- Causes that, pursuant to Article 47 of the Federal Labour Law, entitle the employer to dismiss the employee without any liability (without paying in the employee's favour the corresponding severance): The employer who dismisses an employee must give written notice clearly stating the conduct or conducts that motivated the termination and the date or dates on which they were committed, delivering the notice personally to the employee at the moment of dismissal or, alternatively, communicating it to the competent court, in which case the employer must provide the employee's last registered address in order to allow the authority to notify the employee. If, in the corresponding legal procedure, the employer does not prove the causes of the termination, the employee will be entitled to request their reinstatement in the job they were performing, or the corresponding compensation, and to be paid their overdue wages, calculated from the date of the dismissal for a maximum period of 12 months and, if applicable, the corresponding interest.
- Causes that, pursuant to Article 51 of the Federal Labour Law, entitle the employee to terminate the labour relationship without any liability: The employee has 30 days following the date on which any of the causes mentioned in Article 51 occurs, to terminate the labour relationship, and they shall be entitled to indemnification by the employer.

Collective Redundancies

With respect to the collective termination of employment relationships, Article 434 of the Federal Labour Law provides that the causes for termination of these employment relationships are causes of force majeure or acts of God not attributable to the employer, or the employer's physical or mental incapacity or death, which produce as a necessary, immediate and direct consequence, the suspension of works; the manifest unprofitability of the operation; the exhaustion of the material object of an extractive industry; the legally declared insolvency or bankruptcy of the employer, if as a result the definitive closure of the company or the definitive reduction of its work is decided by resolution; and some additional specific events for certain industries.

In most of the above-mentioned cases, notice must be given to the labour authority, or authorisation must be obtained from the labour authority, to proceed with the termination.

7.2 Notice Periods

As discussed in **7.1 Grounds for Termination**, an employer that dismisses an employee based on any of the grounds for termination mentioned in Article 47 of the Federal Labour Law must give written notice clearly stating the conduct(s) that motivated the termination and the date(s) on which they were committed, delivering the notice personally to the employee at the moment of dismissal or, alternatively, communicating it to the competent court, within five working days, in which case the employer must provide the employee's last registered address in order to allow the authority to notify the employee.

In case of occurrence of any of the causes mentioned in Article 51 of the Federal Labour Law, the employee may terminate the labour relationship within 30 days following the date on which any of those causes occurs.

Severance Payment

Those employees who voluntarily terminate their employment relationship or who are terminated with justified grounds for dismissal, are entitled only to a settlement payment (*finiquito*), comprising the proportional amounts accrued for the work rendered in favour of the employer (eg, salary up to the date of termination, vacations not taken, vacation bonus, proportional Christmas bonus, etc), without being entitled to any severance payment.

In all other cases, employees will be entitled to a severance payment consisting of the constitutional indemnity which is integrated with the amount of three months of integrated salary (ie, comprising payments made in cash for daily work, gratuities, bonuses, room and board, commissions, benefits in kind and any other amount or benefit given to employees for their work), as well as a seniority premium consisting of 12 days of salary for each year of service rendered. Certain maximum limits provided by law must be considered for the calculation of the seniority premium.

Finally, it should be noted that, in the event of an unjustified dismissal of an employee, they will be entitled to demand before the local or federal labour authority reinstatement in their job under the same terms and conditions under which they had been working, as well as the payment of wages due for a maximum period of 12 months and, if applicable, corresponding interest thereon. Failure to comply or the impossibility of complying with the above will also result in the payment of additional severance.

It is recommended, in any case, to obtain external professional advice in order to determine whether any of the causes for termination set forth in the law have occurred, and to determine how they may be proven in an eventual labour proceeding initiated by the employee, as well as for the calculation of the amounts to be paid in their favour due to the termination and, finally, to determine the manner in which it is advisable to document the termination of the labour relationship.

7.3 Dismissal for (Serious) Cause

In Mexico, there are no special or different procedures for summary dismissals or dismissals for serious cause. All types of terminations are processed in terms of the provisions set out in **7.1 Grounds for Termination** and **7.2 Notice Periods**.

7.4 Termination Agreements

In terms of the Federal Labour Law, one of the grounds for termination provided by law (Article 53) is the mutual consent of the parties; therefore, termination agreements signed by both employer and employee are permitted and a common practice.

Although there are no specific formalities or requirements with which these agreements must comply, taking an approach arising from a systematic interpretation of several articles of the Federal Labour Law, the common practice is that such agreements usually include mutual release of liability for both parties. In addition, such agreements must be executed in writing and ratified before the relevant conciliation and arbitration board.

7.5 Protected Categories of Employee

In Mexico, there are no specific categories of employees who cannot be dismissed.

8. Disputes

8.1 Wrongful Dismissal

In the event that the employer does not prove the existence of any of the grounds for justified termination of the labour relationship, the employee will be entitled to demand before the competent labour authority, the reinstatement in their job (or, as the case may be, the payment of the corresponding severance), the payment of wages due for up to a maximum period of 12 months, plus the corresponding interest thereon, if applicable, the payment of seniority premium, vacations not enjoyed by the employee, vacation bonus, Christmas bonus and the constitutional indemnity.

8.2 Anti-discrimination

In terms of the provisions of the Federal Labour Law, as well as other Mexican laws on discrimination, employers may not establish any conditions that may result in discrimination among employees based on ethnic or national origin, gender, age, disability, social status, health conditions, religion, immigration status, opinions, sexual preferences or marital status, or any other condition that violates human dignity. Therefore, neither employers nor their representatives may refuse to hire employees on the basis of the above-mentioned grounds for discrimination.

In addition, other laws contain other types of obligations to prevent and eradicate discrimination in the workplace, for example, the Federal Law to Prevent and Eliminate Discrimination (*Ley Federal Para Prevenir y Eliminar La Discriminación*), which states that it is considered discriminatory to establish differences in remuneration, benefits or working conditions for equivalent jobs.

In case of violation of the above, the corresponding authority may impose a fine ranging from 250 to 5,000 times the Unit of Measurement and Update – ie, between approximately MXN27,000 and MXN545,000.

It should be noted that, to impose the corresponding sanctions, the authority must consider several issues, such as the seriousness of the discriminatory conduct or social practice; the concurrence of two or more causes or forms of discrimination; recidivism – ie, when the same person commits the same, a similar or a new violation of the right to non-discrimination, whether to the detriment of the same or a different aggrieved party; the effect produced by the discriminatory conduct or social practice, etc.

8.3 Digitalisation

Despite much technological advance in the workplace, no regulation in Mexico has aided in the digitalisation of employment disputes: court disputes remain in-person proceedings.

9. Dispute Resolution

9.1 Litigation

Mexico has had specialised labour courts since 2017, when a constitutional reform was published that ordered the creation of labour courts at the federal and state levels. This reform was complemented in 2019 by a reform to the Federal Labour Law that set forth the parameters for the creation of labour courts, and initially granted a maximum term of three years in local matters and four years in federal matters for their creation and entry into operation.

Prior to these reforms, labour disputes were tried before the federal or local conciliation and arbitration boards which, although they exercised

judicial functions in labour matters, belonged structurally to the executive branch.

Regarding class actions in labour matters, in Mexico the concept of class actions is exclusive to civil matters to protect conflicts in matters of consumer relations of goods or services, public or private, and the environment. Notwithstanding the foregoing, the Federal Labour Law contemplates the existence of collective labour disputes, in which the legitimised entity is usually the union of employees holding collective bargaining agreements and/or the majority of the employees of a company or establishment.

9.2 Alternative Dispute Resolution

In Mexico, employees who wish to start a labour dispute must, before going to the labour courts, attend a conciliation procedure. The conciliation procedure will be carried out by federal or local conciliation centres.

If a conciliation agreement is executed, it will have the status of res judicata and the quality of a title to start executive actions through the mechanisms for the enforcement of judgments provided for in the Federal Labour Law.

Additionally, since the USMCA was ratified by Mexico in 2019, the Rapid Response Labor Mechanism, designed to prioritise labour obligations and reduce interference in workers' union activities within specific sectors, has been highly active. To date, the United States has initiated 26 cases against Mexico, including eight in 2024.

The Rapid Response Labor Mechanism allows, in case of non-compliance with certain labour obligations and/or denial of rights established in Chapter 23 of the USMCA, such as rights of freedom of association and collective bargaining within a specific company, for a USMCA party to initiate a dispute resolution procedure against another party in a specific list of sectors. This mechanism applies only between Mexico and the USA, and Mexico and Canada. The dispute begins with a request to a USMCA party, followed by a series of interactions between the parties. If the issue is not resolved, it is brought before a labour panel. If non-compliance continues, a party may adopt measures such as increased tariffs, monetary sanctions, and even potential restrictions on imports from the company in question. Thus far, the majority of cases have been solved prior to the labour panel stage of proceedings, with Mina San Martin and Atento Servicios S.A. de C.V. being the exceptions.

9.3 Costs

Although Article 944 of the Federal Labour Law sets forth that "[t]he expenses incurred in the enforcement of the award shall be borne by the party that fails to comply", the Mexican federal courts have ruled that this only refers to the costs of enforcement itself and does not extend to the attorney's fees incurred during the lawsuit.

Trends and Developments

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Sánchez Devanny is a Mexican legal consulting firm with international expertise, specialised in providing holistic and innovative solutions to resolve its clients' needs, understanding their industries from the inside out. The firm is committed to practicing law with social responsibility, upholding the highest standards of transparency, ethics, and inclusion. The firm has lasting relationships with its clients that go beyond a simple contract for temporary services. The team combines experience and creativity to create effective solutions, believing that a solid foundation in the fundamentals is the springboard for successful innovation. Sánchez Devanny has offices in three of Mexico's key industrial hubs, to serve businesses all over the country: Mexico City, the capital city and home to the most important national and international corporations; Monterrey, a major metropolis, dynamic, growing, and economically active; and the rapidly developing Querétaro, located in the centre of the country. Its international alliances ensure the firm remains accessible and responsive to its clients' needs, no matter where they are located.

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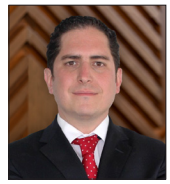
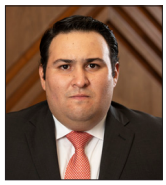
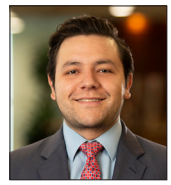


Fermín Lecumberri is a lawyer at Sánchez Devanny. He graduated from the Universidad Iberoamericana, and has more than 15 years of experience in labour and social security litigation and consulting. He has a Master's degree in Human Resources and Labour Relations, EAE Business School, Madrid. He is a senior associate in the firm's Mexico City and Queretaro offices. From 2019 to 2021, he was the head lecturer of Individual Labour Law at Universidad Anahuac del Norte. Fermin advises local and foreign clients in complex labour and employment matters, including union negotiations, planning for new and existing investments in efficient labour structures, executive transfers and terminations, equity compensation programmes, and flexible benefit plans. He is particularly experienced in complex union negotiation and litigation of collective labour matters, as well as labour matters related to mergers, acquisitions, restructurings and privatisations and has developed successful labour relations strategies.



Sebastián Rosales joined Sánchez Devanny in 2015 as part of the labour, social security and immigration practice group. Before joining the firm, he worked as a law clerk at a law firm specialising in labour law. He also worked as an associate in the labour practice area in a different law firm, where he co-ordinated the issues of Querétaro's State Commission of Roads, as well as individual and collective conflicts for the firm's clients.



Hugo Gutierrez is part of the labour, social security and immigration practice group at Sánchez Devanny. With over three years of experience, Hugo has developed the knowledge and skills to provide reliable and trustworthy services, always striving to be proactive and solution-oriented. His areas of expertise include employment terminations, individual employment consulting, and services related to Labour Secretary Inspections, particularly those concerning the Productivity, Training and Skill Enhancement Joint Commissions.

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Contributed by: Alfredo Kupfer, Fermín Lecumberri, Sebastián Rosales and Hugo Gutierrez, **Sánchez Devanny**

Mexico's labour market is undergoing a significant transformation, with 2024 marking another year of legislative changes that challenge both existing employers and new entrants seeking to capitalise on the "nearshoring" trend. As a key part of the global supply chain shifts closer to the world's largest consumer market, Mexico is emerging as a prime location for business expansion and new ventures.

The Mexican Federal Labour Law (FLL) has been amended once again in 2024, and this trend is expected to persist in the coming years. The United States has continued to file claims under the Rapid Response Labor Mechanism, aiming to raise awareness and enforce the principles of freedom of association and collective bargaining enshrined in the United States – Mexico – Canada Agreement (USMCA).

Mexico is reaffirming the significance of international instruments in advancing employee rights, seeking to ratify additional conventions from the International Labor Organization (ILO). With a strong majority, the ruling political party in the Mexican Congress is currently considering measures to reduce weekly working hours, introduce headcount quotas to promote the inclusion of older workers and those with disabilities, and increase Christmas bonuses, vacation premium percentages, and other benefits.

In its pursuit to compete with other markets, meet the expectations of its USMCA partners, and evolve into a modern and progressive nation, Mexico is placing considerable pressure on businesses to adapt to these changes, potentially increasing their operational costs.

Initiative of Amendments to the Constitution and FLL

Following the federal elections held on 2 June 2024 in Mexico, the newly elected Congress, dominated by the ruling political party, is poised to continue promoting initiatives to amend the Constitution and the FLL. These proposed changes include:

Reducing the weekly hours of work

An amendment has been submitted to the Lower Chamber of the Mexican Congress to modify the current weekly work schedule from six days of work and one day of rest to five days of work and two days of rest. Given the constitutional maximum of eight hours per day, this change would automatically reduce the weekly work schedule from 48 to 40 hours.

Increase the days of Christmas bonus

The FLL currently mandates a minimum Christmas bonus equivalent to 15 days of an employee's daily base salary, payable by December 20th each year. An amendment under consideration in Congress proposes increasing this to 30 days.

The Christmas bonus is factored into an employee's total compensation that is reported to the Mexican Social Security Institute (IMSS); this salary forms the basis for calculating social security, housing, and retirement contributions payable by employers. Consequently, an increase in the Christmas bonus would lead to higher payroll costs for employers. Additionally, a higher Christmas bonus would increase severance pay in cases of termination without cause. Furthermore, each state in Mexico levies a payroll tax based on an employer's total payroll cost, further adding to labour expenses.

Increase percentage of vacation premium

In addition to the right to take vacations, the FLL currently entitles employees to a vacation premium of at least 25% of the salaries corresponding to their annual vacation period. An amendment is currently being proposed to increase this premium from 25% to 50%, which would naturally lead to a rise in the cost and payout of the vacation premium.

Similar to the Christmas bonus, the vacation premium is also considered part of an employee's total compensation reported to the IMSS. This means that an increase in the vacation premium would also increase the severance pay owed to employees in cases of termination without cause.

Modification of back pay salaries

Currently, under the FLL, back pay is a crucial consideration when terminating an employee. It accrues for the first year of litigation, based on the employee's daily integrated salary. From the second year onwards, a monthly interest of 2% is calculated over a 15-month year, capitalised at the time of payment.

However, there is a proposed amendment in Congress to modify how back pay is calculated during labour trials. If the judge rules that the termination was without cause according to the FLL, the back pay would be paid for the entire duration of the trial.

Initiative of amendment for elderly workers

The Mexican Senate has voted and approved an initiative to reform Articles 132 and 133 of the FLL. This initiative aims to mandate that all employers with a workforce exceeding 20 employees must have at least 5% of their workforce composed of elderly employees. Furthermore, employers will be required to implement actions and programmes to promote the employment of elderly individuals, taking into account their abilities, professions, occupations, and any mental or health disabilities.

Initiative of amendment for disability employees

On 9 October 2019, the Mexican Senate approved an initiative to reform the FLL to include provisions that protect and guarantee the employment of people with health and mental disabilities. This reform specifically involves the addition of a new title (Title Fifth Ter) to the law to address this important issue.

The new title to be included in the FLL focuses on the employment of individuals with disabilities, aiming to ensure an inclusive and equitable work environment. Labour authorities, including the Ministry of Labour and employers, are tasked with promoting the hiring, retention, training, and advancement of people with disabilities without discrimination and with equal opportunities. To achieve this, they must implement measures such as establishing criteria and procedures to favour inclusion, ensuring physical and technological accessibility in the workplace, providing job training under equitable conditions, designing inclusive recruitment and selection procedures, and promoting awareness among all involved in the process.

The law also stipulates that at least 5% of the workforce in work centres must be composed of people with disabilities. Additionally, any form of discrimination based on disability is prohibited throughout the entire employment lifecycle, from selection and hiring to remuneration, promotion, and dismissal.

Minimum Wages in Mexico

Mexico is currently experiencing a period of significant increases in both minimum and contractual salaries. President Andres Manuel Lopez Obrador's policy to restore the real value of wages has led to a 113% increase in minimum wages during his presidency. This has positioned Mexico as the country with the highest rate of salary increases among the major G20 economies. While these increases have helped lift 4.1 million people out of poverty, they have also put pressure on salaries paid by the private sector.

Employees across various industrial sectors and economic activities have also seen salary reviews not witnessed in decades. Unions have capitalised on this trend and continue to negotiate for wage increases ranging from 7% to 15%, even as the country's inflation rate remains below 5%. This momentum is likely to continue under the newly elected President Claudia Sheimbaum Pardo, who has pledged that during her term, the minimum wage in Mexico will be sufficient to purchase 2.5 times the basic household necessities as defined by the federal government. This ambitious goal will necessitate an average annual increase of 15% over the next five years.

While the National Commission for Minimum Wages is the official body that determines minimum wage increases, it is widely understood that the Tax Ministry proposes the final figure, securing the necessary votes from employer and worker representatives. Companies and businesses should anticipate continued pressure from workers and unions for higher wages, presenting a challenge in maintaining competitiveness and productivity.

Rapid Response Labor Mechanism

The arbitration process for collective labour matters under the USMCA continues to be actively utilised by workers, unions, and labour organisations in Mexico. This innovative dispute resolution system, addressing the denial of freedom of association rights and effective collective bargaining, has been invoked 24 times as of the writing of this document. An additional claim is anticipated from workers at the Italian tire manufacturer Pirelli, alleging the imposition of a mandatory collective bargaining agreement instead of a less favourable one negotiated by the current union and the company.

The trend of claims from the United States Trade Representative against Mexico persists in 2024, seeking to enforce the obligations outlined in Chapter 23 and Annex 23-A of the free trade agreement. At present, the following cases await resolution:

- Case No 19: Atento Servicio, a call centre located in the State of Hidalgo was charged with alleged denial of collective rights, for which the Mexican government concluded there was appropriate remediation. The United States government, unsatisfied with this answer, insisted on the claim and called for an arbitration panel, whose final decision is pending.
- Case No 20: Agro-industrial company Fresh Food, located in the State of Michoacan, was sued by an independent union for obstructing its activities to represent workers, influencing the election of union delegates and directly paying union dues instead of collecting them from affiliated workers. Both the Mexican and the United States governments are working on an agreed solution to maintain the company's neutrality and respect for its workers' freedom of association rights.
- Case No 23: German auto-manufacturer Volkswagen, operating the largest automobile plant in the country, was accused of violat-

ing the workers' union activities and unfairly terminating members of the union's executive committee. These actions are seen as retaliation for the most recent negotiation to renew the collective bargaining agreement covering the Puebla plant with over 8,000 workers. Mexico and the United States continue working on a possible remediation plan that may avoid an arbitration panel.
- Case 24: Ammunition manufacturer Industrias Tecnos in the State of Morelos was charged with interfering in lawful union activities, supposedly discouraging workers from affiliating with a competing union contesting the existing collective bargaining agreement, and dismissing workers participating in campaigns for affiliation. The Mexican government has recently admitted the claim and will initiate fact-finding and evidence gathering to substantiate the allegations.

Businesses in Mexico will continue facing claims under the Rapid Response Labor Mechanism of the USMCA, as a potential risk, unless there is a strict compliance programme to observe and promote respect of workers' collective labour rights.

Nearshoring in Mexico

Given the geographical proximity of Mexico to the USA, and trade agreements such as the USMCA, many companies are deciding to move their operations to Mexico. This nearshoring trend allows companies to benefit from lower operational costs and access to a less expensive yet skilled workforce.

However, establishing manufacturing operations in Mexico necessitates setting up legal entities that must comply with all aspects of Mexican labour legislation. Additionally, given the current union landscape in Mexico, many businesses opting to relocate will need to develop a comprehensive collective bargaining strategy. Beyond labour considerations, it is important to recognise that there are other crucial aspects to address, including customs, tax, corporate, environmental, and real estate regulations.

Adoption of Convention 190 of the International Labor Organization on Zero Tolerance of Violence and Harassment at Work

On 15 March 2023, the Mexican Congress ratified Convention 190 of the ILO for the Elimination of Violence and Harassment in the World of Work, published in the Official Gazette of the Federation on 19 June 2023. The Convention comprises twenty articles designed to prevent violence and harassment through guidance, awareness-raising, and the implementation of protocols and complaint mechanisms. It emphasises the profound impact such conduct has on workers and their environment. The Convention mandates adequate investigation and the application of sanctions in all cases of workplace violence and harassment, including those based on gender.

The Convention is not limited to situations that occur in the workplace, but also applies to different places and situations connected with the workplace.

Human Trafficking Law

On 7 June 2024, a reform to the General Law to Prevent, Punish, and Eradicate Crimes of Human Trafficking and to Protect and Assist Victims of These Crimes ("Human Trafficking Law") was published in the Official Gazette of the Federation.

A distinction between the constitutional origin of the Human Trafficking Law and that of the FLL

is relevant because the Human Trafficking Law reform bill amends Article 21, which imposes a penalty of three to ten years of imprisonment and fines from 5,000 to 50,000 days' wages on anyone who performs acts of labour exploitation. Under the Human Trafficking Law, labour exploitation encompasses:

- Unjustifiable benefit: The perpetrator obtains an unjustifiable benefit, whether economic or otherwise, directly or indirectly from the exploitation.
- Illicit benefit: The benefit obtained is illicit or unlawful.
- Exploitation of another's labour: The exploitation involves the labour or work of another person.
- Violation of dignity: The exploitation utilises practices that violate the person's dignity, including:
  (a) Dangerous or unhealthy conditions: The individual is subjected to dangerous or unhealthy working conditions without the necessary protections mandated by labour legislation or industry standards.
  (b) Disproportionate work and payment: A clear disproportion exists between the work performed and the payment received.
  (c) Salary below legal minimum: The individual is paid a salary below the legally established minimum wage.
  (d) Excessive workdays: The individual is forced to work for longer hours than those stipulated by the Human Trafficking Law.

The distinction between the FLL and the Human Trafficking Law is crucial. The FLL regulates labour relationships and sets limits on work hours and related penalties. In contrast, the Human Trafficking Law addresses labour exploitation, focusing on the unjustifiable and illicit benefits obtained through the exploitation of another's labour in ways that violate human dignity.

The reform aims to strengthen the legal framework against labour exploitation, but careful attention will be required to observe how unions and authorities may apply this reform, particularly against employers who require employees to work excessive overtime.

REPSE Renewal

As a result of the reform of the FLL, published in the Official Gazette of the Federation on 23 April 2021, personnel outsourcing has been prohibited in Mexico, with the exception of specialised services that are not part of the core business activities of the recipient company.

In this sense, and in order for individuals or legal entities to be able to provide specialised services, they must be registered with the Ministry of Labour (STPS) in the Registry of Specialised Service Providers or Specialised Works (REPSE).

For this purpose, the STPS created an online platform for obtaining and renewing REPSE registrations, which has been operational since 25 May 2021.

REPSE registrations must be renewed every three years, and the renewal process can be initiated three months before the expiration of the initial registration. Failure to renew within the stipulated timeframe will result in the cancellation of the registration. This can trigger potential labour, social security, and tax liabilities for the recipient of the services. Moreover, a cancelled provider is no longer permitted to offer the specialised service.

NETHERLANDS

Law and Practice

Contributed by:
Christiaan Oberman, Nadia Adnani, Lydia Milders and Manon Lucassen
Palthe Oberman

Contents

Palthe Oberman is a leading boutique law firm in the Netherlands focusing exclusively on labour and employment law. The firm has steadily grown since its establishment in 2001. The partners and associates all have many years of (international) experience and are able to provide high-level counsel on all employment law matters. Palthe Oberman is a member and the Dutch representative of L&E Global – an international integrated alliance of premier labour and employment law boutiques (www.leglobal.org). This membership allows Palthe Oberman to share experiences and knowledge with employment law specialists across borders.

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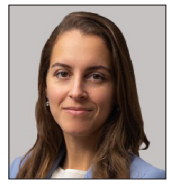
Christiaan Oberman has been affiliated with Palthe Oberman as a founding partner since the firm's inception and has over 25 years of all-round experience in employment law. He is involved in advising national and international companies (including several listed companies and (semi) governmental bodies), executive and supervisory boards, and in guiding boards of directors and HR departments through reorganisations. He represents directors and other officers under the articles of association. Christiaan is a board member, on behalf of the Netherlands, of the European Employment Lawyers Association (EELA). He also publishes regularly on employment law topics and gives lectures and courses.



Nadia Adnani has been affiliated with Palthe Oberman since 2011 and, as a lawyer, since 2014. She has studied private law and international and European law. Nadia is involved in all aspects of employment law, with a special focus on reorganisations and the works council. She represents both national and international organisations, as well as (statutory) employees. She advises and litigates on employee co-determination, individual and collective dismissal cases, workplace privacy and employment contracts (non-compete clauses, study cost clauses, etc). Nadia has been elected to the supervisory board of one of the Netherlands' largest labour unions.

Lydia Milders has been affiliated with Palthe Oberman since 2010. She is involved in guiding (international) reorganisations, advising on (individual and collective) dismissals and employee co-determination law, and litigation, including (breach of) confidentiality, non-solicitation and non-compete clauses. She has a special focus on fraud and workplace integrity issues, including theft, breach of non-compete and/or non-disclosure clauses, unlawful competition, and complaint procedures concerning transgressive behaviour in the workplace (including sexual harassment). She collaborates with private investigation agencies, internal integrity departments and forensic IT experts.

Manon Lucassen studied employment law and criminal law. Manon is involved in all aspects of employment law and advises on (individual) dismissals, reorganisations, employment contracts, non-compete and non-solicitation clauses, and (corporate) fraud.

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PALTHE OBERMAN
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1. Employment Terms

1.1 Employee Status

Dutch employment law is very protective of the employee and applies to all employees. Thus, in the Netherlands, there is no distinction between blue- and white-collar workers.

An employment contract is in place when work, salary and authority are present. Whether or not an employment contract exists depends not only on what the parties agree to, but also on how the parties choose to implement that agreement. The courts and the tax authorities will verify whether the three components (work, salary and authority) are present. If these are present, there is an employment contract and all the provisions of employment law will apply (even if the parties explicitly agree that a particular agreement does not qualify as an employment contract, the court and the tax authorities may decide that it does, if work, salary and authority are present).

The rules of employment law apply to all employees and almost all of them are mandatory, so there cannot be deviation. There are, however, a number of rules that an employer can deviate from on the basis of a collective agreement. In addition, some rules are more flexible for employees earning more than three times the minimum wage (for example holiday pay and working hours). In addition, the rules on dismissal are less strict in the case of temporary agency workers.

1.2 Employment Contracts

General Terms and Conditions

In the context of Dutch employment law, an employment contract can be established either orally or in writing. However, according to Article 7:655 of the Dutch Civil Code, the employer has an obligation to inform the employee in writing about various essential terms and conditions. These terms and conditions include the identification of the parties involved, stating their names and residences. Additionally, the contract must specify the location where the work will be carried out. In cases where the work location is not fixed, it should be mentioned that the employee may need to work at different places. Furthermore, the employment contract should clearly state the position offered to the employee, along with a detailed job description to define the scope of responsibilities.

Duration and Conditions

The contract must also indicate the hiring date and, if applicable, the duration and conditions of any probationary period. When the employment contract has a fixed term, the specific period should be specified. To ensure clarity on the termination process, the contract should include the duration of the notice periods to be observed by both parties, or the method used for calculating these periods. It is essential to be aware that there are limits on the number of fixed-term contracts that can be agreed upon between an employer and employee. These contracts will typically convert into indefinite employment contracts if they fall under certain conditions. For instance, if a chain of temporary employment contracts covers a period of 36 months or more, it must be converted into an indefinite contract. Similarly, a chain of three fixed-term employment contracts, with no more than six months in between, will also result in an indefinite contract. These rules apply not only to consecutive contracts within the same company but also to contracts with different employers, where there is reasonable continuity of work performed. It is worth noting that the period of time for these conditions can be shortened if there is a relevant provision in a collective labour agreement.

Leave
When it comes to leave entitlements, the vacation rights and the method of calculating them need to be outlined. Additionally, any other paid leave and the corresponding calculation method should be clearly communicated.

Remuneration
Financial aspects play a crucial role, and the salary details must be specified. This includes specific elements of the remuneration, payment intervals, method of payment, and, if applicable, how the remuneration is tied to the work's results. In such cases, the amount of work expected per day or week and the time involved in performing the work should be explicitly stated. If the employee will be participating in a pension scheme, this must be clearly stated, along with any associated conditions.

Working Hours
The customary number of working hours per day or week should also be mentioned in the contract. For situations involving overtime work, the contract should define the conditions and payment terms. Additionally, if the customary working hours per day or week are unpredictable, the contract should mention the adjustability of working hours, the guaranteed hours, and the payment for work beyond those guaranteed hours. The days and hours on which the employee may be obliged to work should be specified.

Other Aspects
Moreover, if the employment contract is through a temporary employment agency or an on-call contract, these details should be mentioned, as well as the identity of the user undertaking.

In cases where there is a collective labour agreement (CLA) applicable to the employment, the contract should refer to its provisions. Similarly, if the employer offers any training opportunities, this right should be mentioned in the contract.

1.3 Working Hours
The legislation on working hours and working conditions is based on the Working Hours Act (*Arbeidstijdenwet*). The number of working hours depends upon the sector of industry and the kind of labour performed. In general, an employee is only allowed to work a maximum of 12 hours per day, and a maximum of 60 hours per week. Over a period of four weeks, the maximum number of working hours per week is 55. Over a period of 16 weeks, the maximum number of working hours per week is 48 hours. Arrangements on working hours included in an individual employment contract, which are not in conformity with the Working Hours Act, can be declared null and void. The Working Hours Decree (*Arbeidstijdenbesluit*) provides exceptions and additional measures for certain industries (inter alia, the care sector). It is possible to deviate from this by collective labour agreement.

1.4 Compensation
Minimum Wage
In principle, the parties are free to agree to the wages to which an employee is entitled. However, the Act on Minimum Wages and Minimum Holiday Allowances (*Wet minimumloon en minimumvakantiebijslag*) specifies certain minimum wages and minimum holiday allowances, which are normally adjusted each year. A collective labour agreement, if applicable, may also specify salary scales that are binding.

Government Intervention in Compensation
The Standards for the Remuneration of Top Officials in the Public and Semi-public Sector Act (*Wet nomering top inkomens* or WNT) regulates the income and severance payments of top officials in the (semi-)public sector. As of

2015, they are not allowed to earn more than the salary of a minister, which is also known as the "*Balkenendenorm*". The Act also applies to semi-public organisations such as hospitals and schools. For 2024, the maximum salary for top civil servants is set at EUR233,000 gross (including holiday pay, end-of-year bonus, pension contribution and taxed expense allowances).

In addition, bonuses in the financial sector are subject to the rules of the Financial Supervision Act (*Wet financieel toezicht* or WFT). These rules include the following:

- a variable bonus cannot exceed 20% of the fixed salary;
- a severance payment cannot exceed one year's salary; and
- guaranteed bonuses are not permitted.

Bonuses

Employees are not legally entitled to receive a bonus. However, it may be agreed in an employment contract or be mandatory under a collective labour agreement. There are a number of rules which are relevant to the payment of bonuses.

- The General Treatment Act prohibits an employer from discriminating on the basis of race, sex, religion, nationality, sexual orientation or marital status. When an employer gives bonuses, it is therefore important that it does not (even if unintentionally) give bonuses only to a certain group of employees, eg, only men or excluding people of a certain religion.
- In addition, the principle of being a good employer applies when awarding bonuses. This means that the employer should act with care, avoid arbitrariness and comply with the established rules on bonuses. If an employer awards bonuses on a completely discretionary basis, this can lead to unfair situations where employees can claim them (possibly through the courts). If necessary, employers should justify why one employee does not receive a bonus while another employee does.
- Based on case law, there is a doctrine of "acquired rights". If an employer pays a structural bonus without reservation, an employee may be confident that they will receive it again in the future. To prevent this, an employer can state in writing when paying such bonuses that they are discretionary bonuses which are given once and from which no rights can be derived in the future.
- Finally, temporary agency workers are entitled to the same remuneration as employees of the hirer. This includes a year-end bonus.

1.5 Other Employment Terms

Vacation

Pursuant to Article 7:634 of the Dutch Civil Code, employees are entitled to a statutory minimum number of vacation days equivalent to four times the weekly working hours. For example, an employee with a full-time work week of 40 hours is statutorily entitled to a minimum of 20 vacation days per year. Vacation days accrued in addition to the statutory entitlement are referred to as "non-statutory vacation days". This is not mandatory but may be agreed upon in the employment contract or collective labour agreement.

Statutory vacation days will in general lapse if they are not taken within six months after the year in which they were accrued. Non-statutory vacation days will in general lapse five years after the end of the year in which the vacation days were accrued. The expiration of these statutory vacation days only occurs under the condition that the employer has fulfilled the obligation of effort and has informed the employee about the

expiration of the vacation days. This means that the employer must encourage and enable the employee to take the vacation days. Additionally, the employee must be informed that the vacation days will otherwise expire on 1 July. If the employer fails to do this, the vacation days will not expire. On 26 June 2023, the Dutch Supreme Court confirmed that this principle also applies to non-statutory vacation days.

In addition, employees who are ill will be entitled to accrue the same full number of vacation days as employees who are not ill.

In general, the vacation period is fixed according to the employee's wishes. If compelling business reasons will not allow the employee to take vacation during that specific period, the employer should inform the employee (in writing) within two weeks after the employee's request (in writing), in default of which, the period is fixed according to the employee's wishes.

In addition to vacation days, employees are entitled to a holiday allowance, which, in general, equals 8% of the annual salary, in so far as the annual salary does not exceed three times the annual equivalent of the minimum wage.

Maternity and Birth Leave

Female employees have the right to (at least) 16 weeks of maternity leave. During this maternity leave, the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen* or UWV) will pay 100% of the daily wage, not to exceed the maximum daily wage. The maximum daily wage in the Netherlands is currently EUR282.95 gross.

Partners will have five days of birth leave at full pay after the birth of their child (based on full-time employment). Partners can choose to take this leave immediately after the birth of their child, or to spread the leave over the first four weeks after the birth.

Parental Leave

An employee with a child under eight years old in their care, is entitled to parental leave. The employee can take at most 26 times the number of weekly contractual hours as parental leave. The right of parental leave ends when the child becomes eight years old. Parental leave is unpaid leave, and no holiday entitlements can be built up during the hours of parental leave.

An employee is entitled to nine weeks of partly paid parental leave. The parental leave must be taken within the first year of the baby's life and can be split. The employee receives 70% of their salary during this parental leave. The other 17 weeks of the 26 weeks of parental leave remain unpaid. The aforementioned applies to both parents. However, partners of the parent who gave birth, must take the five days of birth leave (based on full-time employment).

During the partly paid parental leave, the employee is entitled to 70% of their salary (increased up to the maximum daily wages). The partly paid parental leave must be taken within one year after the child's birth.

Sickness Leave

Pursuant to Article 7:629 of the Dutch Civil Code, employers are obliged to continue to pay the salaries of sick employees for the first two years of illness. The employer is obliged to pay 70% of the employee's salary. The salary paid by the employer during the first year of sickness cannot be less than the minimum wage. For the second year, the minimum wage limit does not apply. The 70% is not calculated on the amount of salary that exceeds the maximum daily wage.

Most employees in the Netherlands are bound to a diverging clause laid down in either an individual employment contract or a collective labour agreement (such clauses are often more favourable to the employee).

Non-disclosure

A good employee can be expected not to divulge confidential information or to try to damage the employer's image. Even if the employer and employee have not expressly agreed to this, case law has shown that this obligation continues after the employment relationship has ended.

Employments contracts can also contain a secrecy clause, which is designed to prevent employees from disclosing specific, often sensitive, information to third parties, thus allowing the employer to safeguard its confidential business information. There are no legal requirements for a non-disclosure clause. As long as it is clear what the non-disclosure clause applies to (eg, with respect to the work, organisation, customers, activities and market position). It is also wise to include a penalty for breach of the clause. However, the penalty clause must meet a number of legal requirements, namely, it must be entered into in writing, and there must be a penalty ceiling based on the employee's salary. The purpose of the penalty must also be narrowly defined. A confidentiality clause cannot be used by an employer as a disincentive to an employee's whistle-blowing.

Furthermore, the employee may not denounce their (former) employer on the grounds of being a good employer. If the employer suffers loss as a result of negative comments made by an employee, the employer can reclaim the loss from the employee.

Employee Liability

The general principle governing employee liability can be found in Article 7:661 of the Dutch Civil Code. According to this provision, an employee will not be held liable to the employer or a third party, whom the employer is obliged to compensate, for any damage caused while carrying out their employment duties, unless such damage resulted from the employee's intentional actions or deliberate recklessness.

To gain a comprehensive understanding of the matter, it is essential to consider Article 6:170 of the Dutch Civil Code in conjunction with Article 7:661. Article 6:170 states that the employer assumes liability for the actions of its subordinates, leading to damage to a third party, as long as those actions were carried out within the scope of their employment duties.

2. Restrictive Covenants

2.1 Non-competes

In principle, it is prohibited to include a non-compete clause in a fixed-term employment contract, unless the employer has a substantial business interest in including such a clause (which must be substantiated in the employment contract).

Non-compete clauses, effective for a certain scope of activities, a certain geographical area and/or for a certain number of years, must be agreed upon in writing. Furthermore, the employee must be at least 18 years old at the time of signature.

The restriction must be limited to what is reasonably necessary to protect the employer's business interests. Typically, a duration of one year is considered reasonable. Limitations as to

territory and the nature of activities depend on the branch in which the employer operates and the position of the employee. According to case law, the non-competition clause cannot be used to bind employees to the company.

The employer can enforce the non-compete clause in court and claim damages from the employee. In practice, a penalty clause is usually agreed upon between the parties on the basis of which the employee has to pay an agreed amount to the employer, if the employee breaches the non-compete clause. The employer might also take the employee's new employer to court if the new employer acts unlawfully by hiring an employee while knowing that the employee breached the non-compete clause with the previous employer.

On 4 March 2024, a bill was introduced to tighten the regulations concerning non-compete clauses. If enacted, the bill will limit the effective length of a non-compete clause to a maximum of one year. In addition, the geographical scope of the clause must be clearly defined and justified. Employers will also need to substantiate the "compelling business interest" for the clause, even in indefinite employment contracts. Additionally, employers will be required to provide compensation equal to 50% of the employee's last earned monthly salary for each month in which the non-complete clause is enforced. The bill's provisions also apply to non-solicitation clauses.

Enforcement

Enforcement of the non-compete clause can also be mitigated or denied by a court. A non-compete clause may become (in whole or partly) invalid if the responsibilities ensuing from the employee's position are substantially amended. If the non-compete clause prevents the employee from being employed elsewhere, the court may order that the employer has to compensate the employee during the period in which the employer holds the employee to the non-compete clause. The employer can unilaterally release the employee from their obligations under the non-compete clause, in which case the employer will no longer be required to pay any compensation.

2.2 Non-solicits

Employment contracts can also contain a non-solicitation clause, which stipulates that the employee is not allowed to solicit their employer's customers or employees during or after their employment. The clause has to be in a language the employee understands. There are no other requirements as to form.

The employer can enforce the non-solicitation clause in court and claim damages from the employee. In practice, a penalty clause is usually agreed upon between the parties on the basis of which the employee has to pay an agreed amount to the employer, if the employee breaches the non-solicitation clause. Enforcement of a non-solicitation clause can be mitigated or denied by a court.

3. Data Privacy

3.1 Data Privacy Law and Employment

The General Date Protection Regulation (GDPR) is applicable to the handling of personal data when a data controller or data processor operates within the EU. In the Netherlands, there are additional national deviations that stem from the GDPR Implementation Act (*Uitvoeringswet AVG* or UAVG).

Article 88 of the GDPR allows member states to establish specific privacy rules concerning employment matters. However, the Dutch legislators have not yet taken advantage of this provision. While it was anticipated that a bill including such provisions would be introduced, none of the provisions were included in the draft bill amending the UAVG, published on 20 May 2020.

Accountable processing of personal data is a core requirement of the GDPR. The controller must be able to demonstrate compliance with the GDPR through various means, including policies, agreements, and other documentation. Article 5 of the GDPR outlines key principles that must be followed when processing personal data, including lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, and integrity and confidentiality.

Compliance with the GDPR and the UAVG is overseen by the Dutch Data Protection Authority (the Dutch DPA), which has the authority to impose administrative measures and fines for non-compliance. The maximum fines under the GDPR can reach up to EUR20 million or 4% of the annual worldwide turnover, whichever amount is higher.

Regarding fines, the Dutch DPA has adopted Fining Guidelines, categorising fines into four levels with varying ranges, with a maximum fine of EUR1 million. However, the Dutch DPA may deviate from these guidelines under justified circumstances. Apart from administrative enforcement and fines, breaching the GDPR or UAVG may also lead to (collective) civil claims and damages.

Compliance with the GDPR and the UAVG is contingent on the specific circumstances of each case and relies on relevant documents, procedures, and organisational practices. It is an ongoing process that must be addressed on a case-by-case basis.

4. Foreign Workers

4.1 Limitations on Foreign Workers

A work authorisation is not required for nationals from the European Economic Area (EEA) and Switzerland. People from outside the EEA and Switzerland often need a work permit (for less than three months) or a combined residence and work permit, known as a single permit (for more than three months). The employer applies to the Employee Insurance Agency (in the Netherlands, the UWV) for a work permit and has to meet several conditions, such as meeting the Dutch Working Conditions Act (*Arbeidsomstandighedenwet*), and the employee must have a residence permit. Where the employee will stay in the Netherlands for longer than three months and does not have a residence permit, the employer needs to apply for a single permit at the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst* or IND). Simplified procedures apply to skilled and highly educated foreign nationals and other categories, such as students, artists and employees transferred within an enterprise to the Netherlands, that is, someone who is considered highly skilled or educated, primarily on the basis of their salary or education.

The application forms are only available in Dutch. Before the application process, all the documentation must be translated into Dutch, English, French or German. Permit application procedures require extensive preparation, which can easily take several weeks (aside from the time it takes the authorities to process the appli-

cation). The IND has three months to process the application for a single permit.

4.2 Registration Requirements for Foreign Workers

When a foreign employee commences work in the Netherlands, the employing company from abroad is generally obliged to register as a withholding agent with the tax authorities for wage taxes and, if applicable, social security contributions, which also include the employer's contribution to healthcare insurance. However, if none of the employees are subject to wage taxes and/or none of them fall under Dutch social security legislation, such registration is not necessary.

Before an employee starts working, the employer must comply with the following conditions:

- Set up a payroll administration that handles the deduction of wage taxes and, if applicable, social security contributions from the employee's earnings.
- Register the employee with the salary administration.
- Record the employee's citizen service number (*burgerservicenummer* or BSN) with the salary administration.
- Identify the employee through their passport or ID card and keep a copy of the passport or card with the salary administration.
- Complete and have the employee sign the "wage tax declaration", which must be kept with the salary administration.
- Verify the tax residency of the employee.
- If applicable, verify and register the employee's residency or employment status. Keep a copy of the permit(s) with the salary administration, and in case of permit renewal, forward a copy to the salary administration.
- If applicable, both the employer and employee must apply for the 30% ruling with the foreign office of the tax authorities in Heerlen. If the application is submitted within four months of starting employment, the ruling will be effective retrospectively from the date of the first employment with the Dutch employer.

5. New Work

5.1 Mobile Work

In the Netherlands, working from home is not a legal right. However, employees have the option to submit a written request to work (partially) from home, for instance, due to health concerns. Employers must, if they choose to decline such a request, provide valid reasons for doing so. Acceptable reasons for refusal may include:

- disruption to the work schedule caused by working remotely;
- the nature of the job necessitates on-site presence; and/or
- the home workspace does not meet safety or suitability standards.

Additionally, specific conditions apply to employees seeking to work from home:

- the company must have a minimum of ten employees;
- the employee must have completed at least six months of employment; and
- a written request must be submitted by the employee no later than two months before the desired work-from-home start date.

Employers must fulfil their duty of care, which involves providing a good and safe home workplace for their employees. This obligation extends to a reasonable and practical extent, including the possibility of reimbursing or providing necessary resources like ergonomic

office chairs or additional computer screens. To prevent (physical) complaints, employers must engage in discussions with their employees to ascertain their needs. The home workplaces of employees must be designed to be ergonomically sound, ensuring safety, health, comfort, and functionality. Employers should consider providing ergonomic accessories such as an ergonomic mouse, good lighting, or special keyboards. The employer has the option to provide, supply, or reimburse the cost of the necessary equipment (up to a certain amount) tax-free.

Employees who work from home must receive education on how to perform their tasks safely and healthily. This includes information on arranging their home workplace appropriately and maintaining good posture during work. Employers must also inform employees about the potential risks they face while working from home, such as musculoskeletal complaints or work-related stress. Moreover, they should explain the rules for computer work.

Employers must incorporate the concept of working from home into their risk inventory and evaluation (RI&E), which forms the basis of their mandatory health and safety policy. This entails addressing any unique risks that may arise when employees work remotely, including mental pressure due to combining work and other obligations at home. Employers should consider implementing policies to counter the psychosocial workload.

5.2 Sabbaticals

Employees have the option to take unpaid leave, either on a full- or part-time basis, following consultation with the employer. There are no rules regarding the duration of sabbaticals that employees may take. However, it is important to note that unpaid leave is not a legal entitlement for employees. Employers are thus allowed to deny such a request for a sabbatical, bearing in mind that the collective labour agreement may contain provisions or arrangements concerning sabbaticals.

As there is no statutory regime for sabbaticals, parties can make their own arrangements (preferably in writing). The following aspects can be subject to agreement:

- the duration of the leave;
- the position the employee will return to after the sabbatical;
- the applicable employment conditions, such as arrangements regarding the use of a company car or a company phone and whether the employee can retain or should return these; and
- how to handle a situation where an employee falls ill during the sabbatical – generally, the employee is not entitled to continued salary payments unless explicitly agreed otherwise.

All of the above can also be formalised in a sabbatical policy. However, creating such a policy is not obligatory.

5.3 Other New Manifestations

The Work Where You Want Act was rejected by the Senate in September 2023. If passed, the bill will would have made it easier for employees to file a request to work from their own workplace. These requests were to be made in writing two months before the intended date of implementation, and employers were going to be obliged to respond in writing one month before the planned date of implementation. If they had failed to do so, the employment contract would have been adapted to the employee's request.

The requested location would have had to be one that was a "suitable place of work" from which work was normally carried out for the employer, or the employee's home address, as long as it was within the EU. Small employers with fewer than ten employees were to be exempt from the rule and employees were going to be obliged to provide a sound justification for their request.

Despite this rejection, employers in the Netherlands are still obliged to consider employees' request to work from home in a timely manner under the Flexible Working Act *(Wet Flexibel Werken*).

6. Collective Relations

6.1 Unions

Trade unions play a crucial role in representing the interests of individual employees or groups of employees. Their significance lies in advocating for the collective interests of workers within specific industries or sectors. Trade unions engage in negotiations with either a particular large employer or multiple employers' associations, and sometimes with other trade unions, to establish collective terms and conditions of employment, leading to the formation of a collective labour agreement. These agreements can apply at a company level or extend across an entire industry.

Furthermore, trade unions offer assistance in negotiating redundancy schemes and providing guidance on forced redundancies within organisations. They also have the authority to deviate from certain statutory employment laws through collective labour agreements.

6.2 Employee Representative Bodies

Works Council

In accordance with the law, companies with 50 or more employees must establish a works council composed of elected employees. Failure to comply with this legal requirement allows any interested party, whether an employee or a trade union, to initiate court proceedings to ensure the establishment of a works council.

The works council is endowed with several essential rights and obligations, including:

- the right to provide advice on significant financial, economic, and organisational decisions proposed by the company; and
- the right to give consent to proposed decisions by the company regarding the establishment, modification, or revocation of regulations concerning, in a broad sense, the company's social policies.

If a company has established two or more works councils, it has the option to set up either a central works council or a group works council. This decision must contribute to the proper application of the Works Councils Act (*Wet op de ondernemingsraden*) concerning those enterprises.

Employee Representative Body

In cases where a company employs at least ten but fewer than 50 individuals and does not have a works council in place, there may be a requirement to establish an employee representative body (*personeelsvertegenwoordiging* or PVT). This body must consist of at least three persons directly elected through a secret voting process.

6.3 Collective Bargaining Agreements

The Collective Agreements Act (*Wet CAO*) defines the concept of a collective labour agree-

ment and specifies the parties authorised to engage in such agreements. Collective labour agreements are contractual arrangements established between one or more trade unions and one or more employer organisations. These agreements encompass various aspects of the employment relationship, including wages, working hours, pension schemes, holiday entitlements, and social issues.

Two types of collective labour agreements exist. In the case of a collective labour agreement with a minimum character, deviations that benefit the employee are permissible when compared to a company scheme or individual employment agreement. However, any deviating provisions that disadvantage the employee will be considered null and void. On the other hand, for collective labour agreements with a standard character, any terms that deviate from the agreement are invalid and thus null and void.

If an employer is a member of an employers' union that has concluded a collective labour agreement, the employer is required to apply the terms of the collective labour agreement to its own employees. Additionally, a collective labour agreement can be declared binding by the Minister of Social Affairs and Employment upon request from the involved parties. This means that the collective labour agreement becomes applicable to the entire sector, regardless of whether the employer is a member of the employers' association involved in the collective labour agreement. If the employer's activities fall within the scope of the collective labour agreement, they are obliged to apply its terms within the company.

7. Termination

7.1 Grounds for Termination

A fixed-term employment contract or a contract for a specific project ends by operation of law upon expiration of the term or completion of the project. However, an employer is obliged to notify the employee at least one month before the end of a fixed-term contract of six months or longer whether the employment contract will be extended and, if so, what terms and conditions apply. Furthermore, pursuant to Article 7:657 of the Dutch Civil Code, the employer is obliged to inform an employee who has a fixed-term contract about vacancies with an open-ended employment contract.

An open-ended employment contract can be terminated in the following ways:

- the employer gives notice after receiving permission from the UWV;
- the employee consents after the employer has given notice, without the above-mentioned permission;
- by court proceedings;
- by mutual consent;
- by dismissal because of an urgent reason; or
- by notice given by the employee.

Economic Grounds or Long-Term Incapacity to Work

In case of dismissal on economic grounds or because of long-term incapacity to work, an employer can terminate an employment contract by giving notice after the UWV has given permission to do so by a dismissal permit. The UWV will grant permission only if there is a reasonable ground for dismissal and redeployment within a reasonable period of time is (even after training) not possible or reasonable. The UWV

procedure takes approximately four weeks, once it has received all the necessary information.

After permission has been granted, notice is to be given with due observance of the notice period. Due to the time involved in obtaining permission from the UWV, the employer can deduct the duration of the procedure from the notice period (provided that at least one month of notice remains).

Personal Grounds

The court can terminate an employment contract where a reasonable ground for dismissal exists and redeployment within a reasonable period of time is (even after training) not possible or reasonable. An employment contract can be terminated by decision of the court, by filing a petition for dissolution in case of:

- frequent and disruptive absence due to illness;
- unsuitability for the position/underperformance (other than because of illness);
- culpable acts or omissions of the employee;
- refusal to work due to a serious conscientious objection;
- an impaired working relationship as a result of which the employer cannot reasonably be required to continue the working relationship;
- dismissal based on the cumulative ground;
- other reasons and/or circumstances (by way of an exception); or
- a cumulation of multiple different grounds for dismissal, where these other grounds are, by themselves, insufficient to justify a dismissal.

The cumulative ground can only be applied for the dismissal motives mentioned above and cannot be employed for dismissals made on the grounds of business economics, or those that are due to long-term incapacity to work. Where employment is terminated on the basis of a cumulated dismissal, the court can grant an extra severance, equal to a maximum of half of the transition payment, in addition to the statutory transition payment that the employee is ordinarily entitled to receive.

After filing the petition with the competent court, the employee is offered the possibility to file a statement of defence. The court will then set a date for a hearing, during which the parties can explain their opinions. The court could grant the request for termination and dissolve the employment contract, or it could deny the request. The court must take into account the notice period in a case where the contract is dissolved. There is a possibility to appeal against the court's judgment to the Court of Appeals.

Collective Dismissals

If an employer wants to dismiss 20 employees or more within a term of three months within one of the working areas of the UWV, it must, according to the Dutch Collective Redundancy (Notification) Act (*Wet Melding Collectief Ontslag*), notify and consult the relevant trade unions and notify the UWV of its intention to do so. It is also necessary to take into account all employment contracts that will be terminated by mutual consent and terminations due to a deterioration in essential conditions of employment imposed/proposed by the employer. If the employer fails to comply with its obligation under this Act, the employee has the right to nullify the termination of their employment contract.

7.2 Notice Periods

Dutch law provides for the following statutory notice periods for an employer:

- fewer than five years of service – one month;

- more than five years, but fewer than ten years of service – two months;
- ten or more years of service, but fewer than 15 years of service – three months; and
- 15 or more years of service – four months.

The employee must take into account a notice period of one month. A longer notice period may be agreed upon if it is laid down in writing. In that case, the notice period the employer has to observe must be twice the notice period the employee has to observe.

The notice period may be reduced under a collective labour agreement, although any variance should be within statutory limitations, in default of which, the statutory notice period is applicable. Unless agreed otherwise, the notice period starts at the beginning of the month following the month in which notice is given.

Where the employee has reached retirement age during their employment, the applicable notice period for the employer is one month.

Severance Payment

Employees are entitled to a transition payment (*transitievergoeding*) from the first day of employment, as well as during probationary periods. An employee will receive a third of the monthly salary per calendar year. The transition payment is capped at EUR94,000 gross – or if the employee is entitled to a higher annual salary – then one annual salary. The transition payment is not due if the employee terminates the employment contract, unless this termination is as a result of seriously culpable actions on behalf of the employer.

It is possible for employers to apply for compensation for the transition payment if they dismiss an employee on the grounds of long-term occupational disability (after two years of sickness). Moreover, in the event of closure of a business by an employer for reasons of illness or pension, the employer will be compensated. Employers must satisfy a number of narrowly circumscribed conditions in order to qualify for compensation. It is important to note that this option is only available to small-business employers (with less than 25 employees) who owe a transition payment incurred during a period of six months prior to the consent of the UWV, or termination of an employment contract.

For calculating the duration of an employment contract, one or more employment contracts between the same parties (or successors) that have followed each other with intervals lasting no longer than six months, will be counted together.

7.3 Dismissal for (Serious) Cause

Pursuant to Article 7:677 of the Dutch Civil Code, the employer may summarily dismiss an employee if the employee has engaged in such misconduct that the employer cannot reasonably be expected to continue the employment relationship any longer. An urgent reason must exist, in which case the employment contract will be terminated with immediate effect. The urgent reason must be communicated to the other party immediately and the employment contract must be terminated without notice.

In the case of instant dismissal, the employer does not have to take into account the period of notice and, since the employee has given a reason for not complying with the notice period, the employer has a right to compensation for the period of notice.

If there is serious culpable conduct (which may be present in the case of instant dismissal, but this does not necessarily have to be the case),

the employee will in most cases lose the right to transitional compensation. In addition, if an employee has become unemployed as a result of something they have or have not done, this may affect their entitlement to unemployment benefits, as per the Unemployment Act (*Werkloosheidswet* or WW).

7.4 Termination Agreements

In Dutch employment law, separation agreements are used when the employment contract will be terminated with mutual consent (a so-called settlement agreement). In this agreement, the employer and employee arrange under which conditions they may terminate the contract. A settlement agreement is not a legal requirement but is considered best practice (as an employee is also able to apply for unemployment benefits after concluding a (legally correct) settlement agreement).

The settlement agreement usually contains provisions including:

- the personal data of the parties involved;
- the current position and salary of the employee;
- the reason for termination;
- the dismissal payment (can be zero);
- the termination date;
- whether or not the employee will be exempt from work;
- payment of the remaining number of holidays (if any, or in derogation of the statutory provision);
- post-contractual obligations, such as a non-compete clause or a business relations clause;
- the right of the employee to dissolve the settlement agreement within 14 days after conclusion (if this is not included in the agreement, the reflection period will be extended to 21 days after conclusion); and
- full and final discharge when all the provisions of the settlement agreement are fulfilled.

7.5 Protected Categories of Employee

An employer is restricted from giving notice of termination under the following circumstances:

- during pregnancy or maternity leave (and up until six weeks after the end of an employee's maternity leave);
- while an employee is a member of an employee participation body, such as a works council;
- during prospective membership (eg, candidates) or within two years after termination of membership of an employee participation body;
- during the first two years of illness, unless the employee deliberately hinders their recovery;
- during compulsory military service;
- when the employee applies for or takes care leave, such as parental leave, adoption leave, short-term leave, or long-term leave;
- because the employee is a trade union member;
- due to leave for political activities;
- because of an employee's refusal to work on Sundays; or
- because of the transfer of an undertaking.

These restrictions apply to both the UWV and sub-district court procedures. However, the "during" prohibitions do not apply if the employee's contract is terminated by mutual agreement during the probationary period, due to an urgent cause, upon reaching retirement age or state pension age, and in specific, limited situations, for dismissals based on commercial reasons. The "because" prohibitions do not have any exceptions.

Additional Exceptions

In addition to the aforementioned general exceptions, the sub-district court may dissolve the employment agreement if:

- the termination request is unrelated to the circumstance covered by the prohibition; or
- the circumstances warrant the termination in the best interests of the employee (eg, for health reasons).

However, these specific exceptions only apply to the "during" prohibitions, such as pregnancy or membership in the works council. These exceptions are not applicable in cases of dismissals for economic reasons, unless this involves the complete termination of the company's activities.

8. Disputes

8.1 Wrongful Dismissal

If an employee believes they have been subject to an unjust termination, they have several grounds on which they can take action, depending on the situation. Some examples of such grounds include:

- termination of the employment agreement without proper intervention from the UWV or the sub-district court, despite the requirement for such intervention;
- dismissal in violation of a prohibition on giving notice;
- failure to offer the dismissed employee their former job position, which was filled by someone else within 26 weeks of the termination date, in cases of economic, technical, or organisational reasons for dismissal;
- wrongful granting of termination permission by the UWV (eg, when there was no reasonable ground for the dismissal);
- incorrect dissolution of the employment agreement by the court (eg, when there was no reasonable ground for the dismissal); and
- unjustified immediate dismissal.

In the event of wrongful dismissal, the employee has two options for recourse:

- to file a request with the sub-district court to declare the termination null and void; or
- to request fair payment, also known as fair compensation, from the sub-district court.

The request must be filed within two months of the termination of the employment agreement. If the wrongful dismissal results from a breach of the reinstatement requirement, the limitation period will begin when the employee becomes aware or could reasonably have become aware of the situation, but it should not exceed eight months after the employment agreement's termination.

Calculating fair compensation does not follow a standard formula. The amount is highly dependent on the specific circumstances of the case and the court's evaluation. The Supreme Court has outlined various viewpoints that can be considered when determining fair payment, including the employee's potential earnings if the employment agreement had continued, the degree of employer culpability, and whether the employee has secured alternative employment or is expected to do so in the future, along with the corresponding expected income.

8.2 Anti-discrimination

According to Dutch legislation, discrimination on any ground whatsoever is prohibited. In the Dutch Equal Treatment Act (*Algemene wet gelijke behandeling*), discrimination on the following grounds is explicitly prohibited: religion, person-

al beliefs, political opinion, race, sex, nationality, sexual orientation, and civil status. In addition, under specific employment laws, discrimination on the following grounds is explicitly prohibited: age, sex, handicap and chronic disease, temporary/permanent employment contracts and working hours (part-time/full-time).

In principle, discrimination directly based on the grounds mentioned above is never permitted, except for certain situations in which discrimination is explicitly allowed by law.

The discrimination laws also cover indirect discrimination. Indirect discrimination occurs when a neutral behaviour (eg, a policy or practice) results in discrimination based on one of the grounds mentioned above.

Indirect discrimination – and direct discrimination with respect to age, temporary/permanent employment contracts and working hours – can be justified if objectively necessary to achieve a legitimate aim and if proportionate to the aim sought.

Agreements between employers and employees that are contrary to discrimination laws can be void or voidable. The employee can also hold the employer liable for damages resulting from discriminating behaviour of the employer.

8.3 Digitalisation

Currently, it is not customary to conduct legal proceedings digitally in the Netherlands.

9. Dispute Resolution

9.1 Litigation

Employment Law Proceedings

Legal disputes arising from an employment relationship are initially resolved before the competent sub-district court (*kantonrechter*) and can be appealed before the appropriate Court of Appeal (*gerechtshof*). The case may further escalate to the Supreme Court (*Hoge Raad*) if it involves a point of law. Employers must also take into account that, in some cases, they need to obtain permission from the UWV before they can dismiss an employee. This applies, for example, to the termination of an employment contract after two years of illness, or for compelling business economic reasons within the company.

In the absence of an agreed-upon competent court, the court in the district where the work is primarily performed will be declared competent. Sub-district court judges handle cases individually, whereas appeal cases are heard by a panel of multiple judges.

Unlike in appeal proceedings, parties are not obliged to be represented by a lawyer before the sub-district court.

Regarding employee participation law, particularly the Works Councils Act, certain claims must be filed with the Netherlands Enterprise Court at the Amsterdam Court of Appeal (*Ondernemingskamer*).

Class Action Claims

The Dutch Civil Code allows an interest group to pursue a declaratory judgment in cases of mass damage caused by unlawful actions, known as collective action. If liability is established, and the parties cannot agree on compensation for

the damage caused, a separate procedure will determine the extent of individual compensation.

9.2 Alternative Dispute Resolution

In Dutch employment law, arbitration is a possible method for resolving employment disputes, although it has not been frequently utilised. Predispute arbitration agreements are considered valid and enforceable. However, a critical condition for arbitration is the mutual agreement of both parties to submit the case to an arbitration court. If only one party seeks arbitration, the court will assess whether the other party is willing to participate in the arbitration process.

In instances where both parties agree to arbitration, the application becomes bilateral, and the arbitration proceedings can proceed accordingly. However, if one party is unwilling to co-operate in the arbitration proceedings, the applicant will be required to initiate regular legal proceedings instead.

9.3 Costs

The general principle in legal proceedings is that each party is responsible for its own attorneys' fees, regardless of the outcome of the case. For example, if an employee loses a court case against their employer, they will bear their own legal costs but not the employer's expenses. Similarly, if an employee prevails in a case, they typically will not be entitled to recover their legal fees.

However, the judge holds the authority to decide which party must cover the costs of the proceedings and may order the losing party to compensate the opposing side for court and attorneys' fees. It is important to note that the attorneys' fees are usually calculated based on fixed rates, which are generally much lower than the actual legal fees incurred during the proceedings.

Trends and Developments

Contributed by:
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Palthe Oberman

Palthe Oberman is a leading boutique law firm in the Netherlands focusing exclusively on labour and employment law. The firm has steadily grown since its establishment in 2001. The partners and associates all have many years of (international) experience and are able to provide high-level counsel on all employment law matters. Palthe Oberman is a member and the Dutch representative of L&E Global – an international integrated alliance of premier labour and employment law boutiques (www.leglobal.org). This membership allows Palthe Oberman to share experiences and knowledge with employment law specialists across borders.

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Introduction

Employment law is constantly evolving, and so is Dutch employment law. However, the fall of the Dutch government in 2023 has thrown a wrench into the plans for labour market reforms. On 6 July 2024, a new government (the "Schoof government") was sworn in, presenting an outline agreement. This article will first examine the core elements of this policy framework and then delve into the latest developments affecting independent workers and employees, the legislative proposal for non-compete and business relations clauses, inappropriate behaviour in the workplace and other key developments such as changes to the "30% ruling" and CO_2 reduction measures.

The Schoof Government's Outline Agreement

On 21 May 2024, the coalition-forming political parties presented the key priorities for the new government. With regard to employment law, the outline agreement primarily focuses on enhancing job security by clarifying the regulations surrounding freelance and self-employed work.

The following topics are particularly relevant for the Dutch labour market:

- A proposal will be submitted to amend the Constitution by abolishing the prohibition on judicial review of the constitutionality of Acts of Parliament or treaties in Article 120 and introducing a Constitutional Court, allowing the classic provisions of the Constitution to be subject of review.
- There will be a reduction in labour taxes; specifically, a decrease in the marginal tax rate for individuals.
- Employment stability is being actively enhanced in the labour market, particularly for independent workers through specific regulations. Additionally, there is an effort to increase the number of permanent contracts for employees. This includes advancing the legislative review of the Clarification of Employment Relations and Legal Presumption Act (VBAR), as well as the Temporary Employment Workers Act (WTTA).
- The protection of whistle-blowers will be strengthened.

Independent Workers Versus Employees

A critical issue in Dutch labour law is the distinction between an independent worker and an employee. Of equal importance is under what circumstances an individual will be recognised as one rather than the other. This classification has significant implications for employment rights, tax obligations and social security contributions. Hereinafter, the latest case law, the pending legislative proposal for the Clarification of Assessment of Employment Relations and Legal Presumption Act, and the termination of the enforcement moratorium by the Tax Authority, effective from 2025, will be considered.

The Deliveroo case

On 24 March 2023, the Supreme Court ruled in the Deliveroo case that Deliveroo couriers are employees. The Supreme Court established additional criteria to determine whether an agreement is an employment contract. The most important aspect is that the Supreme Court places more emphasis on whether the worker behaves as an entrepreneur, for example by having the freedom to commit to multiple (possibly competing) clients.

To address this issue, the Supreme Court has provided additional criteria that should be considered when determining whether a contract is an employment contract. These criteria take into account all relevant circumstances of the case

and the relationship between the parties. Some of the key factors are:

- the nature and duration of the work performed;
- the manner in which the work and working hours are determined;
- the level of integration of the worker and their work into the organisation and business operations of the employer;
- the existence of an obligation to personally perform the work;
- the method used to establish and pay the compensation for the work performed;
- the level of compensation paid to the worker;
- whether the worker bears any commercial risk in performing the work; and
- whether the worker behaves, or can behave, as an entrepreneur.

The Clarification of Assessment of Employment Relations and Legal Presumption Act is postponed

On 6 October 2023, the Clarification of Assessment of Employment Relations and Legal Presumption Act (*Wetsvoorstel Verduidelijking beoordeling arbeidsrelaties en rechtsvermoeden*) was submitted to the Dutch Parliament. The proposal intends to eliminate the current uncertainty in distinguishing between independent workers and employees by creating a legal assessment framework grounded in recent judicial decisions. In February 2024, Minister van Gennip announced that the law would be postponed until 2026.

Tax Authority to begin enforcing regulations against misclassification as an independent worker from 2025

Starting 1 January 2025, the Tax Authority will actively enforce regulations to address the misclassification of workers as independent workers. This was established in a letter to Parliament dated 20 June 2024, where the Secretary of State for Taxation and the Tax Administration addressed questions regarding the so-called enforcement moratorium. When the Tax Authority determines that an independent worker qualifies as an employee rather than an independent worker, and therefore an employment contract is applicable, they may impose additional tax assessments and penalties. This provision now extends to cases of non-malfeasance. Consequently, it is crucial that employers pay close attention to this issue and prepare a comprehensive overview of how independent workers are used within their organisations.

In the progress report for December 2022, the Dutch government highlighted that in numerous cases, the engagement of independent workers fails to meet legal standards and regulations. The Enforcement Plan for Employment Relations outlines the following three-tier system to tackle false self-employment:

- creating a more level playing field for contract forms and independent workers;
- clarifying the rules on when to work as an employee and when to be an independent worker; and
- strengthening and improving enforcement in preparation for abolishing the enforcement moratorium by 1 January 2025.

The Secretary of State stated that progress on one tier is not dependent on the others. For this reason, it has been decided to lift the moratorium on enforcement before the specific legislation comes into force.

Legislative Proposal for Non-compete and Business Relations Clauses

In recent years, criticism of non-compete and business relations clauses has significantly intensified in the Netherlands. This is primarily attributed to the widespread misuse of non-compete and business relations clauses by employers, who use them to prevent employees from joining competitors, even when these employees do not possess sensitive company information. Consequently, employees often find themselves unnecessarily restricted in their job mobility, which violates their right to choose where they work. In March 2024, a draft for a legislative proposal titled The Modernisation of Non-competition Agreement Act was published for internet consultation. The Bill aims to overhaul and improve the regulations concerning non-compete and business relations clauses in the Netherlands, thereby tackling the improper use of such clauses.

What changes?

This legislative proposal entails the following regulations:

- A non-competition clause may have effect for a maximum of one year after the end of the employment contract.
- The employer must provide written reasons justifying the area in which the employee is not allowed to work due to the clause.
- The compelling business or service interest for the clause must be justified in writing for all employment contracts (currently, this requirement is only mandatory in fixed-term contracts).
- When the employer wishes to enforce the non-competition clause, it must provide compensation to the employee. This compensation amounts to 50% of the employee's last earned monthly salary (inclusive of all emoluments) for each month that the clause remains in effect.
- The employer must notify the employee of its decision to maintain the clause at least one month before the end of the contract. The employer must pay the compensation no later than the last day of employment. If the employer fails to notify the employee or fails to pay the compensation timely, the employer will not be able to enforce the clause against the employee.

Please note that the above changes apply to both the non-compete and the business relations clause.

Transitional law

The non-compete and business relations clauses agreed upon prior to the new law will remain valid, even if they do not meet the new formal requirements (ie, written justification, duration and geographical scope). The new substantive requirements will, however, apply to these "old" clauses. Therefore, the employer cannot enforce a duration of more than one year, must inform the employee timely and provide compensation if it wishes to enforce the clause.

Practical tips

In light of the proposed bill, it would be advisable for employers to take the following steps:

- Review the non-compete and business relations clauses of their employees. Employers will need to consider whether they are willing to pay compensation if they invoke these clauses. For employees, this presents an opportunity to claim such compensation when they are held to the clause by their employer.
- Ensure that when entering into new non-compete and business relations clauses, the

aforementioned conditions are met to prevent nullity of the clause.

Inappropriate Behaviour in the Workplace

The Guide on Workplace Culture Change

The issue of inappropriate behaviour in the workplace is receiving increasing attention in the Netherlands. On 13 March 2024, Government Commissioner Mariëtte Hamer released the "Guide on Workplace Culture Change" for organisations addressing sexual misconduct in the workplace. This guide is a follow-up to the earlier prototype from 2023, the "Guide on Sexual Misconduct". It is important to note that these guides are not legislation.

The Guide on Workplace Culture Change identifies three pillars of cultural change. These pillars, which are closely related to addressing sexual misconduct, together form the foundation for developing a safe culture within an organisation.

These three pillars are comprised of the following:

- Social interaction culture – the set of behaviours, norms, values and images shared within a particular group.
- Organisational culture – the way the organisation is structured and other arrangements or practices that create risk factors for sexual misconduct within the organisation.
- Supportive system – the set of measures designed to prevent and address sexual misconduct, such as the proper handling of reports.

Modernisation of the Sexual Offences Act

Additionally, the Modernisation of the Sexual Offences Act was enacted and came into effect on 1 July 2024. This act is based on consent and free will. Involuntary, unequal, or unwanted sexual contact is a punishable offence, regardless of whether coercion was involved. It is considered a criminal offence if it was clear that the other person did not want to engage in sexual activity, but someone proceeded anyway. If evidence of coercion is present, the perpetrator may face a harsher penalty.

The 30% Ruling

With effect from 1 January 2024, the Dutch 30% ruling for ex-pats has been amended. Under the new regulations, the tax-free-reimbursement is structured as follows:

- During the initial 20 months, ex-pats can receive a reimbursement of up to 30% of their taxable salary.
- This will be reduced to maximum of 20% for the next 20 months, and then further decreased to 10% for the remaining 20 months.

Although the maximum duration of the 30% ruling remains five years, the percentage of the tax-free reimbursement will decrease progressively. It is important that affected persons review any specific conditions or exceptions that might apply to their individual circumstances.

CO_2 Reduction

On 1 July 2024, the decision on CO_2 reduction for business-related passenger mobility came into effect. Since then, organisations have been required to report their CO_2 emissions related to business travel and employees' commuting to the Netherlands Enterprise Agency.

Legislative Proposal for Increased Stability for Flexible Workers

In April 2023, the government introduced a labour market package. The initial legislative proposal from this package, which encompasses a set of

measures aimed at enhancing job security for employees, has been presented. The following points are addressed within this proposal:

- Zero-hour contracts will be abolished.
- The break period for the chain arrangement will be extended from six to sixty months.
- The provision allowing deviations from the collective labour agreement (Article 7:668a, paragraph 5) will be abolished.
- For temporary employment agreements, there will be a limitation on the phase system and a tightening of the provisions under the Working Conditions (Flexibility and Security) Act (*Waadi*).

The request for advice from the Council of State is the next step in the legislative process. Following this advice and necessary adjustments to the draft bill, the final proposal can be submitted to the House of Representatives.

Final Remarks

Dutch employment law is in a period of significant change, with new reforms on worker protection, job security, and clearer distinctions between employees and independent workers. Recent legislative updates and judicial decisions signal a shift towards a more regulated labour market. Both employers and workers need to remain updated and adjust to these changes, as they will shape the future of employment in the Netherlands.

NIGERIA

Law and Practice

Contributed by:
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Contents

Bloomfield LP is one of Nigeria's top labour and employment law firms. Its expert team is composed of professionals with years of experience in corporate immigration, employment and labour law. The firm has built a strong reputation for addressing complex employment issues for major players across various industries, both locally and internationally. Its team excels in facilitating employer-employee negotiations, addressing complex matters such as terminations, mutual termination agreements and wrongful termination claims. The team handles a robust portfolio of cases, offering legal advice on drafting essential employment documents – including employment contracts, company policies, handbooks and policy reviews – and helping clients ensure compliance with Nigerian laws. Its expertise also extends to advising on, inter alia, employee benefits, structuring agreements with employers of record, and navigating trade union negotiations.

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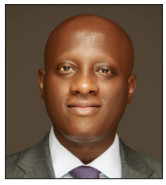

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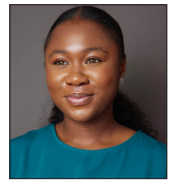

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1. Employment Terms

1.1 Employee Status

There are two formally recognised employment categories, namely "Workers" and "Employees".

Workers: Workers, as defined by the Nigerian Labour Act, encompass those who perform manual labour or clerical work. This category includes casual workers, contract staff and part-time workers. They may engage in physical tasks like construction, manufacturing and maintenance. Workers enjoy basic labour protections under the Labour Act but may not receive the extensive benefits afforded to Employees under formal employment contracts.

Employees: Under the Labour Act, any individual engaged in administrative, executive, technical or professional functions is not a Worker and is not covered under the Labour Act. Such persons are commonlyreferred to as Employees. They typically work under formal employment contracts. Examples include full-time managers, engineers and lawyers.

Other Statuses: Apart from Employees and Workers, independent contractors form another significant category within the Nigerian labour market. These individuals, such as freelancers, operate without formal Employee status or the full statutory protections provided to Workers. They negotiate contracts for specific services and operate more independently within their respective professions.

1.2 Employment Contracts

There are three basic types of employment contracts, namely:

- Full-Time/Permanent/Indefinite Employment Contract: This type of contract provides indefinite employment with no set end date. Permanent employees are entitled to benefits such as health insurance, pensions and paid vacations, in addition to their wages.
- Fixed-Term/Definite Employment Contract: This type of contract specifies a predetermined duration for the employment, typically for a specific project or period. Fixed-term employees may receive similar benefits to permanent employees but only for the contract's duration.
- Part-Time Employment Contract: This type of contract is entered into for employment with fewer working hours than a full-time position.

Such contracts may also be for a definite or indefinite period.

Requirement of Contracts

Section 7 of the Labour Act requires employers to issue a written contract to Workers within three months of starting the employment relationship.

For Employees, while there is no statutory requirement for contracts to be in writing, it is highly advisable to have written contracts. Written contracts provide clarity and serve as a reference point, forming the basis of the formal employment relationship between the parties.

1.3 Working Hours

The Labour Act does not stipulate maximum working hours for Workers. However, guidance is generally derived from the ILO Hours of Work Convention, 1919, which limits work hours in industrial undertakings to eight hours per day and 48 hours per week.

The Labour Act also permits flexible arrangements, stating that normal working hours can be determined:

- by mutual agreement;
- by collective bargaining within the organisation or industry concerned; or
- by an industrial wages board, established by relevant legislation, where there is no machinery for collective bargaining.

Flowing from the above, the Labour Act allows for flexible working arrangements within the legal limit of eight hours per day.

It is important to note that the Labour Act generally prohibits women and young persons from engaging in night work in the industrial and agricultural sectors. Therefore, flexible working arrangements must adhere to these restrictions.

While the Labour Act specifically applies to Workers, it is generally expected to serve as a guideline for employers when setting work hours.

Terms Required for Part-Time Contracts

Section 7 of the Labour Act requires the inclusion of the following terms for Workers:

- the nature of the employment;
- the duration of the employment;
- the appropriate notice period;
- the rates of wages and calculation thereof, and the manner and periodicity of payment of wages;
- terms and conditions relating to hours of work and overtime;
- statutory entitlements including leave, leave requirements and any provisions for sick pay, and maternity leave for female Workers, etc; and
- any special conditions of the contract.

Employers may adopt similar terms for part-time Employees.

Overtime

The Labour Act defines overtime as any work performed beyond the normal working hours stipulated in the agreement or contract between the employer and employee. The Labour Act does not mandate a specific limit on overtime hours or prescribe a set rate for overtime pay.

Regulation on overtime is minimal beyond this definition. Generally, the preferred approach is for the employer and employee to mutually agree on the rate of overtime compensation in the employment contract.

1.4 Compensation

The Federal Government of Nigeria (FGN) has approved a new minimum wage threshold for Nigerian workers. This new development was confirmed in the statement from the Office of the Minister of Information announced on Thursday, July 18, 2024. The Executive Bill for this wage adjustment was presented to the National Assembly by Tuesday, July 23, 2024. The National Minimum Wage, as approved by the Federal Government, is Seventy Thousand Naira (₦70,000.00) ($43).

Thirteenth-month salaries and bonuses are not stipulated benefits under the law. These payments are typically outlined in employment contracts and can be determined by mutual agreement between the employer and employee. The agreement between the parties also determines whether such payments shall be mandatory or at the discretion of the employer, and under which circumstances they may be paid.

1.5 Other Employment Terms

Vacation/Leave in Nigeria

The Labour Act outlines the following provisions regarding leave and benefits:

- Workers with at least 12 months of service are entitled to a minimum of six working days of annual leave with full pay.
- Annual leave can be accumulated for up to two years with mutual agreement.
- Employers cannot provide monetary compensation instead of leave, except upon termination.
- Public holidays during annual leave do not count against leave entitlement.
- Leave allowance is not mandated by law but may be provided as per contracts or company policies.
- There is no standard or mandated leave allowance calculation. Leave allowance varies from one employer to another based on the contract.
- A Worker is entitled to up to 12 working days of paid sick leave per calendar year for temporary illness certified by a registered medical practitioner.
- Women are entitled to 12 weeks of maternity leave, with six weeks taken before delivery and six weeks after. During this period, they should receive 50% of their salary. Some states may have different maternity leave regulations.
- A nursing mother is permitted half an hour, twice a day during working hours, to nurse her child.
- Paternity leave is not provided under the Labour Act but is approved by the Federal Government for men working in public service or federal roles. Some states in Nigeria, namely Enugu and Lagos, also offer paternity leave to male Employees in public service. Enugu permits three weeks, while Lagos permits two weeks only for the first two children of such Employees. Paternity leave pay is not specified/mandated under these regulations.

While the provisions of the Act specifically cover Workers, the National Industrial Court (NIC) often uses them as a standard for leave benefits for Employees in Nigeria. Employers are also encouraged to adhere to international standards and best practices as the NIC has statutory authority to apply ratified international laws in its judgments.

Limitations on Confidentiality and Non-disparagement Agreements

Nigeria does not have statutory provisions addressing confidentiality and non-disparagement agreements comprehensively. However,

the NIC generally considers the following limitations when evaluating the enforceability of such agreements:

- Public Domain: Information that becomes publicly known through lawful means cannot be subject to confidentiality obligations. Once information is in the public domain, it loses its confidential status.
- Public Order, Public Policy or Legal Requirements: Confidentiality and non-disparagement agreements cannot override laws, public policy or legal requirements. Employees have the right to disclose information required by law or in the public interest, such as illegal activities or matters affecting public safety.
- Illegality: Confidentiality clauses in employment contracts or contracts related to illegal activities are generally illegal ab initio. Courts would not enforce agreements that involve illegal activities or are against public policy.

Employee Liability for Breach of Confidentiality and Non-disparagement Agreements

- Termination of employment for breach of confidentiality and/or non-disparagement agreement where such can be proven and constitutes a valid ground for termination under the contract.
- Damages for breach of contract.
- Accounting for profits obtained by the employee as a result of the breach.
- Contractual penalties (if specified under the contract).
- Bearing the cost for legal action by the employer (at the discretion of the court).

Limitation of Liability: For these liabilities to apply, the employer must be able to demonstrate that a breach occurred and provide evidence of the damages incurred or profits obtained by the employee.

2. Restrictive Covenants

2.1 Non-competes

Requirement of Reasonableness for the Validity of Non-compete Clauses

Nigerian courts emphasise the importance of reasonableness in non-compete agreements. The restrictions imposed by any such clause – such as geographic scope, duration, and the specific line of business being restricted – must be fair and balanced. The terms must be clearly defined and proportionate to protect the legitimate business interests of the employer.

Enforcement of Non-compete Clauses

The enforceability of non-compete clauses hinges on their reasonableness and their necessity to protect the employer's legitimate business interests, rather than merely stifling competition. Each case is evaluated on its merits. For instance, in the case of *Lacasera Company v Mr Prahad Gangadharan*, the court deemed a non-compete clause invalid and unfair for prohibiting the employee from accepting any job in a similar field for five years post-employment. Similarly, in *7th Heaven Bistro Limited v Mr Amit*, the NIC ruled against a three-year non-compete clause deemed excessively restrictive and unfair.

Courts assess factors such as the nature of the employer's business, the employee's access to confidential information or trade secrets, and the impact of the restriction on the employee's ability to earn a livelihood.

2.2 Non-solicits

Non-solicitation clauses in employment contracts are designed to prevent former employ-

ees from enticing current employees to leave the company and join a competitor or a new business venture. Non-solicitation clauses relating to customers prevent former employees from contacting or soliciting the former employer's clients, customers or business contacts after they leave the company. These clauses are essential for protecting the company's business relationships, workforce and client base.

For non-solicitation clauses to be enforceable, they must be reasonable in scope, duration and geographical area. The Nigerian courts typically seek to ensure that these clauses are not overly restrictive and do not unfairly limit an individual's ability to work. For instance, in the case of *Infinity Tyres Limited v Mr Sanjay Kumar & 3 Ors* (Unreported Suit No. NICN/LA/170/2014), the NIC emphasised the importance of specificity and reasonableness in non-solicitation clauses. The Court noted that while it could have upheld the clause if it specified the industry or company to which the restraint applied, it ultimately rejected the clause for being overly broad. The clause attempted to prevent Mr Kumar from taking up any employment in Nigeria, which the Court found unreasonable and non-specific.

3. Data Privacy

3.1 Data Privacy Law and Employment

Nigeria does not have a comprehensive regulation specifically protecting data privacy in the workplace. However, several existing laws can be applied to address data privacy protection in the workplace:

- The Constitution of the Federal Republic of Nigeria (1999), as amended: This guarantees the right to privacy of citizens.
- The Nigeria Data Protection Regulation (NDPR) 2019: This provides comprehensive guidelines on data protection and privacy. It mandates that organisations, including employers, must ensure the confidentiality, integrity and availability of personal data. It requires employers to obtain consent for data collection, limit data use to necessary purposes, secure data, and uphold employees' rights to access and correct their data.
- The Cybercrimes (Prohibition, Prevention, Etc.) Act 2015: This Act prohibits unlawful interception of communications and mandates data protection measures.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Foreign employees and companies hiring foreign employees must obtain the necessary permits, including an expatriate quota, a visa, and a Combined Expatriate Residence Permit and Aliens Card (CERPAC) or temporary work permit, depending on the duration of the work.

Employers must facilitate skill transfer from expatriates to local employees through training programmes to enable Nigerians take over such positions after a period.

The government enforces local content policies, especially in sectors like oil and gas, to prioritise Nigerian employment.

Companies must prove they have conducted labour market testing to show the unavailability of local talent before hiring expatriates.

4.2 Registration Requirements for Foreign Workers

Expatriate Quota: Companies intending to employ expatriates must register and obtain an expatriate quota from the Ministry of Interior.

CERPAC: Foreign employees employed by a Nigerian company must register with the Nigerian Immigration Service (NIS) upon arrival and obtain a CERPAC. This serves as both a residence permit and a work authorisation document.

Emigrant Registration: Foreign employees must also complete emigrant registration with the NIS. This involves providing personal details, employment information and any other relevant documentation required by the NIS.

5. New Work

5.1 Mobile Work

There are no specific regulations regarding mobile work in Nigeria.

Data Privacy: While there is no specific law on data privacy during mobile work, the NDPR requires organisations to protect personal data collected or processed within Nigeria. Employers must ensure that data accessed or processed during mobile work is handled in compliance with this regulation. Employees must also be informed about how their data will be collected, used and protected.

Occupational Safety and Health: Employers are required under the Factories Act and the Labour Act to ensure the safety and health of their employees, including those engaged in mobile work. Employers must conduct risk assessments for mobile work environments and provide necessary safety equipment and training to mitigate risks. Employees must also adhere to safety protocols and report any hazards encountered during mobile work.

5.2 Sabbaticals

Public Sector: In the Nigerian public sector, under the provision of the Public Service Rules, officers on Grade Level 15 and above are eligible for a one-year sabbatical leave.

Academic Institutions: Sabbatical leave is most common in academic institutions. Universities and research centres typically grant sabbatical leave to faculty members for research, further education or other scholarly activities. This leave is usually granted every seven years for a duration of up to one year.

Private Sector: Some progressive private sector companies may offer sabbatical leave as part of their employee benefits package or may grant such on request. This leave can be used for personal growth, for skill development or to prevent burnout.

There is no specific national legislation governing sabbaticals, but they are a well-established practice in academia and public service.

5.3 Other New Manifestations

There is no regulatory provision with regard to desk sharing; however, since the pandemic, many private employers that have designed remote work policies have added desk sharing as part of the policy in order to manage office space.

6. Collective Relations

6.1 Unions

Trade unions play a significant role in the labour market in Nigeria, serving as vital intermediaries between Workers and employers. They have a strong historical presence and continue to influence labour relations, workplace conditions and labour laws. Once a union is duly registered by the Registrar of Unions, it gains recognition under Nigerian law and possesses the legal authority to exercise various powers as stipulated by the Trade Unions Act, including negotiation and advocacy, dispute resolution, legal representation in disputes, etc.

Role of Unions

- Promotion of collective bargaining agreements.
- Maintaining peace and harmony in the work environment.
- Contribution to members' welfare.
- Representation of employees.

6.2 Employee Representative Bodies

See **6.1 Unions**.

6.3 Collective Bargaining Agreements

Collective bargaining agreements (CBAs) are legally binding contracts negotiated between employers and labour unions or representatives on behalf of employees. These agreements record the terms and conditions of employment, including wages, working hours, benefits, grievance procedures, and other workplace policies reached between the parties after the bargaining process. The process of negotiating a CBA involves both parties bargaining in good faith to reach mutually acceptable terms that balance the interests of labour and management. They are enforceable under Nigerian labour law and provide a framework for resolving disputes through agreed-upon procedures, thereby promoting harmonious employer-employee relations.

CBAs are recognised in Nigeria in both public and private employment.

7. Termination

7.1 Grounds for Termination

Motive for Termination of Employment

Previously, the law on termination was that motive was irrelevant as long as the terms of the contract were complied with, and an employer had the right to terminate an employee's contract either with or without reason, provided this was done within the ambit of the law and the clearly stated provisions of the employment contract. That position has, however, shifted, with the NIC specifying that an employer must now provide a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service, as held in *Duru v Skye Bank Plc* and *Aloysius v Diamond Bank Plc*.

Procedure for Dismissal

An employer has the right to terminate an employment contract through dismissal without notice in cases of gross misconduct, as defined by common law. This right is typically outlined in the employment contract, which specifies the grounds for such dismissal. Commonly reaffirmed grounds under Nigerian law include fraud, criminal conduct, professional misconduct, incapacity, dishonesty, etc. The procedural requirements for dismissal vary depending on the grounds for termination:

Performance-related dismissal

1. Document performance issues and provide feedback.

2. Issue formal warnings and offer a performance improvement plan.

3. Allow the employee time to improve their performance.

4. If there is no improvement, proceed with termination, ensuring the process and documentation are clear and transparent.

Misconduct-related dismissal

1. Conduct a thorough investigation of the alleged misconduct.

2. Provide the employee with an opportunity to respond to the allegations (*Baba v NCATC (1991) 5 NWLR (PT. 192) 388*).

3. Based on the investigation and hearing, decide on termination for gross misconduct (*Olatunbosun v NISER Council [1988] 3 NWLR (Pt. 80) 25*).

Generally, where the employment contract has set out the procedure, it should be followed, and the employers must ensure they align with best practices and legal standards.

Collective Redundancies

Collective redundancies are permitted and recognised under Nigerian law. The Labour Act, which is the primary legislation regulating labour and employment, defines redundancy as an involuntary and permanent loss of employment caused by excess manpower. Flowing from this, various reasons have been accepted/endorsed by the Nigerian courts as being valid grounds for redundancy, including technological advancement.

Procedure for Collective Redundancies

The Labour Act outlines the steps an employer must take in the event of redundancy:

- Notification: The employer must inform the trade union or Workers' representative of the reasons for and the extent of the anticipated redundancy.
- Selection Criteria: The principle of "last in, first out" should be adopted for the category of Workers affected, taking into account factors such as skill, ability and reliability.
- Redundancy Payments: Negotiations should be conducted regarding redundancy payments to any discharged Workers.

The above procedure applies to Workers as defined by the Labour Act.

For employees

In the case of Employees, redundancies are regulated by the terms of the employment contract, the CBA (if applicable) and the company's handbook (collectively referred to as the "Documents"). When a dispute arises, the court will enforce the terms of these Documents.

The law states that the removal of an Employee by redundancy does not entitle them to any benefits beyond those specified in the employment contract. Therefore, the entitlements of an Employee declared redundant are strictly as agreed in the contract. If the employment contract or applicable document specifies redundancy payments or benefits, the employer must comply with these terms; otherwise, it may constitute a breach of contract.

Entitlements for Workers

For Workers, entitlements will be determined by the outcome of negotiations between the trade union/employee representatives and the employer.

7.2 Notice Periods

Notice Period

The Labour Act provides statutory notice periods for Workers in Nigeria. The length of the notice period typically depends on the Worker's length of service and the terms specified in the employment contract. According to the Labour Act, the notice periods are as follows:

- one day's notice for a Worker who has been employed for a period of three months or less;
- one week's notice for a Worker who has been employed for more than three months but less than two years;
- two weeks' notice for a Worker who has been employed for a period of two years but less than five years; and
- one month's notice for a Worker who has been employed for five years or more.

For Employees, the notice periods are generally defined under the employment contract. However, most employers are guided by the provisions of the Labour Act in defining their notice periods.

Formalities to be Observed

Written Notice: The notice of termination must be in writing.

Employment Contract: The employment contract may specify certain formalities to be observed in the case of termination. Where this is the case, the employer must carry out all the necessary formalities.

Payment in Lieu of Notice: By virtue of Sections 11 (6) and (9) of the Labour Act, employers can terminate employment immediately by paying the Worker for the notice period instead of requiring them to work through it. The same applies for Employees if so provided under the employment contract. The termination notice must inform the Employee of this.

Payment of Outstanding Benefits: The employer is required to pay any outstanding benefits, including:

- the salary of the Employee for the period already worked;
- salary in lieu of notice if termination is immediate;
- severance pay, if any, as specified in the employment contract; and
- other earned entitlements such as bonuses and allowances, as provided in the employment contract.

Severance Pay

The Labour Act does not mandate severance pay for general terminations. However, the terms of the employment contract or CBA may stipulate severance pay, and in such cases, the employer is obligated to comply with those terms. Many employment contracts include clauses that provide for severance pay in the event of termination, especially for higher-level Employees or where CBAs are in place. Employers must adhere to these contractual obligations.

Furthermore, in cases of redundancy, the Labour Act requires that redundancy payments be negotiated with the trade union or Workers' representatives. The specific amount and terms of redundancy pay are not defined by law but can be determined through negotiations between the employer and the Workers' representatives.

While external advice is not legally required for terminating employment, it is often advisable for employers to seek legal counsel before proceeding with termination to ensure compliance with relevant laws and reduce the possibility of wrongful termination claims. For mass layoffs and redundancies, notifying the relevant labour authorities may be necessary.

7.3 Dismissal for (Serious) Cause

Summary Dismissal

Summary dismissal is the immediate termination of an employee's contract without notice due to serious misconduct or significant failure in performance. This is justified under common law based on the employee's conduct or capabilities. The Nigerian case *Jombo v Petroleum Equalisation Fund (Management Board) & ors* highlights the distinction between termination and dismissal: "Termination" or "dismissal" of an employee by the employer means bringing the employment to an end. Under a termination of appointment, the employee is enabled to receive the terminal benefits under the contract of employment. Dismissal, on the other hand, is punitive and, depending on the contract of employment, very often entails a loss of terminal benefits.

Generally, where the employment contract has set out the procedure, the contract specifies a procedure for dismissal, and it must be strictly followed. Employers must ensure the procedure outlined under the contract is in alignment with best practices and legal standards.

The procedural requirements for dismissal vary depending on the grounds for termination as follows:

Performance-related dismissal

1. Document performance issues and provide feedback.

2. Issue formal warnings and offer a performance improvement plan.

3. Allow the employee time to improve their performance.

4. If there is no improvement, proceed with termination, ensuring the process and documentation are clear and transparent.

Misconduct-related dismissal

1. Conduct a thorough investigation of the alleged misconduct.

2. Provide the employee with an opportunity to respond to the allegations (*Baba v NCATC (1991) 5 NWLR (PT. 192) 388*).

3. Based on the investigation and hearing, decide on termination for gross misconduct (*Olatunbosun v NISER Council [1988] 3 NWLR (Pt. 80) 25*).

Consequences

Failure to follow the appropriate process or lack of valid grounds for dismissal can lead to several adverse outcomes:

- Damages: Employees may successfully claim unfair dismissal, resulting in damages awarded against the employer.
- Loss of Reputation: Mishandling dismissals can damage the employer's reputation.
- Legal Costs: Employers may incur significant legal expenses.
- Reinstatement: Courts may order the reinstatement of the employee to their former position.

7.4 Termination Agreements

Termination agreements are permissible in Nigeria. They stand as legally binding contracts between an employer and an employee that outline the terms and conditions of the employee's departure from the company. Termination agreements must comply with the requirements/formalities of a contract under law. These include:

- Form: The agreement must be in writing, signed by the parties and witnessed.
- Mutual Consent: The agreement must be made mutually by both parties, free from fraud, duress, undue influence, or other vitiating factors that could invalidate the contract.
- Consideration: There must be a form of consideration provided, such as terminal benefits. These benefits should be clearly negotiated and included in the termination agreement.

Limitations on Termination Agreement Terms

Non-disparagement Clauses: Such clauses must not infringe on the employee's freedom of speech to an unreasonable extent.

Confidentiality Agreements: Any confidentiality clauses should be specific and not overly broad to avoid being considered unenforceable.

Restrictive Covenants: Restrictive covenants such as non-compete or non-solicitation clauses must be reasonable in terms of duration, geographical scope and scope of activities restricted.

Waivers of Future Claims: The agreement cannot lawfully waive the employee's right to bring future claims relating to issues that may arise after the agreement is signed.

Layoffs and Redundancies: In cases of mass layoffs or redundancies, employers may need to comply with additional regulatory requirements, such as notifying the relevant labour authorities before concluding such termination agreements.

7.5 Protected Categories of Employee

By virtue of Section 54 (4) of the Labour Act, employers are prohibited from terminating the contract of any female Worker who is absent due to maternity leave, or who remains absent from her work for a longer period as a result of illness that arose out of her pregnancy or confinement and renders her unfit for work.

Furthermore, under the Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry 2019, employers that hold an oil mining lease, licence or permit (or an interest therein) issued under the Petroleum Act or under regulations made pursuant to the Petroleum Act, are required to obtain an approval from the Minister of Petroleum Resources (the "Minister") for the dismissal of a worker. The Department of Petroleum Resources will conduct an inquiry into the circumstances of the proposed staff release and make a decision on whether to convey the Minister's approval or otherwise.

The Staff Release Guidelines stipulate a penalty, not exceeding the sum of USD250,000, for failure to comply with the Staff Release Guidelines.

8. Disputes

8.1 Wrongful Dismissal

Wrongful dismissal claims can arise from several factors, including:

- failure to follow due process:
  (a) not providing a fair hearing;
  (b) not adhering to procedures outlined in the employment contract;

- dismissal on invalid grounds:
  (a) termination based on grounds not justified by evidence;
  (b) discriminatory or retaliatory dismissal; and
- lack of sufficient proof:
  (a) insufficient documentation or evidence to support the reasons for dismissal.

Consequences of Wrongful Dismissal Claim

Failure to follow the appropriate process or lack of valid grounds for dismissal can lead to several adverse outcomes:

- Damages: Employees may successfully claim unfair dismissal, resulting in damages awarded against the employer.
- Loss of Reputation: Mishandling dismissals can damage the employer's reputation.
- Legal Costs: Employers may incur significant legal expenses and may be required by court to recompense the employee for the legal cost for the court proceeding.
- Reinstatement: Courts may order the reinstatement of the employee to their former position.

8.2 Anti-discrimination

Grounds for Claims of Discrimination

The NIC rules provide that where there is a claim of alleged workplace discrimination, the claimant shall state on which grounds the claim is based, which may include the following:

- ancestry;
- religion;
- gender;
- marital status;
- family situation;
- genetic heritage;
- ethnic origin;
- political or ideological convictions;
- union affiliation;
- tribe;
- handicap or disability;
- health;
- pregnancy; and
- any other ground.

Burden of Proof

In Nigeria, the burden of proof for discrimination in the workplace primarily rests on the employee (the one who alleges the discrimination). The employee must provide sufficient evidence to support their claim of discriminatory practices by the employer. Once the employee establishes a prima facie case of discrimination, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the actions in question. The decision of the court is usually based on the balance of probabilities.

In termination cases where there is a claim of termination for discriminatory reasons, it is not for the employee to show that the termination was discriminatory; it is for the employer to justify the said termination. The law is that once an employer gives a reason for terminating or dismissing an employee, the burden lies with the employer to justify the said reason (*Angel Shipping & Dyeing Ltd v Ajah [2000] 13 NWLR (Pt.685) 551 CA*).

8.3 Digitalisation

Virtual Hearings and Remote Court Sittings

Due to the COVID-19 pandemic, the NIC was prompted to commence virtual hearings, as recommended by the Court of Appeal. Following this, the NIC Practice Directions of 2020 included provisions for virtual proceedings. The NIC continues to practise virtual hearings, allowing parties to participate in their proceedings from any part of the country via their website.

The NIC encourages and promotes virtual court sittings (also referred to as "remote court sittings" or "online court sittings") for matters that do not require the taking of evidence.

E-filing Centre

The NIC Rules, Order 6A, establishes an E-filing Centre for electronic filing and the payment of filing fees for processes and documents relating to or connected with a matter before the court.

It provides that a party or counsel to a party may e-file any process or document that may be filed with the court in paper form, except:

- documents to be presented to the court in camera (ie, in chambers) solely for the purpose of obtaining a ruling; and
- documents to which access is otherwise restricted by law or court order.

9. Dispute Resolution

9.1 Litigation

Specialised Employment Forums

The NIC is the primary forum for employment disputes in Nigeria. It has exclusive jurisdiction over labour, employment, trade unions, industrial relations, and conditions of service matters, as established by the 1999 Nigerian Constitution (Third Alteration) Amendment Act 2010.

In furtherance of its authority, the NIC has established an additional forum for hearing employment disputes through means of alternative dispute resolution (ADR) – the NIC Alternative Dispute Resolution Centre. The NIC offers parties the option of ADR using two mechanisms – mediation and conciliation. The ADR Centre may handle civil matters involving disputes between employers and employees, disputes arising from health at the workplace, disputes arising from safety at the workplace, and disputes arising from the welfare of workers.

Class Action Claims

Class action claims are permitted in employment disputes in Nigeria. According to Order 13 Rule 11 of the NIC Rules, if numerous persons have the same interest in one suit, one or more such persons may sue or be sued on behalf of all interested parties.

Representation in Court

In employment litigation before the NIC, parties can be represented by the following:

- **Legal Counsel**: Both employees and employers are often represented in court by their legal counsels.
- **Trade Unions or Employee Associations**: These bodies may represent their members, especially in collective disputes.
- **Class Action Representatives**: In class action claims, one or more persons with the same interest can represent the entire group of affected individuals.

9.2 Alternative Dispute Resolution

Arbitration in Employment Disputes

Where arbitration is provided under the employment contract as the means of dispute resolution, the parties may resort to arbitration to resolve any dispute arising from the employment contract.

Furthermore, the NIC offers parties the option of ADR using two mechanisms – mediation and conciliation. The court has established an ADR Centre, which utilises the techniques of mediation and/or conciliation in the resolution of dispute between parties to arrive at a mutually accepted agreement. Specific disputes resolved

by the NIC using ADR include disputes between employers and employees, disputes arising from health at the workplace, disputes arising from safety at the workplace, and disputes arising from the welfare of workers. Parties that adopt this means are required to comply with the procedure set out in the Centre's rules.

Arbitration Agreements

Arbitration agreements are enforceable in Nigeria where the court has jurisdiction. For the court to have jurisdiction over an application for recognition and enforcement of an award, one of the following conditions must be met:

- the award debtor must be in Nigeria or be a Nigerian; or
- the assets sought for enforcement must be within Nigeria.

9.3 Costs

A prevailing employee or employer can be awarded attorney's fees or other costs.

According to Order 55 of the NIC Civil Procedure Rules, the following rules apply to the award of costs in employment disputes:

- The costs of the entire suit and each specific proceeding are at the discretion of the Court as regards the party by which they are to be paid.
- Even if a party is successful, the Court can order it to pay the costs of any particular proceeding.
- The Court may order costs to be paid out of any fund or property related to the suit.
- In fixing the amount of costs, the principle to be observed is that the successful party is to be indemnified for the expenses that party unnecessarily incurred in the proceedings. The Judge may summarily fix the amount of cost at the time of delivery of judgment. However, the Court may stay the proceeding pending the payment of the costs of any party.

Trends and Developments

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ÆLEX

ÆLEX is a full-service commercial and dispute resolution law firm with its head office in Lagos and other offices in Port Harcourt and Abuja, Nigeria, and in Accra, Ghana. The firm has eight partners, one international counsel and over 60 lawyers operating from its various offices. Its lawyers are admitted to practice in several jurisdictions including Nigeria, New York, Texas, Ghana, and England and Wales. ÆLEX has continued to win awards and recognition for quality of work and service. The firm has been ranked as a leading firm by Chambers Global 2024.

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Introduction

Nigeria's commitment to building a thriving economy in the face of harsh economic conditions has led to several legislative and regulatory reforms. Recognising the crucial role of human capital, Nigeria is focused on investment and growth through creating and retaining a well-equipped and well-compensated workforce as an economic driver. This focus is translating to increased labour and employment innovations, including enforcement of international labour standards by the National Industrial Court of Nigeria (NICN), in a bid to solidify Nigeria's dedication to cultivating a favourable labour environment, a cornerstone of modern industrial success in Nigeria's business environment.

This article focuses on trends and developments in 2023 and the first half of 2024.

Recent Legislative Interventions

Business Facilitation (Miscellaneous Provisions) Act, 2023

The Business Facilitation (Miscellaneous Provisions) Act, 2023 (BFA), enacted in February 2023, aims to enhance the ease of doing business in Nigeria. Among its various provisions, the BFA amends the National Housing Fund Act, the Industrial Training Fund Act and the Pension Reforms Act. All of these amendments have significant implications for the world of work.

- Part IX of the Schedule to the BFA amended section 6 of the Industrial Training Fund Act, 2011. Now, employers outside free trade zones with at least 25 employees must contribute 1% of their payroll to the Industrial Training Fund. Previously, the requirement applied to employers with five or more employees or those with fewer than five employees but an annual turnover of NGN50 million. The BFA raises the employee threshold to 25 and removes the turnover criterion.
- Part XI of the Schedule to the BFA amended sections 4 and 9 of the National Housing Fund Act. Before the amendment, all private and public sector employees, as well as self-employed individuals earning at least NGN3,000, had to contribute to the National Housing Fund (NHF) at an interest rate of 4% of contributions. Following the amendment, only public sector employees earning the national minimum wage or above, and self-employed persons earning at least the national minimum wage, are required to contribute 2.5% of their monthly income to the NHF. With this, private sector employees have an option to voluntarily contribute the prescribed 2.5% of their monthly income to the NHF.
- Part XIX of the BFA amended section 89(2) of the Pension Reform Act, 2014. By the amendment, pension assets are now eligible for securities lending as the Pension Commission ("PenCom") may approve. Also, Pension Fund Administrators may, subject to guidelines issued by PenCom, apply a percentage of the pension assets in a holder's retirement savings account towards payment of equity contribution for payment of residential mortgage by a holder, and for the purpose of securities lending.

Ratification of two International Labour Organization (ILO) conventions

Nigeria has ratified the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Private Employment Agencies Convention, 1997 (No. 181) by depositing with the Director-General of the International Labour Organization (ILO) the instruments of ratification. Both conventions came into force on 23 March 2023.

By its ratification of the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Nigeria now recognises and ensures protection of the equal rights of legally resident migrant workers and their families with regard to their employment and occupation, and other rights. The convention also extends to providing sanctions for employers who engage in the illegal employment of migrant workers.

Also, by the ratification of the Private Employment Agencies Convention, 1997 (No. 181), Nigeria now operates a framework for licensing and regulation of private employment agencies, including overseeing the operations of legitimate private employment agencies to prevent child labour and the misuse of personal data, and overseeing the protection of workers from being exploited under such agencies.

Executive Interventions

National Health Insurance Authority Operational Guidelines, 2023

As part of its efforts to ensure affordable healthcare services, the National Health Insurance Authority issued its Operational Guidelines, 2023 (the "NHIA Guidelines") pursuant to the National Health Insurance Act, 2022. The NHIA Guidelines introduce a contributory social health insurance scheme as a form of financing and management of healthcare based on risk pooling, and cater to members in both the formal and informal economies and their dependant(s), including staff of micro enterprises, domestic staff, artisans, etc.

PenCom's Framework for the Establishment of Additional Benefits Scheme under the Contributory Pension Scheme

In September 2023, PenCom announced the publication of the Framework for the Establishment of Additional Benefits Scheme under the Contributory Pension Scheme (the "Framework"). The Framework allows employers to set up an Additional Benefits Scheme (ABS) for exiting employees pursuant to section 4(4)(a) of the Pension Reform Act. The ABS must be managed by a licensed Pension Fund Administrator and the pension assets kept in the custody of a licensed Pension Fund Custodian.

Expatriate Employment Levy

Before its suspension on 8 March 2024, the Federal Government of Nigeria launched the Expatriate Employment Levy (EEL), a mandatory contribution imposed on employers hiring foreign workers in Nigeria. The EEL, an annual payment, with rates of USD15,000 for directors and USD10,000 for other employee categories, sought to promote skill transfer, prioritise local talent development and act as a revenue-generating tool. However, the stakeholder concerns and possible breach of non-discrimination commitments under the International Labour Organization's Migration for Employment Convention (Revised), 1949 (No. 97) led to its suspension. Dialogue among stakeholders regarding the EEL's future remains ongoing.

Judicial Interventions

Recent notable decisions by the NICN on crucial issues within the world of work are discussed below:

Jurisdiction of the NICN over contracts for service

The position of the law has always been that the NICN's jurisdiction is limited only to contracts of service and not contracts for service. However, there seems to be a shift in this position. In the unreported decision of the NICN in Suit No. NICN/ABJ/57/2023 – *Alphacyn Nigeria Limited v Registered Trustees of Prince and Princess Estate Residents Association & Anor.* delivered

on 26 July 2023, the President of the NICN held that the NICN has jurisdiction over all labour issues on the basis that the ordinary meaning of labour is one that encompasses work as it relates to both contracts of service and contracts for service, and that section 254C(1)(a) of the Nigerian Constitution confers jurisdiction on the NICN with respect to "any labour and matters incidental thereto or connected therewith".

Alphacyn followed the earlier unreported decision of the NICN in Suit No. NICN/YEN/444/2016 in *Fedison Manpower Supply Ltd v Niger Blossom Drilling Nigeria Ltd*, delivered on 29 March 2022, where the NICN found that a contract for supply of staff was a labour-related contract and not a simple contract, and therefore within the jurisdiction of the NICN.

The above decisions have been handed down by the NICN after the amendment of the Nigerian Constitution by the Third Alteration Act, 2010. We are not aware of any appellate decision that has interpreted contracts for services in light of section 254C(1) of the Nigerian Constitution. Looking to the future, and pending any appellate decisions on the point, it would seem the NICN is poised to exercise jurisdiction over disputes arising from contracts for service.

Jurisdiction of the NICN over the tort of defamation

The jurisdiction of the NICN over the tort of defamation has been a subject of conflicting decisions of the Court of Appeal. There are two schools of thought on the issue. The first considers tortious claims, particularly defamation, arising from an employment relationship as within the jurisdiction of the NICN, while the second school of thought considers such tortious claims as falling outside the jurisdiction of the NICN.

The conflicting decisions of the Court of Appeal have also been replicated in the recent decisions of the NICN. In the unreported decision of the NICN in Suit No. NICN/BEN/25/2021 – *Odigie Nosakhere v Lift Above Poverty Organization*, delivered on 17 April 2023, the claimant claimed the sum of NGN50 million as damages for a libellous publication against him during the pendency of his employment with the defendant. Even though the claim was unsuccessful due to the claimant's failure to provide sufficient evidence in proof of his claim, the NICN assumed jurisdiction over the claim. However, in the subsequent unreported decision of the NICN in Suit No. NICN/EN/35/2021 – *Chibuzor Albert Agulana v Dr Fabian Okonkwo*, delivered on 17 April 2024, the NICN, after analysing the various conflicting decisions of the Court of Appeal on the issue, held that it had jurisdiction to determine the defamation claim and found that unproven accusations of dishonesty and crimes in an employee's dismissal letter, posted in conspicuous places in the workplace, was proof of defamation.

However, less than a month later, the NICN, in the unreported decision in Suit No. NICN/ABJ/94/2022 – *Durojaiye Hassan v Leadership Newspapers Group Ltd*, delivered on 2 May 2024, declined jurisdiction to hear a claim for defamation. It therefore appears that in view of these conflicting decisions, the NICN is still undecided on its jurisdiction over the tort of defamation arising from workplace relationships and torts in general.

Award of general damages for wrongful termination

Since the Court of Appeal's decision in *Sahara Energy Resources Ltd v Mrs Olawunmi Oyebola* [2020] LPELR-51806(CA), the NICN seems to have adopted an incremental approach to the award of damages for wrongful termination, jet-

tisoning the age-long award of salary in lieu of the period of notice in deserving circumstances, particularly where the wrongful termination goes beyond the employer's failure to give the required notice and is predicated on allegations that carry a stigma, such as dishonesty, bribery, fraud, etc.

Following this decision, the NICN, in the unreported decision in Suit No NICN/ASB/47/2020 – *Richard Ogagaoghene Okagbare v United Bank for Africa*, delivered on 18 January 2023, where the claimant's complaint was that his dismissal was without valid reasons, in breach of the defendant's handbook, and that the defendant had refused to issue a work reference, awarded damages equivalent to two years' salary to the claimant for his unlawful dismissal.

In the recent decision in *Skye Bank Plc v Adegun* (2024) LPELR-62219(SC), the Supreme Court, in recognition of the evolving labour jurisprudence in Nigeria in alignment with international labour standards and best practices, upheld an award of damages of two years' salary to an employee for wrongful termination and held that the award of damages when an employer terminates an employment contract in violation of its terms cannot be limited to the employee's remuneration during the notice period specified in the agreement.

The Court's reasoning was that limiting damages to one month's salary in lieu of notice, as stipulated in the contract, would unjustly benefit the employer despite its breach. Since equity would demand that a party should not profit from its wrongful act, the Court was empowered, as a departure from common law principles, to award damages that reflect the consequential losses resulting from the breach and other factual considerations as presented before the Court.

NICN continues to recognise triangular employment relationships

Prior to the Court of Appeal's decision in *Luck Guard Limited v Mr Felix Adariku & Ors.* (2022) LPELR-59331(CA), the NICN, in accordance with its constitutional powers to apply international labour standards in its adjudication, had given priority to the doctrine of primacy of facts and concerned itself with the substance of an employment relationship rather than the form it takes in adjudicating on disputes arising from tripartite employment relationships.

Decisions such as *PENGASSAN v Mobil Producing Nig. Unltd* (2013) 32 NLLR (Pt. 92) 243 NIC and *Diamond Bank Plc v National Union of Banks, Insurance and Financial Institutions Employees & 3 Ors.* (unreported Suit No. NICN/ABJ/130/2013, judgment delivered on 6 February 2019) applied the doctrine of primacy of facts to determine whether any liability fell at the doorstep of the end-user solely or as co-employer with the labour contractor.

In *Luck Guard*, the Court of Appeal upheld the doctrine of privity of contract and overturned the finding of the existence of a triangular employment relationship. The Court of Appeal held that the employees failed to establish an employment relationship with the end-user, having failed to produce a written contract of employment.

In *Emmanuel Onyeji v Global Manpower Limited & Anor.* (unreported Suit No. NICN/LA/257/2015, judgment delivered on 27 November 2023), the NICN, after considering the decision in *Luck Guard*, still found that a triangular employment relationship existed between the claimant and defendants, even though the claimant was unable to prove his case, which was dismissed. In *Company Odoh & 3 Ors. v Hally Brown Efeluc Consortium & Anor.* (unreported Suit No. NICN/

YEN/28/2018, judgment delivered on 8 March 2024), the NICN held the second defendant liable to pay the claimants' outstanding salaries as end-user of the services of the claimants.

From the aforementioned decisions, it is clear is that the existence of triangular employment relationships will continue to be determined based on the doctrine of primacy of facts. The decision in *Luck Guard* does not seem to have affected the evolving jurisprudence.

Right of privacy of unmarried pregnant police officers

In *The incorporated Trustees, Nigeria Bar Association v The Attorney General of the Federation and 2 Ors.* (unreported Appeal No: CA/ABJ/CV/454/2022, judgment delivered on 3 May 2024), the Court of Appeal overturned the decision of the Federal High Court, which upheld the provisions of the Nigeria Police Regulations restricting unmarried female police officers from being pregnant or risk being discharged from the police force without the option of being re-enlisted. The Court of Appeal held that the provisions amounted to a violation of the privacy rights and right to freedom from discrimination of the unmarried policewomen as guaranteed under the Nigerian Constitution.

Conclusion

In the years under review, Nigeria's labour and employment landscape witnessed changes that portend a continuous growth in stakeholder involvement in labour and employment advocacy and the willingness of government at all levels to improve on processes and policies that affect stakeholders. Although there are challenges, as, for instance, can be seen in conflicting decisions of the NICN and controversial levy policies, it is expected that these challenges will remain the past.

The judicial, executive and legislative interventions so far have made for an improved landscape, and it is expected that these improvements will further solidify the gains of the years under review for a better world of work in the future.

NORWAY

Law and Practice

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Advokatfirmaet Thommessen AS is considered to be one of Norway's leading commercial law firms, with offices in Oslo, Bergen, Stavanger and London. It provides advice to Norwegian and international companies and organisations in both the public and private sectors. With approximately 290 lawyers, Thommessen covers all business-related fields of law, including M&A and corporate law, banking and finance, IP, compliance and investigation, insolvency and restructuring, insurance, litigation and other dispute resolution, tax, competition, employment, real estate, technology data protection and cybersecurity, sustainability and climate risk, and energy (including oil and gas, oil service and renewable energy and infrastructure).

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1. Employment Terms

1.1 Employee Status

The main rule is that all employees have the same employment protection under Norwegian law and there is no legal distinction between blue-collar and white-collar employees.

Nevertheless, the chief executive of a company may waive their protection against wrongful termination and the statutory rules on restrictive covenants in return for severance pay, and employees in leading or particularly independent positions may be exempt from the working hour regulations.

1.2 Employment Contracts

Forms of Employment

The main rule is that employment should be permanent, which implies that:

- the employment is for an indefinite period of time;
- the employee is ensured a minimum number of paid working hours (zero-hour agreements are not permitted); and
- the provisions on termination of employment in the Norwegian Working Environment Act apply.

However, temporary employment is permitted in the following cases:

- when the work is of a temporary nature;
- for work as a temporary substitute for another person(s);
- for work as a trainee;
- for participants in labour market schemes in co-operation with the labour and welfare services; and
- for athletes, trainers, referees and other leaders within organised sports.

The regulation on temporary employment is particularly strict in Norway. Should the requirements for temporary employment not be met in respect of a temporarily employed employee, the employee may claim permanent employment with the employer. Employees are also considered permanently employed after three years of continuous temporary employment if the legal basis is work of a temporary nature, work as a temporary substitute or work under the former Section 14-9 (2) litra f) of the Working Environment Act, or any combination of those legal bases.

The Working Environment Act also sets out a presumption of permanent employment where the employment contract does not specify

that the employment is temporary nor the legal basis for temporary employment. Temporarily employed employees who have been working for more than six months and completed any probationary period are also entitled to request more predictable and secure working conditions. In such cases, the employer must provide a written and reasoned response within one month of the request.

The Working Environment Act sets out strict restrictions on hiring employees from staffing agencies, which is not permitted for work of a temporary nature (such as temporary increased workloads or projects), and for practical purposes it is only permitted for substitute work (with a few limited exceptions).

Written Employment Contract

The employer must ensure that a written employment contract is entered into as soon as possible, and no later than seven days after commencement of employment if the duration is more than one month (or immediately, if the duration is shorter than one month). Subsequent changes to the terms of employment must be reflected in the employment contract or an addendum to the employment contract as soon as possible, and no later than on the day the change takes effect.

The employment contract must include certain minimum provisions on:

- the identity of the parties;
- the place of work;
- a description of the work or the title, post or category of the work;
- the commencement date;
- the expected duration of the employment and the legal basis for the temporary appointment, if the employment is temporary;
- provisions relating to a trial period;
- the employee's right to holiday and holiday pay, rules for determining the timing of holidays, and information about the right to other leaves of absence paid by the employer;
- the applicable notice period and the procedure for terminating the employment relationship;
- the current or agreed salary at the start of the employment, any additional payments and other benefits that are not included in the salary, such as pension contributions and meal or night allowances, and the method and timing of salary payment;
- the duration and placement of the daily and weekly working hours – if the work is to be performed periodically or if the daily and weekly working hours will vary, the employment contract must state this and stipulate or provide a basis for calculating when the work is to be performed;
- the duration of breaks;
- agreements on special working time arrangements;
- arrangements for shift changes and for work beyond agreed working hours, including payment for such work;
- information about applicable collective bargaining agreements;
- any right to competence development that the employer may offer; and
- benefits provided by the employer for social security and the names of institutions that receive payments from the employer in this connection (including pension and insurances).

The minimum requirements of the employment contract have been expanded with effect from 1 July 2024. The new minimum requirements do not apply to employment contracts that existed prior to 1 July 2024, but existing employees

can request that their employment contract is updated according to the new requirements. In the event of such request, the employer must update the employment contract within two months.

The employment contract must be signed by both parties (digital signatures are acceptable).

If employees work from home, a separate agreement governing working from home must be entered into. Exceptions to the requirement are when working from home happens sporadically or is due to a government order. See **5.1 Mobile Work** for further details.

1.3 Working Hours

Normal Working Hours

The statutory normal working hours are nine hours per day and 40 hours per week. Employees are entitled to a daily break of at least 30 minutes if they work more than 5.5 hours per day. Different regulations may follow from collective bargaining agreements (CBAs), where the working hours are normally agreed at 7.5 hours per day and 37.5 hours per week.

Overtime

Work exceeding the agreed working hours must not be carried out unless there is a specific and time-limited need for it.

Work exceeding the statutory limits is considered overtime and must be compensated with an overtime supplement of at least 40% per hour. Time off in lieu can be agreed, but the overtime supplement must nevertheless be paid. CBAs will typically include a higher overtime supplement (50–100%) per hour.

Overtime work must not exceed ten hours per seven days, 25 hours per four weeks and 200 hours per year. These limits may, however, be extended by a collective agreement or by approval from the Norwegian Labour Inspection Authority.

Flexibility of Working Hours

It is possible to agree to an average calculation of the normal working hours (with the individual employee, in a CBA or by approval from the Norwegian Labour Inspection Authority) to provide more flexibility to cover peak workloads.

Employees may also be entitled to flexible working hours and reduced working hours (under certain conditions) if this can be arranged without major inconvenience to the employer.

Maximum Working Hours

The total working hours (including overtime hours) shall not exceed 13 hours during 24 consecutive hours or 48 hours during seven consecutive days. The 48-hour limit may be average-calculated over a period of eight weeks.

In addition, employees are entitled to daily and weekly off-duty time. According to the Working Environment Act, employees are entitled to 11 hours of continuous off-duty time per 24 hours. The off–duty period shall be placed between two main work periods. Employees are also entitled to have a continuous off-duty period of 35 hours per seven days. The weekly off-duty time shall include Sundays as far as possible, as the main rule is that work on Sundays is not permitted.

Part-Time Employees

It is stipulated in the Working Environment Act that, as a main rule, employees shall be employed in full-time positions. Before entering into part-time employment agreements, employers are required to document the need for part-time employees. The question of part-

time employment must be discussed with the employee representative(s), who shall be provided with documentation from the employer regarding the need for part-time employment.

Working hours for employees in part-time positions must be set out in the employment contract or a work schedule. Part-time employees who regularly work beyond the agreed working hours over a 12-month period are entitled to an increased position, unless the employer can document that the additional work is no longer needed. Part-time employees also have a preferential right to extra shifts and an increased position, including parts of a role.

Employees who work part-time for more than six months with the same employer, and who have completed any probationary period, have the right to request a form of employment with more predictable and secure working conditions. In such cases, the employer must provide the employee with a written and reasoned response within one month after the request.

Exemption From Working Hour Regulations

Leading and particularly independent positions are exempt from the working hour regulations. Whether a position qualifies as being "leading" or "particularly independent" depends on a comprehensive assessment of several factors. The core criterion is that the position in question must have a real and significant degree of independence with respect to how, when and where work is performed. Typically, only a few positions in the company will qualify as leading or particularly independent, and these exemptions should not be applied too extensively.

1.4 Compensation

Minimum Wage

There is no statutory general minimum wage requirement in Norway. Minimum wage is often agreed as part of a CBA and will apply to the employers bound by such agreements. In companies that are not bound by a CBA, salary is based on individual negotiations between the employer and employee. However, wages and terms of employment defined in CBAs have been made generally applicable within certain sectors, which means that the minimum wage requirements agreed in CBAs will apply to all employers within the relevant sector (eg, construction work, cleaning, electro work, agriculture, shipyards, fisheries and transportation). For the purposes of obtaining a work permit, the agreed salary must correspond to the rates in the applicable CBAs or meet certain minimum thresholds for a bachelor/master's degree.

Bonus

It is quite common for employers to offer a bonus scheme, which will typically be based on the achievement of targets relating to company results or individual performance, or a combination thereof.

Government Intervention

The government has prepared regulations that apply to the compensation of certain groups of employees, as follows:

- the remuneration (fixed and variable) of leading employees employed by the state or state-owned companies; and
- the remuneration (fixed and variable) of certain groups of employees in financial institutions.

1.5 Other Employment Terms

Holiday and Holiday Pay

Pursuant to the Norwegian Holiday Act, employees are entitled to a minimum of four weeks and one day of annual leave. The holiday year runs from 1 January to 31 December, and there is no accrual of holidays throughout the year. It is quite common for employers to offer five weeks of annual leave.

The employer is responsible for determining the holiday and ensuring that employees take their annual leave. Employees are entitled to take three weeks' consecutive leave during the main holiday season between 1 June and 30 September. Employees who become ill during their employment are entitled to postpone their holiday (with certain requirements), and holiday that the employee has not been able to take will transfer to the following year. If holiday is not taken during the holiday year, the employer may be liable to pay compensation to the employee. The employer and the employee may also agree to transfer two weeks of holiday to the following year, and the employer may only cash out holiday that has not been taken in connection with a termination of employment.

Employees who are absent on holiday receive holiday pay instead of salary. Holiday pay is accrued in the year prior to payment (accrual year) and is based on salary payments (both fixed and variable) paid to the employee in the accrual year.

The holiday pay rate is 10.2% of the employee's remuneration in the accrual year if the employer offers four weeks and one day of annual leave, and 12% of the employee's remuneration in the accrual year if the employer offers five weeks of annual leave. The right to take holiday applies regardless of whether or not the employee will be entitled to holiday pay. Although the Holiday Act provides that holiday pay must be disbursed on the last ordinary pay day before the holiday is taken, it is common practice in Norway to include a section in the employment agreement stating that holiday pay is disbursed in lieu of salary in the month of June, regardless of when holiday leave is taken. For the rest of the year, the ordinary monthly salary is paid.

Employees above the age of 60 are entitled to an additional week of annual leave with an increased holiday pay rate of an extra 2.3%.

Statutory Leaves of Absence

Norwegian law provides for a number of paid and unpaid leaves of absence.

Sick leave

Employees are entitled to sick pay for a period of up to 52 weeks (provided that certain minimum tenure requirements are fulfilled). The employer pays sick pay for the first 16 days; thereafter, the sick pay is paid by the Norwegian National Insurance. The sick pay is limited to 6 G (1 G currently equals NOK124,028), but many employers offer to pay the difference between full salary and the sick pay from the National Insurance.

Prenatal examinations

Pregnant employees are entitled to a leave of absence to attend prenatal examinations if such examinations cannot reasonably take place outside working hours. Such leave is paid.

Pregnancy leave

A pregnant employee is entitled to leave of absence for up to 12 weeks during the pregnancy. Such leave is unpaid, but the employee may be entitled to benefits from the National Insurance.

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Leave in connection with childbirth/adoption

The co-parent is entitled to two weeks' unpaid leave in connection with childbirth to assist the mother. Adoptive parents/foster parents are entitled to two weeks' unpaid leave when taking over responsibility for a child.

Parental leave

Parents are entitled to parental leave for a period of up to 12 months or during such time when parental leave pay is paid from the National Insurance. Employees receive parental leave pay from the Norwegian National Insurance for a period of 49 weeks at a 100% compensation rate, or 59 weeks at an 80% compensation rate. If the child is born after 1 July 2024, employees receive parental leave pay for a period of 61 weeks and one day at an 80% compensation rate. The parental leave pay is limited to 6 G (1 G currently equals NOK124,028), but many employers offer to pay the difference between full salary and the parental leave pay from the National Insurance. At the moment, three weeks are reserved for the mother prior to birth and 15 weeks (19 weeks if opting for the 80% compensation rate) are reserved for both the mother and the co-parent. The parents may freely allocate the remaining 16 weeks between them (20 weeks and one day if opting for the 80% compensation rate).

Additional parental leave

Parents are entitled to take unpaid parental leave immediately in connection with the paid parental leave for a period of up to 12 months.

Nursing mothers

During the child's first year, nursing mothers are entitled to time off with pay to breastfeed a child for a maximum of one hour on workdays with agreed working hours of seven hours or more.

Child's or childminder's sickness

Employees are entitled to ten days of annual leave (15 days if the employee has three or more children, and up to 20 days for disabled/chronically ill children) to care for a child if the child or the childminder is sick, until the year the child turns 12 (18 years for disabled/chronically ill children). Additional leave is granted in the case of hospital stays, when the child needs continuous monitoring or has a life-threatening injury or illness. The employee is entitled to similar compensation as during their own sick leave.

Care for close relatives

Employees are entitled to 60 days to nurse close relatives/persons in the home during the terminal stage. Employees are also entitled to up to ten days per year to care for parents or a spouse/partner/disabled or chronically ill child above the age of 18. Such leave is unpaid, but the employee may be entitled to benefits from the National Insurance.

Educational leave

Employees are entitled to educational leave after having been employed for at least three years, and employed by the same employer for the last two years. Such leave is unpaid.

Military service

Employees are entitled to leave in connection with mandatory military or civil service. Such leave is unpaid.

Religious holidays

Employees that have religious holidays other than the Norwegian public holidays are entitled to up to two days of leave per year in connection with religious holidays. As a starting point this leave is paid, but the employer can require employees to make up lost working hours relat-

ing to such leave at another time (without additional pay).

Several CBAs also set out additional rights to leave of absence.

Confidentiality

During employment, employees have a duty of confidentiality as part of their duty of loyalty towards the employer. Some categories of employees also have a statutory duty of confidentiality (health personnel, lawyers, priests, etc), and additional provisions on confidentiality are commonly included in the employment contract.

Trade secrets are specifically protected against misuse under the Norwegian Trade Secrets Act, which came into force in January 2021.

Non-disparagement

The duty of loyalty covers non-disparagement requirements to a certain degree. Contractual provisions on non-disparagement are sometimes found in termination agreements, but seldom in employment contracts.

Employee Liability

The employer is liable for damage caused by the employee, either wilfully or negligently, during the performance of work for the employer. Limitations apply if the employee has gone beyond what could reasonably be expected, given the nature of the business or the work.

2. Restrictive Covenants

2.1 Non-competes

Pursuant to the Working Environment Act, non-compete and non-solicitation of customer clauses must be agreed between the employer and the employee, and such clauses are subject to mandatory regulations.

An employer may enforce a non-compete obligation if the employer can substantiate that it has a specific need for protection against competitive actions from the employee after termination of employment. Such specific need relates to the protection of business secrets, know-how and other confidential information, and the employer must demonstrate that the employee has had access to such information through their role.

The non-compete obligation may prohibit the employee from taking employment with, starting, running or participating in a competing business for a period of up to 12 months from the expiry of the notice period. The protection would generally be limited to the area in which the employee has worked.

The non-compete undertaking must be made in writing in advance. The employer must also pay consideration to the employee during the restrictive period at least equal to the statutory minimum consideration of 100% of the remuneration (both fixed and variable) up to 8 G (1 G currently equals NOK124,028), and thereafter a minimum of 70% of the remuneration exceeding 8 G. The annual consideration may be capped at 12 G in total, and deductions may be made for other income for up to half of the consideration.

The employer must actively invoke the restrictions within certain time limits (details below) by giving a written statement to the employee. The written statement must outline the employer's special need for protection, as well as the scope and geographical area of the restrictions. The employee may also request such statement from the employer, at any time during the employ-

ment. The written statement must be provided within the following limits:

- if the employee requests a statement – four weeks;
- if the employee resigns – four weeks;
- if the employer terminates the employment – written statement must be provided together with the notice of termination; and
- if the employee is summarily dismissed – within one week.

The written statement must be provided at the employee's request or upon termination of employment, subject to a short deadline. Failure to meet these criteria will render the non-compete obligation void. The employer's position in the statement is binding for three months or until the end of the notice period.

The non-compete obligation may not be enforced if the employment is terminated for reasons other than those attributable to the employee, or if the employer has given the employee reasonable grounds to terminate the employment.

The chief executive of the company may waive these rights in return for severance pay. The restrictions imposed on the chief executive must nevertheless be reasonable.

2.2 Non-solicits

Non-solicitation of Customers

Non-solicitation obligations with regards to customers may prohibit employees from contacting customers for a period of up to 12 months after the expiry of the employment contract. The obligations may only be applied to customers with whom the employee had contact or for whom the employee was responsible during the last 12 months of the employment.

There is no requirement to pay consideration for non-solicitation obligations, but the requirement to actively invoke the restrictions through a written statement applies (see **2.1 Non-competes**). The written statement must also identify which customers are covered by the obligation.

Non-solicitation of Employees

Norwegian law does not imply any restrictions on agreements between an employer and an employee with regard to non-solicitation of employees following termination of employment. Nevertheless, such obligations must be reasonable. Agreements between an employer and another undertaking preventing or limiting an employee's opportunity to take up an appointment in another undertaking are prohibited. Exceptions apply in connection with business transfers, and the employer may enter into an agreement on non-solicitation of employees during the negotiations of such business transfers as well as for a period of up to six months after the completion of such transfer. Such agreements are only valid if the affected employees are informed about the restrictions in writing.

3. Data Privacy

3.1 Data Privacy Law and Employment

The Norwegian Act on Processing of Personal Information of 2018 (which implements the GDPR) applies to the employment sphere. Additional specific regulations apply with regard to the following, for example:

- the employer's access to the employee's email or personal areas of the company's IT network;
- the employer's monitoring of the employees' use of the IT systems, including internet use; and

• the use of video surveillance in the workplace.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Citizens from outside the EU/EEA will need a work permit to work in Norway, and may not generally commence work before such permit is granted. Employers who engage employees without the necessary work permits may be penalised with fines or imprisonment.

4.2 Registration Requirements for Foreign Workers

EU/EEA citizens who intend to work in Norway must register with the police within three months of arrival in Norway. Swedish, Danish, Icelandic and Finnish citizens can work without registering with the police.

Non-EU/EEA citizens must register with the police upon arrival to receive their residence card. The employee cannot commence work before an application for a residence card has been filed. In some cases, non-EU/EEA citizens do not need a residence card if they are going to work in Norway for less than three months.

5. New Work

5.1 Mobile Work

The Norwegian Work from Home Regulation was originally implemented in 2002; necessary amendments and revisions have since been made to adapt the regulation to a more modern working life. This Work from Home Regulation applies in addition to the requirements set out in the Working Environment Act.

Unless working from home only happens sporadically or due to government orders, the employer and the employee are required to enter into a separate agreement regarding working from home. Such agreements shall include at least the following:

- the scope of work from home;
- working hours;
- provisions on when the employee shall be available to the employer;
- expected duration if the agreement is temporary;
- any provisions on the right to change or terminate the agreement on work from home, deadlines for such termination, etc;
- any provisions on a probationary period for the working from home arrangement;
- ownership, operation and maintenance of equipment; and
- provisions regarding case management, confidentiality and the storage of documents.

As far as practically possible, the employer is obligedto ensure that the employee has satisfactory working conditions. This includes ensuring that the workplace, work equipment and indoor environment do not cause the employee any physical harm, and that the psychosocial work environment is satisfactory.

5.2 Sabbaticals

Without regard to the statutory leaves of absence described under **1.5 Other Employment Terms** (Statutory Leaves of Absence), Norwegian employers are not obliged to grant their employees sabbatical leave. Upon application from an employee, the employer has discretion over whether or not to grant sabbatical leave.

5.3 Other New Manifestations

It is an increasing trend in Norway that employers no longer provide individual offices to employees, but rather offer desk sharing in open spaces or group offices. The Working Environment Act does not set out any specific legal requirements with regard to office layouts, but mandates that the physical and psychosocial working environment must be fully satisfactory.

6. Collective Relations

6.1 Unions

The number of organised employees has been relatively stable over the last ten years, at around 50% of the workforce. It has decreased somewhat since the 1980s and early 1990s. Unions play a significant role in the Norwegian labour market, and it is common for undertakings to be bound by CBAs.

As a main rule, CBAs are not compulsory. To be bound by a CBA, the employers must usually be part of an employers' organisation (although direct agreement with a trade union is also possible). Normally, at least 10% of the employees must be part of the trade union in order for a CBA to be applicable. If that is the case and the employer is part of an employers' organisation, then the relevant trade union will be entitled to demand that the employer is bound by a CBA. However, if the trade union does not demand an agreement, the employer will not automatically be bound by a CBA.

Changes and legislation in the employment law area are often the result of three-party collaboration between the government, the main employer's association and the main unions. The current government has expressed its intention to increase the influence of the trade unions, and several recent legislation changes align with this intention (eg, restrictions on hiring employees from staffing agencies, which can be waived by agreement with representatives from large nationwide trade unions in companies bound by CBAs with such trade unions).

There are several large nationwide trade unions (with LO being the biggest), and most local or company-specific unions have an affiliation with these. The legislation allows the nationwide trade unions, or employers bound by CBAs with such trade unions, to enter into agreements that may deviate quite significantly from the main rules of the Working Environment Act (eg, with regard to working hours).

6.2 Employee Representative Bodies

General

Employers with more than 50 employees have a statutory obligation to consult with employee representatives in matters that may affect the workforce, the terms and conditions of employment, etc. Best practice may also require consultation on other matters. There is no specific statutory obligation to elect employee representatives or a works council for this purpose, so the extent and level of employee representation will vary.

Employee Representatives on the Board of Directors

In limited liability companies, the employees are entitled to elect directors to the company's board of directors based on the number of employees, as follows:

- if the company has more than 30 employees, the employees can request to elect one director with a deputy;
- if the company has more than 50 employees, the employees are entitled to elect one third

of the members of the board of directors and at least two directors with deputies; and
- if the company has more than 200 employees, the company must establish a corporate assembly or enter into a written agreement with the employees entitling the employees to elect one third of the members of the board of directors and at least three directors with deputies.

The employee representatives will be elected by and among the employees, and will serve as ordinary directors on the board of directors for a period of two years.

HSE Representatives

A health and safety representative must be elected in all companies, but companies with fewer than five employees can agree not to elect a health and safety representative.

In companies with 30 employees or more, a working environment committee must be established. The working environment committee consists of representatives from the employer and employee side of the business, and the committee is responsible for discussing health and safety matters.

Union Representation

CBAs generally imply an obligation on the part of employers bound by such agreements to establish local forums for communication and collaboration with union representatives.

Group Level Consultation

With effect from 1 January 2024, in group companies that collectively employ at least 50 employees, the parent company must establish a framework for co-operation, information and discussion between the companies and the employees in the group. The form of co-operation shall be established in consultation with a majority of the employees in the group, or with one or more local trade unions that represent a majority of the employees in the group.

6.3 Collective Bargaining Agreements

CBAs are entered into between a union on one side and an employer's association or an employer directly on the other side, and address wages and/or working conditions for employees.

In Norway, CBAs are generally divided into three levels:

- national main agreements, which typically set out the framework concerning relations between the parties, including consultation obligations, the election of employee representatives and collaboration;
- industry agreements, which apply to specific industries or sectors and typically include provisions on minimum wage and working hours; and
- company-specific agreements, which typically include company-specific regulations.

CBAs normally apply for a period of two years, and there is a general duty of peace during the term of a CBA, preventing industrial action during such period.

7. Termination

7.1 Grounds for Termination

Material Requirements

Terminations under Norwegian law must comply with both material and procedural requirements in order to be valid. The employer must substantiate and document that the requirements have been fulfilled.

A termination of employment initiated by the employer must be objectively justified by reasons relating to the employee (eg, performance or misconduct) or the employer (eg, redundancy).

Termination due to employee performance, etc

Termination based on performance will require that the employee's performance has, for some time, been of a significantly lower standard than what could reasonably be expected, and that the employee has been given the means and opportunity to improve.

There is great variation in the nature and seriousness of the circumstances relating to the employee that could form the grounds for termination. However, a circumstance relevant for termination does not necessarily sufficiently warrant termination in the individual case and this will depend on, inter alia, the severity and duration of the circumstance, the extent to which warnings have been given, to what extent the employer has communicated its reasonable expectations and contributed to enabling the employee to succeed, etc. Generally, the threshold for termination of employment for reasons relating to the employee is quite high, and the employer is required to thoroughly document both the circumstance on which termination is based and how the matter has been followed up prior to the decision to terminate the employment.

Termination due to redundancy, etc

A reduction in workforce due to insufficient workload or the downscaling of operations or restructuring will normally be accepted as sufficient and valid cause. In the event of such redundancy, the redundant employee(s) must be selected from a relevant pool of employees (which, as a starting point, will include all employees in the legal entity in Norway) based on recognised selection criteria (which will typically include qualifications, years of service and weighty social reasons). The employer must also investigate whether there are other vacant roles to offer the potentially redundant employee(s), and must weigh the company's need to terminate the employment against the disadvantages such dismissal will have on the employee. Employees who are terminated due to redundancy have a preferential right to re-employment with the employer for a period of 12 months, unless the employee is not qualified for the position in question.

With effect from 1 January 2024, the requirement to offer vacant positions applies to all companies in the employer's group of companies within Norway. The preferential right to re-employment also applies to all group companies within Norway.

Procedural Requirements

In principle, the process is the same regardless of the reason for the termination. The employer must call the employee to a discussion meeting before a decision to terminate the employment is made. The purpose of the meeting is to explain the reasons for the potential termination and the employer's assessments in this respect. The employee will be allowed to comment and supplement such information. The employee is allowed to bring a representative to the meeting. The employer must make its decision, taking all the facts of the case into consideration, after completing the relevant discussion meetings. A notice letter may then be issued (see **7.2 Notice Periods**).

However, due to the fair selection of employees required in a redundancy process, a redundancy process will usually require additional procedural

steps prior to the individual discussion meetings, usually including consultations with employee representatives, a town hall meeting and individual meetings with employees to map the selection criteria.

Collective Redundancies

If ten or more employees are made redundant within a 30-day period, the redundancies are considered a collective redundancy. A collective redundancy will trigger a requirement for prior consultations with the employee representatives as well as written notification to the Labour and Welfare Authority about the terminations. The aim of the consultations is to avoid a collective redundancy or, if that is not possible, to mitigate its effect on the employees.

Prior consultations with the employee representatives may be required if the employer is bound by a CBA, even if the redundancies do not qualify as a collective redundancy. Such consultations are also recommended for employers who are not bound by a CBA.

7.2 Notice Periods

The statutory minimum notice periods will depend on the employee's age and years of service, as follows:

- trial period – 14 days;
- up to five years of service – one month;
- five to ten years of service – two months;
- more than ten years of service – three months;
- more than ten years of service and above the age of 50 – four months;
- more than ten years of service and above the age of 55 – five months; and
- more than ten years of service and above the age of 60 – six months.

It is customary in Norway for employees to agree to a notice period of three months, with six months' notice being the market standard for executive employees. The statutory minimum notice periods will prevail over contractual notice periods if the statutory notice period is longer.

The notice period will start to run on the first day of the month after notice is given. There are no formal requirements with regard to a notice of resignation provided by the employee, although written format is recommended. For the employer, the notice of termination must be provided in writing, include certain information and be delivered personally or by registered mail.

There are no statutory rights to severance pay. Employees have a right and an obligation to work during the notice period, and employers may not elect to provide pay in lieu of notice.

External advice or authorisation of the termination of employment is not required, but employees may contest the validity of the termination (see **8.1 Wrongful Dismissal**).

7.3 Dismissal for (Serious) Cause

A summary dismissal implies that the employment is terminated with immediate effect without a notice period.

An employer may summarily dismiss an employee if said employee is guilty of a gross breach of duty or other material breach of contract. Norwegian employment contracts do not typically list the reasons for summary dismissal, as this will need to be assessed on an individual basis, taking into account the seriousness of the breach and relevant case law. The threshold is generally high and the employer carries the burden of proof. The summary dismissal must be proportionate and the employer must consider

whether the purpose can be achieved by a termination with notice, which is considered a less onerous reaction.

The same procedural requirements that apply to a termination with notice also apply to a summary dismissal. The employer will therefore be required to hold an individual discussion meeting with the employee before a decision is made, and a notice letter must be delivered personally or by registered mail (see **7.2 Notice Periods**).

Employees may contest the validity of a summary dismissal in the same manner as a termination with notice (see **8.1 Wrongful Dismissal**), but the employee would not be entitled to remain in the position during the dispute.

7.4 Termination Agreements

The employer and the employee have contractual freedom to enter into termination agreements in connection with the termination of employment (or at any stage of the employment relationship). There are no formal requirements to consider when entering into such agreements, but the agreements should be made in writing. Certain provisions have also developed into market practice, and the terms of a termination agreement must not be unreasonable. There is no requirement for the employee to obtain independent legal advice.

7.5 Protected Categories of Employee

Norwegian law includes several categories of employees who enjoy specific protection against termination of employment:

- employees who are absent due to sickness may not be terminated due to such absence during the first 12 months of absence;
- employees who are pregnant may not be terminated on the grounds of pregnancy;
- employees who are absent on pregnancy leave, leave in connection with childbirth or parental leave (both paid and unpaid), in connection with either childbirth or adoption, may not be terminated on the grounds of such absence; and
- employees who are absent due to military or civil service may not be terminated due to such absence.

In these instances, the Norwegian Working Environment Act applies a presumption that a termination of employment during such absence will be based on the absence, unless the employer demonstrates other highly probable grounds for termination.

The following also applies:

- whistle-blowers are protected against retaliation, including termination of employment;
- employees who have been transferred to a new employer pursuant to the transfer of undertaking regulations may not be terminated by reason of the transfer of undertaking; and
- CBAs generally include additional protection for employee representatives.

8. Disputes

8.1 Wrongful Dismissal

An employee who alleges that a termination of employment (or summary dismissal) is invalid may request negotiations with the employer within two weeks of the termination. The employee can further instigate legal proceedings claiming reinstatement within eight weeks from the conclusion of the negotiations (or the termination, if negotiations are not held). If the employee only claims compensation, the deadline is six months

from the conclusion of the negotiations (or the termination, if negotiations are not held).

Employees who are successful in their claim are entitled to reinstatement (unless this has not been claimed), compensation for suffered and future economic loss, and compensation for non-economic loss.

Employees are entitled to remain in the position until the dispute is settled. This implies a right to work and receive salary until the dispute is settled either by mutual agreement or by the courts. The salary paid during this time is non-refundable even if the employee's claim is found to be unmerited. The right to remain in the position does not apply to employees whose employment is terminated during the trial period or who have been summarily dismissed, unless a court rules otherwise.

8.2 Anti-discrimination

The Norwegian Equality and Anti-Discrimination Act and the Working Environment Act set out protected characteristics under Norwegian law. Direct or indirect discrimination on the basis of any of the following characteristics is prohibited:

- gender;
- pregnancy;
- leave in connection with childbirth or adoption;
- care responsibilities;
- ethnicity (which includes national origin, descent, skin colour and language);
- religion;
- belief;
- disability;
- sexual orientation;
- gender identity;
- gender expression;
- age;
- membership of a union;
- part-time employment; or
- temporary employment.

However, differential treatment may be lawful if it has an objective purpose, is necessary to achieve the purpose and does not have a disproportionately negative effect on the persons subject to differential treatment, or if it is considered permitted positive treatment in line with the law.

The prohibition against discrimination applies to all aspects of employment, including announcements of positions, recruitment, reassignments and promotions, training and skills development, wage and working conditions, and termination of employment.

The employer has a duty to actively promote equality and prevent discrimination. Public companies, and private companies with more than 50 employees, must conduct regular risk assessments and implement measures to counteract discrimination, and must provide information about such efforts in the annual account (or in another publicly available document).

If an employee alleges they have been discriminated against and the circumstances give reason to believe that discrimination has occurred, the burden of proof is reversed, meaning that the employer must substantiate that discrimination has not taken place.

Employees who have been discriminated against are entitled to damages for economic and non-economic loss.

8.3 Digitalisation

Generally, the main rule for disputes is physical attendance in both court hearings and witness examinations. During the pandemic, there was

an increase in digital court proceedings, which led to changes implementing more flexibility regarding digital attendance in the Dispute Act Schedules 13-1 and 21-10. Despite the legal framework now providing higher flexibility for remote hearings, physical attendance seems to have largely reverted to pre-pandemic levels.

9. Dispute Resolution

9.1 Litigation

Most employment disputes will be tried before the ordinary courts.

Disputes concerning CBAs are to be tried before the labour court, which is a specialist court. Such proceedings may only be initiated by the employer's association (or the employer, in the event of a direct agreement) or the trade union that is party to the CBA.

Certain employment issues will be heard by the Dispute Resolution Tribunal before they are brought before the ordinary courts. Matters concerning discrimination may be heard by the Equality and Anti-Discrimination Tribunal before being brought before the ordinary courts.

A trade union that has members in a company that has hired employees from a staffing agency may instigate legal proceedings in its own name against the employer regarding the legality of such hiring.

Class actions may be initiated if several persons have claims or obligations for which the factual or legal basis is identical or substantially similar. It is a further requirement that the claims may be heard by a court with the same composition and principally the same procedural rules. In addition, class action must be the most appropriate method of hearing the claim, and a class representative must be appointed. Class actions are not very common within employment matters in Norway.

The Dispute Act also allows for multiple claimants or defendants in a matter, upon the fulfilment of certain conditions.

9.2 Alternative Dispute Resolution

The chief executive may agree to arbitration in a written advance agreement, but this is not very common. Other employees may agree to arbitration once a dispute has occurred, but this is also very uncommon in Norway.

9.3 Costs

For the ordinary courts, the main rule in Norway is that the prevailing party will be awarded attorney's fees. The court may exempt the losing party (fully or partially) from this liability if it finds compelling grounds that justify exemption.

For the labour court, attorney's fees are not awarded.

Trends and Developments

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Ræder Bing advokatfirma is a prominent law firm with a robust team of experts specialising in labour law. It is located in the centre of Oslo and serves a diverse clientele, including Norwegian and international businesses, municipalities and government entities. The labour law team includes three partners, three managing associates, three associates and three junior associates. The team handles all aspects of labour law, such as restructuring, downsizing, cases related to sick leave, and representing trade unions, employers and employees. Notable recent work includes redundancies and reorganisations for larger companies, handling complex whistle-blowing cases, advising major property developers, managing complex employment protection cases, and providing legal support in independent contractor v employee disputes. The firm's interdisciplinary approach ensures comprehensive legal solutions across related fields. The Raeder Bing team also has its own podcast, with a steadily rising number of listeners.

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Norwegian Employment Law: an Introduction

Norwegian employment law has seen several developments aimed at strengthening employment protection. The main trends and developments seen this year are outlined below.

Classification of independent contractors v employees

As of 1 January 2024, the definition of "employee" in the Working Environment Act (WEA) was amended to clarify the distinction between independent contractors and employees. This change aims to ensure that individuals functioning as employees receive the appropriate protections and benefits they are entitled to according to the WEA, the Holiday Pay Act, etc.

This amendment is part of a broader effort to adapt to the evolving nature of employment and the increasing use of independent contractors across various industries.

A notable case highlighting the implications of workers' classification involves a church singer in Northern Norway, highlighting the legal and financial risks businesses face when misclassifying workers. The outcome of this case has paved the way for many similar disputes, and it is likely that the courts will increasingly have to address similar cases in the future.

Revised definition of "employee"

The amended definition of "employee" in the WEA introduces specific criteria to determine whether a worker should be classified as an employee with employment protection rights or as an independent contractor, which are not covered by the protection of the WEA or other protective legislation.

The WEA states that an "employee" is anyone performing work for someone else to whom they are subordinate, subject to that person's management prerogative. This hierarchical relationship implies that the employee is subject to the employer's authority and oversight.

In contrast, independent contractors are characterised by their autonomy in delivering specific results or services, managing their operational costs and assuming personal responsibility for their work. Independent contractors are not under the direct management or control of the hiring entity and operate with greater independence, often managing their own schedules, resources and methods of work.

The WEA's criteria codify existing case law and focus on the nature of the working relationship, considering whether the worker continuously makes its personal labour available, and whether the worker is subordinate through direction, management and control. This evaluation includes factors such as the degree of supervision, the level of control over the work process, and the contractual terms governing the relationship.

Criteria for classification

The preparatory works of the WEA and case law suggest several factors that indicate the existence of an employment relationship (the list is not exhaustive and other factors may also be relevant), including:

- personal labour – the worker must personally perform their tasks without the use of substitutes;
- management and control – the worker is subject to the employer's direction and oversight;
- provision of tools – the employer provides the necessary tools, equipment or materials;
- risk and reward – the employer bears the risk for the work's outcome;

- remuneration – the worker receives a form of salary for their services;
- stability and termination – the employment relationship is relatively stable and can be terminated with notice; and
- exclusive service – the worker primarily provides services to one employer.

Burden of proof

One of the most significant changes introduced by the amended WEA is that it places the burden on the employer to prove that a contractor is indeed an independent contractor rather than an employee. The burden of proof is elevated as it requires the employer to prove "a high degree of probability". If the employer fails to meet the heightened burden of proof, the individual will be classified as an employee. This places a substantial responsibility on businesses to demonstrate that their contractors meet the criteria for independent status. It makes the content and wording of contracts extremely important for businesses that intend to use independent contractors in Norway.

Case study: the church singer's verdict

A recent ruling by the Hålogaland Court of Appeal highlights the economic risk businesses face when they misclassify workers. In November 2022, the court ruled in favour of a church singer who had sued a congregation, claiming that his one-year renewable contract constituted an illegal independent contractor arrangement. The singer argued that this arrangement had deprived him of permanent employment, wages, holiday pay and pension accruals since his engagement in 2013, and demanded compensation.

The Court of Appeal concluded that the singer should be considered an employee, and therefore permanently employed by the congregation in a 63% position. Consequently, the court awarded the singer NOK100,000 in non-economic compensation, in addition to back pay for wages and holiday pay, and ordered the congregation to enrol him in its pension scheme retroactively. The congregation was also required to cover the singer's legal costs, amounting to approximately NOK950,000, and their own legal expenses, estimated at around NOK2 million.

The court examined the contractual terms and practical conduct between the parties over the years. The singer's work was governed by annual contracts, which were consistent in content over the years and outlined obligations and artistic expectations, but also highlighted the structured nature of their engagements, indicating an employment relationship.

The court noted that the singer and other musicians worked in a highly organised environment, with a set group of around 12–15 musicians consistently performing midnight concerts. Except for one musician employed as a cantor, all engagements were through annual contracts. This level of organisation and continuity supported the claim of a de facto employment relationship.

The court emphasised that, despite having some flexibility in scheduling, the singer's ability to offer his services elsewhere was limited, further indicating an employment relationship.

Implications for businesses

Businesses operating in Norway must thoroughly examine their workforce affiliations to ensure compliance with the WEA criteria. Misclassifying employees as independent contractors can have far-reaching consequences, including significant legal liabilities and financial penalties. These consequences may encompass back pay

of salary and overtime, holiday pay, enrolment in pension schemes, compensation for non-compliance and legal costs.

Employers have unsuccessfully argued that previously paid fees exceeding the wage claims of misclassified employees should be offset or deducted. This argument is based on differential considerations and the notion that employees should not profit from a reclassification. The Court of Appeal has repeatedly rejected such differential considerations due to the lack of legal precedent, inadequate and/or unclear arguments, and legal grounds. This shows that the compensation also has an element of punishment in regard to the calculation of the loss.

To mitigate these risks, employers should undertake regular audits of the affiliation of the workforce – the contracts must accurately reflect the worker's classification as it is in practice. All aspects of the working relationship should align with the legal definitions of employee or independent contractor.

Requirements for the content of employment contracts

The recent amendments to the WEA (1 July 2024) introduce several new requirements for the content of employment contracts. These changes are influenced by Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union, and aim to make contracts more comprehensive and transparent. Ensuring that the rights and obligations of both employers and employees are clearly outlined is essential for fostering fair labour practice and enhancing workplace clarity.

New contract requirements

The new requirements include the following.

- Percentage of position: if the employer has not specified the percentage of the position in the employment contract, the employee's claim about the extent of the position will be upheld unless the employer can prove that it is probable (ordinary preponderance of probability) that another arrangement exits.
- Temporary employment assumption: if the employment contract does not state that the employment is temporary, it will be considered permanent unless the employer can prove otherwise (ordinary preponderance of probability).
- Workplace specification: if an employee does not have a fixed workplace, the contract must specify that the employee may work at various locations or may choose their work location.
- Salary elements: the employment contract must detail the various components that make up the salary, including any additional payments and other compensation that are not part of the regular salary. This includes bonuses, allowances and other financial benefits.
- Working hours: if daily and weekly working hours vary, this variation must be specified in the employment contract.
- Shift changes and overtime: the contract should outline the arrangements for shift changes and work beyond agreed hours, and the corresponding payment for such work.
- Probation period: if the contract includes a probation period, it can never exceed six months. For temporary employment, the probation period cannot exceed half of the employment's duration.
- Termination procedures: the contract must describe the procedures for terminating the employment relationship, including the process for resignation and dismissal.

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- Right to competence development: the contact should provide an overview of the company's competence policies.
- Other paid absences: the contract should mention any other types of paid leave granted by the employer, such as paid workout sessions during working hours.
- Social benefits: the contract must inform the employee about general social security benefits that the employer administers and pays for, such as health insurance and pension schemes, as well as the names of the institutions providing these benefits.
- Identity of hiring company: if the employee is hired from a staffing agency, the identity of the hiring company must be included in the contract.

Implications for employers

Employers must review and update their employment contracts to comply with the WEA requirements. Please note that the amendment does not mean that the employer must give up managerial prerogative.

The new legal requirements do not mean that the employer must update existing employment contracts that were entered into before 1 July 2024. However, if the employee requests it, the employer must amend and supplement the existing employment contract in accordance with the prevailing law. In such cases, the employer has a two-month deadline to amend the contract.

It might be practical to have all employees on the same employment contract template, and therefore to consider replacing all contracts once the process is initiated. When reviewing the templates, it is recommendable to also evaluate other commercial points.

Corporate group obligations: enhanced protections during redundancies

Amendments to the obligation to offer "other suitable work" and referential rights during downsizing within a corporate group came into effect on 1 January 2024. The legislative update expands the employer's statutory obligations beyond the individual company conducting the downsizing to encompass all entities within the group. The changes are applicable only to companies in Norway.

New legislative requirements

The expanded obligations are part of the government's efforts to strengthen employees' rights and address the unique dynamics of corporate groups, where decisions impacting employees are often made by entities other than the employers conducting the downsizing. The legislature therefore believes that these changes will enhance influence and accountability.

Offer of suitable work across the group

Employers within corporate groups are now required to offer "other suitable work" to employees facing redundancy. This means that, before terminating an employee's contract, the employer must have documentation on whether there are any other positions within the group that the employee could fill. This promotes internal mobility and helps employees retain employment within the corporate group.

Secondary preferential rights within group companies

Employees facing redundancy have preferential rights to new positions within the corporate group: if new positions become available, employees who have been made redundant have priority for these positions. This enhances job security and helps employees transition to new roles within the same corporate group.

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The obligation to offer relocation may be limited to certain companies within the group if the reason for the limitation is "objectively justified".

Employers within groups with at least 50 employees must establish a platform for collaboration, information sharing and dialogue with their employees.

Liability and compliance

If any of the subsidiaries within the group fail to fulfil the obligation to offer "other suitable work", the company conducting the downsizing may face liability. Therefore, it is crucial for group-affiliated subsidiaries to thoroughly understand the new regulations and adapt their downsizing procedures accordingly.

Practical steps for employers

To comply with these new requirements, employers should review and update their policies to ensure alignment with the latest legal standards and organisational needs. It is also crucial to document decisions thoroughly by maintaining detailed records of the decision-making process, particularly when limiting relocation offers to certain companies within the group.

Reassignment v dismissal: the evolving duty to offer alternative employment

In the realm of employment law, the concept of "other suitable work" often arises in discussions about downsizing and layoffs. Most employers are well acquainted with the idea that, when faced with redundancy, they must offer suitable alternative roles within the organisation before proceeding with dismissals. However, the Supreme Court has recently established that the duty to consider reassignment is not limited to cases of downsizing but can also apply in situations where an employee is underperforming or facing dismissal for reasons related to their own conduct.

The case that changed the landscape

The Supreme Court's decision of 16 June 2024 significantly shifts how employers must approach employee dismissals. The case involved a healthcare worker who had been employed by a municipality since 2004. In 2017, after completing his training and obtaining a professional certificate, he secured a permanent position as a healthcare worker. Despite his qualifications, complaints about his performance emerged from both users and colleagues soon after his appointment.

In response, the municipality implemented several corrective measures. However, despite these efforts, further serious discrepancies in his performance occurred. In April 2022, he was dismissed from his position.

Legal framework: other suitable work

Under the WEA, it is generally understood that dismissals due to "downsizing or rationalisation measures" are not deemed lawful if the employer has another suitable position to offer – this is in contrast to employee misconduct.

However, in the case before the Supreme Court, the issue was whether this duty extended to dismissals related to employee performance. The Supreme Court acknowledged that, while the statutory wording implies that the duty is limited to organisational reasons for dismissal, there could still be a "limited and circumstantial" obligation to offer reassignment in cases where the dismissal is due to the employee's conduct.

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The Supreme Court's criteria for reassignment

To determine the extent of this reassignment obligation, the Supreme Court identified three key criteria.

- Employer's interest in the termination of the employment contract – the Supreme Court clarified that if an employer has a significant interest in terminating the employee due to serious misconduct or breaches of duty, this may override the obligation to offer alternative employment. For instance, if an employee has engaged in severe misconduct that undermines the trust necessary for their role, the employer may not be required to offer reassignment. This principle ensures that employers are not unduly burdened by the obligation to reassign employees whose conduct severely disrupts the workplace.
- Employee's interest in continuing employment – the Supreme Court emphasised that the duty to offer alternative work is contingent upon the employee's genuine interest in remaining with the organisation. This interest is assessed based on factors such as age, dependents and length of service. For example, an employee near retirement age with a significant family burden and long tenure may have a stronger claim to reassignment compared to an employee with less seniority and fewer personal or professional stakes. The Supreme Court acknowledged that social considerations play a role but carry less weight in cases where the dismissal is due to the employee's performance conduct rather than organisational needs.
- Availability of suitable and open positions – the obligation to offer reassignment is conditioned on the existence of a suitable and available (open) position within the organisation. This means that the employer is not required to create a new role nor modify existing ones specifically for the employee. The employer's duty is to assess existing positions and determine whether any align with the employee's skills and qualifications.

The evaluation in the case

In the specific case reviewed by the Supreme Court, the municipality's efforts to find alternative employment for the worker were deemed sufficient. The worker's performance had consistently fallen below expectations and, despite several interventions, including competency assessments and practical training, he continued to exhibit significant performance issues. The municipality had made substantial efforts to assess the worker's capabilities and explore potential roles within the health service sector.

The Supreme Court noted that the municipality had conducted a thorough investigation to identify any suitable alternative positions but found none that matched the worker's qualifications or that would have been appropriate for addressing the performance issues. The evaluations reinforced the decision to proceed with dismissal.

The rulings implications for employers

The Supreme Court's ruling extends the concept of reassignment beyond mere downsizing scenarios. The ruling derives the duty to consider relocation from the requirement to have an "objectively justified reason" before dismissal, and the employer's obligation to balance interest when considering dismissal due to circumstances relating to the employee. The Supreme Court defined the duty to offer other suitable work as "limited and circumstantial". This means that the employer must assess whether such a duty exists in each specific situation.

Employers must now carefully evaluate – and make documentation of the assessment –

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whether there are suitable alternative positions before proceeding with a dismissal, even when the reasons for termination relate to the employee's conduct.

Supreme Court ruling clarifies "whistle-blowing"

On 21 December 2023, the Supreme Court delivered a ruling that redefines the concept of whistle-blowing under the WEA. This decision has implications for employers, particularly in how they handle internal complaints and communications from employees and union representatives.

The case involved a union representative who assisted a colleague during a meeting with an HR representative, where the colleague received a written warning. The next day, the union representative sent an angry email directed to the company's Head of HR, criticising the HR representative's conduct during the meeting. The Supreme Court ruled that this email constituted a whistle-blowing notification under the WEA, as it highlighted behaviour that was a breach of the company's code of conduct regarding respectful and proper conduct.

The key takeaways of the case are as follows.

- Broad interpretation of whistle-blowing: the concept of whistle-blowing under the WEA is broad, encompassing any statements from employees, including union representatives, that highlight objectionable conditions within the organisation. Examples may be violation of legal rules, written ethical guidelines or widely accepted ethical norms.
- Format and procedure: whistle-blowing does not require a specific format or procedure. Any form of communication that addresses objectionable issues within the workplace can be considered whistle-blowing. The critical factor is the content of the statement, not its format.
- No public interest requirement: the ruling establishes that the objectionable conduct highlighted in a whistle-blowing notification does not need to be of public interest. The key consideration is whether the employer reasonably perceives the statement as a whistle-blowing notification.
- Employer's responsibility: in cases of ambiguity, it is the employer's responsibility to determine how the statement should be interpreted. Employers must be proactive in addressing all forms of complaints that may constitute whistle-blowing.

Implications for employers

This ruling has several important implications for employers.

- Review and update policies: employers should review and update their whistle-blowing policies to ensure they align with the broad interpretation established by the Supreme Court. Policies should be clear about what constitutes whistle-blowing and the procedures for handling such complaints.
- Document decisions: employers must document decisions, especially when handling internal complaints. Detailed records of the decision-making process can provide crucial evidence if a whistle-blowing claim arises.
- Focus on issues, not classification: instead of debating whether a complaint qualifies as whistle-blowing, employers should focus on addressing the issues raised. Collaborative efforts to resolve the identified problems are more productive and can help to maintain a respectful and safe workplace.

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Conclusion

The Supreme Court has clarified that whistle-blowing constitutes any form of "statement", without specific requirements for its format or procedure. The key criterion is that the statement addresses certain issues, rather than adhering to a particular format. This broad interpretation means that any communication highlighting objectionable conditions within the workplace can be considered whistle-blowing, provided it conflicts with clearly defined norms.

The judgment emphasises that issues of concern can cover a broad spectrum, as long as they relate to a violation of legal rules, written ethical guidelines or widely accepted norms. Importantly, there is no need for the objectionable conduct to have a public interest. The critical factor is whether the employer reasonably perceives the statement to be a whistle-blowing notification.

In cases of ambiguity, it is the employer's responsibility to determine how the statement should be interpreted. For both employers and employees, the judgment suggests focusing on addressing the facts revealed by the survey rather than debating whether a complaint qualifies as a whistle-blowing case. Typically, such complaints should be treated as whistle-blowing.

Employees are entitled to safe and satisfactory working conditions. Therefore, issues raised in whistle-blower cases must be thoroughly investigated and resolved. Instead of arguing over the classification, parties should work collaboratively to address the issues identified.

One key consideration is determining the extent of investigation required.

An essential aspect of handling whistle-blower cases is implementing measures to prevent future issues and reduce the likelihood of further whistle-blowing incidents.

POLAND

Trends and Developments

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Linklaters

Linklaters is a leading global law firm, supporting its clients in achieving their strategic goals wherever they do business. The Warsaw office is one of the largest law firm offices in Poland, offering a broad range of legal services across all major practice areas. The Warsaw team is part of Linklaters' global employment practice, which allows it to provide seamless legal support to clients on multinational matters, in particular those requiring an innovative or a unified approach across various jurisdictions, and benefits from the experience gained across the firm's international network. The lawyers work on the most complex and sensitive employee relations issues, including executive exits, whistle-blowing allegations, restructuring, labour disputes and risk management. They also advise on various day-to-day HR matters. The team has vast experience advising various clients from a range of industries on many significant and complex matters in the Polish and European markets.

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A Progressive Era in the World of Work – New Social Norms on the Horizon

Recent years have proven to be incredibly challenging for employers in Poland, and the coming months are expected to continue in the same vein, heralding a new, progressive era in the world of work. This transformation is driven by advancements in artificial intelligence (AI) and its increased use in the workplace, as well as environmental, social and governance (ESG) considerations. Additionally, the incorporation of various EU Directives into the Polish legal framework – particularly those concerning pay transparency – are poised to set new standards in employment relationships. Furthermore, the recently implemented law on whistle-blowers has been a significant addition to the legal landscape. These changes will not only force a re-evaluation of established structures but will also refresh perspectives, provoke innovative solutions and, potentially, enhance employee awareness.

A straightforward question on the readiness of an organisation to discuss the details of employee remuneration, including the criteria for setting it and how it compares with the remuneration of other employees in the same role, encompassing both male and female staff, often elicits confusion. This reflects the substantial workload necessitated by the new stipulations of Directive (EU) 2023/970, enacted by the European Parliament and the Council on 10 May 2023 and referred to as the Equal Pay and Transparency Directive. This legislation bolsters the enforcement of equal pay for equal work or work of equal value among genders, and in particular, it introduces robust measures that enhance employee empowerment by ensuring access to information regarding their own and specific colleagues' remuneration and the rationale behind it, which is ultimately aimed at fostering greater transparency in salary negotiations. Mandatory pay gap reporting, collective pay assessments, and a shift in the burden of proof during pay disputes are further novel solutions.

How will the Directive radically reshape existing remuneration structures and policies? The headache of criteria and evaluation

The Directive mandates that the criteria for differentiating employees' remuneration must be objective, gender-neutral and based on factors such as skills, effort, responsibility and working conditions. These criteria may also consider other relevant job-specific factors. Importantly, these criteria must be applied in a manner that excludes any direct or indirect gender-based discrimination. The importance of not undervaluing relevant soft skills, which has often been the case in the past, is particularly emphasised. This focus aims to correct imbalances whereby such skills have been overlooked in previous remuneration practices. Accordingly, in light of the considerations mentioned above, the next pressing inquiry is whether employers are prepared to explain and justify any salary discrepancies when challenged by their employees. If not, they will have a lot to catch up on in the coming months.

To align with the requirements, employers can choose from various job evaluation methodologies. These methodologies generally fall into two main categories: global and analytical. Global (generic) methods involve ranking individual jobs according to an established criterion (eg, according to their value to the company) or, conversely, first establishing a specific number of groups and then assigning individual jobs to them. Analytical methods such as scoring or comparison, on the other hand, involve evaluating each job according to a set of specific fac-

tors. It is only after this assessment, including of factors such as skills, effort or responsibility, that remuneration is assigned to individual positions. Instead of ranking complete positions, each position should be evaluated according to specific factors. These factors include mental effort, physical effort, skills required, responsibility and other similar factors. Remuneration is assigned by comparing the weights of the factors required for each job.

The requirements of the Directive indicate that analytical methods may be more adequate as they provide for a more precise assessment and enable objective job evaluation. They also facilitate detailed justification for decisions made concerning the remuneration of individual employees, ensuring clarity and accountability. While the Directive does not introduce new principles for pay differentiation, it promotes those established through case law. The primary objective is to ensure consistent and pertinent application of these criteria across the EU, rather than to introduce new standards.

While defining the criteria for pay differentiation may be a significant challenge, their effective application in practice unveils even greater complexities. Job evaluation factors will be absolutely essential to ensure compliance; however, incorrect determination may lead to discrimination, despite scrupulous adherence to the adopted standards. For example, an overemphasis on factors typically associated with male-dominated roles, such as, traditionally, physical strength, and an insufficient recognition of soft skills, can skew results unfairly. The list of erroneously adopted criteria goes on, covering for instance practices of dual assessment of the same requirements (eg, various classifications of the required strength), or defining the "responsibility" of a position solely by its place in the organisational hierarchy of a given firm while ignoring the actual level of responsibility, or using different criteria for assessing male-dominated and female-dominated tasks.

Employers encompassed by the Equal Pay and Transparency Directive (and corresponding national provisions) will also face new obligations regarding gender pay gap reporting. They will have to transparently provide information on the gender pay gap and will have to inform about the reasons for any differences in average pay levels between female and male employees and proceed to a joint pay assessment if certain conditions are met. Employers will also have to make their employees aware of the remuneration structure in place and highlight the criteria used to determine the remuneration, pay levels and pay progression available, and also specifically remind their employees annually of their rights to this specific information.

The Directive must be implemented in Poland by 7 June 2026. In turn, the largest employers (those with more than 250 employees) must submit by 7 June 2027 the first reports required by the Directive (eg, on the pay gap), and of course the final shape of the domestic legislation will be decisive for the determination of their duties. While today the timeline appears to be generous and it may seem that there is plenty of time left to prepare for the requirements, this is a gross misconception. Establishing well-defined pay structures that comply with the new regulations is a complex process that demands strategic planning and cannot be achieved overnight (and in terms of actually reducing any identified gender pay gap to avoid having to report it publicly within the above timeframes).

The interesting observation is that most of the aspects mentioned above are already sanc-

tioned by the existing anti-discrimination laws and jurisprudence; however, the EU has spotted their ineffectiveness thus far and frequent violations of the relevant laws. The good news for employers is that the vacatio legis set by the Directive should suffice for addressing any pitfalls, if internal remedial actions among employers begin now. It has to be borne in mind that for most companies in Poland, the transformation will entail the creation of an entirely new remuneration structure that will have to be implemented on actual persons, ie, towards employees who may currently receive imbalanced or unfounded amounts of remuneration.

Navigating the tightrope: addressing the no longer silent "S" in ESG

Another pressing topic for employers is the "S" in ESG. Why now? Because although entities subject to the non-financial corporate reporting obligation in the first instance will have to publish their first report in 2025, they already have to gather, analyse and prepare the necessary data to compile their reports from 1 January 2024.

For proactive employers already doing their homework in advance, this is an excellent opportunity to tailor the appropriate systems and corporate culture principles, among others, through the implementation of internal policies such as diversity, employment, work-life balance or reintegration policies, and thus increase their attractiveness as counterparties and employers on the labour market. To achieve this, they have to determine the applicable scope of reporting and then decode which European Sustainability Reporting Standards indicators are mandatory for them and which indicators they have to examine in terms of the so-called double materiality (and include in or exclude from the report) and what kind of data will be analysed. It might also be necessary to designate those employees who will be responsible for gathering and organising data for reporting purposes and, subsequently, for developing the reports or their particular sections. This is the right time to identify potentially problematic areas in which an employer's postulates and declarations will not match reality, as after the first reports are published, the employer may become exposed to allegations of increasingly frequent "social washing" (the neighbour of the infamous "greenwashing"), where the declared values and actions, although excellent on paper and in promotional materials, are not reflected by the hard data evidenced by the reports.

Although the above-mentioned aspects have gained momentum, there is one aspect that seems to not be getting enough attention. Namely, that the Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464 of The European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting) will indirectly, through the impact of their business partners – ie, entities subject to the non-financial reporting obligation in the first place – force many smaller entities (employers) to undertake activities with respect to gathering specific data, in particular in the social field, since they, as suppliers, will have to provide appropriate information along the value chain to their contract partners, who will in turn need this to prepare their own non-financial reports. If they fail to do so, they risk losing their contracts since their counterparties will not be able to include relevant information in their reports and may choose not to prolong such co-operation, thus exposing them to unnecessary risk. This means that not only the biggest employers will have to pay attention to

the social aspects of the ESG reporting requirements in the next months.

The Artificial Intelligence Act: the convenience and threat of AI

The extensive discussion about the influence of AI on the labour market now has an even bigger audience due to the recent publication of European Regulation No. 2024/1689 of 13 June 2024, the so-called Artificial Intelligence Act (the "AI Act") – published on 12 July 2024 in the Official Journal of the EU, with most of the provisions becoming applicable after a transitional period of 24 months following its entry into force. Notably, AI systems used in the EU must be safe, transparent, traceable, non-discriminatory and environmentally friendly. They should be overseen by people and not be automated in order to prevent any potential harmful effects resulting from their use.

The discussion about the use of AI tools in the employment space is definitely going to boost, eg, recruitment, task distribution, performance assessment tools, etc. Existing mechanisms will require certain internal audits by the employer to verify any risk exposure in order to avoid penalties imposed by the AI Act. Certain AI systems will be categorised as high-risk and some will even be prohibited. It is important to note that the legislation requires conducting a level of social dialogue with employee representatives; hence, a certain level of scrutiny should be applied by the employers. The EU authorities are planning to issue more detailed guidelines for employers; however, certain internal preparatory works and reviews can be initiated even earlier.

Whistle-blowers

Although Poland was one of the last countries to implement Directive 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law, this does not imply that the related Polish law is flawless. On 24 June 2024, the Act of 14 June 2024 on the Protection of Whistle-Blowers was published in the Journal of Laws of the Republic of Poland. This Act will enter into force on 25 September 2024, three months after the date of publication, with the exception of provisions regarding external reports, which will come into force after six months. The key actions that will need to be undertaken include: (i) implementation of an internal reporting procedure by legal entities where, as of 1 January or 1 July of a given year, at least 50 individuals perform paid work. This number includes not only employees but also individuals working under other legal forms, particularly under civil law contracts, (ii) conducting consultations within a defined timeframe regarding the said procedure with trade unions or (in their absence) representatives elected by persons providing paid work for the legal entity. The representatives should be elected in accordance with the procedure adopted by the entity, (iii) organising the said elections of the representatives, (iv) making the procedure accessible to various specified individuals and contractors, and (v) establishing structures and procedures and preparing the necessary documentation.

There is currently widespread discussion on whether capital groups can have a common policy and resources. However, this does not seem to be a viable option. While some intra-group common approaches, co-operation and unification may be allowed, the safest course of action, given the current interpretation of the respective provisions, is to introduce a local policy tailored to the specific requirements of the law, being mindful of the possible sanctions for any errors in fulfilling the requisite obligations.

Why a progressive era?

Modern employees – and, broadly speaking, workers – often have little in common with those for whom the initial labour codes were introduced, although the employing entities' fundamental interests seem to remain unchanged over time. Based on the EU's post-COVID-era initiatives, legislative directions and technological developments, it can be concluded that there will likely be a focus on enhancing employee rights, awareness and empowerment. Additionally, there will be a preference for entities that maintain coherent, employee rights-driven policies and practices and promote gender equality. Ensuring market transparency and providing informative insights will be key priorities, including for the authorities. Those entities that do not follow these mainstream trends may lose out both in the employment market and against their business competitors.

PORTUGAL

Law and Practice

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Contents

PLMJ is a law firm based in Portugal that provides a full range of services as well as bespoke legal counsel. The firm has been providing tailored solutions to effectively represent the interests of its clients for more than 50 years. It offers its clients legal services in all areas of law, often through multidisciplinary teams, and always acts as a business partner making strategic decisions. As part of its commitment to close client relationships, the firm founded PLMJ Colab, a network of law firms with which it maintains cultural and strategic ties across Portugal and other countries. PLMJ Colab strives to maximise the use of resources and deliver effective solutions to its clients' international challenges, regardless of where they are located. The firm works closely with law firms competent in the legal systems and cultures of Angola, China/Macao, Guinea-Bissau, Mozambique, São Tome and Príncipe and Timor-Leste.

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1. Employment Terms

1.1 Employee Status

There is no legal distinction between blue-collar and white-collar workers as employment law does not include any classification of workers, although specific provisions or protection are applicable to:

- workers employed on fixed-term contracts;
- part-time workers;
- young workers; and
- working students.

Categories of worker based on the different duties and responsibilities are usually set by collective agreements.

1.2 Employment Contracts

An employment contract is a contract whereby a person undertakes, in return for payment, to work for another person or other persons under its/their authority and direction. Offer and acceptance are traditional elements of contract formation and are rarely a source of disagreement. The acceptance of an offer may be implied (notably by performance) or expressed.

Employment contracts are not subject to any special form unless otherwise provided for by law. However, the following contracts, among others, must be made in writing:

- promissory employment contracts;
- fixed-term employment contracts;
- employment contracts for foreign workers save as otherwise provided by law;
- employment contracts for high management positions (service commission);
- secondment agreements;
- multiple employer employment contracts;
- part-time employment contracts;
- early retirement contracts; and
- contracts to loan labour.

Terms and conditions of employment need not be expressly agreed and are governed by statutory provisions, collective agreements, work regulations or established practices.

1.3 Working Hours

Maximum Working Hours

Regular working hours may not be more than eight hours per day or 40 hours per week.

Flexible Arrangements

Average working hours rules

By collective agreements, regular working time may be defined as an average, within a reference period. In this case, the limits on working hours may be increased by a maximum of four hours, provided the weekly working time does not exceed 60 hours, not including overtime worked for reasons of force majeure. The average working time is calculated by reference to the period established in the applicable collective agreement, but cannot exceed 12 months, or, if the agreement makes no such provision, by reference to periods of no more than four months.

Exemption from the working hours rules

The exemption from working hours rules may be applicable to some specific jobs, such as managerial positions and commercial jobs, as well as to employees working remotely. A proper written agreement is legally required (this agreement can be part of the employment contract, as recommended).

Employees exempt from the working hours rules are entitled to an additional pay equivalent to no less than one overtime hour per day (general law). The additional pay can be paid separately or included in the monthly remuneration – in the latter case, this has to be specifically addressed in the written agreement (or in the employment contract).

Other flexible arrangements can also be set out in collective bargaining agreements.

Part-time contracts

A proper written contract is legally required and must contain certain minimum terms. The normal weekly working period is shorter than the one worked by full-time employees. This reduction can be achieved:

- by reducing the number of working days per week or month; or
- by reducing the daily working time.

Part-time employees are entitled to the same conditions as full-time employees on a pro rata basis, and have the right not to be discriminated against due to their status.

Overtime

Work done over the maximum weekly and daily limits qualifies as overtime. Overtime work is only admissible when requested by the employer if it is needed to face extraordinary circumstances, an increase in workload or the work is to prevent or repair damage to assets. However, there are some limits depending on the number of employees and type of contract. A collective bargaining agreement (CBA) may establish higher ceilings.

Overtime work entitles the employee to additional pay. This is a rate of 25%, of the ordinary hour, during the first hour and 37.5% during the following hours on the normal working days; and 50% on public holidays and rest days. Overtime worked over 100 hours per year is paid at the rate of 50% for the first hour or part thereof and 75% for each additional hour or part thereof worked on a normal working day; 100% for each hour or part thereof worked on public holidays and rest days. It also entitles them to time off equivalent to one full day in the case of overtime on mandatory rest day (usually Sunday). CBAs may establish a more beneficial treatment for the employee.

1.4 Compensation

There is a minimum national salary (EUR820 for 2024) set by law. Collective labour agreements may set out higher salaries in a specific sector, group of companies and/or company.

In Portugal, there are 14 payments, 12 salaries, one holiday bonus and one Christmas bonus. It is optional to pay variable salaries and companies are free to set out their own terms and conditions as long as they ensure these are objective and non-discriminatory.

1.5 Other Employment Terms

Annual Leave (Holidays)

All employees are entitled to a minimum of 22 working days' annual leave. During the first year of employment, employees are entitled to two working days for each month of the duration of their contract, up to 20 working days, which may be taken after six months' full performance of the contract.

During holiday periods, employees are entitled to their normal monthly remuneration plus a holiday allowance, typically of the same amount.

Parental Leave

Upon the birth of their child, both parents are entitled to initial parental leave of 120 or 150 consecutive days, to be shared between mother and father. The leave can be enjoyed simultaneously by both parents between the 120th and 150th days.

The leave may be increased by 30 days if each of the parents enjoys, exclusively, a period of 30 consecutive days, or two periods of 15 consecutive days, following the mandatory period of six weeks following the childbirth to be enjoyed exclusively by the mother. In case of multiple births (eg, twins), the duration of the initial parental leave is increased by 30 days for each child beyond the first one.

Fathers are entitled to take parental leave after birth of 28 days (consecutive or in interpolated periods of at least seven days), within 42 days of the birth (seven of which must be taken immediately after the birth). The paternity leave may be extended for seven more days provided it is taken at the same time as the mother's initial parental leave.

During the parental leave, the employer is not obliged to pay remuneration, as the Social Security pays an allowance. This period of leave cannot prejudice the position of the woman concerning any of the remaining entitlements, notably those dependent on attendance at work.

Parents are entitled to extended parental leave, up to three months, to be taken after the initial parental leave. Following this extended leave, parents are also entitled to leave within the first two years of the child's life to provide assistance to the child. There is no mandatory payment of the employer during these leave periods.

Employees with children under 12 years of age or, irrespective of age, with a disability or chronic illness who live with the employee and are under their care and employees with the status of non-formal caregivers are entitled to work part-time or to work under flexible working hours arrangements.

Sick Leave

Employees are entitled to time off from work for illness or injury, which is paid by the Portuguese Social Security protection schemes, provided they meet all the eligibility requirements. The Social Security protection schemes pay sick pay to employees who are absent from work as

a result of illness or injury. The employee can receive sick pay for a total of 1,095 days. Sick pay is calculated based on the employee's remuneration reference for Social Security purposes and varies between 55% and 75% depending on the period of illness.

The sickness leave suspends the employment contract as of 30 days and has no maximum period. Employees have the obligation to communicate absences due to sickness as soon as possible and may be required to present medical documentation proving the sickness. In some cases, CBAs provide specific rules covering employee illness or injury.

Protection of Confidential Information

During the employment relationship, employees are bound by a confidentiality duty. The parties may also agree upon a confidentiality duty after termination.

2. Restrictive Covenants

2.1 Non-competes

Portuguese employment law allows restrictive covenants, notably confidentiality, non-competition (and in that context, non-solicitation) and/or minimum stay obligations. The duration of the post-employment non-compete duty cannot exceed two years from the termination of employment.

In cases of employees who hold positions that entail a special level of trust (eg, management positions) or that have access to sensitive information from a competition standpoint, the restricted period can be extended to a maximum of three years. The minimum stay duty can be set at a maximum of three years.

Employees covered by a post-contractual non-compete duty must receive financial compensation during the restricted period. Portuguese law does not set a specific criterion to determine the compensation to be paid during the non-compete period. The Constitutional Court case law follows the understanding that the compensation must be fair, adequate and proportional. This means that the non-compete duty financial compensation must be sufficient to support the employee during the restricted period, taking into account their salary while employed by the company. Although the law leaves the parties some room to establish the time of payment, the purpose of the compensation is to ensure the employee can obtain a suitable income source during the restricted period. It is therefore recommendable that the payment of the compensation be made on a monthly basis during the restricted period.

If any agreement fails to provide for compensation, or if the compensation is considered insufficient, the agreement will be null and void, and thus release the employee from complying with it and the employer from paying the compensation. The amount of compensation may be reduced in cases where the employer has expended large sums on the employee's vocational training.

The remedies for a non-compete breach are limited to the possibility of seeking compensation from the former employee. The burden of argument, and the quantification and proof of the damage, falls solely on the former employer. In many cases, it is quite hard to quantify the damage as the value of information is difficult to measure. In addition, it is quite difficult to prove damage which arises as a result of the employee's behaviour. In order to mitigate this risk, it is usual for the parties to agree on a penalty award.

2.2 Non-solicits

Non-solicitation clauses are null and void under Portuguese employment law. No specific penalty is provided in the law concerning these agreements.

In addition, non-solicitation agreements may also constitute a breach of competition law, as this type of agreement is deemed limiting and disruptive to competition and therefore illicit. Companies may be penalised with fines that may amount up to 10% of the turnover of the company.

3. Data Privacy

3.1 Data Privacy Law and Employment

In Portugal, personal data processing is governed by the GDPR and Law 58/2019 of August 8th, which incorporates the GDPR into Portuguese law. When it comes to employees' personal data, special category data may be collected, processed and used by employers when necessary to meet obligations and exercise rights under employment, social security and social protection law or a CBA.

The Portuguese data protection law establishes that the consent given by an employee does not constitute a legitimate legal basis for processing their personal data if such processing results in a legal or economic advantage for the employees, except as otherwise specified by law. However, the Portuguese supervisory authority (the *Comissão Nacional de Proteção de Dados* – CNPD) holds that this provision is not compliant with EU law.

Transfers of personal data to third countries in and outside the EU (including Norway, Liechtenstein and Iceland) are only permitted if the conditions set under the GDPR are met. Furthermore, transfers to third countries (outside Europe) are also permitted if appropriate safeguards (eg, binding corporate rules and standard contractual clauses) are provided by the controller or processor of personal data and only if enforceable rights and effective legal remedies are available for the data subject. In any case, the transfer of personal data must observe the main data quality principles established under the GDPR: lawfulness; fairness and transparency principle; purpose limitation principle; data minimisation principle; accuracy principle; storage limitation principle; and the integrity and confidentiality principle.

4. Foreign Workers

4.1 Limitations on Foreign Workers

A proper written contract is legally required when hiring foreign employees, except for citizens from the EU or from a state with which there is a treaty between states. This contract can only be executed after the employee has obtained the proper visa and a copy of that visa must be annexed to the contract – this will not prevent a company from signing an offer letter or a promisory employment contract to be effective after the visa is obtained.

4.2 Registration Requirements for Foreign Workers

No specific registration requirements apply.

5. New Work

5.1 Mobile Work

The law allows the full remote working and hybrid regimes (when the employee carries out some days of remote work from their home or

co-working space, and on other days they work physically on company premises). As a rule, remote work is implemented by written agreement, which shall contain, most notably, the place of telework, the identification of the owner of any working equipment, as well as responsibility for its installation and maintenance, and the terms and periods the employee should physically attend company premises to work to avoid isolation from the company and their colleagues.

The following categories of employees are entitled to remote work:

- with a child up to the age of three or, irrespective of age, disabled, chronically ill or suffering from an oncological disease, who lives with them in the same household, and the employer has the resources and means to do so;
- with a child aged up to eight years, and the employer has the resources and means to do so (except for micro-company employees), in the following cases:
  - (a) when both parents meet the conditions to exercise the activity in telework, provided that it is exercised by both in successive periods of equal duration within a maximum reference period of 12 months; or
  - (b) single-parent families or situations in which only one of the parents, demonstrably, meets the conditions to exercise a teleworking activity;
    - (i) who are victims of domestic violence and have verified the conditions for transfer to another workplace; or
    - (ii) who have the status of non-formal caregivers.

The capture and use of images, sound, writing or history, or the use of other means of control that may affect an employee's right to privacy, are prohibited.

Powers of direction and control over the provision of remote work are exercised, in principle, by means of the equipment and communication and information systems allocated to the employee's activity, in accordance with procedures previously known by the latter and compatible with respect for their privacy.

The employer is obliged to carry out health examinations at work before the implementation of remote work and, subsequently, annual examinations to assess the employee's physical and mental aptitude to carry out the activity, the repercussion of the activity and the conditions in which it is provided on the employee's health, as well as the appropriate preventative measures. Furthermore, the employer has the duty to evaluate and control the health and safety conditions at work in the place where the employee carries out their activity and to ensure that it complies with the health and safety conditions set by law.

5.2 Sabbaticals

Employees are entitled to unpaid leave of over 60 days to attend educational or vocational training. The employer can only refuse to grant such leave in the following cases:

- when, in the previous 24 months, the employee has been given appropriate vocational training or leave for the same purpose;
- in the case of an employee with less than three years of seniority;
- if the employee has not applied for an unpaid leave at least 90 days before it is due to start;
- in the case of a micro or small business and if it is not possible to adequately replace the employee if necessary; and

- in the case of employees performing managerial, supervisory or qualified roles, who cannot be replaced during the leave without causing serious loss to the operation of the business.

Apart from this case, the employee does not have a legal right to take unpaid leave, which means that it will be up to the employer to decide whether or not to grant the unpaid leave.

The unpaid leave determines the suspension of the employment contract. All the rights, duties and guarantees of the parties that do not presuppose the actual provision of work remain in force and the time of suspension is considered for seniority purposes.

5.3 Other New Manifestations

There are no new manifestations to mention for this jurisdiction.

6. Collective Relations

6.1 Unions

Trade union organisations are entitled to:

- negotiate and settle collective labour agreements;
- provide financial and social services to their members;
- participate in the drafting of employment laws;
- represent their affiliated workers at company level and appoint union representatives;
- participate in dismissal proceedings that concern their affiliated workers; and
- receive information and be consulted about:
  (a) recent and probable future evolution of the company's activity;
  (b) probable evolution of employment;
  (c) any decision that may entail a material change in the work organisation of employment contracts; and
  (d) participating in company restructuring processes, particularly where training measures or changes in working conditions are planned.

6.2 Employee Representative Bodies

The employees of a company may (although it is not mandatory) take the initiative to set up the following representative bodies.

- Works council – the members are appointed by the employees and their purpose is to represent the interests of the employees of that company. In most companies in Portugal, there is no works council; they are only found in larger companies.
- Union delegates – elected by employees affiliated with a specific union; there can be more than one union with representation in a company.
- Security and health representatives – to supervise issues relating to security and health. They are not common in Portugal.
- European Works Council (EWC).

Representatives of employees are entitled to time off to perform their duties and may convene general meetings of employees either outside or within working hours (in the latter case, for a maximum 15 hours a year).

Works councils have information and consultation rights such as:

- the right to obtain information on some matters of relevance for the company/employees;
- the right to consultation on some specific matters of relevance for the employees, as defined by the law, but they do not have the

right of veto in respect of any employer's decisions;
- the right to meet periodically with the management; and
- the right to negotiate a collective labour agreement specific to the company, provided that the unions representing the company's employees delegate that power to the works council (this is not common).

6.3 Collective Bargaining Agreements

At the industry level, CBAs are common in almost all sectors. Since CBAs usually provide more favourable employment conditions than the Employment Code, they will prevail. However, there are some specific matters where the law is mandatory and the CBA cannot overrule them. These matters mainly involve termination of employment contracts.

Employment contracts cannot, in principle, provide conditions that are less favourable than the ones established by a CBA. The parties to a collective agreement may agree that a particular provision is one from which there can be no derogation.

7. Termination

7.1 Grounds for Termination

The employer may be entitled to terminate the employment contract by dismissal:

- with just cause;
- on grounds of redundancy; or
- on grounds of failure to adapt.

In addition, during the trial period, either employer or employee may terminate the contract without prior notice (save if the trial period has lasted more than 60 days, in which case the employer must give prior notice of seven days) or just cause. There is no right to any compensation unless otherwise agreed in writing.

Term contracts lapse at the end of their term, provided the employer or the employee respectively notifies the other in writing of the intention to terminate the contract, 15 or eight days prior to the end of the term.

All methods of termination require compliance with specific procedures provided in the law.

The legal grounds for collective dismissals are as follows:

- definitive closure of the company;
- closure of one or more sections; or
- eduction in staff for structural, technological or market reasons.

If the dismissal is made on the grounds of redundancy, the employer must notify its intention, in writing, to the works council, if there is one, or otherwise to either the inter-union committee or the union committees. The notice must contain:

- the reasons given for the collective dismissal;
- a workforce table, broken down into the company's organisational structures;
- indication of the criteria serving as the basis for selection of the workers to be dismissed;
- the number of workers to be dismissed and occupational categories covered by the dismissal;
- the period of time over which the dismissal is to be made; and
- the method to calculate any redundancy payments to be awarded to the redundant workers, over and above that provided for by law or by collective agreement.

At the same time as the employer notifies the workers, it must also send a copy of the letter and the enclosures to the appropriate department of the ministry responsible for employment that deals with collective employment relationships.

Where there are no workers' representative bodies; the letter must be sent to each of the employees who may be affected by the collective redundancies. Within five business days of the date of receipt of the initial notice, the employees may appoint, from among themselves, a workers' representative committee of no more than three or five members, depending on whether the dismissal will cover up to or more than five workers. In the 15 days following the date of receipt of the initial notice, the employee and/or the workers' representatives may issue a non-binding opinion about the dismissal and propose alternative measures.

If employment contracts are to be terminated, the company must, within 20 days after the initial notice has been received, inform each of the workers who are affected, in writing, of the decision to proceed with the redundancies, expressly stating the grounds for termination and the date of termination of the employment contract.

7.2 Notice Periods

Only employees who are dismissed on grounds of redundancy or on grounds of failure to adapt must be given notice of termination as follows:

- employees with under one year of service – 15 days;
- employees with between one year and under five years of service – 30 days;
- employees with between five years and under ten years of service – 60 days; or
- employees with ten or more years of service – 75 days.

7.3 Dismissal for (Serious) Cause

Dismissals without just cause are not permitted. In general, any wilful behaviour on the part of the employee, which, given its significance and consequences, makes any continuation of the employment relationship immediately impossible, constitutes just cause for dismissal.

In particular, any of the following conduct by the employee is deemed to constitute just cause for dismissal:

- illegitimate refusal to comply with instructions given by the employer;
- violation of other employees' rights and guarantees;
- regular conflicts with other employees;
- continuously careless or negligent performance of duties;
- damage to significant financial interests of the employer;
- false justification of absence;
- unjustified absence causing any damage or serious risks to the employer or unjustified absence for five consecutive days or ten non-consecutive days per calendar year;
- wilful non-compliance with the rules concerning security or hygiene conditions at work;
- criminal behaviour towards any other employee or officer of the employer;
- non-compliance with or opposition to any judicial or administrative decision; and
- abnormal decrease in the employee's productivity.

In order to dismiss an employee with just cause, the employer has to begin a disciplinary procedure against the employee.

The procedure starts with the employer addressing a written statement of misconduct to the employee containing a full description of the relevant facts, particularly those that may be considered just cause for dismissal. Within ten working days of receipt of this document, the employee may present a written defence and request that the relevant evidence, such as witness statements, be examined. The employer must accede to the requests made in the written defence, or risk the disciplinary procedure being held invalid.

After conclusion of these proceedings, the employer must make a final decision within 30 days. Should the employer's decision be of dismissal, the employer pays no compensation to the employee for the termination of the employment contract, except the legal amounts due for such termination and in respect of the pro-rata holiday pay and Christmas bonus due.

7.4 Termination Agreements

Employers and employees may terminate employment contracts by means of a mutual agreement. Termination agreements take the form of a document to be signed by both parties, in two originals, with one to remain with each party. This document should expressly include, at least, the date on which the agreement was signed and the date on which it is effective. The parties may agree on other effects, provided these are not contrary to the law.

Should the parties agree to the employee being paid overall pecuniary compensation, it is assumed that they have included all the credits having matured on the date of the employment contract termination or being payable in reason thereof.

The effects of employment contract termination agreements may be revoked at the employee's initiative by notice in writing within seven days of the date on which they were signed. The notice of revocation of termination will only take effect if, together with the notice, the employee delivers or in any way places at their employer's disposal the entire amount of the pecuniary compensation possibly paid pursuant to the agreement or by reason of the termination of their employment contract. The revocation notice provisions do not apply to duly dated employment contract termination agreements when the signatures on them have been certified in the presence of a notary.

7.5 Protected Categories of Employee

Any dismissal of pregnant employees as well as employees who have recently given birth or are breastfeeding and employees with the status of non-formal caregivers always requires the prior opinion of the equal opportunities authority. If this opinion is not in favour of the dismissal, the employer is only permitted to continue with the dismissal following a court finding of just cause.

In addition, the dismissal of any employee who is a workers' representative is presumed to be made without just cause.

8. Disputes

8.1 Wrongful Dismissal

The employee may apply to the Employment Court for a declaration of unlawfulness of the dismissal. The court should declare the unlawfulness of the dismissal in the following situations:

- failure to follow a procedure prior to the dismissal;

- the dismissal was motivated by political, ideological, ethical or religious grounds;
- absence of cause for termination; or
- invalidity due to non-compliance with the legal requirements.

When a dismissal is declared unlawful, employees are entitled to compensation for financial and personal damage arising from the unlawful dismissal, reinstatement without prejudice to their category and length of service, and to the earnings they did not receive from the time they were dismissed until the time the court decision becomes final. Any sums they may have received as a result of the termination of their employment contract, which they would not have received were it not for their dismissal (eg, unemployment subsidy), will be deducted from this compensation.

In lieu of reinstatement, employees may choose to receive a compensatory award, the amount of which is established by the courts and is equivalent to between 15 and 45 days of basic pay and length of service payments for each full year or fraction of a year of service.

If companies have a maximum of ten workers, or if the workers are directors or managers, the employer is entitled to oppose reinstatement provided it can justify that the return of these workers would seriously interfere with and prejudice the normal running of the company. The court must assess the grounds alleged by the employer.

8.2 Anti-discrimination

The grounds for anti-discrimination claims include any direct or indirect discrimination that privileges, benefits, wrongs, deprives of any right or exemption from any duty based notably on ancestry, age, sex, sexual orientation, marital status, family situation, genetic heritage, decreased work capacity, handicap, chronic disease, nationality, ethnic origin, religion, political or ideological convictions, or union affiliation.

Employees who seek to enforce discrimination rights may lodge judicial claims. They must indicate the employee with whom they consider themselves to be discriminated against. The employer must prove that the different treatment between the two employees is based on non-discriminatory reasons.

Employees may be entitled to compensation and, to the extent possible, to be placed in an equal position with their colleagues compared with whom they consider themselves to be discriminated against.

8.3 Digitalisation

There are no new regulations with regards to the digitalisation of employment disputes.

9. Dispute Resolution

9.1 Litigation

The Portuguese judicial system has specialised courts specifically dedicated to labour and employment cases. Portuguese law does not specifically allow class action cases related to employment and labour cases. However, unions are entitled to represent their affiliate works in judicial proceedings seeking to defend collective rights of employees.

9.2 Alternative Dispute Resolution

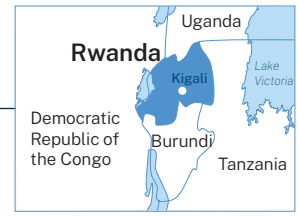
Arbitration is, currently, not possible in Portugal in employment disputes.

9.3 Costs

Nominal compensation will be awarded to the prevailing party for attorney's fees incurred, to be paid by the non-prevailing party. This compensation corresponds to 50% of the legal fees and other costs associated with the legal action paid by both parties to the court during the judicial procedure.

RWANDA

Law and Practice



Contributed by:
Aimery de Schoutheete, Chloé Stassart and Isaac Rwapasika
Liedekerke

Contents

Liedekerke has a labour and employment department that is one of the largest employment teams within a full-service law firm in Belgium, and which is recognised as a leading practice. With a team of nine lawyers – including three partners – it advises and assists clients in all matters touching on labour and employment law. With offices in Brussels, London, Kinshasa and Kigali, and as part of the Lex Mundi global network, the firm can offer seamless services wherever its clients choose to do business. Clients include Belgian, foreign and multinational corporations that are active in numerous industry sectors, such as energy, IT, automotive, retail, hotel, food and logistics. The labour and employment department advises public administrations and has particular experience in (international) transfers of undertaking, collective dismissal and reorganisations, closures, trade union negotiations, compensation and benefits, discrimination law, social crimes and employment fraud.

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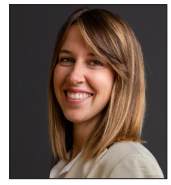

Chloé Stassart is a senior associate in Liedekerke's labour and employment department. She recently became the "Chief Operating Officer, Africa" of the firm, in charge of the strategic growth of its African practice. As a senior associate specialised in labour law, Chloé has successfully advised national and international clients, large multinationals, public sector clients and non-profit organisations on all aspects of Belgian employment and social security law. She has also represented clients in complex litigations before Belgian labour courts. In parallel with her practice in Belgian labour law, Chloé specialised in Congolese, Rwandan and Burundian labour law. This enriching experience has led her to focus on the booming Central-Africa market.

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1. Employment Terms

1.1 Employee Status

Rwandan labour law makes no distinction between blue-collar and white-collar workers. The Rwandan Labour Code defines an "employee" as a person having agreed to work for an employer under a contract entered into between them, and in return for remuneration.

The only distinction appearing in the Rwandan Labour Code is between "employees" and "informal sector employees", who are employees working for an enterprise or an individual for an employment that is not registered in the register of companies or with a public authority. The Rwandan Labour Code provisions relating to occupational health and safety, the right to form unions and employers' associations, the right to salary, the minimum wage, leave, social security protection against workplace discrimination, protection from forced labour, and prohibited forms of work apply without distinction to these two categories of employees.

In addition, specific regulations (eg, the Ministerial Order of 17 March 2020 relating to employees' representatives) refer to managerial staff, without this category of worker being formally defined by law. In this context, the definition of a managerial employee may be the one used in other jurisdictions, ie, an employee who generally performs a management or control function in a company and usually enjoys a special status in collective agreements.

1.2 Employment Contracts

In Rwanda, employment contracts are required. They can be entered into for a fixed term or for an indefinite duration and can be written or oral. However, the duration of an oral employment contract cannot exceed 90 consecutive days.

The following terms must appear in written employment contracts:

- identification of the employee and the employer;
- purpose of the contract;
- obligations of contracting parties;
- duration of the contract;
- nature of the employment;
- category or level of employment;
- place of work;
- probation period;
- working hours;
- salary and fringe benefits;
- deductions on salary;
- date and place of payment of the salary;
- overtime remuneration;
- procedure of transfer of an employee;
- dispute settlement procedure;
- procedures for termination of the employment contract; and
- date of commencement of the employment contract.

These are the mandatory provisions. The parties to an employment contract remain free to add other clauses to govern their working relationship.

1.3 Working Hours

Working Time

The weekly working time is 40 hours. The Rwandan Labour Code does not impose daily working time limits, but a communication from the Prime Minister Office dated 11 November 2022 recommends official working hours from 9am to 5pm. This schedule excludes a one-hour lunch break but includes a flexible hour between 8am and 9am, where an employee may work remotely. Although the official working hours from 9am to 5pm have not been formally adopted by a Ministerial Order yet, they are applied in practice and

considered by the Labour Inspectorate to be the applicable working time schedule.

A Ministerial Order adopted the so-called flexible hour, defining it as a working hour where an employee has the flexibility to schedule their work in a way that allows them to attend to personal or family-related affairs, or during which they are not obliged to be at their duty station or during which the employee may work remotely and report to their duty station when it is urgent. In practice, it means that for companies whose working hours start before 9am, and in so far as this is possible given the nature of the work, the parties may agree that the employee can work one hour from home before arriving at the workplace. This flexible hour will be counted as working time. The time spent travelling to work, as well as the compulsory one-hour break, do not count as working time.

Part-Time

Rwandan law does not provide for any special arrangements for part-time workers.

Overtime

Overtime is permitted in Rwanda if it is performed at the employer's request in the case of urgent work, seasonal work, exceptional work, work done to increase productivity or work of a special nature. As these concepts are not defined, they are interpreted broadly. Hours worked are considered to be overtime if they are worked in excess of the 40-hour week or in excess of the weekly working hours laid down in the company's rules of procedure (work rules) or in the employment contract.

The employer must track overtime hours in a register and the employee must confirm these hours, either by signing the register or by affixing their fingerprint. As regards compensation for overtime, the employer must grant the employee compensatory rest within 30 days of the overtime being worked. If this is not possible, the employer must pay overtime at the same hourly rate with the following month's salary. There is no statutory complementary overtime pay (that is, an extra pay in addition to the normal hourly rate due for the overtime work) in Rwanda, regardless of whether overtime is worked during the day, at night, on a public holiday or during weekends. Of course, employers are free to grant complementary overtime pay to their employees. In that case, it can be done by mentioning it in the company's rules of procedure, in a collective bargaining agreement, and/or in the employment contracts.

1.4 Compensation

Minimum Wage

To date, there is no statutory legal minimum wage in Rwanda as a ministerial order has yet to be adopted in this regard. A draft bill is currently being discussed and should be adopted in the coming months.

In the absence of a legal basis, the current reference is a judgment of 26 November 2016 from the Supreme Court (Soras Ag Ltd v Umuhoza et al, RCAA0049/14/CS), which sets the minimum daily wage at RWF3,000 (approximately USD3). This judgment is considered as setting the general rule regarding minimum wage, since (i) the ministerial decree regulating the issue has not yet been adopted, (ii) judges in Rwanda have the obligation to adjudicate all cases submitted to them, even in the absence of relevant rules of law, by adjudicating according to the rules that they would establish if they had to act as legislator, relying on precedents, customs, general principles of law and doctrine, and (iii) Soras Ag Ltd v Umuhoza et al, being a decision of the

Supreme Court, is binding on all other courts in Rwanda.

Thirteenth Month and Bonuses and Government Interventions

There is no obligation under Rwandan law for employers to grant a thirteenth month and/or bonuses to their employees. However, approximately 20% of employers grant such incentives to their employees in order to improve the company's productivity.

There is sometimes government intervention in compensation or salary increases, especially in the public sector. For example, teachers' salaries were increased in 2022.

1.5 Other Employment Terms

There are five types of leave in Rwanda: annual leave, circumstantial leave, maternity leave, sick leave and authorised absence.

Annual Leave

The statutory annual leave equals one and a half working days per month of work, ie, 18 days per year. The parties can agree on provisions that are more favourable to employees. In any case, employees are entitled to one additional working day's paid leave for every three years of service with the same company, but the total annual statutory leave can never exceed 21 days. In principle, the annual leave must be taken and cannot be paid in lieu. An employee is entitled to such leave after one year of service (including the trial period). Leave must be requested in writing and must be taken by mutual agreement with the employer, depending on the needs of the company.

In case of termination before the employee benefits from their annual leave, they are granted an indemnity in lieu of leave.

Circumstantial Leave

The employee is entitled to circumstantial leave for the following reasons:

- two working days in the case of their civil wedding;
- four working days if their wife gives birth, five working days in case of complications, and one month if their wife dies leaving an infant aged less than three months;
- seven working days in the case of death of their spouse;
- five working days in the case of death of their child;
- four working days in the case of death of their father, mother, father-in-law or mother-in-law;
- four working days in the case of death of their brother or sister;
- three working days in the case of death of their grandfather or grandmother; and
- three working days in the case of their transfer over a distance of more than 30 km from their usual place of work.

Maternity Leave

A female employee who has given birth is entitled to maternity leave of at least 14 consecutive weeks, which includes two weeks that the employee can take before the delivery. In the event of complications, she is entitled to an additional paid leave of one month.

Additional leave is granted to employees who give birth to a stillborn baby, whose child dies after birth or who give birth to a premature baby.

Since 2023, a male employee is entitled to a paternity leave of seven days after the birth. In the event of complications, he is entitled to five extra working days.

Sick Leave

The Rwandan Labour Code distinguishes short-term and long-term sick leaves. A short-term sick leave does not exceed 15 days and must be ascertained by a doctor. A long-term sick leave cannot exceed six months and must be ascertained by a medical committee composed of three doctors. The employee is entitled to their full salary during the first three months of leave. During the further three months, the employment contract will be suspended, and the sick employee will not be paid. If the employee remains sick after six months, the employer is entitled to terminate the employment contract, with a termination allowance ranging from two to seven months of salary, depending on the number of years of occupation.

Authorised Absence

An employee can lodge a request with their employer to be absent from work for a duly justified reason. Although not legally required, in practice, such request is made in writing.

Confidentiality and Non-disparagement

Nothing is provided in respect of limitations on confidentiality or non-disparagement agreements under the Rwandan Labour Code. Employers are therefore free to include such clauses in the employment contracts or settlement agreements, although it is not frequent in practice. It is, however, recommended for key positions.

Employees' Liability

The Rwandan Labour Code specifies two situations in which an employee can be held liable, entitling the employer (and any other suffering party) to claim compensation.

- In case of illegal strike – employees risk at least six months' imprisonment and a fine of between RWF500,000 (approximately USD500) and RWF5 million (approximately USD5,000) or one of these penalties only. Employees are also liable for the damages caused in case of illegal strike.
- In case of violation of rules governing health and security at the workplace, if the employee causes a danger through clumsiness, negligence, carelessness, or inattention. Employees risk an imprisonment of between six months and two years and a fine of between RWF500,000 (approximately USD500) and RWF2 million (approximately USD2,000) or one of these penalties only.

Disciplinary sanctions can also be imposed on employees, depending on the seriousness of the fault committed whilst performing the contract:

- oral warning;
- written reprimand;
- temporary suspension not exceeding eight unpaid working days;
- dismissal with notice; or
- dismissal.

2. Restrictive Covenants

2.1 Non-competes

There are no provisions regarding non-compete clauses in Rwandan employment law. The general principles of civil and contract law apply, among which the prohibition of unfair competition. Of course, the parties are free to agree on non-compete provisions in their employment contract, as a consequence of their contractual freedom.

2.2 Non-solicits

Nothing is set out in the Rwandan Labour Code regarding non-solicitation clauses. It is, however,

advisable to include such a clause, usually applicable for a standard period of 12 months following the termination of the employment contract.

3. Data Privacy

3.1 Data Privacy Law and Employment

Nothing related to privacy is mentioned in the Rwandan Labour Code. Generally speaking, privacy is mentioned in the Rwandan Constitution. Although not expressly stated, it may reasonably be assumed that this provision could be interpreted as applicable within the work sphere.

Rwanda adopted a data privacy law on 13 October 2021, which states that the Data Protection Officer appointed by a company must monitor compliance with the data privacy law at the workplace. This particularly includes the protection of personal data, awareness-raising and the training of staff involved in personal data processing operations.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Occupying foreign workers is strictly regulated in Rwanda. To hire a foreign worker, an employer must:

- verify whether the job is on the occupations in demand list;
- verify whether the foreigner fulfils the requirements for the job;
- comply with immigration and emigration laws in relation to the residence permit; and
- recruit a foreigner whose licence is recognised by a regulatory professional body in Rwanda if the job has a regulatory professional body.

The occupations in demand list includes 20 job categories, such as managers, science and engineering professionals, life science professionals, health professionals, teaching professions, business administration professionals, etc, and lists the jobs in demand.

The ways to hire a foreigner are:

- through a labour market test;
- for a position specifically mentioned in an agreement ratified or signed by Rwanda;
- for public interest (this notion not being defined by law so its implementation will depend on practice); or
- secondment.

For the labour market test, the employer must:

- advertise the vacancy for at least two weeks and request applications from Rwandans only;
- examine the applications and, if none fulfils the requirements, issue a written report specifying the names of the applicants;
- when a hiring test has been made but no applicant has the required skills for the position, the employer issues a written report that indicates the names of the applicants, the name of those who sat for the test, the questions asked during the test, their marks and their answers;
- when none of the applicants fulfil the requirements for the job or when none of the applicants has successfully passed the hiring test, the employer must submit a written report to the immigration authorities for assessment and recommendations, and requests the authorisation to recruit foreign employees; and
- the immigration authorities must provide their answer within 15 working days from the

reception of the report and the request for authorisation.

If the employer fails to find a Rwandan employee with the required skills, they must:

- prove that they conducted a labour market test and failed to find a qualified Rwandan employee for the position;
- prove that the foreigner fulfils the requirements for that position; and
- submit to the immigration authorities a plan for transferring the foreigner's skills to Rwandan employees and an implementation plan.

Only when these conditions have been met can an employer hire a foreign worker based on a labour market testing.

Once a foreigner is hired, and regardless of how they were hired, the employer must:

- employ them for the job for which they were issued the residence permit;
- implement all the requirements and ensure skills transfer to Rwandan employees; and
- collaborate with the Labour Inspectorate regarding the occupation of foreigners.

For purposes of skills transfer between Rwandan and foreign employees, the employment contract of the foreigner must include the duty to train Rwandan colleagues. The Ministry in charge of Labour appoints a team in charge of monitoring the implementation of the rules governing the occupation of foreign workers.

Some specific rules regarding foreign workers may apply in specific sectors. For example, an employee ratio is applicable in the mining sector: at least 70% of the employees engaged must be Rwandans unless the company proves that no Rwandan has the required skills to perform the duties. It is, therefore, always advisable to verify any applicable collective bargaining agreement's provisions in this respect before contemplating hiring foreign workers.

When the employment contract with a foreigner is terminated, the employer must inform in writing the immigration authorities.

4.2 Registration Requirements for Foreign Workers

Foreigners willing to work in Rwanda are required to obtain a residency permit which allows them to reside and work in Rwanda. There are different categories depending on the job category. The permit application procedure is done online subject to payment of a fee. Provided that the Directorate General at the Ministry of Foreign Affairs considers the requirements fulfilled, the permit is issued within ten days of application.

5. New Work

5.1 Mobile Work

Nothing is set out in the Rwandan Labour Code regarding mobile work. As a result of their contractual freedom, the parties may agree on specific provisions on mobile work.

5.2 Sabbaticals

Nothing is set out in the Rwandan Labour Code regarding sabbaticals.

5.3 Other New Manifestations

There is nothing specific to be mentioned for this jurisdiction at this time.

6. Collective Relations

6.1 Unions

Right of Association

Employees and employers have the right to form unions or employers' associations, join a union or an employers' association of their choice and participate in lawful activities of the unions or the employers' associations.

Registration and Legal Capacity

Employees' and employers' associations are registered with the Minister in charge of Labour and must draft Articles of Association. They enjoy legal capacity after the publication of their Articles of Association in the Official Gazette of the Republic of Rwanda. They can therefore initiate legal proceedings, represent employees or employers, act within the limits of their Articles of Association and acquire movable or immovable property through donation or debt repayment. They can also enter into agreements amongst themselves at the national, regional or international levels.

6.2 Employee Representative Bodies

Role of Representative Bodies

Employees' representatives have the following responsibilities:

- to represent the employees in all matters related to work;
- to submit to the Labour Inspectorate any complaint or any issue relating to the application of laws;
- to ensure that laws relating to employees' health and safety are complied with and provide advice to ensure compliance;
- to provide opinions on measures and conditions on termination of employees due to lack of work or restructuring; and
- to inform and advise the employer on the smooth running of the work and on the improvement of production in the company.

Number of Delegates

A company with at least ten employees must organise elections for employees' representatives and their substitutes. The number of employees' representatives and their substitutes to be elected depends on the total number of employees within the company:

- one employees' representative and one substitute for companies employing between 10 and 29 employees;
- two employees' representatives and two substitutes for companies employing between 30 and 49 employees;
- three employees' representatives and three substitutes for companies employing between 50 and 99 employees;
- four employees' representatives and four substitutes for companies employing between 100 and 249 employees;
- five employees' representatives and five substitutes for companies employing between 250 and 499 employees;
- six employees' representatives and six substitutes for companies employing between 500 and 999 employees;
- seven employees' representatives and seven substitutes for companies employing between 1,000 and 1,499 employees;
- eight employees' representatives and eight substitutes for companies employing between 1,500 and 1,999 employees;
- nine employees' representatives and nine substitutes for companies employing between 2,000 and 2,500 employees; and
- ten employees' representatives and ten substitutes for companies employing more than 2,500 employees.

Elections

For companies with several branches in Rwanda, each branch employing at least ten employees must organise elections. The elected representatives and their substitutes are elected for a renewable term of three years and must comprise at least 30% women, where possible.

Within four weeks preceding the elections, the company management appoints an electoral committee, composed of at least three employees. The electoral committee must be composed of an odd number of members, must comprise male and female employees where possible and must choose among its members the chairperson, the vice-chairperson, and the secretary. The electoral committee organises the elections, verifies the process and announces the result of the elections.

The employees' representatives are elected by two colleges – the college of staff and the college of managers – each of them having a list of voters. To be able to vote, the voter must:

- appear on the list of employees of the company;
- not have been deprived of the right to vote; and
- have been employed by the enterprise for at least six consecutive months before the elections (this condition does not exist for newly created companies).

Candidacies must be submitted to the employer between ten and three days before the elections. Candidates are allowed to campaign during working hours. The employees' representatives are elected through secret ballots in the premises of the company during working hours. An employee votes by signing or placing a fingerprint on the ballot paper in front of the name of the candidate they vote for and then places their ballot paper in a ballot box and signs in front of their name on the list of voters. Employees cannot vote on behalf of a colleague, even if they are given a power of attorney, except if they vote on behalf of a disabled employee.

Where there is no candidate, elections are postponed for a maximum period of seven working days.

Once the elections are completed, the electoral committee selects at least three people to help count the votes and then the votes are counted in public. It then makes a statement on the electoral operations and sends it to the employer, with a copy being sent to the District Labour Inspectorate. This statement mentions at least the name of the company and registered office, the number of all employees, the number of voters, the exact number of votes obtained by each candidate and the names of the elected employees' representatives. The electoral committee publishes and posts the results of election on the company notice board within two days after the elections.

Rectification of Voting Results

The electoral committee may nullify the election if it was carried out in violation of the law. In such case, another election takes place within 20 days from the day of annulment.

Complaints

An employee or a member of a union may lodge a complaint on elections results to the electoral committee within 48 hours after publication of the elections results. The electoral committee must rule within 72 hours. Where the outcome is not satisfactory, the complaint is submitted to the District Labour Inspectorate within the next three working days, and the Inspectorate must

rule within two days of receipt of the complaint. Where it is still not resolved, the complaint is submitted to the Minister in charge of labour within five days, who in turn rules within one month.

6.3 Collective Bargaining Agreements

A collective bargaining agreement is defined as a written agreement relating to employment conditions or any other mutual interests between employees' organisations or employees' representatives where there are no such employees' organisations on the one hand, and one or more employers or employers' organisations, on the other hand. They can be entered into for a definite or indefinite period.

The employees' organisations and employers' organisations designate a committee in charge of negotiations of the collective bargaining agreements on their behalf.

To be valid, a collective bargaining agreement must at least include provisions relating to the following:

- conditions of recruitment of an employee and termination of contract;
- employee's right of joining trade unions and freedom of opinion;
- professional categories;
- salary applicable to each professional category, overtime and its compensation rate, the duration of the probation period and notice;
- paid leave, seniority allowance and transport allowance;
- conditions of modification of all or part of the collective bargaining agreement;
- methods of dispute resolution; and
- commencement of the collective bargaining agreement.

Parties to the negotiation of a collective bargaining agreement negotiate in good faith. If, in a company, there are representatives of several employees' organisations, they team up to carry on collective negotiations. If they fail to do so, the employees' organisation representing the majority of the employees will lead the negotiations on behalf of the others. Once negotiated, the collective bargaining agreement is entered into in writing and signed by the parties. Once signed, the employer must inform all the concerned employees about the collective bargaining agreement.

7. Termination

7.1 Grounds for Termination

Grounds for Termination

The Rwandan Labour Code states that dismissals must be justified by legitimate reasons but does not define such reasons. In practice, employers are required to mention the reasons for dismissal in writing in the notice letter and must be able to prove them in case of legal proceedings.

The termination procedure does not differ depending on the reason for termination. However, additional compensation is payable in the event of dismissal for economic reasons or due to the employee's illness (see below).

Termination Formalities

Any termination must be notified in writing by the party who takes the initiative, to the other party. Where termination is at the employer's initiative, the letter of notification must expressly state the reasons for dismissal. There is no motivation regime a posteriori.

The notice period is not required if mutually agreed between the parties.

An employer can conduct an administrative investigation against an employee, which could result in the suspension of the contract and potentially lead to dismissal. In such case, the employer can suspend the employee in writing for 30 days without payment, but the employee's salary is calculated and retained. If, after the investigation, the employee's innocence is proven, the employer reinstates the employee and pays them all their retained salary.

A fixed-term employment contract can be terminated before its term if mutually agreed by the parties or if the party wishing to terminate it has legitimate reasons. Although not specifically mentioned in the Rwandan Labour Code, the party who terminates the fixed-term employment contract before its term will have to comply with the applicable notice period.

Termination of an open-ended employment contract without a legitimate reason entitles the employee to damages amounting to between three and six months of net salary, or up to nine months of net salary if the employee has more than ten years' experience with the same employer or if the employee is an employees' representative.

Any dismissal based on economic reasons, technological transfer or sickness (after a sick leave of six months if they are unable to resume work) for an employee with at least 12 consecutive months of service, entitles the employee to a termination allowance as follows:

- two times the average monthly salary for an employee with less than five years of service with the same employer;
- three times the average monthly salary for an employee having between five and ten years of service with the same employer;
- four times the average monthly salary for an employee having between ten and 15 years of service with the same employer;
- five times the average monthly salary for an employee having between 15 and 20 years of service with the same employer;
- six times the average monthly salary for an employee having between 20 and 25 years of service with the same employer; or
- seven times the average monthly salary for an employee having more than 25 years of service with the same employer.

Such termination allowance must be paid within seven working days of the dismissal. The average monthly salary is obtained by dividing by 12 the total salary the employee has received for the last 12 months, exclusive of allowances.

Collective Redundancies

The employer may, after informing employees' representatives, proceed with collective dismissal due to the company's internal reorganisation or restructuring due to economic reason or technological transfer. The collective dismissal must aim to preserve the company's competitiveness.

The employer must inform in writing the competent Labour Inspectorate and follow an order of dismissal, taking into consideration the performance, professional qualification, experience in the company and the employees' legally recognised dependants. A worker dismissed for economic or technical reasons keeps priority for recruitment within six months of dismissal if they have the required profile for the vacancy.

7.2 Notice Periods

Notice Period

Subject to more favourable provisions in a collective bargaining agreement, rules of procedure or employment contract, the notice period is equal to:

- at least 15 days for an employee with less than one year of service; or
- at least 30 days for an employee with more than one year of service.

Longer notice periods are rare in practice.

Notice must be given in writing and state the reasons for the termination. Notice cannot be given:

- during the probation period;
- if the employment contract is suspended; and
- if the employee is on leave.

During the notice period, the employer and the employee remain bound by all their contractual obligations. During the same period, the employee is entitled to one paid day off per week to find a new position.

Indemnity in Lieu of Notice

Termination of an open-ended contract without notice or without full observance of the notice period will entail the payment of an indemnity in lieu of notice, corresponding to the remuneration that the employee would have received during the (part of the) notice period that was not granted.

Specific Procedure

There is no specific procedure to be followed nor external advice or authorisation required to proceed with dismissals.

7.3 Dismissal for (Serious) Cause

An employment contract can be terminated without notice for gross misconduct. In that case, the employer must notify the employee within 48 hours of the occurrence of evidence of the gross misconduct, specifying the grounds for termination.

A Ministerial Decree lists acts that are considered gross misconduct:

- theft;
- fraud;
- fighting at workplace;
- taking alcoholic drinks at workplace;
- to be on duty under the influence of alcohol or drugs;
- falsification;
- any form of discrimination at workplace;
- sexual harassment;
- soliciting, offering, or receiving bribes or illicit benefit;
- embezzlement;
- unlawfully obtaining or disclosing professional confidential information;
- behaviour that may endanger the health and safety of others at workplace;
- gender-based violence at workplace;
- illegal strike; and
- intentional destruction of work equipment.

A company may determine a list of other acts or behaviour considered as gross misconduct. Before its implementation, this list must be approved by the Minister in charge of labour, incorporated in the rules of procedure (if the company is required to adopt rules of procedure, ie, if it employs more than five employees) and notified in writing to the employees.

As with dismissal with notice, an employer can conduct an administrative investigation against

an employee, which could result in suspension of the contract and potentially lead to dismissal for gross misconduct. In such case, the employer can suspend the employee in writing for 30 days without payment, but the employee's salary is calculated and retained. If, after the investigation, the employee's innocence is proven, the employer reinstates the employee and pays them all their retained salary.

In case of dismissal for gross misconduct, the employment contract will be immediately terminated, without notice.

7.4 Termination Agreements

Any employment contract may be terminated by mutual consent. There are no specific requirements involved. There are no statutory requirements for enforceable releases or other limitations on termination agreement terms as long as they comply with public order.

7.5 Protected Categories of Employee

The Rwandan Labour Code does not provide for a specific regime of protection (eg, entitling employees to a certain compensation (lump sum) for a dismissal that would have been based on protected criteria). However, it includes some provisions that aim to protect some categories of employees against dismissal.

For example, it is prohibited to dismiss:

- an employee for having reported or testified on sexual harassment committed by their supervisor;
- an employee as a result of occupational accident, unless a recognised doctor declares the employee unfit to resume service in the employment they held prior to the accident;
- a female employee during her maternity leave; or
- an employees' representative, based on fulfilment of their duties.

Dismissals in breach of these protections will be deemed unfair dismissals, entitling the employees to damages amounting to between three and six months of net salary, or up to nine months of net salary if they have more than ten years of experience with the same employer. For employees' representatives, occupational health and safety committee members and trade union representatives dismissed for fulfilling their duties, they are entitled to damages amounting to up to nine months of net salary, regardless of their years of service.

8. Disputes

8.1 Wrongful Dismissal

In addition to the protections against dismissal, as discussed, the Rwandan Labour Code prohibits dismissals:

- when the employment contract is suspended as a result of one of the following:
  - (a) strike or lock-out;
  - (b) disciplinary lay-off for eight working days;
  - (c) an employee is sentenced to an imprisonment not exceeding six months;
  - (d) in case of suspension of the company's activities as a result of economic or technical difficulties;
  - (e) suspension for administrative purposes; or
  - (f) suspension of the company's activities due to force majeure;
- when the employee is on leave; and
- during the probation period.

In the event that a dismissal is decided in one of these circumstances, or based on an invalid

ground for dismissal, it will be deemed unfair, entitling the employees to damages amounting to up to nine months of net salary, depending on their years of service or their capacity. Employers must be careful when dismissing an employee and make sure that they have a valid ground for dismissal.

8.2 Anti-discrimination

The Rwandan Labour Code states that an employer must give employees equal opportunities at the workplace. An employer is prohibited from discriminating against employees on the basis of ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural difference, language, physical or mental disability, or any other form of discrimination. Every employer must pay employees equal salary for work of equal value without discrimination of any kind.

The constitutional principle of non-discrimination is also applied in certain specific employment laws, such as the law on trade union delegates, specifying that candidates to social elections within the company must be treated equally.

Nothing is mentioned in the Rwandan Labour Code regarding the burden of proof. It may reasonably be assumed that it is the employee invoking discrimination who must prove that they are effectively a victim of discrimination. Employees could claim compensation before courts.

8.3 Digitalisation

There is no regulation regarding the digitalisation of employment disputes in Rwanda.

9. Dispute Resolution

9.1 Litigation

There are no specialised employment forums, and class actions are not available as such. Parties can always be assisted by a lawyer for legal proceedings, either before the Labour Inspectorate or the labour courts.

9.2 Alternative Dispute Resolution

Neither the Labour Code, the Civil Procedure Act nor the Arbitration Act prohibit arbitration in employment matters. Consequently, there is nothing to prevent the parties from including an arbitration clause in their employment contract, although this is not frequent in practice and is not recommended given the often extremely high costs of arbitration compared to the average worker's salary.

9.3 Costs

A prevailing employee can claim for, and, therefore, be awarded representation fees. The labour court will analyse this incidental claim at the same time as the principal claim.

SINGAPORE

Law and Practice

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Contents

Drew & Napier LLC has been providing exceptional legal service since 1889 and is one of the largest full-service law firms in Singapore. The firm has four senior counsels. It is pre-eminent in dispute resolution, international arbitration, competition and antitrust, corporate insolvency and restructuring, IP (patents and trade marks), tax, and telecommunications, media and technology, and has market-leading practices in M&A, banking and finance, and capital markets. Drew & Napier has represented Singapore's leaders, top government agencies and foreign governments in landmark, high-profile cases. It is also appointed by Fortune 500 companies, multinational corporations, and local organisations. The firm is experienced in international disputes before the Singapore International Commercial Court and covers the full range of commercial litigation matters, including building and construction, constitutional law, debt recovery, defamation, fraud, and white-collar crime.

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1. Employment Terms

1.1 Employee Status

An employee is a person who has entered into or works under a contract of service with an employer. On the other hand, a person who has entered into a contract for service is not an employee. Whether a person is an employee is determined by a flexible and fact-sensitive approach that considers, holistically, the parties' working relationship with reference to factors such as the employer's control over the person's work and whether the person's work forms an integral part of the employer's business.

The Employment Act generally covers all employees (subject to very limited exceptions), but additional statutory protection of certain employment terms and benefits under Part IV of the Employment Act only applies to classes of employees who are considered more vulnerable in their ability to negotiate their terms of employment, as follows:

- workmen (ie, employees whose work mainly involves manual labour) earning a basic monthly salary of not more than SGD4,500; and
- employees (other than a workman or a person employed in a managerial or an executive position) earning a basic monthly salary of not more than SGD2,600.

Platform Workers

Based on the recently introduced Platform Workers Bill which was passed by parliament on 10 September 2024, platform workers will be recognised as a distinct and separate group of workers. Due to the flexible nature of their work, platform workers are neither classified as employees nor self-employed. For more details on platform workers and the ongoing efforts to protect their interests, see **5.3 Other New Manifestations**.

1.2 Employment Contracts

An employment contract may be for a fixed or indefinite period.

Key Employment Terms

An employer is required to provide employees (other than transient employees) with written records of at least the key employment terms, which include:

- employer's full name;
- employee's full name;
- job title, main duties and responsibilities;
- start date of employment;
- duration of employment;
- working arrangements, such as daily working hours, number of working days per week and rest days;
- salary period;
- basic rate of pay;
- fixed allowances;
- fixed deductions;
- overtime payment period;
- overtime rate of pay;
- other salary-related components such as incentives and bonuses;
- leave entitlement;
- medical benefits;
- probation period; and
- notice period for dismissal or termination.

Any term of an employment contract which is less favourable than the conditions of service prescribed by the Employment Act for an employee covered under the Act is deemed to be illegal, null and void to the extent that it is less favourable.

Terms Implied in Law

In addition to the agreed employment terms, there is some indication that the Singapore courts are likely to recognise that an implied duty of mutual trust and confidence exists between employer and employee.

1.3 Working Hours

Working Hours and Overtime Regulations

Employees whose terms of employment are protected by the Employment Act (see **1.1 Employee Status**) are not required to work more than:

- six consecutive hours without a period of leisure; or
- eight hours a day, or more than 44 hours a week.

If an employer requires a protected employee to work overtime, the employer has to pay the employee at least 1.5 times the employee's hourly basic rate of pay.

In addition, a protected employee is not allowed to work overtime for more than 72 hours in a month. Working on a rest day or public holiday does not count towards the 72-hour overtime limit except for work done beyond the usual daily working hours on those days.

Part-Time Employment

An employee who is required to work fewer than 35 hours a week is considered a part-time employee. Part-time employees covered under the Employment Act are entitled to the same rights and benefits as full-time employees, but their statutory entitlements (eg, to annual leave, sick leave and maternity leave) are prorated.

Flexible Working Arrangements

The Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) – a body with representatives from the government, trade unions and employers – encourages employers to enable flexible working arrangements, which have become more accepted in the workplace.

In April 2024, the Ministry of Manpower (MOM) announced that all ten recommendations by the Tripartite Workgroup on the Tripartite Guidelines on Flexible Work Arrangement Requests (the "FWA Guidelines") have been accepted by the government. Employers are expected to abide by the mandatory FWA Guidelines when they come into effect on 1 December 2024. The FWA Guidelines are aimed at making it easier for employees to request flexible work arrangements, while acknowledging that employers continue to have the prerogative to decide on work arrangements.

The FWA Guidelines establish how formal flexible work arrangements requests should be made, how employers should consider such requests in a proper manner, and the requirement for employers to communicate decisions on such requests in a transparent and timely manner.

1.4 Compensation

No Minimum Wage – Progressive Wage Model

There is no general minimum wage in Singapore.

However, employers in certain prescribed sectors which employ low-wage employees are required to implement a progressive wage model (PWM).

In respect of each sector, the PWM provides minimum basic wage requirements, minimum annual increases as well as the necessary certifications and qualifications that employees in

these sectors would need to secure a higher minimum wage under the PWM.

The Singapore government is seeking to expand the PWM to cover more sectors over time.

National Wages Council

The National Wages Council is a tripartite body comprising representatives from employers, trade unions and the government. It formulates wage guidelines in line with Singapore's long-term economic growth, which are used by both unionised and non-unionised companies as a framework or reference point to determine wage increases for their employees. The guidelines are recommendations, not legal requirements.

Bonuses

Bonuses are payable depending on contractual terms and employers' discretion.

Annual Wage Supplement

The MOM encourages employers to give employees an annual wage supplement (AWS) comprising a single annual payment on top of an employee's total annual wage, also known as a 13th-month bonus. The AWS is not compulsory, unless it is provided for in the employment contract.

Central Provident Fund (CPF) Contributions

During the 2023 Budget, it was announced that the Central Provident Fund (CPF) monthly salary ceiling will be increased. The increment will take place in four stages to allow employers and employees to adjust to the changes. The increment is as follows:

- from 1 September to 31 December 2023 – SGD6,300;
- from 1 January to 31 December 2024 – SGD6,800;
- from 1 January to 31 December 2025 – SGD7,400; and
- from 1 January 2026 – SGD8,000.

There will be no change to the current CPF annual salary ceiling of SGD102,000. This will be reviewed periodically to ensure that it continues to cover about 80% of employees.

To keep pace with rising wages and to strengthen the retirement preparedness of senior employees, there will also be changes to the CPF ordinary wage ceiling and contribution rates. As of 1 January 2024, the current contribution rates are as follows:

- for employees aged 55 and below, the contribution rate is 37% of wages (17% from the employer and 20% from the employee);
- for employees aged 56–60, the contribution rate is 31% of wages (15% from the employer and 16% from the employee);
- for employees aged 61–65, the contribution rate is 22% of wages (11.5% from the employer and 10.5% from the employee);
- for employees aged 66–70, the contribution rate is 16.5% of wages (9% from the employer and 7.5% from the employee); and
- for employees aged 71 and above, the contribution rate is 12.5% of wages (7.5% from the employer and 5% from the employee).

1.5 Other Employment Terms

Public Holidays

Employees are entitled to paid holidays on public holidays. If the public holiday falls on a non-working day, employees will be entitled to another day off or one extra day's salary in lieu of the public holiday. If an employee is required to work on a public holiday, the employee is entitled to another day off, time off (only for employees not

covered under Part IV of the Employment Act), or one extra day's salary.

Annual Leave

At the minimum, the Employment Act requires that employees who have worked for their employer for at least three months are entitled to seven days of paid annual leave within the first 12 months of continuous service with that same employer.

Thereafter, employees are entitled to one additional day of paid annual leave for every subsequent year of continuous service with the same employer, subject to a maximum of 14 days' paid annual leave.

Sick Leave

The Employment Act requires that employees who have worked for at least three months are entitled to paid outpatient sick leave and paid hospitalisation leave.

Employees who have worked for at least six months are entitled to 14 days of paid outpatient sick leave in each year and 60 days of paid hospitalisation leave. The amount of paid outpatient sick leave and paid hospitalisation leave is capped at the amount of the employee's sick leave entitlement.

Where an employee has worked for an employer for less than six months but for at least three months, the employee's entitlement to paid outpatient sick leave and paid hospitalisation leave ranges from five to 11 days and 15 to 45 days respectively, depending on the length of service.

Maternity Leave

Under the Child Development Co-Savings Act 2001 (CDCA), female employees are entitled to 16 weeks of paid maternity leave provided that:

- the employee has worked for her employer for a continuous period of at least three months before the birth of her child; and
- the child is a Singapore citizen at the time of birth.

If an employee is not entitled to maternity leave under the CDCA, she will be entitled to 12 weeks of maternity leave provided that:

- the employee is covered under the Employment Act; and
- the employee has worked for her employer for at least three months before the birth of her child.

Eight of those 12 weeks of maternity leave will generally be paid leave unless, at the time of delivery, the employee has two or more living children and those children were born during more than one previous confinement.

Paternity Leave

Under the CDCA, male employees are generally entitled to two weeks of government-paid paternity leave provided that:

- the employee is the natural father of the child;
- the child is a Singapore citizen at the time of birth or becomes one within 12 months from the date of birth;
- the employee has worked for his employer for at least three months preceding the birth of the child; and
- the child's mother is lawfully married to the child's natural father at the time the child is conceived, or becomes lawfully married to the child's natural father before the child's birth, or becomes lawfully married to the child's natural father within 12 months from the date of the child's birth.

Furthermore, employers may grant an additional two weeks of government-paid paternity leave on a voluntary basis, which will be reimbursed by the government.

Paid Childcare Leave

Under the CDCA, both male and female employees are entitled to up to six days of paid childcare leave within a period of 12 months depending on their length of service, provided that:

- the employee has worked for the employer for at least three months;
- the employee has a child that is below seven years old; and
- the child is a Singapore citizen.

The CDCA also provides that both male and female employees are entitled to two days of paid extended childcare leave within a period of 12 months, provided that:

- the employee has worked for the employer for at least three months;
- the employee has a child that is between seven and 12 years old (inclusive); and
- the child is a Singapore citizen.

However, an employee is not entitled to more than six days of childcare leave and extended childcare leave within a period of 12 months.

If an employee is not entitled to childcare leave under the CDCA, an employee covered by the Employment Act is entitled to two days of paid childcare leave within a period of 12 months provided that:

- the employee is covered under the Employment Act;
- the employee has worked for the employer for at least three months; and
- the employee has a child that is below seven years old.

Unpaid Infant Care Leave

Under the CDCA, employees are entitled to a maximum of six days of unpaid childcare leave within a period of 12 months, regardless of the number of children, provided that:

- the employee has worked for the employer for at least three months;
- the employee has a child that is below two years old; and
- the child is a Singapore citizen.

An employee's entitlement to unpaid infant care leave is in addition to the entitlement to paid childcare leave.

2. Restrictive Covenants

2.1 Non-competes

Post-termination restrictive covenants, such as non-compete and non-solicitation clauses, which impose restrictions on an employee after they have ceased working for their employer, are enforceable if they satisfy the following criteria.

- The clause protects a legitimate proprietary interest, such as a trade secret, trade connection or a stable workforce.
- The clause is reasonable between the parties concerned (ie, the employer and employee), including in terms of the scope of limitation, geographical area of limitation and the period of limitation. This may also include whether consideration was paid in return for the clause, or whether it was negotiated between the parties.
- The clause is reasonable with reference to the public interest.

The reasonableness of a restrictive covenant is assessed at the time the contract was made.

The reasonableness of a restrictive covenant will also be assessed with reference to other restrictive covenants in the employment contract. For example, if an employment contract contains a confidentiality clause and a non-solicitation clause, a court may take the view that the employer's legitimate proprietary interest regarding its trade secrets and trade connections is sufficiently protected, and that a non-compete obligation on the employee is an unreasonable prohibition on competition, unless it can be shown that there is some other reason that necessitates the non-compete clause. This may be the case if it can be shown that the particular circumstances are such that it is much more difficult to enforce the non-solicitation clause or confidentiality clause compared to the non-compete clause.

If a restrictive covenant is found to be too wide, the court may apply a "blue pencil" test to sever parts of the clause that are unjustified. This can only be done if no words need to be altered or added and the remaining words of the clause continue to make grammatical sense.

However, it should be noted that a restrictive covenant containing cascading restrictions that are intended to accommodate the blue pencil test, or the insertion of a modification clause that provides that restrictions will be modified in order to make the covenant valid, may not save an otherwise unenforceable restrictive covenant.

The MOM and tripartite partners are currently developing a set of tripartite guidelines to shape norms and provide employers with further guidance on the inclusion of restrictive covenants in employment contracts. The MOM has said that employers should generally avoid including restrictive covenants in employment contracts for lower-paying jobs.

Enforcement

If an employee breaches a restrictive covenant, an employer can apply to court for an injunction to restrain the employee from continuing the breach. The employer can also seek damages.

The employer may also have a claim against the new employer if the new employer has induced the employee to breach the restrictive covenant clauses.

However, a restrictive covenant cannot be enforced by employers who have themselves committed a repudiatory breach of the contract that is accepted by the employee. Therefore, an employer who has wrongfully dismissed an employee cannot enforce any non-compete or non-solicitation clause.

Employees who believe that they are affected by unreasonable or unjustified restrictive covenants may seek assistance from their unions, TAFEP, or MOM.

2.2 Non-solicits

The principles regarding restrictive covenants discussed in **2.1 Non-competes** apply to non-solicitation clauses.

Non-solicitation of Customers

Clauses prohibiting the solicitation of customers protect an employer's legitimate proprietary interest in its trade connections. For such clauses to be enforceable, there must be personal knowledge of and influence over the customers of the employer.

Non-solicitation of Employees

Clauses prohibiting the solicitation of employees protect an employer's legitimate proprietary interest in maintaining a stable and trained workforce. The reasonableness, and consequently the enforceability, of such clauses may turn on whether the former employee has influence over the categories of employees that they are restricted from soliciting.

3. Data Privacy

3.1 Data Privacy Law and Employment

Applicability of the PDPA

There is no employment-specific data privacy law. In general, employee personal data is governed by the general data protection legislation in Singapore – ie, the Personal Data Protection Act 2012 (PDPA).

The PDPA governs the processing of individuals' personal data by private sector organisations and is administered and enforced by the Personal Data Protection Commission (PDPC).

Under the PDPA, personal data is defined as data, whether true or not, about an individual who can be identified from that data, or from that data in conjunction with other information to which the organisation has or is likely to have access. This would include the personal data of employees (full time and part time) and job applicants.

Need to Obtain Consent From Individuals

The PDPA requires organisations to obtain consent before collecting, using or disclosing an individual's personal data, unless otherwise required or authorised under written law, or an exception under the PDPA applies ("consent obligation").

Consent is validly given if the employer has provided the individual with information regarding the purposes for the collection, use or disclosure of the personal data (as the case may be) on or before collecting the personal data ("notification obligation").

Exceptions to Consent

Section 95 of the Employment Act requires all employers to maintain detailed employment records of employees covered under the Employment Act, which includes the employees' identity card number or foreign identification number, residential address, date of birth, gender, and other relevant information as specified under the Employment (Employment Records, Key Employment Terms and Pay Slips) Regulations 2016. Thus, to the extent that the collection of personal data is authorised or required under these laws, employers may collect such employee personal data without employees' consent.

For example, under Section 17 of the PDPA, read with Part 3 of the First Schedule of the PDPA, employers may collect, use and disclose employee personal data without consent where:

- the collection, use or disclosure of the employee's personal data is for the purpose of or in relation to (i) entering into an employment relationship with the individual or appointing the individual to any office, or (ii) managing or terminating an employment relationship; or
- the collection, use or disclosure of personal data is necessary for evaluative purposes (ie, for the purpose of determining the suitability, eligibility or qualifications of the individual for employment, appointment to office, promotion, removal, etc).

For job applicants, deemed consent may also apply when they voluntarily provide their personal data to the organisation during the application process, provided it was reasonable for them to have been asked to provide such data.

Need to Notify Employees of Collection

However, while consent may not be required in certain scenarios, the employer is still required to notify the individual of the purpose of such collection, use or disclosure, and, on request by the individual, the business contact information of a person who is able to answer the individual's questions relating to such processing.

For new and existing employees, organisations may choose to provide them with notice of such collection, use or disclosure in the employment contract, employee privacy policy, employee data protection handbook, or data protection notices on the company intranet. For job applicants, organisations may include a data protection notice in the job application form.

Other Obligations Under the PDPA

Employers must also comply with several other data protection obligations under the PDPA, as set out below.

Purpose limitation obligation

Employers must only collect, use or disclose employee personal data for purposes that a reasonable person would consider appropriate in the circumstances.

Access and correction obligation

While there is a general requirement for organisations to provide individuals with the right to access and correct their personal data, there are some exceptions to this requirement. For example, employers do not need to provide job applicants with the opinions formed in the course of determining the applicant's suitability and eligibility as this would be considered opinion data kept solely for evaluative purposes.

Retention limitation obligation

While employers can retain the personal data of former employees and job applicants for future job opportunities, they should not retain such personal data if it no longer serves the purpose for which it was collected and if it is no longer necessary for legal or business purposes. This includes the minimum statutory retention period under the Employment Act.

Accuracy obligation

Employers must make reasonable efforts to ensure the accuracy and completeness of employee personal data.

Protection obligation

Employers must protect the employee personal data that they possess or control by making reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks, as well as the loss of storage mediums or devices on which personal data is stored.

Transfer limitation obligation

Employers must not transfer employee personal data to a jurisdiction outside Singapore except in accordance with the requirements set out in the PDPA and the Personal Data Protection Regulations 2021, to ensure that transferred personal data is accorded a standard of protection comparable to the PDPA.

Data breach notification obligation

In the event of a data breach involving employee personal data, employers must assess whether a data breach is notifiable and notify the PDPC

and/or affected individuals where it is assessed to be notifiable.

Accountability obligation

Employers must appoint a person responsible for ensuring compliance with the PDPA (typically called a data protection officer). Employers must also implement the policies and practices necessary to meet their PDPA obligations, including a process to receive complaints. In addition, employers must communicate information about such policies and practices to their employees and make such information available upon their request.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Foreigners must generally have a valid work pass before they start work in Singapore.

Employing a foreigner without a valid work pass is an offence. Where a foreigner without a work pass is found at any premises, the occupier of the premises is presumed to have employed the foreigner, until the contrary is proved.

Types of Work Passes

There are three main types of work passes.

Employment Pass

The Employment Pass (EP) is for foreign professionals, managers and executives who earn at least SGD5,000 a month in the non-financial services sectors and SGD5,500 a month in the financial services sector and have acceptable qualifications. Older, more experienced candidates will require higher salaries to qualify (the qualifying salaries increase progressively with age, up to SGD10,500 for a candidate in their mid-40s in a non-financial sector and up to SGD11,500 for a candidate in the financial services sector). The minimum qualifying salary will be revised to SGD5,600 in the non-financial services sector and SGD6,200 in the financial services sector for new applications and renewals from 1 January 2025.

Aside from meeting the qualifying salary, candidates will also need to pass a points-based Complementarity Assessment Framework (COMPASS), which has applied to new applications from 1 September 2023 and will apply to renewal applications from 1 September 2024. COMPASS is an additional stage in the EP application process; that is, candidates must pass a two-stage eligibility framework – stage 1 being the above-mentioned EP qualifying salary, and stage 2 being COMPASS. COMPASS evaluates EP applications based on a holistic set of individual and firm-related attributes, and applicants are scored on four foundational criteria (ie, salary, diversity, qualifications and support for local employment). There are also two bonus criteria: a skills bonus (for candidates in jobs where skills shortages exist) and a strategic economic priorities bonus (for partnerships with the Singapore government on ambitious innovation or internationalisation activities).

There are certain exemptions to COMPASS; that is, a candidate will be exempted from COMPASS if they fulfil any of the following conditions:

- they earn at least SGD22,500 a month (similar to the prevailing Fair Consideration Framework job advertising exemption);
- they apply as an overseas intra-corporate transferee under the World Trade Organisation's General Agreement on Trade in Services or an applicable free trade agreement to which Singapore is a party; or

- they fill a role on a short-term basis (ie, for one month or less).

MOM has released a self-assessment tool for employers to use in order to get an indicative outcome for each EP application, including performance on the EP qualifying salary and COMPASS (with breakdown of scores by criterion).

Generally, employers submitting EP applications must first advertise the job vacancy on the national jobs bank, MyCareersFuture, for at least 14 calendar days and consider all candidates fairly.

S Pass

The S Pass is for foreign mid-level skilled staff who earn at least SGD3,150 a month in the non-financial services sector and SGD3,650 a month in the financial services sector, and they meet the assessment criteria in terms of qualifications and work experience. Older, more experienced candidates will require higher salaries to qualify (the qualifying salaries increase progressively with age, up to SGD4,650 for a candidate in their mid-40s in the non-financial services sector, and up to SGD5,650 for a candidate in the financial services sector). The qualifying salaries mentioned above apply to new applications from 1 September 2023, and to renewals from 1 September 2024. For renewals prior to 1 September 2024, the qualifying salaries of at least SGD3,000 and SGD3,500 apply for the non-financial and financial services sectors respectively.

The minimum qualifying salary will be revised to at least SGD3,300 in the non-financial services sectors and at least SGD3,800 a month in the financial services sector for new applications from 1 September 2025, and for application renewals from 1 September 2026. The qualifying salaries mentioned in this paragraph are not yet the finalised figures, which will be announced closer to the implementation date.

Employers are limited by a quota and subject to a levy for each S Pass-holder employee.

Generally, employers submitting S Pass applications must first advertise the job vacancy on the national jobs bank, MyCareersFuture, for at least 14 calendar days and consider all candidates fairly.

Work Permit

The Work Permit is generally for foreign semi-skilled workers in the construction, manufacturing, marine shipyard, process or services sector. There is no minimum salary for employees on a Work Permit, but employers are limited by a quota and subject to a levy. Depending on the sector, there may also be restrictions based on source country or region, minimum age, maximum period of employment and other restrictions.

4.2 Registration Requirements for Foreign Workers

Applications for work passes are made to the MOM. When making work pass applications, the prospective employer needs to get the worker's written consent.

When making an EP application, the prospective employer needs to provide particulars of the foreign worker's passport, the foreign worker's educational certificates and the employer's latest business profile information. Employers are required to verify educational qualifications submitted to the MOM in support of an EP application. The verification can be done through selected background screening companies, which are listed on the MOM's website. Alternatively, the MOM will also accept verification proof

obtained from online portals of countries' governments or educational institutions, which are also listed on the MOM's website. The MOM is currently studying the feasibility of other avenues of verification, such as digital certificates.

For Work Permit applications and S Pass applications, the employer is required to buy and maintain medical insurance as follows.

- For policies with start date effective before 1 July 2023 – providing coverage of at least SGD15,000 per year.
- For policies with start date effective on or after 1 July 2023 – providing coverage of at least SGD60,000 per year.

When making a Work Permit application, the employer is required to post a SGD5,000 security bond for each worker (with the exception of Malaysians).

5. New Work

5.1 Mobile Work

Under the Workplace Safety and Health Act 2006 (WSHA), the "workplace" is defined in Section 5(1) as any premises where a person is at work or is to work, where a person works for the time being, or customarily works, and includes a factory.

With increased recognition of Flexible Work Arrangements (FWAs) (see **1.3 Working Hours**), organisations are more open to allowing their employees to do their work away from conventional offices. In a case study published by TAFEP, it was found that FWAs are key to hiring and retaining talent.

As such, workplaces may possibly extend to locations outside the office. This would include mobile working where employees are often required to be on the move to carry out their job.

Work Injury

An employer is liable to pay compensation under the Work Injury Compensation Act 2019 (WICA) where the employee suffers from a work injury arising out of and in the course of their employment. Hence, based on the wording of the WICA, the place where the work injury was suffered does not appear to matter and employees engaged in mobile working would likely be covered under the WICA.

In fact, Section 9 of the WICA provides that employers are even held liable for accidents happening to employees outside of Singapore if the employee is ordinarily resident in Singapore and is employed by an employer in Singapore but is required to work outside Singapore.

Data Privacy

As mentioned in **3.1 Data Privacy Law and Employment**, the PDPA contains a transfer obligation. Hence, where employees are posted to an overseas office such as for an overseas assignment and personal data of that employee is transferred to the overseas office, the local office transferring that data must ensure that the overseas office provides a standard of protection to the personal data that is comparable to its protection under the PDPA.

Social Security

CPF contributions are payable if the employee is employed in Singapore but is required to go overseas for an assignment, such as an overseas business trip or training.

5.2 Sabbaticals

A sabbatical leave is an extended period of leave taken for personal reasons such as for further studies, travelling or to rest.

There is no statutory requirement for sabbatical leave in Singapore, and the offering of sabbatical leave is a matter of contractual agreement.

Employers may allow for a sabbatical in the form of non-statutory leave, which is an additional provision to cater to an employee's welfare. Employers may decide to offer fully paid, part-paid or unpaid sabbatical leave. Typically, sabbatical leave would be provided to employees who have had a long period of service. The duration of the leave would depend on the employer. Typically, an employee would be entitled to a period of two months to a year, continuing their employment upon their return from the sabbatical.

An example is the National Council of Social Services' (NCSS) Sabbatical Leave Scheme that allows application for up to ten weeks of paid leave for a sabbatical. The NCSS Sabbatical Leave Scheme is available to social workers, therapists (occupational therapists, physiotherapists and speech therapists), psychologists, counsellors and EIPIC (Early Intervention Programme for Infants and Children) teachers.

5.3 Other New Manifestations

FWAs

FWAs include working arrangements that differ from traditional arrangements of fixed daily work hours at the workplace. FWAs are usually offered by employers to enable their employees to better manage work as well as family and personal responsibilities. Please also see **1.3 Working Hours**.

FWAs may come in the form of flexi-load, flexi-time or flexi-place. A few examples for each category are as follows:

Flexi-load

- job sharing; and
- part-time work.

Flexi-time

- creative scheduling;
- staggered time;
- compressed work schedule; and
- flexi-hours.

Flexi-place

- teleworking; and
- home-working.

Platform Workers

With the advent of online platforms such as food delivery and ride-hailing apps, there has also been a rise in the number of platform workers using these platforms to provide their services.

However, the government has recognised that platform workers are in a precarious position due to their generally modest incomes and exposure to significant risk due to the amount of time spent on the road. Hence, the Advisory Committee on Platform Workers was established to look into how platform workers could be better protected.

In November 2022, the Advisory Committee on Platform Workers published 12 recommendations that sought to address the lack of protection for platform workers. The following 12 recommendations were accepted by the government.

- Platform workers should not be classified as employees.

- Platform companies that exert a significant level of management control over platform workers should be required to provide them with certain basic protections.
- Platform companies should be required to provide the same scope and level of work injury compensation as employees are entitled to under the Work Injury Compensation Act (WICA).
- The platform company for which the platform worker was working at the time of injury should be required to provide compensation, based on the platform worker's total earnings from the platform sector in which the injury was sustained.
- Sector-specific definitions of when a platform worker is considered to be "at work" should be determined.
- The strengths of the current WICA regime should be retained, including the provision of work injury compensation insurance through the existing open and competitive insurance market.
- The CPF contribution rates of platform companies and platform workers should be aligned with those of employers and employees respectively (required for platform workers who are aged below 30 in the first year of implementation).
- Older platform workers who are aged 30 and above in the first year of implementation of the aligned CPF rates should be allowed to opt in to the full CPF contribution regime.
- Platform companies should be required to collect platform workers' CPF contributions to help workers make timely contributions.
- The increased CPF contributions should be phased in over five years, unless major economic disruption warrants a longer timeline. To ease the impact, the government may wish to consider providing support for platform workers (and the form this should take).
- Platform workers should be given the right to seek formal representation through a new representation framework designed for platform workers.
- A Tripartite Workgroup on Representation for Platform Workers should be set up to co-create the new representation framework (for more details on representation of platform workers, see **6.2 Employee Representative Bodies**).

These 12 recommendations have been incorporated into the Platform Workers Bill, which has been passed by parliament on 10 September 2024."

6. Collective Relations

6.1 Unions

Trade unions are the representative bodies for employees in Singapore.

Under current legislation, platform workers cannot form unions as they are self-employed. They are currently represented by three industry associations (the National Private Hire Vehicles Association, National Delivery Champions Association, and National Taxi Association), although these associations have limited powers compared to trade unions.

However, based on the recently passed Platform Workers Bill, a new legal framework will be introduced for the representation of platform workers. Platform work associations (PWAs) will be required to be registered in order to be formally recognised. Registered PWAs will have similar powers as unions to engage in collective bargaining on behalf of platform workers, to represent platform workers in disputes and to provide platform workers with support services.

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6.3 Collective Bargaining Agreements

Collective agreements are agreements between an employer and the trade union on the employees' employment terms. They are valid for a minimum of two years and a maximum of three years.

Certain matters are statutorily excluded from the scope of collective bargaining, such as:

- the promotion of an employee;
- an internal transfer, which does not entail a detrimental change to the transferred employee's employment terms;
- the employer's hiring decisions;
- the termination of an employee's contract by reason of redundancy or the employer's reorganisation;
- the dismissal and reinstatement of an employee who considers that they have been wrongfully dismissed; and
- the assignment or allocation of duties to an employee that are consistent or compatible with the employee's employment terms.

A trade union must be accorded recognition by the employer under Section 17(1) of the Industrial Relations Act 1960 and the Industrial Relations (Recognition of a Trade Union of Employees) Regulations before it may engage in collective bargaining.

Either the employer or the trade union may initiate the collective bargaining process through serving notice.

If a collective agreement cannot be reached within the prescribed timeframes, any party to the negotiations may make a request to the MOM for conciliation assistance. If no agreement can be reached between the parties through conciliation, the trade dispute can be referred to the Industrial Arbitration Court as a last resort.

7. Termination

7.1 Grounds for Termination

An employment contract may be terminated by agreement, including by way of notice (see **7.2 Notice Periods**), or by a fundamental breach on the part of the other party, including dismissal for cause (see **7.3 Dismissal For (Serious) Cause**).

Advisory on Managing Excess Manpower and Responsible Retrenchment

The TAFEP's Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment strongly encourages employers to take a long-term view of their manpower needs, includ-

ing the need to maintain a strong Singaporean core, and preserve jobs as far as possible.

Retrenchment should be the last resort and, if all other feasible options have been exhausted, should be conducted in a responsible and sensitive manner. This includes providing a longer notice period beyond the contractual or statutory requirements, where possible.

Employers who have businesses registered in Singapore and have at least ten employees must notify the MOM if any employee is notified of their retrenchment, within five working days after such notification.

7.2 Notice Periods

Notice Period

The Employment Act provides that either party to an employment contract may, at any time, give the other party notice of their intention to terminate the employment. The length of the notice must be the same for both the employer and employee and is determined by the employment contract or, if there is no such provision, the statutory notice period will follow Section 10(3) of the Employment Act and is up to four weeks, depending on the length of service.

The employment may also be terminated by either party without notice by paying a sum to the other party equal to the salary which would have accrued to the employee in lieu of notice.

The Tripartite Guidelines on Wrongful Dismissal provide that where the employment contract provides for termination with notice, the employer is entitled to terminate the employment with notice without providing a reason.

Formalities

The Employment Act requires that notice of termination must be in writing. Even where the Employment Act does not apply, it is usually prudent to give notice in writing.

The notice should generally contain the date of termination, or make it ascertainable by computation. In addition, where an employer is giving notice, it is generally useful to state the employer's expectations of the employee's work and conduct up to the last day of work.

Severance Payments

Generally, there is no statutory requirement for an employer to pay retrenchment benefits/severance payments. However, an entitlement to retrenchment payments/severance payments may be provided in the terms of employment contracts.

Employees who fall under Part 4 of the Employment Act will not be entitled to any retrenchment benefit if they have not been in continuous service with their employer for two years or more. Non-Part 4 employees are not statutorily entitled to any retrenchment benefit.

The quantum of severance benefits will often depend on the terms of the employment contract or, where the employee is unionised, the collective agreement.

Where there is no contractual provision for the quantum of severance benefits, the TAFEP's Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment recommends that employers pay severance benefits of between two weeks' to one month's salary per year of service, depending on the financial position of the company and taking into consideration the industry norm. The TAFEP's recom-

mendation represents the prevailing norm for the quantum of severance benefits.

7.3 Dismissal for (Serious) Cause

An employee may be summarily dismissed for cause, without notice or salary in lieu of notice, if the employee commits a fundamental breach of the employment contract, such as where there is disobedience, negligence, incompetence or disloyalty.

An employee may also be summarily dismissed if the employment contract provides for the immediate termination of the contract on the occurrence of certain events and such an event occurs. For example, an employment contract may provide that an employer may immediately terminate the contract if the employee is convicted of a criminal offence involving fraud or dishonesty.

Procedure Under the Employment Act

Where an employee is covered by the Employment Act, an employee can only be summarily dismissed for misconduct after a due inquiry. The requirement for there to be a due inquiry only applies if the employee is summarily dismissed for misconduct, and not for wilful breach of the employment contract or some other reason (eg, gross incompetence).

A due inquiry requires that the employee concerned be properly informed about the allegation(s) and the evidence against them so that they have an opportunity to defend themselves by presenting their position and any other evidence. Additionally, the person hearing the inquiry should be seen as impartial.

A failure to carry out a due inquiry may constitute wrongful dismissal. See **8.1 Wrongful Dismissal**.

Procedure Under Common Law

There is no general common law prescription of procedural due process or requirement for the application of natural justice.

However, where there is an employment contract, or other terms are incorporated into the employment contract that set out the procedure for inquiry into misconduct, the employer will have to comply with such procedure for dismissal on the grounds of misconduct.

7.4 Termination Agreements

It is common for employers and departing employees to enter into termination agreements, which may contain obligations in the remaining period of employment, as well as post-employment obligations. Some of the provisions in such agreements include severance payments, arrangements for employee stock option plans (ESOPs) and other benefits payments, mutual waivers and releases, non-disparagement clauses, and post-termination restrictive covenants. These agreements provide clarity and closure at the end of the employment relationship and minimise the risk of disputes.

Employers need to handle the presentation of termination agreements with care. For example, employers will want to avoid their employees apprehending discussion of such agreements as constructive dismissal from employment or perceiving that they are under duress or other undue pressure to enter into the agreements.

7.5 Protected Categories of Employee

The dismissal of an employee because of discrimination on the basis of that employee's age, race, gender, religion, marital status and family responsibilities, or disability is regarded as wrongful dismissal. It is also wrongful dismissal to dismiss an employee in order to deprive them of benefits/entitlements that they would otherwise have earned (eg, maternity benefits), or to punish the employee for exercising an employment right (eg, filing a mediation request, or declining a request to work overtime), according to the Tripartite Guidelines on Wrongful Dismissal.

It is also an offence under the Industrial Relations Act 1960 for employers to discriminate against members of trade unions.

8. Disputes

8.1 Wrongful Dismissal

Wrongful dismissal is the dismissal of an employee without just or sufficient cause. The termination of employment with notice but without giving any reason is presumed not to be wrongful. However, if an employer chooses to give a reason, the dismissal can be wrongful if the reason given is proven to be false. If no reason is given, an employee must substantiate a wrongful reason for the dismissal, such as discrimination, deprivation of benefit, or to punish an employee for exercising their employment right (Tripartite Guidelines on Wrongful Dismissal).

Damages for Wrongful Dismissal

The normal measure of damages in a case of wrongful dismissal is for the amount which the employee would have received under the employment contract had the employer lawfully terminated the contract by giving the required notice or paying salary in lieu of notice. However, if the wrongful dismissal claim is brought to the Employment Claims Tribunal, the successful employee may be awarded compensation for harm suffered in addition to the employee's loss of income.

Reinstatement of Employment

For employees covered under the Employment Act, an employee who considers that they have been dismissed without just cause or excuse may lodge a claim with the Employment Claims Tribunal for the reinstatement of their former employment, or compensation.

However, under common law, the reinstatement of former employment is generally not granted and the former employee will typically be compensated by damages.

8.2 Anti-discrimination

Tripartite Guidelines on Fair Employment Practices

The Tripartite Guidelines on Fair Employment Practices (TGFEP) are issued by the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP), consisting of the MOM, the Singapore National Employers Federation and the National Trades Union Congress.

The TGFEP is mainly guided by the following five principles of fair employment practices.

- Recruit and select employees on the basis of merit (such as skills, experience or ability to perform the job), regardless of age, race, gender, religion, marital status and family responsibilities, or disability.
- Treat employees fairly and with respect and implement progressive human resource management systems.

- Provide employees with an equal opportunity to be considered for training and development based on their strengths and needs, to help them achieve their full potential.
- Reward employees fairly based on their ability, performance, contribution and experience.
- Abide by labour laws and adopt the Tripartite Guidelines on Fair Employment Practices.

Newly Proposed Workplace Fairness Legislation

On 4 August 2023, the government announced that it has accepted the Tripartite Committee's Final Recommendations For Workplace Fairness Legislation (the "WFL Recommendations"). The WFL Recommendations set out 22 recommendations to tackle workplace discrimination and the MOM has indicated that the government targets to enact the WFL Recommendations into legislation in the second half of 2024. The recommendations are categorised as follows:

- strengthen protections against workplace discrimination;
- provisions to support business/organisational needs and national objectives;
- processes for resolving grievances and disputes while preserving workplace harmony; and
- ensuring fair outcomes through redress for victims of workplace discrimination and more appropriate penalties for breaches.

While the existing TGFEP does not have the force of law, it is being retained and enhanced to work in concert with upcoming legislation. Thus, employers should continue to comply with the TGFEP even where the Workplace Fairness Legislation does not apply.

Discrimination in Dismissal and Retrenchment

The dismissal or retrenchment of an employee because of discrimination on the basis of that employee's age, race, gender, religion, marital status and family responsibilities, or disability is wrongful (Tripartite Guidelines on Wrongful Dismissal; Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment).

Employers who have wrongfully dismissed employees on discriminatory grounds may be made to compensate the employees beyond their salaries payable in lieu of notice. Furthermore, the MOM may also take action against employers found to follow discriminatory practices by curtailing work pass privileges for such employers.

8.3 Digitalisation

Court Proceedings

Most court proceedings in respect of civil disputes (including employment disputes) are now conducted via videoconferencing. Certain hearings, such as those involving the examination of witnesses, however, continue to be conducted in person. In some cases, parties may seek permission for witnesses who are situated abroad to give evidence via video conference.

Mediation

Mediation conducted by the Tripartite Alliance for Dispute Management (TADM), which is a prerequisite for a party to bring a claim to the Employment Claims Tribunal (see **9.1 Litigation**), is mainly conducted online via the TADM online dispute resolution (ODR) system, or by email or phone. The process involves each party exchanging correspondence or responses via email or the ODR system, with the mediator facilitating the exchange and, where necessary,

with the mediator having private discussions with the parties separately.

Mediation before a private mediation provider such as the Singapore Mediation Centre may also be conducted virtually, in-person, or in a hybrid manner, depending on the parties' agreement. Flexibility in the conduct of the mediation can make it easier for parties with representatives that are located in different countries to participate in the mediation.

9. Dispute Resolution

9.1 Litigation

Employment Claims Tribunal

The Employment Claims Tribunal provides an alternative, low-cost forum for employees and employers to resolve salary-related claims or wrongful dismissal disputes. For a claim to be heard in the Employment Claims Tribunal, the following preconditions must be satisfied:

- if the claimant is an employee, the claim must either be a specified statutory or contractual salary-related dispute or a wrongful dismissal dispute;
- the claim cannot exceed the prescribed claim limit of SGD20,000 unless it involves a union (recognised under the Industrial Relations Act 1960), in which case, the limit is SGD30,000;
- a mediation request must first be lodged with the TADM, the claim must have failed to be resolved through mediation, and a claim referral must have been issued by the mediator;
- if the claimant is an employer, the claim must relate to a salary in lieu of notice of termination dispute; and
- the claimant is claiming against a party who is residing, or has a registered office or place of business, in Singapore.

However, certain employees, namely, seafarers, domestic workers, and public officers are not allowed to bring claims before the Employment Claims Tribunal and employers are similarly not allowed to bring claims against such employees before the Employment Claims Tribunal.

All proceedings before the Employment Claims Tribunal are conducted in private. The parties must act in person and cannot be represented by lawyers.

Litigation

Parties may choose to bring their employment disputes before the Singapore courts. Claims not exceeding SGD60,000 are filed in the magistrate's court, while claims not exceeding SGD250,000 are filed in the district court. Claims exceeding SGD250,000 are filed in the High Court.

There are no specific processes under Singapore law for bringing class action claims.

9.2 Alternative Dispute Resolution

Arbitration

Parties can agree to have disputes arising between them determined through arbitration. If an action is brought before a court where the parties have entered into an arbitration agreement, the court will generally stay the court proceedings.

Mediation

The TADM provides mediation services for salary-related claims, wrongful dismissal claims and appeals under the Retirement and Re-employment Act. Only disputes that cannot be resolved via mediation may then be referred to the Employment Claims Tribunal.

Parties can also agree to refer employment disputes to private mediation service providers, such as the Singapore Mediation Centre.

9.3 Costs

Costs are generally awarded to the successful party at the discretion of the court, taking into account the conduct of all the parties (including before and during the proceedings) and the parties' conduct in relation to any attempt to resolve the dispute through mediation or any other means of dispute resolution.

Trends and Developments

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Rajah & Tann Singapore LLP is one of the largest full-service law firms in Singapore with over 430 fee earners, and as part of Rajah & Tann Asia, offers clients an integrated network of more than 1,000 fee earners across ten countries including Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Thailand and Vietnam – providing a deep pool of talented and well-regarded lawyers dedicated to delivering the highest standards of service across all its practice areas. Its geographical reach also includes Singapore-based regional desks focusing on Brunei, Japan and South Asia. Further, as the Singapore member firm of the Lex Mundi Network, it is able to offer its clients access to excellent legal support in more than 125 countries around the globe. It is the exclusive Singapore member firm of Ius Laboris – a leading legal network specialising in employment and labour law with a worldwide coverage of over 50 countries and over 1,400 lawyers.

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Jonathan Cham is a partner at Rajah & Tann Singapore's employment practice. He specialises in non-contentious employment law and immigration law issues in Singapore. He represents and advises a wide range of employers (from start-ups to multinational corporations and financial institutions) on a broad spectrum of matters spanning all stages of the employment life cycle, ranging from pre-employment issues to the cessation of employment. Jonathan also regularly advises on corporate transactions from an employment and immigration law perspective. He was recently recognised as a thought leader in an international survey of employment lawyers.

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RAJAH & TANN ASIA

2024 – Strengthening Singapore's Workforce and Labour Mobility

The Singapore government has made several changes to the employment legislation and regulatory framework to empower more working-age adults to continue working or return to the workforce, and to improve labour mobility. In this article, we examine three key changes and their consequent impact on employers and employees in Singapore.

Tripartite Guidelines on Flexible Work Arrangement Requests

According to the 2023 Labour Force Report by the Ministry of Manpower (MOM), nearly a quarter of the 1.12 million residents outside the workforce cited housework and caregiving as reasons for not working. With an ageing population in Singapore, there will likely be an increase in the proportion of workers with caregiving responsibilities.

Flexible work arrangements (FWA) can enable more working adults, including seniors, caregivers, and young parents, to balance work and personal responsibilities, allowing them to continue working or return to the workforce. Employers can use FWAs as a tool for talent attraction and retention. According to a survey conducted by Michael Page in 2023, 41% of local employees would consider changing jobs for better flexibility. By offering FWA, employers gain access to a larger talent pool and retain valuable employees who require the flexibility to continue working.

The tripartite partners of the MOM, the National Trades Union Congress (NTUC) and the Singapore National Employers Federation (SNEF) have introduced the Tripartite Guidelines on Flexible Work Arrangement Requests (the "FWA Guidelines"), which come into force on 1 December 2024. The FWA Guidelines establish (i) how formal FWA requests should be made; (ii) how employers should consider such requests in a proper manner; and (iii) the requirement to communicate decisions on such requests in a transparent and timely manner.

Requirements for a formal FWA request

Under the FWA Guidelines, a formal FWA request must be made in writing, and include minimally the following information (the "Requirements").

- The date of the request.
- The FWA requested, including its expected frequency and duration.
- The reason for the request.
- The requested start date (and end date, where relevant) of the FWA.

If an employer does not have any existing policy or procedure for employees to request FWA, employees can submit a formal FWA request by complying with the Requirements. The FWA Guidelines note that a text message may qualify as a formal FWA request if all the Requirements are met. However, if an employer has an existing policy or procedure for employees to request FWA, employees should adhere to the existing policy or procedure. This may include additional stipulations beyond the Requirements, such as using a certain template, submitting via a portal, or including further information. Employers are encouraged to continue any existing practices if they work well for both employers and employees.

Employer's consideration of an FWA request

When considering a formal FWA request, employers should:

- understand and properly consider the underlying reason for the employee's FWA request;

- discuss the request with the employee in an open and constructive manner with the aim of reaching mutual agreement;
- focus on factors related to the employee's job, and any impact on the business or the employee's job performance;
- avoid rejecting the request on grounds that are not directly linked to business outcomes, such as company tradition or a preference to have direct sight of employees. Employers should only reject FWA requests on reasonable business grounds, such as cost, practicality, or if the FWA is detrimental to productivity or output; and
- communicate its decision on an FWA request.

Employers should notify their employees of their decision on the FWA request within two months after the request was submitted. The two-month window gives employers enough time to consider what alternative arrangements are needed should the request be approved, and evaluate whether these arrangements are feasible.

If the request is rejected, the employer should include the reason(s) for rejection, and are encouraged to discuss viable alternatives with the employee. Employers and employees are encouraged to address any disagreements through the company's internal grievance handling procedure as far as possible. Unionised employees may also seek assistance and advice from their unions.

Where employers do not adhere to the FWA Guidelines, employees can seek assistance from the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) or their respective trade unions. MOM and TAFEP will refer to the FWA Guidelines in supporting the adoption of, and handling cases related to, FWAs. In response to media queries, MOM has stated that where employers are recalcitrant or wilfully non-compliant, MOM "may issue a warning and require them to attend corrective workshops".

Practical guidance for employers

Employers would do well to develop their own FWA policies, processes and frameworks before the FWA Guidelines come into force on 1 December 2024. This will allow employers to fine-tune their policies, processes and documentation before the implementation date where it can be expected that employers will start receiving FWA requests from their employees.

An FWA policy should cover the following.

- The types of FWA offered by the employer, such as:
  - (a) flexi-place – working from different locations aside from their usual office location (for example, working from home and telecommuting);
  - (b) flexi-time – working at different timings with no changes to total working hours and workload (for example, staggered working hours and compressed work schedule); and
  - (c) flexi-load – different workloads with commensurate remuneration (for example, job sharing and part-time work).
- Any eligibility criteria that employees must satisfy before they are eligible to request FWA. Apart from criteria that are related to the employee's role, employers can also consider including criteria that is based on the employee's attributes. For example, employees must have achieved a certain performance grade in the last performance appraisal to be eligible to request FWA.
- The employer's expectations on an employee's responsible use of FWA. If possible, the policy should set out work expectations

such as workload requirements and response times when using FWA, and the consequences if the work expectations are not met.
- To reduce the additional work created by free-form ad-hoc FWA requests from employees to their managers, the FWA policy should establish a clear procedure for the application and approval of FWA requests. For example, it may be preferable to stipulate that any FWA request must be submitted via the company's HR portal or by e-mail rather than text messages, and in a prescribed format with the relevant information needed for the company to properly consider the request.

The FWA Guidelines aim to normalise FWAs in the workplace by putting in place formalised and clear processes for employees to request them. Similar to legislation in countries such as Australia and New Zealand, the FWA Guidelines do not guide the outcome of FWA requests – employers retain the prerogative to decide on work arrangements, but are now obliged to properly consider the requests and base acceptance or rejection on reasonable business grounds.

Raising of Retirement and Re-employment Age

With increased life expectancy and health, more Singapore residents are consequentially entering the older age bands, leading to a corresponding increase in the proportion of older workers in the resident labour force. It has been reported that Singapore presently has the third-highest employment rate for workers aged 65 to 69 among countries in the OECD, and is expected to have one in four citizens aged 65 and above by 2030.

In order to support older Singaporeans who wish to continue working to do so and better prepare them for retirement, on 19 August 2019, the MOM announced that the retirement and re-employment ages would be raised to 65 years and 70 years respectively by 2030.

As part of the progressive increase in the retirement and re-employment ages, on 1 July 2022, the retirement and re-employment ages were raised to 63 years and 68 years respectively. On 4 March 2024, the Minister of State for Manpower announced that from 1 July 2026, the retirement and re-employment age will be raised to 64 years and 69 years respectively.

Sectors that employ more part-time and older workers are likely to be more significantly impacted by the change in the retirement and re-employment ages. According to the Minister of Manpower in response to a Parliamentary question on 7 February 2023, the top five industries employing the most resident workers aged 65 and over in 2022 were "wholesale and retail trade, administrative and support services, transportation and storage, accommodation and food services, and manufacturing". In addition, the Minister highlighted that "[a] third of the 207,000 employed residents aged 65 and over were working part-time". Employers in these sectors should take note of the following in adapting to the increase in the retirement and re-employment ages.

Practical guidance for employers

The increase in the proportion of older employees in the workforce (who are also employed for longer) will inevitably give rise to consequential issues and tensions arising from a more intergenerational workforce. Coupled with rapid technological changes, the difference in backgrounds, mindsets and skill sets across different generations will become sharper. Generational gaps in values and work ethics may lead younger employees to feel that older workers are not

agile enough to meet changing demands, while mature workers may feel uncomfortable reporting under a younger authority. Moreover, stereotypes may exist such that older workers tend to be considered less physically fit, harder to train, or less willing to adapt to new roles, and it can be difficult to retain them if the workplace culture is not welcoming of age diversity. Progressive employers must learn how to cope with these workforce dynamics so as to effectively tap into the growing pool of senior workers to meet their manpower needs in the long run.

In addition, employers should study and understand their workforce profile and plan their manpower needs in anticipation of more employees becoming more senior. They should consider setting up age-friendly workplaces to better tap into the growing pool of senior workers, such as by implementing technological solutions to minimise physical work for senior workers. In addition, employers should also adapt by putting in place progressive hiring practices that centre on skill sets rather than age, and by reviewing their hiring and HR policies to provide for flexible work arrangements and re-employment opportunities. In this regard, employers may take advantage of the Part-Time Re-employment Grant introduced by the Singapore government to support more flexible work options for senior workers. Employers can also receive support through the Senior Employment Credit scheme, which provides wage offsets to employers who hire Singaporean workers aged 60 and above.

Changes to Paternity Leave and Unpaid Infant Care Leave Benefits

Singapore is amongst the countries with the lowest birth rates globally and in 2023, Singapore's resident total fertility rate dropped to 0.97, marking the first time in Singapore's history that the total fertility rate has dropped below 1.

According to feedback received by the Singapore government, the cost of raising a child, especially when children are younger, up to six years old, and the ability to manage work and family commitments are some concerns that have been raised by Singaporeans. To this end, the Singapore government has implemented the following measures which recently came into force.

From 1 January 2024, working fathers of Singaporean children can take up to four weeks of government-paid paternity leave, up from the previous two weeks offered, depending on their employers. The additional two weeks of paternity leave is currently given by employers on a voluntary basis, but is expected to become mandatory in due course.

In addition, from 1 January 2024, working parents with Singaporean children aged below two years old are eligible to take up to 12 days of unpaid infant care leave per year, which is an increase from the previous six days of unpaid infant care leave.

These measures were put in place to encourage paternal involvement in raising children and to give parents more time to bond and with and care for their young children. Taken together with the FWA Guidelines, it is hoped that these measures will help to alleviate the concerns raised by Singaporeans regarding parenthood.

Practical guidance for employers

Given that the increased paternity leave to four weeks is expected to become mandatory in the future, employers should begin putting in place working arrangements and policies to facilitate the increase in paternity leave. This includes updating internal policies and systems as well as educating and training managers on how to

handle requests for increased paternity leave and unpaid infant care leave and how to manage manpower needs in light of such requests.

This is especially pertinent in male-dominated sectors and smaller companies, which will need to consider how operational and manpower needs can continue to be met whilst employees are on leave, for example by looking at how the coverage of employees' job responsibilities can be distributed such that there will be no disruption to the workflow.

Upcoming Tripartite Guidelines on the Inclusion of Non-competes in Employment Contracts

In February 2024, the Minister for Manpower announced that the MOM and its tripartite partners are developing a set of tripartite guidelines on the inclusion of restrictive clauses, such as non-competes, in employment contracts. The Minister stated that the guidelines are meant "to shape norms and provide employers with further guidance" and are targeted for release in the second half of 2024. In a clear warning to employers, the Minister warned that "MOM will not, will never, and does not condone any exploitative employment contracts".

The proposed introduction of the tripartite guidelines presents an opportune moment to reflect on Singapore's present approach towards non-compete clauses.

Singapore law position on non-compete clauses

Singapore law strikes a balance by holding a non-compete clause to be void unless the employer can show that the clause protects a legitimate interest of the employer and is both reasonable in the interests of the parties and the public.

Legitimate proprietary interests may include (i) trade secrets or confidential information, (ii) trade connections established with the employer's customers or its suppliers, and (iii) the maintenance of a stable, trained workforce. Where there are other express provisions in the employment contract protecting one of these interests, for example, via a confidentiality agreement or a non-solicitation clause, the employer must be able to show that the non-compete clause protects additional legitimate interests beyond what is already protected in order for the clause to be upheld.

As to reasonableness, the Singapore courts will consider whether the clause is drafted no wider than is necessary to protect the employer's legitimate proprietary interests. Factors such as scope of the activity, along with the geographical area and the duration of the restraint would be relevant. In relation to the interests of the public, a High Court case has found that an indiscriminate application of identical restrictive covenants across the employment contracts of all employees regardless of their seniority, nature of work or level of access to information, would be deemed unreasonable.

A recent decision by the High Court in relation to a suit commenced by e-commerce giant Shopee against its ex-employee helps illustrate some of the above principles in action. Shopee sought injunctions to restrain its ex-employee from, amongst others, accepting employment with ByteDance as a Leader for Governance and Experience of TikTok Shop. Pertinently, the ex-employee's last role in Shopee was as Head of Operations for Shopee Brazil, which was confined to Brazil, in which TikTok Shop did not operate.

Shopee relied upon a non-compete clause, which prohibited the ex-employee from accepting employment with Shopee's competitor in any country where Shopee had operations. One of Shopee's main arguments was that the clause served to protect Shopee's confidential information, which the ex-employee was allegedly privy to by virtue of his participation in regional operations meetings, where Shopee's strategies for all markets would be discussed.

The High Court held that the non-compete clause was unenforceable. One key reason was that Shopee's confidential information, which was allegedly the legitimate interest being protected by the non-compete clause, was already protected by an employee confidentiality agreement.

In relation to the reasonableness of the clause, the High Court observed that the confidential information in question must be specifically pleaded, and expressed serious doubts about the reasonableness of the scope of Shopee's clause. This was because Shopee failed to plead any specific confidential information in respect of all markets where Shopee was operating, even though the ex-employee had only worked in Brazil under Shopee Brazil.

In another case, the High Court upheld a non-compete clause which prohibited an engineer of a marine manufacturing company from carrying on any activity in competition with the company's business for two years within Singapore and Malaysia. The court held that the company had a legitimate proprietary interest in maintaining a pool of trained skilled workers; and that the clause was reasonable as it only specifically prevented the joining of businesses in competition with the design and manufacturing of marine hydraulic and electrical installations. The court also noted that the restraint was limited to only countries in which the company had business presence, and the duration of the restraint was also reasonable given the specialised nature of the industry.

Practical guidance for employers

Given the Singapore government's clear policy direction in protecting workers through fair employment practices, employers can expect that non-compete clauses will be closely scrutinised by the MOM as well as the Singapore courts. Employers will bear the burden of showing that the restraint seeks to protect a legitimate proprietary interest over and above those that are already protected by any confidentiality and/or non-solicitation clauses. The clauses would also need to be as specific and targeted as possible in their restrictions to enhance their reasonableness and resulting enforceability. The use of expansive boilerplate "one-size-fits-all" non-compete clauses that purport to apply across all employee job functions and seniority levels will certainly not be enforceable.

Apart from investing time and resources to properly draft highly customised non-compete clauses to increase the prospect of their enforceability, employers can also rely on non-solicitation agreements, confidentiality agreements, as well as paid non-compete and/or garden-leave provisions/arrangements. The latter mechanisms can be triggered by an employer against a departing employee to require the employee not to work for a competitor for a stipulated period of time, in return for receiving a pre-agreed quantum of money.

Employers can also consider placing a reasonable price on training investments they make in employees and require repayments if they leave

before the employer has recovered the training or opportunity investment.

Ultimately, employers need to understand that legal protections cannot be the only line of defence against employees leaving to join competitors. Employers need to ensure that their working environment, compensation and benefits policies and career progression tracks are attractive and competitive.

What to expect from the upcoming guidelines

We do not expect the tripartite guidelines to change the state of the law, which is well-established by the Singapore courts. However, to provide more guidance to employers, it is hoped that the tripartite guidelines will propose the recommended range of monetary compensation to be paid to the employee during the restraint period, suggest the recommended profile of employees that such clauses should be targeted at, and propose scenarios where such non-competes should not be enforced, for example, when an employee is being retrenched.

We expect that the guidelines will seek to create a balanced ecosystem by supporting employers in developing fair and reasonable non-compete clauses that protect legitimate business interests, whilst respecting employees' rights to pursue their professional aspirations and maintain labour mobility.

SLOVENIA

Law and Practice

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Contents

Fabiani, Petrovič, Jeraj, Rejc o.p. d.o.o. is a well-recognised, dynamic and continuously growing Slovenian law firm with a cross-border reach, which provides full business law service to companies, entrepreneurs and other businesses as well as state agencies. It has knowledge and experience in several practice areas that impact the daily life of any business. The firm advises domestic and foreign companies, as well as public organisations, on all matters related to employment law, data protection and social security law. It has specialised expertise in dismissal and individual termination proceedings, internal staff reorganisations, collective bargaining negotiations with trade unions, data protection issues (GDPR) and work permits/detachments, as well as other employment law-related matters. With its experience and expertise, the firm can offer support to employers' HR and legal departments, helping to prevent conflicts and protect clients' rights. It also represents the interests of employees in labour disputes.

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1. Employment Terms

1.1 Employee Status

There is no formal distinction between blue-collar and white-collar workers in Slovenia. The Slovenian law is generally employee-friendly and determines a rather wide scope of minimal rights that need to be provided to all employed persons – ie, persons working based on an employment contract.

However, the law allows certain deviations from the mandatory provisions of the law (ie, minimum employee rights) with regard to the legal representatives of employers and executive workers. A special regime also applies to so-called public employees.

Employers' Legal Representatives

The Slovenian Employment Relationships Act (*Zakon o delovnih razmerjih*, Official Gazette no 21/13 et seq – "ZDR-1") allows deviation from the minimum rights and obligations set forth therein for managing directors of the company and (registered) proxy holders – ie, employees who have a corporate mandate in addition to their employment contracts.

With these employees, the employer can agree on a regime deviating from ZDR-1 with regard to the following rights and obligations:

- the term of the contract (it is usually linked to the term of the mandate of such employee);
- working hours and provisions on breaks and rest periods;
- remuneration of work;
- disciplinary responsibility;
- termination of the employment contract; and
- the applicability of collective bargaining agreements for such employees.

In practice, employers prefer to reach all-in agreements with such employees, by which they agree on a fixed compensation for work provided under such agreement (which is not possible for other employees, even executives). The flexibility with regard to the termination of the employment agreement is also important, as it allows the parties to deviate from the rather strict and formalistic termination regime set forth in ZDR-1 for all other categories of workers.

Executive Employees

Certain deviations from the minimum rights set forth in ZDR-1 are also allowed for executive

employees, albeit to a lesser extent than for legal representatives of the employer. Executive employees are employees who manage a business area or an organisational unit of the employer *and* are authorised to make independent decisions about either personnel or the organisation of work in their respective department or legal transactions. It is important that the executive employees have such competences not just "on paper", as the agreements on deviations from the minimum rights set forth by ZDR-1 will otherwise not be valid.

A special regime applies to the duration of such contracts, as they can be concluded for a fixed term (even if they do not fall into any other categories that permit the conclusion of fixed-term agreements, as listed in **1.2 Employment Contracts**) if such executive employee is already employed with the employer for an indefinite term in a non-executive position to which the employee will be able to return after their employment agreement for an executive position terminates.

Further deviations from the minimum rights are permitted with regard to working hours, night work and rests and breaks, provided that the executive employee has certain independence with regard to the organisation of their working hours or if their working hours cannot be planned in detail in advance (due to the nature of the position) and under a further condition health and safety at work are ensured. To a certain extent, employers can also agree with such employees that the contractual monthly salary will encompass work over and outside of regular working hours.

1.2 Employment Contracts

Difference Between Indefinite and Fixed-Term Employment Contracts

Employment contracts for an indefinite term are the "standard" under Slovenian law, whereas fixed-term contracts are regulated as exceptions, which can only be concluded in cases and under conditions stipulated in ZDR-1. See **1.1 Employee Status** for details on some of the exceptions.

Written Form of Employment Contracts

The law requires an employment contract to be concluded in written form. The employer is obliged to present a written proposal to the employee at least three days before its signing and a signed copy after it has been concluded.

The lack of written form does not necessarily mean that no employment relationship has been concluded. The written form is stipulated in favour of the employee. If the employee claims that an employment relationship exists between the parties, the employer will bear the burden of proof that no such relationship exists in case of dispute.

ZDR-1 sets forth the mandatory elements of an employment contract. With regard to certain rights and obligations, the employment contract can also refer to collective bargaining agreements or general regulations of the employer. The statutory content includes:

- information on the contracting parties;
- the date of commencement of work;
- the employee's position and a detailed job description;
- the place of work;
- the term of the contract and (if applicable) the reason for concluding a fixed-term employment contract;

- an indication of whether the employment contract is for full-time or part-time work;
- working hours and the distribution thereof;
- the amount of the employee's basic salary and any other payments to which the employee is entitled;
- the payment of allowances and other components of the employee's salary, the pay period, payday and the method of salary payment;
- the duration of annual leave;
- the length of notice periods;
- training provided by the employer;
- reference to the binding collective agreements or the employer's general acts determining the working conditions of the employee; and
- other rights and obligations in specific cases.

Employment Contracts for an Indefinite Term

If the duration of the employment contract is not specified in writing or if the fixed-term employment contract is not concluded in accordance with the law, it is presumed that the employment contract has been concluded for an indefinite period.

Under Slovenian law, employment agreements may only be terminated in cases and in accordance with the conditions and procedures set forth by ZDR-1 (with the exception of employment agreements with legal representatives, as described in **1.1 Employee Status**).

Fixed-Term Employment Contracts

As mentioned above, fixed-term contracts are viewed as "unwanted exceptions" by the law, as the social security of workers is still a very important value in Slovenia. In exceptional cases, an employment contract may be concluded for a fixed term if it pertains to:

- the performance of work that, by its nature, lasts for a specified period;
- the replacement of a temporarily absent worker;
- a temporary increase in the volume of work;
- the employment of a foreigner or a stateless person;
- a managerial person or a procurator or other leading worker;
- the performance of seasonal work;
- a worker who concludes a fixed-term employment contract for the purpose of preparing for work, training, improving for work or education;
- fixed-term employment due to work during an adaptation period;
- the performance of public works or inclusion in active employment policy measures;
- work organised as a project;
- work required during the introduction of technical and technological improvements of the work process or due to the training of workers or the transfer of work;
- elected and appointed officials or other workers tied to the mandate of a particular body or official; or
- other cases defined by law or by a collective agreement at the industry level.

Collective bargaining agreements may grant further exceptions, particularly to smaller employers (those employing ten or fewer employees).

As fixed-term agreements are viewed as "irregularities", ZDR-1 also limits their duration. In general, they are limited (for the same position) to the duration of the underlying reason for which such exception was permitted, but not more than two years. Several exceptions apply. If the fixed-term agreement was concluded or extended contrary to the law, the employee has the right to seek its conversion into an agreement for indefinite term.

Special Types of Employment Agreements

Apart from the distinction between indefinite and fixed-term contracts and contracts with managerial and executive employees on one hand and regular employees on the other, ZDR-1 also regulates some other specific types of contracts, such as:

- those for the employment of agency workers;
- agreements with self-employed, economically dependent persons who are personally performing work for the contracting entity based on a civil law agreement (and receiving 80% of their annual income from the same contracting entity);
- those relating to student work and work of children above the age of 15 (work under this age limit is permitted only exceptionally); and
- special regimes that apply to posted workers.

The law determines that an employment relationship shall be deemed to exist between parties if their relationship has all the elements of an employment relationship, even if neither of the parties wishes to conclude an employment relationship. This often applies to student work (where students work under comparable circumstances to employed workers) and civil law contracts between self-employed persons and companies, as the parties often opt for such arrangements for tax reasons.

1.3 Working Hours

Full-Time Work

Full-time working hours must not exceed 40 hours per week. Exceptions apply to employment agreements with legal representatives and executives (see **1.1 Employee Status**).

Specific laws or collective bargaining agreements can also determine shorter full working hours for individual industries or positions, but not less than 36 hours per week, except for positions with higher risks of injury or health impairments.

Distribution of Working Hours

As a rule, the working hours are evenly distributed, with the "national standard" still being five days per week and eight hours per day (including a paid break of 30 minutes per eight hours). The parties can agree on a different distribution of working hours. In an even distribution of working hours (meaning that the regular number of working hours is the same every week), the working hours cannot be distributed to fewer than four or more than six days a week.

The law also sets forth conditions under which the working hours can be unevenly distributed or temporary redistributed (and limitations with regard to daily and weekly breaks, which need to be considered). In an uneven distribution of working hours, the weekly working hours may not exceed 56 hours and the employer needs to ensure that the working hours are evened out within a certain reference period, not longer than six months (unless extended by a collective bargaining agreement).

The employer must determine the annual schedule of working hours (annual calendar) and notify employees (and workers' unions if they exist on the employer's level) in writing beforehand. The parties can also agree that the specific monthly/weekly working hours will be determined by periodic calendars, determined by the employer (in accordance with all applicable agreements and limitations). Even if the working hours are distributed unevenly, this does not mean that the employer can determine the working hours/schedules ad hoc, as the employees have the right to foreseeability of working hours in order to be able to plan their private lives.

Special categories of workers (disabled workers, older employees, certain categories of parents, etc) enjoy protection, which prevents the employer from ordering them to work more than 40 hours per week (meaning that uneven distribution of their working hours is not possible if they are employed full time) or to work overtime hours.

ZDR-1 further regulates the right of employees to propose a different allocation of working hours for the purpose of balancing the professional and private life of employees. The employer must reply to such request in writing and justify their refusal.

Overtime Work

Overtime work is viewed as an "extreme measure" by ZDR-1, and may be requested only in cases when the employer cannot ensure the unhindered work process with less intrusive measures. In other words, the employer is not allowed to continuously request overtime work if this could be avoided by better organisation of work, new employments, etc.

Extraordinary and unforeseeable circumstances under which overtime work is allowed include exceptional cases of increased workload, pending damages or danger to people and goods, aversion of defects that could lead to work interruptions and similar situations.

If possible, overtime work shall be ordered in writing before it commences. If not, then it can be assigned orally, although a written justification of the overtime work must be provided to the employee by the end of the week following the performed overtime work, at the latest.

Overtime work may last a maximum of eight hours per week, 20 hours per month and 170 hours per year. The working day may last a maximum of ten hours. Daily, weekly and monthly time limits may be observed as average limits over a period specified by law or a collective bargaining agreement, and this period must not exceed six months. With the consent of the worker (given for each individual case), overtime work may exceed 170 hours, but it must not exceed 230 hours per year. When assigning overtime work, the statutory provisions on daily and weekly rest periods must be considered.

The employer cannot assign work beyond full-time working hours to specific groups of employees, such as pregnant workers, older workers, minor workers, workers in bad health whose health condition could deteriorate due to such work, workers with full-time working hours shorter than 36 hours per week due to work in a position with higher risks of injury or health impairments, or disabled workers working part-time.

Part-Time Contracts

An employment contract may also be concluded for working hours shorter than full-time. Such an employee has the same contractual and other rights and obligations arising from the employment relationship as an employee who works full-time and exercises them (with some exceptions) proportionally to the time for which the employment relationship was concluded (eg, the employee is entitled to proportional annual leave of a minimum duration and to holiday pay).

Specific and temporary part-time contracts are also regulated by laws determining the special rights of parents, disabled employees, etc.

1.4 Compensation

Minimum Salary Requirements

Compensation for work under the employment contract consists of a salary, which must always be in monetary form, and other types of payments (if agreed upon). In determining the salary of a worker who works full-time, the employer must adhere to the minimum salary requirements, annually determined by the Minister for work (in 2024, the minimum salary amounts to EUR1,253.90 gross for full-time). Collective bargaining agreements often set forth higher minimum basic salaries for individual categories of jobs.

Basic Salary, Supplements and Variable Part

A salary consists of:

- a basic salary, which is the agreed monthly compensation for the agreed number of working hours and expected results of work;
- supplements for seniority and special circumstances of work; and
- a variable part of the salary (bonus) for the individual and collective performance (if applicable at the employer).

The salary needs to be agreed in a gross amount.

Employees are entitled to a special seniority allowance, the amount of which is determined by collective branch bargaining agreements – most commonly, the employees receive 0.5% of their basic salary for every completed year of their work experience. Other supplements are also determined by collective bargaining agreements and apply to special working conditions, such as overtime work, night work, work in shifts, work on Sundays and other work-free days, etc. The supplements are calculated from the basic salary.

The criteria for bonuses for individual or collective job performance are determined by collective bargaining agreements on the level of the industry or the employer or by the employer's general acts, and are usually not a mandatory part of the employee's salary. Provided that the employer meets the conditions set forth by Article 44 of the Personal Income Tax Act (*Zakon o dohodnini*, Official Gazette no 13/11 et seq – "ZDoh-2"), the bonus for the collective performance is not subject to personal income tax (up to a certain threshold).

Employees are entitled to a paid daily break of 30 minutes per eight hours of work (or a proportionally longer or shorter paid break if the daily working hours were longer or shorter).

Vacation Allowance

Every employee is entitled to a vacation allowance. The minimum annual vacation allowance equates to the minimum salary. The vacation allowance is not subject to any taxes or social contributions up to the amount of the last published average gross salary in Slovenia. In cases where an employee starts or ends their employment with the employer during the year, they are entitled to a pro rata part of the vacation allowance.

Work-Related Expenses

Employers are responsible for reimbursing employees for all acknowledged work-related expenses, the amount of which is usually determined by collective bargaining agreements and/or a governmental decree on thresholds up to which these payments are not subject to taxes (and social contributions). These reimbursements include the daily meal allowance, costs of commuting to and from work, travel costs and compensation for use of the employee's assets (if the employee works from home).

1.5 Other Employment Terms

Vacation

Employees in Slovenia are entitled to a certain number of paid days of vacation (annual leave). Annual leave in a given calendar year cannot be less than four weeks, regardless of whether the employee works full-time or part-time. A longer duration of annual leave may be determined by collective bargaining agreements, general employer's acts or the employment contract. Annual leave is determined and used in working days. The employer is obliged to notify the employee in writing each year (by March 31st) of the number of vacation days to which the employee is entitled.

Annual leave may be taken in several parts, and the employer is obliged to allow the employee to use two weeks of annual leave in one piece. The specific dates on which the annual leave will be taken are subject to an agreement between the parties, but the employer must consider the personal circumstances of the employee (particularly if the employee has younger children) and shall not refuse the employee's requests unless the use of annual leave on a certain date would seriously hinder the employer's work process.

The employer must enable employees to take their annual leave in the current calendar year, and employees must take at least two weeks of annual leave by the end of the current calendar year, with the remaining leave to be taken by June 30th of the following year (extensions apply in case of longer absences from work due to sick leave or parental leave).

Other Permitted Absences From Work

Paid and unpaid absences from work for personal reasons are permitted.

An employee is entitled to paid leave from work for up to seven working days in a calendar year due to personal (non-health-related) circumstances explicitly listed in Article 165 of ZDR-1. Absence from work due to illness or injury and absence due to blood donation are also paid. The duration of such paid absence is not limited, but only a certain part of the compensation burden falls on the employer.

The recent amendments to the law have introduced up to five working days of paid absence in a calendar year for the purpose of providing care to close relatives, as listed in ZDR-1 (ie, caregiver leave). An employee who is a victim of domestic violence is entitled to five working days of paid leave in a calendar year for the purpose of arranging protection, legal and other procedures, and addressing the consequences of domestic violence.

Confidentiality and Non-disparagement Requirements

An employee has a general obligation to refrain from any actions that materially or morally harm or could harm the business interests of the employer, given the nature of the work performed for the employer. In addition, the employee must not use for personal purposes or disclose to a third party the employer's trade secrets, which are designated as such by the employer, and which were entrusted to the employee or became known to the employee in another way. There are no specific statutory limitations for confidentiality and non-disparagement agreements in this regard.

2. Restrictive Covenants

2.1 Non-competes

Slovenian labour law recognises statutory non-compete prohibition and contractual non-compete clauses. The first apply to the duration of the employment agreement and prohibit the employee from engaging in any activities that might be competitive to the employer's business during the employment (exceptions are subject to employer's explicit approval), while the latter apply only if they have been explicitly and validly agreed upon in the employment contract and apply to the post-employment period.

If a statutory prohibition of competitive activities is breached during the employment, the employer may claim compensation for damages caused by the employee's actions within three months from the day the employer became aware of the violation but not later than three years from the completion of the work or the conclusion of the transaction.

A (post-)contractual non-compete clause may be agreed upon in writing for a period not exceeding two years after the termination of the employment contract, and only for cases of termination of the employment contract by mutual agreement between the parties, due to regular termination by the employee or termination for cause by the employer.

If compliance with the non-compete clause prevents the employee from earning an income comparable to their previous salary, the employer must pay the employee a monthly monetary compensation for the entire duration of the prohibition. The monetary compensation for compliance with the non-compete clause must be stipulated in the employment contract, and must amount to at least one-third of the employee's average monthly salary in the last three months before the termination of the employment contract. If the monetary compensation for compliance with the non-compete clause is not stipulated in the employment contract, the non-compete clause is not valid.

The employer and the employee may mutually agree to terminate the validity of the non-compete clause. If the employee terminates the employment contract because the employer has seriously breached the terms of the employment contract, the non-compete clause ceases to be valid if the employee provides a written declaration to the previous employer that they are not bound by the non-compete clause, within one month from the termination of the employment contract.

The legal representatives of the employer may be subject to additional non-compete obligations in accordance with the provisions of Slovenian corporate law. These restrictions are separate from the non-compete obligations under employment law and are not commented on in detail here.

2.2 Non-solicits

The aim of non-solicitation clauses is to prevent employees from actively recruiting their colleagues from their (former) employers. Such contractual clauses are relatively rare in employment contracts and are usually agreed upon only with managerial workers and executives. It is questionable whether they would be enforceable in case of dispute, as Slovenian employment law allows for a rather limited number of restrictions, pertaining to the post-contractual obligations of an employee.

Such clauses might also be agreed upon with an employer's business partners (customers). As they are not regulated by Slovenian employment

law and do not directly impose any obligations on the employees, such clauses cannot prevent an individual from accepting employment with a company that has agreed on such a clause with the employee's former employer. It is even questionable whether the customer bound by such a clause could refuse to employ the employee if they were the most suitable candidate for an open position.

3. Data Privacy

3.1 Data Privacy Law and Employment

The General Data Protection Regulation (GDPR) applies in the employment sphere. IN addition, the national Personal Data Protection Act (*Zakon o varstvu osebnih podatkov*, Official Gazette no 163/22 – "ZVOP-2") regulates video surveillance of official, work or business premises and within workspaces.

Operators of video surveillance systems in the public and private sectors may conduct video surveillance of access to official, work or business premises if it is necessary for the safety of people or property, to ensure control of entry into or exit from these premises, or if the nature of the work poses a potential risk to employees. Before introducing video surveillance in a public or private sector entity, the employer must consult with the representative trade unions at the employer and the works council or employee representative.

The implementation of video surveillance within workspaces may only be conducted when it is absolutely necessary for the safety of people or property, for the prevention or detection of violations in the area of gambling, or for the protection of classified information or trade secrets, and when these purposes cannot be achieved by less intrusive means. It is prohibited to record workstations where an employee usually works, except when it is necessary in the circumstances mentioned above. Direct monitoring of camera footage is permitted only if it is carried out by expressly authorised personnel of the operator.

In all instances, employees must be notified in writing in advance of the implementation of video surveillance.

4. Foreign Workers

4.1 Limitations on Foreign Workers

If foreign workers want to work in Slovenia, they require a work permit and employment authorisation. Foreign workers are citizens of third countries – ie, countries that are not members of the European Union or European Economic Area. Conditions for the employment, self-employment and work of foreigners, as well as related tasks of the Republic of Slovenia for regulating and protecting the labour market, are regulated in the Employment, Self-Employment and Work of Foreigners Act (*Zakon o zaposlovanju, samozaposlovanju in delu tujcev*, Official Gazette no 47/15 et seq – "ZZSDT"). Usual conditions relate to:

- passing a labour market test to determine if suitable candidates registered as unemployed at the Employment Service of Slovenia are available;
- having a clean criminal record; and
- demonstrating sufficient means of subsistence for their stay in Slovenia.

Foreign workers can apply for the following permits and authorisations:

- a single permit (a combined residency and work permit) for employment, with subtypes including an EU Blue Card, an EU ICT permit and a single permit for seconded workers and daily migrant workers;
- work permits under the various bilateral agreements (eg, with Bosnia and Herzegovina or Serbia);
- posted worker notification from another EU member state;
- short-term work notification (a visa may be required for entry);
- short-term legal representative work notification (a visa may be required for entry);
- a business visit permit (no permit or notification is required if conditions are met, although a visa may be necessary for entry); and
- various other types of visas.

Various administrative simplifications were enacted in April 2023, including:

- simplifying the process of changing employers, changing positions with the same employer, or employment with two or more employers within the framework of a valid single permit for residence and work;
- easing the employment of foreigners who will be employed by public sector employers; and
- allowing applicants for international protection to integrate into the labour market more quickly.

4.2 Registration Requirements for Foreign Workers

There are no registration requirements for employers seeking to hire foreign workers. However, a foreign citizen can only enter an employment contract in Slovenia if they meet the conditions for obtaining a work/single permit, and they cannot begin working until the permit is issued; any employment contract signed with a foreign citizen who does not hold a valid permit is considered null and void. Employers are allowed to hire only those foreign workers who possess valid work permits. The application for a work permit can be submitted by either the employee or the employer.

Depending on the severity of the violation, employers who are fined for an offence may be prohibited from hiring or working with foreign nationals for one to five years.

Due to the severe delays at the administrative units for issuing work/single permits for foreign workers in recent years, in 2024 the legislature passed some de-bureaucratisation measures aimed at speeding up the administrative processes, such as the elimination of local jurisdiction for issuing single permits for residence and work.

5. New Work

5.1 Mobile Work

The location of work is an essential element of the employment contract. The parties can agree on remote work or a hybrid arrangement (which is customary), but this requires:

- an amendment of the employment agreement;
- notification of work at home to the Employment Inspectorate; and
- a prior assessment of the suitability of the remote workplace with regard to the health and safety at work requirements.

These formalistic requirements often prevent the parties from agreeing on more flexible forms of remote work (where the employee could, for example, freely choose their daily workplace).

These and additional considerations (eg, recognition of minimum employee rights of the host country) also apply in cases where the employee would temporarily work in other jurisdiction(s).

Furthermore, ZDR-1 has recently introduced the so-called "right to disconnect", which obliges employers to undertake measures aimed at ensuring employees are aware of their right not to monitor emails or other telecommunications during their breaks, rests and other off-work times, which further limits the flexibility of such arrangements.

The relative complexity of such relationships often leads to employees deciding to become self-employed and to conclude a civil law agreement with their (previous) employer.

5.2 Sabbaticals

Sabbatical leave (as a longer absence from work) is not explicitly regulated by Slovenian laws and is also not common on the market.

Due to the very shallow labour market and increasing competition for high-performing workers, some employers are introducing such measures and are introducing their own systems with regard to sabbatical leave. Some opt for temporary suspension of the employment (meaning that the agreement remains in force but the employer does not pay any remuneration to the employee for the term of suspension), others pay only social contributions to the employee for such term, and some pay the employee their full salary for such term.

Agreements on mutual rights and obligations are usually regulated in individual agreements and on occasions also by an employer's internal regulations.

5.3 Other New Manifestations

Desk Sharing

Desk sharing is becoming popular due to the high rents for office spaces. It is not specifically regulated in Slovenian legislation and is often not even regulated in individual employment agreements but is rather applied as an employer's organisational measure in combination with hybrid work.

Platform Work Challenges

Platform work challenges have become a hot topic, particularly with regard to platforms providing deliveries of foods and other products, as the scope of these services and workers soared during the pandemic and throughout the related restrictions.

Many of these workers are foreigners, who are not even aware of their rights and do not know the local language well (which is also a consumer protection topic, as they deal with consumers). They usually work based on civil law contracts and would generally be entitled at least to the protection granted to economically dependent self-employed persons (see **1.2 Employment Contracts**), as they commonly receive more than 80% of their income from the same entity.

Recent concerns with regard to such workers also pertained to the liability of the employer/contracting entity if such workers cause an accident (eg, traffic accident) or commit a violation of the laws while working. In the case of employed workers, the damaged party/authorities can act against the employers, which is usually easier than acting against an individual employee.

It goes without saying that such workers are often also subject to other abuses (which is, however, more related to them being foreigners than to the platform work as such).

Use of Artificial Intelligence

The use of various AI tools is becoming more and more common in various industries and the EU has already introduced the first regulations regulating this area. It is yet to be seen how these acts will be implemented into national legislation and introduced, as this is a totally new area.

Challenges related to the use of AI are numerous and expand well beyond the legal issues.

6. Collective Relations

6.1 Unions

Role of Trade Unions

In Slovenia, trade unions are defined as organisations where workers voluntarily unite to protect and improve their social and economic position and rights from and within their employment. Trade union freedom allows for the free establishment and operation of trade unions and the right to join them.

The Trade Union Representativeness Act (*Zakon o reprezentativnosti sindikatov*, Official Gazette no 13/93 – "ZRSin") sets the conditions for acquiring legal personality and representativeness of trade unions. A trade union acquires legal personality on the day of the issuance of a decision on the custody of its statute, with competent authorities keeping the statutes based on the area and activity.

Trade unions still have a lot of influence in Slovenia, as they hold the right to organise strikes, serving as a powerful means to exert pressure on employers and advocate for the demands and rights of their members. The right to strike is guaranteed in Article 77 of the Constitution, with the possibility of legal restrictions if required by public interest, considering the type and nature of the activity.

Furthermore, trade unions in individual industries (branches), professions or companies are entitled to negotiate collective bargaining agreements with their employer counterparts. If the trade union is representative (on the level of the industry, profession or company, or even at the national level), it is allowed to conclude collective bargaining agreements that apply to all employees in the respective industry, profession or company (ie, the level for which the collective bargaining agreement was concluded). If a trade union is organised in the company, the employer cannot unilaterally regulate through its internal regulations employees' rights and obligations that are the subject of collective bargaining agreements.

Unions further play a crucial role in the processes of business transfers and collective layoffs, as well as individual terminations (if they affect their members).

Representative Status of Trade Unions

Representative trade unions are those that are democratic, independent from state bodies and employers, primarily financed by membership fees, and have a certain percentage of members based on the industry, activity or profession. Trade union representativeness is divided into sectoral unions, activity unions and professional unions, where representativeness is crucial for the conclusion of collective agreements and participation in bodies that decide on the economic and social security of workers. A confederation of trade unions represents an association of unions from various sectors, activities or professions.

The status of representativeness on the level of an industry (branch) is obtained through a decision issued by the minister based on legal conditions; such decision is published in the Official Gazette. Since ZRSin does not provide for periodic verification of the conditions for representativeness, the employer may only challenge the trade union's authority for collective bargaining stemming from trade union representativeness in a collective labour dispute.

A trade union organised on the level of the company becomes representative once a certain percentage of employees (15%) joins the trade union, provided that all other conditions for representativeness (as stated above) are met.

6.2 Employee Representative Bodies

Workers have a constitutional right to participate in the management of economic organisations and institutions, as regulated by Article 75 of the Constitution, where the details and conditions are specified by law. The Law on Worker Participation in Management (ZSDU) sets out the methods and conditions for workers' participation in the management of economic companies, regardless of ownership type, as well as sole proprietors with at least 50 employees, and co-operatives.

Worker participation is realised through the following means:

- the right to initiate proposals and to receive responses to those proposals;
- the right to be informed;
- the right to provide opinions and suggestions and to receive responses to them;
- the possibility or obligation of joint consultations with the employer;
- the right to co-decision; and
- the right to veto employer decisions.

Comparison to Trade Unions

Unlike trade unions, works councils are primarily designed to engage in co-management rather than in employment relations that establish rights and obligations within employment relationships. Works councils only take on the role of trade unions in employment matters under certain exceptional circumstances, as outlined by ZDR-1, particularly when no trade union exists at the employer. This generally means that works councils do not address workers' rights and obligations related to employment, such as salaries or working conditions (and they are prohibited from doing so if a trade union is active within the company). Instead, they serve as the representative voice for workers in the management and business decision-making processes of the company.

6.3 Collective Bargaining Agreements

The Law on Collective Bargaining Agreements regulates the parties involved, the content, the process of concluding a collective bargaining agreement and its form, validity and termination, as well as the peaceful resolution of collective labour disputes, and the record-keeping and publication of collective agreements. A collective agreement may only include provisions that are more favourable for workers than the statutory provisions, with some exceptions as specified in ZDR-1.

Parties to and Contents of Collective Agreements

Collective agreements are concluded between trade unions or associations of trade unions on behalf of workers and employers or employers' associations on behalf of employers. They consist of:

- an obligational part that regulates the rights and obligations of the parties who signed

the agreement, and may also address methods for the peaceful resolution of collective disputes; and
- a normative part that contains provisions regulating the rights and obligations of workers and employers in employment contracts, during the employment relationship, and in relation to the termination of employment contracts, payment for work, other personal earnings and reimbursements related to work, health and safety at work, and other rights and obligations arising from relationships between employers and workers, as well as ensuring conditions for trade union activities at the employer.

Types of Collective Agreements

There are several types of collective agreements, such as sectoral agreements (eg, the Collective Agreement for Non-Economic Activities), industry agreements (eg, the Collective Agreement for the Healthcare and Social Care Activities of Slovenia) and professional agreements (eg, the Collective Agreement for Doctors and Dentists in the Republic of Slovenia).

A collective agreement applies to the parties to the collective agreement and their members. If the signatories to the collective agreement include associations of trade unions or employers' associations, the collective agreement specifies which members of the association it applies to. A collective agreement binds the parties to the agreement and their members even if a signatory withdraws from the association, but for no longer than one year.

General and Extended Validity of Collective Agreements

When a collective agreement is concluded by one or more representative trade unions it is granted a general validity, meaning that it applies to all workers at an employer, or employers covered by the agreement.

When a collective agreement is concluded by one or more representative trade unions and one or more representative employers' associations whose members employ more than half of all workers employed by the employers for whom the extension is proposed, it is granted extended validity by the Minister of Labour, meaning that the validity of the entire collective agreement or part of it is extended to all employers in the activity or activities covered by the agreement.

After the termination of a collective agreement's validity, the provisions of the normative part (see above) continue to apply until a new agreement is concluded, but for no longer than one year, unless the parties agree otherwise.

Collective labour disputes are resolved peacefully through negotiations, mediation and arbitration, and before the competent labour court.

7. Termination

7.1 Grounds for Termination

When an employer terminates an employment contract, they are required to provide a justification (already in the termination). The list of reasons for which an employer is allowed to terminate an employment agreement is limited, and the termination procedures are subject to rather strict formal requirements.

Conversely, a worker may terminate the employment contract without providing any justification in the case of an ordinary termination, whereas a justification is required in cases when the employee terminates the employment agree-

ment for cause and without a notice period (extraordinary termination).

Termination by the Employer – Permitted Termination Grounds

An employer can terminate an employment contract only based on one of the following grounds specified by ZDR-1 (numerus clausus principle):

- business reasons;
- the employee's incompetence/inability to perform the contractually agreed work;
- a material breach of obligations in the employment relationship;
- an unsuccessful probation period; or
- the inability to perform work as stipulated in the employment contract due to disability.

Under certain conditions, an employee's material breach of contractual obligations can even represent a ground for extraordinary termination by the employer – ie, a termination without any notice period. Extraordinary termination is possible in cases where the violations are so severe that the employer cannot reasonably be expected to continue the employment relationship until the end of the notice period. The severity of the violation is a legal standard that needs to be assessed on a case-by-case basis, but extraordinary terminations are usually issued in cases of criminal offences against the employer, intentional violations of most important obligations that could cause material damage to the employer, violations of sick leave regimes, failure to show at work for several days without a reason, etc.

Certain categories of workers enjoy special protection against ordinary termination, which needs to be considered in the termination proceeding (certain parents, disabled persons, older employees, trade union representatives, employees on sick leave, etc).

Termination Procedure

The procedures for termination vary depending on the grounds for termination. ZDR-1 regulates the mandatory elements of the termination letter, as well as how it needs to be served. It needs to be emphasised that the employer's termination always needs to contain a justification therefor. The termination needs to be as detailed as possible (particularly with regard to the relevant facts), as the court assessment of the termination – in case the employee decides to file a lawsuit challenging the termination – is always limited only to the termination reasons stated in the termination, meaning that the employer is later prevented from justifying the termination with any reasons that were not stated in the termination.

Collective bargaining agreements or even an employer's internal regulations often regulate individual types of termination procedures in more detail.

For termination based on business reasons, the employer needs to prepare a written termination containing justified reasons for termination and serve it to the employee in accordance with the law. The business reasons must be such that the employer will be able to prove their existence in case of a legal dispute. Although the courts are not allowed to assess the business decisions of the employer (and thus assess whether a decision leading to termination is economically sound, necessary, prudent, etc), in case of dispute the employer will still need to prove that the reasons for termination actually existed and explain why the work of the terminated employee has become redundant.

Employees are entitled to the mandatory notice periods (or longer if contractually agreed) and to a statutory severance pay, which depends on the length of the employee's employment with the employer and their average salary prior to the termination.

For termination due to an employee's incompetence, the employer needs to monitor the employee's work for a certain period and, based on this, prepare a written justification of the termination summarising their findings. "Employee's incompetence" means that the employee is not able to provide the contractually agreed performance because they are not performing their work with the expected level of quality, professionalism or on time, or no longer meet the statutory job requirements. The termination reasons cannot be based on an employee's health issues, and termination for incompetence does not come into question when the employee's non-performance is based on the employee's violation of obligations in the employment relationship.

As in the case of termination due to the employee's fault (ie, breach of obligations in the employment relationship), the employee needs to be invited to a hearing (at least three business days before the scheduled hearing) in which they are allowed to present their statement with regard to the termination reasons and also the evidence in their favour. After the hearing, the employer decides on whether the termination will be issued or not. If the employer proceeds with the termination, the termination must also contain the employer's position on the main arguments provided by the employee during the hearing or in the employee's written statement. The termination cannot be issued later than six months after the employer became aware of the employee's incompetence.

In the case of termination due to incompetence, the employee generally has the right to the same notice period and severance pay as in the case of termination for business reasons.

For termination due to the employee's fault (material breach of contractual obligations), the employer must first issue a written warning within 60 days of discovering the violation, and no later than six months after the violation occurred, informing the employee that their employment contract can be terminated if they conduct similar or other material violations of the employment agreement within six months after receiving the warning letter. This period can be extended to up to 18 months by collective bargaining agreements for the respective sector.

The written warning needs to be justified (in the same way as the termination). After receiving the written warning, the employee can request the employer to allow them to present their arguments in a hearing, and the employer must schedule a hearing within 30 days from receiving such request (but not sooner than three working days afterwards). Based on such hearing, the employer adopts a final decision on the warning letter.

An issued (and justified) warning letter is a precondition for a later ordinary termination of the employee's employment agreement due to the employee's fault, whereas the later material violation must be committed within a "probation period" stated in the warning letter. For the termination, the employer must issue a separate written accusation and invite the employee to a hearing where the employee can present arguments and evidence in their favour. After the hearing, the employer decides whether to proceed with issuing the termination notice. The

same 60-day/six-month deadline applies as for the warning letter.

In the case of extraordinary dismissal due to fault reasons (described in more detail in **7.3 Dismissal for (Serious) Cause**), no previous warning letter is required. This termination ground is reserved for the most material violations only. In such cases, the employer must act very quickly, as the termination must be issued within 30 days after the competent representatives of the employer learn of the termination reasons and not later than six months after the respective violations occurred. Also in this proceeding, the employee has a right to a hearing (based on previous confrontation with the accusations against them), except where the nature of the violations is such that the employer cannot reasonably be expected to grant the employee a hearing (in cases of personal assaults, longer absences from work without cause, etc).

In the case of termination due to the employee's fault, the employee is not entitled to severance pay. A 15-day notice period applies in the case of ordinary termination for fault reasons.

In the case of an employee's termination for ordinary reasons (without case), no special formal requirements apply. The termination needs to be in writing and served to the employer. The notice period cannot be longer than 60 days, except in the termination of an employer's legal representatives, for which different notice periods can be agreed upon.

In the employment contract, the worker and the employer may agree on a probationary period of six months at most, during which time the worker may terminate the employment contract with seven days' notice. If the employer determines during or at the end of the probationary period that the worker has not successfully completed the probation, the employer may terminate the employment contract with seven days' notice.

Termination by Operation of Law

The employment contract terminates by operation of law in the following two circumstances:

- on the date the worker is served with a decision confirming a Category I disability or the decision granting the right to a disability pension becomes final; or
- on the date of expiration of the single permit or the seasonal work permit, if the employment contract is concluded by a foreigner or a stateless person.

Mass Dismissals

Special rules apply to mass layoffs (ie, situations when an employer plans to dismiss a certain number of employees within a 30-day period) when they affect:

- at least ten employees if the company has between 21 and 99 employees;
- at least 10% of employees if the company has between 100 and 299 employees; or
- at least 30 employees if the company has 300 or more employees.

In such situations, the employer must inform and consult with a recognised trade union and a works council, if they exist within the company. The subject of these consultations is mostly the criteria by which the employer will determine (individual) redundant employees and measures for preventing the loss of employment and those easing the loss of employment (and other elements of the redundancy programme).

While the employer is obliged to discuss the redundancy programme with the above-

mentioned employee representatives, it is not obliged to reach an agreement with them on this matter. However, an agreement is still recommendable, as the employer otherwise faces the risk of the employee representatives doing everything in their power to delay or even prevent the mass dismissal. After the consultations with the employee representatives (if applicable), the employer must also submit information on the redundancy programme to the Employment Service of Slovenia, which is also entitled to provide its own suggestions to the employer with regard to the measures proposed in the redundancy plan, which the employer must consider as far as possible.

If no trade union or works council exists in the company, the redundancy programme must be presented to all employees during a meeting. The employer may issue dismissal notices to the affected employees 30 days after notifying the Employment Service of Slovenia in writing about the redundancy plan. The Employment Service may decide to extend this 30-day period to 60 days, in which case the employer may only terminate the employment contracts 60 days after providing the required notification to the Employment Service as outlined above.

7.2 Notice Periods

ZDR-1 determines the statutory notice periods that apply to various types of ordinary terminations. No notice periods apply for extraordinary terminations. The law sets forth minimum notice periods in favour of the employee, which can be extended either by collective bargaining agreements or by individual employment agreements.

The shortest notice periods apply to terminations during the probationary period, where either side can terminate the agreement with seven days' notice.

If the employee terminates the employment agreement outside of the probationary period, the notice period cannot exceed 60 days (unless a longer notice period is agreed upon with a legal representative of the employer). If no longer notice period is agreed upon by the parties, then the 15-day notice period applies if the employee has been employed for less than a year, and a 30-day notice period applies when the employee has been employed for more than a year with the employer.

When the employer terminates the contract for business reasons or due to employee incompetence, the notice period is 15 days for up to one year of service and 30 days for service exceeding one year. After two years of employment, the 30-day notice period increases by two days for each completed additional year of service, up to a maximum of 60 days. After 25 years of service, the notice period is 80 days, unless otherwise specified by a branch collective agreement, but it cannot be less than 60 days.

In cases of termination by the employer due to the employee's fault, the notice period is 15 days.

Severance Payment

Employees are entitled to a statutory severance payment in the following cases:

- employer's termination due to business reasons or incompetence;
- extraordinary termination by the employee (due to the employer's fault); and
- lapse of a fixed-term agreement (with certain exceptions).

If the employee terminates the contract extraordinarily due to reasons attributable to the employer, the employee is entitled to a sever-

ance payment in the same amount as if the employee were terminated for business reasons. The employee is also entitled to compensation for the lost income during the notice period to which they would be entitled in case of termination for business reasons.

The severance pay is calculated based on the average monthly salary the employee received or would have received during the last three months prior to termination. The employee is entitled to severance pay calculated as follows:

- one fifth of the above-mentioned basis for each year of completed employment if employed for more than one year and up to ten years with the respective employer;
- one quarter of the basis for each year of employment if employed for ten to 20 years; and
- one third of the basis for each year of employment if employed for more than 20 years.

The statutory severance payment is capped at ten times the amount of the above-mentioned basis for the severance payment, unless a higher cap is determined in the collective bargaining agreement, employer's regulations or the employment agreement.

The statutory amount of the severance payment is not subject to income tax and social contributions, up to the amount of ten times the average gross monthly salary in Slovenia. Any amounts exceeding this threshold or severance payments that go beyond the statutory rights are subject to income tax and social contribution.

7.3 Dismissal for (Serious) Cause

See **7.1 Grounds for Termination** and **7.2 Notice Periods**.

Upon initiation of the extraordinary termination process, the employer may prevent the employee from performing work (suspension). During the suspension period, the employee is entitled to a compensation of salary amounting to 50% of the employee's average salary for the previous three months.

An employee terminated due to said employee's fault is not entitled to severance pay, and their employment relationship ends the day after the termination notice is served, without any notice period. In the case of extraordinary termination due to an employee's continuous absence from work, lasting at least five working days and if the employee has not notified the employer of the reasons for their absence, the employment relationship is terminated with the first day of such absence.

7.4 Termination Agreements

Each employment contract can be terminated by mutual agreement. Such an agreement must be in writing and must contain provisions informing the employee that they will not be able to exercise any social rights from unemployment, as the employee will become unemployed willingly. While failure to provide this notice does not invalidate the termination agreement itself, the employer may face fines for this omission.

The parties can agree on a voluntary severance payment and the conditions under which it will be paid, but such severance payment is subject to the same income tax and social contributions as the employee's regular salaries.

In practice, mutual termination agreements are preferred by employers as they reduce the risk of the termination of the employment being challenged in front of the court. Such termination agreements are challenged (within one year from

signing) only if either party signed it based on a misunderstanding, fraud or coercion, or in similar circumstances that would make the agreement challengeable under the general provisions of civil law.

Employees usually consent to such mutual termination agreements if the termination package is more favourable than what they are entitled to under statutory provisions or in cases where they would otherwise face a termination for fault reasons.

7.5 Protected Categories of Employee

ZDR-1 regulates several categories of employees who enjoy protection against individual (but not all) termination grounds, based on their personal circumstances. The existence of such special circumstances needs to be checked by the employer prior to initiating a termination procedure. If the employee enjoys protection based on more than one circumstance, the most favourable protection regime for the employee applies.

Pregnant Workers and Parents on Leave

Pregnant workers, breastfeeding mothers of children not older than one year and parents on full-time parental leave are protected from termination during these periods, and for one month afterward. The law also prohibits employers from initiating any (even preparatory) steps against such employees during this period of protection, providing job security for expecting and new parents. Exceptions are termination due to extraordinary reasons by the employer and termination due to the winding-up of the employer, provided that the employer previously obtains the consent of the Employment Inspectorate for such termination.

Disabled Workers

Disabled workers also enjoy broad protection against termination. Their agreements can only be terminated in accordance with specific laws regulating the rights of disabled persons, except in cases of terminations due to the employee's fault or due to the winding-up of the employer. The regular termination proceedings are rather lengthy and complex, and are subject to additional approvals by the competent authorities.

Employee Representatives

The law provides specific protections against termination for certain categories of employee representatives, including worker delegates, employee representatives in the supervisory board of the employer, and appointed or elected trade union representatives. Their employment contracts cannot be terminated without the consent of the works council, the employees who elected them or the trade union, except in cases of terminations due to the employee's fault or due to the winding-up of the employer. This protection remains in place throughout their term of office and extends for an additional year after their term ends.

Organisations that have elected such employees also have relatively broad participation rights in such termination proceedings (and can oppose the termination), and can even request the suspension of termination for a certain period of time, etc.

Workers Approaching Retirement

For employees close to retirement, the employer is prohibited from terminating the contract for business reasons once the employee reaches age of 58 or has a limited time left (less than five years) to qualify for a pension without any deductions. However, this protection does not apply in certain cases, such as when compen-

sation is provided through unemployment insurance for the remaining period or if suitable new employment is offered or if the employee provides their written consent to the termination.

8. Disputes

8.1 Wrongful Dismissal

Employees can contest wrongful terminations on the basis of procedural errors or due to the termination not being justified/founded. Terminations and any other situations where the employment agreement has ceased contrary to the law (eg, expiration of an illegally concluded fixed-term employment agreement, termination of a concealed employment relationship) may be subject to challenge.

Wrongful terminations can be challenged within 30 days after the employee receives such termination or since the employment ended based on any other illegal grounds.

Not every violation of termination proceedings results in the unlawfulness of such termination; the courts assess whether or not the procedural violation actually affected the outcome of the termination.

If the employee's lawsuit is successful, the court may rule that the employment relationship never actually ended due to the unlawful termination. In such cases, the court can award the employee all rights from the employment relationship for the period since the unlawful end of the employment relationship until the finality of the decision, which can be a significant financial burden for the employer. The court can also order the employer to reinstate the employee.

If the court finds (based on the request of either party) that continuing the employment is impossible despite the dismissal being unlawful, it may establish the employment's duration up to the issuance of the first-instance judgment, recognise the length of service, and award reasonable compensation. The compensation cannot exceed 18 months' salary based on the last three salaries of the employee. The compensation awarded depends on the length of employment, the employee's prospects for future employment and the circumstances surrounding the termination. This compensation covers the rights the employee asserted up until the contract's termination.

The income the employee received after the termination reduces the potential obligations of the employer, as described above. Potentially, a wrongful termination can also result in contractual penalties, liability for minor offences or even criminal liability of the employer.

8.2 Anti-discrimination

Based on the constitutional principle of equality before law, any personal circumstance of a worker or a work candidate can be the ground for an anti-discrimination claim, and the Constitution and ZDR-1 explicitly list some of them.

Employers must ensure equal treatment and avoid any form of bias or prejudice in their employment practices. Direct and indirect discrimination based on any personal circumstance is prohibited.

In case of dispute, the burden of proof lies with the employer. Therefore, if in a dispute a candidate or employee presents facts that justify the presumption of a violation of the prohibition of discrimination, the employer must prove that the

principle of equal treatment or the prohibition of discrimination was not violated.

If discrimination is proven, the following remedies are available:

- invalidating the termination and reinstating the employee if the dismissal was discriminatory;
- compensation that is effective, proportionate and dissuasive; or
- monetary compensation ranging from EUR500 to EUR5,000 under the Protection Against Discrimination Act.

8.3 Digitalisation

Under the provisions of the Civil Procedure Act, which applies to labour and social disputes, there have been advancements in the digitalisation of employment disputes, including the option to conduct court proceedings via videoconferencing. As stipulated in the Act, parties can participate in hearings and carry out procedural actions remotely through audio and visual transmission (videoconference) if they mutually agree. This flexibility allows parties and their legal representatives to be in different locations while still actively participating in the proceedings. Nevertheless, in practice these options are not used as much as desired, as the videoconferencing requires the consent of all parties involved.

Courts may also utilise digital tools for gathering evidence, such as conducting onsite inspections, reviewing documents, hearing testimony from parties and witnesses, and consulting with court experts. There has long been an expectation that e-court files will be implemented in labour disputes, but these projects have not yet been introduced.

9. Dispute Resolution

9.1 Litigation

Specialised Courts

In Slovenia, four specialised labour and social courts serve as the first instance courts for resolving individual and collective labour disputes. The Ljubljana Higher Labour and Social Court serves as the second instance court, handling appeals against decisions made by the first instance courts. In labour disputes, the first instance court panel consists of a professional presiding judge and two lay judges (representing workers and employers).

Class Actions

According to the Collective Actions Act (*Zakon o kolektivnih tožbah*, Official Gazette no 55/17 et seq – "ZKolT"), a collective lawsuit with class action claims can be filed together by several workers filing independent lawsuits in individual labour disputes.

Court Representation

In proceedings before the courts of first and second instance, only attorneys or individuals who have passed the state bar exam may act as authorised representatives. In cases involving extraordinary legal remedies before the Supreme Court, a party may also be represented by a trade union representative, an association of insured persons or an employer's representative, provided that the representative is employed by the organisation to represent its members and has passed the state bar exam.

9.2 Alternative Dispute Resolution

In Slovenia, mediation is a common method for resolving individual disputes between workers and employers, and is actively encouraged by the courts. In individual disputes, the parties can voluntarily enter into a mediation process

at the start of the court procedure, and have a maximum of three months to reach an amicable solution before the judicial procedure continues.

Arbitration is less popular due to its expense, so it is mostly used in collective disputes and conflicts between employers and works councils. The procedure is regulated by ZKolT, with two possible types of disputes:

- an interest dispute, when a collective labour dispute arises from differing interests of the parties regarding the conclusion, supplementation or amendment of a collective agreement; or
- a rights dispute, when the parties disagree on the interpretation or implementation of the provisions of an existing collective agreement, or when one of the parties claims a violation of the agreement.

A list of conciliation experts for individual cases is established by the Minister for Labour, based on recommendations from unions and employer associations.

9.3 Costs

A special rule applies to legal costs in labour and social disputes. The courts usually require the employer to cover all costs associated with presenting evidence, even if the employee does not entirely prevail in the litigation and has not incurred any special costs as a result.

The court may also decide that each party bears its own representation costs if the employee participated in the proceedings without a legal representative or was represented by a trade union representative and did not (fully) win the case.

In disputes concerning the existence of an employment relationship or its termination, the employer is responsible for covering its own costs, regardless of the case's outcome, unless the employee has misused procedural rights by filing the action or through their conduct during the proceedings.

Trends and Developments

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Fabiani, Petrovič, Jeraj, Rejc o.p. d.o.o. is a well-recognised, dynamic and continuously growing Slovenian law firm with a cross-border reach, which provides full business law service to companies, entrepreneurs and other businesses as well as state agencies. It has knowledge and experience in several practice areas that impact the daily life of any business. The firm advises domestic and foreign companies, as well as public organisations, on all matters related to employment law, data protection and social security law. It has specialised expertise in dismissal and individual termination proceedings, internal staff reorganisations, collective bargaining negotiations with trade unions, data protection issues (GDPR) and work permits/detachments, as well as other employment law-related matters. With its experience and expertise, the firm can offer support to employers' HR and legal departments, helping to prevent conflicts and protect clients' rights. It also represents the interests of employees in labour disputes.

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Employment in Slovenia: an Introduction

Legislative changes in the past year were marked by the fact that the current Slovenian government is more liberal and socially oriented than the previous one, which ended its mandate in Q2 2022. This has resulted in a reactivated social dialogue between the government, trade unions and employers' organisations (in which the government often favours the trade unions), notable increases of minimum employee rights and an increased number of long-lasting strikes in the public sector (domino effect).

There is also an ongoing discussion about tax reform, which will affect remuneration from employment relationships and labour costs, and legislative changes promoting employee participation in the ownership of companies.

Last but not least, the labour market is still seriously affected by the shallow pool of available workforce, which has led to continuous increases of salaries and to changes in immigration policies.

Employment and unemployment rates

In 2023, the employment rate in the Republic of Slovenia was historically the highest, and the unemployment rate the lowest. These circumstances have remained unchanged in the first half of 2024. There is a notable shortage of skilled workers, particularly in the construction, manufacturing, healthcare and social care, education, HoReCa (hotel, restaurant and catering), trade and transport sectors.

Statistics show that the recent shortage of domestic labour is to a certain extent compensated by the employment of foreign workers, the number of which has been increasing annually despite rather rigid and lengthy procedures for obtaining work permits in Slovenia. The procedures for obtaining work and residential permits were further negatively affected by the long-lasting strike of administrative units, which lasted from mid-March 2024 until the beginning of July 2024.

Promotion of work-life balance

The COVID-19 pandemic has also visibly and permanently affected the Slovenian labour market. One of the most notable changes was the shift to more regular work from a home office and a hybrid way of working in general. This has resulted in a quicker digitalisation of certain industries and work processes, and in the

introduction of more flexible work arrangements. Such changes have also led to altered expectations among employees with regard to the organisation of their working hours and the so-called work-life balance.

The November 2023 changes to the Employment Relations Act (*Zakon o delovnih razmerjih* – "ZDR-1") introduced certain new regulations, aimed at allowing the parties to easier adjust their arrangements to the specific needs of an individual employee.

One of the new regulations is the right of employees to propose an improvement of their work conditions to the employer and moreover the obligation of the employer to reply to such proposal in writing and justify it within 30 days from receipt. The employee can make such formal request basically every 12 months, and the failure of the employer to formally reply to such proposal is sanctioned by monetary fines.

Every employee can also propose a different distribution of their working hours to the employer, which is obliged to respond to such proposal (and justify its decision in writing) within 15 days from receiving the request.

Employees caring for a child under the age of eight or who formally care for certain members of their family or household can propose to their employer the transformation of an employment from full time into a part-time arrangement, for a definite term (as long as the relevant circumstances last). The employer is not obliged to grant such request, but is obliged to reply to such request and justify its decision in writing within 15 days from the receipt thereof. This option differs from the right to work part-time under the special law governing parental protection, which is not subject to employer approval and where the state pays social contributions for the period between part-time work and full-time hours.

Workers who are victims of domestic violence also have the right to propose part-time work for the period needed to arrange protection, legal and other procedures, and to address the consequences of domestic violence (the same principles apply as for parents/caretakers mentioned in the previous paragraph). The recent amendments have also introduced an additional protection for such workers (overtime work, unevenly distributed working hours and night work are possible only with their consent) and have granted them the right to up to five days of paid leave when such circumstances occur.

Right to disconnect

Employees' right to disconnect is a newly introduced measure, aimed at ensuring a better work-life balance and related also to the rise in remote work. The right to disconnect is intended to ensure that workers are able to enjoy their free time without fearing any breach of their employment obligations at times of rest, breaks and permitted absences from work.

Although employees were already not obliged to work outside of their scheduled working hours (unless overtime work was ordered in accordance with the law), the more flexible arrangements of working hours and in particular the hybrid forms of work often led to situations where employees felt they needed to be available to employers outside of working hours as well, particularly when it came to accepting calls, organising video meetings or monitoring emails. This often led to the blurring of borders between work and work-free hours, and the newly introduced right to disconnect is aimed at addressing this problem.

Each employer needs to make sure they adopt the necessary regulations (unless they will be regulated by any collective bargaining agreements that are binding for the respective employer) and implement them by 16 November 2024.

Strikes in the public sector

This year has seen numerous strikes in the public sector. While the government tries to implement a new salary model for the whole public sector, individual professions are pushing for more favourable treatment and for separate agreements in their favour. For example, doctors and dentists began striking in January 2024 (this strike is still ongoing), which resulted in the cancellation of many "non-urgent" surgeries and specialist examinations, and in the further deterioration of public health services in Slovenia. These circumstances also affected health-related absences in private sector and increased the number of sick leaves.

The strike of administrative units between March and July 2024 also affected various aspects of daily life in Slovenia and caused significant delays in obtaining permits for residence and work for foreigners, which has further increased the problems related to the lack of workforce in various industries.

Simplifications in employment of foreigners

The new Act on measures for the optimisation of certain procedures at administrative units has introduced changes in the territorial jurisdiction of administrative units in procedures for the issue and renewal of work and residential permits. The main goal of this change is to allow applicants to file their motions and requests at less burdened administrative units and thus to speed up these procedures in individual regions.

The Act has also introduced a provision allowing foreigners who are legally residing in Slovenia and have already filed a motion for a joint permit for work and residence in Slovenia to legally reside in Slovenia until a final decision on their work and residential permits is issued.

New social contributions

As of 1 January 2024, voluntary supplementary health insurance (provided by private insurance companies) was abolished and replaced by a new mandatory health contribution (payable to the state). Voluntary supplementary health insurance covered the difference to the full value of most health services not entirely covered by the mandatory health insurance. On average, 70% of health service costs were covered by mandatory health insurance, while 30% were covered by voluntary supplementary health insurance or by the individual's self-contribution.

With the introduction of the new mandatory health contribution of EUR35 per month, most health services in Slovenia are now provided at the expense of mandatory health insurance. The amount of the mandatory health contribution will be adjusted annually based on the growth of the average gross salary in Slovenia. The mandatory health contribution is part of the contributions from the gross salary paid by the worker, and the employer must ensure the appropriate calculation, deduction and payment of the mandatory health contribution to the Health Insurance Institute of Slovenia. This contribution has thus reduced the net income of numerous employees.

On 1 July 2025, the obligation to pay a long-term care social contribution will come into force. The burden will be divided between employees and employers (and also other social groups). The employee will be obliged to contribute 1%

of their gross salary for this purpose, and the employer will need to add 1% on top of the current 16.1% employers need to pay on top of gross salaries.

Remuneration for business performance

In recent years, employers' regulations with regard to collective bonuses for business performance (paid once a year to all employees who meet the conditions and criteria determined by the employers or by collective bargaining agreements) were often scrutinised by the courts and by the Slovene Equality Body.

The main issue was whether or not the conditions and criteria that linked the right of individual employees to such a bonus payment and/or its amount to the employee's presence at work illegally discriminated against certain groups of employees. The opponents of such models often argued that such conditions and criteria are (unjustly) discriminating against certain groups of people, such as older employees, disabled people, young parents and people who tend to get sick more often. On the other hand, employers argued that it is only logical and fair that those who have effectively contributed more to the company's success in a business year receive a higher remuneration than those who have not (for whatever justified reason). This legal issue has now been brought before the Slovenian Supreme Court, which is focusing particularly on the question of whether the period of sick leave shall be excluded from a period for which the employee is eligible for such bonus or not. The decision is still pending.

Bonuses for collective business performance were also an important topic with regard to state aids. Companies who have received state aid were generally prevented from paying business performance bonuses to their managing directors for and in certain years (usually for and in years in which they have received state aid).

On the other hand, under the Slovenian Personal Income Tax Act, remuneration for (collective) business performance is treated favourably with regard to income tax (not included in the tax base for income tax calculation up to a certain amount) only if it is paid to all eligible workers – ie, also to employed managing directors (certain exceptions apply). These bonuses are relatively modest (usually up to one average gross monthly salary in Slovenia), but are very important to blue-collar employees in particular. Arbitrary exclusion of individual employees from such bonuses could lead to an employer's obligation to tax payments to all employees and thus either reduce their net income or increase their labour cost.

As it is unclear whether the regulations on state aids actually seek to prohibit the payment of such general bonuses (payable to all employees) to managerial workers or only special bonuses to which only management would be eligible, many companies that have received state aid were and are in a dilemma over whether they shall exclude the management in order to avoid the risk of having to pay back the received state aid and thus face the risk of higher taxation, or vice versa. Reliable case law on this matter is not yet available.

Tax amendments

In June 2024, the Slovenian Ministry of Finance presented the first package of proposed tax amendments aimed at fostering an attractive environment for highly educated workers and industries generating a high added value. The proposal is currently still subject to comments and discussions.

The proposed amendments include an amendment of the Personal Income Tax Act to allow employers to effectively reward employees by granting them shares in their company.

Under the current legislation, income derived from workers' rights to purchase or acquire shares or other assets at a discounted value is treated as income from an employment relationship or a benefit, which is taxable as soon as the employee receives such benefit. The current regime is not stimulating, as employees need to pay taxes and social contributions from such rewards when they get them, despite not receiving any monetary payment or even being able to sell the received shares. This is particularly problematic in the case of start-ups, which cannot even afford to pay such taxes and social contributions for their employees. By being able to reward key employees with shares of the company they are working in, start-ups can further bind such employees to the company and motivate them adequately.

The proposed law aims to address these issues by implementing a special taxation regime for such remuneration in kind and by delaying the moment when the tax from such remuneration in kind would need to be paid. The announced changes are promising (and long overdue), but it remains to be seen if these proposals will actually survive the legislative process and be implemented.

Artificial intelligence

The use of AI in the work environment and the related risks and potential advantages are important topics in Slovenia. Slovenia has not yet introduced any progressive national regulations but rather has waited for the adoption of the EU AI Act and for harmonised solutions on an EU level.

Due to the increasing use of various AI-supported applications in work processes, including in processes where personal data may be processed, more emphasis is expected to be put on proper regulation of AI-related risks in the near future, including on the national level.

Conclusion

This brief summary of trends in the field of employment law is aimed at concisely presenting the main changes that were recently implemented, as well as those that are still pending.

SOUTH KOREA

Law and Practice

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Contents

Yoon & Yang LLC has an employment and labour practice group that consists of 35 attorneys and other professionals who all concentrate solely on employment issues. The types of issues that the practice group has dealt with recently are illegal worker dispatches, discrimination among different types of workers, implementation of performance-based salary systems, protection of non-regular workers and ordinary wage issues. The employment and labour practice group's key focus is general HR issues – including performance-based salary systems, labour union activities, collective bargaining agreements and disciplinary regulations – plus employment issues in M&A and corporate restructuring, and representation in labour disputes in civil, criminal and administrative proceedings.

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1. Employment Terms

1.1 Employee Status

Labour laws in the Republic of Korea ("South Korea") do not distinguish blue-collar workers from white-collar workers, and these terms are merely used to describe employees doing different types of work. Hence, blue-collar workers and white-collar workers both fall under "employees", as defined under the Labor Standards Act, and are subject to identical treatment under other labour-related laws. The Labor Standards Act defines employees as persons who provide labour to businesses or at workplaces for the purpose of earning wages, irrespective of job type.

Meanwhile, forms of employment can be largely categorised into two types:

- direct employment by the employer; and
- indirect employment of another employer's employee.

These forms may be further narrowed down based on the employee's employment contract period and roles.

1.2 Employment Contracts

Among the various types of employment contracts, the two major types are "employment contracts without a fixed term" (ie, indefinite employment contracts) and "employment contracts with a fixed term" (ie, definite employment contracts). The Labor Standards Act does not have provisions that separately govern the duration of employment contracts. Therefore, employers and employees may freely determine the duration of the employment contract.

However, definite employment contracts are governed by the Act on the Protection, etc, of Fixed-Term and Part-Time Workers (the "Fixed-Term Workers Act"). According to Article 4 of the Fixed-Term Workers Act, employment contracts with a fixed term in excess of two years are considered to be indefinite employment contracts.

Article 17(1) and (2) of the Labor Standards Act provides that employment contracts must explicitly provide for the terms and conditions of employment in writing (which can be in the form of electronic documents). In particular, employment contracts must include provisions on:

- wages (eg, composition of wages, methods for calculating wages and methods for paying wages);
- contractual working hours;
- holidays; and
- annual paid leave.

Moreover, employers are obliged to deliver these employment contracts to employees.

1.3 Working Hours

Since 1 July 2021, the weekly maximum working hours (52 hours) have been applied to businesses or workplaces that have five or more employees. Article 50(1) and (2) of the Labor Standards Act provide that working hours may not exceed eight hours per day and 40 hours per week. However, Article 53(1) allows employers to extend the foregoing working hours, as overtime, by up to 12 hours per week upon obtaining the relevant employee's consent.

For the purposes of determining the working hours, one week refers to seven days, including holidays. Thus, the maximum number of weekly working hours with the permitted extensions is 52 hours (40 hours per week plus up to 12 hours of overtime).

Meanwhile, under limited circumstances where certain criteria are satisfied, the Labor Standards Act recognises the following types of "flexible working systems".

Flexible Working Hours System (Article 51 of the Labor Standards Act)

In a flexible working hours system, working hours are increased during the weeks where work is concentrated but reduced during other weeks so that, on average, the weekly working hours are within the statutory working hours (ie, 40 hours). A flexible working hours system can be utilised for a maximum of six months.

Selective Working Hours System (Article 52 of the Labor Standards Act)

In a selective working hours system, an employee may freely choose their working hours over a certain period (not exceeding one month or, in the case of work pertaining to research and development of new products or new technologies, not exceeding three months), as long as the total working hours do not exceed the statutory working hours for such period. In this system, the employee may decide when they will begin and end work, as well as the number of hours of work in a day.

Presumed Working Hours System (Article 58(1) of the Labor Standards Act)

Presumed working hours systems are used in circumstances where it is difficult to calculate the hours of work performed by an employee because the employee provides labour outside the workplace. In a presumed working hours system, employees are presumed to have worked:

- their contractual hours;
- the hours that are typically needed to perform the relevant work; or
- the hours that have been agreed in writing with the employees' representative for particular work.

Discretionary Working Hours System (Article 58(3) of the Labor Standards Act)

Discretionary working hours systems apply to limited types of work prescribed under the Enforcement Decree of the Labor Standards Act. These types of work have been legally recognised, based on the nature of the work, to require employees' discretion in determining how the work should be performed. In a dis-

cretionary working hours system, the working hours that have been agreed in writing between the employer and the employees' representative are recognised as the hours worked by the employees.

Part-Time Contracts

Employees under part-time employment contracts are also considered as "employees" within the meaning of the Labor Standards Act. Hence, the laws do not require part-time employment contracts to have specific terms that are different from ordinary employment contracts. Furthermore, the format used for part-time employment contracts is identical to that of ordinary employment contracts. However, considering the nature of part-time work, a part-time employment contract must clearly indicate the working hours.

Overtime

As described at the beginning of this section, statutory working hours under Article 50(1) and (2) of the Labor Standards Act may not exceed eight hours per day and 40 hours per week (excluding break times). However, such statutory working hours may be extended as overtime by up to 12 hours per week in accordance with Article 53(1) of the Labor Standards Act, as long as the employees consent to such overtime.

Article 56 of the Labor Standards Act governs overtime pay. More specifically, at least 50% of the ordinary wage must be paid in addition to the ordinary wage for:

- overtime worked in excess of the statutory working hours (ie, eight hours per day, 40 hours per week);
- work performed during holidays; and
- work performed at night (ie, between 10 pm and 6 am).

1.4 Compensation

Minimum Wage Requirements

By 5 August every year, the minister of employment and labour determines the minimum wage applicable in the following year. The publicly announced minimum wage becomes effective as of January 1st of the following year. Currently, the hourly minimum wage for 2024 is KRW9,860. The hourly minimum wage for 2025 is scheduled to be KRW10,030.

Employers are required to pay at least the minimum wage to their employees, pursuant to Article 6(1) of the Minimum Wage Act. Therefore, in accordance with Article 6(3) of the Minimum Wage Act, employment contracts that stipulate wages below the minimum wage level are invalidated as to such stipulation and, by operation of law, the wages under such employment contracts are presumed to be minimum wages.

13th-Month and Other Bonuses

There is no legal requirement for employers in South Korea to pay 13th-month bonuses, etc. Under the South Korean labour laws, employers are only obliged to pay monthly wages and severance pay upon an employee's resignation.

To describe employers' obligation to provide severance pay in more detail, Article 8(1) of the Act on the Guarantee of Workers' Retirement Benefits (the "Retirement Benefits Act") requires employers to set up a system that enables the employers to pay a retiring worker severance pay in the prorated amount equivalent to the average wages earned in 30 days for each year of the resigning employee's continuous service. Therefore, even if severance payments are not covered in employment contracts, or are otherwise covered in the employer's rules of employment, such payments must be provided upon an employee's resignation.

If an employer is paying "periodic bonuses" as 13th-month bonuses in South Korea, such payment is at the employer's complete discretion, and there are no provisions in the Labor Standards Act that prohibit such bonuses.

Government Intervention

The minimum wage system is a classic example of the government's intervention in compensation. The government determines the minimum wage on a yearly basis. For 2024, the hourly minimum wage is KRW9,860, which will be increased to KRW10,030 in 2025.

Aside from the minimum wage system, the government may make compensation-related interventions by overseeing whether employers are – among other things – paying statutory severance, as well as the additional wages that must be paid for work performed overtime, during holidays or at night.

1.5 Other Employment Terms

Vacations and Vacation Pay

The most typical types of vacation available for employees are:

- weekly holidays;
- public holidays (ie, holidays prescribed under Presidential decree); and
- annual paid leave.

Weekly holiday (under Article 55 of the Labor Standards Act and Article 30 of the Enforcement Decree of the Labor Standards Act) refers to a paid vacation given to employees who have "worked continuously" for the contractual working days in a single week. If employees provide such "continuous work" for contractual working days in one week, employers are required to grant, on average, more than one paid vacation per week.

A public holiday prescribed under presidential decree refers to statutory holidays (excluding Sundays) and alternative statutory holidays, which are provided under the Regulation on Holidays of Government Offices. An employer must guarantee such public holidays to its employees on a paid basis. However, an employer may substitute public holidays with other working days by entering into a written agreement with the employee representative (see Article 55(2) of the Labor Standards Act).

Annual paid leave is prescribed under Article 60 of the Labor Standards Act, and it refers to the 15 days of paid vacation granted to employees who have worked for at least 80% of a year. If an employee has provided continuous work for less than a full year or worked less than 80% of a year, then one day of paid vacation is granted as annual paid leave for every month in which an employee provided continuous work.

Required Leave

Leave that is statutorily guaranteed includes maternity leave, paternity leave, fertility-treatment leave, child-care leave, family-care leave, short-term family-care leave, and menstrual leave.

Maternity leave

Maternity leave is covered under Article 74(1) of the Labor Standards Act, and it refers to the leave granted to pregnant women prior to and after childbirth. Statutes on maternity leave are mandatory provisions and, thus, neither the employer's right to adjust the timing of such leave nor an employee's forfeiture of the right to take such leave is recognised under the law. Employers must grant a total of 90 continuous days of leave prior to and after childbirth, and at least 45 days of this 90-day leave must be allocated after childbirth.

Paternity leave

Paternity leave is covered under Article 18-2 of the Equal Employment Opportunity and Work-Family Balance Assistance Act (the "Equal Employment Opportunity Act"). If an employee requests paternity leave due to their spouse giving birth, their employer is obliged to grant them ten days' leave. However, an employee must request paternity leave within 90 days from the date on which their spouse gives birth to the child. Paternity leave is granted to an employee on a paid basis. An employer is prohibited from dismissing, or taking any disadvantageous measures against, an employee on the basis of paternity leave.

Fertility-treatment leave

Fertility-treatment leave is covered under Article 18-3 of the Equal Employment Opportunity Act. If an employee requests fertility-treatment leave in order to receive medical treatment, such as artificial insemination or in-vitro fertilisation, their employer is obliged to grant up to three days of leave per year, the first day of which is on a paid basis.

Child-care leave

Child-care leave is covered under Article 19 of the Equal Employment Opportunity Act. An employer must permit childcare leave of up to one year if:

- a female employee requests child-care leave to protect her motherhood; or
- an employee requests child-care leave to tend to their child who is eight years of age or younger or in second grade or lower in elementary school.

Furthermore, upon returning from child-care leave, the employer must reinstate the returning employee into the same position or a position at the same wage level as they had prior to taking the child-care leave.

Family-care leave

Family-care leave is covered under Article 22-2 of the Equal Employment Opportunity Act and Article 16-3 of the Enforcement Decree of the same act. An employee may request family-care leave to care for their grandparents, parents, spouse, parents-in-law, children, or grandchildren (hereinafter, referred to as "family") on the grounds of disease, accident or senility. If family-care leave is requested, an employer is obliged to grant up to 90 days of leave per year. Family-care leave may be taken on multiple occasions, provided that each period of leave is at least 30 days long.

Short-term family-care leave

This is also covered under Article 22-2 of the Equal Employment Opportunity Act and Article 16-3 of the Enforcement Decree of the same act. An employee may request short-term family-care leave urgently to care for their family on the grounds of disease, accident or senility, or to urgently care for their children. If family-care leave is requested, an employer is obliged to grant up to ten days of leave per year, which may be taken in increments as short as a single day. The number of days taken as short-term family-care leave is counted towards the ordinary family-care leave.

Menstrual leave

Menstrual leave is covered under Article 73 of the Labor Standards Act. Employers must grant one day of unpaid menstrual leave per month upon request from a female employee.

Confidentiality and Non-disparagement Agreements

There are no provisions under the South Korean labour laws that restrict employers from requiring confidentiality and non-disparagement obligations from their employees. Therefore, employers may enter into confidentiality and non-disparagement agreements with employees. An employee's breach of such agreements would enable their employer to take disciplinary action. Furthermore, if an employer suffers damages from an employee's breach of confidentiality and non-disparagement agreements, then the employer would be able to seek civil damages.

In addition to contractual agreements on confidentiality, trade secrets – as defined under the Unfair Competition Prevention and Trade Secret Protection Act (the "Trade Secret Act") – are legally protected. According to Article 2 of the Trade Secret Act, trade secrets refer to information (including production methods, sale methods and useful technical or business information for commercial activities) that:

- is not publicly known;
- has been maintained as a secret; and
- has independent economic value.

In other words, for a trade secret to be protected under the law, it must be undisclosed, kept confidential and useful. Undisclosed trade secrets are those that are not publicly known, and the confidentiality element requires the trade secret to be a secret that deserves legal protection. Lastly, a trade secret is useful if it has independent economic value.

Therefore, as long as a trade secret satisfies all three of the above-mentioned requirements, then a person (including an employer) may request a prohibition or preventative order from the court against any person (including an employee) who infringes or is likely to infringe trade secrets if the business interest of the employer who possesses the trade secrets suffers damages or is likely to suffer damages due to such infringement (see Article 10(1) of the Trade Secret Act).

Employee Liability

South Korean labour laws do not have provisions that restrict or limit an employee's contractual or tort liabilities. However, the South Korean Supreme Court has previously held that where an employer suffers direct damages due to an employee committing a tortious act while performing their work, then such employer's right to claim damage compensation from the employee is limited – based on the notion of fair distribution of the damages – to an amount that is deemed appropriate under the principle of good faith. In this regard, employee liability can be deemed to be partially limited.

On a separate note, the obligations of employees are not expressly governed under the Labor Standards Act. Rather, employees' obligations are stipulated under the employers' rules of employment. Some of the common obligations of employees include:

- arriving at work on time;
- not holding concurrent positions;
- keeping secrets acquired in connection with work confidential;
- not destroying or removing equipment or facilities from the company;
- not engaging in unlawful conduct;
- expending full effort at work; and
- performing work in a diligent manner in good faith.

Breach of such obligations and responsibilities may subject the relevant employees to disciplinary action.

2. Restrictive Covenants

2.1 Non-competes

The Korean Commercial Act imposes a non-compete obligation upon directors, whereas employees are not subject to the same restriction. Nevertheless, employees' non-compete obligation can be partially recognised through interpretations of court precedents.

The South Korean Supreme Court has held that where an employment contract has a non-compete clause, such clause is valid, as long as it is reasonable. However, if a non-compete clause excessively restricts employees' constitutionally protected rights (eg, freedom in choosing jobs or providing labour) or free competition, then such non-compete clause is invalid for going against Article 103 of the Civil Act.

The Korean Supreme Court further held that, to determine whether a non-compete clause is valid, there must be comprehensive consideration of various factors. Among other things, the court considers:

- whether the employer has an interest that necessitates protection;
- the resigning employee's position and rank;
- the reasons for the employee's resignation;
- territorial scope, time period and the types of jobs restricted through the non-compete clause;
- whether the employee received compensation in exchange for signing the non-compete clause; and
- public interest furthered by the non-compete clause.

2.2 Non-solicits

Employees

South Korean labour laws do not forbid or restrict non-solicitation clauses that prohibit former employees from soliciting other employees who remain employed by the former employer. Therefore, employers may include such non-solicitation provisions within their employment contracts, and they may require their employees to pay liquidated damages pursuant to Article 398 of the Civil Act for a breach of such an agreement. In addition to liquidated damages, employers may seek civil damages for breach of contract if the employer suffers ascertainable damages from the employee's breach.

Non-solicitation clauses can also trigger issues regarding trade secret infringements under the Trade Secret Act. The South Korean Supreme Court has held that where a person who acquires technological information that qualifies as a trade secret moves to another company and attempts to disclose and use such trade secret at such other company, then such an act constitutes violation of the confidentiality obligation under Article 2.3(D) of the Trade Secret Act. Furthermore, the company that recruits such person is in violation of Article 2.3(A) for unlawfully acquiring a trade secret if such company has failed to exercise due care and supervision in preventing its employees from unlawfully using the trade secrets of another company.

Customers

It is difficult to deem a former employee's solicitation of their former employer's customers as an infringement of trade secrets within the meaning of the Trade Secret Act.

However, South Korean labour laws do not forbid or otherwise restrict an employer from requiring its employees to sign an employment contract that includes a non-solicitation clause prohibiting those employees from soliciting the employer's customers upon termination of the employment relationship.

3. Data Privacy

3.1 Data Privacy Law and Employment

In South Korea, the Personal Information Protection Act serves as the framework act in relation to data privacy. As such, unless otherwise regulated through separate legislations, data privacy and personal information are governed by the Personal Information Protection Act.

In the past, the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc (the "Info-communications Act") and the Credit Information Use and Protection Act (the "Credit Information Act") stipulated provisions that governed an individual's data privacy and personal information separately from the Personal Information Protection Act. However, as a result of an amendment to the Personal Information Protection Act in 2020, provisions on data privacy and personal information under the Info-communications Act and the Credit Information Act have been consolidated under the Personal Information Protection Act.

The Personal Information Protection Act now contains special rules that apply to providers of information and communication services. However, despite the foregoing consolidation, the Credit Information Act still has certain provisions that govern data privacy and personal information as they relate to credit information.

Duty to Comply

An employer's duty to comply with the Personal Information Protection Act begins from the recruiting stage and extends beyond the termination of the employment agreement with its employees. During the foregoing period, the employer must collect and/or use the employee's personal information in compliance with the Personal Information Protection Act. Employers may independently collect and/or use the employee's personal information, and, if necessary, employers may also:

- outsource work relating to the processing of collected personal information; or
- provide collected personal information to third parties in accordance with the relevant laws.

Employers are required to store the collected personal information safely. The collected personal information must be destroyed once it is no longer necessary owing to reasons such as:

- fulfilling the purposes for which the personal information was collected; and
- expiration of the storage period of the collected information (here, the storage period refers to the period consented to by the employees or otherwise prescribed under the applicable laws).

4. Foreign Workers

4.1 Limitations on Foreign Workers

The Immigration Act and Foreign Worker Employment Act

Methods of employing foreigners can be largely divided into two categories. The first method is through the "Hiring Foreigners With Professional Skills" system and "Other Status Stay That Permits Employment (mainly those who are not pro-

fessionals but simple-skilled workers)" under the Immigration Act. The second method is via the "Employment Permit System" and "Work Permit System" based on the Act on Employment, etc, of Foreign Workers (the "Foreign Worker Employment Act").

The Employment Permit System is a system that allows an employer to employ certain foreigners if that employer cannot hire domestic employees despite its recruiting efforts. The Work Permit System, on the other hand, allows a foreigner who satisfies certain conditions to obtain a work permit in South Korea to be employed with an employer of such foreigner's choice. This system allows for a relatively broader movement of foreign workers among workplaces in South Korea compared to the Employment Permit System. In South Korea, the Employment Permit System ordinarily serves as the default system for hiring manual labourers. As regards Koreans who hold foreign nationalities, the Work Permit System is applied.

Defining foreign workers

Article 2 of the Foreign Worker Employment Act defines a "foreign worker" as a person who does not have South Korean nationality who provides or desires to provide labour in return for wages in any business or workplace situated within South Korea. Anyone within the meaning of foreign worker must satisfy the requirements and follow the requisite procedures under the Foreign Worker Employment Act to be employed in South Korea. In addition, any matters not provided under the Foreign Worker Employment Act relating to entering, leaving or staying in South Korea must be handled in accordance with the Immigration Act.

Pursuant to Article 18 of the Foreign Worker Employment Act, a foreign worker may pursue employment activities for up to three years from the date they entered Korea. Furthermore, foreigners staying in Korea, as a principle, are subject to the sovereignty of Korea. Additionally, unless a foreigner's rights under public or private laws are otherwise restricted through treaties or laws, foreigners and Koreans receive identical protection.

Visas

The Foreign Worker Employment Act provides that the Act does not apply to foreigners with any of the following visas who are permitted to stay and work in South Korea (ie, visas that allow the visa-holder to pursue employment activities in South Korea):

- visas for short-term employees (C-4), professors (E-1), foreign language instructors (E-2), researchers (E-3), technology transfer (E-4), professional employment (E-5), artistic performers (E-6) and designated activities (E-7);
- residence permits for overseas South Koreans, such as permanent residence (F-2, F-4, F-5, F-6); and
- working holiday visa (H-1).

4.2 Registration Requirements for Foreign Workers

According to Article 6(1) of the Foreign Worker Employment Act, a person who intends to hire "ordinary" foreign workers (through the Employment Permit System) must first post a job opening for a domestic worker through an employment security office defined under the Employment Security Act.

If, despite these efforts to hire a domestic employee, an employer fails to hire new personnel, then – as prescribed under Article 8(1) of the Foreign Worker Employment Act – the employer must apply for an employment permit for foreign

workers from the head of the employment security office, in accordance with the requirements under the enforcement decrees of the Ministry of Employment and Labor.

If an employer satisfies the conditions for employing foreigners, then the employer may apply for the issuance of an employment permit from an employment assistance centre. Upon receipt of such application, the employment assistance centre makes worker referrals (in multiples of three). The employer can then select the personnel qualified for the job from among the referred workers and obtain an employment permit for such worker (see Article 8 of the Foreign Worker Employment Act).

Simultaneously upon issuance of the employment permit, a standard employment contract is drafted based on the working conditions described in the employer's application for the employment permit.

Once said employment contract is executed, a visa issuance certificate is issued. Thereafter, upon the selected foreign worker's arrival in South Korea and completion of employment training, they are dispatched to the relevant workplace.

5. New Work

5.1 Mobile Work

Mobile work has recently been receiving heightened attention from many companies. Mobile work in South Korea generally refers to performing one's tasks via smartphones, tablet computers, laptops and other mobile devices. South Korean labour laws do not have provisions that govern mobile work; hence, companies may freely implement mobile work in accordance with their needs.

Advantages

From the employees' perspective, the benefits of mobile work include the ability to perform their work without restraints in time and location. Moreover, the freedom to choose where to work may lead to enhanced work efficacy and work satisfaction. Employers may also enjoy benefits of mobile work such as reduced costs for maintaining office spaces and increased performance arising from higher work efficacy.

Disadvantages

There are, however, downsides to mobile work. Employees often use mobile devices for both personal and work purposes, which increases vulnerability in relation to information security in comparison with working from an office that is physically protected by various security facilities and measures. Furthermore, given that employees performing mobile work generally work alone, they may be more susceptible to feeling socially isolated or experiencing attention deficit, among other things. In addition, if an employee is injured while working at a location other than the office, there may be difficulties in determining whether such injury was caused by an industrial accident covered under the Industrial Accident Compensation Insurance Act.

Steps Employers Can Take

Therefore, companies that intend to implement mobile work are advised to address the disadvantages by taking precautionary measures such as:

- establishing the necessary information security system;
- devising means to strengthen the bond among employees; and

- creating manuals to prevent occupational injuries or accidents.

5.2 Sabbaticals

"Sabbatical" in Korean generally refers to sending a long-tenure employee on paid leave for a certain period as a reward for, and in recognition of, the employee's continued services. Sabbatical leave is not governed under South Korean law. However, given that Korean labour laws stipulate only the statutory minimum protections for employees, companies have full discretion to provide sabbatical leave to their employees in addition to their statutory required leave (eg, annual paid leave).

As previously mentioned, sabbatical leave is generally granted to long-tenure employees. However, sabbatical leave is not a common type of leave observed in South Korea, and most companies in South Korea do not provide sabbatical leave to their employees.

However, a company may wish to provide sabbatical leave to its employees in order to attract talented employees, promote long-term employment or accommodate and compensate long-tenure employees. In such cases, the company should consider stipulating provisions within its rules of employment to govern sabbatical leave (eg, eligibility for sabbatical leave, sabbatical leave duration and procedures to apply for sabbatical leave) before implementing said leave.

5.3 Other New Manifestations

"Smart Work"

Companies have recently begun actively implementing a new method of performing work called "smart work" in response to the outbreak of COVID-19, the emergence of new technologies, and the trend towards valuing work efficacy. Smart work is a concept that encompasses less traditional working environments, such as working from home, hot-desking and working from base offices (ie, work spaces maintained outside the headquarters of a company in locations that are more accessible to employees).

By way of example, companies have begun allowing employees to work from home on a regular basis to induce enhancements in productivity and performance while reducing the costs of maintaining office spaces. Some companies have also adopted hot-desking, which enables employees to select their preferred work spaces (eg, window-side, open desk or partitioned desk) to increase work efficacy. Other companies have opened up new office spaces in remote locations that are more accessible to, or preferred by, their employees in order to reduce their commuting burden.

Overall, companies are experimenting with various types of smart work to explore new working methods and environments that are mutually beneficial to the company and its employees. This trend is anticipated to continue in light of the developments in technology, the acknowledgement of benefits associated with non-traditional working arrangements and changes in the values sought by employees.

6. Collective Relations

6.1 Unions

Article 2.4 of the Trade Union and Labor Relations Adjustment Act (the "Trade Union Act") defines a trade union (ie, a labour union) as "an organisation or associated organisations of employees, which is [or are] formed voluntarily and collectively upon the employees' initiative for the purpose of maintaining and improving their working conditions and enhancing their economic and

social status". However, such organisation or associated organisations of employees is/are not considered as a trade union if:

- an employer or other person who always acts in the interest of the employer is allowed to join;
- most of the union's expenditure is funded by the employer;
- its activities are only aimed at mutual benefits, moral culture and other welfare undertakings (as opposed to enhancing employees' working conditions);
- those who are not employees are allowed to join the union; or
- the main purpose of the union is to engage in political activities.

The most important function and role of a trade union is engaging in "collective bargaining" with the employer and thereby executing a "collective agreement" to foster enhancement and preservation of employees' working conditions (see Articles 29 and 31 of the Trade Union Act).

In addition, trade unions may engage in "collective actions" to carry through their position in a dispute with the management arising from disagreements concerning working conditions (see Articles 2.5 and 2.6 of the Trade Union Act).

6.2 Employee Representative Bodies

Article 29 of the Trade Union Act confers on the representative of a trade union the authority to bargain and enter into a collective agreement with the employer on behalf of the trade union and its members. Hence, any by-laws or internal regulations applicable to trade unions that limit the foregoing authority of a trade union representative are deemed invalid.

Neither the Trade Union Act nor any other relevant laws provide methods for appointing or electing a representative of a trade union. Therefore, the methods and procedures for appointing or electing a trade union representative are determined through by-laws or internal regulation of the trade unions, and the trade union representative should be appointed or elected accordingly.

As a result of the implementation of the 6 July 2021 amendment to the Trade Union Act, dismissed employees and job-seekers may join a company's union. However, union members who are not current employees of the company are subject to certain limitations in their union activities. By way of example, non-employee union members may only engage in union activities to the extent that such activities do not hinder efficient operation of the company's business, and they may not serve as an officer of the union. Furthermore, the number of non-employee union members is not counted for the purposes of:

- determining the limits of working hours exemption;
- selection of the union representative for collective bargaining; and
- voting for or against taking industrial action.

6.3 Collective Bargaining Agreements

"Collective agreement" refers to a written agreement that details the terms of trade union members' working conditions (eg, their wages and working hours) that have been negotiated through the collective bargaining process. Collective agreements are signed and executed by and between the trade union and the employer.

Collective agreements not only define the contractual obligations of the parties, but also have a normative effect in regulating the employment

contract between the employer and individual employee. By way of example, Article 33 of the Trade Union Act invalidates portions of the employment contract or the employer's rules of employment that fall foul of the standards for working conditions stipulated in the collective agreement. In other words, a collective agreement that has been entered into on an equal footing between the workers and the management takes precedence over individual employment contracts or rules of employment set by the employer.

Collective agreements also entail a "peace obligation" that, during the effective period (maximum of three years) of the collective agreement, requires the parties to mutually comply with the provisions within the collective agreement and prohibits the trade union from taking collective action for the purposes of modifying terms of the collective agreement that have already been agreed between the parties.

Ordinarily, contracts are binding only upon the parties to such contracts. For collective agreements, however, the binding effect of the agreement may also extend to third parties (ie, non-parties to the agreement) if "certain conditions are satisfied" (see Articles 35 and 36 of the Trade Union Act).

7. Termination

7.1 Grounds for Termination

In South Korea, termination of employment can occur in the following ways:

- occurrence of grounds for automatic termination (eg, employee reaching retirement age, death of the employee or expiry of the contract period);
- the employer's unilateral dismissal of the employee; and
- termination through mutual agreement between the employer and employee.

There is no difference in procedures depending on the grounds for dismissal; hence, the general requirements for dismissal are identical regardless of the grounds on which an employee is dismissed. In particular, Article 26 of the Labor Standards Act prescribes that an employer must give an employee prior notice of at least 30 days if the employer intends to dismiss such employee. If this notice requirement is not satisfied, the employer must pay the employee an additional sum of money equivalent to at least 30 days' worth of the employee's ordinary wages. The foregoing requirement applies even in circumstances where employees are dismissed owing to managerial reasons.

In addition to the prior notice requirement, to dismiss an employee, the employer must provide the employee with "written" notice in accordance with Article 27 of the Labor Standards Act. Furthermore, the written notice must describe the reason for dismissing the employee as well as when the employee is to be dismissed.

Automatic Termination

No "motivation" is required for automatic termination where employment is terminated, irrespective of the employer or employee's intent. However, if employment is terminated owing to expiry of the contract period, and if the employee concerned had a legitimate expectation for renewal of their employment contract, then it may be difficult for the employer to terminate the employment relationship unilaterally against the relevant employee's will without a justifiable cause.

Unilateral Dismissal

Article 23(1) of the Labor Standards Act requires employers to have a justifiable cause when dismissing, laying off, suspending or transferring an employee, reducing an employee's wages or taking other disciplinary actions. As such, employers may only terminate employees against their will if the employer has a "justifiable cause". The South Korean Supreme Court has defined that there is a justifiable cause if, owing to a fault attributable to the employee, it is impossible for the employer and the employee to continue their employment relationship under generally accepted social norms.

Mutual Termination

This refers to termination of employment upon the employer's and employee's mutual agreement. Mutual terminations can further be narrowed down to, among others, cases where employees voluntarily resign by submitting a letter of resignation or employees accept the employer's suggestion to resign, in which case the employment relationship is terminated upon the parties' execution of a separation agreement.

Collective Redundancies

Article 24 of the Labor Standards Act governs dismissals based on managerial reasons, and this includes mass lay-offs (ie, collective redundancies). For an employer to dismiss its employees for managerial reasons, all of the following requirements must be met:

- there must be an urgent managerial need;
- the employer must make every effort to avoid the dismissals;
- the employer must select employees to be dismissed based on reasonable and fair standards; and
- the employer must notify the employee representative of the dismissal no later than 50 days prior to the dismissal and engage in good-faith discussions with said employee representative.

These requirements have been further explained by the Supreme Courts, as follows.

Urgent managerial need

An urgent managerial need is not limited to circumstances where a lay-off is required for the company to avoid bankruptcy. If there is a reasonable and objective need for a reduction in the workforce to prepare for a potential future risk, then such need qualifies as an urgent managerial need.

Efforts to avoid dismissal

"Making every effort to avoid dismissals" refers to taking all possible measures to minimise the number of dismissals by, among other things, streamlining work methods or managerial policies, freezing new hires, utilising temporary suspensions, suggesting voluntary resignations (by offering additional compensation, etc) and transferring employees. The measures to be taken and their degree are neither fixed nor conclusively defined; thus, whether adequate measures were taken depends on multiple factors, including the managerial risks faced by the relevant employer, managerial reasons as to why lay-offs should be made, the type and scale of the business, and the number of employees at various levels.

Reasonable and fair standards

The definition of "reasonable and fair standards" is also fluid. It considers various factors to determine what is "reasonable and fair", such as the magnitude of the managerial risks faced by the relevant employer, the managerial reasons that necessitate lay-offs, the type of business performed by the relevant division and the com-

position of its employees, and the social and economic conditions during the period when lay-offs are deemed necessary. Furthermore, when determining the standards for selecting the employees to be laid off, the employer's circumstances relating to its managerial interests can be considered concurrently with the employees' interests, as long as the employer's interest is objectively reasonable.

Notice period

The final requirement of 50 days' notice and a good-faith discussion does not affect the validity of a lay-off, even if it is not satisfied. Therefore, if there has been sufficient time (albeit not 50 days) to notify the employees and engage in good-faith discussions, the lay-off is valid as long as all other requirements have been satisfied.

7.2 Notice Periods

Notice Periods

As noted in **7.1 Grounds for Termination**, employers must, pursuant to Article 26 of the Labor Standards Act, give an employee prior notice of at least 30 days if the employer intends to dismiss such employee. This notice requirement applies also to dismissals due to managerial reasons. In addition, as with the procedures for taking disciplinary actions, employers are required to provide prior notice (usually one week before the meeting) that an HR committee meeting will be held.

Other than the foregoing, the Labor Standards Act does not provide a mandatory notice period. However, if the employer provides a separate notice period in its rules of employment that are not required by law, then such procedures must be complied with.

Severance

If an employer fails to give the requisite notice of 30 days before dismissing an employee, then the employer must pay the employee an additional sum of money equivalent to at least 30 days' worth of the employee's ordinary wages pursuant to Article 26 of the Labor Standards Act.

Also, aside from the requirements to provide prior notice and pay an additional allowance for failing to provide prior notice, there are additional severance pay-related requirements under the Retirement Benefits Act, that require employers to provide severance payments or retirement pensions to resigning employees who have been employed for at least one year. To provide the foregoing payments or pensions, an employer is required to operate a retirement-benefit scheme in accordance with the Retirement Benefits Act.

7.3 Dismissal for (Serious) Cause

Article 23(1) of the Labor Standards Act requires an employer to have justifiable cause when dismissing an employee. The South Korean Supreme Court has defined that there is a justifiable cause if, owing to a fault attributable to the employee, it is impossible for the employer and the employee to continue their employment relationship under generally accepted social norms. Whether continuance of the employment relationship is impossible under generally accepted social norms is determined by comprehensive consideration of various factors, including:

- the purpose and nature of the employer's business;
- workplace conditions;
- the employee's position and responsibilities;
- how and why the employee engaged in misconduct;
- the impact such misconduct will have on the sound order of the business; and

• the employee's past behaviour.

Common Grounds for Dismissal

Ordinarily, grounds for dismissal are stipulated under a company's rules of employment and other relevant internal regulations. Some of the most common grounds for dismissal recognised through court precedents are:

- misrepresentation or concealment of educational background and work experience;
- fabricating CVs;
- bad behaviour at work, such as unexcused absences;
- refusing to follow orders relating to personnel movements (eg, transfers);
- assaulting colleagues or supervisors;
- inflicting harm on the company through criminal conduct (eg, embezzlement, breach of duty); and
- personal misconduct committed outside the workplace.

Valid Dismissals

Pursuant to the Labor Standards Act, an employer must provide 30 days' notice prior to the employee's dismissal (Article 26) and provide the detailed reason for, and timing of, the dismissal in writing (Article 27).

Furthermore, if an employer has collective agreements, rules of employment, employment contracts or other relevant agreements that separately provide additional procedures for taking disciplinary actions, then the employer must comply with such procedures. The South Korean Supreme Court has also held that disciplinary dismissals are invalid if an employer fails to follow the procedures laid out in its collective agreements, rules of employment, employment contracts or other relevant agreements when dismissing an employee.

An employer's dismissal of an employee is valid if the employer can justify:

- its reason(s) for taking the disciplinary action;
- the procedures followed for taking the disciplinary action; and
- the level and/or adequacy of the disciplinary action taken.

However, the South Korean Supreme Court has held that if any of the foregoing factors cannot be justified, then the resulting disciplinary dismissal is invalid.

7.4 Termination Agreements

An employer and employee may terminate their employment relationship upon mutual agreement. There are no specific requirements as to the methods of – or procedures/formalities for – mutually agreeing to terminate the employment relationship, as long as the termination is based on the employer's and employee's free will. Ordinarily, however, an employee voluntarily submits a letter of resignation to the employer, and the employer accepts such letter of resignation by the employee to terminate the employment contract.

The Labor Standards Act does not govern voluntary terminations of employment based on the free will of both the employer and employee. Although the Labor Standards Act does not have any restrictions on employers and employees terminating their relationship through a mutual agreement, the South Korean Supreme Court deems termination agreements to be invalid if such mutual agreement was not a product of the employee's genuine intent.

7.5 Protected Categories of Employee

Article 23(2) of the Labor Standards Act protects an employee from dismissal when:

- they are on leave for medical treatment of an occupational injury or disease and within the 30 days immediately following their return to work; and
- when an employee is on maternity leave and within the 30 days immediately following their return to work.

However, the foregoing protections do not apply if the employer has paid lump-sum compensation to the relevant employee in accordance with Article 84 of the Labor Standards Act, or if the employer is no longer able to continue its business.

The Labor Standards Act does not have provisions relating to dismissals, etc, of an employee representative. However, if the collective agreement (or other similar agreement) requires the employer to obtain the trade union's consent to dismiss an employee representative or a union member, then the employer must comply with such requirement. Otherwise, the employer's actions against the relevant employees are deemed invalid pursuant to South Korean Supreme Court precedents.

8. Disputes

8.1 Wrongful Dismissal

An employee may make a wrongful dismissal claim by:

- filing a civil suit for invalidation of the dismissal and disputing whether the dismissal was justified; and
- petitioning for wrongful dismissal relief from the local Labor Relations Commission (the "Local Commission"). The civil suit for invalidation of dismissal and petition for wrongful dismissal relief are two independent systems. Therefore, an employee may choose to proceed with either or both of the systems.

Civil Suit

When an employee proceeds with the first of the two above-mentioned options and subjects the dismissal to a dispute, then the court of first instance must decide as to the validity of the dismissal. Both the employer and employee may challenge the court of first instance's decision by filing an appeal within two weeks from the date the written court decision was served to the relevant party. If either of the parties wishes to challenge the decision rendered by a High Court or a panel of district court judges acting as a court of second instance, then the parties must file an appeal to the Supreme Court within two weeks from the date the written decision was served for a final and conclusive judgment.

Petition for Relief

If an employee proceeds with the second option, then the petition for relief must be filed with the Local Commission within three months from the date the employee was dismissed. Once the petition for relief is filed, the Local Commission determines whether the employer was justified in dismissing the employee. Article 31 of the Labor Standards Act provides that both the employer and employee may challenge the Local Commission's decision by submitting a request for a new examination to the National Labor Relations Commission (the "National Commission") in accordance with the Labor Relations Commission Act within ten days of being notified of the Local Commission's decision.

If either of the parties wishes to challenge the National Commission's decision on a re-examination, then the relevant party must file an administrative lawsuit in accordance with the Administrative Litigation Act within 15 days of

being served with the National Commission's decision. The administrative lawsuit can be appealed twice, much like the first option (ie, a civil lawsuit).

In the past, where the petitioning employee could not be reinstated to their original position owing to expiry of the contract period or reaching retirement age, the Labor Relations Commission dismissed the employee's petition without reviewing the claim because the petition did not satisfy the criteria for a review. However, the Labor Standards Act, which came into force on 19 November 2021, prescribes in Article 30(4): "The Labor Relations Commission shall issue a remedial order or dismissal decision (ie, dismissing the case on merits after reviewing the claim) in accordance with paragraph (1) even if the employee cannot be reinstated to [their] original position (or for cases other than dismissal, reinstated to [their] original condition) due to expiration of contract period, reaching retirement age, etc. In such a case, if the Labor Relations Commission determines that the dismissal was unlawful, it may order the employer to pay the employee an amount equivalent to the wages the employee would have received had the employee continued to provide services during the period they were dismissed (or for cases other than dismissal, an amount equivalent to reinstate the employee to [their] original condition)." Therefore, the Labor Relations Commission must review the petition filed by an employee irrespective of whether the employee can or cannot be reinstated to their original position (or original condition if the employee was not dismissed) and either render:

- a remedial order (if the employee's petition is supported by justifiable cause); or
- a dismissal decision (if the employee's petition is not supported by justifiable cause).

8.2 Anti-discrimination

South Korean labour laws that prohibit employers from discriminating against employees include the:

- Labor Standards Act;
- Equal Employment Opportunity Act;
- Fixed-Term Workers Act;
- Act on the Protection, etc, of Temporary Agency Workers (the "Temporary Agency Workers Act"); and
- Act on the Prohibition of Age Discrimination in Employment and Elderly Employment Promotion (the "Age Discrimination Act").

The foregoing legislation protects employees from various types of discrimination identified in the legislative intent and purpose of the respective acts, as follows.

- Labor Standards Act – Article 6 prohibits employers from discriminating against employees based on gender. Furthermore, employers are prohibited from discriminating in relation to employees' working conditions based on nationality, religion or social status.
- Equal Employment Opportunity Act – Article 7(1) prohibits employers from discriminating on the basis of gender when recruiting or hiring employees. Also, Article 8(1) prohibits wage discrimination by requiring employers to provide equal pay for equal work performed within the same business.
- Fixed-Term Workers Act – Article 8(1) prohibits employers from discriminating between employees under definite employment contracts and employees under indefinite employment contracts who work in the same business or workplace or who work in the same or similar positions.
- Temporary Agency Workers Act – Article 21(1) prohibits employers of agency employees (ie,

dispatch agencies) and users of dispatched agency employees (ie, companies that use dispatched agency employees; "user companies") from discriminating between such dispatched employees and other employees of the user company who perform the same or similar work.
- Age Discrimination Act – Article 4-4(1) prohibits employers from discriminating against employees on the basis of age, without justifiable grounds, as to the following:
  (a) recruitment and employment;
  (b) wage, provision of money and valuables other than salary, and other welfare benefits;
  (c) education and training;
  (d) job placement, transfer or promotion; and
  (e) retirement and dismissal.

Burden of Proof

Ordinarily, the party raising a legal claim bears the burden of proof in substantiating their claim. However, South Korean labour laws determine whether laws have been violated based on substantive – as opposed to formalistic – standards when the employment relationship between an employer and an employee is at issue. In particular, Article 30 of the Equal Employment Opportunity Act expressly provides that the burden of proof is shifted to employers when resolving disputes arising out of this Act.

Relief and Damages

Article 9(1) of the Fixed-Term Workers Act and Article 21(1)2 of the Temporary Agency Workers Act enable fixed-term employees, part-time employees and dispatched employees who have been discriminated against to file a petition to the Local Commission for a corrective order against the discrimination such employees were subject to. Furthermore, as of 19 May 2022, employees have been enabled to seek relief from the Labor Relations Commission for discrimination prohibited under the Equal Employment Opportunity Act. Although the Labor Standards Act and the Age Discrimination Act do not expressly provide the opportunity to seek relief from the Local Commission or the National Commission, remedies for violations of these Acts (including unlawful discrimination) can be obtained through filing:

- petitions with the Ministry of Employment and Labor;
- civil lawsuits with the court; or
- criminal complaints with the investigative authorities.

Separate from the foregoing, an employee may also seek compensation for any pecuniary damages and/or emotional distress they have suffered due to the employer's discrimination without reasonable cause.

8.3 Digitalisation

Increased Use of Virtual Hearings Through Amendment of the Civil Procedures Act and Criminal Procedures Act

The amendments to the Civil Procedures Act and the Criminal Procedures Act, which came into effect on 18 November 2021, provided grounds for expansion of the use of virtual hearings. According to the National Court Administration of the South Korean Supreme Court, more than 13,000 hearings had been conducted virtually by June 2023, and the use of virtual hearings is on the rise.

Civil litigations

For civil litigations, virtual hearings may be held:

- if the presiding judge deems it appropriate; or
- at the request of, or consent by, the parties if the court deems it difficult for a party to

appear before the court in person owing to a traffic inconvenience or any other reason. Virtual hearings may be held not only for the pleading hearing, but also for preparatory pleading and examination hearings.

Criminal litigations

For criminal litigations, the appearance of the party is an absolute requirement; hence, trials may not be held virtually. However, preparatory hearing and witness examinations may be conducted virtually if the court deems this reasonable after hearing the opinions of the prosecutor and the defence counsel.

Benefits of virtual hearings

The procedures for conducting virtual hearings do not substantially differ from those for conducting the hearing in person other than the fact that the parties attend virtual hearings through the use of audiovisual devices connected to the internet. One of the main benefits of virtual hearings is that the parties or their representatives are relieved of travelling burdens or difficulties.

Problems with virtual hearings

Some of the concerns regarding virtual hearings include not being able to fully present one's case if there are internet connection issues that cause difficulties in presenting arguments or sharing exhibits. Moreover, there is a risk of a third party intervening in the hearing by providing advice or intimidating the party out of view of the camera.

Implementation of the Online Labor Relations Commission

The Labor Relations Commission has recently introduced an electronic system for their dispute-resolution procedures. The Labor Relations Commission is currently in the process of expanding the application of such electronic system to document submissions and virtual examinations. As recently as 2023, as a principle, all documents (eg, complaints, answers and exhibits) had to be delivered via postal or courier services, and parties were required to attend examinations and hearings in person.

However, with the introduction of the electronic system, parties can now file responses and briefs in electronic-document format via the Labor Relations Commission's website. Further, since June 2024, the Labor Relations Commission has been carrying out test runs for conducting examinations on retrials through virtual means. As a start, the National Labor Relations Commission began conducting video examinations for retrials that were appealed from the Gyeonggi Regional Labor Relations Commission as of June 2024. Starting in July 2024, video examinations will be conducted for retrials that were appealed from the Seoul and Busan Regional Labor Relations Commission. The Labor Relations Commission plans on expanding the application of virtual examinations to the nationwide level in the near future.

Once the e-Labor Relations Commission system is fully operational, it is anticipated that the parties will experience increased convenience in all aspects of the dispute resolution procedure, including filing petitions, submitting documents and attending hearings.

9. Dispute Resolution

9.1 Litigation

Class actions in South Korea are different from class actions in common-law jurisdictions, where they are initiated by a few plaintiffs who represent a class of individuals, and damages are awarded even to the individuals within the class who did not participate in the class action

– provided that such individuals were not otherwise excluded.

By contrast, in South Korea, class actions take the form of a "multiparty litigation" in accordance with the Civil Procedures Act, and multiple plaintiffs file a lawsuit as a single "group". In other words, in South Korean class actions, only the individuals who are named as a party to the litigation are compensated or redressed.

With certain exceptions under Article 87 of the Civil Procedures Act, only lawyers may represent employees before the court.

9.2 Alternative Dispute Resolution

Employment and other related disputes between employers and employees may be resolved privately through arbitrations, mediations and settlements. Moreover, such disputes may also be resolved through arbitrations, mediations and settlements administered before the court and the Local Commission.

Under the principle of private autonomy (ie, freedom of contract), pre-dispute arbitration agreements regarding disputes relating to working conditions, etc, are effective in principle if they are included in the employment contracts. At the same time, labour laws (including the Labor Standards Act) are considered mandatory provisions that cannot be avoided via contracts. Therefore, any agreement that excludes such labour law provisions – or is less favourable to employees compared with labour law provisions – is invalid.

9.3 Costs

Article 98 of the Civil Procedures Act imposes the cost of the lawsuit upon the losing party. As such, the losing party – in principle – is responsible for the litigation fees. Conversely, attorney's fees are divided between the parties in accordance with Article 3 of the Rules on Calculation of the Attorney's Fees.

SPAIN

Law and Practice

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A&O Shearman

Contents

A&O Shearman has an employment practice that stands out for its wide experience and knowledge of employment law, pensions, benefits and incentives. It provides and develops individual and creative solutions to all workplace issues, from working terms and conditions, employee relations and HR policies, to restructuring and dispute resolution. The firm's approach is very much that of a partnership, working in collaboration with clients to develop individual and creative solutions to their workplace and benefits needs. It is accessible, pragmatic and hands-on, with expertise in communicating directly with workers, employee representatives and regulatory authorities on HR and reward issues.

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1. Employment Terms

1.1 Employee Status

Generally, companies hire employees through an ordinary employment relationship. There are some distinctions between senior executive employment contracts and ordinary employment relationships.

Executive contracts are regulated under Royal Decree 1382/1985 of 1 August 1985. Executives are defined as managers who exercise powers inherent to the legal ownership of the company and relating to its general purpose, limited only by the decisions and instructions from the governing person in charge of the company. These employment relationships have fewer regulated rights.

1.2 Employment Contracts

There are different types of employment contract in Spain depending on the form, duration and nature of the relationship. Employment relationships may be distinguished by the number of hours worked by the employees (eg, part-time or full-time employment contracts with the same rights).

Form of the Employment Contract

The principle of freedom of form applies to employment contracts, which may be entered into either verbally or in written form. Verbal employment contracts are generally considered to be indefinite.

However, the following employment contracts must be made in writing:

- temporary contracts;
- contracts for employees hired through temporary employment agencies;
- relief contracts to replace partially retired employees (*contratos de relevo*);
- part-time contracts;
- indefinite contracts that may be subject to interruption;
- permanent employment contracts to support entrepreneurs;
- contracts with employees hired in Spain for Spanish entities operating abroad;
- the transformation of temporary contracts into indefinite contracts;
- contracts for associated assistance (*contrato de auxilio asociado*);
- co-operation contracts; and
- contracts of employees who work remotely.

Duration of the Employment Contract

An employment contract is presumed to last, in general, for an indefinite period. In order to conclude a fixed-term contract, it is necessary to specify precisely the exact and detailed ground of the temporary contract, the specific circumstances that justify it and its connection with the expected duration. Currently, there are only two circumstances where fixed-term contracts are allowed:

- due to production circumstances; or
- in order to temporarily replace an employee.

Temporary contracts due to production circumstances

A fixed-term contract due to production circumstances may not last more than six months (extendable by another six months), and it must be in response to the occasional and unforeseeable variations that generate a temporary imbalance of employment in the company. Contracting for a period determined by circumstances of production would also include contracts for occasional foreseeable situations of reduced duration and delimited within the fixed contract,

duly identified in the contract. They may be used for a total of 90 days, but never consecutively.

Temporary contracts to replace employees

A fixed-term contract to replace an employee may be concluded if the employment of that employee has been suspended with a specific right to be reinstated in their position, to cover the reduced working day for legal or conventional reasons, as well as to fill vacancies during a selection process. In the last of these cases, the duration of the contract shall not exceed three months.

Training contracts

Training contracts now come in two forms.

- A work-linked training contract, the purpose of which is to allow an employee to acquire the appropriate professional competence that corresponds to a certain level of study. It may not have a duration of more than two years. Working hours may not exceed 65% of the normal working hours in the first year and 85% in the second year, with no overtime, shift work or night work. The remuneration will be adapted to the collective bargaining agreement (CBA) and will not be less than the minimum official salary pro rata to the working day, nor less than 60% of that which is set out in the CBA in the first year and 75% in the second year.
- A contract for obtaining professional practice, which may be concluded within three years after obtaining the professional certification in question, and which will have a duration of between six months and one year. The remuneration shall be that provided for in the CBA for the job position, unless specifically provided.

Fixed-term employment becoming indefinite

Employees who, in a period of 24 months, have been contracted for a period of more than 18 months, with or without interruption, for the same or a different job within the same company or group of companies, through two or more contracts due to production circumstances, either directly or through their provision by temporary employment agencies, will acquire the status of permanent employees. This provision will also apply when cases of transfer of undertakings occur in accordance with legal or conventional provisions.

Likewise, a person who has occupied a job, with or without interruption, for more than 18 months in a period of 24 months through contracts due to production circumstances, including secondment contracts entered into with temporary employment agencies, will acquire permanent status.

Formal Requirements

Specific information must be included in a contract of employment, such as:

- the identity of the parties;
- the initial date of the employment relationship;
- the registered office of the company;
- the place of work;
- the applicable CBA;
- the employee's professional group;
- remuneration;
- hours of work;
- probationary period (if any); and
- holiday entitlement.

1.3 Working Hours

Maximum Working Hours and Flexible Arrangements

The weekly maximum working time is 40 hours. However, this maximum may be reduced by an applicable CBA or in an employment contract. As a general rule, daily working time cannot exceed nine hours unless a longer duration is provided for in a CBA.

Negotiations are currently ongoing regarding a possible reduction in the maximum working hours to 38.5 in 2024 and then to 37.5 in 2025. This reduction would not imply a salary diminution.

Both employers and employees must comply with the minimum rest periods:

- a minimum of 12 hours between working days;
- one and a half days uninterrupted per week;
- 14 bank holidays; and
- 30 calendar days of vacation per year.

Companies may agree with workers' representatives on an irregular distribution of working hours.

Part-Time Employees

Part-time employees cannot work overtime, but they can sign a complementary-hours agreement.

Overtime

Those hours worked over the maximum duration of ordinary working hours shall be considered overtime, which must be compensated with time off or payment in cash.

The number of overtime hours may not exceed 80 per employee in a year. Overtime hours compensated with time off in the subsequent four months do not count towards the maximum yearly limit, but they shall in any event be considered as overtime.

Certain categories of employees are not permitted to work overtime:

- employees under 18 years of age;
- employees rendering services on a part-time basis;
- employees who are hired to work during night hours;
- employees whose work hours have been reduced due to a decision of the company in respect of ETOP reasons; and
- employees hired on a trainee contract.

Under Spanish employment law, companies must register the daily working hours of each employee, setting out the start and end times, including overtime. This obligation does not apply to the working hours of senior executives.

1.4 Compensation

A minimum wage is fixed every year by the government, which must be paid in cash. However, applicable CBAs regulate the minimum wage to be paid for each job position in each specific sector, to which increases are applicable each year. Since 1 January 2024, the minimum salary has been increased by 5%, being fixed at EUR15,876 annually.

Salaries must be paid in 12 monthly instalments, plus two extraordinary payments (in July and December).

1.5 Other Employment Terms

Vacation

Employees are entitled to a minimum of 30 calendar days (22 business days) of vacation per

annum. Annual vacations have to be taken within the calendar year and cannot be carried forward unless otherwise agreed with the employer. Vacation cannot be paid in lieu except in case of termination of employment. The employee's remuneration during the vacation period must be the same as what they are entitled to receive during ordinary working days. In addition, employees are entitled to 14 bank holidays per year.

Other Paid Leave

In addition to the above, employees are also entitled to the following paid leaves (which may be enhanced as per the applicable CBA).

- For the time strictly necessary to undergo prenatal tests and childbirth preparation training and, in the case of adoption, custody for adoption purposes or fostering, for the attendance of information sessions and for undertaking the psychological and social profiling necessary for the declaration of suitability for adoption; provided that these have to be done during the working day.
- In the case of a birth, adoption, custody for adoption purposes or fostering, employees are entitled to one hour (or two half hours) of absence from work per day to breastfeed a child aged less than nine months. Since December 2023, it has been possible to accumulate all the paid hours in assigned to breastfeeding to enjoy them over complete working days. The duration of such leave shall be increased proportionally in cases of multiple childbirth and can be accumulated into full days as long as a collective agreement or the employer allows it. In addition, one of the parents will also be entitled to enjoy this leave as long as the child is aged between nine and 12 months, with a proportional reduction in salary. In the case of the birth of a premature child who has to remain hospitalised, the mother or the father shall have the right to be absent from work for one hour per day.
- Five days' absence will be provided for in the case of, accident or serious illness, hospitalisation, or a surgical operation without hospitalisation but requiring home rest.
- Two days' absence will be provided in case of bereavement.
- Four days of paid leave will be provided to be absent from work due to force majeure when necessary for urgent and unforeseeable family reasons, in the event of illness or accident that makes the employee's immediate presence essential.

Should the employee need to travel due to one of the above-mentioned circumstances, the leave shall be extended by two additional days.

Furthermore, employees are entitled to:

- 15 calendar days in the case of a marriage;
- one day in the case of change of residence;
- the time strictly necessary to comply with an unavoidable duty of a public and personal character;
- the time necessary to perform union or employee representative tasks; and
- a reduction of their working hours if they are the victims of gender violence or terrorism, in order to make effective their protection or social assistance.

Maternity leave

Employment for mothers is suspended for 16 weeks due to the birth of a child; this is extended in the case of multiple births by two weeks for each additional child. The first six weeks following the date of birth are compulsory.

Paternity leave

This leave has been gradually increased, and since 1 January 2021, paternity leave is 16 weeks due to the birth of a child, being extended in the case of multiple births by two weeks for each additional child. Employees are obliged to take paternity leave for at least the first six weeks following the date of birth. After those first six weeks, paternity leave can be taken on a part-time basis.

Social security covers maternity and paternity payments up to 100% of the contribution base. Several CBAs oblige companies to supplement the social security allowance up to 100% of the employee's salary.

Parental leave

Employees have the right to enjoy unpaid parental leave to take care of a child up to eight years old. The leave will have a duration of eight weeks, either continuously or not to be enjoyed in full or part time.

Unpaid leave to take care of children or family members

Employees may take up to three years' unpaid leave from the date of a child's birth, or from the administrative resolution in cases of adoption. Employees may also request unpaid leave, with a maximum duration of two years, to take care of family members who, due to age, accident or illness, cannot care for themselves. In both cases, employees have the right to be reinstated by the company after taking such leave.

Reduction of working hours

Employees with a child aged under 12 or who are responsible for a person with a physical, mental or sensory disability are entitled to a reduction in working hours with a pro rata reduction in salary of between one eighth and one half of the normal duration of the working day. This reduction in working hours constitutes an individual right of any employee.

2. Restrictive Covenants

2.1 Non-competes

Restrictive covenants are enforceable if certain requirements are met.

A non-competition clause in the course of employment is an employment obligation. No special regulation is needed.

Exclusivity restrictions must be adequately remunerated in order to be enforceable. The law does not make provision as to how much is "adequate" for this purpose.

Post-contractual non-competition restrictions may not exceed two years for technicians and six months for other employees. Post-contractual non-competition restrictions must meet the following requirements:

- there must exist a real industrial and commercial interest in such a restriction; and
- adequate compensation must be provided.

The law does not make provision as to what is adequate for these purposes although, on the basis of case law and depending on how restrictive the covenant is, the compensation should range from 70% to 100% of the employee's fixed salary.

A post-contractual non-competition restriction is deemed to be a bilateral covenant, the waiver of which requires the agreement of both parties.

2.2 Non-solicits

Non-solicitation of customers is considered to be included within the scope of a non-competition clause.

However, non-solicitation of employees is not regulated in Spain; therefore, this type of clause could raise enforceability issues.

3. Data Privacy

3.1 Data Privacy Law and Employment

Organic Law 3/2018 of 5 December 2018 on the Protection of Personal Data and the Guarantee of Digital Rights sets out a number of specific provisions that apply when processing an employee's personal data.

Surveillance and Recording in the Workplace

Employers may process data collected through camera or video camera surveillance systems to supervise employees, as established by Article 20.3 of the Workers' Statute and by public service legislation, provided that these functions are exercised within their legal framework and within the limits inherent therein. The Workers' Statute permits an employer to adopt such measures (having regard to the employees' dignity and the capacity of workers with disabilities) to verify that employees are fulfilling their employment obligations. Employers must provide advance, express, clear and concise notification to their employees and, where appropriate, to their representatives about the use of camera surveillance systems.

In the event that the flagrant commission of an unlawful act by an employee has been captured by such a system, the duty to inform shall be understood to have been fulfilled when an information notice has been placed in a suitably visible location, which gives notice of the processing, the identity of the controller and the data subjects' rights. In no case shall the installation of sound recording or camera/video camera surveillance systems be permitted in places intended for the rest or leisure of employees.

The use of sound recording systems will only be allowed if such use is relevant to the protection of installations, goods and persons in the workplace and adheres to the principles of proportionality and minimum intervention. The data collected in this way must be deleted within a maximum period of one month from its capture, except when it must be kept to prove the commission of acts that threaten the integrity of persons, goods or facilities. In this case, the images and sounds must be made available to the competent authority within a maximum period of 72 hours.

Digital Devices in the Workplace

Employees have the right to protection of their privacy when using digital devices made available to them by their employer. The employer may only access content from such digital media for the purpose of monitoring compliance with work or statutory obligations and maintaining the integrity of such devices. Employers shall establish criteria for the use of digital devices, always respecting the minimum standards for the protection of employees' privacy. The employees' representatives shall participate in establishing such criteria.

The policy around employer's access to the content of digital devices shall precisely specify the authorised use thereof and establish guarantees to preserve the privacy of workers, such as, where appropriate, those periods when the devices may be used for private purposes. Employees shall be informed of the said criteria.

Geolocation Systems in the Workplace

Employers may process data collected through geolocation systems to supervise employees as explained above. The employer must expressly, clearly and unequivocally inform employees and, where appropriate, their representatives about the use of geolocation systems. They shall also inform employees about their right to access and rectify data gathered through geolocation systems and restrictions on the processing and erasure of that data.

Whistle-Blowing Systems

Employers may process data to facilitate the reporting of cases of misconduct committed within the company or through the actions of third parties. The employees and relevant third parties must be informed of the existence of such systems. Access to the data contained in these systems shall be limited exclusively to those who, whether or not employed by the entity, carry out internal control and compliance functions and are in charge of the processing that may be designated for that purpose. However, access by other persons, even their communication with third parties, shall be lawful when it is necessary for the adoption of disciplinary measures or for the processing of legal proceedings.

Without prejudice to the notification to the competent authority of acts constituting criminal or administrative wrongdoing, it is only when disciplinary measures are to be taken against an employee that access to the systems shall be granted to personnel with managerial and HR functions. Necessary measures must be taken to preserve the anonymity and guarantee the confidentiality of the data relating to the persons affected by the information supplied, in particular the person who brought the facts to the attention of the entity. The data relating to the complainant, and of employees and third parties, shall be kept in the complaints system only for as long as is necessary to decide whether it is appropriate to initiate an investigation into the alleged facts.

Data Storage and Removal

The data shall be removed from the system after a period of three months has elapsed, unless it is being kept for evidential purposes. Thereafter, the data may be investigated by the appropriate body. Complaints that have not been dealt with may only be recorded in anonymised form unless an obligation to block the data applies.

Contact Details

The processing of personal data in the form of the contact data of individuals who work in a legal entity and individual entrepreneurs and freelance professionals shall be assumed (unless proven otherwise) to have a lawful basis, provided that the processing relates only to data necessary for professional purposes and the purpose of the processing is to maintain relations with the legal entity in which the data subject works.

4. Foreign Workers

4.1 Limitations on Foreign Workers

There are no maximum or minimum hiring quotas for foreign employees.

4.2 Registration Requirements for Foreign Workers

Non-EU citizens require a work and residence permit to work. Simplified procedures apply to specially qualified employees.

EU Regulations relating to social security and social security bilateral agreements signed between Spain and other countries must be considered to determine the social security obliga-

tions applicable to temporary employees who have been hired by a foreign employer.

As a general rule, any foreign employee rendering services in Spain shall pay into the Spanish social security system unless they are entitled to make contributions in their country of origin, whether under EU Regulations or a bilateral agreement on social security matters signed between the country of origin and Spain. In the latter case, a formal communication must be submitted to the labour authorities.

A foreign employee will need to apply for a social security number before the beginning of the contract, which will enable their employer to register them for social security purposes.

5. New Work

5.1 Mobile Work

Law 10/2021 of 9 July 2021 on Remote Working regulates labour relationships that are performed remotely on a regular basis (the work must be performed for at least 30% of the working day over a three-month reference period). This law, along with the Personal Data and Digital Rights Law (3/2018) of 5 December 2018, the Occupational Risk Prevention Law (31/1995) of 8 November 1995 and the General Social Security Law (8/2015) of 30 October 2015, cover the following issues related to remote work.

Regarding data privacy:

- The employer must inform the employees' representatives of the remote work agreements, without disclosing personal data, and comply with the data protection legislation.
- The remote work agreements must contain the employer's instructions on data protection and information security, taking into account the employees' representatives' opinions.
- Remote employees have the right to privacy and data protection, which implies that the employer cannot oblige them to use their own devices or programs, or interfere with their personal use of the employer's devices, in accordance with the law and social customs.
- Employees also have the right to digital disconnection outside their working hours, which the employer must respect and foster through an internal policy and training, with the participation of the employees' representatives. These rights may be further regulated by collective or company agreements.

Regarding occupational safety and health:

(a) The employer must ensure the health, safety and wellbeing of the remote employees, paying special attention to the following occupational hazards of the home-office:
(b) mental health – due to isolation and stress;
(c) ergonomic issues – the safety of home-office equipment, such as screens, keyboards and chairs; and
(d) organisational risks.

- The employer's responsibility towards the remote employees is limited to the area of the employees' residence designated as the home-office.
- The employer must carry out home-office risk assessments to help create a healthy and safe home-office environment, but the employees' consent is required.

Regarding social security:

- The same rules apply to all employees who are part of the Spanish social security sys-

tem, regardless of their occupation, type and amount of income. The company's reimbursement of expenses derived from the remote work provision (teleworking costs) are not included in the contribution base.
- When the remote work provision involves an international element, the national Social Security Law that governs the employees' affiliation and contribution depends on the location where the teleworking is deemed to take place.

Finally, Law 28/2022 marks a significant step towards adapting the legal framework to the changing realities of the global labour market. As a result, international teleworkers can benefit from various measures such as a new visa category that simplifies the legal requirements and procedures.

5.2 Sabbaticals

Employees can enjoy sabbatical leave (*excedencia voluntaria*) for a period of no more than five years and no less than four months, as long as:

- they have at least one year of seniority in the company; and
- more than four years has elapsed since the end of the any previously taken period of sabbatical leave.

Unless otherwise established by the applicable collective bargaining agreement, no particular reasons need to be alleged in order to be granted this type of leave.

The main characteristics of sabbatical leave can be summarised as follows:

- it is an unpaid leave;
- during this time, the employment relationship is not terminated, although it is reduced to its minimum expression;
- the leave time does not count for seniority purposes;
- the employee retains a preferential right to re-entry in the event that, from the time when they request re-entry, there is a vacancy of the same or similar professional category to the one they held.

The right to be reinstated will be extinguished if, during the leave of absence, the employee does not request their reinstatement. In addition, once reinstatement has been requested and denied by the employer, the employee does not need to reiterate this request, but the employer is obliged to offer it as soon as the first suitable vacancy arises.

5.3 Other New Manifestations

The organisation of workspaces in Spanish firms has undergone significant changes, driven by remote work and digitalisation. With the reduced need for permanent facilities for their entire staff, firms have adopted flexible spaces that adapt to the needs of each scenario and that promote collaboration and integration among employees.

One of the most common forms of this flexibility is hot-desking, whereby employees do not have a fixed desk, but rather can use any desk that is vacant on the day. In the absence of specific regulation, Spanish case law has confirmed that the firm has the authority to introduce this system, after informing and consulting the employees' representatives, without this constituting a substantial modification of the working conditions.

Another growing tendency is co-working, a practice that involves professionals from various fields sharing office facilities, where they

can perform their tasks, establish connections and create opportunities. As of September 2024, there is no existing regulation in Spain that specifically regulates this matter.

6. Collective Relations

6.1 Unions

Unions and their rights are regulated under the Spanish Constitution and the Organic Law 11/1985 of 2 August 1985 on the Freedom of Union Association. Unions have the right to appoint their own representatives at the company concerned.

The two national representative unions in Spain are the *Confederación Sindical de Comisiones Obreras* (CCOO) and *Unión General de Trabajadores* (UGT). However, there are also other representative unions in specific autonomous communities. CCOO and UGT are entitled to represent employees and:

- provide institutional representation before public administrations;
- negotiate CBAs;
- determine working conditions with the government;
- participate in non-judicial systems for the resolution of labour disputes;
- promote elections for personnel delegates and company committees and corresponding bodies of the Public Administration;
- obtain temporary assignments of the use of public assets under the terms established by law; and
- perform any other representative function established by law.

6.2 Employee Representative Bodies

There is a dual representation system within companies:

- unitary representation, composed of works councils/personal delegates; and
- trade union representation.

It is not compulsory to appoint employees' representatives; rather it is the right of the employees and the trade unions, who may or may not exercise that right.

Unitary Representation

Unitary representation covers all employees in the workplace or the company. The number and type of employees' representatives depends on the number of staff, ie:

- individual delegates may be appointed in companies or workplaces with more than ten but fewer than 50 employees, or even with six to ten employees if decided by majority; and
- works councils may be appointed in workplaces with at least 50 employees (the number of members of the works council will depend on the number of employees in the workplace).

Elections for workers' representatives can be promoted by:

- the most representative trade union;
- a trade union with a minimum of 10% of the workers in the company; or
- employees in the workplace (by majority agreement) and following a specific procedure.

Trade Union Representation

Trade unions have the right to designate union delegates where there is a minimum workforce

of 250 employees in any company or workplace. The number of union delegates will depend on the number of employees in the company.

Regarding to information and consultation, union delegates have the right to:

- to be informed on a quarterly basis of the company's economic situation and other special matters;
- to be informed at least once a year about the implementation of rights to equal treatment and equal opportunities between men and women and to participate in the negotiation of the equality plan;
- in the event of a transfer of undertaking and the subcontracting of employees, to be informed of:
  (a) termination documents;
  (b) serious sanctions imposed;
  (c) individual terminations;
  (d) substantial modification of working conditions; and
  (e) balance sheets, profit and loss accounts, annual reports and other documents provided to the company's shareholders;
- to be informed and consulted about the situation and structure of employment in the company or workplace and about the adoption of measures designed to reduce risks at work;
- to issue a non-binding report prior to the company carrying out decisions on:
  (a) the restructuring of the workforce or when terminations are implemented;
  (b) reductions in working hours;
  (c) a total or partial relocation of the company's facilities;
  (d) a merger process or amendments to the company's legal status; and
  (e) organisational and work control systems;
- to check that the company is complying with all labour and social security obligations;
- to participate in measures of inspection and control of health and safety; and
- to negotiate collective measures (collective agreements, redundancies, suspension of employment, geographical mobility, substantial amendment of terms and conditions, etc).

Other rights and guarantees of union representatives include:

- the ability to commence an appeal in the event of sanctions due to serious breaches of obligations;
- the possession of seniority over other employees in cases of suspension or termination due to technical or economic reasons;
- not being dismissed or sanctioned during the exercise of their representative tasks or during the year following, provided that the basis for the dismissal or sanction was grounded in the acts of the employee in the exercise of their mandate;
- freedom of speech and the ability to publish and distribute publications on matters of labour and social interest; and
- the right to paid leave to carry out their representative tasks.

6.3 Collective Bargaining Agreements

Statutory CBAs, which carry the force of law, are negotiated by the workers' representatives and the employer. Statutory CBAs are directly applicable to all employees and employers included within their scope, and those employees and employers are bound by them. These agreements regulate minimum salaries, annual working hours, professional groups, probationary periods, holidays and paid leave, and disciplinary measures, among other matters.

There are various types of CBAs.

- Sectoral CBAs negotiated between the most representative unions and the employers' associations; examples include:
  (a) state and national sectoral agreements;
  (b) regional sectoral CBAs;
  (c) provincial sectoral CBAs; and
  (d) interprovincial sectoral CBAs.
- Company CBAs negotiated between the unitary workers' representatives in the company and the employer; company CBAs have priority over sectoral ones.

7. Termination

7.1 Grounds for Termination

This section is concerned with dismissal based on an employee's serious and wilful non-compliance with their contractual duties. Legal causes for this type of dismissal are explained in **7.3 Dismissal for (Serious) Cause**.

Objective Dismissal

Termination of employment for objective reasons can be based on the following grounds.

- The incompetence of the employee, discovered after recruitment.
- The employee's inability or failure to adjust to reasonable technical changes in their position; however, the employer must have offered the employee a training course aimed at facilitating adaptation to such changes, and termination cannot be considered until at least two months have elapsed since the changes were introduced or the training began.
- A proven objective need to amortise an employment position if there are technical, economic, organisational or production reasons; if a specific number of employees affected is reached, the collective dismissal process will be triggered.

Collective Dismissal

A collective dismissal occurs if a company terminates employment contracts on the basis of economic, technical, organisational or production grounds, and if, within a period of 90 days, such a measure affects at least:

- ten employees in companies with fewer than 100 employees;
- 10% of the workforce in companies with 100 to 300 employees;
- 30 employees in companies with more than 300 employees; or
- all the employees of the company, provided the number of employees affected is over five and the redundancy is based on the total cessation of the company's activities.

However, according to latest case law, which takes into account European Court of Justice case law, a collective dismissal will also arise where the number of redundancies within a single workplace affects:

- ten or more employees in workplaces with 20 to 100 employees;
- at least 10% of the workforce in workplaces with 100 to 300 employees;
- 30 or more employees in workplaces with more than 300 employees, within a period of 30 days; or
- at least 20 employees within a 90-day period.

Grounds

If dismissal is based on economic grounds, those grounds exist when there are current or foreseeable losses or a persistent decrease in the level of income or sales. A decrease qualifies as persistent if it takes place over three consecu-

tive quarters compared with the same period in the previous year. The performance of a group as a whole is also relevant if the group can be considered to act as a single employer.

The technical grounds that justify dismissal apply when there are changes in the scope, means or instruments of production. Organisational grounds are those which justify the dismissal whenever there is a change in the scope of the working systems or in the way production is structured, among others. Finally, justification may be based on productive grounds whenever there are changes in the demand for the products or services that the company offers to the market.

7.2 Notice Periods

The dismissal process is different depending on the employee status, the grounds for the termination and the number of employees impacted.

Individual Dismissal

Disciplinary dismissal

See **7.3 Dismissal for (Serious) Cause**.

Objective dismissal

The employer must communicate the dismissal to the employee in writing, which should include a detailed description of the grounds. Statutory notice must be served (or longer if contractually agreed). Alternatively, the company may pay the employee a sum of money in lieu of notice. On the date of communication of the dismissal, the employee shall be entitled to statutory compensation equivalent to 20 days' salary per year of service, up to a maximum of 12 months' salary.

Should the termination be based on technical, economic, organisational or production reasons, a copy of the notice of communication must be provided to the employees' representative, if one has been appointed.

Qualification of individual dismissals

The employee may take their case to the labour courts to challenge the grounds or reasons given by the employer for the dismissal or contend that the facts do not justify it. The competent labour court may deem the dismissal as one of the following.

- Fair – the court considers the dismissal justified.
- Unfair – the court considers that the dismissal was not justified.
- Null and void – the court considers that the dismissal was based on grounds which violated the employee's fundamental rights; therefore, the employer must reinstate the employee and pay their salary accrued from the date of termination up to the reinstatement date as well as, possibly, damages.

If the court deems the dismissal unfair, the employer is permitted to:

- reinstate the employee, in which case the employer must pay to the employee their salary accrued from the date of dismissal up to the date of reinstatement; in the case of an objective dismissal, the employee would have to return the severance package made; or
- pay the employee compensation equal to 33 days' salary per year of service (subject to a limit of 24 months' salary) for the period of service accrued as from 12 February 2012 and equal to 45 days' salary per year of service (subject to a limit of 42 months' salary) for the period of service up to 12 February 2012; in the latter case, the resulting severance payment cannot be higher than an amount equal to 720 days' salary unless

the amount resulting from the calculations corresponding to the first tranche (ie, the calculation of severance corresponding to the period from the start date to 12 February 2012) is higher, in which case the said amount shall apply but it may not be higher than an amount corresponding to 42 months' salary.

The choice between the two above options will belong to the employee if they are an employee representative.

Collective Dismissal

Process

Collective dismissals can only be implemented following a formal statutory procedure. The main aspects are as follows.

- Announcement – the employer must serve notice on the employees' representatives or, in their absence, the employees, stating an intention to initiate a negotiation period to implement a collective dismissal in order for them to appoint a negotiation body; the maximum period for the constitution of the representative committee will be seven days where employees' representatives are appointed or 15 days where no employees' representatives have been appointed.
- Starting the negotiation period – the employer must deliver a written notice to the representative committee to open the negotiating process; a copy of this written notice must also be sent to the appropriate labour authority.

Notice

The written notice must include a report on the grounds for collective dismissal, which must enclose the necessary supporting technical documents as well as a technical report.

If the collective dismissal is based on economic grounds, the documents must evidence economic and financial changes in the company during the last two years and must be duly audited. Whenever the grounds are based on foreseeable losses, the information provided shall include the criteria used for such forecasts. Also, a technical report on the forecast of losses must be provided, based on data extracted from the annual accounts, the sector in which the company operates and the evolution of the market and the position of the company in the same. Special requirements and documentation need to be included if the company forms part of a group of companies.

If the collective dismissal is based on technical, organisational or production grounds, the report must enclose technical reports justifying the dismissal, the measures to be adopted and their impact on the viability of the company.

The written notice must also include:

- the number and professional classification of employees affected;
- the number and professional classification of the employees rendering services during the last year;
- the term envisaged for the implementation of the dismissals;
- the criteria used to designate the affected employees, which must be objective and non-discriminatory;
- a copy of the written notification of the company's intention to start a consultation period to implement a collective dismissal;
- information about the employees who form part of the representative committee; and
- a request from the representative committee of a report on the collective dismissal.

Once the labour authority has received this notice, it will inform the public entity managing unemployment benefits and apply for a compulsory report to be issued by the Labour and Social Security Inspectorate on the content of:

- the communication and the development of the negotiation process; and
- the existence of the specific grounds used by the company to justify the dismissal.

Negotiations

The employer must hold negotiations with the representative committee within a maximum of 30 days, or 15 days in case of companies with fewer than 50 employees. The negotiations must include possible options to avoid the collective dismissal, reduce the number of employees affected or ameliorate its consequences, as well as on the severance packages to be paid. A minimum number of mandatory meetings must be held, and a calendar followed unless otherwise agreed.

The parties must negotiate in good faith. The labour authority will safeguard the effectiveness of the negotiation period and is entitled, if appropriate, to send recommendations and warnings, but these will not stop or suspend the procedure.

The negotiation period will be concluded whether or not an agreement between the parties is reached. If sufficient grounds exist, the employer can unilaterally execute the terminations.

After the consultation period has ended, the company shall communicate to those employees who were part of the negotiation committee and to the labour authority the decision on collective dismissal. This communication should be made within a maximum period of 15 days from the last meeting held in the consultation period.

The company must also communicate notice of dismissal individually to each of the affected employees. The individual communication must follow the formal procedure for individual objective dismissals.

Severance

The statutory payment in case of collective redundancy is 20 days' salary per year of service up to a maximum of 12 months' salary. The final amount of severance is negotiated during the consultancy period, which is usually increased by companies in order to reduce the risk of litigation.

Other obligations to be included in the social plan

Out-placement programmes must be provided for a minimum of six months if the collective redundancy affects more than 50 employees.

Special social security contributions will be made for employees in the case of employees aged 55 years or above who did not make social security contributions prior to 1 January 1967 and who are included in a collective dismissal process which is not based on an insolvency. The employer must pay their contributions until they reach the age of 61 (in the case of economic grounds) or 63 (in the case of organisational, productive or technical grounds). The application of the special agreement must be made during the collective dismissal procedure.

An additional contribution to the Public Treasury must be paid by companies which make profits and carry out a collective dismissal that affects employees aged 50 or above.

Qualification of collective dismissal

Collective dismissals can be challenged collectively by workers' representatives on the basis that:

- the grounds argued by the company to justify the dismissals do not exist;
- the formal process has not been followed; or
- the decision has been reached after wilful coercion, fraud or abuse of law.

Normally, the workers' representatives only launch a claim against collective dismissal if the negotiation period concludes without an agreement.

The subsequent judgment may render the company's decision as one of the following.

- Fair – where the company has complied with the legal procedure and has evinced the existence of the grounds for the dismissal.
- Not according to law – when the company has not proved the grounds justifying the dismissal, in which case the employer will have to pay to the affected employees the same compensation regulated for unfair individual dismissals.
- Null and void – when the legal process has not been followed or when the company's decision was taken in breach of fundamental rights or public liberties or wilful coercion, fraud or abuse of law (in this case the employer must reinstate the affected employees and pay them the salaries accrued from the date of termination up to the reinstatement date).

Termination of Top Executive Contracts

Top executives' contracts, regulated by Royal Decree 1382/1985 of 1 August 1985, may be terminated as set out below.

Termination by the employer

The employer can terminate a top executive contract at any time without giving any reason. The company must deliver to the employee a termination letter stating the date of the termination, serve three months' notice (or a longer notice if contractually agreed) or make payment in lieu of salary. The employee is entitled to the compensation agreed in the employment contract or, in its absence, the legal compensation of seven days' salary per year of service subject to a limit of six months' salary.

The employer can terminate a top executive contract for a serious breach of their contractual duties. The company must deliver to the employee a dismissal letter, which should include a detailed description of its reasons and the date of termination, which may be immediate. Should the employee challenge the dismissal and the labour court rules it to be unfair, the company will have to pay them severance equal to 20 days' salary in cash per year of service with a limit of 12 months' salary.

In the case of objective dismissal, the same procedure applicable to ordinary employees shall apply.

Termination by a top executive with severance entitlement

Top executives are entitled to terminate their contract at will with the right to receive:

- the severance agreed in their contracts, if any; or
- in the absence of contractually agreed severance, severance pay equal to seven days' salary (in cash) per year of service subject to a limit of six months' salary in the case of:
  (a) a substantial change to the executive's employment terms and conditions which

resulted in damage to the executive's professional training or dignity (decided by the employer in a serious breach of contractual good faith);
(b) lack of payment or repeated delay in the payment of the remuneration agreed;
(c) any other serious breach of contractual duties by the employer; or
(d) a transfer of undertaking or relevant change in the ownership of the company which involved the restructuring of senior executive positions, provided that the top executive exercises their right to terminate within three months following the transfer.

A top executive may have to serve the employer with three months' notice (or a longer period if agreed in their employment contract). Should this not be served, the employer will be entitled to be paid the salaries corresponding to the period in lieu of notice.

Statutory Severance of Temporary Contracts

Upon the termination of a temporary contract, due to the expiry of the time agreed or completion of the work or service subject to the temporary contract, employees are entitled to a severance payment equivalent to 12 days of salary per year of service (except in cases of replacement and training contracts).

7.3 Dismissal for (Serious) Cause

This type of dismissal is based on an employee's serious and wilful non-compliance with their contractual duties. Legal causes for dismissal must be proven by the employer and include the following:

- unjustified repeated absence or lack of punctuality;
- lack of discipline or disobedience;
- verbal or physical offences against the employer or other people who work in the company or to their relatives who live with them;
- breach of good faith or betrayal of trust;
- continued and wilful unsatisfactory performance;
- habitual drunkenness or drug addiction affecting work performance; and
- harassment on grounds of racial or ethnic origin, religion or belief, disability, age, sexual orientation and sexual or gender-based harassment of the employer or persons working in the company.

Additional causes may be set out in applicable CBAs or individual employment agreements.

Unless further requirements are set out in an applicable CBA or an employment contract, the company shall terminate the employee concerned by way of a written letter of dismissal stating the date on which the termination takes effect as well as the grounds for dismissal. This type of dismissal will not entitle the employee to statutory severance pay.

Should the employee be an employee legal representative or a union delegate, a contradictory procedure shall be opened in which the affected employee and works council shall be heard. Should the employee be affiliated to a union and the employer is aware of that, it must give a prior hearing to the union delegates.

Disciplinary dismissal is the most serious sanction that a company may impose on an employee and is subject to a statute of limitation of 60 days, as from the date on which the breaches became known to the employer or six months from the date on which the breaches took place.

7.4 Termination Agreements

An employment relationship can be terminated by mutual agreement between the employer and the employee. The advantage of this route is that the parties are free to agree the terms and conditions of the termination unconstrained by statutory compensation. The drawback is that the employee shall not be entitled to collect unemployment benefits and the tax treatment of any compensation agreed will be impacted.

Apart from the above, when a company follows the dismissal route and the employee challenges the termination before the conciliation authorities or a labour court, the parties will have the chance to settle the case and avoid further disputes. For such purposes, the employee must file a conciliation claim within a maximum period of 20 working days from the effective date of termination. Thereafter, the parties shall attend a hearing in which they will have the opportunity to settle the dismissal.

Upon completion of the conciliation process, the officials will issue the relevant minutes of the hearing. Should the conciliation process end without an agreement, the employer will have to submit the relevant judicial claim before the labour courts if it wants to pursue its claim, and the court will have to admit the claim and schedule a judicial conciliation hearing and trial. Nevertheless, the parties will have an opportunity to reach an agreement before judgment is issued.

7.5 Protected Categories of Employee

Certain groups of employees are especially protected from dismissal. These include:

- pregnant employees and employees during the 12 months that follow them giving birth;
- employees on reduced hours of work to take care of a child or a disabled person;
- employees in maternity/paternity during the period of suspension of their employment contract;
- employees who are victims of domestic violence;
- employees' representatives;
- data protection delegates; and
- employees who have filed and won a claim against the company.

Courts are very protective towards these employees, and dismissals affecting them are presumed to be contrary to their fundamental rights unless otherwise evidenced by the company. If the employer is unable to provide objective criteria and adduce strong and sound evidence to justify termination, the dismissal will be rendered null and void. This will entail an obligation on the part of the employer to reinstate the employee so affected and pay to them a procedural salary (ie, the salary accrued from the date of termination up to the reinstatement date).

8. Disputes

8.1 Wrongful Dismissal

See **7.2 Notice Periods**.

8.2 Anti-discrimination

It is unlawful to directly or indirectly discriminate against employees or potential employees on the grounds of sex, marital status, age, race, ethnic or racial origin, social status, religious or political beliefs, sexual orientation or identity, trade union membership, language or disability, or against employees who have familial relationships with the employer.

Filing Claims

Employees who believe that they have been discriminated against may file a claim against

such discriminatory treatment and be awarded compensatory damages. The burden of proof lies with the employer, which should objectively and sufficiently demonstrate that the decision was not based on discriminatory grounds. If the court finds evidence of discrimination, the judgment may provide for compensation and nullify the company's discriminatory action, order the immediate cessation of the discriminatory action and order the reinstatement of the employee under the same conditions that applied prior to the episode of discrimination. If an employee's termination of employment is nullified, the employee will be reinstated to their role and be paid the salary accrued – but not paid – from the termination date for the length of the judicial process.

The prejudicial treatment of employees on the basis that they requested that their rights be upheld or have reported anomalies within the company is not permitted. Any sort of claim (which need not be a judicial claim) may be sufficient to argue the existence of retaliation, even if done through an informal procedure. Dismissals and any other detrimental employment measures adopted on the basis of retaliation shall be null and void. The affected employee can also claim for damages.

In cases of discrimination, the company may be sanctioned with:

- a penalty of between EUR7,501 and EUR225,018;
- the automatic loss (proportional to the number of employees affected) of subsidies, rebates or bonuses or any state benefit granted in the context of employment programmes; and
- loss of access to the above-mentioned subsidies, rebates or benefits for a period of six months to two years.

Legislation on Gender and Sexual Equality

The Spanish Government has approved two Royal Decrees related to equality between men and women in companies.

- Royal Decree 901/2020, of 13 October 2020, which regulates equality plans and the obligation to register it. This Royal Decree entered into force on 14 January 2021, with the aim of promoting effective equality between men and women, eliminating any discrimination that may exist, through the obligation to develop and apply an equality plan in those companies who employ more than 50 employees. The equality plan has to be negotiated with the workers' representatives and will consist of three phases:
  (a) diagnosis of the company situation;
  (b) preparation of an equality plan; and
  (c) monitoring, evaluation and review of the equality plan.
- Royal Decree 902/2020, of 13 October 2020, on equal pay between women and men. This Royal Decree entered into force on 14 April 2021, with the aim that there are equal salaries for jobs of equal value, without any discrimination based on gender. By virtue of this Royal Decree, employers must keep a record with the average values of salaries, salary supplements and extra-salary payments of their workforce, disaggregated by gender and distributed by professional groups, professional categories or jobs with equal value. Workers may access this registry through their legal representatives, or directly if they do not have legal representation.

In addition of the above, the Spanish government has approved Law 4/2023, which implied the obligation of companies with more than 50 employees to implement a protocol to act against any type of harassment or violence towards the LGBT+ community. The effective date for the implementation of the LGBT+ plan was 2 March 2024, and the conditions must be negotiated with the legal representatives of the employees.

8.3 Digitalisation

Article 230 of the Organic Law of the Judiciary had a general rule that courts and tribunals should use any available technology to do their work and exercise their functions. However, the COVID-19 pandemic made it necessary to adopt more specific measures for this purpose.

Law 3/2020 of 18 September 2020 established that, whenever possible, courts and tribunals should use electronic means to carry out trials, hearings, statements, and other procedural acts. This law applied only as long as there was a health crisis scenario in our country.

This measure, the effectiveness of which was subject to the existence of a health crisis in our country, ceased to be in force on 4 July 2023 with the publication of Order SND/726/2023, which contained the Agreement of the Council of Ministers declaring the end of the health crisis situation caused by COVID-19.

9. Dispute Resolution

9.1 Litigation

Judicial proceedings deal with several areas of conflict. These include ordinary dismissals, collective conflicts, the breach of fundamental rights, holidays, workers' representative elections, professional classifications, amendment of working conditions, geographical mobility and social security.

Depending on the geographical scope of the claim and/or the number of employees impacted, different competent courts deal with the matters raised.

- Labour courts of first and unique instance – these courts resolve individual and social security claims.
- Superior courts (one per autonomous community) – these courts resolve appeals filed against judgments of the labour courts as well as certain collective conflicts in the first instance phase.
- National Audience – this Audience hears, at first instance, collective conflicts that affect employees based in more than one autonomous community.
- Supreme Court – the Supreme Court resolves appeals filed against judgments of the superior courts and the National Audience, and even judgments issued by the Supreme Court at first instance.

Prior to the filing of a judicial claim, there is a general requirement to file a claim for conciliation (some matters are excluded from this preliminary conciliation hearing).

9.2 Alternative Dispute Resolution

Collective matters are subject to a compulsory mediation process. If that ends without agreement, the parties may expressly agree to submit the collective case to arbitration as an alternative to the judicial process.

Pre-dispute arbitration agreements are not enforceable in Spain.

9.3 Costs

Under Spanish employment law, employees are beneficiaries of so-called free justice; they are entitled to an appointed lawyer, free of charge. In view of this, there can be no award of legal fees.

A judgment may impose costs on the prevailing party in an appeal, except where the party enjoys the benefit of free justice or in the case of unions or public officials or statutory personnel. Such costs shall include the fees of the lawyer of the opposing party that had acted in the appeal with a maximum of EUR1,200 in the appeal phase before the superior court and EUR1,800 in the appeal phase before the Supreme Court.

The above does not apply in cases involving collective conflict; each party is responsible for its own costs. However, the court may impose the payment of costs on any party that has acted with recklessness or bad faith.

SWEDEN

Law and Practice

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Contents

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CEDERQUIST

1. Employment Terms

1.1 Employee Status

In Sweden, there are no statutory definitions of white- and blue-collar workers. Instead, these groups are defined by the applicable trade unions of which the workers are members and, therefore, different collective bargaining agreements (CBA) apply to these two groups. In some labour market areas, the CBA regulations are uniform and a categorisation of these two groups of workers is not necessary.

General regulations regarding employment protection are found in the Employment Protection Act. Certain terms for employees in the public sector in Sweden are regulated through the Public Employment Act. However, the same rules essentially apply to private and public employees, and the Public Employment Act only contains a few specific rules for public employees.

1.2 Employment Contracts

The general rule is that an employment agreement is for an indefinite period, unless agreed otherwise. The Employment Protection Act allows for a special fixed-term employment when the employer is in need of fixed-term employees. A fixed-term employment agreement may also be concluded for a temporary substitute employment and for seasonal employment. An employee who has been employed either for a special fixed-term employment or as a substitute for an aggregate of more than 12 months during the past five years will have their employment converted into indefinite-term employment. A special fixed-term employment may also be converted into an indefinite-term employment if the employee has been employed in different consecutive fixed-term employments. A special fixed-term employment or a temporary substitute employment will not convert into an indefinite-term employment if the employee has reached the age of 68, or the age of 69 if the employee was employed after 1 January 2023.

Note that CBAs may contain regulations deviating from the statutory rules governing fixed-term employment.

In Sweden, an employment agreement does not have to take any specific form in order to be valid. However, Sweden has implemented Directive 2019/1152 on Transparent and Predictable Working Conditions in the European Union. An employer must provide certain information in writing to the employee concerning the principal terms of the employment within one month of the commencement of the employment. Failure to do so can result in an obligation to pay damages to the employee concerned.

The requisite information includes, inter alia, the name and address of the employer and the employee, the commencement date, the place of work, duties and title, whether employment is fixed or for an indefinite term, the length of the probationary period, periods of notice, payment and other employment benefits, the length of paid annual leave, the length of the normal working day or working week, and information on the applicable CBAs.

1.3 Working Hours

The maximum normal working hours are 40 hours per week. The Working Hours Act sets forth rules concerning overtime work as well as daily and weekly rest for employees. Deviations from certain regulations in the Working Hours Act can be made by a CBA, but not in individual employment agreements.

For part-time employees, the equivalent to overtime is called additional time, which comprises

the working hours in excess of the employee's regular working hours and on-call time. When there is a special need to increase the number of hours worked, an additional maximum of 200 hours may be worked per employee over a calendar year (general additional time). When there are special grounds, additional time in excess of general additional time may be worked, up to a maximum of 150 hours per employee over a calendar year. Together, extra additional time and general additional time may not exceed 48 hours per employee over a period of four weeks, or 50 hours over a calendar month.

For full-time employees, overtime comprises working hours in excess of regular working hours and on-call hours. Where additional working hours are required, overtime hours may not exceed 48 hours over a period of four weeks or 50 hours over a calendar month, subject to a maximum of 200 hours per calendar year.

Statutory law does not contain regulations regarding overtime pay, which is normally provided for in CBAs. In general, employees may choose to receive overtime pay in terms of money or compensatory leave. If no CBA exists, the employee is not entitled to overtime pay unless agreed upon individually. If a CBA exists and provides a right to overtime pay, it may contain provisions that make it possible for the employee to waive the right to overtime pay and instead receive compensation in the form of compensatory leave. However, such waiver usually only applies to employees who have flexible working hours, or if special reasons apply.

1.4 Compensation

There are no provisions regarding minimum wage requirements in Swedish law, but such provisions are often found in CBAs.

In Sweden, it is common for employers and employees to agree that part of the full salary will be paid as variable salary. The different types of variable salary vary and can be paid out, inter alia, as commission (eg, a certain percentage of the contractual sum for provided services) or as bonus (eg, variable salary paid out in accordance with specific and determined targets with financial parameters of the performance of the employing company and/or personal performance of the employee). The payment of variable salary is not regulated in statute and is rather a matter of negotiation between the parties to the employment agreement. It is most common for the terms for the payment of variable salary to be set out in the employment agreement, or for the variable salary targets and the payment of variable salary to be decided annually at the employer's discretion. It should be noted that variable salary generally qualifies for the payment of holiday pay in Sweden.

In Sweden, a 13th month payment is not normally applied, but some employers do choose to award their employees with an annual bonus, paid at the company's discretion, if the company has performed well during the year. Such a bonus is paid as a gratuity and normally does not qualify for the payment of holiday pay or occupational pension contributions.

There is no general government intervention on compensation and salary increases in Sweden, but such matters are often regulated in CBAs. It should be noted that compensation in connection with holiday, parental and sick leave is statutorily regulated.

1.5 Other Employment Terms

Holiday and Holiday Pay

Holiday entitlement is regulated by the Annual Leave Act, which distinguishes between holiday

days and holiday pay, and between a "holiday year" (April 1st to March 31st) and a "qualifying year" (the 12-month period prior to the holiday year). The normal and minimum holiday entitlement is 25 days paid holiday per year. An employee earns his or her entitlement to holiday pay during the qualifying year and is entitled to use his or her paid holiday during the holiday year. CBAs or employment agreements generally contain rules entitling employees to a longer period of holiday – up to 30 days' paid holiday – if the employee is not entitled to overtime pay. This is normally the case for white-collar employees.

Employees are entitled to take a continuous four-week holiday during the period from June to August, unless there are circumstances justifying other arrangements. Employees who have been given a period of notice of termination of less than six months cannot be required to take their holiday entitlement during the notice period, unless they agree to do so. Under certain conditions, employees are entitled to exchange holiday that has already been scheduled for sick leave or parental leave, for example. It is possible for employees to carry over their entitlement to paid holiday days to the next holiday year (but not unpaid holiday days), but only if the employee has earned more than 20 days of paid holiday, and only for those days that exceed 20 days.

Deviations from certain regulations in the Annual Leave Act can be made by a CBA.

Holiday pay is usually paid out in connection with the employee's use of their accrued holiday. According to the Annual Leave Act, holiday pay may be calculated according to either the same salary rule or the percentage rule. The same salary rule applies to employees whose remuneration is calculated on a monthly or weekly basis, while the percentage rule applies to employees whose remuneration is not calculated on a weekly or monthly basis or has a high variable element. If the variable elements of the salary amount to at least 10% of the total salary during the year, the percentage rule shall be used.

According to the same salary rule, the employee is paid their regular salary plus a holiday supplement of 0.43% of their monthly salary per holiday. For variable parts of the salary, the employee is paid 12% of the variable salary if he or she is entitled to 25 days of holiday. According to the percentage rule, the holiday pay for employees is 12% of the total salary paid out during the qualifying year when the employee is entitled to 25 holiday days.

If the employment ends before the employee has taken accrued days of paid holiday to which he or she is entitled, the employer must pay the employee in lieu of the unused holiday pay entitlement.

Required Leave

An employee may go on parental leave until their child is 18 months old. Thereafter, the employee is entitled to leave for as long as he or she receives compensation from the state. Compensation is paid by the state for a total of 480 days per child. The compensation may be paid until the child reaches the age of 12 years, but only 96 days may remain when the child reaches the age of four years.

In addition to parental leave, the mother is entitled to parental allowance during the 60 days prior to the expected birth of the child. The father of the child may also be on paternity leave for ten days in connection with the birth of the child.

The entitlement to parental days is divided equally between the parents, but the parents

have the right to transfer their entitlements to each other, with the exception of 90 days; these 90 days will be forfeited if they are not used. As a result, one parent may use a maximum of 390 days, during which the allowance is capped at 80% of the employee's salary up to a certain salary level. In Sweden, some employers choose to offer their employees parental leave pay on top of the parental allowance paid by the state. If a CBA is in force in the workplace, parental leave pay paid by the employer is often mandatory. A parent is also entitled to parental leave and temporary parental benefit if their child is sick.

An employee is entitled to mandatory sick pay payable by the employer, provided that the employment is expected to continue for more than one month or that the employee has been working for more than 14 consecutive days. During days one to 14 of the sick leave, the employee is entitled to 80% of the estimated salary and employment benefits they receive during a normal week. A deduction of 20% is made from the sick pay (*karensavdrag*). If the employee falls ill again within five days, the previous sick leave period will continue and no further deductions will be made. From day 15 in the sickness period, the employee may be entitled to compensation payable by the state. The entitlement to such compensation is based on strict rules and is decided by the Swedish Social Insurance Agency. There is no obligation for the employer to provide any supplementary sick pay from day 15 in the sickness period, unless such is provided for in an applicable CBA or individual agreement.

Limitations on Confidentiality

An employee's obligation not to reveal confidential information about the employer's business follows from the employee's duty of loyalty during the employment. However, according to the Trade Secrets Act, the disclosure of a company's trade secret by an individual for the purpose of making public or revealing to a public authority or other authorised body a matter that may reasonably be suspected of constituting a criminal offence punishable by imprisonment or that is deemed to constitute another serious irregularity in the company's business activities is not considered an unlawful disclosure. A comparable principle is found in the Whistle-Blowing Act. As a main principle, there are no limitations on confidentiality agreements in terms of time, but such an agreement may be considered unreasonable and unenforceable by a court if it is too burdensome for the employee.

Non-disparagement clauses are not that common in Sweden, but the duty of loyalty includes a duty not to be disloyal towards the employer by way of disparagement. However, an employee has a right to put forward a critique of the employer when doing so is justified, as mentioned above.

Employee Liability

The main principle is that the employer is responsible for all damage caused by the employee in the employment. An employee is responsible for damage that an employee causes through fault or negligence in his or her employment only to the extent that there are exceptional circumstances with regard to the nature of the act, the employee's position, the interest of the injured party and other circumstances, according to the Tort Liability Act.

2. Restrictive Covenants

2.1 Non-competes

Post-employment restrictive covenants regarding non-competition are valid under certain cir-

cumstances. The main rule is that they must be reasonable, taking many different factors into account, such as whether employees receive some kind of compensation for the restriction, whether the restriction is limited to certain companies, whether the restriction is limited geographically, etc. An overall assessment of all relevant factors has to be made in each individual case.

Non-competition covenants should normally only be used for employees whose position in the company makes such restrictions necessary. In principle, the period of a non-competition covenant should not exceed nine months or, under certain conditions, a maximum of 18 months.

According to CBAs and market practice, employers are obliged to pay approximately 60% of the monthly income from the employer as compensation for inconvenience caused by the non-competition covenant. However, a general assessment of the reasonableness of a non-competition covenant must be made in each individual case, which means that other types of compensation may also be accepted as long as they are linked to the non-competition covenant.

Non-competition covenants are normally combined with a contractual penalty, which must be reasonable in relation to the employee's salary. Such a penalty is usually set at between three and six months' salary for each breach. Restrictive covenants may also be combined with a continuing penalty, and the employer can be entitled to further damages if the damage caused by the employee exceeds the amount of the contractual penalty.

2.2 Non-solicits

There is no limitation in time for non-solicitation covenants in relation to the solicitation of employees, but they generally follow the same time limitations set forth in non-competition covenants. A covenant regarding the non-solicitation of employees does not usually need to be combined with any compensation in order to be considered reasonable (unlike non-competition covenants) but should be limited, for example, to colleagues with whom the employee has worked. A general assessment of the reasonableness of a non-solicitation covenant in relation to the solicitation of employees must be made in each individual case.

There is no limitation in time for non-solicitation covenants in relation to customers, but they generally follow the same time limitations set forth in non-competition covenants. Furthermore, in the same way as for non-competition covenants, a covenant regarding the non-solicitation of customers generally needs to be combined with compensation in order to be considered reasonable. However, a general assessment of the reasonableness of a non-solicitation covenant in relation to the solicitation of customers must be made in each individual case.

3. Data Privacy

3.1 Data Privacy Law and Employment

The General Data Protection Regulation (GDPR) is applicable in Sweden and provides protection for individuals against violation of their personal integrity by the processing of personal data. Accordingly, there are restrictions on employers' use of data regarding employees, former employees and applicants. There are certain basic requirements for any form of processing of personal data that is fully or partly computerised, according to the GDPR.

Personal data may only be processed if it is lawful to do so. For example, personal data may be processed to satisfy a purpose that concerns a legitimate interest of the employer, provided that this interest outweighs the interest of the registered person in protection against violation of their personal integrity. The personal data must be collected for specific, explicitly stated and justified purposes. The collected personal data needs to be relevant and necessary for the purpose stipulated, and may not be stored for longer than necessary with reference to the specified purposes. It must also be accurate and processed in a manner that ensures appropriate security of the personal data.

Certain types of personal data are considered special categories of personal data, such as:

- information about employees' or applicants' race or ethnic origin;
- genetic data;
- political opinions;
- religious or philosophical beliefs;
- membership of a trade union; or
- personal data concerning health or sexual preference.

Special categories of personal data may only be processed in special circumstances.

The GDPR sets forth certain rights for registered individuals, such as the right to information concerning the processing of their personal data, the right to access and the right to the rectification, erasure and restriction of processing.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Citizens of countries outside the EU must have a work permit to work in Sweden. In order for a person to obtain such a permit, the employer must have prepared an offer of employment and advertised the job in Sweden and the EU for ten days (this applies to new recruitment). The person applying for a work permit must also be able to show a signed written employment agreement. The terms of employment must be equal to or better than those provided under a Swedish CBA or that are customary for the occupation or sector. In addition, the employee shall be entitled to health insurance, life insurance, industrial injuries insurance and occupational pension insurance. The employee must also earn enough from the employment to be able to support himself or herself, the gross monthly salary should be at least 80% of the Swedish median monthly salary at the time of the application (SEK27,360 on 17 June 2024) and the relevant trade union must have been given the opportunity to express an opinion on the terms of employment.

The Posting of Workers Act applies to posted workers in Sweden.

4.2 Registration Requirements for Foreign Workers

EU and EEA citizens do not need a visa and have the right to work in Sweden without work permits or residence permits. People who have a residence permit in an EU country but are not EU citizens can apply to obtain the status of long-term resident in that country, thereby enjoying certain rights similar to those of EU citizens.

Foreign employers with workers posted to Sweden are obliged to report such posting to the Swedish Work Environment Authority.

5. New Work

5.1 Mobile Work

The increase in mobile work imposes new demands on the work environment. The employer's responsibility for the work environment is regulated by the Work Environment Act, which requires employers to take all necessary measures to prevent workers from being exposed to ill health or accidents. The employer must therefore systematically plan, direct and monitor activities in a manner that ensures that the work environment meets the prescribed requirements for a good work environment. The employer's responsibility for the work environment applies even when employees work remotely.

However, the employer and employees must co-operate to create a good work environment. In the case of mobile work, when the employer's insight into the work environment is limited, employees must consequently alert the employer to any deficiencies in the working environment. The employer's responsibilities include the physical work environment, such as equipment, as well as the social work environment, such as working hours. Furthermore, the rules regarding working hours in the Working Hours Act must be complied with even when an employee is working remotely. Employees are therefore entitled to a minimum rest period of 11 consecutive hours in any 24-hour period ("daily rest"), and to a rest period of 36 consecutive hours per seven-day period ("weekly rest").

The GDPR applies to mobile work, and the protection of personal data must be upheld in accordance with the GDPR, regardless of where the work is carried out.

An employee working remotely is entitled to the same social security benefits as an employee performing work at a fixed location. This means that the same rights to sick pay, parental leave and holiday pay apply.

5.2 Sabbaticals

The term "sabbatical" is not used in Swedish labour law but employees may be legally entitled to a leave of absence, depending on the purpose of the leave. The leave of absence entails unpaid leave for a period of time. An employee is not entitled to general leave, but the employer may choose to grant it.

Under certain conditions, an employee may be entitled to necessary leave from his or her employment to receive education. Pursuant to the Employee Leave (Education) Act, this applies if an employee has been an employee of the employer during the most recent six months or for a total of not less than 12 months during the last two years.

An employee may also be entitled to leave from work for a maximum of six months in order to pursue a business activity by themselves or through a legal entity. However, the employee's activities must not compete with the employer's business. Employees may have a legal right to a leave of absence for family-related reasons as well, for instance because of a family member's accident or to care for a seriously ill relative.

5.3 Other New Manifestations

Gig work or platform work is increasingly common. Gig work involves individuals working through platforms, such as an application, and receiving orders for tasks. This type of work is not regulated separately in Swedish law.

An important issue that arises in connection with gig work is whether the individuals working are to be regarded as "employees" in the context of

the law, or as independent agents. To be covered by the protection of Swedish labour law, the person carrying out the work must be considered an employee. There is no legal definition of the term "employee"; instead, the court must decide in each individual case whether a gig worker is to be considered an employee. Note, however, that gig work may become subject to separate regulations through national implementation of the new EU directive on improving working conditions in platform work.

6. Collective Relations

6.1 Unions

Almost 10% of employers in Sweden are members of an employers' organisation, and approximately 70% of employees are members of a trade union. There are approximately 110 different trade unions and employers' organisations in the Swedish labour market. The parties have agreed on more than 650 CBAs, so trade unions are very prevalent on the Swedish labour market. The "Swedish model" of industrial relations is characterised by a high degree of organisation, even though trade union density is currently falling.

The Co-Determination Act contains the general provisions governing the relationship between employers and the trade unions in areas such as association, information, negotiations, industrial actions and labour stability obligations.

According to the Co-Determination Act, an employer has certain consultation and information obligations towards the trade unions. For example, prior to any decision to reorganise the business or terminate employment contracts, the employer must call for and conduct consultations with the trade unions under the applicable CBAs (at both local and national level, if applicable). Even if the employer is not bound by a CBA, they are obliged to consult the trade union of which the employee concerned is a member regarding the planned reorganisation and potential redundancies.

The Act also contains certain interpretation regulations, to the benefit of the trade unions. Generally, these rules give the trade union the right to interpret the CBA until the matter has been finally decided by the court, and are therefore important in the case of disputes.

6.2 Employee Representative Bodies

The local trade unions usually elect one or more representatives to represent the employees at a workplace, under the provisions of the Trade Union Representatives Act. Employees who are trade union representatives may not be prevented from carrying out union work during working hours, may not be discriminated against due to their union activities and are entitled to a reasonable leave of absence to carry out their union activities. The local trade union representative shall manage questions relating to labour at the specific workplace – issues of salary, work environment, reorganisations, etc, are normally covered. A trade union representative enjoys extended protection in a redundancy situation.

The Board Representation Act entitles employees of private companies that are bound by CBAs and have at least 25 employees to appoint two ordinary and two deputy employee representatives to the board of directors. Employees of companies that have at least 1,000 employees and are engaged in different industries are entitled to appoint three ordinary and three deputy employee representatives to the board of directors.

Moreover, Sweden has implemented the European Works Council Directive (Directive 2009/38/EC) and the Directive establishing a general framework for informing and consulting employees in the European Community (Directive 2002/14/EC).

Lastly, in a workplace where at least five employees are regularly employed, one or more safety representatives should be appointed, in accordance with the Working Environment Act. If the employer is bound by a CBA, the safety representatives are appointed by the trade union; otherwise, they are appointed by the employees.

6.3 Collective Bargaining Agreements

The Swedish system is based on the principle that law and CBAs together shall provide a comprehensive framework.

Through membership in an employers' organisation, the employer is bound by the CBAs applicable to that organisation. The employer is also obliged to apply the terms and conditions of the CBA to employees that are not members of a trade union. It is also possible for an employer to sign a CBA directly with one or more trade unions.

Once a collective bargaining agreement has been entered into and is in effect, an obligation to refrain from industrial action comes into effect and prohibits strikes or lock-outs. Breaking the peace obligation will incur liability for damages on the breaching party.

7. Termination

7.1 Grounds for Termination

A dismissal must be based on objective reasons, which are not defined by statute or case law but can relate either to redundancy or to the employee personally. Redundancy covers all reasons attributable to the employer, such as reorganisations, shortage of work or the economic situation of the employer, while personal grounds are all grounds attributable to the employee, such as the employee's conduct or performance.

An overall assessment of all the factors involved must be made when determining whether there are objective reasons for dismissal. A dismissal with notice will never be considered as being based on objective reasons if there were other alternatives available to the employer, such as relocating the employee elsewhere within the business. Therefore, an employer must investigate whether there are any vacant positions within their business that the employee can be offered before a notice of termination is given.

Dismissal Procedure

The procedure for dismissing employees varies to some extent, depending on whether the dismissal is due to redundancy or personal reasons. The procedural requirements to follow are laid down in the Employment Protection Act. Prior to terminating an employment agreement due to redundancy, the employer may be obliged to conduct consultations under the Co-Determination Act if the employer is bound by a CBA or if the employee is a member of a trade union.

The basic principle to be applied when the labour force has to be made redundant is that the employee with the longest aggregate period of employment with the company should be entitled to stay the longest: the employer must select those to be laid off on a "last in, first out" basis. A condition for continued employment is that the employee has sufficient qualifications for one of the available positions that may be offered.

Prior to terminating an employment agreement on personal grounds, the employer must notify the employee concerned in writing and the trade union, if the employee is a trade union member, two weeks in advance. If an employer wants summarily to dismiss an employee without notice, the information must be given one week before the actual dismissal. The employee or the trade union may request consultations with the employer concerning the dismissal, within one week of receiving the information.

The employer must observe certain formal rules set out in the Employment Protection Act when serving a notice of termination to an employee. Notices shall always be made in writing and must state the procedure to be followed by the employee if they wish to claim that the notice of termination is invalid or to claim damages as a consequence of the termination. The notice shall also state whether or not the employee enjoys rights of priority for re-employment. Several statutes contain limitation periods for bringing employment claims, including the Co-Determination Act, the Annual Leave Act and the Employment Protection Act. Furthermore, the Limitations Act stipulates limitation periods for salary and pension claims.

Dismissal of Multiple Employees

In Sweden, there is no principal difference between a termination due to redundancy involving one employee or such a termination involving 150 employees; hence, the Co-Determination Act does not recognise the term "collective redundancies". In contrast to many other European countries, where the obligation to consult collectively is triggered only if there are several redundancies, the provisions on obligations to consult according to the Co-Determination Act are applicable even if the redundancy concerns only one employee (please see the outline for termination due to redundancy described above).

If more than five employees are subject to a redundancy situation and their employments are being terminated, the employer is obliged to notify the Swedish Employment Agency a certain period in advance, depending on how many employees are being terminated. This also applies if the total number of notices of termination is expected to be 20 or more during a 90-day period. Failure to observe this notification obligation may result in a liability to pay a special fee to the state.

7.2 Notice Periods

Statutory notice periods from the employer's side vary between one and six months, depending on the length of the employment term, as follows:

- one month if the length of the employment term is less than two years;
- two months if the length of the employment term is at least two years but less than four years;
- three months if the length of the employment term is at least four years but less than six years;
- four months if the length of the employment term is at least six years but less than eight years;
- five months if the length of the employment term is at least eight years but less than ten years; and
- six months if the length of the employment term is at least ten years.

The length of the notice period may be extended by virtue of CBAs or individual contracts. During the notice period, the employee is obliged to perform work for the employer, and is enti-

tled to salary and all other employment benefits. It is possible for an employer to release the employee from the duty to perform work during the notice period.

The minimum notice period in the case of a termination from the employee's side is one month, but this can be extended by a CBA or an individual employment contract.

There are no statutory provisions regarding severance pay. However, an employee may be entitled to severance pay in accordance with an employment agreement or a termination agreement.

Please see **7.1 Grounds for Termination** regarding union consultations and union representation where the employee is a member of a trade union.

7.3 Dismissal for (Serious) Cause

Summary dismissal may take place where the employee has grossly neglected his or her obligations to the employer.

The summary dismissal may not be based exclusively on circumstances of which the employer was aware either longer than two months prior to the notice of summary dismissal or, should such a notice not be issued, longer than two months prior to the summary dismissal.

Prior to summarily dismissing an employee, the employer must notify said employee in writing and the trade union, if the employee is a trade union member, one week in advance. Within one week of receiving the information, the employee or trade union may request consultations with the employer concerning the dismissal.

The summary dismissal shall be in writing and shall be given to the employee personally. In the notification of summary dismissal, the employer shall state the provisions with which the employee must comply if he or she wishes to bring legal action alleging that the summary dismissal is invalid or to seek damages on the grounds of the summary dismissal.

Upon the employee's request, the employer shall state the circumstances invoked as reasons for the summary dismissal, in writing if the employee so requests.

Summary dismissal shall be deemed effected when the employee receives the notification of summary dismissal.

Summary dismissal means that the employee is not entitled to any notice period or other termination benefits, according to the employment agreement.

7.4 Termination Agreements

The employer and employee are free to enter into a final settlement in a termination agreement; hence, the employment may be terminated disregarding the strict rules of the Employment Protection Act. Consequently, an employee may waive his or her contractual rights. As a rule, an employee cannot waive rights laid down in mandatory law that are not yet accrued, but an employee is free to waive rights that are already accrued. Normally, the employee is financially compensated in order to enter into a termination agreement with the employer that includes a full and final release. There are no specific procedures or formalities to consider when entering into a termination agreement with an employee.

There are no specific requirements for termination agreements in Swedish law. However, all

agreements can be deemed unreasonable and amended or declared invalid by a court, according to general contractual law.

7.5 Protected Categories of Employee

Dismissals that are considered discriminatory according to the Discrimination Act are prohibited. Several other regulations also protect employees from unfair dismissals. For instance, an employee may not be dismissed for reasons related to parental leave or a leave of absence for educational purposes, or part-time employment. Trade union representatives also have specific protection against dismissal and against discrimination based on their union activities.

A trade union representative may not be given less favourable working conditions or employment terms and conditions as a result of his or her activities. Upon termination of his or her duties, the employee shall be ensured the same or a comparable position in respect of working conditions and employment terms and conditions as if he or she had no trade union-related duties. Furthermore, in conjunction with a termination due to redundancy and in conjunction with lay-offs, the union representative shall be given priority for continued work, provided it is of specific importance for trade union activities at the workplace.

8. Disputes

8.1 Wrongful Dismissal

A wrongful termination of employment could be challenged by the employee as not having an objective reason and could be declared invalid by the court. If the termination is declared invalid, the employer may be obliged to retroactively pay salary and benefits for the period from the termination until the court's decision to declare the termination invalid, as well as punitive damages, compensation for economic losses and the costs of the litigation.

8.2 Anti-discrimination

The Discrimination Act prohibits both direct and indirect discrimination as well as harassment in working life based on sex, ethnicity, religion or other belief, disability, sexual orientation, transgender identity or expression, and age.

Furthermore, employers may not discriminate against part-time or fixed-term employees, nor may they treat an applicant or an employee unfairly for reasons related to parental leave under Swedish law. Trade union representatives are also protected from discrimination based on their union activities.

Where a person who believes that they have been subject to discrimination or reprisals proves facts that give cause to believe that they have indeed been subject to discrimination or reprisals, the defendant must prove that there has been no such discrimination or reprisals.

A party who violates the prohibitions against discrimination or reprisals, or who fails to fulfil its obligations to investigate and take measures against harassment or sexual harassment under the Discrimination Act, shall pay compensation for discrimination for any humiliation and personal indignity resulting from the violation. When compensation is decided, the specific purpose of combating such violations of the Act shall be taken into consideration. The compensation shall be paid to the person offended by the violation.

An employer who discriminates against an employee, applicant, etc, or breaches the provisions regarding prohibition against repris-

als shall also pay compensation for the loss incurred. However, this does not apply to loss that is incurred in conjunction with a decision pertaining to employment or promotion, nor to loss incurred as a result of discrimination in the form of insufficient access.

Furthermore, if someone is discriminated against by a provision in an individual contract or in a CBA in a manner that is prohibited under the Discrimination Act, the provision shall be modified or declared invalid if the discriminated person requests it.

8.3 Digitalisation

Digital court hearings have become more frequent, but no new legislation has been implemented that specifically regulates digital court proceedings. It is common for a party to a court hearing or a witness to participate digitally. Pursuant to the Swedish Code of Judicial Procedure, the court may decide that a participant in a hearing should be present via video if it is appropriate and there are specific reasons for doing so. Digital participation in court hearings is generally compliant with the right to a fair trial in Article 6 of the European Convention on Human Rights, which is incorporated into Swedish law.

Digital trade union consultations have become more common as well. There is no regulation on the possibility of digital trade union consultations; instead, it is up to the parties involved to decide how a consultation should proceed.

9. Dispute Resolution

9.1 Litigation

The Labour Court is the first and only instance for employment disputes concerning a CBA or in accordance with the Co-Determination Act, or if a CBA applies between the parties. Other employment disputes are resolved in the district courts, with the Labour Court as the first and final instance of appeal.

Negotiations and consultations between employers and organisations can be held at both a local and a central level.

Regarding judicial disputes, since a trade union organisation has the right to bring an action before the court – regarding a dispute of a CBA, for example – this constitutes a form of class action. According to the Class Action Act, an organisational class action can be commenced by a non-profit association that, according to its statutes, will protect the interest of its employees. Class action claims are uncommon in Sweden.

Furthermore, the right to resort to industrial action is a constitutional right laid down in the Instrument of Government, which applies only to trade unions, employers or employers' organisations. Restrictions of this right are set forth in the Co-Determination Act, which stipulates that an employer and an employee that are bound by a CBA may not initiate or participate in industrial action if an organisation is party to that agreement and has not duly sanctioned the action.

Normally, the employee is represented by a union representative in court if they are a trade union member. Therefore, the employee bears no costs for his or her representation in court, as the costs are borne by the trade union. Employers are also sometimes represented by their employers' organisation, but more often they are represented by an in-house legal representative or by a law firm.

9.2 Alternative Dispute Resolution

The employer and the employee may agree in an employment agreement that any future disputes shall be settled by arbitration. Such a clause may be deemed unreasonably burdensome for the employee and set aside by the courts, particularly if the employee does not occupy a managerial or comparable position.

Dispute resolution regulations may also be specified in CBAs.

9.3 Costs

For employment disputes, the main principle regarding liability for litigation costs is found in the Swedish Code of Judicial Procedure – namely, that the losing party shall be ordered to bear the prevailing party's litigation costs. However, according to the Labour Disputes Act, each party may be ordered to bear its own litigation costs if the losing party had reasonable grounds to bring the action. However, this rule is normally only applied in collective bargaining disputes.

SWITZERLAND

Law and Practice

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Walder Wyss Ltd

Contents

Walder Wyss Ltd is one of the largest law firms in Switzerland, with over 280 fee earners and impressive growth over the past years. Walder Wyss is the only Swiss law firm with a specialised employment team, which is spread across Zurich, Basel, Bern, Lausanne, Geneva and Lugano for seamless client service across offices and languages: French, Italian and German. The employment law team currently consists of 37 attorneys at law: four partners, three managing associates, three counsel, 16 associates and an immigration specialist deal exclusively with employment law issues. It is not only the size of the team, but above all the strong focus of a large part of it exclusively on employment law issues that distinguishes it from the offerings of other large Swiss firms. In January 2024, Walder Wyss opened an immigration law desk, which is part of the employment law team. It is headed by an experienced immigration specialist who deals exclusively with immigration law issues.

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1. Employment Terms

1.1 Employee Status

Blue-Collar v White-Collar Workers

As a matter of principle, Swiss employment law does not provide for the traditional differentiation between blue-collar and white-collar workers, but it does occasionally provide for similar differentiations. This particularly applies to the following provisions contained in the Federal Act on Work in Industry, Trade and Commerce (the "Labour Act") relating to the maximum weekly working time and minimum rest periods.

- Employees holding a higher executive position, employees performing a scientific activity and employees performing an autonomous artistic activity are entirely exempt from any maximum weekly working time and minimum rest periods.
- For ordinary employees in industrial businesses, office staff, technical and other employees (ie, employees performing predominantly intellectual work in offices or office-like jobs), including sales personnel in large retail trade companies, the maximum weekly working time is principally 45 hours.
- For all other employees, particularly those performing predominantly manual activities, the maximum weekly working time is 50 hours. The same applies to office staff, technical and other employees, including sales personnel in large retail trade companies, working in establishments or parts thereof that employ a majority of employees to whom this maximum weekly working time of 50 hours applies.

Other Employee Statuses

There is a whole range of other employee status categories that are subject to special protection (particularly in connection with their working conditions and terminations) due to their particular personal situation (see **1.5 Other Employment Terms** and **7.5 Protected Categories of Employee**).

1.2 Employment Contracts

Permanent v Fixed-Term Employment Contracts

There are two main types of employment contract in Swiss employment law: permanent and fixed-term employment contracts.

While permanent employment contracts are entered into for an indefinite period and may only end upon notice of termination, fixed-term employment contracts cease automatically at the end of their fixed term and may, as a matter of principle, not be terminated prematurely. The only exception to this relates to dismissals for serious cause (see **7.3 Dismissal for (Serious) Cause**).

Parties' (Limited) Freedom to Choose a Type of Employment Contract

As a matter of principle, parties are free to choose the type of employment contract that best suits their needs. They may even agree on a hybrid construct – ie, an employment contract that provides for a fixed (maximum) term but may also be terminated earlier by way of notice of termination.

In order to guarantee a minimum of employee protection, however, case law has developed limits to such freedom. Most notably, multiple consecutive fixed-term employment contracts are to be reinterpreted into one permanent employment contract if there has been no objective reason for choosing consecutive fixed-term employment contracts over one permanent employment contract (so-called "illegal chain employment contracts").

(No) Formal Requirements for Employment Contracts

An employment contract is concluded by way of mutual, corresponding declarations of intent by the employer and the employee, pursuant to which the employee undertakes to work in the service of the employer for a limited or unlimited period, and the employer undertakes to pay remuneration to the employee for such work. As a matter of principle, such agreement does not require the observation of any particular form and can therefore also be concluded orally or even implicitly. However, specific employment contracts such as apprenticeship contracts and contracts with temporary workers require observance of the written form (ie, the contract must be signed by all persons on whom it imposes obligations).

Formal Requirements for Specific Contractual Provisions

For reasons of legal certainty and/or employee protection, a considerable number of specific contractual provisions may only be bindingly agreed upon by observing the written form. This applies, inter alia, to:

- deviations from the statutory compensation for overtime (see **1.3 Working Hours**);
- deviations from the statutory provisions regarding continued salary payments in the case of an employee's incapacity for work (see **1.5 Other Employment Terms**);
- amendments to the statutory notice periods (see **7.2 Notice Periods**); and
- non-compete clauses (see **2.1 Non-competes**).

1.3 Working Hours

Maximum Working Time per Week/Day

Pursuant to the Labour Act (see **1.1 Employee Status**), the weekly working time may only exceed 45 or 50 hours in exceptional circumstances, and various provisions with regard to minimum rest periods (in particular mandatory minimum breaks and the general prohibition of work during the night and on Sundays/public holidays) must be observed which, inter alia, result in a maximum daily working time of 12.5 or 13 hours (depending on the calculation method). However, these principles do not apply to all categories of employees and businesses.

Part-time employees are generally subject to the same provisions as full-time employees – ie, the maximum working time is not calculated pro rata temporis.

(No) Possibility of Flexible Arrangements

The parties' freedom to deviate from the above-mentioned principles is very limited; the provisions are basically mandatory.

Overtime and Extra Hours

Swiss employment law differentiates between overtime (ie, the hours worked in excess of the contractually agreed or customary weekly working time) and extra hours (ie, the hours worked in excess of the applicable maximum weekly working time, if any).

While the employee is obliged to perform overtime if such overtime is required and to the extent that the specific employee is able and may conscionably be expected to do so (less frequently the case for part-time employees), the performance of extra hours requires the existence of exceptional circumstances, in addition to the requirements for the performance of mere overtime.

In variable working time systems, there may be a third important category of hours worked in excess of the applicable weekly working time

(ie, hours worked based on the employee's time sovereignty).

Compensation for Overtime and Extra Hours

Pursuant to statutory provisions, overtime and extra hours are principally compensated by corresponding time off (if the employee consents) or an additional salary payment including a 25% surcharge (in the absence of the employee's consent).

While the parties may contractually exclude any compensation (whether in cash or in kind) for overtime as long as they observe the written form, compensation is mandatory with regard to extra hours. However, for office staff, technical and other employees, including sales personnel in large retail trade companies, such mandatory compensation for extra hours only applies from the 60th extra hour per calendar year.

1.4 Compensation

Minimum and Maximum Compensation

As a matter of principle, the parties are free to agree on the employee's compensation, although there are deviations from this principle.

The most practically relevant minimum compensation requirements are as follows.

- Selected cantons provide for a general hourly minimum salary (Geneva, Jura, Neuchâtel, Ticino and Basel-Stadt).
- In June 2023, two communities (Winterthur and Zurich) voted in favour of a communal hourly minimum salary; however, the respective provisions are not yet in force due to pending legal proceedings.
- Various Collective Bargaining Agreements (CBAs) and so-called standard employment contracts (ie, a special kind of legislative decree) provide for minimum salaries in selected sectors.

The most practically relevant compensation cap is for Swiss stock corporations whose shares are listed on a Swiss or foreign stock exchange. They are subject to certain restrictions with regard to the compensation paid to members of the board of directors, the executive board and the advisory board, as well as to persons close to them (eg, the prohibition of severance payments contractually agreed or provided for in the company's articles of association).

Thirteenth Monthly Salary

The parties are free to agree that the salary shall be paid in 13 instead of 12 monthly instalments. In the absence of a different agreement, such 13th monthly salary shall become due at the end of the year. Due to its legal nature as a salary component, the payment of the 13th monthly salary may not be declared subject to conditions, and it must be paid on a pro rata basis if the employment ends before its due date.

Bonus

The term "bonus" is not defined by Swiss law. Accordingly, established case law provides that, depending on the specific (bonus) agreement and the pertinent company practice, a bonus can be qualified either as a salary component or as a gratification (or as one remuneration element consisting of two independent parts).

Legal qualification as salary component or gratification

A bonus qualifies as a salary component if the payment of the bonus and its amount are not subject to the employer's discretion. This is also the case if the exact bonus amount is clearly determinable independent of any subjective assessment.

A bonus qualifies as a gratification, however, if it is a voluntary extra compensation, meaning that the entitlement per se or at least the exact amount of the bonus is ultimately at the employer's discretion.

In addition, if an employee's total compensation is below the five-fold Swiss median salary in the private sector (approximately CHF390,600 in 2022), Swiss law requires that the bonus is only of an accessory nature in order to potentially qualify as a gratification. The bonus is of an accessory nature if it is of secondary importance in relation to the employee's salary; as a rule of thumb, the bonus may not exceed 100% of the salary in order to remain accessory. In the absence of such accessoriness, at least part of the bonus qualifies as a salary component.

Consequences of such legal qualification

The respective legal qualification (salary component v gratification) is of great importance: to the extent that the bonus qualifies as a salary component, it may not be declared subject to conditions (such as an ongoing/not yet terminated employment, vesting, forfeiture, etc) and the employee has a mandatory (pro rata) claim. The exact opposite is true for bonuses that qualify as entirely voluntary gratifications. In the case of gratifications to which the employee is entitled in principle, they have a mandatory claim to part of the bonus (which may not be determined arbitrarily).

1.5 Other Employment Terms

Vacation

An employee is entitled to at least four weeks of fully paid vacation per year (five weeks if the employee is under the age of 20), at least two weeks of which must be taken consecutively. The timing of the employee's vacation is determined by the employer, although the employer must take due account of the employee's wishes.

The vacation entitlement is mandatory and may not, in principle, be replaced by monetary or other benefits during the employment. Subject to exceptional circumstances, (financial) compensation is only possible at the end of the employment.

Other Absences

As a general rule, the employee is only required to perform their work to the extent that this can reasonably be expected from them. However, the fact that an absence is justified does not necessarily mean that it is also paid.

The most practically relevant reasons for an absence are as follows.

- Illness, accident, legal obligations, public duties and pregnancy – if an employee is prevented from working by one of these (or equivalently severe) personal circumstances without being at fault, they remain entitled to their full compensation for a limited time, depending on (and increasing with) their years of service, but only if the employment has lasted or was concluded for longer than three months. Provided that the chosen alternative solution is no less favourable to the employee, it is possible to deviate from this rule (in writing) in employment contracts, standard employment contracts or CBAs. In connection with absences whose financial consequences are already covered by compulsory insurance (eg, in connection with accidents, disability and official duties), the employer is only obliged to pay the potential difference between the insurance benefits and 80% of the employee's compensation.

- Family responsibilities – to the extent that an employee is legally obliged to care for close relatives (ie, children, spouses and registered partners) and may not avoid an absence for this purpose through reasonable means, the employee remains entitled to their full compensation as in connection with other legal obligations. Moreover, and potentially in addition to that, an employee is entitled to fully paid short-term leaves of up to three days per incident and a maximum of ten days per year in order to take care of a family member or partner living in the same household with a health impairment (and actually requiring care by the employee). Eventually, working parents of a minor child whose health is seriously impaired due to an illness or accident are generally (jointly) entitled to a care leave of up to 14 weeks per incident and care allowances of 80% of the previous average income (but not more than CHF220/day) during such care leave.
- Maternity – female employees are exempt from the obligation to work for 14 weeks after giving birth. To the extent that the Labour Act applies (see **1.1 Employee Status**), the respective exemption is 16 weeks and the employee is even prohibited from working during the first eight weeks. During the first 14 weeks, the employee is generally entitled to receive maternity allowances of 80% of the previous average income (but not more than CHF220/day). Should the new-born require hospitalisation, said allowance entitlement may be extended up to 22 weeks in total.
- Parenthood – after the birth of their child, male employees (or female employees when they are the non-birthing parent) are exempt from the obligation to work for two weeks within the first six months after the child's birth. During such parental leave, the employee is generally entitled to receive parental allowances of 80% of the previous average income (but not more than CHF220/day).
- Adoption – working parents who take in a child under the age of four for adoption are generally (jointly) entitled to an adoption leave of two weeks within the first year after taking in the child. During such adoption leave, the employee is entitled to receive adoption allowances of 80% of the previous average income (but not more than CHF220/day).
- Customary hours and days off – the employee is entitled to the customary hours and days off for dealing with urgent personal matters (such as doctor's appointments) as well as important family matters (such as the passing away of close relatives), but only to the extent that they cannot reasonably be dealt with during the employee's spare time. Despite the absence of a general employer's obligation to continue compensation payments during such customary time off, the latter is assumed once the parties have agreed on a monthly or weekly salary without an express exception in this regard (the opposite is true for hourly salary earners).

Cantonal law may provide for additional entitlements.

Confidentiality and Non-disparagement

Pursuant to the statutory employee's duty of loyalty, the employee must not exploit or reveal confidential information obtained while in the employer's service, such as manufacturing or trade secrets. While the respective confidentiality obligation applies unrestrictedly during the employment, its application after the end of the employment is limited to the extent required to safeguard the employer's legitimate interests.

The same duty of loyalty also requires the employee to principally refrain from any actions

that could be economically damaging to the employer, including making any derogatory statements towards third parties (regardless of their veracity). Whistle-blowing is only protected under very limited prerequisites – ie, if the employee strictly adheres to the principle of proportionality.

Employee Liability

Principle

Subject to a few special provisions, the employee is generally liable for any financial damage they cause to the employer either deliberately or by negligence. While the burden of proof for the existence of financial damages resulting from an employee's breach of contract lies with the employer, it is the employee who must prove that they were not at fault.

The main difference compared to the usual contractual liability lies in the special standard of care and the various circumstances that can lead to a reduction or even complete elimination of the employee's liability.

Circumstances reducing or eliminating the employee's liability

Of particular importance is the employee's degree of fault: mere minor negligence (ignoring something that should have been considered on closer consideration) may result in an extensive reduction or even complete elimination of liability. Medium negligence (ignoring important rules of conduct but not downright elementary duties of caution) may at least result in a significant reduction of liability.

Other practically relevant circumstances are the occupational risk, the level of education or technical knowledge required for the work in question, and the specific characteristics of the employee of which the employer is or should be aware.

Possibility of deviations in favour of the employee

The above-mentioned statutory principles represent the maximum employee liability. Contractual deviations are only possible in favour of the employee.

2. Restrictive Covenants

2.1 Non-competes

Statutory Prohibition of Competition During Employment

During the term of employment, an employee is prohibited from competing with their employer by virtue of the statutory duty of loyalty.

Post-contractual Non-compete Clauses

Validity and enforceability

The employer may only validly agree and enforce a (post-contractual) non-compete undertaking subject to the following prerequisites:

- the non-compete clause must be agreed in writing, and must particularly determine the time, place and scope of the non-compete undertaking;
- the employee must have gained insight into the employer's customer base or manufacturing or business secrets in the course of the employment;
- the employer must face substantial harm as a result of such insight (this is not the case if, for example, the employee's services were predominantly characterised by their personal abilities);
- the employer must have a substantial interest in the prohibition of competition (such interest particularly ceases if the employment is

terminated either by the employer without the employee having given reasonable cause to do so or by the employee after the employer has given reasonable cause to do so); and
- the enforceability of a non-compete undertaking requires appropriate limitation in terms of place, time and scope so that there is no unreasonable impediment to the employee's economic advancement.

While the final point above regarding appropriate limitation is not a validity requirement, agreeing on a (substantial) consideration for the employee's compliance with the non-compete clause at least significantly increases the chances of the latter's enforcement. If a court, acting on its free discretion, deems an agreed non-compete undertaking to be unreasonable, it will reduce the respective undertaking to a reasonable extent.

Consequences of a violation

If the employee violates a valid and enforceable non-compete clause, they become liable to pay damages to the employer. In order to free the employer from the difficult proof of financial damages resulting from such violation, the parties regularly agree on a contractual penalty. The engagement in a competing activity as such may only be prohibited if this has been expressly and unambiguously agreed upon in writing, and if this is exceptionally justified by the employer's violated or threatened interests and the employee's particularly inappropriate behaviour.

2.2 Non-solicits

Non-solicitation Clauses With Reference to Employees

The statutory duty of loyalty prevents the employee not only from competing with the employer but also from enticing away employees during the term of the employment.

Pursuant to the rather controversial case law of the Swiss Federal Supreme Court (SFSC), however, the fact that the statutory provisions only address post-contractual competition in the supply market (but not in the demand market) shall, as a matter of principle, exclude any valid agreements on the prohibition of enticing away employees after the termination of the employment. The situation shall only be different if such actions also affect the supply market, as is the case when temporary employees are being enticed away.

Non-solicitation Clauses With Reference to Customers

Since this always involves competition, any prohibitions with regard to enticing away customers are governed by the same restrictions as common non-compete clauses (see **2.1 Non-competes**).

3. Data Privacy

3.1 Data Privacy Law and Employment

As a general principle, the employer may handle data concerning the employee only to the extent that such data concerns the employee's suitability for their job, or to the extent it is necessary for the performance of the employment contract. The general provisions of the Swiss Federal Data Protection Act (DPA) also apply to employment relationships (since 1 September 2023 in a revised version).

The DPA stipulates a number of principles, including proportionality, transparency and limitations on purpose. It notably also provides for a right of information. Under the previous version of the DPA, this right of information was regularly invoked by employees who have been dismissed by their employer with the purpose

of accessing their entire "personnel file", even though the SFSC has found that a respective employee's request that is made solely for the purpose of obtaining evidence for subsequent civil proceedings may be considered abusive. The revised version of the DPA now explicitly clarifies that the right of information is limited to personal data as such (ie, does not extend to entire documents) and that the request for information can be denied, restricted or deferred if it is manifestly unfounded (particularly if it pursues a purpose contrary to data protection) or if is manifestly querulous. The practical impact of this remains to be seen.

Monitoring and control systems designed to monitor the behaviour of employees at the workplace are generally prohibited. If monitoring or control systems are required for other (legitimate) reasons, they must be designed and arranged in such a way that they do not affect the employees' health and freedom of movement.

4. Foreign Workers

4.1 Limitations on Foreign Workers

In Switzerland, a dual system exists for the admission of foreign workers to the local labour market. Nationals of member states of the European Union and the European Free Trade Association ("EU/EFTA nationals") benefit from the Treaty of Free Movement (TFM) and generally do not need to meet special requirements in order to be permitted to work in Switzerland. However, the nationals of other countries ("third-country nationals") may only be granted access to the Swiss labour market as employees if they meet the strict requirements according to the Swiss Foreigners and Integration Act. As an exception to this, the rights already obtained under the TFM by nationals of the United Kingdom prior to the end of 2020 principally remain protected.

4.2 Registration Requirements for Foreign Workers

EU/EFTA nationals wanting to engage in a remunerated activity in Switzerland according to the TFM are granted a residence permit, which automatically includes a work permit. After immigration to Switzerland, they must register at the community office of the future place of residence and apply to the responsible cantonal authorities for the residence permit. Subject to the presentation of a respective employment contract and depending on the duration thereof, either a short-term residence permit L or a residence permit B (for durations of one year or more) is generally granted. Cross-border commuters who do not have their main residence in Switzerland and who return to their home country at least once per week may apply for a special cross-border permit for the duration of five years. All three permits may be extended.

Under certain circumstances, an application for a residence permit is not required of EU/EFTA nationals. In such instances, a prior online notification via the so-called notification procedure suffices (eg, in the case of a temporary employment contract with a Swiss employer with a duration of less than three months).

Third-country nationals primarily have to apply for a work permit before a residence permit will be issued. Once the employer has submitted the application for the respective employee with all necessary documents, the cantonal labour office will assess it and, if approved, forward it to the federal immigration authority where, in the case of a positive decision, the work permit will be granted. Upon further request, the residence

permit (permit L or B) is issued by the cantonal migration office.

5. New Work

5.1 Mobile Work

Need for a Parties' Agreement

As a matter of principle, mobile work is subject to a parties' agreement – ie, there is neither a general employee's right to mobile work nor a general employee's obligation to mobile work. Temporary exceptions to this may apply in exceptional situations (eg, during pandemics or to accommodate specific health needs).

Equipment, Materials and Expenses

Subject to an agreement or customary practice to the contrary, work equipment and materials shall be provided by the employer. However, the parties may even agree that the employee must provide these without any compensation.

However, necessary work-related expenses (including rent, electricity, internet, etc) must be mandatorily borne by the employer. No necessity is assumed if the employee's mobile working is at their own request and a permanent and suitable workplace is available in the office.

Data Privacy and Confidentiality

Mobile work may result in the application of additional data protection laws. In addition, the employee remains bound by their statutory duty of confidentiality irrespective of their place of work (see **1.5 Other Employment Terms**).

Occupational Safety and Health

The employer is obliged to take all reasonable measures to protect the physical and mental health of all their employees, including mobile workers. Within its scope of application, this also includes compliance with the health protection, working time and rest period provisions of the Labour Act (see **1.1 Employee Status**). However, the latter only apply to activities carried out in Switzerland; for activities carried out abroad, other laws may have to be complied with.

Social Security

Employees who are subject to the TFM and are residing in another member state of the European Free Trade Association or the European Union may not carry out a substantial part of their work from their country of residence in order to be subject to the Swiss social security system. As per the general rules, this means that being subject to the Swiss social security system requires that an employee carries out less than 25% of their total working activity and earns less than 25% of their total remuneration in their foreign country of residence. However, since 1 July 2023, an increased percentage limit of 49.9% (of the total working time) applies in relation to those states which have also signed the pertinent multilateral understanding (inter alia Austria, France, Germany, Italy, and Liechtenstein), provided that employees are conducting so-called telework from their foreign country of residence, although thresholds from a tax perspective generally differ therefrom.

5.2 Sabbaticals

No General Employee's Right

In principle, there is no employee's right to take a sabbatical in the sense of an unpaid special leave in addition to their statutory rights regarding hours and days off and other absences (see **1.5 Other Employment Terms**). It is only in exceptional cases that there is a legal entitlement (eg, for women who are subject to the Labour Act (see **1.1 Employee Status**) and are pregnant, breastfeeding or have recently given birth). In some cases, CBAs (see **6.3 Collective**

Bargaining Agreements) or the employment contract provide for a contractual entitlement.

Parties' Agreement

As a rule, the parties are free to agree on the specific terms and conditions of a sabbatical. While there is no formal requirement to be observed, it is generally in the interest of both parties to put this in writing.

Employer's Information Obligations

In any case, the employer is obliged to provide the employee with certain information on the insurance consequences of taking a sabbatical, which depend on their specific circumstances and may be rather complex.

5.3 Other New Manifestations

Driven by the experience gained during the pandemic, there is a strong tendency in practice toward greater digitalisation and flexibility, in particular regarding the places and times in which work may be performed. This is regularly manifested in the implementation of policies regarding mobile work, desk sharing and/or flexible working structures.

However, there are rather strict limits to this flexibility, especially to the extent that the working time and rest period provisions of the Labour Act apply (see **1.3 Working Hours**), or where mobile work in general and cross-border mobile work in particular is involved (see **5.1 Mobile Work**).

6. Collective Relations

6.1 Unions

Trade unions play a marginal role in some sectors of the Swiss economy, while for other sectors such social partners are highly relevant and active.

In a nutshell, the role of trade unions is to represent employees vis-à-vis employers and to assert the interests of employees on the political stage. Traditionally, this includes the fight for better working conditions, efficient social security and higher wages. Furthermore, in Switzerland, trade unions have established self-help and social institutions, such as unemployment insurance. One of the most important tasks of trade unions is negotiating CBAs (see **6.3 Collective Bargaining Agreements**) as counterparties to employers' associations.

6.2 Employee Representative Bodies

The participation rights of employee representative bodies in Switzerland are regulated by the Federal Participation Act, according to which employees of a company with a headcount of 50 or more are entitled to constitute a works council. At the request of 20% of the employees (or if demanded by 100 employees in a company with a headcount of more than 500), a vote must be held in order to determine whether the majority of those employees casting a vote are in favour of the suggested constitution of a works council.

If a works council has been set up, management must provide it with all the information necessary to carry out its tasks properly. In particular, the employer must inform the works council at least once a year about the business performance and its effects on the employment relationships.

Swiss employment law provides for the information and consultation rights of the works council in specific events. This applies to questions of occupational safety, the process of transfer of undertakings, and collective redundancy procedures. In rare cases, the works council even has a right of co-decision making or, in other words, a type of veto right over certain decisions made by management.

The consequences of failing to involve the works council vary. For example, the dismissal of employees in the context of collective redundancies without a proper consultation of the works council is valid but deemed abusive (see **7.1 Grounds for Termination** and **8.1 Wrongful Dismissal**).

6.3 Collective Bargaining Agreements

A CBA is a contract between the employer or an employers' association and an employees' association.

The normative regulations become part of the individual employment contract. Those provisions are mandatory and are directly applicable to all employees who benefit from a CBA by contract or by law. Unless they are beneficial to the employee, deviating clauses in employment contracts are invalid. Very often, the participating employers also apply the CBA to non-organised employees. Furthermore, CBAs regularly contain contractual provisions that regulate the general obligations and rights of the parties to it, as well as the enforcement of the CBA.

Upon the request of a party to the CBA, the competent authorities may declare a CBA to be generally binding. The effect of this is that the CBA automatically applies to all employers and employees in a particular economic sector or profession, including the ones that do not belong to any association or are not even aware of the existence of the CBA. This procedure has a big practical impact: as of 1 May 2024, as many as 81 CBAs had been declared generally binding (45 on a national level and 36 on a cantonal level).

7. Termination

7.1 Grounds for Termination

(Limited) Freedom of Termination

Ordinary terminations of employment (ie, terminations observing the applicable notice period) do not require a particular lawful reason, although the party giving notice must state its respective reasons in writing if the other party so requests. This is not least because the principle of freedom of termination is limited by the prohibition of terminations in bad faith (so-called "abusive" terminations; see **8.1 Wrongful Dismissal**).

Collective Redundancies

Collective redundancies (ie, the dismissal of a certain minimum number of employees within 30 days and for reasons which are unrelated to the person of the affected employee) are subject to specific procedural requirements. An employer may not decide to carry out collective redundancies before having informed (in writing and with a copy sent to the cantonal employment office) and consulted the works council or (if there is none) the employees. In the context of such consultation, the employer must at least provide the opportunity to formulate (non-binding) proposals on how to avoid redundancies, limit their number and/or mitigate their consequences, failing which any respective dismissal would qualify as abusive (see **8.1 Wrongful Dismissal**) and entitle each employee to a compensation claim of up to two monthly salaries. The minimum duration of such consultation depends on the circumstances of the individual case; for standard cases, two weeks is a suitable point of reference.

If the employer still intends to carry out collective redundancies after such consultation, they may take this decision and issue the required notices of termination. Moreover, the employer must inform the cantonal employment office about the

results of the consultation and provide it with further appropriate information in writing, with a copy sent to the works council or (if there is none) to the employees. The latter step is of particular importance since individual employment relationships terminated in the course of collective redundancies may not end until at least 30 days after such notification.

Duty to Issue a Social Plan

An employer normally employing at least 250 employees and intending to make at least 30 employees redundant within 30 days for reasons which are unrelated to the person of the affected employee is obliged to agree on a social plan with the works council or, in its absence, the employees – ie, an agreement setting out measures to avoid redundancies, to reduce their number and to mitigate their consequences. If no agreement can be reached, however, the social plan will eventually be issued by an arbitral tribunal.

7.2 Notice Periods

Notice Periods

Required observance of notice periods

Unless the employer or the employee claims that there is good cause for a dismissal for serious cause (see **7.3 Dismissal for (Serious) Cause**), terminating a permanent employment contract always requires the observance of a notice period.

Statutory notice periods

Pursuant to the statutory provisions, the following notice periods apply:

- during the probation period (by default the first month of an employment), the employment may be terminated at any time by giving seven days' notice; and
- after completion of the probation period, if any, the employment may be terminated at one month's notice during the first year of service, at two months' notice between the second and the ninth year of service and at three months' notice thereafter, with all such notice to expire at the end of a calendar month.

Possible deviations from the statutory notice periods

Both the probation period and the notice periods (including their effective date) may be amended by written agreement, standard employment contract or CBA, subject to the following restrictions:

- while it is possible to exclude any probation period, the probation period may not be extended beyond three months;
- the notice period may not be less than one month (unless agreed within a CBA and for the first year of service only); and
- the notice periods must principally be the same for both parties (unless the employer has already given notice for economic reasons or at least expressed such an intention) – if the parties nevertheless agree on unequal notice periods, the longer period is applicable to both parties.

Severance

Pursuant to the statutory provisions, the employer is only required to pay the employee compensation during the notice period. While the employer may not unilaterally move the termination date forward by providing a payment in lieu of the notice period, they may put the employee on garden leave during such period (possibly offsetting at least part of the employee's vacation balance and a replacement income), unless the employee exceptionally claims a legitimate

interest in effectively rendering their work (eg, professional athletes and surgeons). However, subject to the respective prohibition with regard to Swiss stock corporations whose shares are listed on a Swiss or foreign stock exchange (see **1.4 Compensation**), providing for severance payments in employment contracts or CBAs is perfectly possible.

(No) Formalities to Be Observed

Issuing a valid notice of termination does not require the observance of any formalities, other than in connection with collective redundancies (see **7.1 Grounds for Termination**) or in the case of a respective contractual agreement (eg, a written form requirement provided by an individual employment contract). For evidentiary purposes, however, it is most recommendable to issue notices of termination in such a way that the fact and date of receipt can be proven.

7.3 Dismissal for (Serious) Cause

Dismissal for Serious Cause

Either party may at all times terminate an employment with immediate effect. While the law declares that dismissal for serious cause must be subject to the existence of good cause, even dismissal for serious cause without good cause results in an immediate termination of the employment. The (non-)existence of good cause therefore only determines the further legal consequences of dismissal for serious cause. Nevertheless, the party declaring dismissal for serious cause must state its respective reasons in writing if the other party so requests.

Good Cause

Good cause is assumed if the party declaring dismissal for serious cause may not reasonably be expected to continue the employment until the expiry of the applicable notice period or the agreed fixed term. While the competent court has a large margin of discretion when assessing this requirement and will consider all circumstances of the particular case, it is well established that good cause may only be affirmed in exceptional and particularly severe cases. Also, in order not to forfeit the right to dismissal for serious cause, it is necessary for the dismissal to be declared within a few days (usually two to three working days) of becoming aware of the relevant (good) cause.

Consequences of Dismissal for Serious Cause

As already explained, a dismissal for serious cause results in the immediate termination of the employment.

In the most practically relevant scenario, where the employer issues dismissal for serious cause due to an employee's (alleged) breach of contract, the following applies:

- if the employer exceptionally succeeds in proving good cause, the employee loses any claims arising from the employment that have not yet been earned (in particular future salary payments) and becomes liable to pay damages to the employer; or
- if the employer fails in proving good cause, the employee is entitled to what they would have earned if the employment had been terminated observing the applicable notice period or by expiry of an agreed fixed term (minus any savings and a replacement income resulting therefrom) and to an additional penalty payment of up to six month's salary.

(No) Formalities to Be Observed

With regard to the (absence of) formalities to be observed, the explanations in connection with ordinary terminations (see **7.2 Notice Periods**)

principally apply mutatis mutandis. The only (rather theoretical) difference is that dismissal for serious cause may not even be declared subject to the observation of contractually agreed formalities.

7.4 Termination Agreements

Permissibility and Requirements

Swiss employment law principally allows for the conclusion of termination agreements, but there are strict limits on the parties' freedom of contract. Most importantly, termination agreements may not be concluded in order to circumvent statutory provisions protecting employees' interests (in particular, mandatory provisions in connection with incapacities for work due to illness or accident – see **7.5 Protected Categories of Employee**); but must rather constitute actual settlements in which the employer also makes concessions. In most cases, one of the very purposes for concluding a termination agreement is to obtain clarity with regard to the termination date by excluding any prolongation of the employment in connection with an employee's incapacity for work, so the parties regularly agree on an additional "voluntary" employer's payment to compensate the employee for such concession. Another popular motive for such an additional employer's payment is to compensate for the impending consequences of an abusive termination (see **8.1 Wrongful Dismissal**).

Reflection Period

Pursuant to (controversial) case law, the conclusion of a termination agreement initiated by the employer requires the employee to be granted a sufficient reflection period. There are no other specific procedures or formalities to be observed when concluding termination agreements.

Consequences of Non-compliance

As non-compliance with the "actual settlement" or reflection period requirements may lead to the entire termination agreement being declared null and void, strictly adhering to these requirements is of the utmost importance in order to actually obtain the legal certainty envisaged in connection with the conclusion of termination agreements.

7.5 Protected Categories of Employee

Temporal and Substantive Protection against Dismissal

Notwithstanding the governing principle of freedom of termination, Swiss employment law provides for both temporal and substantive protection against dismissal. In this context, certain categories of employees benefit from stronger protection than others.

Categories Benefiting from Specific Temporal Protection

In particular, the following categories of employees benefit from specific temporal protection against dismissal (after completion of the probation period, if any).

- Employees performing Swiss compulsory military service, civil defence service or alternative civilian service – protection against terminations during such performance and potentially during a certain period before and after.
- Employees being (partially) incapacitated for work due to illness or accident through no fault – protection against terminations during such incapacitation, but at most for 30, 90 or 180 days (depending on the employee's years of service).
- Pregnant employees and new mothers – protection against terminations during the pregnancy and for 16 weeks after delivery

(possibly for a longer duration in case of a hospitalisation of the newborn or the death of the other parent). Other than in case of the death of the new mother, employees entitled to parental leave do not benefit from a comparable temporal protection against terminations, however, and may only benefit from an extension of the notice period corresponding to the not yet taken days of parental leave (see **1.5 Other Employment Terms**).
- Parents of a minor child with serious health impairments – protection against terminations as long as the entitlement to care leave exists, but no longer than six months from receipt of the first daily care allowance (see **1.5 Other Employment Terms**).

Generally, each of these circumstances triggers separate "proscribed periods", although an exception to this principle applies for incapacities for work arising from one and the same medical condition (relapses in particular).

Any notice of termination given during such proscribed periods is considered void and must be re-issued after the expiry of the proscribed period in order to become effective.

Where notice of termination has been given prior to the commencement of a proscribed period, said notice remains effective. In this case, however, the notice period is temporarily suspended and does not resume until the expiry of the proscribed period. Finally, the prolonged employment is further extended until the next usual end date (ie, generally the next end-of-month, unless agreed otherwise) to ensure consistency with the usual job change dates.

Categories Benefiting from Specific Substantive Protection

The following categories of employees benefit from specific substantive protection against dismissal.

- employees performing non-voluntary legal obligations, members of a trade union and employees performing trade union activities (in a lawful manner) and members of the works council or elected members of a body linked to the business – protection against terminations due to such status; and
- older employees with many years of service – this category may, under certain circumstances (in particular, the employee's position), benefit from an increased employer's duty of care so that the employer must timely inform and consult the employee regarding an intended termination, grant the employee a last chance and also evaluate possibilities to continue the employment before effectively giving notice.

Any termination due to such status or in violation of an employer's increased duty of care would be considered abusive (see **8.1 Wrongful Dismissal**).

8. Disputes

8.1 Wrongful Dismissal

Grounds for Wrongful ("Abusive") Termination Claims

Despite the principle of freedom of termination, terminations can be considered abusive when issued in bad faith (see **7.1 Grounds for Termination**). This general criterion is specified in a non-exhaustive legal enumeration of circumstances.

A notice of termination is considered abusive when it is given by either party in the following circumstances:

- on account of an attribute pertaining to the person of the other party, unless such attribute relates to the employment or substantially impairs co-operation within the business;
- because the other party exercises a constitutional right, unless the exercise of such right violates an obligation arising from the employment or substantially impairs co-operation within the business;
- solely in order to prevent claims under the employment from accruing to the other party;
- because the other party asserts claims under the employment in good faith; or
- because the other party is performing a non-voluntary legal obligation.

A notice of termination given by the employer is considered abusive when it is given in the following circumstances:

- because the employee is or is not a member of a trade union or because they carry out trade union activities in a lawful manner;
- while the employee is an elected employee representative on the works council or on a body linked to the business and the employer cannot cite just cause to terminate the employment; or
- in the context of collective redundancies, without having consulted the works council or (if there is none) the employees.

However, case law has developed further cases in which a termination may be deemed abusive.

Consequences of Abusive Terminations

Even an abusive termination remains valid and there is, in principle, no claim to continued employment (see **8.2 Anti-discrimination** for an exception to this principle). However, the terminated party is entitled to a compensation payment of up to six monthly salaries (two monthly salaries in connection with collective redundancies – see **7.1 Grounds for Termination**). The exact amount of compensation is to be determined considering all circumstances of the particular case (such as the seriousness of the terminating party's misconduct).

Procedural Requirements

In order to avoid the forfeiture of such compensation claim, the party receiving notice must submit a written objection against the termination before the expiry of the notice period, and it must bring the claim before the courts within 180 days of the end of the employment.

8.2 Anti-discrimination

General Principles

Anti-discrimination issues are typically raised in connection with abusive termination claims (see **8.1 Wrongful Dismissal**). In such cases, it is the terminated party that must prove the existence of the circumstances leading to the abusiveness of the termination.

Specific Provisions Regarding Gender Discrimination

Federal Act on Gender Equality

The Federal Act on Gender Equality (GEA) provides for specific protection against both direct and indirect discrimination on the basis of gender in all areas of working life, not least by providing for a special burden of proof and additional damages/relief.

Burden of proof

The GEA provides for a lowered burden of proof for the employee. In connection with the allocation of duties, the setting of work conditions,

pay, basic and continuing education and training, promotion and termination (but not in connection with a discriminatory refusal of employment and sexual harassment), discrimination is presumed if the employee can at least substantiate this with prima facie evidence.

Applicable damages/relief

Under the GEA, an employee may challenge a termination if it takes place without reasonable cause following an employee's internal complaint of discrimination based on gender or an employee's initiation of respective proceedings before a conciliation board or a court (so-called revenge dismissal). However, according to an express GEA provision, the employee may also opt against continuing the employment and claim a compensation payment for abusive termination.

The GEA also provides for a whole range of remedies against gender discrimination beyond the field of terminations of employment. In particular, an employee may claim the (retrospective and future) elimination of a discriminatory pay gap. In the case of discrimination by way of sexual harassment, the employee may, inter alia, claim a compensation payment of up to six monthly average salaries in Switzerland, unless the employer proves that they took measures that have been proven in practice to be necessary and adequate to prevent against sexual harassment and which they could reasonably have been expected to take.

In the case of a discriminatory refusal of employment, the employee may claim a compensation payment of up to three monthly salaries.

8.3 Digitalisation

While international arbitration proceedings have been highly digitalised for quite some time, the same cannot be said about ordinary civil proceedings. However, as of 1 January 2025, there will finally be a legal basis in Switzerland for conducting hearings and examining witnesses through videoconferencing (or teleconferencing) in ordinary civil proceedings. This will, however, always require the consent of all parties involved.

9. Dispute Resolution

9.1 Litigation

Specialised Employment Forums

As a matter of principle, employment disputes between private parties are adjudicated by the ordinary judicial instances. Many cantons have established specialised employment court panels for this purpose.

Special provisions apply for employment disputes where the amount in dispute is less than CHF30,000, or for disputes that are based on the GEA (see **8.2 Anti-discrimination**). In these cases, the court generally establishes the facts ex officio and the respective proceedings are characterised by their simplicity and effectiveness in terms of time and costs (there are no court fees, for example, but, subject to further cantonal exemptions, there are costs for professional representation).

(No) Class Action Claims

Swiss law does not provide for class action claims, but the strengthening of collective redress is a current topic in the legislative process. Also, as the law stands, the court may already decide to order the joinder of separately filed claims.

Representations in Court

Generally, only lawyers are allowed to act as professional representatives in court proceedings.

Cantonal law may provide for exceptions from this principle, however, particularly in connection with employment law disputes.

9.2 Alternative Dispute Resolution

Domestic Arbitration

While the topic of the domestic arbitrability of employment disputes is intensely debated in Swiss doctrine, the SFSC has recently confirmed that an employee's claims against their employer are not arbitrable if they arise from mandatory provisions of the law or a CBA. However, the situation looks different for arbitration agreements concluded one month after the termination of the employment: from this point in time, the parties may conclude an arbitration agreement with regard to any and all claims arising from the employment.

International Arbitration

In international arbitration, employment disputes shall principally be arbitrable without any specific restrictions.

9.3 Costs

In most cases, the general rule applies that procedural costs (court fees and costs for professional representation, if any) are allocated in proportion to the outcome of the case (ratio of prevailing and losing; see **9.1 Litigation** for the potential absence of court fees and costs for professional representation in some cases).

Moreover, it is important to note that the potentially reimbursed costs for professional representation do not correspond to the actual costs incurred but are determined based on cantonal tariffs, mainly depending on the amount in dispute and hardly ever matching the effective costs. Subject to a respective (standard) agreement to this effect, any difference must be borne by the client.

Trends and Developments

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Walder Wyss Ltd

Walder Wyss Ltd is one of the largest law firms in Switzerland, with over 280 fee earners and impressive growth over the past years. Walder Wyss is the only Swiss law firm with a specialised employment team, which is spread across Zurich, Basel, Bern, Lausanne, Geneva and Lugano for seamless client service across offices and languages: French, Italian and German. The employment law team currently consists of 37 attorneys at law: four partners, three managing associates, three counsel, 16 associates and an immigration specialist deal exclusively with employment law issues. It is not only the size of the team, but above all the strong focus of a large part of it exclusively on employment law issues that distinguishes it from the offerings of other large Swiss firms. In January 2024, Walder Wyss opened an immigration law desk, which is part of the employment law team. It is headed by an experienced immigration specialist who deals exclusively with immigration law issues.

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New Aspects of Swiss Parental Leave

Since the Swiss electorate voted in favour of same-sex marriage in 2022, Switzerland has had to adapt its parental leave system to provide rules for same-sex parents who are neither the biological mother nor the biological father of the child. This adaptation came into force on 1 January 2024 and mainly consisted of renaming "paternity leave" as "leave of the other parent" as well as renaming "paternity compensation" as "compensation of the other parent". As a result, female employees who are the legal spouse of a newborn's mother can now benefit from the same parental leave entitlements that were previously reserved for male employees who become fathers.

In addition, from 1 January 2024, Switzerland's paid parental leave provisions now also account for the sudden death of one of the newborn's parents. If the other parent of a newborn dies while said parent was still entitled to their "leave of the other parent", the remaining leave entitlement of the deceased parent is transferred to the mother of the newborn child. The surviving mother is subject to the same restrictions as the child's other parent – ie, she has to take the transferred leave entitlement within the first six months of the newborn's life or lose her entitlement. However, this does not affect her existing entitlement to paid maternity leave – ie, any leave she receives as a result of the death of the other parent would be in addition to her maternity leave entitlement (see **1.5 Other Employment Terms** in the Swiss Law and Practice chapter in this guide).

On the other hand, if a mother dies while she is still entitled to maternity leave, the remainder of the deceased mother's leave entitlement is transferred to the surviving parent of the newborn child. The surviving parent is subject to the same restrictions as the newborn child's mother, which means that the surviving parent must take the transferred leave entitlement immediately after the death of the deceased mother. In addition, the surviving parent loses the remainder of the transferred leave entitlement if they start working before their leave entitlement has expired.

Furthermore, while the surviving other parent is using the leave entitlement transferred from the newborn child's deceased mother, they profit from the temporary protection new mothers are granted under Swiss law in regard to termination of employment.

Workplace-Related Incapacity to Work

Under Swiss law, employees who are unable to work due to illness or accident through no fault of their own benefit from temporary protection against ordinary termination of employment. This temporary protection is limited in time and depends on the affected employee's length of service for the employer (see **7.5 Protected Categories of Employee** in the Swiss Law and Practice chapter in this guide). For many years, Swiss courts and legal scholars have held different opinions on whether employees may also profit from such temporary protection if their incapacity to work is workplace-related as opposed to universal.

Workplace-related incapacity to work is typically the result of a workplace-related conflict that renders the employee unable to perform their duties at their regular workplace, without preventing the employee from performing their work elsewhere and without restricting other areas of the employee's life (eg, leisure, vacation or hobbies). In contrast, a non-workplace-related incapacity to work (eg, an employee coming down with a severe cold) generally affects all aspects of the employee's life.

The Swiss Federal Supreme Court was tasked with finally deciding this hitherto controversial question (albeit in a case of a public sector employee). In its ruling dated 26 March 2024, the Swiss Federal Supreme Court held that the (temporary) protection against ordinary termination in case of incapacity to work was introduced not because the employee's condition at the time of receiving notice of termination would prevent them from seeking other employment, but because employment by a new employer at the end of the ordinary notice period is generally highly unlikely due to uncertainty as to the duration and extent of the employee's incapacity to work. Therefore, the Swiss Federal Supreme Court held that the (temporary) protection against ordinary termination in the event of incapacity to work does not apply if the employee's health impairment proves to be so insignificant that it does not prevent the affected employee from taking up a new job. The Swiss Federal Supreme Court specified that this is particularly the case if the health impairment is confined to the workplace – ie, constitutes a workplace-related incapacity to work.

No Application of Criminal Procedural Rules in Case of an Internal Investigation by an Employer

Before a recent decision by the Swiss Federal Supreme Court, there had been a longstanding debate among Swiss legal scholars and Swiss courts about which procedural rights, if any, employers have to grant their employees when conducting an internal investigation. In regard to investigations concerning the accused employee, many legal scholars had previously held that employers must award their employees under internal investigation rights that closely resembled those of an accused person in a criminal investigation, in particular:

- the right not to incriminate oneself;
- the right to refuse testimony;
- the right to have an attorney or another person of their choice present during interviews; and
- the right to confront the accuser.

On 19 January 2024, the Swiss Federal Supreme Court finally settled the matter. In the case before the Swiss Federal Supreme Court, an employer had terminated the employment relationship with an employee after it had concluded in its own internal investigation that an accusation of sexual harassment against the employee was credible. The employer had come to this conclusion after it had interviewed several of its employees, including the accused and the allegedly harassed person and after it had searched some of the accused's electronic communications with regard to his comments about the allegedly harassed person. The accused had challenged the termination of his employment as wrongful, claiming that his employer had not:

- provided him with sufficient information and time to prepare for his interview;
- had not given him sufficiently concrete information about the accusation to defend himself; and
- had not informed him that he had the right to have a person of his choice present during the interview.

However, the Swiss Federal Supreme Court ultimately held that employers did not have to grant their employees rights typically associated with criminal procedures when conducting an internal investigation. It reminded the parties that internal investigations held by (private sector) employers were fundamentally different to a criminal investigation conducted by state authorities, not only in regard to the distribution of power of the

parties involved, but also in regard to the consequences resulting from such investigations (termination of employment as opposed to fines or imprisonment). To illustrate this difference even further, the Swiss Federal Supreme Court reiterated that a mere suspicion of wrongdoing can be sufficient to have the right to (rightfully) terminate the employment relationship with an accused employee, while a mere suspicion cannot be the basis of a (rightful) criminal conviction of an accused person by state authorities.

Additional Monthly State Pension Payment

On 3 March 2024, the Swiss electorate voted to amend the current state pension system to include an additional monthly payment to the already existing 12 (monthly) state pension payments per year. The aim of this measure was to provide a degree of financial relief to pensioners who had been affected by the constant rise in the cost of living that Switzerland has experienced over the last couple of years.

Following the approval of the respective national initiative by the Swiss people, the additional monthly state pension payment will be paid out to pensioners from the year 2026 onwards. It is currently still unclear whether the initiative's implementation will result in pensioners receiving an additional (13th) payment in December or whether pensioneers will continue to receive (only) 12, but proportionally increased, state pension payments per year.

Furthermore, since the national initiative did not specify how to finance this increase in pension payments, the Swiss government now has to come up with a respective proposal. The most anticipated and discussed options are either an increase in social security contributions due on (self-)employment-related income or an increase in Swiss value added tax as well as combinations of both these measures. However, given the general unpopularity of either of these measures, there is a risk that the Swiss people will vote against the implementation of such measures, negatively impacting the financial situation of the Swiss state pension system.

New Social Security Agreement between Switzerland and Argentina

In May 2024, Switzerland and Argentina concluded a bilateral social security agreement in line with the many other social security agreements Switzerland has concluded with selected countries worldwide (such as the USA, Canada, Australia, Brazil and Japan).

The bilateral social security agreement covers old-age, survivors and invalidity insurance in particular and aims to facilitate co-ordination between the two countries' respective social security systems. Furthermore, the agreement largely guarantees equal treatment of insured persons as well as easier access to benefits and regulates the payment of state pensions abroad. In addition, the agreement also promotes economic exchange between the two countries by streamlining the social security aspects related to the posting of workers to the respective other country. Lastly, the agreement provides a legal basis for both countries to fight related social security abuse.

Before the agreement can enter into force in 2025, it has to be approved by both countries' respective parliaments.

Special Migration Law Status for Ukraine Refugees

Since deciding to grant refugees from Ukraine so-called "protection status S" in March 2022, the Swiss Federal Council has extended this measure several times. The last extension of the

protection status S was decided in November 2023, prolonging the measure until March 2025.

However, criticism of the protection status S has risen steadily in recent months. While the Swiss government continues to believe that Switzerland has a duty to offer people from war-torn Ukraine refuge, plans regarding a restructuring of the protection status S have surfaced.

Given the low level of employment amongst Ukrainian refugees in Switzerland (23% as of April 2024; compared to 50% in the Netherlands and Norway), the Swiss Federal Council reached out to Swiss employer associations, among others, for suggestions. One of the main problems identified relates to the idea that people under the protection status S are supposed to return to their home once the war is over and are not granted the right to stay or switch to a regular Swiss residence permit after a certain time spent in Switzerland. This makes it difficult for Swiss employers to plan ahead, as the people employed under the protection status S could or would have to leave again quickly if the situation in Ukraine were to change. Given this set-up, many Swiss employers have been and remain hesitant to invest in the training of persons under protection status S. In addition to the language barrier many Ukrainian refugees face in Switzerland, this has been seen as one of the main factors contributing to low employment levels amongst people under protection status S.

In reaction, the Swiss Federal Council has openly discussed the idea of facilitating the transition of persons under protection status S to regular Swiss resident permits under specific circumstances. The Swiss Federal Council did not specify, however, if residence permits granted to Ukrainian refugees through this channel would be counted toward the yearly quota of residence permits Swiss cantons are allowed to grant to non-EU or non-EFTA nationals. Given that many Swiss employers are already struggling to find qualified specialists in Switzerland as well as in EU and EFTA member states, Swiss employers' associations have voiced their concern that Ukrainian refugees could soon compete with specialists from non-EU or non-EFTA countries for residence permit quotas if Ukrainian refugees will be able to switch from protection status S to residence status.

Given this blowback, it is expected that the migratory situation for people under protection status S will not change in the near future in Switzerland.

TAIWAN

Law and Practice

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Contents

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Dentons Taiwan (Dacheng Taiwan) was established in 2010 and boasts over 50 lawyers and legal consultants. As one of the world's largest law firms, the Taiwan office includes approximately ten lawyers specialising in employment and labour law, providing strategic legal solutions to ensure multinational businesses align with local laws while maintaining a consistent corporate culture. The firm offers extensive expertise in a variety of practice areas, including labour and employment, TMT, dispute resolution, corporate and M&A, capital markets and cross-border investment. Notably, the firm's team excels in handling employment-related disputes, compliance audits and complex negotiations, and has significant experience advising on high-stakes terminations and restructuring processes. The firm's global network spans key markets such as China, Hong Kong, Southeast Asia, Europe and the Americas, allowing it to seamlessly handle local and international legal challenges.

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1. Employment Terms

1.1 Employee Status

The Taiwan Labor Standards Act does not specifically distinguish between blue- and white-collar workers with respect to domestic employees. Instead, this distinction mainly applies to foreign workers under the Employment Service Act, which categorises them into two groups: specialised or technical workers (white-collar) and those primarily engaged in manual labour (blue-collar).

For domestic workers, distinctions under the Labor Standards Act are based on the nature of the employment contracts, distinguishing between definite- and indefinite-term contracts. Additionally, Taiwan recognises apprenticeships, which are regulated separately.

1.2 Employment Contracts

Taiwan's labour law recognises two main types of employment contracts: indefinite and definite. Definite-term contracts are restricted to specific circumstances, such as temporary, short-term and seasonal contracts, as well as to particular project engagements as stipulated by Article 9 of the Labor Standards Act. The maximum durations for these contracts are as follows: up to six months for temporary or short-term, nine months for seasonal and over one year for project-specific contracts; the latter requires prior notification to the appropriate authority.

Although a written employment contract is not universally mandated in Taiwan, it is required for apprentices as per Article 65 of the Labor Standards Act. Despite this, it is advisable to formalise all employment agreements in writing to ensure clarity and legal compliance. Article 7 of the Enforcement Rules of the Labor Standards Act recommends that employment contracts include key elements such as:

- job description and workplace;
- working hours, breaks and rotational shifts;
- salary details, including payment methods and timing;
- contract terms, termination conditions and retirement policies;
- benefits including severance, pension and bonuses;
- worker responsibilities for expenses;
- safety, health and welfare policies;
- labour training;
- disciplinary and reward systems; and
- other relevant rights and obligations of employees and employers.

1.3 Working Hours

Under the Labor Standards Act, the maximum allowable working hours are 8 hours per day and 40 hours per week (Article 30). Overtime is permitted but cannot exceed 12 hours in a single day or 46 hours per month (Article 32). For every four consecutive hours worked, employees are entitled to a minimum break of 30 minutes (Article 35). Additionally, employees should receive one regular day off and one rest day off every seven days (Article 36), and they are entitled to annual paid leave (Article 38).

The Ministry of Labor also provides for flexible work schedules, allowing two-, four- and eight-week flexible working periods for eligible industries and thereby facilitating a more adaptable employment environment.

Part-time employment contracts are subject to the same labour rights as full-time contracts, with specific adaptations to account for reduced working hours as outlined in the "Guidelines for Hiring Part-time Workers".

Overtime provisions are also governed by the Labor Standards Act, which integrates comprehensive regulations to ensure fair compensation and proper working conditions for all employees.

1.4 Compensation

In accordance with Article 21 of the Labor Standards Act, wages are to be negotiated between the employer and employee but must not fall below the minimum wage. The minimum wage covers remuneration earned during "normal working hours" and excludes overtime payments and bonuses. Notably, Taiwan does not guarantee a 13th-month salary, and there is no specific legislation solely dedicated to setting the minimum wage.

Currently, the Basic Wage Deliberation Committee, initiated by the Ministry of Labor, typically convenes in the third quarter of each year to discuss potential adjustments to the minimum wage.

The Ministry of Labor in Taiwan has recently prepared a draft Minimum Wage Act encompassing 19 articles. This draft outlines the creation of a "Deliberation Council" tasked with holding regular meetings and defines "deliberation reference indicators" to ensure a comprehensive decision-making process regarding minimum-wage adjustments.

1.5 Other Employment Terms

Vacation and Leave Entitlements

Employees in Taiwan are entitled to various forms of paid and unpaid leave under multiple legislative frameworks, including the Labor Standards Act, the Regulations of Leave-Taking of Workers and the Gender Equality in Employment Act. The provisions for leave include:

- wedding leave – eight days with full pay;
- bereavement leave – three to eight days with full pay, depending on the relationship to the deceased;
- sickness leave – up to 30 days annually at up to half pay;
- personal leave – 14 days per year without pay;
- military/public leave – full pay (duration not limited);
- menstruation leave – one day per month at half pay (up to three days per year);
- maternity leave – eight weeks, with the pay varying depending on the length of service;
- miscarriage leave – four weeks for pregnancies over three months, one week for pregnancies of two months and above and five days for pregnancies less than two months, with full pay if the employee has been employed for over six months (otherwise, 50% pay);
- pregnancy check-up leave – seven days with full pay;
- pregnancy check-up accompaniment and paternity leave – seven days with full pay;
- parental leave – up to two years until the child reaches three years of age, without employer pay but eligible for an allowance; and
- family care leave – seven days per year, counted within personal leave, without pay.

Overtime Compensation

Employees are generally entitled to overtime pay under the Labor Standards Act for rest-day overtime, regular-leave overtime and holiday overtime. Employers must compensate employees for extended work hours as follows.

- rest-day overtime:
  (a) for the first two hours, payment is one-third above the normal hourly wage;
  (b) for two to eight hours, payment increases to two-thirds above the normal hourly

wage; and
(c) for eight to 12 hours, payment escalates to one- and two-thirds above the normal hourly wage;
- regular-leave overtime:
  (a) work on regular leave is compensated for at least eight hours; and
  (b) overtime beyond eight hours on regular leave is paid at double the rate; and
- public holidays overtime:
  (a) for up to eight hours, pay is equivalent to eight hours at the normal hourly wage;
  (b) for eight to ten hours, pay increases by one-third of the normal hourly wage; and
  (c) for ten to twelve hours, pay increases by two-thirds of the normal hourly wage.

Confidentiality and Liability

Regarding confidentiality and non-disparagement, Taiwanese labour law does not specifically mandate these requirements; instead, they are typically governed through employment contract terms.

However, if an employer's confidential information qualifies as a trade secret protected by appropriate confidentiality measures, employees are prohibited from disclosing such information under the Trade Secrets Act.

2. Restrictive Covenants

2.1 Non-competes

In Taiwan, the Labor Standards Act outlines specific conditions under which post-termination non-compete covenants are considered valid and enforceable. These covenants must protect legitimate business interests, particularly concerning employees privy to trade secrets, and must be reasonable in terms of duration, geographical scope and the nature of the restricted activities. Additionally, there is a requirement for employers to provide reasonable compensation for employees who adhere to these restrictions after employment. The enforceable duration for non-compete clauses is capped at two years.

Pursuant to Article 7-3 of the Enforcement Rules of the Labor Standards Act, the enforceability of non-compete clauses also hinges on providing "reasonable compensation" during the non-compete period. Requirements for meeting the definition of reasonable compensation include:

- the monthly compensation must not be less than 50% of the employee's average monthly wage at the time of resignation;
- the compensation should be adequate to support the employee during the non-compete period;
- the compensation should equate to the losses incurred by the employee due to the restrictions regarding the period, area and scope of occupational activities, as well as prospective employment limitations; and
- other relevant factors that may affect the reasonableness of the compensation should be considered.

2.2 Non-solicits

Taiwan's labour law does not explicitly regulate non-solicitation covenants; thus, the enforceability and validity of restrictions against soliciting customers, employees or suppliers post-employment are not specifically addressed.

However, as a best practice, it is generally advisable to include non-solicitation clauses in employment contracts to safeguard business interests without statutory regulation.

3. Data Privacy

3.1 Data Privacy Law and Employment

Taiwan's Personal Data Protection Act grants employees specific rights concerning their personal data that are irrevocable and cannot be contractually limited. These rights ensure the employees' control over their personal information and include:

- the right to inquire about and review personal data held by the employer;
- the right to request copies of their personal data;
- the right to supplement or correct any inaccuracies found in their personal data;
- the right to demand a halt in the collection, processing or use of their personal data by the employer; and
- the right to request the deletion of their personal data from the employer's records.

These provisions are designed to protect the privacy and integrity of employee data and ensure that employers handle personal information responsibly and transparently.

4. Foreign Workers

4.1 Limitations on Foreign Workers

General Rules

The employment of foreign workers in Taiwan is governed by Articles 42 to 62 of the Employment Service Act and the Regulations Governing Visiting, Residency, and Permanent Residency of Aliens. These laws require employers to obtain employment permits for foreign workers, specify the necessary documentation, define permissible job categories and establish the qualifications required for both employers and employees. The validity period of the employment permit is also stipulated within these regulations.

Employers who hire foreign workers without the requisite authorisation are subject to administrative fines and may face criminal charges, as outlined in Articles 63 and 68 of the Employment Service Act.

Visas

While Taiwan does not impose numerical limits on most short-term visas, there is a specific cap for foreign professionals seeking employment: only 1,000 six-month employment-seeking visas are issued annually under Article 11 of the Act for the Recruitment and Employment of Foreign Professionals. This quota is enforced by directives from the Ministry of Foreign Affairs and the Ministry of the Interior.

Spouses

Spouses and children of foreign workers are eligible to apply for dependent residency; however, this status does not automatically grant them the right to work. Spouses desiring to work must obtain their own work permits under the guidelines set forth in Articles 42 to 62 of the Employment Service Act, as per the Immigration Act and the Regulations Governing Visiting, Residency, and Permanent Residency of Aliens.

This ensures that all foreign workers, including spouses of authorised workers, meet local employment regulations before they can commence employment.

Resident Labour Market Test

There is no requirement for a labour market test in Taiwan as a prerequisite for employers to hire foreign workers, or for the issuance of short- or long-term visas.

4.2 Registration Requirements for Foreign Workers

In Taiwan, employers must obtain authorisation from the central competent authority before hiring foreign workers, except under special regulations. This involves a review and approval process by the Ministry of Labor, which must be completed before the foreign professional can commence employment. Each employment permit application for foreign professionals can be granted for up to three years, with the possibility of renewal without limitation on the number of extensions. If the foreign professional meets the criteria for specific talents, the permit can be extended for up to five years per application.

Most foreign workers must be hired by an employer and sign an employment contract, which is accompanied by the necessary documentation to apply for a "Work Permit for Foreign Professionals".

Notably, foreign individuals can also apply directly to the Ministry of the Interior for an Employment Gold Card, which allows them to engage in professional work once approved by the Ministry of Labor after a joint review of their qualifications.

5. New Work

5.1 Mobile Work

Taiwan currently lacks specific legislation for mobile work except for guidelines issued during the COVID-19 pandemic by the Occupational Safety and Health Administration. These guidelines, titled "Reference Guidelines for Home Office Occupational Safety and Health", require employers to identify potential hazards in the home office environment, conduct risk assessments, and implement appropriate control measures within a reasonably practicable scope. Employers must also pay attention to the mental and physical health of home workers.

Regarding data privacy, mobile work must adhere to the provisions of the Personal Data Protection Act concerning the collection, processing, and use of personal data by non-governmental agencies.

5.2 Sabbaticals

Taiwanese law does not provide specific regulations regarding sabbatical leave. This type of leave is typically not recognised formally within Taiwan's regulatory framework, leaving it to the discretion of individual employers to offer sabbatical options as part of their employment policies based on internal company rules or mutual agreements with employees.

5.3 Other New Manifestations

As the concept of "new work" evolves, one of the notable trends is desk sharing in co-working spaces, which reflects a shift towards more flexible and collaborative, and less permanently assigned, work environments. This approach offers various benefits such as increased flexibility, reduced company overheads and opportunities for networking. However, it also brings challenges related to data security and personal privacy.

In co-working and desk-sharing settings, the lack of permanent personal workspaces complicates the safeguarding of sensitive information. Companies must implement robust data security policies that address:

- physical document security – ensuring that sensitive paperwork is securely stored and not left unattended on shared desks;

- digital data protection – utilising secure networks for data transmission, employing strong encryption and ensuring that digital devices are protected against unauthorised access;
- confidentiality in open environments – training employees on the importance of maintaining confidentiality when discussing sensitive matters and using privacy screens and designated "quiet zones" for confidential discussions; and
- adapting company policies for flexible workplaces.

Organisations adopting new work models like desk sharing should revise their operational policies to address these challenges. Policies should clearly define expectations for data protection and outline employee responsibilities in shared work environments. Additionally, implementing regular training sessions on data privacy and security can help mitigate risks associated with mobile and flexible work settings.

6. Collective Relations

6.1 Unions

Foundational Role and Legal Framework

Unions in Taiwan are pivotal organisations formed under democratic principles aimed at upholding and improving the labour conditions and economic status of workers. The primary legislative framework governing the formation and operation of unions is the Labor Union Act, which explicitly affirms every worker's right to organise and join unions. These rights are essential as they empower workers to collectively negotiate better working conditions and protect their employment rights.

Types of Unions

According to Article 6 (1) of the Taiwan Labor Union Act, unions can be categorised into three types: "enterprise unions", "occupational unions" and "industrial unions". This classification helps tailor union activities to the specific needs of different sectors and workplaces.

The Fundamental Labour Rights

The "three rights of labour", namely the rights to unionise, negotiate collectively and dispute collectively, are fundamental collective rights aimed at improving labour conditions and enhancing social and economic status. These rights are indivisible and closely interrelated, with the right to unionise being particularly crucial as it forms the foundation for collective action and voice.

Collective Bargaining and Dispute Resolution

Unions represent their members in collective bargaining with employers to enhance labour conditions and protect employment rights. Should negotiations fail, the Labor Union Act allows workers to legally strike or engage in collective dispute actions to compel employers to agree to the conditions proposed by the union.

Role and Importance of Unions

Unions are voluntary organisations for workers that embody the right to free association, which is a special and important human right and a core labour standard crucial for supporting democratic and legal order. Additionally, unions play a unique role as a bridge in establishing stable and harmonious labour relations. The Labor Union Act underscores the purpose of union formation to promote worker solidarity, elevate their status and improve their living conditions, thereby acting as a vital component in the social and economic development of Taiwan.

6.2 Employee Representative Bodies

Formation and Legal Rights

In Taiwan, every worker has the right to organise and join unions, as stipulated by Article 4 of the Labor Union Act. Furthermore, Article 11 of the same Act requires a union to initially be formed by at least 30 workers. These workers must organise a preparatory committee, which is responsible for conducting public membership drives, drafting statutes and convening an inaugural meeting. The committee is then required to submit the necessary documentation, including statutes and member directories, to the local competent authority within 30 days after the union's establishment meeting for official registration.

If the union is organised on a national scale, registration must be sought directly from the central competent authority, namely the Ministry of Labor.

Role in Collective Bargaining

These representative bodies play a crucial role in the collective bargaining process, negotiating on behalf of all members to enhance labour conditions and protect employment rights.

Should negotiations fail, the law empowers workers to legally strike or initiate collective dispute actions to enforce the conditions proposed by the union. This process is foundational in maintaining fair labour practices and protecting worker rights under Taiwanese law.

6.3 Collective Bargaining Agreements

Legal Framework and Implementation

A collective bargaining agreement in Taiwan is a formal written contract negotiated between an employer (or an employer's organisation) and a union established under the Labor Union Act. The agreement is structured to manage labour relations and related matters, conforming to the procedural guidelines outlined in the Collective Agreement Act.

Content and Binding Nature

The potential contents of these agreements are comprehensive, including labour conditions like wages, work hours, allowances and safety, as well as organisational matters such as union operations and enterprise facilities. Article 12 of the Collective Agreement Act provides a detailed list of negotiable items that can be included in these agreements.

Ratification Process

According to Article 9 of the Collective Agreement Act, for an agreement to be effective, it must be ratified either by a majority vote at a general or representative assembly of the union or employer group or through written consent from three-quarters of all members.

If the collective bargaining agreement is not ratified according to these stipulations, it lacks legal force until the required approval process is completed. This ensures that all agreements genuinely represent the interests of the members and contribute positively to the labour-management relationship, fostering a stable and harmonious work environment.

7. Termination

7.1 Grounds for Termination

Requirements for Dismissal and Procedures Based on Grounds for Termination

Employers must adhere to a fair process before terminating an employee, which varies based on the specific grounds for dismissal. The process must include severance pay, reporting the dis-

missal to competent authorities and complying with the minimum advance notice period.

Statutory Grounds for Termination

The Labor Standards Act outlines specific conditions under which employment can be terminated, as follows.

Article 11

Termination with advance notice is required for reasons such as operational adjustments or financial difficulties. Specific grounds include business suspension or transfer, operational losses, force majeure events lasting over one month, changes in the nature of business requiring fewer employees and the clear inability of an employee to meet performance expectations.

Article 12

This allows immediate termination without notice due to employee misconduct or other specific severe conditions.

Procedural Requirements

Termination procedures are specified under Articles 11, 13 and 20 of the Labor Standards Act, along with Article 33 of the Employment Service Act, which mandates the following:

- Notification to authorities – employers must notify local competent authorities and public employment service institutions ten days before the employee's last working day, detailing necessary personal and job-related information.
- Exception for force majeure – in cases of force majeure, the notification period is within three days from the termination date.
- Involuntary separation certificate – employers must issue an involuntary separation certificate to dismissed employees.

Collective Redundancies

The Act for Worker Protection of Mass Redundancy regulates mass terminations, applying when certain criteria are met.

- Small entities – a site with fewer than 30 employees intending to lay off more than ten employees within 60 days.
- Medium entities – a site with 30 to 200 employees planning to lay off more than one-third of its workforce within 60 days, or more than 20 employees in one day.
- Large entities – a site with 200 to 500 employees aiming to lay off more than one-fourth of its workforce within 60 days, or more than 50 employees in one day.
- Very large entities – a site with over 500 employees planning to lay off more than one-fifth of its workforce within 60 days, or more than 80 employees in one day.
- Extensive layoffs – any business entity intending to lay off over 200 employees within 60 days or more than 100 employees in one day.

For collective redundancies, the employer must create a mass redundancy plan and provide written notice at least 60 days prior to the proposed termination date to the local labour authority, the labour representatives from the Labor Management Committee and the employees to be laid off.

Employees affected by collective redundancies are entitled to advance notice or pay in lieu of notice, severance pay and any outstanding bonuses or payments, similar to the conditions in unilateral terminations.

7.2 Notice Periods

Required Notice Periods and Formalities

Under the Labor Standards Act in Taiwan, employers are required to provide advance

notice prior to terminating an employment contract. The length of the notice period depends on the employee's duration of continuous service:

- less than one year but more than three months – a minimum of ten days' notice;
- more than one year but less than three years – a 20-day notice period; and
- more than three years of service – a 30-day notice period.

During the notice period, employees are entitled to take up to two days off per week to seek new employment, with full pay for these days. Employers may alternatively choose to offer pay in lieu of notice.

While notice does not necessarily have to be in writing, it is highly recommended to provide written notification to avoid any misunderstandings or disputes.

Severance Pay Requirements

Severance pay is mandated under specific conditions, as outlined in the Labor Standards Act and the Labor Pension Act. The calculation of severance pay depends on whether the employment falls under the old pension system or the new pension system, as follows.

- Old pension system (Labor Standards Act pension system):
  (a) employees receive one month's average salary for each year of continuous service; and
  (b) for periods of service less than a year, severance pay is calculated on a pro rata basis, with periods less than a month considered as a full month.
- New pension system (Labor Pension Act pension system):
  (a) employees are entitled to 0.5 month's average salary for each year of service, with a cap at six months' average salary; and
  (b) severance for service periods less than a year is also calculated pro rata, subject to the six months' average salary cap.

Procedure and External Authorisation

The formalities for termination involve notifying the employee in advance according to the stipulated notice periods. There is no specific requirement for external advice or authorisation for the termination process under Taiwan labour law. However, ensuring compliance with all legal provisions, including appropriate documentation and adherence to severance pay regulations, is crucial for the lawful termination of employment contracts. This structured approach helps protect both the employer and the employee from potential legal complications.

7.3 Dismissal for (Serious) Cause

Definition and Grounds for Summary Dismissal

Summary dismissal, or dismissal for serious cause, allows an employer to terminate an employment contract immediately, without the requirement of a notice period, due to severe misconduct or specific situations that necessitate such immediate action. According to Article 12 of the Labor Standards Act, grounds for summary dismissal include:

- misrepresentation – providing false information at the time of the contract signing that leads to employer harm;
- violent or insulting behaviour – acts of violence or severe insults directed at the employer, their family, agents or coworkers;

- criminal conviction – if an employee is convicted and receives a non-suspended temporary imprisonment in a final judgment;
- breach of contract or work rules – serious violations of the employment agreement or workplace regulations;
- deliberate damage or disclosure – intentionally causing damage to the employer's property or revealing confidential information resulting in employer harm; and
- unauthorised absences – absence from work without a valid reason on three consecutive days or on six days within a month.

Procedure and Formalities

When proceeding with a summary dismissal, the employer must ensure that the reasons for termination fall strictly under the categories listed in Article 12 of the Labor Standards Act. The dismissal process involves:

- documentation – thoroughly documenting the reasons and evidence supporting the dismissal decision, which should clearly match one of the valid grounds under Article 12;
- communication – communicating the decision to the employee, ideally in writing, to provide a clear record of the dismissal and its reasons; and
- immediate effect – the dismissal takes effect immediately, with the employee ceasing work and obligations to the employer from the date of dismissal.

Consequences of Summary Dismissal

Aspects of summary dismissal include the following:

- no notice period required – employers are not obligated to provide a notice period when terminating an employee for serious cause under Article 12;
- no severance pay – the employee is not entitled to severance payment when dismissed for serious cause as defined in Article 12; and
- legal protection – employers must be cautious and ensure the dismissal is justifiable under the stipulated conditions to avoid legal challenges or claims of unfair dismissal from the employee.

7.4 Termination Agreements

Permissibility and General Practices

Termination agreements are permissible in Taiwan. While Taiwanese law does not mandate specific terms to be included in termination agreements, it is commonly recommended to specify the amount of severance payment and to establish the agreement as a final settlement. This means that post-agreement, neither the employer nor the employee can make any further civil or criminal legal claims against each other.

Procedures and Formalities

Employers are required to notify local competent authorities and public employment service institutions ten days before the employee's last working day. This notification should include details such as the dismissed employee's name, gender, age, address, phone number, and job position, the reason for layoff and the necessity for employment counselling services.

Statutory Requirements for Enforceable Releases

According to Article 71 of the Civil Code, employees generally cannot waive statutory and contractual rights to potential employment claims in advance. This provision ensures that legal acts contravening mandatory or prohibitive statutes are void. Specifically, any pre-emptive relinquishment of rights to severance payments

and pensions before these rights accrue is considered invalid.

Post-termination agreements where an employee consents to waive their rights to severance pay and pensions may hold validity provided these claims have already materialised. This acknowledges that such rights, once accrued, become independent rights that could theoretically be waived. Such waivers, agreed upon after employment has expired or been terminated, reflect the principle of private autonomy, allowing agreements on severance and pensions even if they result in lower compensation than legally prescribed.

Judicial Scrutiny and Fairness

The validity of these post-termination waivers, especially in cases where employees forgo their claims entirely, may still be subject to judicial scrutiny. Courts often examine whether such agreements were made under duress or deception to safeguard the interests of employees. Therefore, while post-termination waivers are theoretically permissible, they must not exploit the employee's position, ensuring that any consideration given (economic or otherwise) is fair and freely agreed upon without coercion or fraud.

In summary, while termination agreements are allowed in Taiwan, they must be carefully crafted to ensure they do not contravene statutory protections, particularly regarding severance and pension rights.

7.5 Protected Categories of Employee

Specific Protections Against Dismissal

In Taiwan, the law provides specific protections against the dismissal of employees who belong to certain vulnerable categories or who are involved in particular activities. It is unlawful to dismiss an employee for reasons such as:

- pregnancy and maternity – employees are protected from dismissal due to pregnancy, during maternity leave and post-childbirth;
- occupational accidents – employees who suffer work-related injuries or illnesses are safeguarded from being dismissed while they are recuperating;
- participation in labour-management dispute resolution – this includes involvement in mediation, arbitration or any decisions arising from such disputes;
- union membership and activities – employees cannot be dismissed for joining a labour union, participating in union activities or engaging in lawful union-organised events;
- legal actions or complaints – protection is extended to employees who take lawful legal actions or lodge complaints against their employers; and
- whistle-blowing – employees who report or expose any illegal activities within the organisation are protected from retaliation, including dismissal.

Legislative Framework

Acts in the legislative framework include the following.

- Gender Equality in Employment Act (Article 11) – this act explicitly prohibits any work rules, labour contracts, or group agreements that require employees to resign or take unpaid leave due to marriage, pregnancy, childbirth or childcare responsibilities. Any violations of this provision render the stipulations or agreements invalid, and any resultant terminations are deemed without effect.
- Labor Standards Act (Article 13) – this provision protects employees who are on leave

due to work-related injuries or are receiving medical treatment as specified under the act. Employers are prohibited from terminating such employees unless the business is unable to continue due to extraordinary circumstances, such as natural disasters. Even in these cases, termination requires prior approval from the competent authorities.

Implications for Employee Representatives

Employee representatives, particularly those involved in union activities or labour-management dispute resolution, are afforded additional protections to ensure they can perform their representative roles without fear of reprisal or dismissal. This safeguard is crucial for maintaining fair and just labour practices, as it allows representatives to advocate effectively for the rights and interests of their constituents.

These protections are designed not only to safeguard the rights of employees during periods of vulnerability but also to ensure that employees are not discriminated against or unfairly dismissed for upholding their rights or fulfilling their responsibilities in workplace relations.

8. Disputes

8.1 Wrongful Dismissal

Grounds for a Wrongful Dismissal Claim

Wrongful dismissal occurs when an employer terminates an employee without adhering to the legal grounds stipulated under the Labor Standards Act (Articles 11 and 12) or specific contractual terms agreed upon in the employment agreement, provided these terms do not contravene existing laws. Grounds for a wrongful dismissal claim include:

- dismissal without meeting the statutory reasons for layoffs (economic or operational) or disciplinary dismissals as defined in the law; and
- termination that violates the agreed terms of the employment contract that are themselves lawful.

Consequences of a Wrongful Dismissal Claim

Employees who believe they have been wrongfully dismissed have the right to seek mediation through local government employment centres or to file a civil lawsuit. Most Taiwanese courts have specialised divisions handling labour-related cases to facilitate this process. If the court finds the dismissal to have been unlawful, the consequences for the employer can include:

- payment of the employee's salary for the period they were unemployed due to wrongful dismissal;
- compensation for any loss or damages suffered by the employee as a result of the dismissal; and
- potential reinstatement of the employee to their former position.

Overall, a successful wrongful dismissal claim may entitle the employee to accrued salary, reasonable compensation and possible reinstatement.

8.2 Anti-discrimination

Grounds for Anti-discrimination Claims

Taiwanese labour law prohibits discrimination on various grounds including race, class, language, thoughts, religion, political affiliation, place of origin, gender, sexual orientation, age, marital status, appearance, features, physical or mental disability, astrological sign, blood type or past union membership.

Discrimination can relate to any aspect of employment including hiring, firing, training, benefits, pay and termination.

Burden of Proof

In Taiwan, the initial burden of demonstrating the existence of discriminatory conduct typically falls on the complainant. However, the burden of proving that discrimination did not occur rests with the employer.

This means the employee must initially show plausible evidence of discrimination, after which the employer must demonstrate that their actions were not discriminatory.

Damages and Relief for Discrimination Claims

If an employer is found to have discriminated against an employee, they may face fines ranging from NTD300,000 to NTD1.5 million. Employees can file complaints with local government offices or labour bureaus. Furthermore, any retaliatory actions by the employer, such as dismissal or salary reduction in response to complaints, are deemed invalid under the Labor Standards Act.

8.3 Digitalisation

In Taiwan, the process for handling employment disputes remains primarily traditional, with physical court appearances being required. Despite the increasing global trend towards digitalisation in judicial processes, Taiwan's legislation currently does not support conducting employment dispute hearings via videoconferencing as a standard practice. Exceptions can be made, however, if a judge or mediation committee specifically agrees to allow videoconferencing based on the unique circumstances of a case.

This approach reflects a cautious stance towards the digitalisation of court proceedings, particularly in employment disputes where personal interactions and direct negotiations can be crucial. As digital tools and platforms become more integrated into various legal processes globally, there may be future revisions in Taiwan to this policy to allow greater flexibility and accessibility in handling employment disputes digitally.

9. Dispute Resolution

9.1 Litigation

Specialised Employment Forums

Taiwan has established specialised procedures for handling employment disputes, including alternative dispute resolution mechanisms and designated courts.

Alternative Dispute Resolution for Employment Matters

The Department of Labor plays a crucial role in mediating employment disputes before they escalate to formal litigation; how this process works is detailed in the following.

- Initial mediation by the Department of Labor:
  - (a) the Department conducts a basic investigation of the evidence provided by both parties;
  - (b) mediation is facilitated by a single mediator and is free of charge; and
  - (c) the process typically lasts up to 20 days but, if referred to a mediation committee, can extend from 42 to 49 days.
- Court mediation and litigation:
  - (a) if mediation through the Department of Labor fails, the aggrieved party may file a lawsuit at the District Court;
  - (b) before the trial commences, the judge will attempt a mediation period;
  - (c) under the Labor Incident Act, mediation is mandated before trial, and one of the three labour mediation committee

members will be the judge who may later oversee the trial if mediation fails;
(d) court-mandated mediation may incur a fee depending on the nature of the claim (proprietary or non-proprietary); and
(e) according to the Labor Incident Act, court-mandated mediation should conclude within three months; if the case proceeds to trial, the first instance trial should be concluded within six months.

Class Action Claims

In the realm of employment law, class or collective actions are permitted, primarily facilitated through labour unions. Key points include the following.

- Legal framework:
  (a) labour unions can initiate class action lawsuits on behalf of employees, as permitted by Article 44-1 of the Civil Procedure Act and Article 40 of the Labor Incident Act; and
  (b) these provisions allow labour unions to represent their members collectively, providing a unified legal front in disputes affecting multiple employees.
- Representation in court:
  (a) labour unions play a significant role as representatives in court for collective actions, enhancing the efficiency and effectiveness of the legal process by consolidating similar claims into a single proceeding.

This specialised approach to employment litigation and dispute resolution in Taiwan ensures that both individual and collective employment grievances are handled efficiently, with opportunities for resolution through mediation before escalating to more formal legal proceedings.

9.2 Alternative Dispute Resolution

Possibility and Enforceability of Arbitration

In Taiwan, arbitration is indeed a viable method for resolving employment disputes outside of traditional court proceedings. This alternative dispute resolution mechanism is supported by the framework provided under the Act for Settlement of Labor-Management Disputes.

Procedure for Initiating Arbitration

According to Article 26 of the Act for Settlement of Labor-Management Disputes, the process for initiating arbitration requires the parties involved to prepare and submit a written application for arbitration to the competent authority. This submission must adhere to the specific procedures and requirements outlined in the Act, ensuring that all necessary documentation and details are properly presented.

Legal Force of Arbitration Decisions

Decisions made through arbitration in labour disputes carry the same legal force as final judgments made by courts. This equivalency means that:

- an arbitration award pertaining to adjustments in labour disputes is considered a court's judgment between the parties involved;
- if one of the parties is a union, the arbitration award is treated as a collective agreement between the parties; and
- if the parties reach a settlement during the arbitration process, this must be reported to the local government for record-keeping and is considered as binding as a mediation agreement established through labour dispute mediation.

Pre-dispute Arbitration Agreements

Regarding the enforceability of pre-dispute arbitration agreements, while the legal framework

allows for arbitration, the specifics regarding the enforceability of such agreements before a dispute arises typically depend on the agreement's adherence to the legal standards set by the Act for Settlement of Labor-Management Disputes.

Employers and employees are encouraged to clearly define the terms and conditions of any arbitration agreement within the scope of this Act to ensure its enforceability.

In summary, arbitration serves as an effective and legally binding alternative to court litigation for resolving employment disputes in Taiwan, provided the involved parties adhere strictly to the legislative guidelines.

9.3 Costs

In Taiwan, the issue of covering legal costs, including attorney's fees, in labour disputes is regulated with specific provisions to aid employees under certain conditions.

Court Fees

Employees who meet specified criteria can apply for reduced court fees, providing financial relief during the process of seeking justice. This concession is designed to make the legal process more accessible to employees who might otherwise be deterred by the costs associated with litigation.

Attorney's Fees

As per the current legal framework in Taiwan, the following applies.

- The prevailing party in a labour dispute can request the losing party to cover the attorney's fees, but this is generally limited to the costs incurred during the third (final) instance in the litigation process. This provision ensures that the financial burden of prolonged legal disputes can be mitigated for the successful party at the culmination of the legal proceedings.
- Additionally, employees who meet certain conditions may apply for a government subsidy to cover the attorney's fees. This support aims to reduce the financial barriers that might prevent workers from seeking legal redress in employment disputes.

These measures reflect Taiwan's approach to balancing the financial aspects of legal disputes, ensuring that employees have the support necessary to assert their rights without being overwhelmed by the potential costs.

THAILAND

Law and Practice

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Baker McKenzie

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Baker McKenzie has 650+ employment lawyers and professionals in 74 offices across 45 jurisdictions, who work closely with tax, IP, antitrust, compliance and litigation colleagues to provide timely and integrated solutions for all employment needs. The employment and compensation practice in Thailand has the requisite size and expertise to provide the full range of advice on both contentious and non-contentious employment law issues. It works with domestic and multinational businesses to manage all of their employment needs, from day-to-day human resources requirements to critical global business change projects. It represents employers in collective bargaining and works council negotiations, and also develops robust industrial relations strategies. Services include workplace legal counselling and policies; restructuring and transactions; workforce restructuring; workplace compliance; dispute resolution; executive compensation and employee benefits; labour relations; data protection and privacy; outsourcing; and retirement benefits. Baker McKenzie has been ranked in Band 1 by Chambers Global for Employment for 14 consecutive years.

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1. Employment Terms

1.1 Employee Status

There is no legal distinction between blue-collar and white-collar workers under Thai labour laws; both receive the same treatment and protection under the Labour Protection Act B.E. 2541 (1998) (LPA).

However, there are requirements relating to outsourced employees under the LPA, where a business operator could legally be deemed an employer of such outsourced workers if they require another person to dispatch such workers to perform any work within their manufacturing process or business operation under their responsibility.

1.2 Employment Contracts

Employees may be hired indefinitely or for a fixed-term period, and there is no legal requirement for the contract for either to be in writing.

The main differences between these two types of contracts are as follows.

Indefinite-Term Employment Contract

For this type of contract, an employer or an employee may terminate the agreement at any time by giving advance notice to the other party of at least one pay period as legally required, or a longer period if the parties agree otherwise. If the employer fails to provide notice in advance as legally required, they must make payment in lieu of the shortfall of the notice period required.

Such employment contracts may simply specify the term to be indefinite, subject to termination by either party through providing notice in advance, and in reliance on grounds for termination.

Fixed-Term Employment Contract

On the other hand, a fixed-term employment contract shall be terminated automatically upon the expiry of the term as agreed between the parties, without any requirement for advance notice.

Such contracts must prescribe the date or period upon which the employment term will end. No renewal or early termination clauses should be prescribed in the contract, as Thai labour courts would view such contractual clauses to alter the nature of the term of the contract to be indefinite.

1.3 Working Hours

The employer is legally required to specify the start and end time of work in a day. Working hours must not generally exceed eight hours per day and 48 hours per week, except for certain hazardous works prescribed under the laws, where the maximum working hours are capped at seven hours per day and 42 hours per week.

There is a legal exception if the employer cannot specify the start and end time of work due to the nature or conditions of the work; such work can be exempt from the exact start and end times for working hours, as long as they do not exceed eight hours per day and 48 hours per week.

The LPA does not provide a definition or distinction for part-time or full-time contracts. All employees are treated similarly under Thai labour laws, regardless of their status as part-time or full-time employees.

Overtime work is legally defined as working outside or in excess of the normal working hours. In general, the employee's prior consent is required each time they are required to work overtime unless it is an emergency case, or unless the work is continuous and the stoppage will cause

damages to that work. In any case, the total overtime working hours and holiday work shall not exceed 36 hours per week.

The employee is entitled to overtime pay at 1.5 times the normal hourly wage for any overtime worked. For working overtime on a holiday, the rate is three times the normal wage for overtime worked.

1.4 Compensation

Under Thai labour law, the employer must pay at least the minimum daily wage rate announced by the Wage Committee from time to time, regardless of the number of hour worked in each day. The Wage Committee consists of representatives from the government, employers and employees, and generally announces the minimum wage for each province or a group of provinces.

13th month payment and bonuses are not statutory payments under the LPA and it is up to the employer to prescribe terms and conditions as it wishes or as agreed with the employees as parts of their employment terms and conditions.

1.5 Other Employment Terms

Statutory Holidays

Under the LPA, there are three types of holidays.

- Weekly holiday: the employer must provide at least one weekly holiday per week. The interval between weekly holidays shall not be more than six days, and the employer and the employee may agree in advance to fix any day as a weekly holiday.
- Traditional holiday: the employer must provide at least 13 traditional holidays per year, including National Labour Day, to be announced in advance by the employer. The employer must fix the traditional holidays according to the official annual holidays and religious or local traditional holidays.
- Annual holidays: the employer must provide annual holidays of not less than six working days per year for any employee who has worked for an interrupted period of one year. The annual holidays can be fixed in advance or as agreed by the employer and employee.

The employer and the employee may agree in advance to accumulate and postpone any annual holiday that has not yet been taken in a year to be included in the next year.

If an employee has not completed one year of service, the employer may set annual holidays for the employee on a pro rata basis.

During these holidays, the employee shall receive wages equivalent to the wages of a working day. If the employee is required to work on these holidays, the employer must provide holiday pay or overtime work, if any.

Statutory Leaves

There are six statutory leaves under the LPA.

- Sick leave: an employee is entitled to take sick leave as long as they are truly injured or ill. The employer will pay wages throughout leave but for no more than 30 working days a year.
- Maternity leave: a female employee is entitled to take maternity leave of not more than 98 days for each pregnancy, inclusive of holidays during the period of leave. Pre-natal care is considered as part of this leave. The employer will pay wages throughout leave but for no more than 45 days for a pregnancy.
- Sterilisation leave: an employee is entitled to take leave for sterilisation and leave as a result of sterilisation for a determined period,

and with a certificate issued by a first-class physician, with wage pay.
- Business leave: an employee is entitled to take leave for necessary business of not less than three working days per year, with wage pay.
- Military service leave: an employee is entitled to take leave for military service for inspection, military drilling or readiness testing under the law concerning military service. The employer must pay wages throughout leave but for no more than 60 days a year.
- Leave for training: an employee shall be entitled to take leave for training or the development of their knowledge and skills in accordance with the rules and procedures prescribed in the Ministerial Regulations. As the law is silent on payment during this leave, it is up to the employer to allow the employee to take this leave with or without wage pay.

There are no statutory leaves for disability or childcare.

Confidentiality and Non-disparagement Requirements

Thai labour law is silent on the obligations on confidentiality or non-disparagement. It is generally permissible for the employer and employee to agree on these obligations, including for the period after the cessation of employment.

The enforcement of these confidentiality clauses, in practice, could be quite challenging. One of the challenges is that it will be difficult for some employers to have sufficient evidence and witnesses to prove the employee's breach of confidentiality and to establish the extent of damages it suffers to claim for compensation due to the breach and the causal link between such damages and the breach.

Nonetheless, depending on the nature of the information and infringement by the employees involved, the employer may also rely on the protections and enforcements under the Trade Secrets Act B.E. 2545 (2002), the Computer Crime Act B.E. 2550 (2007) and the Copyright Act B.E. 2537 (1994), as well as criminal offences under the Penal Code (eg, offences relating to commerce and defamation).

2. Restrictive Covenants

2.1 Non-competes

Similar to the confidentiality and non-disparagement requirements, restrictive covenants like non-compete clauses are generally valid and enforceable under Thai labour laws.

However, the Thai labour court is empowered to exercise its discretion to review whether these restraints are fair to employees, including any post-termination restraints. If the court thinks they are unfair to employees (eg, the geographical scope is too broad or the period after the cessation of employment is too long), it may exercise its discretion to render them enforceable to the extent it deems fair and reasonable to the employees (eg, reducing the period after the cessation of employment to be the period the court considers as fair to the employee).

Enforcement of Non-compete Clauses

Since these restrictions limit an employee's rights and freedoms, the court is likely to interpret the scope of the application of these restrictions in a limited manner. Therefore, it is crucial for the employer to carefully draft the relevant contractual provisions to ensure that the scope of their application will cover the protections it intended to have from these clauses, while ensuring that the scopes and restrictions are not

too overtly restrictive, unfair and burdensome to the employee.

In practice, the enforcement for specific performance of the non-compete clause can be quite challenging, and the court rarely grants any enforcement on specific performance (eg, by ordering the employee to leave the competitor) nor injunctive relief. However, the court is more likely to award damages due to the employee's breach of these restrictive covenants if the employer can prove the existence of damages as well as the casual link between the breach and the damages it suffered.

2.2 Non-solicits

Non-solicitation clauses are treated similarly to non-compete clauses; see **2.1 Non-competes**. The court is empowered to review or not whether these restraints are fair to employees. If the court thinks they are unfair to employees, it may exercise its discretion to render them enforceable to the extent it considers fair and reasonable to the employees.

3. Data Privacy

3.1 Data Privacy Law and Employment

The purposes of the Personal Data Protection Act B.E. 2562 (2019) (PDPA) are to protect individuals' personal data by imposing obligations on any data controller or processor collecting, disclosing, transferring and utilising personal data of a data owner.

The key legal requirements under the PDPA in the employment context include the following.

- Employers must limit the collection of personal data to lawful grounds and with the employee's prior consent, unless it falls under prescribed exceptions.
- A request for consent shall be explicitly made in a written statement or via electronic means, which must be separated from other content and must be easy to understand.
- There are exceptions where consent from employees is not required for the processing of their personal data (collecting, disclosing and utilising such personal data), such as the employer may rely on its necessity due to its legitimate interest or contractual obligations to process such personal data in compliance with the PDPA, among others.
- An employer shall collect, utilise or disclose personal data only for the purpose notified to the employee prior to or at the time of such collection, unless the employer has informed the employee of the new purposes and has received the employee's consent to collect, use or disclose personal data for such purposes.
- A privacy notice must be given to the employees before or at the time the employer collects their personal data. The privacy notice must contain the information required under the PDPA – the purpose of data processing, the categories of data to be processed, retention period, the contact person for PDPA matters, rights of the employee as the data owner, etc.

4. Foreign Workers

4.1 Limitations on Foreign Workers

If an employer wishes to hire a foreign employee, a valid business visa and work permit must be obtained in order for such foreign employee to be able to stay and work in Thailand. Generally, a foreign employee will have to obtain an appropriate business visa from the Thai Embassy/Con-

sulate of their home country, which permits them to stay in Thailand for work or business activities for 90 days. The foreign employee will then have to apply for and obtain a work permit from the competent authority in Thailand in order to be able to legally work in Thailand.

After obtaining the work permit, the foreign employee may apply to the competent immigration bureau for an extension of the permit to stay in Thailand for a longer period than the initial 90 days permitted under the business visa above – eg, one year.

4.2 Registration Requirements for Foreign Workers

An employer that hires a foreign employee must notify a work permit official of their name, nationality and work description within 15 days from the date of hiring. When said foreign employee's employment ends, the employer must also notify a work permit official, including their reason of employment cessation, within 15 days from the employment cessation date.

Foreign employees must also be registered with the Social Security Fund, similar to Thai employees. They will also have to obtain a Tax ID from the Thai Revenue Department.

5. New Work

5.1 Mobile Work

In 2022, an amendment to the LPA was approved to facilitate the new way of working remotely. Under the newly amended LPA, an employer may agree to allow an employee to work from home or to work via from anywhere, using information technology, for the benefit of the business and the promotion of quality of life for employees, or in cases of necessity.

Such agreement must be made in writing or in the form of electronic data that is accessible and reusable without altering the meaning. The agreement may include the following details:

- commencement and end date;
- normal working hours, rest periods and overtime;
- rules on overtime work, holiday work and leave;
- the scope of the work and the control of work by the employer; and
- obligations to procure and provide work equipment and tools, including expenses arising out of the work.

The amendment to the LPA also introduced the "right to disconnect" for employees when working remotely – ie, the employee has the right to refuse any communications with their employer, supervisors, chief or work inspector after the end of normal working hours, unless written consent is given by employees in advance.

There are no specific legal requirements for remote working, so the requirements under the Thai PDPA will continue to apply to the employer and employee working remotely.

Occupational Safety, Health and Environment

There has not yet been any specific occupational safety, health and environment legislation nor regulations dealing specifically with mobile work or remote working in Thailand.

However, under the Occupational Safety, Health and Environment Act B.E. 2554 (2011), an employer has a general obligation to arrange and maintain the establishment and its employees in safe and hygienic working conditions, and to support and promote the work operation of

employees in order to prevent them from harm to life, physique, mentality and health.

Moreover, an employee is entitled to receive compensation under the Workmen's Compensation Act B.E. 2537 (1994) if the injury or death is due to work in the course of protecting the interest of the employer, or complying with the commands of the employer, among others, regardless of their place of work.

Social security

The employer is required to register any remote-working employee with the Social Security Fund and make contribution to the fund similar to other normal employees.

5.2 Sabbaticals

There are no statutory sabbatical leaves under the LPA. The most similar concept is the annual holiday requirements. As noted in **1.5 Other Employment Terms**, the employer is required to provide at least six annual holidays per year to employees who have worked for an uninterrupted period of one year. The employer and the employee may agree in advance to accumulate and carry forward any unused annual holiday to the following years.

Some employers may allow employees to take extended breaks from work as unpaid leave for a certain period, or may provide a paid sabbatical leave in addition to the annual holidays as part of the benefits. There are no restrictions if the employer provides such leaves, as they will be considered part of the non-statutory benefit package. Therefore, the employer may set the requirements and duration of leave as appropriate.

5.3 Other New Manifestations

There are some interesting new developments on the nature of work in Thailand, including the following.

- Fully remote, hybrid or flexible work arrangements are becoming a norm for office workers in Thailand, as many employers allow employees to work remotely either fully or in a hybrid manner where a certain number of days in a week will be remote and the rest will be attending the office to work as usual. Desk sharing is also considered by certain employers to accommodate the shrinking size of office space as more fully remote, hybrid or flexible work arrangements are being adopted.
- An increase in cross-border personnel engagement is due to the rapid adoption of information technology allowing for more effective and efficient ways to work remotely. However, overseas employers should still consider legal issues in engaging personnel in Thailand from overseas, including:
  - (a) appropriate and legally permissible forms of engagement;
  - (b) work permit and visa requirements;
  - (c) restrictions on foreign business activities in Thailand; and
  - (d) tax issues in connection with such cross-border personnel engagement.
- Employers in various industries are seeking to better utilise AI. Work and employee regulations may have to be adopted to regulate the use of AI by employees to perform their work, particularly to address risks regarding intellectual property and confidentiality issues.

6. Collective Relations

6.1 Unions

A labour union is an organisation with a separate legal personality formed voluntarily by at least ten qualified employees, which must be registered with the registrar under the Labour Relations Act B.E. 2518 (1975) (LRA). It could be formed either by employees of the same employer (house union) or by employees within the same industry, regardless of the number of employers (industrial union).

Under the LRA, a labour union mainly has duties and powers to demand, negotiate and acknowledge an award or enter into a collective bargaining agreement (CBA) with an employer or employer's association regarding the activities of its members, and to manage and carry out activities for the benefit of its members within the objectives of the labour union, among others.

6.2 Employee Representative Bodies

Labour Unions

Labour unions may be established by at least ten qualified employees under the same employer or within the same industry and registered with the registrar to become a juristic person under the LRA. As noted in **6.1 Unions**, labour unions have the authority to demand, negotiate and acknowledge an award or enter into a CBA with an employer or employer's association regarding the activities of its members, and to manage and carry out activities for the benefit of its members within the objectives of the labour union, among others.

Welfare Committee in the Establishment

In a workplace with 50 employees or more, the employer must arrange for the establishment of a Welfare Committee in the Establishment, appointed from an election by employees in accordance with the LPA. The Welfare Committee in the Establishment shall have general duties on consultation with the employer to provide welfare to employees, among others.

An employer must hold a meeting with the Welfare Committee in the Establishment at least once every three months, or upon request by more than one half of the total number of committee members or by the labour union with appropriate reason.

Employee Committee

An employee committee may be established voluntarily by employees in a place of business that has 50 or more employees by election or appointment from the labour union, or both, depending on the proportion of the members of the labour unions in the workplace, in accordance with the LRA. Employers must arrange for a meeting with the employee's committee at least once every three months, or upon request to discuss the provision of welfare or the prescription of work regulations that would be beneficial to employers and employees, to consider complaints or to settle disputes in the place of business, among others.

If there is an employee committee established under LRA, such committee shall perform the same duties as the Welfare Committee in the Establishment.

Labour Federations

Two or more labour unions whose members are employees working for the same employer or in the same industry can jointly establish a labour federation for the promotion of better relationships between labour unions and the protection of employees' interests.

6.3 Collective Bargaining Agreements

Under the LRA, a CBA is an agreement between employer and employee or between an employer's association and a labour union relating to conditions of employment – ie, working days and hours, wages, welfare, termination of employment, or other benefits relating to employment.

A CBA under the LRA must be done through the processes under the LRA, by either the employer or employees (or through its labour union) submitting a labour demand to the other party and going through the negotiation process until an agreement is reached. The CBA agreed must also be registered with the registrar under the LRA.

A CBA shall be effective for a term as agreed between the employer and employee, but shall not exceed a period of three years. If no term is specified in a CBA, such CBA shall be effective for one year from the date such CBA is entered into. If the term of the CBA expires and there is no negotiation on such CBA, it shall be deemed to be applicable for one further year.

7. Termination

7.1 Grounds for Termination

Under Thai labour law, an employer can terminate an employee's position at any time and for any reason, provided that it complies with all legal requirements for such termination, including providing notice in advance, paying severance pay as required, etc.

However, the employer may also rely on the six statutory grounds under the LPA – eg, employment may be terminated if an employee commits a serious violation of the employer's lawful and fair order and regulations, without having to provide a termination notice in advance or pay severance pay.

The employer should have a justifiable reason to terminate its employees' contracts, in order to be able to defend itself against an unfair termination claim by a terminated employee (see **8.1 Wrongful Dismissal**).

No special rules are applied in a general case of collective redundancy. However, in the case of redundancy due to the improvement of the organisational structure, manufacturing process, sales or service resulting from the use of new machinery or a change of machinery or technology, the employer is required to give advance notice with the details on the effective date of termination, the reason for termination and a list of names of affected employees to the labour inspector and the terminated employees no less than 60 days before the effective date of termination. Failure to provide advance notice or to provide notice within the accepted timeframe will lead to the employer being liable to pay special severance pay in lieu of advance notice equivalent to the last 60 days of wage, in addition to the severance pay.

Moreover, if the employer makes redundant an employee who has worked consecutively for six years or more, the employer shall pay a special severance pay in addition to the normal severance pay to that employee, of not less than the last wage rate for 15 days for each of the full service years beyond the initial six years; this special severance pay shall not in aggregate exceed the last wage rate for 360 days.

7.2 Notice Periods

For a general case of employment termination not due to any statutory termination grounds, the employer must comply with the following.

Notice Period

According to the LPA, an employee or employer who wishes to terminate an indefinite-term agreement must give no less than one pay period advance notice of termination in writing to the other party – ie, the terminating party must provide the other party notice on or before any payday to take effect on the next payday. The notice period can be longer if agreed otherwise by the employer and employee.

Please note that this pay period is not necessarily one month or 30 days, and could be longer depending on the payday, when the termination notice is given, and the termination effective date.

An employer who fails to provide sufficient termination notice in advance is legally required to make payment in lieu of the shortfall notice period.

Severance Pay

Severance pay is required if the employer terminates an employee not due to any statutory grounds for termination and the employee has worked for 120 days or more at the following rates:

- service of more than 120 days but less than one year: 30 working days' wage is payable;
- service of one year or more but less than three years: 90 working days' wage is payable;
- service of three years or more but less than six years: 180 working days' wage is payable;
- service of six years or more but less than ten years: 240 working days' wage is payable;
- service of ten years or more but less than 20 years: 300 working days' wage is payable; and
- service of 20 years or more: 400 working days' wage is payable.

Payment for Accrued but Unpaid Wages

Any outstanding wage must be paid within three days from the effective date of termination.

Payment in Lieu of Unused Annual Holidays

The employer will be required to make payment in lieu of unused annual holidays (pro-rated of the year of termination, and carried forward from previous years, if any), which must be paid within three days from the effective date of termination.

Any Contractual Payments

Contractual payments may have to be paid upon termination as agreed between the employer and the employee (if any), in accordance with the terms and conditions of those payments.

No government authority permission is legally required for termination.

7.3 Dismissal for (Serious) Cause

The employer can terminate an employee's position without providing advance notice or severance pay when the employee has committed any of the following offences:

- been dishonest in the exercise of their duty or intentionally committed a criminal offence against the employer;
- intentionally caused damage to the employer;
- caused gross damage to the employer, through their negligence;
- violated any work regulations, rules or orders of the employer, which are lawful and fair, and for which a warning in writing has previously been given by the employer and the employee repeats the violation within one year from the date of the violation (in a serious case, the

employer is not required to give such warning);
- neglected duties for three consecutive regular working days, regardless of whether there is a holiday in between, without reasonable excuse; or
- been sentenced to a term of imprisonment by a final judgment of court – if such imprisonment is a result of an offence committed by negligence or a petty offence, it must have caused damages to the employer.

For the employer to be able to rely on these statutory termination grounds, a written termination notice with the details of fact of the grounds for termination must be given to the employee at the time of the termination.

7.4 Termination Agreements

Termination agreements with the employee, including the employee agreeing to release and waive their right to claim against or sue the employer, are generally permissible, provided that the employee voluntarily enters into such agreement. Termination agreements are helpful to mitigate the litigation risk associated with the termination of employment, particularly the unfair termination claim (see **8.1 Wrongful Dismissal**).

The employer will often have to offer some extra payments (ex-gratia payment) in addition to all termination payments that are already required to convince the employee to agree to sign the termination agreement. There is no legal requirement or guideline on the ex-gratia payment, which it is up to the parties to negotiate and agree.

7.5 Protected Categories of Employee

Employees are protected from dismissal in the following circumstances:

- an employer is prohibited from terminating a female employee on the grounds of her pregnancy;
- under the LRA, an employer is prohibited from terminating an employee who is a member of an employee committee, unless permission is obtained from a labour court; and
- termination of an employee must not involve any unfair practices under the LRA (eg, termination of an employment due to the employee being a member of a labour union or due to their participation in submitting a labour demand or negotiation for a CBA).

8. Disputes

8.1 Wrongful Dismissal

There is a concept of "unfair termination" under Thai law, whereby a terminated employee may decide to bring a claim of unfair termination against the employer even if the employer has already paid them all statutory payments upon termination, and ask the court to order:

- reinstatement (rather rare); or
- separate unfair termination compensation.

Generally, the Supreme Court's precedents require that the termination must be fair both substantively (eg, the ground for termination must be justifiable and reasonable) and procedurally (eg, the employee selection is fair, and the termination should be a last resort). If the court finds the termination unfair, it is likely to order the employer to make unfair termination compensation, which is in addition to the statutory termination payments. The court is free to determine the amount as it deems appropriate (eg, it may base the amount on the employee's one month of wage for each year of their service, or on something else).

However, if the court considers the employer to have terminated the employee in bad faith (eg, without any real reasons at all, or by simply bullying or retaliating against the employee), it may consider ordering a substantial amount of unfair termination compensation as punitive damage against the employer.

8.2 Anti-discrimination

There is no specific legislation dealing with discrimination in the workplacebut various legislation prohibits discrimination, including the following:

The Constitution of Thailand

This prohibits discrimination on the basis of place of birth, nationality, language, gender, age, physical or health condition, economic or social status, religious belief, education or training, or political ideology.

The LPA

Under the LPA, an employer shall treat male and female employees equally in employment, unless the description or nature of the work prevents such treatment. Furthermore, an employer must fix wages, overtime pay, holiday pay and holiday overtime pay at the same rate for male and female employees who undertake work of the same nature and quality, and an equal quantity or work of equal value.

An employer who violates these provisions shall be subject to a maximum fine of THB20,000. The injured employee may claim damages from the employer on the grounds of a wrongful act under the Civil and Commercial Code.

Gender Equality Act B.E. 2558 (2015)

Under the Gender Equality Act, any private organisation is prohibited from prescribing policies, ordinances, rules, notifications, measures, projects or practices that appear to discriminate unfairly based on gender. Unfair discrimination based on gender is defined under this law to cover the grounds that such person is male or female or expresses themselves differently from their inborn gender, which is broader than the protection under the LPA.

Unfair discrimination based on gender could result in an order issued by the competent committee requiring a person to comply with appropriate measures to cease and prevent the recurrence of unfair discrimination based on gender and to pay compensation to the injured person. Moreover, the injured person may file a complaint to the court to claim for compensation due to such discrimination, including punitive damages up to four times the actual damages.

There is also other legislation dealing with discrimination in certain aspects relating to childcare and disability.

8.3 Digitalisation

The electronic method of consulting and filing labour claims is now available through the website of the labour court. Online procedures for witness trials and proceedings for the labour court are also available, subject to the agreement by the parties in the case and the court's approval.

9. Dispute Resolution

9.1 Litigation

There is a specialised labour court, which has jurisdiction over labour disputes, with specific procedures for labour cases. There is no court fee, and no lawyer is required to file a case with the labour court. The court will try to reconcile parties so they can reach a mutual settlement

first. The labour court's ruling can be further appealed to the Court of Appeal for Specialised Cases with special division for labour cases, but only on the legal issues in the case. Even though the ruling of the Court of Appeal can be further appealed to the Supreme Court, this rarely happens in practice since it would normally require the Supreme Court's approval in the first place.

Class actions for a labour case are not generally accepted by the court. However, the labour court can consider consolidating all other complaints that have the same facts and issues (eg, termination cases concerning many similar employees of the same employer) into one case to expedite the process.

9.2 Alternative Dispute Resolution

An arbitration clause as the choice of forum under Thai law is possible and enforceable.

However, for any matters that are related to labour law (eg, payment of wages, severance pay, damages due to unfair termination), the Thai labour court would still exercise its jurisdiction to consider the case, regardless of the arbitration clause, since the court considers they are relating to a public order. As a result, it is not common and not recommended to attempt arbitration for labour disputes.

9.3 Costs

There is no court or official fee for filing a labour case with the court in the first place.

Trends and Developments

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Baker McKenzie has 650+ employment lawyers and professionals in 74 offices across 45 jurisdictions, who work closely with tax, IP, antitrust, compliance and litigation colleagues to provide timely and integrated solutions for all employment needs. The employment and compensation practice in Thailand has the requisite size and expertise to provide the full range of advice on both contentious and non-contentious employment law issues. It works with domestic and multinational businesses to manage all of their employment needs, from day-to-day human resources requirements to critical global business change projects. It represents employers in collective bargaining and works council negotiations, and also develops robust industrial relations strategies. Services include workplace legal counselling and policies; restructuring and transactions; workforce restructuring; workplace compliance; dispute resolution; executive compensation and employee benefits; labour relations; data protection and privacy; outsourcing; and retirement benefits. Baker McKenzie has been ranked in Band 1 by Chambers Global for Employment for 14 consecutive years.

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Employment Law in Thailand: an Introduction

The general shifts in working culture towards greater flexibility amidst economic uncertainty and the interplay of factors affecting the traditional legal paradigms are putting pressure on employers. Rapid technological progress, changing consumer demands and the emergence of environmental, social and governance (ESG) considerations have led to a changing environment for business operations. For Thailand, these global trends have been reflected through a number of regulatory changes to the legislation and changing practices in the workplace.

Domestically, certain sectors were hit hard by the COVID-19 pandemic and the recovery has been sluggish. Employers in Thailand are also facing higher operation costs, partly as a result of the new minimum wage rates and increasing logistics costs. Thus, most employers are still finding ways to further restructure their organisation, making it leaner and more efficient, or ways to diversify their business as a necessary means to improve their situation.

Minimum wage hike

The minimum wage raise promised by the new government of Thailand since it came into power in 2023 has continued to grab headlines and generate much debate among policymakers, the business community and academics. Minimum wage policies have always been controversial, as they could have a mixed impact on the economy. While they guarantee minimum income for workers, they also put pressure on business costs, with a potential impact on the employment of these workers.

Coming out of the pandemic, exacerbated by concerns regarding the general economic downturn across the globe and rising household debt in Thailand, many politicians in the May 2023 election campaign proposed policies to help alleviate its impact on the population. One of the policies that received a lot of attention during the run up to election is the issue of minimum wage. In Thailand, minimum wages are prescribed by law as daily rates and employers are required to pay no less than the minimum wage to their employees.

As part of the measures focusing on stimulating domestic economy, the new Cabinet set out to increase the baseline minimum wage to THB400 across all provinces. In Thailand, as required by law, the minimum wages are determined by the tripartite National Wage Committee, consisting of representatives from the government, employers and employees.

On 26 December 2023, the Cabinet acknowledged an increase to the minimum wage as proposed by the National Wage Committee. Subsequently, the Notification of the National Wage Committee on Minimum Wage Rates (Number 13) was published in the Royal Thai Gazette on 28 December 2023 and became effective from 1 January 2024 onwards. The new minimum wages are applicable to unskilled workers and now range from THB330 to THB370, depending on the provinces, representing an average increase of 2.4% from the previous daily wage rates of THB328 to THB354.

Despite this, the government still considered the increase too low in light of the increasing costs of living and has subsequently pushed for further wage increases to be enacted in 2024. As a result, the National Wage Committee has further approved new minimum wage rates for employees in the tourism industry, starting with those employed by hotels. In this regard, the Notification of the National Wage Committee on Wage

Rate for Hotel Businesses ("Notification") was published in the Royal Gazette on 10 April 2024 and came into force on 13 April 2024. According to the Notification, hotels that are rated four stars or higher by the Ministry of Tourism and Sports of Thailand, have 50 or more employees and are situated in locations with the highest tourism-related revenues will have a minimum daily wage rate of THB400 for their employees.

Furthermore, the government has been continuing to push for a nationwide minimum wage of THB400 per day across all industries in all provinces by 1 October 2024. This has generated much debate across various sectors. Many employers have expressed concerns regarding the hike, especially those in the industrial sector, fearing it will significantly increase their costs and expenses and they may end up having to lay off their employees.

Flexible workforce

For quite a while, the types of work people do and how the work gets done have been evolving. With a move towards more flexibility and new ways of hiring, employers are increasingly embracing and capitalising on technological advancements. However, laws do not always provide clear guidance on complex legal issues around these arrangements. These legal complexities require careful navigation, from compensation and benefits to immigration, corporate tax, cybersecurity and data privacy, among others. A pressing legal issue is whether gig or contingent workers are legally considered employees of their hirers.

The recent ruling by Thailand's National Human Rights Commission (NHRC) on the status of delivery riders highlights this issue. The NHRC ruled that riders are indeed employees of the digital platform owners, not merely their business partners, and thus have the employer-employee relationship in accordance with Thai labour laws, including being entitled to rights and benefits under such laws as employees.

The ruling considered that digital platform owners can directly supervise riders on matters such as working hours and uniforms, and subject them to penalties based on altered work conditions. In addition, it was deemed that the riders do not have a say or stake in the operation of the digital platform business nor its profits and losses, which would be the case for a business partner.

Interestingly, the NHRC's ruling and rationale were not based on Thai labour laws but on the Thai Constitution, international treaties and foreign court rulings. It should also be noted that the NHRC's ruling does not have legal power and is not legally binding. In contrast, the Thai labour court has decided in a similar case that a platform worker is not considered an employee of a platform operator under Thai labour laws.

While these two cases involve different facts, they reflect ongoing legal debates and complexities around non-traditional work models, which can trigger several compliance issues and risks and uncertainty for employers. To formally address these flexible workforces, a new legal framework is being developed in Thailand in the form of the draft "Promotion and Protection of Independent Worker Act", which aims to provide broader coverage and protection to all independent workers, especially "semi-independent workers", including platform workers. The draft proposes to help independent workers by providing certain accident and health assistance and loans. It also aims to ensure that business operators pay fair wages at agreed rates and conditions. However, it remains to be seen

whether the draft act can strike the right balance between the interests of gig workers and other relevant parties.

Hybrid work

In April 2023, a new amendment to the Labour Protection Act (LPA) to facilitate remote working in Thailand was introduced through the new Section 23/1, aligning with the global trend and providing alternatives for employers and employees regarding employment arrangements.

Principally, Section 23/1 states that employers and employees can come to an agreement allowing the employee to perform work that can be done outside of the business premises or office of the employer with convenience, under their employment, or as agreed with the employer to be performed at the employee's home or residence or anywhere remotely using information technology. In this regard, employers must prepare a written agreement that includes details such as:

- the commencing and ending of the work period;
- working days and hours, rest periods and overtime work;
- the scope of work, control and supervision; and
- duties to provide work equipment.

Employees who work from their home or residence, or from anywhere using information technology, must have the same rights as employees who perform work at the workplace or office of the employer.

Interestingly, the amended LPA also introduced the concept of "the right to disconnect" for remote working employees. This allows employees working outside the employers' work environment to refuse contact from the employer, after normal working hours, including the chief, supervisor or work inspector. This concept has already been introduced in various jurisdictions and is also present in the new Section 23/1.

However, this provision is not mandatory. The amended act aims only to facilitate agreements between employers and employees regarding such arrangements. Employers who have already implemented work from home or remote working arrangement arrangements may need to revisit key documents, such as employment contracts, work-from-home policies and work regulations, in light of the new Section 23/1 to determine if revisions are necessary. Employers who have yet to adopt a work-from-home policy or agreement may also need to consider whether they would like to implement this and what documents would be involved.

ESG considerations

Inclusion, diversity and equity

On 18 June 2024, the Thai Senate passed the act amending the Civil and Commercial Code, commonly known as the Marriage Equality Law, making Thailand the first country in Southeast Asia to enact a law concerning marriage equality. The law is currently awaiting royal endorsement, after which it will be published in the Royal Gazette and take effect 120 days post-publication.

The Marriage Equality Law aims to ensure that all individuals are granted the same fundamental rights in marriage under the Civil and Commercial Code, regardless of their biological sex. Gender-neutral language has been used to replace gender-specific terms such as "*a man and a woman*" and "husband and wife", using instead "two individuals" and "spouses", respectively. The law also specifies that spouses

who legally register for marriage will be entitled to rights and subject to obligations under any laws and regulations that establish the rights and obligations of a husband and a wife or spouses, regardless of whether the terms used in other laws are changed to align with the Marriage Equality Law.

In view of the above, employers should revisit their existing employment regulations, policies and benefits to take into account the amendments under this law, including using gender-neutral language where appropriate and revising benefits that are originally offered only to "spouses" under the old definition, to include all partners (eg, family health insurance).

With ESG gaining increased focus globally and in Thailand, understanding employers' legal obligations to ensure employee well-being will be important, along with issues of inclusiveness and diversity in the workplace. Thailand already has the Occupational Safety, Health and Environment Act in place, which generally requires the employer to ensure that the workplace is safe for employees. Currently, Thai law does not have a requirement for companies to collect and report diversity and gender pay gap data, but employers should not simply ignore these issues. In particular, issues concerning diversity, equity and inclusion, as well as addressing discrimination in the workplace, are becoming more important than before, not only as a result of the employer's own initiative but also due to pressure from customers and investors. Non-compliance with these issues could have serious implications for employers.

At the same time, the issue of mental health and employee well-being is becoming more important, with some employees starting to prioritise their well-being and work-life balance over job security. These employees are constantly considering if their employers are willing to accommodate their requests (eg, flexible working hours and remote working) and are willing to leave a company that cannot do so. The legal challenge at the moment is how to strike the right balance between these interests.

Workplace harassment

In recent years, the "Me Too" movement and the growing recognition of the importance of ESG have subjected employers to heightened security and pressure to address workplace discrimination and harassment, particularly of a sexual nature. In Thailand, increased media attention on such issues has led to an increase in high-profile harassment cases coming to public attention, and victims are now more inclined to file complaints or express their frustrations on social media platforms. These issues, therefore, have become crucial for employers to handle appropriately, as mishandling can lead to damaging impacts on business and operations, ranging from litigation risks to reputational damage and the potential for blacklisting by customers or investors.

It is worth noting that harassment can take many forms, including sexual harassment, power harassment, a toxic workplace, bullying and discrimination. While Thailand lacks a legal definition of harassment, it is prohibited and criminally punishable under several laws. Under the Labour Protection Act, it is clearly stated that "an employer, a person in charge, a supervisor, or a work inspector is prohibited from committing sexual abuse, harassment, or nuisance against an employee". Actions considered harassment may also be punishable offences under the Penal Code, with more penalties if the offender exploits their superior power, such as a supervisor, employer or someone with authority,

to engage in sexual harassment or public harassment.

Sexual harassment can encompass various behaviours, including unwanted physical contact, derogatory comments on appearances, inappropriate jokes, and the sending of unwanted suggestive or lewd emails, as well as sexually abusive commenting or posting on internet or social media. When addressing sexual harassment, it is crucial to remember that it is not always about the intention of the perpetrator but more about how the victim feels. Power harassment may involve intimidation, physical and mental aggression, and other non-obvious behaviours such as unjustifiably isolating someone from colleagues or imposing an excessive workload, based on one's superior position. Such behaviours may also constitute discrimination, contributing to a toxic workplace. As power harassment can occur even with well-intended motives, such as for the sake of business, it is essential to evaluate the necessity and justification of action in terms of work, considering alternative approaches that achieve the same result.

Employers must adopt the mindset and tools necessary to navigate and address harassment complaints. Cultivating a culture of compliance that empowers workers and their colleagues to speak up is one of the important factors for success. Simultaneously, establishing effective reporting channels and implementing robust policies and procedures to manage and respond to allegations promptly will make companies less vulnerable to risks such as reputational damage and legal claims.

Given the increasing importance of ESG values and heightened public awareness, employers cannot ignore workplace harassment issues. Instead, they must act promptly to prevent and address these issues effectively in their workplace.

TÜRKIYE

Law and Practice

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Contents

Egemenoğlu is one of the oldest, and largest, law firms in Türkiye, advising leading local and international clients since 1968. In its two offices, one in Istanbul and the other in Bursa, the firm employs over 50 attorneys, with seven partners. Egemenoğlu's busiest practice areas are dispute resolution, commercial, corporate and M&A, employment, restructuring and insolvency. The employment law practice, established in 1990, includes two partners, four senior associates, and five associates, managing day-to-day employment issues for approximately 150 clients. This work encompasses every aspect of employment law, from reviewing contracts for new hires and existing employees with changing terms, to developing strategies against employee related matters. The litigation practice in employment is even busier, with the team having represented clients in over 450 court cases in the past year alone. The team additionally assists clients in collective labour agreement negotiations and cases involving the cancellation of authorisation of unions.

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1. Employment Terms

1.1 Employee Status

There is no legal regulation distinguishing blue-collar and white-collar workers in Turkish employment legislation. However, in practice, such a distinction is made, affecting contract terms, wage types, and other factors.

"Blue-collar personnel" refers to employees mainly involved in production, performing jobs that require physical labour and manual skills, where the focus is on quantity over quality. Conversely, "white-collar personnel" refers to employees who use their mental abilities, typically involved in administrative and managerial roles, where quality is prioritised.

In practice, white-collar personnel are generally employed on a fixed monthly salary. A written agreement can specify that up to 270 hours of overtime per year is included in their monthly wage. For this agreement to be valid, the monthly wage must be above the minimum wage level. With this wage structure, employees are paid in full, regardless of the days or hours worked per month, and no deductions are made for sick leave or similar absences. In such cases, any allowance received from the social security institution is deducted from the employee's wage.

In practice, blue-collar personnel are generally employed on an hourly or daily wage basis, meaning they are paid for the hours or days they work. There is no obligation to pay wages for absenteeism or days off.

The main distinction in practice is between blue-collar and white-collar employees. Although it is not common, the term "grey collar" is sometimes used for employees who possess characteristics of both statuses. However, there is no legal regulation for this status, nor is there any judicial practice resulting in distinct legal outcomes.

Additionally, it should be noted that the concept of "steel collar" has begun to emerge in today's world, where the use of artificial intelligence and robots is becoming widespread. This concept may be subject to judicial practices and potential legal regulations in the future.

1.2 Employment Contracts

Under Turkish Labour Law No 4857 (the "Labour Law"), the parties may arrange the employment contracts in accordance with their needs, with-

out prejudice to the limitations imposed by the provisions of the law.

Employment contracts are concluded for a definite or indefinite term. These contracts may be full-time, part-time, probationary or other types in terms of working hours.

Employment under Fixed and Indefinite Term Employment Contracts

In Turkish labour law practice, the main principle is that the contract is of indefinite duration. If the employment relationship is not established for a specific period, it is considered to be of indefinite duration; a fixed-term employment contract is an exception.

A fixed-term employment contract is a type of contract that terminates automatically upon the expiration of the period specified in the contract without the need for the parties to declare termination. Employees working under a fixed-term employment contract cannot benefit from certain rights provided by the Labour Law. As such, they are not entitled to severance pay when the contract expires spontaneously, and the notice periods regulated in the law for the termination of an indefinite-term employment contract do not apply to fixed-term employment contracts. Most importantly, employees with fixed-term employment contracts cannot benefit from the "job security" provisions regulated in the Labour Law, which require the termination of employment contracts for valid reasons for employees with a certain level of seniority in workplaces with a certain number of employees.

For these reasons, especially to make the "job security" provisions operational, the validity of a fixed-term employment contract is subject to certain conditions. Accordingly, a fixed-term employment contract may be validly concluded for fixed-term work or subject to objective conditions such as the completion of a certain work or the occurrence of a certain event. If there is no objective reason of this nature in the fixed-term employment contract concluded with the personnel, the employment contract is deemed indefinite from the beginning.

According to the legal regulation, employment contracts with a duration of one year or more must be made in writing. In cases where there is no written contract, the employer is obliged to give the employee a written document within two months at the latest showing the general and special working conditions, daily or weekly working hours, basic wage and wage supplements, if any, wage payment period, the duration of the contract if the duration is fixed, and the provisions that the parties must comply with in case of termination. In any case, it is recommended that the employment contracts be drawn up in writing in terms of the requirement of proof.

Employment with Full-Time and Part-Time Employment Contracts

There is no clear definition of a full-time employment contract in the Labour Law. A full-time employment contract can be defined as a contract between the employee and the employer in which the employee undertakes to work for an employer for the entire weekly and daily legal working hours specified in the Labour Law.

Part-time work, on the other hand, is defined in the Labour Law as work performed up to two-thirds of the equivalent work performed in the workplace with a full-time employment contract.

There is no legal obligation for a part-time employment contract to be made in writing, but it is recommended that it be arranged in writing

between the parties in terms of the requirement of proof.

There is no compulsory legal regulation on the proportion of part-time work to be distributed to which days of the week. The parties may freely agree on the work schedule, if it does not exceed the legal working hours.

On-Call Working

On-call working is basically a type of part-time work. It is regulated separately in the Labour Law. Accordingly, it is a labour relationship in which it is agreed that the employee will work upon the employer's call if he/she is needed in relation to the work he/she has undertaken to do.

If there is no agreement on total working hours per week, month, or year, it is assumed to be 20 hours per week. The employee is entitled to wages even if he/she is not employed during the specified period.

Unless otherwise agreed, the employer must make the call at least four days before the time the employee will work. The employee is obliged to fulfil his/her work performance upon the call in accordance with the time limit. There is no compulsory regulation in the law on the form of the call. If the daily working time is not agreed in the contract, the employer must make the employee work at least four consecutive hours a day in each call.

The on-call employment contract must be made in writing in accordance with the legal regulation.

Remote Working

Remote working is regulated in Article 14 of the Labour Law. It is defined as a work relationship established in writing and based on the principle that the employee performs his/her work at home or outside the workplace with technological communication tools within the scope of the work organisation established by the employer. From the definition in the law, remote working can actually be done in two ways: working from home and working with technological communication (teleworking).

As clearly stated in the definition in the Labour Law, the employment relationship based on remote working must be established in writing. The minimum elements that must be included in the employment contract for the establishment of a remote working employment relationship are: the definition of the work, the way it is done, the duration and location of the work, the wage and the issues regarding the payment of the wage, the equipment provided by the employer and the obligations regarding the protection of these, the employer's communication with the employee and the provisions regarding the general and special working conditions.

For other forms of employment other than remote working, there is no legal regulation on the mandatory content that must be included in the contract. However, in terms of the employment relationship, the necessary and provable information can be listed as the name-surname-address information of the employee, his/her position, the type and amount of employment, the type and amount of wage, the date of payment, the place where the work will be performed; and for the employer, the full title, address, and the wage he/she undertakes to pay. Without prejudice to the law, the parties may also agree on other special conditions in the contract, such as the obligations undertaken within the employment contract, details regarding the form of employment, rights determined above the legal limit. In any case, the unit wage

to be paid to the personnel shall not be below the minimum wage decided and applied by the relevant commission.

1.3 Working Hours

Maximum Working Hours

The Turkish Labour Law sets the maximum weekly working time at 45 hours.

The maximum daily working time is set at 11 hours. There is an exceptional provision for night work. Work between 20:00 and 06:00 is considered night work. In workplaces where shift work is applied, the work of the shift in which more than half of the working time coincides with the night period is considered night work. Night work cannot exceed 7.5 hours per day.

Flexible Working Arrangements

The Labour Law does not directly regulate flexible working. However, partial work and equalisation arrangements can be examined under the section on flexibilisation of working time.

Partial work

Partial work is the work performed up to two-thirds of the equivalent work performed in the workplace with a full-time employment contract. If there is work exceeding two-thirds of the full-time work applied in the workplace, this will not be accepted as part-time work. Overtime work is prohibited in part-time work. Part-time work can be realised between the parties on a voluntary basis. This work must be continuous and regular. Reducing the working time for a temporary period in a full-time employment relationship will not make the employment relationship part-time.

Equalisation

The normal weekly working time can be distributed differently to the working days of the week in the workplaces with the agreement of the parties, provided that the total working time does not exceed eleven hours a day. In this case, the average weekly working time of the employee within a period of two months cannot exceed the normal weekly working time. The equalisation period may be increased up to four months by collective labour agreements. In order to apply equalisation at the workplace, the parties must agree on this issue. An agreement may be reached through an employment contract or a collective bargaining agreement, or the parties may also agree on this issue through a separate written protocol.

Overtime

Overtime work is defined as work exceeding 45 hours per week. In accordance with the relevant legal regulation, overtime work exceeding 45 hours per week is paid by increasing the amount per hour by 50%. In cases where the weekly working time is determined below forty-five hours by contract, the work exceeding the weekly working time and up to forty-five hours is defined as overtime work. In overtime work, the wage for each hour of overtime work is paid by increasing the normal working wage by 25% per hour.

In any case, the working time cannot exceed 11 hours per day, 7.5 hours per day if night work is performed and 270 hours of overtime work per year. Exceeding this limit is grounds for justified termination of the employment contract for the employee and is subject to administrative sanctions (such as administrative fines). In any case, if the working time exceeds 11 hours per day, or 7.5 hours per day if night work is carried out, regardless of whether the weekly work exceeds 45 hours or not, the work exceeding the limit must be paid as overtime wages.

1.4 Compensation

Minimum Wage Requirements

According to Labour Law, the minimum wage is determined by the Ministry of Employment and Social Security through the Minimum Wage Determination Commission every two years at the latest. In general practice, the Minimum Wage Determination Commission determines the minimum wage every year.

Workers cannot be paid less than the wages determined by the Commission. Provisions to the contrary cannot be included in employment contracts and collective labour agreements. No deduction can be made from the minimum wage by employers for social benefits provided to workers. Apart from the minimum wage regulation, there is no other legal regulation that obliges employers to increase wages in certain periods.

Bonuses

In addition to the main wage, the employer may pay bonuses to employees on certain days such as holidays, New Year's and birthdays. If the payment of bonuses is agreed in the employment contract or collective bargaining agreement or has become a working condition with the unilateral application of the employer, the employee has the right to demand the payment of bonuses. If the conditions do not exist, the employer is not legally obliged to pay bonuses.

In the workplace where the bonus payment is made, if the employee has been dismissed/dismissed before the payment date, the bonus must be paid in proportion to the period of employment, unless there is a different agreement.

1.5 Other Employment Terms

Week Holiday

A week holiday is a period of at least twenty-four hours without interruption within a period of seven days, provided that the employee has worked on the working days specified in the Labour Law. Even if the employee does not work on a week holiday, he/she is entitled to that day's wage. If he/she works on a week holiday, in addition to the one wage he/she would be entitled to even if he/she did not work, he/she is entitled to 1.5 wages with a 50% increase, considering the overtime tariff for working over 45 hours. In other words, if the employee works on a week holiday, he/she is entitled to a total of 2.5 wages for that day.

National and Public Holidays

National and public holidays are defined in the Labour Law and it is essential that these days are recognised as holidays. Even if the employee does not work on these days, he/she is entitled to that day's wage. If the employee works on these specified holidays, he/she is entitled to one wage for working in addition to the one wage he/she will be entitled to even if he/she does not work. In other words, if the employee works on national and public holidays, he/she is entitled to a total of two wages. National and public holidays are listed in the legal regulations.

Annual Leave

Pursuant to the Labour Law, all employees who have completed one year of seniority in the workplace of the same employer are entitled to annual leave. Employees with one to five years of service are entitled to at least 14 days of annual leave, while those with more than five but less than fifteen years are entitled to 20 days. Employees with fifteen or more years of service have a minimum entitlement of 26 days. Employees aged 18 and under and employees aged 50

and over cannot be granted less than 20 days of annual paid leave. Annual leave periods may be increased by employment contracts and collective bargaining agreements.

The employer is obliged to pay the employee taking his/her annual leave in advance before the start of the leave period. While there is no legal requirement for additional payment, it is customary for employers to provide a "leave allowance" to employees taking annual leave. This practice is often enshrined in collective bargaining agreements.

Prenatal and Postnatal Leave

Pursuant to Article 74 of the Labour Law, it is essential that a female worker is granted leave for a total period of sixteen weeks, eight weeks before and eight weeks after childbirth. In case of multiple pregnancies, two weeks are added to the eight-week period before the birth. However, if it is documented that the health condition of the employee is appropriate to work with the approval of a doctor, female and pregnant employees can work up to three weeks before the birth. In this case, the periods worked before the birth are added to the postnatal leave periods. In case of the death of the mother during or after childbirth, the periods that cannot be used after childbirth shall be made available to the father. Employees who adopt a child (only one spouse if a married couple adopts) under the age of three are granted eight weeks of maternity leave from the date the child is delivered to the family or adopting parent.

Right to Unpaid Leave After Birth/Adoption

If the female employee requests, she should be granted unpaid leave for up to six months after the completion of sixteen weeks of maternity leave or after the completion of eighteen weeks in case of multiple pregnancy. This leave is also granted to one of the spouses or adopting parent in case of adoption of a child under the age of three.

Postnatal Part-time Work

From the end of the maternity leave, provided that the child is alive, female workers and female or male workers who adopt a child under the age of three are given unpaid leave for sixty days in the first birth, one hundred and twenty days in the second birth, and one hundred and eighty days in subsequent births for half of the weekly working time. In case of multiple births, thirty days are added to these periods. If the child is born disabled, the applicable period is three hundred and sixty days. On the days of part-time work, the worker receives an allowance from the Social Security Institution for the period he/she does not work and if he/she meets the necessary conditions.

Part-time Work at the Compulsory Primary Education Age of the Child

After the end of the prenatal and postnatal maternity leave, one of the parents may request part-time work at the beginning of the month following the start of the compulsory primary education age of the child. This request must be met by the employer and the employer cannot terminate the employee's employment contract for this reason. An employee who starts part-time work within the scope of this provision may return to full-time work, without benefiting from this right again for the same child. The employee who wishes to return to full-time work must notify the employer in writing at least one month in advance. If one of the parents is not working, the working spouse cannot request part-time work.

Breastfeeding Leave

A female worker is given 1.5 hours of paid leave per day to breastfeed her child under one year of age.

Illness and Incapacity for Work

There is no legal regulation in the Labour Law regarding any requirement to grant leave to employees without a doctor's note for illness. In case of illness or other reasons, the employer's wage payment obligation varies according to the type of wage received by the employee.

For employees working on a monthly fixed wage, the wages of the days they do not work due to illness are not deducted, and the temporary incapacity allowance paid by the Social Insurance Institution is deducted from the wages of monthly paid workers. On the other hand, there is no regulation stating that no deduction can be made from the wages of personnel paid hourly or daily. However, the Turkish Code of Obligations stipulates the obligation to pay an equitable wage to the employee for the period of short-term absenteeism in case of illness, if it is not covered by any other means.

Duty of Confidentiality and Loyalty

In terms of other conditions of employment, particularly in the context of employees' liability, the duty of confidentiality and loyalty of the employees should also be addressed.

According to the Turkish Code of Obligations, the employee cannot use the production and business secrets that he/she learns during his/her work at the workplace for his/her own benefit during the continuation of the employment contract, nor can he/she disclose them to third parties. Even after the termination of the employment contract, it is clearly regulated in the law that the employee is obliged to keep secrets to the extent necessary for the protection of the rightful interest of the employer.

The employee's disclosure of confidential information during the continuation of the employment contract in violation of the obligation of loyalty and in a way that harms the employer is regulated as a justified termination due to breach of integrity and loyalty in the provisions of the Labour Law.

At this juncture, the concept of whistleblowing also finds a place in Turkish law. Whistleblowing can be summarised as the employee's disclosure of practices contrary to the law and ethical rules that he/she is aware of in the workplace to third parties, the media and official institutions. In the doctrine and jurisprudence, it is stated that the employee's disclosure of information that may cause damage to the employer will constitute a breach of the duty of loyalty, but at this point, if there is a situation that constitutes a criminal element and the public interest should be kept superior, this behaviour of the employee should not be considered a breach of the duty of loyalty.

2. Restrictive Covenants

2.1 Non-competes

Pursuant to Article 396 of the Turkish Code of Obligations, the employee may not engage in competition with his/her employer during the term of the employment contract and may not work for a third party for remuneration in violation of the duty of loyalty. If the contrary situation is detected, the employment contract of the employee may be terminated immediately by the employer for just cause due to the employee's behaviour contrary to the duty of loyalty and integrity.

However, for the employee to have a non-competition obligation after the termination of the employment contract, an agreement on non-competition must be concluded between the parties.

For the non-competition agreement signed between the employee and the employer to be valid, the following conditions must be met:

- The employee must have the capacity to act at the time of signing the agreement.
- The non-competition agreement must be in writing.
- The service relationship provides the employee with the opportunity to obtain information about the customer environment or production secrets or the employer's business.
- The use of the information possessed by the employee is likely to cause significant damage to the employer.

The Code of Obligations stipulates that the non-competition clause should not be regulated in a wide scope in terms of location and subject matter, and its duration should not exceed two years in order not to jeopardise the economic future of the employee.

The non-competition clause expires if the employment contract is terminated by the employer without a justified reason or terminated by the employee for a reason arising from the employer.

The employee who violates the non-competition clause is obliged to compensate all damages incurred by the employer as a result. If a penalty clause is included in the employment contract or non-competition agreement, the employee is released from the non-competition obligation by paying this penalty. However, he/she must also compensate the damages, if any, exceeding the amount of the penalty imposed.

2.2 Non-solicits

It is a requirement of the duty of care and loyalty regulated in the Turkish Code of Obligations that the employee does not engage in any act or behaviour against the employer during the continuation of the employment contract.

After the termination of the employment contract, avoiding behaviours that may be to the detriment of the employer may be regulated in the content of non-competition-based agreements to be added to the employment contract or signed separately.

In practice, it is common for an employee who leaves the workplace to transfer some of his/her colleagues from the old workplace to the new workplace, and/or to ensure that the customers of the old workplace become customers of the competitor company.

To prevent such situations, in practice, a non-competition clause is added to the content of the employment contract signed between employers and employees or to the content of the independent contract made in this regard. In addition to the content of such contracts, there are also provisions that prohibit the employee from encouraging the transfer of other colleagues from the workplace to competitor companies and the unfair referral of the customers of the workplace to competitor companies and stipulate the payment of a penalty in case of violation.

3. Data Privacy

3.1 Data Privacy Law and Employment

According to Law No 6698 on the Protection of Personal Data, employers (as the data controller) may process employee data in accordance with the law and good faith, within specific, clear and legitimate purposes and limited to these purposes, if it is proportionate, and may also retain employee data limited to the purpose.

Employers are also obliged to destroy employee data when the reasons for data processing cease to exist. The transfer of employee data within the country and the transfer of employee data abroad are subject to special conditions.

Employees must be informed about the purpose for which their data is processed, the persons/institutions to whom their data may be transferred, how their data is processed and the rights they have in relation to their data.

This information must be made clearly, in writing, and it is recommended that the disclosure notices be made against signature as a separate text independent from the contract when the employment contracts are established.

Within the scope of occupational health and safety obligations, a lot of health data of employees is kept in the workplace. This data is defined as sensitive personal data within the scope of the Law on the Protection of Personal Data. For this reason, such data should be kept in a way that is not accessible to everyone and accessible only to the relevant persons, such as physicians and health officers.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Regulations on foreign employees are regulated in the International Labour Force Law No 6735. Except for workers who are exempted from work permits under other laws or international agreements, the work of foreigners within the scope of the International Labour Force Law in Türkiye is subject to the condition of obtaining a work permit. Accordingly, unless they have an exemption regulated by law, foreigners cannot work in Türkiye without a work permit. Foreigners with a work permit are subject to the same regulations as Turkish employees.

The evaluation criteria for work permit applications are clearly and in detail listed in the International Labour Force Law. It is clearly stated in the law that the applications of those who do not meet these criteria will be rejected.

Work permits are not granted to foreign workers in domestic services, except for the care of the elderly, sick and children. Pursuant to Article 13 of the Implementing Regulation of the Law on Work Permits for Foreigners in force, the evaluation criteria to be met by the applicant workplaces and foreigners are explained by the Ministry of Labour and Social Security, accordingly:

- It is compulsory to employ at least five citizens of the Republic of Türkiye in the workplace where a work permit is requested. In case a work permit is requested for more than one foreigner in the same workplace, five Turkish citizens must be employed for each foreigner after the first foreigner for whom a work permit is granted. Some sectors are exempt from this rule.
- The paid-in capital of the workplace must be at least TRY100,000 or the gross sales must

be at least TRY800,000 or the last year's export amount must be at least USD250,000.
- The capital share of the foreigner, who is a partner of the company requesting permission, must be at least 20%, and not less than TRY40,000.
- The amount of monthly wage declared to be paid to the foreigner by the employer must be at a level compatible with the duties and competence of the foreigner.

4.2 Registration Requirements for Foreign Workers

Work permit applications are made directly to the Ministry of Labour and Social Security in Türkiye and to the embassies or consulates general of the Republic of Türkiye abroad.

The work permit application shall be evaluated according to the international labour policy. In cases deemed necessary by the Ministry, the opinions of the relevant public institutions and organisations and professional organisations having the status of public institutions are to be taken into consideration.

The documents requested from the foreign employee during the application are listed below:

- employment contract signed by the employer and the foreigner;
- passport copy;
- translated copy of diploma or temporary graduation certificate; and
- professional qualification certificate/permit to be obtained from the relevant authority according to the sector in which the foreigner will work.

5. New Work

5.1 Mobile Work

Data Protection

It is stipulated that the employer shall inform the remote worker about the business rules and relevant legislation regarding the protection and sharing of data related to the workplace and the work performed and shall take the necessary measures to protect this data. It is important that this information is made in writing to provide ease of proof.

The employer must determine the definition and scope of the data to be protected in the employment contract or telework protocol signed with the employee. The remote worker must comply with the operating rules determined by the employer to protect the data.

Occupational Health and Safety

The Remote Working Regulation clearly stipulates that the employer is obliged to inform the employee about occupational health and safety measures, to provide the necessary training, to provide health surveillance and to take the necessary occupational safety measures regarding the equipment provided, considering the nature of the work performed by the remote worker. Accordingly, the employer is obliged to:

- carry out a risk analysis;
- prepare an emergency action plan;
- provide training; and
- ensure that obligations, such as providing protective equipment where necessary, continue to be fulfilled within the scope of teleworking; in cases where it is not possible for the employer to directly access the remote working environment, the regulation allows for alternative solutions to fulfil these legal obligations, such as written questionnaires

to gather information about the employee's working environment and assess potential risks, and using video recordings to deliver health and safety training to remote workers.

It is important to establish clear procedures for verifying compliance with occupational health and safety (OHS) practices in remote work settings. This includes documenting training efforts, such as conducting video training sessions followed by assessment tests, and implementing risk assessment protocols like using checklists to identify hazards and track preventive measures. Even in the absence of specific regulatory guidance, proactive steps to establish and document OHS practices can help demonstrate due diligence.

Furthermore, given the presumption that accidents during working hours are work-related, it is advisable to include a provision in employment contracts or additional protocols requiring employees to promptly notify their employer of any work-related accidents or health issues. This ensures that the employer can meet their legal obligations regarding reporting and notification.

Social Security

All the employer's obligations regarding the payment of social security premiums and social security benefits for employees, as outlined in Law No 5510, remain unchanged even when employees are engaged in remote or mobile work arrangements.

5.2 Sabbaticals

There is no provision in Labour Law to grant paid leave to employees due to the need for training. In this respect, it is subject to the employer's acceptance to grant paid and/or unpaid leave to the personnel who need it upon request. The employer is not legally obliged to grant paid and/or unpaid leave to the personnel due to the need for training.

5.3 Other New Manifestations

The new forms of labour that have recently been encountered in practice are listed below. However, there are no clear definitions and regulations in the laws on these forms of labour, nor has there been a clear legal characterisation in the jurisprudence.

Freelancing

The word "freelancing" refers to freelance work or self-employment. In practice, it is often used in the professions of writing, editing, translation, and computer programming. Freelance work is generally carried out remotely and over the internet. In the few precedent judicial decisions on the subject, it is stated that each concrete case should be evaluated separately based on whether there is a dependency relationship between the employee and the employer.

Crowdsourcing

Work is divided into smaller tasks and distributed among multiple workers. This approach aims for faster completion without requiring a fixed workplace, thereby potentially saving on office and personnel costs. There is not yet a separate legal regulation regarding this way of working.

Hybrid Working

This is a working model in which office and remote working are applied together. This form of work is widespread in Türkiye, especially after the COVID-19 pandemic. Unlike other new working models, in this type of work there is a dependency relationship between the employee and the employer, and the provisions of the Labour Law clearly apply.

6. Collective Relations

6.1 Unions

The Purpose and Principles of the Establishment of Unions

Trade unions are organisations with legal personality established to protect the rights and interests of workers and employers. Provided that the conditions specified in the law are met, trade unions may be established without any prior authorisation. The right to establish trade unions is also guaranteed by the Constitution.

Under Turkish law, trade unions are established on a line of business basis and can only operate in the line of business in which they are established. The Ministry of Labour and Social Security determines which jobs are included in which business line.

The Role of Trade Unions

The most important role of trade unions is to conclude collective labour agreements with employers to improve the rights and interests of workers.

Not all trade unions, but those that can obtain official authorisation can conclude collective bargaining agreements. For a trade union to be officially authorised:

- at least 1% of the registered workers across the country in the line of work in which the union is established must be members of the relevant union;
- more than half of the employees of the employer with whom the collective labour agreement will be signed must be members of the relevant trade union; and
- if collective labour agreements are to be made at enterprise level, 40% of the employees in the enterprise must be members of the relevant union.

Trade unions represent workers in many areas other than collective bargaining. Here are some of their fundamental representation powers:

- Trade unions have the authority to initiate legal action on behalf of their members, and to actively participate in ongoing legal proceedings.
- In workplaces with established collective labour agreements, trade unions are empowered to appoint employee representatives.
- The trade union with the largest membership nationwide has the significant responsibility of representing workers on the minimum wage commission.

6.2 Employee Representative Bodies

Trade Unions and Confederations

Trade unions are the most fundamental employee representative body enshrined in labour legislation and guaranteed by the Constitution. Trade unions are private law legal entities that can be established with the participation of at least seven workers.

While trade unions can only operate in the business line they are affiliated with, at least five trade unions in different business lines can come together to form a confederation.

Trade Union Employee Representatives

The trade union, whose authorisation to conclude a collective bargaining agreement is finalised, shall appoint representatives from among the employees of the workplace where the agreement will be concluded.

The number of employee representatives to be appointed in a workplace is specified in the law

and is determined according to the total number of employees of the workplace.

The term of office of the representatives is for the duration of the collective labour agreement. Employee representatives, limited to the workplace where they work, are responsible for listening to and resolving workers' complaints, ensuring communication and harmony between employees and employers, and protecting employees' rights.

Occupational Health and Safety Employee Representatives

According to legal regulations, it is mandatory to have an employee representative in the field of occupational health and safety in workplaces, whether there is an authorised trade union in the workplace. The number of employee representatives required in a workplace according to the degree of danger of the workplace and the total number of employees in the workplace is regulated by law. It is essential that employee representatives are elected.

Occupational health and safety employee representatives are authorised to represent the employees in the workplace in matters such as participating in work at the workplace, requesting measures to be taken to reduce risks, and making proposals for the improvement of processes.

Optional Employee Representatives

It is known that in some workplaces in Türkiye, employee representation units are established even though they are not legally obligatory. Particularly in larger workplaces, these representatives serve as a vital communication channel between employees and management, fostering a harmonious work environment, and ensuring that employee perspectives are considered in business decisions.

6.3 Collective Bargaining Agreements

Collective Labour Agreement Negotiation Process

The trade union, which has reached a sufficient majority for a collective bargaining agreement, invites the employer to collective bargaining negotiations after the finalisation of its authorisation. If they reach an agreement, the collective labour agreement is signed.

If the parties cannot reach an agreement, the legal mediation process starts. At the end of this procedure, if the parties agree, the collective labour agreement is signed.

In case of failure to reach an agreement, the trade union has the right to strike.

Form, Duration and Basic Principles of Collective Labour Agreements

Collective labour agreements must be in writing. The duration of the agreement can be at least one year and at most three years. A collective labour agreement generally includes the following:

- the scope and applicability of the agreement;
- the wage increases that will be applied to workers' wages during the contract period;
- benefits to be provided to the workers and the increases to be applied to them; and
- disciplinary rules and sanctions that will be in effect in the workplace.

Scope of Collective Labour Agreements

Collective labour agreements benefit all workers who are members of the union or all workers who are not members of the union but pay solidarity dues to the union. However, when draft-

ing a collective labour agreement, out-of-scope employees may be identified. In practice, white-collar employees are generally excluded.

7. Termination

7.1 Grounds for Termination

The Employer's Obligation to Rely on a Valid Reason and the Concept of Job Security

According to legal regulations, if the employer has at least 30 employees, it must rely on "valid reasons" when terminating the employment contract of an employee who has worked for more than six months and is not the employer's representative.

Valid reasons are situations where it is unreasonable to expect the employer to continue the employment relationship, although they are not as severe as the grounds which allow the employer to "justify termination".

The employer is obliged to make the notice of termination in writing and to state the reasons in clear and precise language. In addition, if the employment contract is to be terminated for valid reasons arising from the performance or behaviour of the employee, it is obligatory to take the employee's defence before termination.

Other Reasons for Termination for the Employer

The employer may terminate the employment contract within the probationary period, except for valid reasons. The employer who uses the right of termination during the probationary period is not obliged to comply with the notice periods.

In addition, the employer may terminate the employment contract for "just cause". The justified reasons that the employer may rely on will be mentioned in **7.3 Dismissal for (Serious) Cause**.

Collective Dismissal

The employer may make a collective dismissal for economic or structural reasons. To be able to mention collective dismissal, the employment contracts of the following number of employees must be terminated on the same or different dates within a month:

- at least ten in a workplace employing 20-100 workers;
- at least 10% in workplaces with 101-300 employees; and
- at least 30 in workplaces employing 301 or more workers.

The employer who will make a collective dismissal shall notify this situation to the workplace union representatives and the Turkish Labour Institution at least 30 days in advance.

Reasons for Termination and Legal Consequences for the Employee

Probation and resignation

Employees, just like employers, may terminate their employment contracts during the probationary period without the obligation to comply with the notice periods. After this period, termination of the employment contract by the employee without any reason is considered as resignation. The resigned employee is not entitled to any compensation.

Termination due to marriage, military service, retirement

Female employees can terminate their employment contract within one year from the date of marriage due to marriage, and male employees can terminate their employment contract due to

military service. Providing legal retirement conditions is another reason for termination in the legislation.

If the employee's working period is one year or more, these types of termination entitle the employee to severance pay. The employee who terminates the employment contract on these grounds does not have to comply with the notice periods.

Termination by the employee based on justified reasons

Article 24 of the Labour Law regulates "just cause" for the employee. The following can be listed as the main justified reasons in question:

- dangerous working conditions at the workplace for the health of the worker;
- the employer misleading the employee about the terms of the contract;
- the employer attacks the personal rights of the employee, taunts the employee, accuses the employee of a crime;
- the employee has been subjected to harassment and the employer has not taken precautions in this regard despite knowing about it;
- failure by the employer to pay the employee's progress payments or failure of the employer to fulfil other legal obligations; or
- stoppage of work for more than one week due to reasons arising from the workplace.

If the employee has more than one year of seniority and can prove the reason for termination, the employee is entitled to severance pay. The employee who terminates his/her employment contract based on these reasons does not have to comply with the notice periods.

The employee is obliged to exercise his/her right of termination within six working days following the date on which he/she learns the justified reason for termination. Otherwise, the right of termination disappears.

7.2 Notice Periods

According to legal regulations, the party who will terminate an indefinite-term employment contract must notify the other party of this situation a certain period in advance. These periods are called notice periods.

Notice Periods

According to legal regulations, the party who will terminate the employment contract must comply with the following notice periods according to the duration of the employment contract between the parties.

- two weeks if the employment has lasted less than 6 months;
- four weeks if it lasted between six months and 1.5 years;
- six weeks if it lasted between 1.5 years and three years; and
- eight weeks if more than three years.

These periods regulated in the law are minimum and can be increased with the agreement of the parties.

Cases Where There is No Obligation to Comply With the Notice Period

In fixed-term contracts, since the date of termination of the contract is known by both parties, the parties will not need such a transition period. For this reason, in the Turkish Labour Law, the notice period is applicable only for indefinite-term contracts.

However, there is no obligation to comply with the notice periods for terminations based on justified reasons by the employer or the employee.

Again, it is not obligatory to comply with the notice periods for terminations due to marriage, military service, retirement and trial terminations.

Notice Pay

The party who terminates the indefinite-term employment contract without complying with the notice periods is obliged to pay the other party the wage covering this period as compensation. This compensation is different from severance pay.

In addition, it is accepted in Turkish Labour Law that the notice period is indivisible. In other words, it is not possible to complete part of the notice period by working and the remaining part by paying notice pay.

For both parties of the contract, it is recommended to notify the other party with a written notification in order to prove that the notice periods have been complied with.

7.3 Dismissal for (Serious) Cause

Reasons for Justified Termination That the Employer May Rely on

Termination due to the employee's behaviour contrary to the rules of morality and good faith

Article 25/II of the Labour Law gives the employer the right to terminate the employment contract immediately, without any compensation, in cases contrary to the rules of morality and goodwill. The main reasons for justified termination for serious cause mentioned in the article are as follows:

- the employee making statements or behaviours that are offensive to the personal rights of the employer or one of his/her family members, imputing a crime;
- sexual harassment of another worker by the worker;
- engaging in bullying or harassment towards the employer or another worker, or coming to the workplace under the influence of intoxicants or drugs or using them at the workplace;
- abusing the trust of the employer, theft, behaviours incompatible with honesty such as revealing the employer's professional secrets;
- failure of the employee to come to work within the periods specified in the law for an arbitrary reason;
- refusal by the worker to fulfil his/her duties despite being warned; or
- endangering occupational health and safety, or damaging an item belonging to the employer in an amount exceeding his/her 30-day wage.

The employer must exercise his right of termination within six working days from the day he/she learns the reason and in any case within one year from the date of the act. If the termination occurs beyond this timeframe, even if there is a justified cause for termination, the employer will lose the legal advantages associated with justified termination.

Other justified reasons that the employer may rely on

Other justified reasons for termination by the employer listed in Article 25 of the Labour Law are as follows:

- the employee being ill or having a bad lifestyle for any reason and being absent at the workplace for a certain period for this reason;
- an employee submitting an official medical board report stating that he/she will not be able to work due to health reasons; or

- an employee who is detained or arrested due to an offence committed can be counted as being unable to come to the workplace for a certain period.

Unlike the reasons that are contrary to the rules of morality and good faith, the employer is obliged to pay severance pay to the employee who has worked for more than one year.

To prove both the reason for termination and that the termination was made in due time, it is recommended that the employer terminate the employment contract with a written notice clearly stating the reasons for termination.

7.4 Termination Agreements

Rescission Agreements

Although the legal regulations do not contain a provision on termination agreements, the precedent set by the high court acknowledges the possibility for parties to mutually agree on termination.

In cases where the contract is concluded by mutual agreement, as a rule, the employee cannot file a reinstatement lawsuit. For an agreement where the employee is deprived of these rights to be valid, an appropriate benefit must be provided in return for the deprived rights.

It is important which party is the party proposing the agreement in terms of whether the agreed additional benefit is appropriate or not. When the offer is made by the employee, it may be sufficient to pay only the severance and notice pay, whereas if the offer is made by the employer, it is appropriate to make an additional payment of at least four salaries in addition to the severance and notice pay.

Release Agreements

Release agreements are agreements that release the debtor from the debt. The conditions that must be present in a valid release in terms of labour contracts are listed in the law:

- The release agreement must be in writing and at least one month after the date of termination.
- The release agreement should clearly set the types and amounts of receivables subject to it.
- The employer must make all payments in full and through a bank transfer, ensuring that the employee receives the entirety of the agreed-upon compensation.

A release agreement that does not meet these conditions does not completely release the employer from the debt. In such cases, the agreement will only be considered as a receipt for the specific amounts mentioned within it.

7.5 Protected Categories of Employee

Employees Subject to Job Security

The employer's obligation to "rely on valid reasons" is referred to as the principle of job security. The principle of job security aims to prevent the employer from using the right of termination arbitrarily. Employees can benefit from job security when the following conditions are met:

- Workplace size: The employer must have at least 30 employees.
- Seniority: The employee must have completed at least six months of service.
- Position: The employee cannot be an employer's representative.
- Contract type: The employee must be under an indefinite-term employment.

In accordance with this principle, not only the existence of a valid reason is sufficient, but it also requires the employer to act in accordance with the principle of "termination of last resort" by taking certain measures to avoid termination. Failure to adhere to this principle can lead to "reinstatement cases", where employees can seek legal recourse to regain their employment.

Trade Union Members

Employers may not terminate the employment contract of an employee for being a member of a trade union or participating in trade union activities. Otherwise, the employee shall be paid union compensation not less than one year's salary.

Trade Union Representatives

The employer may terminate the employment contract of union representatives only for just cause. If the representative files a reinstatement lawsuit and the lawsuit is concluded in his/her favour, even if the employer does not reinstate him/her despite the court decision, the employee is entitled to wages and other fringe benefits as if he/she were working until the end of the representation period.

Protection Principles Specific to Women Workers

Women workers cannot be dismissed solely on the basis of pregnancy. Otherwise, the employer is liable for the consequences of a reinstatement lawsuit, severance pay and notice pay. In addition, the compensation for non-reemployment in a reinstatement case is determined in the amount of eight months' salary, which is the upper limit. However, the employer must pay discrimination compensation to the employee in the amount of four months' salary.

In addition, female employees have the right to request part-time work after childbirth until the child reaches primary school age. In accordance with the legal regulation, this request must be met by the employer, and it is forbidden to terminate the employment contract for this reason.

8. Disputes

8.1 Wrongful Dismissal

Reinstatement Lawsuits

The employee whose employment contract is terminated by the employer may claim that the employment contract was terminated by the employer without a valid reason and that the termination is invalid.

Application to mediation is mandatory before filing a lawsuit and the application period is one month from the date of termination. When the mediation process results in the parties' failure to agree, this situation is recorded in the minutes. The employee must file a lawsuit for reinstatement within two weeks from the date of this report.

The burden of proof in reinstatement cases is on the employer. The employer is obliged to prove the reason for the termination.

The favourable outcome of the reinstatement case means that the termination made by the employer is invalid. Accordingly, the court decides on the invalidity of the termination and the reinstatement of the employee.

After the court decision is finalised, the employee must apply to the employer in writing. If the employer does not accept the reinstatement application, the employee must be paid four months' salary specified in the court decision

and non-reinstatement compensation in the amount of 4-8 months' salary.

Since the invalidation of the termination means that the termination is not based on just cause, the employee must also be paid severance and notice pay because the reinstatement case concluded in favour of the employee.

Bad Faith Compensation

Employees who are not covered by job security do not have the right to file a reinstatement lawsuit. The law gives these persons the opportunity to claim bad faith compensation against the employer who does not have a justified and valid reason for the termination and acts in bad faith. This compensation is three times the amount of the notice period to which the employee is subject according to his/her seniority at the date of termination.

It is mandatory to apply to the mediator before the lawsuit. The burden of proof in the lawsuit is on the employee, and the employer's bad faith must be proved by the employee.

Severance and Notice Pay Cases

The employee may claim that the employment contract was terminated by the employer without a just cause. The main issue in this case is not whether the termination was valid but whether it was justified.

It is mandatory to apply to the mediator for these cases as well.

In compensation cases, the employee is obliged to prove that the employer did not have just cause for the termination.

Severance Pay

Severance pay is the compensation paid to the employee in the amount of 30 days' wage for each full year of service during the continuation of the employment contract. There is an upper limit for severance pay and this upper limit is announced by the official authorities every year. Even if the 30-day wage of the employee is higher, he/she may be entitled to severance pay up to the official upper limit.

8.2 Anti-discrimination

Equal Treatment Obligation of the Employer

According to the law, employers cannot discriminate based on language, race, sex, disability, political opinion, religion and similar reasons. In addition, the employer cannot discriminate on the grounds of gender and pregnancy and cannot subject employees with fixed-term contracts and part-time contracts to different treatment than other employees.

The equal treatment obligation of the employer exists at every stage of the employment relationship, including the establishment of the employment relationship, the provision of working conditions and termination.

The equal treatment obligation of the employer does not aim for absolute equality; the main thing is not to violate the equality between equals. Accordingly, the employer may develop different practices based on a concrete and objective justification that justifies the discrimination.

If the employer violates the equal treatment obligation, the employee may terminate his/her employment contract for just cause and may be entitled to severance pay. In addition, the employee may demand the payment of the rights he/she has been deprived of due to this breach by the employer.

The burden of proof is, as a rule, on the employee. However, the employee's burden of proof is not conclusive and if the employee demonstrates a situation that strongly indicates the existence of such a possibility, the employer must prove that their actions were not discriminatory.

8.3 Digitalisation

National Judicial Network Project (UYAP) and E-Trial

UYAP is the information system in which the central and provincial organisations of the Ministry of Justice of the Republic of Türkiye are transferred to the digital environment. This system allows parties and their attorneys to access and track all information related to their cases pending in any court.

Furthermore, e-trials are now possible in labour disputes. The party requesting an e-trial must notify the court at least two working days in advance, together with the grounds thereof. The court judge who receives the request shall decide on the request at least one day before the hearing.

9. Dispute Resolution

9.1 Litigation

Expertise and Representation in Litigation

In Türkiye, the Civil Code allows individuals with the necessary legal capacity to personally handle their lawsuits. While hiring a lawyer is not compulsory, it is often recommended given the complexity of legal proceedings.

Since litigation can be pursued personally by the employee or, if the employee prefers, by proxy, it is not possible to pursue litigation processes through specialised employment forums, etc, in the Turkish legal system.

Class Actions

In terms of labour law, only trade unions can file class actions. These lawsuits may be related to disputes such as the determination of a violation of law or the interpretation of a collective labour agreement.

Cases that directly concern the individual interests of workers, such as reinstatement, receivables and compensation, cannot be filed as class actions.

9.2 Alternative Dispute Resolution

Type of Dispute That Can be Submitted to Arbitration

Article 20 of the Labour Law stipulates that reinstatement cases filed on the grounds of invalidity of termination may be submitted to arbitration if the parties agree. However, there is no provision in the legislation regarding the possibility of arbitration in other types of cases.

The Validity of Arbitration Clauses in Employment Contracts

While the Labour Law stipulates that the parties may agree to arbitration for reinstatement cases, there is no limiting provision on when this agreement should be made. However, in the decisions of the high courts, it is accepted that arbitration agreements made at the time of the establishment of the employment contract or during the continuation of the contract are invalid on the grounds that the employee is economically dependent on the employer due to the need for work.

9.3 Costs

In a judicial process, the parties bear certain expenses such as fees, witness fees, expert witness fees, notification expenses and attorney's fees if they choose legal representation.

At the end of the proceedings, the party deemed to be at fault is generally responsible for covering the expenses incurred by the prevailing party, in addition to their own costs.

In scenarios where the court's decision involves partial acceptance and partial rejection of the claims, both parties are obligated to reimburse each other for expenses proportionally, based on the extent to which their respective claims were upheld. Throughout the proceedings, the court decisions explicitly document the judicial expenses borne by each party, along with the precise amount each party is liable to pay the other.

The attorney's fee within the costs of the proceedings is determined according to the officially published attorney's fee tariff. The victorious party is entitled to claim only the fee specified in this tariff, even if their actual legal fees, per their agreement with their lawyer, were higher.

UAE

Law and Practice

Contributed by:
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Addleshaw Goddard (Middle East) LLP

Contents

Addleshaw Goddard (Middle East) LLP is a distinguished international law firm with a legacy nearing 250 years. Esteemed for its comprehensive legal expertise, it serves over 5,000 major organisations, including 51 of the FTSE 100 companies. The firm's proficiency spans over 50 areas of business law, enabling it to deliver exemplary outcomes for clients across diverse industries. With a commitment to solving problems, executing deals, defending rights and ensuring regulatory compliance, Addleshaw Goddard operates with a relentless focus on achieving impactful results. Globally, the firm extends its reach to over 100 countries, ensuring clients can navigate, operate and expand with confidence and legal precision. In the Middle East, Addleshaw Goddard's presence is marked by offices in Dubai, Doha, Muscat and Riyadh. The firm's lawyers, permanently based in the region, bring together international experience from complex transactions and deep local law knowledge.

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1. Employment Terms

1.1 Employee Status

There is no relevant legal distinction between the terms "employee" and "worker" in the UAE.

1.2 Employment Contracts

Federal Decree Law No 33 of 2021 (the "Labour Law") requires all employment contracts to be for a fixed term (which can be auto-renewed in practice) and include a notice period ranging from a minimum of 30 days to a maximum of 90 days. The Labour Law requires employment contracts to be in writing and include the following information:

- the name and address of the employer;
- the employee's name, nationality, date of birth, qualification and job/profession;
- the amount of wages and the proportion of the total wages agreed as basic salary and allowances;
- the date on which the employment contract was entered into between the parties;
- the date on which the employment commenced or is due to commence;
- the duration of the employment contract;
- the location of the workplace;
- the probationary period (if any);
- annual leave entitlement; and
- notice period and procedures for terminating the employment contract.

For onshore UAE, a standard form dual language (Arabic/English) Ministry of Human Resources and Emiratisation (MOHRE) employment contract must be signed in two counterparts, with one being retained by the employee and the other by the employer. The MOHRE is the UAE government's regulatory body governing employment relationships and the Emiratisation initiative. It plays an important role in overseeing the UAE's workforce and regulating the employment process for the private sector in the UAE.

Due to the rigid nature of the standard form MOHRE contracts, it is customary in the UAE for employers and employees to enter into a supplementary private contract that expands on the terms set out within the standard form contract. Where the terms set out in either contract conflict with the other, it is the practice of the UAE courts to allow the employee to rely on whichever of the two conflicting terms is most favourable to the employee.

In the vast majority of cases, the relevant free zones each have their own standard form employment contract. Free zone standard form contracts are also generally bilingual contracts, which set out the core terms of employment derived from the Labour Law and any relevant free zone rules and regulations.

Free zones in the UAE are areas that have a special tax, customs and imports regime and are governed by their own framework of rules and regulations (with the exception of the UAE penal code, which applies both within and outside of the free zones). Private sector companies located within the UAE's free zones are not governed by the MOHRE but are subject to the Labour Law (except for the financial free zones of the DIFC and ADGM, which hold their own employment laws).

Irrespective of varying free zone employment rules and regulations (again excluding the DIFC and ADGM), it is important to note that the Labour Law over-rides any free zone employment regulation that may be in contravention of the Labour Law, and it is ultimately the Labour Law that prevails when determining employment

rights and remedies in the event of a dispute before the local labour courts.

If an employer seeks to utilise a post-termination restriction, this must be clearly depicted within the MOHRE/relevant free zone employment contract or the internal employment contract, failing which the employment will be deemed restriction free.

Changing Contractual Employment Terms

When changing the terms and conditions of employment, it is crucial to ensure that any modifications are not less beneficial to the employee than the provisions of the Labour Law. Key points to consider include the following.

- Freedom to agree: parties can agree to any contractual terms as long as they do not diminish the employee's benefits below the minimum standards set by the Labour Law.
- Written consent: any changes to the employment terms require the employee's express written consent.
- Protection of minimum entitlements: changes must not reduce the employee's protected minimum statutory entitlements under the Labour Law.
- MOHRE oversight: any amendments that reduce employee benefits must be signed before a MOHRE officer. This ensures the employee is not signing under duress or misunderstanding.
- End of service gratuity: any reduction in the employee's basic salary must include an agreement on its impact on the end of service gratuity entitlement.

These measures ensure that employment term changes are fair and transparent, protecting the interests of both the employer and the employee.

1.3 Working Hours

Maximum Working Hours

The maximum working hours are 48 per week over six days, or 40 per week over five days (however, the UAE Cabinet has the discretion to increase or decrease daily working hours for certain sectors or certain categories of worker). This equates to a maximum of eight hours per day, which is reduced to six hours per day (36 per week) during the holy month of Ramadan. Subject to the exceptions listed below, the total average working hours must not exceed 144 hours every three weeks.

Rest Days

An employee is entitled to a weekly paid rest period of not less than one day. For most office workers, for example, the rest days will be Saturdays and Sundays, although in practice the rest day(s) could be any day of the week.

Overtime Rates

Generally speaking, overtime must not exceed more than two hours per day, unless necessary to prevent or alleviate a substantial loss or serious accident. Overtime rates for eligible employees are as follows.

- Ordinary overtime hours: pay equivalent to the basic wage paid during ordinary working hours of work plus an additional amount of not less than 25% of the basic wage for each additional hour worked (Article 19 (2) of the Labour Law).
- Night-time overtime hours (ie, between the hours of 10pm and 4am): pay equivalent to the basic wage paid during ordinary working hours of work plus an additional amount of not less than 50% of the basic wage for each additional hour worked (Article 19 (3)).
- Rest day (ie, the employee's contractual day (s) off): a day off in lieu or pay equivalent to

the basic wage paid during ordinary working hours of work plus an additional amount of not less than 50% of the basic wage for each additional hour worked (Article 19 (4)).
- Public holiday: a day off in lieu or pay equivalent to the basic wage paid during ordinary working hours of work plus an additional amount of not less than 50% of the basic wage for each additional hour worked (Article 28).

Exemptions

The Executive Regulations specify that certain professions are exempt from the maximum working time provisions of the Labour Law, including overtime pay. These exemptions apply to:

- board members, including the chair of a board of directors and other board members;
- supervisory roles – employees in managerial or supervisory positions, such as general managers;
- maritime workers – employees working on naval vessels and seamen;
- shift workers, provided their average working hours do not exceed 56 hours per week; and
- specialised workers – employees engaged in preparatory or complementary work that must be conducted outside of normal working hours.

The MOHRE also has the authority to issue additional exemptions based on market needs at any given time.

Travel Time

In certain situations, as follows, travel time between an employee's accommodation and their place of work is considered part of their working hours:

- adverse weather conditions – when the weather is severe and national weather warnings are in effect, travel time can be counted as working hours;
- employer-provided transportation – if the employee is using transportation provided by the employer and there is an accident or emergency malfunction, the travel time is included in working hours; and
- contractual agreement – if it is explicitly stated in the employment contract, travel time can be considered part of working hours.

Consecutive Working Hours

Employees are prohibited from working more than five consecutive hours without taking a break of at least one hour. This break time is not counted towards the total working hours. However, the MOHRE has the authority to grant exemptions to this rule.

It is important to note that the DIFC and the ADGM have their own distinct regulations regarding working hours and overtime, which are not covered in this summary.

1.4 Compensation

While there is currently no minimum wage in the UAE, the Labour Law empowers the MOHRE to issue a Ministerial Resolution to determine and enforce a minimum wage at any time.

Wage Protection System (WPS)

The payment of employee salaries is regulated by the WPS, a system established by the MOHRE to ensure employees are paid in full and on time. Key aspects of the WPS include:

- coverage – it applies to all onshore employers and some free zone employers;
- process – employers must pay wages through the WPS, which transfers funds via a clearing

system managed by the UAE Central Bank to the employees' bank accounts; and
- minimum payment – employers must transfer at least 80% of the minimum salary stipulated in the MOHRE employment contract.

Employer Obligations

Employers have specific obligations under the WPS:

- notification – employers must notify the WPS before any employee does not receive their salary or is removed from the payroll;
- unexplained shortfalls – any unexplained shortfall in the monthly transfer can lead to difficulties for the employer, including the need for an explanation; and
- sanctions – in the absence of a valid reason for salary discrepancies, the MOHRE may impose fines, suspend work permit permissions and refer the matter for criminal prosecution.

These regulations ensure that employee wages are protected and that employers are held accountable for timely and accurate payments.

1.5 Other Employment Terms

UAE law provides for the following types of statutory leave: annual, maternity, parental, sick, study and bereavement.

Annual Leave

Employees in the UAE are entitled to annual leave as follows.

- First year of employment – a minimum of 24 calendar days of leave, applicable after the first six months of employment. There is no leave entitlement during the probation period.
- After the first year – a minimum of 30 calendar days of leave each year.

Carrying Forward Leave and Cash Alternatives

Employees may carry forward up to half of their annual leave entitlement to the following year, with the employer's approval. Any annual leave not carried over or used will be lost.

Employers have the option to compensate employees with a cash payment instead of carrying forward the leave.

Public Holidays

Public holidays declared by the UAE government are granted in addition to the annual leave entitlement, ensuring employees receive their full annual leave in addition to public holidays.

Unpaid Leave

Unpaid leave may be granted to employees with the employer's consent. Key points to note include:

- gratuity and pension – any period of unpaid leave does not count towards end of service gratuity entitlement or statutory pension purposes;
- maternity leave extension – employees on maternity leave can take up to 45 calendar days of unpaid leave if medically necessary, with appropriate confirmation; and
- job search during notice period – if an employer terminates an employee's employment, the employee is entitled to one day of unpaid leave per week during the notice period to look for a new job.

Maternity Leave

Employees are entitled to up to 60 calendar days of paid leave, structured as follows:

- first 45 days – paid at 100% of the employee's daily wage; and

- next 15 days – paid at 50% of the employee's daily wage.

Parental Leave

Both male and female employees are entitled to up to five days of paid leave, which can be taken within six months of the birth of their child.

Sick Leave

Employees are entitled to a maximum of 90 calendar days of sick leave within a 12-month period, whether taken consecutively or intermittently. The leave is calculated as follows:

- first 15 days – paid at 100% of the employee's daily wage;
- next 30 days – paid at 50% of the employee's daily wage; and
- subsequent days – any additional sick leave beyond 45 days is unpaid.

During the probation period, sick leave is unpaid.

Bereavement Leave

Employees are entitled to up to five days of paid bereavement leave, with the exact duration depending on the degree of kinship to the deceased.

Study Leave

Employees are entitled to ten working days of paid study leave if they meet the following conditions:

- enrolment – the employee must be studying at an accredited university in the UAE; and
- service requirement – the employee must have completed at least two years of service with the employer.

2. Restrictive Covenants

2.1 Non-competes

During employment, employees have a statutory duty of fidelity to their employer, which includes an obligation not to compete, as mandated by the Labour Law.

The Labour Law allows for a contractual "non-compete" provision for certain employees, although future exclusions may apply to some skill levels and job types, potentially including junior employees. This non-compete clause can restrict post-termination activities for up to two years.

Such a provision must be reasonable in terms of geographical location, duration and the type of work restricted. It should only protect the lawful interests of the company.

If an employer terminates an employee or breaches the Labour Law, any post-termination restriction becomes null and void.

Currently, the Labour Law and its accompanying Executive Regulations limit the employer's compensation for a breach of the non-compete clause to three months' total salary, which can be paid by the employee or their new employer. The regulations do not support injunctive relief, and any court claim for breach requires the employer to prove damages. This maintains the previous requirement that employers provide strict proof of financial loss, even with a liquidated damages clause in the employment contract.

As a result, enforcing a non-compete clause in local courts remains challenging, making such clauses primarily a deterrent.

2.2 Non-solicits

There is no statutory prohibition against solicitation, but it is common to include a non-solicitation clause in employment contracts.

Given the absence of injunctive relief under UAE law (outside of the DIFC and ADGM), enforcing a breach of a non-solicitation clause is challenging, making these clauses primarily a deterrent.

The UAE Commercial Transactions Law addresses unfair competition, prohibiting traders from inducing employees of competitors to join them for the purpose of usurping customers or having employees disclose their former employer's secrets to their new employer. While a civil claim for damages is a potential remedy for such breaches, it is notoriously difficult to obtain.

3. Data Privacy

3.1 Data Privacy Law and Employment

UAE Federal Decree Law No 45 of 2021 on the Protection of Personal Data, effective from 2 January 2022, aims to align the UAE with global data protection standards. Executive regulations, expected to be issued in 2024, will provide additional details on the law's provisions and assist employers in meeting compliance requirements.

The DIFC and ADGM free zones have their own data protection laws.

The UAE Constitution contains provisions designed to safeguard individuals' privacy, along with various other legislation including the Penal Code, as well as some Emirate-level and sector-specific laws and regulations.

4. Foreign Workers

4.1 Limitations on Foreign Workers

In order to lawfully reside and work in the UAE, all expatriatesmust hold a UAE residency visa and work permit. A plethora of flexible visas and residency permits are available, which include benefits for individuals and their families.

Other than immigration requirements, there are no limitations to using foreign workers.

4.2 Registration Requirements for Foreign Workers

Employers must ensure that their employees have a valid residence visa and comply with the Labour Law by obtaining the necessary work permits for lawful employment. Failure to meet these requirements can result in financial penalties for both the employer and the employee.

In addition, employers are obliged to provide medical insurance for each employee in accordance with local health insurance laws.

5. New Work

5.1 Mobile Work

The key principles of health and safety legislation in the UAE mandate that every employer must:

- provide employees with suitable means of protection against injuries, occupational diseases, fire and hazards resulting from the use of machinery and other equipment at the workplace;
- display detailed instructions on preventing fire and protecting employees from workplace hazards in a permanent and prominent place at the workplace;

- make available a first aid kit containing medicines, bandages and other first aid materials;
- ensure the workplace is kept clean and well ventilated;
- assign one or more physicians to thoroughly examine employees exposed to certain occupational diseases;
- provide medical care to employees according to standards prescribed by the MOHRE;
- inform each employee about the specific dangers and risks related to their employment, as well as the protection and mitigation measures that must be adopted; and
- prohibit employees from bringing or allowing others to bring any kind of alcoholic drinks for consumption on work premises.

5.2 Sabbaticals

Unpaid leave may be granted to employees at any time, with the employer's consent. Any period of unpaid leave does not count for end of service gratuity entitlement or statutory pension purposes.

UAE nationals are entitled to paid sabbatical leave to complete their National Service requirements.

5.3 Other New Manifestations

This is not applicable in the UAE.

6. Collective Relations

6.1 Unions

Unlike employment legislation in many other jurisdictions, UAE law does not recognise the concept of redundancy. Consequently, there is no mandated redundancy procedure, leading to potential disputes over termination payments.

Without specific redundancy provisions, employers must ensure compliance with existing UAE laws regarding employment termination and associated payments.

In addition, the Labour Law does not impose any collective or individual consultation obligations. Works councils, employee bodies and unions are also not permitted in the UAE.

6.2 Employee Representative Bodies

There are no trade unions in the UAE, and employee representatives are not common.

6.3 Collective Bargaining Agreements

Trade unions do not exist in the UAE, and employee representatives are uncommon.

7. Termination

7.1 Grounds for Termination

The Labour Law stipulates that an employment contract can be terminated for various reasons, including but not limited to:

- agreement in writing by both parties; and
- by either party, in accordance with the provisions of the Labour Law and the contractual notice period.

Either party may end the employment contract for any "legitimate reason" by providing written notice to the other party. However, the Labour Law does not define what constitutes a "legitimate reason", and there is limited case law on this due to the law's recent implementation. It is likely that reasons such as poor performance, misconduct or employer bankruptcy could be considered legitimate, subject to various burdens of proof.

There are no legal provisions governing collective redundancy.

Under the Labour Law, if an employer terminates an employee's employment, the employee is entitled to one day of unpaid leave per week during the notice period to search for a new job.

7.2 Notice Periods

The Labour Law mandates that all employees are placed on fixed-term contracts with no maximum duration. These contracts must include a notice period ranging from a minimum of 30 days to a maximum of 90 days.

Notice Within Probation

Termination

Where an employer terminates an employee's employment, a minimum of 14 days' written notice must be served on the employee.

Resignation

When an employee resigns during the probationary period, they must provide written notice in accordance with the Labour Law, as follows.

- A minimum of 30 days' notice if the employee is resigning to take up employment with a different UAE employer. In this case, the new UAE employer is required to compensate the current employer for the employee's recruitment costs, as stipulated by the Labour Law.
- A minimum of 14 days' notice in all other cases. If the employee leaves the country and returns to take up new employment within three months, the new UAE employer must compensate the previous employer for the employee's recruitment costs, in compliance with the Labour Law.

If notice is not served, the party terminating the contract must compensate the other party in an amount equal to the employee's salary for the notice period.

Entitlements Following Termination

- Accrued benefits, including any benefits specified in the employment contract, such as outstanding incentive payments.
- Normal salary and benefits are due up to and including the termination date. Notice can be paid in lieu upon mutual consent.
- Accrued but untaken annual leave will be compensated.
- End of service gratuity is payable upon termination for employees with one year or more of continuous service. It is calculated based on the basic salary, as follows:
  (a) 21 days' salary per year for continuous service between one and five years; and
  (b) 30 days' salary per year for continuous service beyond five years.
- Repatriation flight – the employer must cover the cost of repatriating the employee to their home country or another agreed location. This is not payable if the employee does not repatriate or resigns.

These entitlements must be paid upon termination, and no later than 14 days from the termination date, in accordance with the Labour Law. Failure to pay within this timeframe may result in financial penalties for the employer.

Arbitrary Dismissal Compensation

Historically, terminations not based on poor performance or gross misconduct, in line with strict legal provisions, entitled employees to up to three months' gross salary as compensation for unfair dismissal.

Under the current Labour Law, employees are entitled to three months' wages as compensation for "unlawful termination" if they are dis-

missed after raising a serious complaint with the MOHRE, a relevant free zone authority or the courts, provided these claims are upheld. To date, local courts have strictly adhered to this rule, awarding compensation only where a complaint was made shortly before the employee's termination.

Post-termination Procedures

An employer can terminate an employee by providing notice, without needing to refer to the MOHRE. It is advisable to issue the notice in writing due to the heavy reliance on documentary evidence under UAE civil procedure rules. Termination notices are often emailed to the employee, which satisfies the UAE civil procedure code regarding document service.

Within 48 hours of termination, the employer should notify the MOHRE and complete the visa cancellation formalities for the residence visa and work permit. If the employee is not sponsored by the employer for residency purposes, the employer may cancel only the work permit.

Failure to comply with MOHRE notification and visa/work permit cancellation requirements can result in fines or penalties for both the employer and the employee. The MOHRE may also restrict the employer's ability to apply for new residence visas and work permits, or refuse the employee a new work permit with a different UAE employer.

7.3 Dismissal for (Serious) Cause

An employer can terminate an employee's employment contract with immediate effect, following a written investigation in accordance with the Labour Law (and/or its internal policies, where applicable), under the following circumstances:

- the employee assumed a false identity or forged documents;
- the employee made a mistake causing significant material loss to the employer;
- the employee violated the company's safety policies;
- the employee consistently failed to perform their primary duties as outlined in the employment contract, despite an investigation and at least two warnings of dismissal if their behaviour persisted;
- the employee disclosed trade secrets or intellectual property, resulting in loss to the employer or personal gain for the employee;
- the employee was intoxicated or under the influence of illegal drugs or committed immoral acts in the workplace during working hours;
- the employee committed any form of assault (verbal or physical) against the employer, manager, supervisors or co-workers;
- the employee was absent from work for more than 20 non-consecutive days or seven consecutive days without a legitimate reason or justification acceptable to the employer;
- the employee misused their position for personal gain; or
- the employee joined another employer without complying with the necessary requirements and permissions as provided by the Labour Law.

Employers must comply with various reporting obligations before terminating an employee for any of the above reasons, to avoid the risk of the termination being deemed unfair and the employee raising a claim before the local labour courts seeking compensation.

Employees who are summarily dismissed for gross misconduct are entitled to their full end of service gratuity entitlement.

Post-termination Procedures

An employer can terminate employment by providing notice to the employee without referral to the MOHRE. It is advisable to issue the notice in writing, given the high reliance on documentary evidence under UAE civil procedure rules. Termination notices are often emailed to employees, as this method satisfies the UAE civil procedure code for document service.

Within 48 hours of terminating employment, the employer should notify the MOHRE of the termination. The employer and employee should then proceed to complete the necessary visa cancellation formalities for the residence visa and work permit. If the employee is not sponsored for residency by the employer, the employer can cancel only the work permit.

Failure to comply with MOHRE notification and visa/work permit cancellation requirements may result in fines or penalties for both the employer and the employee. In some cases, the MOHRE may restrict the employer's ability to apply for new residence visas and work permits, or refuse to issue the employee a new work permit with a different UAE employer.

7.4 Termination Agreements

Termination and settlement agreements are commonly used in practice, but they do not require a specific form or name. These agreements are often referred to as "settlement agreements" or "final settlement and release agreements".

Despite entering into a settlement agreement, an employee cannot waive their rights under the Labour Law. This means that an employee can later challenge the settlement and assert their original claim, subject to a one-year limitation period under the Labour Law. This period starts from the date the employment entitlement became due – typically the employee's termination date.

While there is a risk that an employee may challenge a previously agreed settlement, such agreements are widely used and generally respected. If a claim reaches the labour court, the presiding judge will consider the settlement agreement and usually regard it as a binding document.

7.5 Protected Categories of Employee

UAE National Employees

UAE National employees benefit from special protections. Terminating a UAE National employee requires adhering to strict procedures and obtaining permissions from the relevant UAE authorities before proceeding.

Whistle-blowers

Outside of the DIFC and ADGM, whistle-blowing protections are limited due to the UAE's strict privacy laws.

8. Disputes

8.1 Wrongful Dismissal

Historically, any termination not based on poor performance or gross misconduct, as defined by strict legal provisions, entitled the employee to compensation of up to three months' gross salary for unfair dismissal.

Under the new Labour Law, compensation of three months' wages is specified for "unlawful termination". This applies when an employee is terminated for raising a serious complaint to the MOHRE, the relevant free zone or the courts, and if such claims are upheld.

8.2 Anti-discrimination

The Labour Law includes provisions on equality and anti-discrimination, prohibiting all forms of discrimination based on race, colour, sex, religion, national or social origin, or disability.

The Labour Law also prohibits employers from:

- preventing equal opportunity; and
- hindering equal access to or continuation of employment and the enjoyment of rights.

Employees are now protected from sexual harassment, bullying and verbal, physical or psychological violence in the workplace. Employers are also prohibited from coercing or threatening employees to undertake work or provide services against their will.

Employers may not terminate or threaten to terminate a female employee's employment due to pregnancy or maternity leave. Violations by employers can result in claims for compensation of up to three months' gross salary.

While the Labour Law does not specify explicit remedies for employees in cases of discrimination, bullying or sexual harassment, employers found in violation may face fines ranging from AED5,000 to AED1 million. These fines can be multiplied based on the number of employees affected by the breach.

8.3 Digitalisation

In Dubai, all court hearings are now conducted virtually. Although parties can request in-person hearings, such requests are often denied unless the case involves a marriage dispute. Other emirates use a hybrid system of virtual and in-person hearings, with the mode decided at the court's discretion for each case.

If a party wishes to request a different mode for the hearing (eg, a virtual hearing instead of an in-person one proposed by the court), the request can be granted without the consent of the other party. Aside from the mode of being heard virtually rather than in person, there are no other differences between virtual and in-person hearings.

9. Dispute Resolution

9.1 Litigation

For onshore entities, an employer or employee can file a complaint to the MOHRE in the event of a breach of the terms of an employment contract or a breach of the Labour Law.

For free zone-located entities, an employer or employee can file a complaint to the relevant free zone authority in the event of a breach of the terms of an employment contract, a breach of the Labour Law or a breach of the relevant free zone employment regulations.

In the first instance, a mediation meeting between the parties will be arranged. This meeting is informal and the MOHRE or relevant free zone authority will attempt to mediate and resolve the dispute. The mediator will hear representations from both parties and offer guidance and a suggested approach on resolving matters.

The MOHRE (except for claims under AED50,000) and relevant free zone hold no legal power; if the matter is not resolved during the mediation, it will be referred to the labour court, where the first hearing will be before the Court of First Instance.

For any action to be filed before the labour court, the MOHRE must issue a court referral letter granting permission for a claim to be filed. This is generally valid for a period of three weeks.

All proceedings brought before the labour court must be issued in Arabic. Generally, an employer and an employee will appoint a UAE-qualified advocate through a power of attorney to appear and present the case before the court.

The labour courts consists of three tiers:

- the Court of First Instance;
- the Court of Appeal; and
- the Cassation Court, which is the highest level of the court system (along with the Federal and Supreme Courts).

A claim will proceed initially with the Court of First Instance until a judgment is provided (or the matter is settled), which can thereafter be appealed in the Court of Appeal if the quantum of the claim exceeds AED50,000. The Court of Appeal will then consider the matter further and thereafter a final avenue of appeal (subject to various caveats) is available before the Cassation Court. A Court of Cassation judgment cannot be appealed and will be considered as the final judgment on the matter. Thereafter, the winning party must execute and enforce a judgment through the Execution Court.

Employees are exempt from paying court fees for any claim raised below the value of AED100,000.

Unlike many common law jurisdictions, in the UAE each party is responsible for their own legal costs as well as disbursements, which are not recoverable by a winning party, except for a small nominal amount (AED2,000–5,000) awarded at the final hearing to the winning party at the complete discretion of the court.

In all cases, no claim for any rights due will be heard after one year from the date of violation.

Labour litigation can be protracted and expensive for all involved, and is best avoided where possible.

9.2 Alternative Dispute Resolution

The Labour Law in the UAE grants equal employment rights to all employees, with the following exceptions:

- employees of federal and local government entities;
- members of the armed forces, police and security services; and
- domestic servants employed in private households and similar roles.

For all other employees, the Labour Law presides over employment-related matters.

The MOHRE requires an employment contract issued by the MOHRE to be executed in order to validate and legalise any employment arrangement. This contract must include confirmation of the governing and applicable laws. Any attempt to bypass this requirement is considered a violation of public order and is unlawful.

9.3 Costs

In contrast to many common law jurisdictions, the UAE requires each party to bear their own legal costs and disbursements. These expenses are not recoverable by the winning party, except for a small nominal amount (between AED2,000 and AED5,000) that may be awarded at the final hearing at the court's complete discretion.

Trends and Developments

Contributed by:
Rachel Hill, Lucy Melville and Gorvinder Pannu
Addleshaw Goddard (Middle East) LLP

Addleshaw Goddard (Middle East) LLP is a distinguished international law firm with a legacy nearing 250 years. Esteemed for its comprehensive legal expertise, it serves over 5,000 major organisations, including 51 of the FTSE 100 companies. The firm's proficiency spans over 50 areas of business law, enabling it to deliver exemplary outcomes for clients across diverse industries. With a commitment to solving problems, executing deals, defending rights and ensuring regulatory compliance, Addleshaw Goddard operates with a relentless focus on achieving impactful results. Globally, the firm extends its reach to over 100 countries, ensuring clients can navigate, operate and expand with confidence and legal precision. In the Middle East, Addleshaw Goddard's presence is marked by offices in Dubai, Doha, Muscat and Riyadh. The firm's lawyers, permanently based in the region, bring together international experience from complex transactions and deep local law knowledge.

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Rachel Hill is a partner at Addleshaw Goddard, where she leads the employment practice in the UAE. She is distinguished in both contentious and non-contentious employment law, and has become a leading litigator in UAE Labour Court disputes, showcasing her unique skills as a non-Arab native. Rachel's deep understanding of UAE labour law, informed by 15 years' experience, enables her to offer clients strategic advice on various employment matters, including termination, end of service benefits, commission, incentive entitlements, and handling breaches of non-compete and confidentiality agreements. She also specialises in managing dismissals and investigations related to employee fraud.

Lucy Melville is an associate in the Dubai employment practice at Addleshaw Goddard and offers comprehensive advice on employment and immigration matters, from employee onboarding to termination. She specialises in drafting essential employment documents, such as service agreements, contracts and employee handbooks, and has actively participated in litigation across various jurisdictions, including the local labour courts, DIFC and ADGM. Lucy's expertise extends to providing employment support in corporate transactions, handling employment due diligence and negotiating service and transfer agreements. She also advises on Emiratisation issues, focusing on quotas, mitigation strategies and addressing fines for non-compliance.

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Employment in the UAE: an Introduction

The United Arab Emirates (UAE) stands out as an increasingly attractive destination for expatriates, offering a blend of tax-free salaries, glorious sunshine and a plethora of employment opportunities. Strategically positioned as a central global hub, the UAE is easily accessible for those looking to enhance their financial prosperity through employment or investment.

Over the years, the UAE has experienced consistent economic growth, transforming itself into a leading global hub for business and tourism. This growth is fuelled by a diverse economy that capitalises on its rich natural resources, strategic location and robust investments in sectors like finance, real estate, tourism and technology. The UAE's modern infrastructure, business-friendly policies and tax incentives have attracted businesses and entrepreneurs worldwide, fostering a dynamic and competitive environment.

In addition, the UAE remains a popular destination for the global workforce, offering a high standard of living, safety and a multicultural society that appeals to expatriates. The country's flexible immigration regime has adapted to the changing needs of individuals and investors, with recent reforms making it easier for skilled professionals and entrepreneurs to live and work in the UAE. These measures ensure the UAE remains a premier destination for talent and investment, supporting its continued economic prosperity.

Emiratisation

Emiratisation is a government initiative aimed at increasing Emiratis' participation in the labour market. It imposes a quota system on private sector employers, requiring companies to recruit and retain a specified number of UAE nationals.

In May 2022, the UAE Cabinet approved measures to boost the Emiratisation rate by 2% annually for skilled jobs in private sector companies with 50 or more employees, aiming for a 10% target by 2026. From January 2023, companies that failed to comply faced substantial fines of AED6,000 per month for each Emirati not employed according to the quota. The increase applied to Emirati nationals employed from September 2021 onward, meaning any Emirati nationals employed before that date did not count towards the Emiratisation rate quota. These measures apply only to companies governed by the Ministry of Human Resources and Emiratisation (MOHRE); companies operating in free zones are currently exempt.

Beginning in 2024, the authorities have expanded the Emiratisation targets to include private sector companies operating in specific sectors with a workforce of 20 to 49 employees, which are now required to hire at least one UAE citizen. Starting in 2025, they will be required to hire at least two Emirati citizens. Companies that fail to employ at least one Emirati in 2024 will have to pay a financial contribution of AED96,000 to the government. This contribution will increase to AED108,000 for companies that have not employed two Emiratis by 2025.

While the initiative is widely understood and welcomed by the private sector, its practical implementation has proved challenging for some employers. This is due to the diverse range of businesses in the region that require various skill sets that may not always be readily available or preferred by the UAE National population.

The government continuously introduces initiatives to help businesses comply and meet the targets. It will be interesting to observe how the

programme is enforced and managed by the relevant authorities.

Global workforce trends and the UAE

Global workforce priorities continue to shift, with employees increasingly prioritising mental health and well-being. "The Great Resignation" continues – the phenomenon began in the spring of 2021, marked by a surge in voluntary resignations worldwide. Key drivers of this trend include increased competition for talent, changing worker values and the rising demand for flexible work arrangements, including remote work options. As workers seek greater control over their schedules and environments, companies must adapt by offering flexible working models like part-time, remote or flex-time options. The shift towards a gig economy, alongside advances in technology and automation, has created new opportunities and challenges, prompting companies to innovate in attracting and retaining talent.

In the UAE, traditional immigration laws previously hindered companies from providing the flexibility that modern employees demand, risking potential mass resignations and worker shortages. Recognising these challenges, the UAE government swiftly implemented significant changes to its immigration laws, introducing a variety of flexible visa options and residency permits, making it easier for foreign workers and their families to live and work in the UAE. Notable changes include expanding eligibility for the ten-year Golden Visa and launching the Dubai Virtual Working Programme and Virtual Working Residency visa for remote workers.

These immigration reforms have significantly bolstered the UAE's economic growth by attracting global talent and fostering a more dynamic labour market. The changes have been welcomed by employers and employees, who are now exploring diverse employment arrangements, including remote work and flexible hours. Once seen as rigid, the UAE's employment regime is transforming the country into a competitive global player in offering diverse job opportunities. The new system is particularly beneficial for investors, skilled workers, freelancers and their families, reducing bureaucratic hurdles and enhancing the UAE's appeal as a top destination for talent worldwide.

Conclusion

The UAE is successfully realising its vision of creating a labour market that empowers Emiratis while attracting talent from around the globe. Recent changes in employment regulations have been positively received by both employers and employees, prompting companies to rethink their staffing strategies and embrace diverse work arrangements, including remote work, flexible hours, part-time positions and job sharing. What was once a rigid employment framework continues to transform into a dynamic global player, offering a wide array of opportunities. The UAE's proactive approach ensures its labour market remains adaptable to the evolving needs of the global workforce, reinforcing its status as a leading destination for talent and innovation.

UK

Law and Practice

Contributed by:
Phil Linnard, Philippa O'Malley, David Rintoul and Clare Fletcher
Slaughter and May

Contents

Slaughter and May is a leading international law firm, recognised for exceptional legal service, commercial awareness, and commitment to clients. Its employment practice offers creative, tailored and pragmatic advice on the most difficult and sensitive employment issues. The firm supports a diverse range of businesses – from FTSE-listed companies to start-ups, private ventures to charities, and works closely with general counsel, heads of legal, chief people officers and HR and reward professionals. The firm's advice combines the latest legal and market analysis with an in-depth understanding of clients' cultural and strategic priorities. It has unrivalled experience in advising boards on sensitive employment issues, as well as the latest corporate governance and executive remuneration requirements. Slaughter and May advises on high-stakes issues involving accelerated terminations, discrimination, whistleblowing, and restrictive covenants. Its lawyers are uniquely well-placed to handle complex, sensitive workplace investigations, particularly those with regulatory angles and elements of reputation and crisis management.

Authors

Phil Linnard leads Slaughter and May's employment team and has built a strong employment and incentives practice. His advisory work focuses on the conduct, appointment and termination of senior executives, the corporate governance aspects of executive remuneration, and sensitive issues involving whistle-blowing, investigations and terminations of other employees in difficult circumstances. Phil also specialises in the employment aspects of M&A transactions including public takeovers, and TUPE and other employment issues, including relating to outsourcings and other commercial contracts. Phil is an active member of the Employment Lawyers Association (ELA) and of the Corporate and Regulatory Committee of Share Plan Lawyers (SPL).

Philippa O'Malley was promoted to partner at Slaughter and May in 2023, and brings to its employment team an unrivalled depth of employment advisory experience. She has worked with some of the world's largest corporates on their knottiest employment issues. Philippa has a particular interest in diversity and inclusion in the workplace and has advised numerous clients on issues surrounding workplace culture. She also has significant experience across the full spectrum of employment advisory, transactional and litigation matters, with deep knowledge of public M&A, contentious matters and highly sensitive investigations. Philippa is a member of ELA's Pastoral Committee and an active member of SPL.

David Rintoul was promoted to senior counsel at Slaughter and May in 2023. He has developed an excellent reputation advising on Employment Tribunal and Employment Appeal Tribunal claims (including complex discrimination claims and industrial relations matters) and high-value breach of contract claims in the High Court. David has a wealth of experience navigating sensitive employment law issues, often involving elements of crisis management – such as board-level hires and exits, workplace investigations, and union recognition issues. On transactional matters, he has advised on the employment aspects of complex M&A for some of the largest global companies. David is a member of ELA's Training Committee.

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SLAUGHTER AND MAY/

1. Employment Terms

1.1 Employee Status

Under current English law an individual may be:

- an employee;
- a worker; or
- self-employed.

While there are statutory definitions for both "employee" and "worker", employment status is determined through a fact-specific analysis that considers the actual nature of the employment relationship, rather than solely relying on the terms of the contract. It is not possible for an individual to contract out of their real employment status.

Employees

An "employee" is an individual who has entered, or works under, a contract of employment – meaning a contract of service or apprenticeship which may be express or implied, oral or written (Section 230(1) and (2) of the Employment Rights Act 1996 (ERA 1996)).

Case law has developed the following key components of an employment relationship:

- the individual is required to provide services personally, and cannot send a substitute;
- the employer is obliged to provide work for the individual, which the individual is obliged to do (so-called "mutuality of obligation"); and
- the employer exerts the requisite level of control over the individual.

Other factors such as notice provisions, provision of equipment or insurance may help determine the existence of a contract of service, but the presence or absence of any one of these other factors is not determinative.

"Employees" are entitled to the full range of statutory employment rights discussed in this guide.

Workers

A "worker" is an individual who has entered into a contract personally to perform any work or services for another party, as long as that other party is not the client or customer of any business or profession carried on by the individual (Section 230(3) of the ERA 1996).

The personal service requirement for a "worker" is not as stringent as it is for an "employee". For instance, if the contract permits the individual to send a substitute, but only if they are unavailable and with the employer's agreement, that individual would not be an employee, but could be a worker.

Another key element of worker status is the degree to which the individual is integrated into the employer's business. If the individual is highly integrated they are likely to be a worker, whereas if they are genuinely in business on their own account, they will not be.

"Workers" are entitled to a more limited range of statutory employment rights than employees: their principal rights are the protection against discrimination, protection for making a protected disclosure (whistle-blowing) and rights in relation to working time, national minimum wage and holidays. Workers do not currently have unfair dismissal or redundancy protections.

Self-employed

An individual is "self-employed" if they provide services to another party while running a business or profession in their own right. Self-employed individuals do not benefit from the majority of employment protections and are only

entitled to certain minimum rights, such as a safe working environment.

Future Reform?

In their pre-election Plan to Make Work Pay, the Labour Party expressed an intention to "move towards a single status of worker for all but the genuinely self-employed". This may result in the current statuses of "employee" and "worker" being combined but is likely to be the subject of future consultation.

1.2 Employment Contracts

Under English law an employment contract need not be in writing (but usually is). In accordance with Section 1 of the ERA 1996, upon commencement of employment, the employer is required to provide an employee or worker with a written statement of certain particulars of employment, the majority of which must be provided in a single document. This statement must be provided on or before the date on which the employment starts. It can be provided separately, but in practice the terms required by the statement are often incorporated into the employment contract.

These particulars include:

- the names of the employer and the worker;
- date when the employment began;
- date on which the employee's continuous employment began;
- scale or rate of remuneration, or the method of calculating remuneration;
- the intervals at which remuneration is paid;
- details of all remuneration and benefits provided;
- any terms and conditions relating to hours of work;
- the days of the week the worker is required to work, whether the working hours may be variable and how the variation will be determined;
- any terms and conditions relating to holidays, including public holidays, and holiday pay;
- any terms and conditions relating to sick leave and pay;
- any other paid leave to which the worker is entitled;
- any terms and conditions relating to pensions and pension schemes;
- the length of notice which the worker is required to give and entitled to receive to terminate their employment;
- the job title and brief description of the work for which the worker is employed;
- the place of work;
- any collective agreements which directly affect the terms and conditions of employment;
- specified particulars where the worker is required to work outside the UK for a period of more than one month;
- any disciplinary and grievance rules or procedure applicable to the worker, or a reference to a readily accessible document specifying such rules;
- any probationary period; and
- any training entitlement provided by the employer, including whether any training is mandatory and/or must be paid for by the worker.

Employment contracts can be indefinite (but would include a notice period, either express or implied) or for a fixed-term duration. Fixed-term employees enjoy additional protections, including the right not to suffer discrimination because of their fixed-term status unless differential treatment can be objectively justified. An employee who has been continuously employed under a series of fixed-term contracts for a period of

four years or more is deemed to be a permanent employee, unless the continued use of fixed-term contracts is objectively justified.

In addition to the express terms of the contract, English law also implies certain terms into employment contracts. These implied terms include:

- the duty of mutual trust and confidence;
- obligations on the employee to:
  (a) serve the employer faithfully;
  (b) obey the employer's reasonable and lawful orders; and
  (c) exercise reasonable skill and care in performing their duties of employment;
- obligations on the employer to:
  (a) take reasonable care of the health and safety of the employee; and
  (b) exercise its discretion rationally when making decisions about the employee.

1.3 Working Hours

Working Hours

Under English law, there is technically a maximum 48-hour working week under the Working Time Regulations 1998 (WTR). However, employers are able to ask workers to opt out of this limit (and often do so). There are also exceptions from the 48-hour maximum working week, including for management level workers.

Workers are also entitled to daily and weekly rest breaks, and specific restrictions apply to periods of night work.

Currently, all UK employees have the right to request flexible working. Employers must deal with such requests in a reasonable manner, but can refuse an application if they have a good business reason for doing so (which is relatively easy to establish in practice).

The government has proposed introducing a right to work flexibly (not just a right to request it), with employers required to accommodate this "as far as is reasonable". This could significantly increase the incidences of flexible working, although it remains to be seen what the legislation would look like. Labour have also pledged to introduce a "right to disconnect", whereby employers would not be able to contact employees outside of their normal working hours – but again, what form this will take is currently unclear.

Part-time workers have the right not to suffer discrimination because of their part-time status, unless differential treatment can be objectively justified. Remuneration and benefits may generally be applied on a pro rata basis to reflect the time actually worked.

Overtime is primarily governed by the contract of employment and may be compulsory or voluntary. Employers do not necessarily have to adopt formal arrangements for paying workers for overtime; however, they must be careful to ensure the worker's average pay for the total hours worked does not fall below the National Living or Minimum Wage as applicable (see **1.4 Compensation**). Where compulsory and/or regular, overtime should be included in the calculation of statutory holiday pay.

1.4 Compensation

All English workers aged 21 or over must be paid the National Living Wage (NLW). Younger workers and apprentices are entitled to the National Minimum Wage (NMW). Records should be kept by employers to confirm that eligible workers have been paid at least the NLW or NMW. Paying less than the NLW or NMW is a criminal offence which may attract fines and/or "naming and shaming" by HMRC.

As of 1 April 2024, the hourly NLW and NMW rates were:

- NLW (21 and over): GBP11.44;
- NMW 18–20 year-old rate: GBP8.60;
- NMW 16–17 year-old rate: GBP6.40; and
- NMW apprentice rate: GBP6.40.

Other current rates and payments which are applicable from 6 April 2024 include the following:

- statutory sick pay (SSP) – weekly rate of GBP116.75;
- statutory maternity pay (SMP) – 90% of normal pay for the first 6 weeks, thereafter the lesser of GBP184.03 per week or 90% of average weekly earnings for the remaining 33 weeks;
- statutory paternity pay (SPP), shared parental pay (ShPP), and adoption pay (SAP) – prescribed weekly rate of GBP184.03; and
- statutory redundancy pay (SRP) – GBP21,000 maximum.

An employer is not permitted to make deductions from an employee's salary without either statutory authorisation, such as deducting tax, or the employee's consent, which is often sought through the employment contract.

In addition to salary, it is common to reward and incentivise employees through the use of bonuses and similar arrangements. These may be contractual entitlements but are more commonly expressed as being discretionary.

1.5 Other Employment Terms

Holidays

UK workers have the right to 5.6 weeks' paid holiday each year (which equates to 28 days for full-time workers). This is made up of four weeks' leave under regulation 13 WTR and 1.6 weeks' additional leave under regulation 13A WTR. Different rules apply to how holiday is accrued, paid and carried over under regulations 13 and 13A, and there is also a separate regime for irregular hours and part-year workers. Workers may also be granted additional holiday under the contract of employment, which would then be governed by the contract terms. As such, holiday entitlement is a relatively complex area of English employment law.

Sickness

Employees who are unable to work due to illness or injury are entitled to receive statutory sick pay (SSP), provided they meet the qualifying conditions. Employees do not currently receive SSP for the first three days of any sickness absence. The weekly rate of SSP from April 2024 is GBP116.75. The maximum entitlement is 28 weeks' SSP during any period of incapacity for work (or any series of linked periods). An employee may also be entitled to contractual sick pay.

Maternity and Family Leave

Eligible employees are entitled to up to 52 weeks' statutory maternity leave. They are also entitled to receive up to 39 weeks' statutory maternity pay (SMP) if they meet certain qualifying conditions. SMP is payable at 90% of their average weekly earnings for the first six weeks, and the lesser of GBP184.03 per week (from April 2024) or 90% of their average weekly earnings for the remaining 33 weeks. Equivalent rights exist on adoption.

Employees who are eligible for statutory maternity or adoption leave may choose to end that entitlement and instead opt into a shared parental leave regime (if they meet certain qualifying conditions). This allows up to 50 weeks' leave

and 37 weeks' pay to be shared between both parents. The parents may take the leave together at the same time or separately, and in discontinuous blocks of at least one week, returning to work in between. This is subject to the employers agreeing the proposed pattern of leave; if agreement cannot be reached, the leave is taken in one continuous block.

Employees who are fathers/partners are also entitled to two weeks' statutory paternity leave, if they meet certain qualifying conditions. They may also be eligible for statutory paternity pay, payable at the lower of GBP184.03 per week (from April 2024) or 90% of the employee's average weekly earnings.

Employees who take statutory maternity, adoption, shared parental or paternity leave are also entitled to receive the benefit of all their contractual terms and conditions of employment (except remuneration) during the period of leave. They also have additional protections on return to work and on redundancy. Employees may also receive enhanced rights to maternity or family leave / pay from their employer on either a contractual or discretionary basis.

Employees who are parents are also eligible to take up to 18 weeks' unpaid parental leave for each child, up to the child's 18th birthday.

Confidentiality and Non-disclosure Agreements (NDAs)

Employees owe implied duties of confidentiality during their employment, and are often required to sign up to an NDA as part of their employment contract which extends their confidentiality obligations post-termination of employment. There are however limitations on the scope and enforceability of NDAs against employees (see **7.4 Termination Agreements**).

Employee Liability

Claims against individual employees are not as common as claims against employers, although employees can be individually liable for certain acts, eg, discrimination against co-workers.

An employer may be found vicariously liable for an employee's tortious act if it was committed in the course of the employee's employment or is closely connected with what the employee was authorised by the employer to do.

Under the Civil Liability (Contribution) Act 1978, an employer may be entitled to seek an indemnity from the employee should they be forced to pay damages in respect of the employee's tort. The court will allow such a claim if it is 'just and equitable' to do so – but in practice, such claims are very rare.

2. Restrictive Covenants

2.1 Non-competes

Non-compete clauses in UK employment contracts are only enforceable if the former employer can show that the clause goes no further than is reasonably necessary to protect one of its legitimate business interests, which include its trade secrets, trade connections, and workforce stability. Non-competes need to be drafted as precisely and narrowly as possible to maximise the chance of enforcement, and should only restrain activities of a type, location and duration which would likely cause material damage to the former employer's business. An employer is not obliged to make any payment to a former employee in exchange for being bound by such restrictions.

Non-competes are enforced by way of an application to the High Court for an injunction

to restrain the ex-employee's activities. The employment tribunals have no jurisdiction to hear restrictive covenant disputes. The court will decide on the enforceability of the covenant and whether an injunction is justified, balancing the potential impacts on the employer and the employee if the injunction is (or is not) granted.

In 2023, the previous government announced proposals to limit the duration of non-compete clauses included in employment and worker contracts to three months. It is unclear what the status of these proposals are following the July 2024 General Election.

2.2 Non-solicits

Non-solicitation clauses are designed to prevent former employees from approaching the former employer's customers or suppliers with a view to obtaining their business, or employees with a view to employing them. As with the non-compete clauses, any non-solicit clause will only be enforceable if it goes no further than is reasonably necessary to protect the former employer's legitimate business interest(s). Non-solicits will also need to be carefully drafted, and usually limited in scope to only prohibit solicitation of contacts with whom the former employee had material dealings in the period leading up to termination of their employment.

Non-solicits are generally considered less restrictive than non-competes and may therefore be easier to enforce, although the former employer will need to adduce evidence that solicitation has actually occurred. An alternative approach would be to use a non-dealing clause, which would not require solicitation by the former employee. However, since non-dealing clauses are more restrictive than non-solicitation clauses, they are also harder to enforce.

3. Data Privacy

3.1 Data Privacy Law and Employment

Employers have obligations to their workers under the Data Protection Act 2018 (DPA) and the UK General Data Protection Regulation (GDPR). Employers should also follow guidance published by the Information Commissioner's Office (ICO) to ensure compliance with their obligations under DPA and GDPR. Employers who do not comply with their DPA and GDPR obligations can face civil and criminal penalties.

Employers are "data controllers" for the purposes of DPA, on the basis that an employer is ultimately in charge of and responsible for the processing of its employees' data.

Employers must have a valid legal basis for processing employee data under Article 6 of the GDPR. Some of the grounds typically relied on by employers for processing employee data are that the processing is necessary for:

- the performance of a contract to which the data subject is party, eg, processing an employee's bank details for the purposes of paying them;
- compliance with a legal obligation to which the controller is subject, eg, processing an employee's personal details for tax purposes; and
- the employer's "legitimate interests", eg, processing information about an employee's performance.

Consent is included as a lawful basis under Article 6 of the GDPR. However, ICO guidance warns employers against using employee consent as a ground for processing employee data, given the inherent imbalance of power in an employment context.

Additional considerations apply to the processing of "special categories of personal data", which includes:

- racial or ethnic origin;
- political opinions;
- religious or philosophical beliefs;
- trade union membership;
- genetic and biometric data;
- health; and
- sex life or sexual orientation.

In order to process special category data about its employees, an employer must first identify a lawful basis under Article 6 of the GDPR, and then an additional special category ground under Article 9 of the GDPR. The special category ground most likely to be relied on by an employer is that the processing is necessary for the performance of rights and obligations in connection with employment. In order to rely on this ground, the employer must be able to identify their legal obligation or right under employment law, and any processing must be limited to what is a reasonable and proportionate way of meeting that obligation.

Data Subject Access Requests (DSARs)

Under Article 15 of the UK GDPR, current and former employees can make a DSAR to obtain all their personal data held by their employer. The employer must respond within one month, with the possibility of a two month extension. Certain information is exempt from a DSAR, including:

- information about other people, which typically should be redacted;
- confidential references provided or received for employment purposes; and
- management information if disclosure is likely to prejudice the conduct of the business.

Employee Monitoring

Employers may wish to monitor their employees for a variety of reasons: to review their performance, to protect their health and safety, or as part of information security measures. Such monitoring may cover use of telephone systems, email content and traffic, device activity, or CCTV and video surveillance.

Employers should carry out a Data Protection Impact Assessment (DPIA) and notify employees of the scope and purposes of any proposed monitoring.

Monitoring should be restricted to the smallest numbers of people possible and to the least intrusive methods of processing. Generally, information gathered should be used only for the purpose for which the monitoring has taken place.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Employers are required to check that their workers have the right to work in the UK, and to keep records of their eligibility to work here.

Following Brexit, the free movement rights of EEA and Swiss nationals ended on 1 January 2021. EEA and Swiss nationals (as well as qualifying family members) residing in the UK before 1 January 2021 may remain and work in the UK, if they have secured their immigration status under the EU Settlement Scheme.

A new points-based immigration scheme was introduced in the UK on 1 December 2020, and has applied to EEA and Swiss nationals since 1 January 2021.

4.2 Registration Requirements for Foreign Workers

The standard UK employment visa route into the UK is the "Skilled Worker" route. This visa can be granted for an initial five year period, and requires:

- a job offer from an employer in the UK who is a Home Office approved licensed sponsor;
- the individual is skilled to at least A level or equivalent;
- the individual satisfies a minimum English language requirement; and
- the standard minimum salary for the position exceeds a prescribed threshold.

Another common immigration route for UK employers to bring in foreign workers is the Global Business Mobility (GBM) route. This allows the immigration of foreign workers from the same corporate group, who typically require at least 12 months overseas experience within the same group as the UK employer (who must also hold a sponsorship licence). Unlike the Skilled Worker route, there is no English language requirement, and the visa can be granted for an initial nine year period. There are, however, higher qualification and salary requirements.

Fast-growing UK businesses may be able to bring in workers from overseas using the "Scale-Up" route. The business must hold a sponsor licence, and the worker must have a confirmed job offer to work for an approved scale-up business for at least 6 months, to do a job that is on the list of eligible occupations, and meet the minimum English language and salary threshold for that job. Scale-up visas are granted for an initial period of two years, with the potential to extend for a further three years if the eligibility requirements are still satisfied.

The "Global Talent" immigration route is for exceptionally talented or promising individuals in certain fields (academia or research, arts and culture, or digital technology) who wish to come to the UK to work. Individuals must be able to establish that they are a leader or potential leader in their field, usually by applying for a relevant endorsement. This route does not require the employer to hold a sponsor licence.

Finally, the standard visitor visa category allows qualifying nationals of countries other than the UK to undertake a very limited range of business, and in very limited cases work, related activities in the UK for up to 6 months at a time.

5. New Work

5.1 Mobile Work

There are no specific statutory regulations on mobile or remote work. However, additional considerations may apply to remote work, as regards data protection, occupational health and safety, and social security.

Data Protection

Remote workers may need specific training on their obligations regarding data protection and confidentiality. Employers should also carry out a Data Protection Impact Assessment of the implications of employees working remotely. Relevant considerations include the following.

- Who will have access to an employee's computer and personal data? Can the employee encrypt or password-protect data?
- Should employees be required to access company systems through a VPN, use multi-factor authentication, and only use sufficiently secure wireless networks?

- Where hard-copy data is kept, does the employee have appropriate methods to store it?
- Will the employee's home or other place of work regularly be left unattended? Is it properly secured?
- How is information moved, either between the employee's home and workplace, or between various remote working locations?

Occupational Health and Safety

Employers owe common law and statutory health and safety duties to all employees, even those doing mobile or remote work. Those duties can be harder to fulfil where employees are working remotely, in terms of risks to both physical and mental health. Employers must therefore ensure that they have processes to risk-assess remote working locations and provide such assistance, equipment etc as is needed to protect remote workers' health and safety.

Social Security

Where an employee is working from an overseas jurisdiction, local tax and social security contributions may be payable, which could require the employer to set up payroll within that jurisdiction. The employee may also gain an entitlement to certain mandatory benefits while working abroad, the cost of which would need to be managed by the employer. The employer should also consider whether the employee's remote working risks creating a permanent establishment of the employer (for tax purposes) in the overseas jurisdiction.

5.2 Sabbaticals

Typically, employers in the UK grant sabbatical leave as a matter of discretion. The terms of any sabbatical leave (eg, duration, who is eligible, whether it is paid and, if so, how much) will likely be laid out in a sabbatical policy. The employer should make sure that any sabbatical policy is operated fairly and on a non-discriminatory basis. For instance, using length of service as a criterion for a sabbatical could be indirectly discriminatory on the grounds of age.

The employee remains employed during their sabbatical leave and, except as agreed between the employee and employer, remains bound by their contractual obligations (including those of fidelity and confidentiality) to their employer.

5.3 Other New Manifestations

Hybrid Working

Hybrid working, where employees work from both the office and their homes (or elsewhere), increased significantly during the COVID-19 pandemic. It has broadly continued in many sectors, although some employers are beginning to encourage employees back to the office on a more full-time basis.

Hybrid working has also been assisted by innovative technological developments which facilitate (for example) remote collaboration and more efficient desk-sharing. It has also had an impact on how employers lease and design their office space, to account for a more flexible pattern of employee attendance.

Four-Day Week

An initial pilot looking into the feasibility of a UK four-day working week was run in 2022. 60 employers took part, and 54 of those maintained their new four-day working arrangements after the pilot concluded. A second pilot is due to commence in November 2024, and its findings are expected to be presented to the government in the summer of 2025. It remains to be seen what actions the government may take once this second pilot concludes.

6. Collective Relations

6.1 Unions

The UK does not have as strong a culture of trade union engagement as many of its European neighbours.

Employees have the right to join an independent trade union. Those who join a union benefit from advice and support in workplace matters, including representation at disciplinary and grievance meetings.

Increasing the density of union membership in a workplace also provides a possible route to trade union recognition. Trade unions may be recognised either voluntarily by the employer, or via a statutory process. The latter requires the union to satisfy a number of conditions, including that they have at least 10% membership amongst employees and would be likely to attract the support of the majority of employees in a ballot.

Once the union is recognised, they are able to negotiate agreements with the employer on pay and other terms and conditions of employment on behalf of employees. This process is known as "collective bargaining" (see **6.3 Collective Bargaining Agreements**).

Recognised unions also have the right to be informed and consulted on a number of issues, including redundancies, health and safety and business transfers. They may also instigate industrial action in the event of a dispute with the employer, although this is subject to compliance with a statutory balloting and notification procedure.

Trade unions rights were restricted under the previous Conservative government, including by the imposition of minimum service levels for certain strikes and more wide-ranging restrictions on strike action and ballots for trade union recognition. The Labour government has announced plans to repeal those restrictions and give greater rights and freedoms to trade unions and their representatives, although at the time of writing these have not yet been implemented.

6.2 Employee Representative Bodies

In the UK, if an organisation has 50 or more employees, the employees have the right subject to certain conditions to request that their employer makes arrangements to inform and consult them about issues in the organisation. This may result in the formation of a national works council. Usually, this will be a permanent consultative body made up of management and employee representatives.

Pre-Brexit, UK employers who had at least 1,000 employees throughout the EEA and at least 150 employees in each of at least two of the relevant member states could be required to establish a European works council (EWC). The EWC has the right to receive information about the business and to be consulted about some of the business' activities. After 31 December 2020, the UK became a third country for the purposes of EWCs and UK employees no longer count when determining if an undertaking or group falls within the scope of the EU Directive on EWCs. UK employees may continue to participate in an EWC if the agreement establishing it allows that. There was however a consultation launched in May 2024 which considered abolishing the legal framework for EWCs in the UK. At the time of writing the consultation response had not yet been published.

Some employers convene more informal "employee forums", which may have a man-

date for consultation on a number of workplace issues (and are typically governed solely by their terms of incorporation, rather than by statute).

Where (as is common in the UK) an employer does not have any form of employee representative body, and is required to inform and consult collectively with employees (for example, on a business transfer or collective redundancy process), the employer will need to arrange for employee representatives to be elected for that purpose.

6.3 Collective Bargaining Agreements

Where an employer and trade union have undertaken collective bargaining and reached agreement, this is recorded in a collective agreement. The agreement may cover a number of matters such as pay, hours and holidays; other terms and conditions of employment; and disciplinary procedures.

Under English law, collective agreements are not generally legally enforceable between the trade union and the employer. However, their terms may be incorporated into the individual contracts of employment of employees who are covered by that agreement (known as the bargaining unit). The bargaining unit is not an equivalent population to the organisation's trade union members; it would typically be defined by job type or location, and may include trade union members and non-members alike. Those employees who have the terms of the collective agreement incorporated into their employment contracts can then enforce those terms against the employer. The trade union meanwhile could challenge the employer's non-compliance with a collective agreement by calling or threatening to call industrial action.

7. Termination

7.1 Grounds for Termination

Under common law, an employee can dismiss an employee for any reason, provided they comply with the contractual termination requirements, including notice provisions. There are however a number of statutory protections which may apply, most importantly the right not to be unfairly dismissed. This requires the employer to demonstrate that it has a fair reason for dismissal, and has followed a fair process.

The five potentially fair reasons for dismissal are:

- conduct;
- capability;
- redundancy;
- breach of statutory duty or restriction; or
- some other substantial reason.

The fair procedure which must be followed by the employer will depend to some extent on the particular reason for the dismissal – for instance, a redundancy process would typically look quite different from a lack of capability process (which itself could cover ill health or poor performance, both of which would require a different approach). That said, there are a number of common factors in most fair dismissal processes, which include:

- conducting a reasonable investigation;
- informing the employee of the allegations against them;
- holding a hearing; and
- providing an opportunity to appeal the employer's decision.

Employees have the right to be accompanied by a colleague or trade union representative at a disciplinary or grievance hearing. Additionally,

the Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on Disciplinary and Grievance Procedures will apply to dismissals for misconduct or poor performance (but not, for example, to redundancy or expiry of a fixed-term contract). Failure to follow the Code may affect the fairness of the dismissal and the amount of compensation awarded. Compensation for unfair dismissal is made up of:

- a basic award, based on the employee's age, wages and length of service, but capped at GBP21,000; and
- a compensatory award, capped at the lower of 12 months' pay or GBP115,115.

(Both caps as at 6 April 2024.)

At present, employees must have been continuously employed for at least two years in order to claim unfair dismissal. However, the government has announced an intention to make unfair dismissal a "day one" right, subject to the employer's ability to use a fair probationary period. At the time of writing, further details of this change had not been published.

Collective Redundancies

A specific collective redundancies regime applies where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. "Redundant" for these purposes means that the dismissal is for a reason not related to the individual concerned. It would therefore not only catch more traditional redundancies, where there is a workplace closure or diminished need for employees, but also other types of dismissal, most importantly in the context of restructurings to effect a change in terms or job functions (including "fire and rehire").

Where the regime applies, the employer must consult collectively with elected employee representatives about the dismissals. Consultation must commence in good time before any redundancies are confirmed, and dismissals should not take effect until the expiry of a minimum period following the start of consultation:

- 30 days – if between 20 and 99 dismissals are proposed; or
- 45 days – where 100 or more redundancies are proposed.

Failure to comply with the obligations to collectively consult in a redundancy situation may result in compensation being payable of up to 90 days' uncapped pay per affected employee.

In addition, employers must notify the Secretary of State of the proposed dismissals. The notification must be made in a prescribed format (Form HR1), and it must be made within the 30- or 45-day timescales set out above. Failure to comply with this obligation is a criminal offence which attracts an unlimited fine (although prosecutions are rare in practice).

7.2 Notice Periods

All employees are entitled to receive notice of termination, with the exception of an employee committing a repudiatory breach of contract which justifies a summary dismissal (see **8.1 Wrongful Dismissal**). The notice period is usually specified by the contract, although there is a statutory minimum which is implied in the event that no greater express provision is made. The statutory minimum notice required from the employer is one week's notice for each complete year or service, up to a maximum of 12 weeks. The statutory minimum notice from the employee is one week, provided that they have been employed for at least one month.

There is no general right to severance on top of notice, other than in a redundancy scenario (where employees may have a right to statutory redundancy pay and potentially and enhanced redundancy payment from their employer). Employment contracts frequently provide employers with the right to make a payment in lieu of an employee's notice period (PILON), or to place the employee on "garden leave" for the duration of their notice period. There would also typically be provision made in bonus and share scheme documentation about the employee's rights on termination (although there may also be discretion for different treatment in some circumstances).

In some termination situations, the parties agree to a severance package, typically in exchange for a waiver of claims from the employee (see **7.4 Termination Agreements**).

7.3 Dismissal for (Serious) Cause

There is no statutory definition of summary dismissal in UK law. The employment contract would usually outline a number of situations in which the employer would be entitled to summarily dismiss the employee without notice, which may include:

- gross misconduct;
- conviction of a criminal offence;
- bankruptcy; and
- loss of right to work in their role/in the UK.

"Gross misconduct" is also not specifically defined, but would typically involve serious or persistent disobedience or breach of the employee's duties, often (although not necessarily) with an element of dishonesty. There would typically be examples of gross misconduct set out in the employer's disciplinary policy. At common law, if the misconduct is to be sufficient to justify summary termination, it must amount to a repudiatory breach of contract by the employee.

Before an employee is dismissed summarily, the employer must establish that there are in fact grounds for such a dismissal. Usually this will require an investigation and a disciplinary hearing, at which the allegations are put to the employee and they have an opportunity to make their case. The employee should also be given the right to appeal against the dismissal decision.

7.4 Termination Agreements

In the UK, an employer and employee can agree to terminate the employment contract via a simple contract. However, this would not be sufficient to override the employee's statutory rights, for example as regards unfair dismissal or discrimination. Those statutory rights can only be waived if the appropriate statutory conditions are satisfied. One of these is that a termination agreement has been negotiated with an ACAS conciliator, which can result in a valid waiver of claims (and is known as a COT3 agreement). The other more common route in practice involves a "settlement agreement".

A settlement agreement must be agreed in writing and satisfy a number of other conditions as to its wording. Importantly, the employee must also receive independent legal advice from a lawyer, trade union official or other certified adviser, who must be appropriately insured, in order for the settlement agreement to constitute a valid waiver of the employee's statutory rights. The settlement should also relate to particular proceedings, meaning that a blanket waiver of all claims an employee could make is unlikely to be enforceable (and the agreement should instead set out specifically the claims which are being waived).

Employers commonly include non-disclosure agreements (NDAs) in settlement agreements. These must however be carefully drafted, as there are legal restrictions on the scope of an NDA. It cannot, for instance, prevent an employee acting as a whistle-blower, or a victim of a crime disclosing information about that crime to prescribed individuals. There are also regulatory expectations of solicitors who advise their clients on NDAs, to ensure that they do not inappropriately restrict departing employees from speaking out about wrongdoing.

7.5 Protected Categories of Employee

Dismissal of some employees for specified reasons may be "automatically unfair". These include where the sole or main reason for the dismissal is:

- that the employee is a whistle-blower (see below);
- a business transfer (see below);
- related to pregnancy, childbirth, flexible working or family leave;
- health and safety related;
- by reason of the employee acting as an employee representative, or trustee of an occupational pension scheme; and
- that the employee asserted a statutory right.

In some cases this means that the employee does not require the usual two years' qualifying service in order to claim unfair dismissal, and/or that the usual cap on unfair dismissal compensation does not apply.

Whistle-blowing

Workers have the right to not be subjected to a detriment or be dismissed because they made a "protected disclosure". This is a disclosure of information which, in the reasonable belief of the worker, is made in the public interest and tends to show that a specified type of wrongdoing has occurred. These include criminal offences, dangers to health and safety, environmental damage, or breach of any other legal obligation. The disclosure must also be made in a prescribed manner, which may include to the employer or other responsible person, a regulator, a legal adviser, or to a third party such as the media (although additional conditions must then be satisfied). Compensation in the event of a successful whistle-blowing claim is uncapped.

Business Transfers

English law provides additional protections for employees affected by a business transfer or a service provision change. The legislation (known as TUPE), automatically transfers the employment of all those assigned to the business being sold, or the function being in/outsourced, to the purchaser or new service provider. The terms and conditions of employment of those who transfer are protected, and there are restrictions on dismissals or changes to terms and conditions which are made by reason of the transfer. There are also obligations on both parties to the transfer to inform and, in appropriate circumstances, consult with elected representatives of affected employees. Failure to comply with these obligations may result in a protective award of up to 13 weeks' uncapped pay per affected employee.

8. Disputes

8.1 Wrongful Dismissal

A wrongful dismissal occurs when there is a breach of contract in relation to a termination of employment. The most common grounds for a claim are as follows.

- Inadequate notice – typically where the employee is dismissed summarily on the

basis of conduct alleged to be a repudiatory breach of contract, but which is subsequently found not to amount to such a breach.
- Early termination of a fixed-term contract where there is no notice or other provision entitling the employer to terminate the contract early.
- Breach of contractual procedures – although rare outside the public sector, there may be a contractual disciplinary procedure. If this is not followed, the dismissal would be wrongful.

If a claim is successful, the employee may be entitled to compensation. This is calculated using the net value of the salary and by considering any other contractual benefits to which the employee would have been entitled to. Damages in an employment tribunal are currently capped at a maximum of GBP25,000. There is no cap in a civil court. The employee may also seek a declaration and/or an injunction, although these cannot be awarded in an employment tribunal and can only be sought in civil courts. They will be granted in the unlikely event that damages are an inadequate remedy.

8.2 Anti-discrimination

Under the UK Equality Act 2010, it is unlawful to discriminate against employees in relation to the following protected characteristics:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex; or
- sexual orientation.

Discrimination can take a number of different forms:

- Direct discrimination – where an employee is treated less favourably because of a protected characteristic.
- Indirect discrimination – where an employer adopts a provision, criterion or practice (PCP) which is apparently neutral, but which puts employees with a protected characteristic at a disadvantage. The employer can objectively justify indirect discrimination if it is shown to be a proportionate means of achieving a legitimate aim.
- Harassment – where an employee suffers unwanted conduct related to a protected characteristic which has the purpose or effect of violating their dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- Victimisation – where an employee suffers detrimental treatment because they have done a protected act (such as making an allegation of discrimination).

There are also specific heads of claim for disability purposes, including discrimination arising from a disability, and failure to make reasonable adjustments for a disabled employee.

The employee bears the initial burden of proving facts which could, in the absence of any other explanation, establish that discrimination has occurred. At that stage, the burden of proof shifts to the employer to prove that discrimination has not occurred.

If a discrimination claim succeeds, the usual remedy is compensation (which is uncapped). This is primarily based on the financial loss suffered by the victim, although the tribunal can also make an award for "injury to feelings", and

less commonly, aggravated or exemplary damages. The tribunal may also make a declaration about the rights of the employee and employer, and/or a recommendation for the employer to take steps to reduce the negative impact on the employee.

8.3 Digitalisation

Prior to 2020 there was no system for video remote hearings in the UK employment tribunals (although some preliminary hearings were conducted via telephone). This changed during the COVID-19 pandemic, when in-person hearings initially became impossible. There is now provision within the Employment Tribunals Rules of Procedure for remote hearings, and a Presidential Practice Direction on remote hearings and open justice was introduced in September 2020 to provide a formal framework for the conduct and procedure for remote hearings.

Employment tribunal hearings may take place on a wholly or partly remote basis. Whether or not to list a hearing to be heard remotely is a judicial decision. The Tribunal Rules of Procedure require the tribunal to consider whether a remote hearing would be "just and equitable", and to ensure that those participating and members of the public can hear and see what the tribunal hears and sees.

The preferred audio-visual platform is the HMCTS Cloud Video Platform (CVP). Remote hearings require electronic bundles of documents to be prepared in accordance with the tribunal's guidelines.

Currently, most preliminary hearings, including case management, strike-out applications, and judicial mediations are held as remote hearings by default. Some simpler final hearings may also be listed as remote, although more complex cases of discrimination or whistle-blowing would almost invariably be in person.

Another newer area of digitalisation in employment litigation is the MyHMCTS Portal. This Portal allows tribunal users to file documents, bundles and other correspondence with the employment tribunal so that cases can be processed and reviewed digitally. It is being rolled out in stages throughout 2024 across the UK on a regional basis.

9. Dispute Resolution

9.1 Litigation

The UK has an Employment Tribunal system, which sits alongside the main court system and is intended to operate as a quicker, cheaper and more informal method of litigating employment disputes. The tribunals have statutory jurisdiction to hear more than 80 types of statutory employment-related claims, such as unfair dismissal, discrimination and whistle-blowing. They can also hear contractual claims if they arise out of, or are outstanding on, the termination of employment (but compensation is capped at GBP25,000). High value breach of contract claims in an employment context are therefore more typically brought in the High Court, which also has jurisdiction for other non-statutory employment claims such as restrictive covenants disputes.

Appeals from Employment Tribunals on any question of law will be heard by the Employment Appeal Tribunal (EAT). Appeals from the EAT are then heard in the main court system, starting at the Court of Appeal.

Class actions (or "multiple claims" as they are known in this jurisdiction) are a common fea-

ture within the UK employment tribunals. The Employment Tribunal Rules of Procedure allow for multiple claims where the claims of two or more individuals give rise to common or related issues of fact or law, or if it is otherwise reasonable for their claims to be made on the same claim form. There is also the possibility of representative actions, where more than one person has the "same interest" in a claim. Although the claim would be brought by one or more of those individuals, the decision will be made in respect of all of the represented individuals.

The rules of representation in the employment tribunal are not as strict as the main court system, where parties must be represented by either a solicitor or barrister with higher rights of audience. Rule 74 of the Employment Tribunal Rules of Procedure provides that a party can be "legally represented" (eg, by a barrister or a solicitor), or can be represented by a "lay representative" such as a trade union representative or any other non-legally qualified individual. Equally, employees frequently represent themselves in employment tribunals, when they would be known as a "litigant in person".

9.2 Alternative Dispute Resolution

There are a number of well-established alternative dispute resolution (ADR) models available in the UK as a means of settling employment disputes. The most common ADR mechanisms include the following.

- Negotiation – this is flexible and informal. Discussions often proceed on a "without prejudice basis" so that, if no agreement is reached, the content of the negotiations will not be admissible in any subsequent court or tribunal proceedings. Any agreement is usually recorded in a settlement agreement (see **7.4 Termination Agreements**).
- ACAS conciliation – the ACAS mandatory early conciliation procedure must be followed by claimants who present claims in the majority of employment tribunal proceedings (although the only mandatory element is the notification to ACAS; conciliation will only proceed if both parties agree to it). Conciliation involves a conciliator acting as a go-between for the parties, conveying settlement proposals and helping both sides explore the strengths and weaknesses of their respective positions. Conciliation remains available up to the day of the case being heard by the employment tribunal. A successful conciliation may result in a binding COT3 agreement (see **7.4 Termination Agreements**).
- Mediation – this ADR mechanism involves a neutral third party managing or facilitating the process through which the parties negotiate a settlement. This may take the form of a private mediation or a judicial mediation in the employment tribunal. The latter brings the parties together before a trained Employment Judge who remains neutral and tries to assist the parties in resolving their disputes (which may include remedies which would be unavailable in the Employment Tribunal). The parties may engage in workplace mediation where there is an ongoing working relationship between the employee and the employer. The outcome of mediation would usually be non-binding, unless it also involves a settlement agreement (see **7.4 Termination Agreements**).

Arbitration is not a very common method of ADR for UK employment disputes. An arbitration agreement entered into before the dispute (for example, via an arbitration clause in the employment contract) would not be effective to prevent to individual pursuing a claim to an employment tribunal. Nevertheless, and even where there is

no such provision, parties can agree to submit disputes to arbitration after they have arisen. The outcome of arbitration is typically binding on both the parties (but again, could only be so in respect of statutory employment rights if a settlement agreement is used).

9.3 Costs

Costs do not "follow the event" in employment tribunals as they do in civil courts. This means that the parties typically bear their own costs, and tribunals will not usually order that the unsuccessful party cover the costs incurred by the successful party. Tribunals do however have the power to award costs against a party who has acted vexatiously or otherwise unreasonably in the conduct of the litigation, or where a claim or defence has no reasonable prospect of success.

URUGUAY

Trends and Developments

Contributed by:
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Bergstein Abogados has a labour, employment and immigration department that provides services via a team comprising four lawyers who are equally interested in each client's needs, active in academia, completely up to date and versatile. All members are advisers in the broad spectrum of labour law: employment-related litigation; guidance on the correct application of labour and employment legislation – both individual and collective labour rights; structuring and managing work benefits, stock options and executive compensation plans, including all related areas such as tax and social security. The department's dedication, knowledge and attention to detail has enabled Bergstein to be the go-to firm for important clients and companies, such as DLA Piper, Backer & McKenzie, Mayer Brown and Eversheds Sutherland. In addition, the department has been consistently ranked among the top firms in the country and members of the team have been awarded individual recognitions and are well praised among peers.

Authors

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The Latest in Labour Law in Uruguay

I. Introduction

Uruguayan employment laws are scattered (no Labour Code has been enacted yet) and, in some cases, they date back to the start of the 20th century. On top of that, new regulations are constantly being passed to be in line with current ideals, business models, union participation, and technological developments. All these elements converge to create an ever-changing area which could be challenging to navigate for businessmen and employees alike.

That which follows is a guide of paramount items to consider from a labour and employment perspective when considering doing business in Uruguay.

II. Working hours and overtime

The maximum daily working hours is eight, with a maximum of 48 hours per week for blue-collar employees and a maximum of 44 hours per week for white-collar employees. There are exceptions to this general rule for specific industries and activities.

There is a mandatory middle rest for employees working eight-hour shifts, which could range from half an hour (considered a paid resting time) to two-and-a-half hours (considered an unpaid resting time).

Uruguayan laws require overtime compensation. Services provided in excess of an employee's regular working hours are considered overtime. For example, parties may agree that the employee will work a seven-hour shift (that is, seven hours a day – 35 hours per week), in which case all services provided after the seventh hour are considered overtime.

Overtime must be paid with a 100% surcharge when performed on business days, and with a 150% surcharge when performed on non-business days or non-working days.

There are certain employees who are not entitled to overtime and are outside the scope of the daily working hour limitation. Such employees are:

- key personnel – eg, managers;
- university-educated professionals and/or certain highly specialised employees; and
- certain salespeople who sell products outside the company's premises.

III. Employment benefits

a. Salary

For their services, employees are entitled to receive the agreed salary. Salary can be agreed to be paid:

- per day or per month – in Uruguay (UY) it is not possible to determine an annual salary; and
- in any currency.

Salary must be equal or higher to the minimum salary determined by applicable collective bargaining decisions.

b. Paid time off and vacation salary

Employees are entitled to 20 paid business days off per year (prorated for employees who were employed after the civil year – a standard year comprising 365 days (366 in a leap year) – started). One additional day is granted for every four years of service after the fifth.

Paid-time off must be enjoyed within the calendar year following the year of generation and may not be rolled over (nevertheless, such is a common practice). By written agreement between employers and employees, paid time off could be enjoyed in more than one period.

Paid time off is paid by the employer and the amount must be calculated as follows: (i) monthly employees are entitled to receive full payment of their monthly remuneration as if they had actually rendered services (leave payment is deferred to the moment at which the employee receives their monthly payment); and (ii) payment for day labourers amounts to the average daily remuneration of the employee.

While enjoying paid time off, employees are entitled to receive an additional employment benefit: so called, "vacation salary" (*Salario Vacacional*). Vacation salary amounts to 100% of the net amount of the paid time-off benefit.

c. Thirteenth salary

Employees are entitled to a so-called "thirteenth salary" (*Sueldo Anual Complementario or Aguinaldo*), amounting to one twelfth of the aggregate sums collected by the employee during the calendar year. As per the Decree of the Executive Branch issued every year, payment of this benefit is made in two instalments: (i) June (which covers sums collected in the December–May period), and (ii) December (which covers sums collected in the June–November period).

d. Other benefits

Individual employment agreements, collective bargaining agreements and company policies can recognise additional employment benefits to the ones stated above and/or exceed thresholds determined by applicable legislation. In other words, UY laws only determine mandatory minimums, which can be surpassed by other applicable provisions. If such additional benefits are stipulated in any applicable employment documentation, they are mandatory for all parties to comply with.

IV. Outsourcing

Outsourcing is widely spread in Uruguay. Companies are entitled to outsource any activity and engage with companies that employ individuals to provide services on behalf of the contracting company.

As per the Uruguayan Outsourcing Act, companies who outsource activities would be responsible for the following liabilities related to outsourced employees:

- payment of employment benefits;

- severance payments;
- social security obligations; and
- State Office mandatory insurance (for employment-related accidents and illnesses).

Such responsibility cannot be discharged or waived so if the outsourced company fails to honour these obligations towards its employees, then the principal company will be deemed liable for such obligations for the period in which the outsourced employee provided services. To ensure control over compliance by the outsourced company regarding employment and social security obligation, principal companies are entitled by legislation to request certain information/documentation from outsourced companies; if the information is not provided and/or depicts non-compliance, principal companies may withhold (from the payments to be made to the outsourced company) the respective percentage referred to outsourced employees' employment benefits.

As noted, liability is, in principle, joint and several (employees can go after the assets of the contractor or those of the company indistinctly and even jointly). However, if the principal company conducts the reasonable checks previously stated on the outsourced company employment and social security records specified in the UY Outsourcing Act, liability will be secondary (an outsourced employee would need to go first against the contractor's assets, and only thereafter, if the contractor's assets are not sufficient to meet the claim, the employee would, then and only then, be entitled to go against the company's assets).

In addition to the above rule, additional considerations apply depending on the location where outsourced services are provided. If outsourced services are provided within the principal company's premises and/or under the company's direct/material control, the company would also be obliged to comply with all applicable health and safety regulations. Non-compliance with such regulations in a scenario that causes life-threatening risk to employees could determine that a company is criminally liable (refer to part VIII below).

On the other hand, if services are provided within an outsourced company's premises and/or locations outside of the principal company's control, the principal would comply with legislation by reasonably checking that the outsourced company is complying with applicable health and safety regulations.

V. Termination of employment

1. General regulation

Termination of employment determined by unilateral decision of the company will entitle employees to receive mandatory severance (unless termination was grounded in employee's gross misconduct).

In the case of monthly employees, severance would amount to the total remuneration of one month of work for each year worked (or fraction thereof), up to a maximum of six months.

For day labourers, provided that they have worked at least 100 days, severance will be calculated on the basis of the daily payment and employee's seniority, with a maximum of 150 daily payments.

Union delegates, pregnant women, employees who have suffered abuses and sexual harassment, women who are victims or have been victims of gender-based violence, employees who have suffered work-related accidents, and sick employees whose labour relationship is unilater-

ally terminated by the employer could be entitled to additional compensation as explained below.

2. Common illness, occupational illness and work-related accidents

Regarding common illness, applicable regulations establish a stability period of 30 days after the employee's effective reinstatement under penalty of a double severance payment. However, this situation is exempted in cases of employee gross misconduct or whenever termination is not related to an employee's illness.

Regulation in re occupational illnesses and work-related accidents is different. First and foremost, this regulation is subject to the employee duly reporting his/her accident or occupational illness to the Insurance State Office (*Banco de Seguros del Estado*) – or when the employer concealed or did not report the accident.

Having complied with this formal prerequisite, the employee must be effectively reintegrated to their position after overcoming their ailment. After reinstallation, a stability period of 180 days will apply.

There are two options regarding an employer's penalty for not complying with the reinstallation and/or stability obligations: (i) triple severance payment; or (ii) common severance payment plus payment of salaries that would have accrued during the 180-day stability period.

The employer may be exempted from this payment only by an employee's gross misconduct or reasonable supervening cause. Judges have been very rigorous when determining the scope of the concept of reasonable cause: most of them understand that the closing or reorganisation of companies is not included within such concept.

3. Pregnancy, victims of gender-based violence and sexually abused women

For a six-month period as from the imposition of precautionary measures due to gender-based violence, women in favour of whom such measures have been ordered may not be terminated. If terminated, such employees would be legally entitled to receive six months of their annual salary (in addition to common severance).

The penalty for not complying with this stability period can be understood as mandatory: an employer would be obliged to pay the additional amount regardless of prior conduct or justifications.

Termination of pregnant employees determines an additional payment of six months of their salary. For purposes of this additional payment, it is legally understood that pregnancy comprises the pregnancy period, the maternity-leave period and an additional stability period of 180 days after reinstatement.

If the employer is not aware of the employee's pregnancy at the time of her dismissal, the employer cannot be held liable for this special regulation.

Law No 18.561 determines that any employee that is a victim of sexual harassment may (i) claim compensation for moral damages of six monthly payments; or (ii) consider himself/herself indirectly dismissed and would be legally entitled to receive, in addition to common severance, a further six months of their salary as compensation. In this hypothesis, the employee must prove the acts of sexual harassment carried out against him/her.

Although not expressly regulated, the same regulation would apply in mobbing (bullying) scenarios.

4. Union-affiliated employees

If proven that an employee was terminated for reasons related to union membership or participation in union activities, termination would be considered null and void and the employee's effective reinstatement would be judicially determined. If that is the case, the employer must pay the employee all wages that the employee would have been entitled to receive until effective reinstatement.

Procedural legislation has determined an abridged procedure before Court to rule this kind of claim.

5. Abusive dismissal

In cases of significant or notorious arbitrariness, there have been examples of successful claims where damages caused by termination were considered greater than the legal amount established as severance. In such cases, an employee shall be entitled to receive an additional amount to compensate such further damages. In general, but always depending on the case, the additional amount has ranged from one to three times regular severance.

In any case, the employee must prove abusiveness and additional damages.

6. Constructive dismissal

Relevant changes affecting the employment relation if unilaterally determined by the employer – such as salary reduction, working hours variation, and change in the working location – could be understood by the employee as an "indirect" termination of employment, thus exposing the employer to the severance indicated above.

7. Paternity

Recent regulation has determined an stability period of 30 days after any paternity-related absence. Employees terminated within such stability period could be entitled to an additional payment of three months of their salary (unless company proves that termination is not related to paternity).

VI. Unions and collective bargaining

Collective relationships play a paramount role in UY. What follows below is a brief summary of relevant matters.

1. Uruguayan unions have legal and constitutional protection. Employees are free to choose whether to unionise or not, and are specially protected against dismissal based on union-related reasons (refer to part V.4 above).

2. UY law encourages negotiations via collective bargaining. Such negotiations not only relate to salary matters (applicable minimum salary, mandatory semi-annual increases, etc), but also to general workplace conditions, additional employment benefits and/or any other employment-related items parties might agree on.

3. All companies that conduct business in UY must be included in one of the 24 activity groups determined by the government (each group has various subgroups). Each of these groups have their own applicable Salary Council and the inclusion of the company in the corresponding subgroup would automatically determine the application of the decisions issued by such applicable Salary Council.

Salary Councils are tripartite bodies formed by representatives of the Administration, employees and employers that conduct mandatory collective bargaining. Decisions issued by Salary

Councils are called "*laudos*" and are mandatory for all companies included or that should be included in the applicable Salary Council's scope. In other words, companies are obliged to comply with the employment regulations agreed by the applicable *laudos*.

Laudos typically set forth (among others) the definition of the different job positions, minimum salaries applicable to each position, periodical mandatory salary increases, additional employment benefits and other employment terms and conditions.

VII. Labour claims

The main government office in charge of dealing with employment law matters is the Ministry of Labour.

Prior to the judicial filing of labour claims, employees must request a preliminary administrative conciliation hearing to be conducted before the Ministry of Labour. In case the matter cannot be settled in such preliminary procedure, Uruguayan law determines a very brief judicial procedure to solve all labour claims.

If a court rules in favour of the employee, the employer will be compelled to pay an additional 10% fine (calculated over the total due amount) plus a further 10% to 20% with regards to damages (calculated over all salary items/benefits) in favour of the employee.

The applicable statute of limitations determines that employees must request the administrative conciliation hearing within the year after the labour relationship has been terminated. An employee is entitled to claim labour credits which he/she understands have accrued within the five previous years.

VIII. Corporate criminal liability

UY laws (Act No 19.196, 25 March 2014) establish potential criminal liabilities to employers (or to the person who effectively has management or direction capabilities on the employer's behalf) whenever (i) labour health & safety regulations are not complied with; and (ii) such non-compliance puts employees in a serious and concrete life-threatening situation. Typical cases where this law has been applied (and determined its actual enactment) are within construction projects.

When employers are corporations, it has been understood by case law that managers and/or directors who had actual control over employees and/or the specific activity are criminally responsible for such non-compliance. It is not required that the employee suffers an actual employment-related life-threatening accident; the possibility that such accident could have happened is enough for the criminal scenario to trigger.

Penalties can range from three to 24 months of imprisonment. The penalty does not necessarily have to be served in jail; UY criminal laws provide other possible ways of complying, which can even end with no criminal records for the person involved if no other criminal laws are infringed during the conviction period.

USA

Law and Practice

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Contents

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Ogletree Deakins

1. Employment Terms

1.1 Employee Status

The Fair Labor Standards Act (FLSA) exempts certain white-collar workers from the statute's minimum wage and overtime requirements. Employers are not required to pay minimum wages or overtime pay to executive, administrative, professional, or certain computer or outside sales employees who satisfy the salary level and other requirements to meet one of the white-collar exemptions. Employees who do not meet the FLSA exemptions (generally blue-collar workers) are entitled to minimum wage and overtime under the FLSA, as well as any state or local minimum wage or overtime requirements.

1.2 Employment Contracts

Employment contracts are not required. Where a written contract does not exist, courts may imply terms governing the employment relationship from statements made in employee handbooks, offer letters, and/or oral representations.

In the American workplace, employment is generally assumed to be "at will", meaning either the employee or the employer can end the employment relationship at any time. For those employment relationships that are under contract, most are in writing – although, depending on applicable state law, the employment contract need not be in writing to be enforceable. State law determines whether employment is "at will" and may prescribe what an employment contract must include.

There is no federal law that requires employers to provide specific written information to employees at the time of hire. However, some states require employers to disclose information such as the employee's wages or regular payday at the outset of employment.

1.3 Working Hours

Under the federal FLSA, most employers are required to pay overtime – at a rate of time and a half of the employee's regular pay – for each hour worked that exceeds 40 hours per week, unless the employee is statutorily exempt. Some states expand these terms and conditions to include overtime in excess of eight hours in one day or overtime for work performed on weekends. The FLSA limits the types of flexible scheduling arrangements available. Maximum working hours for minors are imposed by federal and state laws.

1.4 Compensation

Minimum wage requirements are imposed by federal and state laws. The federal minimum wage for employees covered by the FLSA is currently USD7.25 per hour. States and localities may impose minimum wages above the federal minimum wage. The federal government does not otherwise intervene in decisions regarding increases, bonuses or other types of compensation. State laws regulate the timing of compensation payments and permissible deductions from pay.

1.5 Other Employment Terms

Vacation Pay

Vacation and vacation pay are subject to very few regulations and are not required under federal law. However, most employers do provide some paid vacation leave, which is regulated by state and/or local law. State laws will often determine whether an employee is entitled to accrued vacation pay at the conclusion of the employment relationship.

Family/Medical Leave

The federal Family and Medical Leave Act (FMLA) requires employers of a certain size to provide unpaid leave for maternity, taking care

of a medical condition, or caring for family members. Paid sick leave is not required by federal law. Under the FMLA, an employee is eligible for unpaid leave if the employee has been employed for at least 12 months by the employer and for at least 1,250 hours of service during the previous 12-month period. An eligible employee is entitled to:

- up to 12 weeks of unpaid leave per year;
- continuing health insurance benefits during leave (if already provided by the employer); and
- job protection (which guarantees an employee can return to the same job or its equivalent).

Leave related to a serious health condition may be taken intermittently or on a reduced leave schedule when medically necessary.

Some state and local family leave laws provide more generous leave benefits than the FMLA by:

- covering smaller employers;
- extending the time for unpaid leave;
- requiring paid leave in some instances; and
- permitting intermittent leave for maternity.

Workplace Accommodations

Additionally, depending upon the type of employer, the Americans with Disabilities Act (ADA) requires an employer with the requisite number of employees to provide a disabled employee with reasonable accommodations unless said accommodations would impose an undue hardship on the employer. Reasonable accommodations can include a leave of absence, a modified work schedule, modified duties, transfer to a vacant position, or (in some instances) unpaid leave beyond the 12 weeks provided under the FMLA.

Similarly, the Pregnant Workers Fairness Act (PWFA) requires an employer with the requisite number of employees to provide a reasonable accommodation to a qualified employee's or applicant's known limitations related to, affected by or arising from pregnancy, childbirth or related medical conditions, unless said accommodations would impose an undue hardship on the employer. "Related medical conditions" are currently defined broadly.

Covered employers are also required under Title VII of the Civil Rights Act to provide accommodations for an employee's or applicant's sincerely held religious practice or belief, unless the accommodation would create an undue hardship for the employer. "Undue hardship" in the religious accommodation context is analysed differently than an accommodation under the ADA or the PWFA, and the US Supreme Court recently clarified the term to require a heightened showing by employers.

The federal PUMP for Nursing Mothers Act (the "PUMP Act") also requires most employers to provide a private place to pump at work for a year after a child's birth, along with a reasonable break time to do so.

Confidentiality/Non-disparagement

Traditionally, there have not been limitations on confidentiality and non-disparagement requirements. However, there are increasing concerns with regard to such requirements in the employment arena, especially around the extent to which they might prevent disclosure of harassment allegations. A recent ruling by the National Labor Relations Board (NLRB) limits confidentiality and non-disparagement terms – even if agreed – between employers and non-management employees. This is an area that is still evolving under US law.

Employee/Employer Liability

In general, employees may be held liable for their actions, depending on the nature of the act and the context in which the act occurred. Under the American doctrine of respondeat superior, an employer may be held:

- vicariously liable for an employee's acts that are committed within the scope of employment; or
- liable for negligence in the hiring, supervision or retention of an employee, as determined by state law.

2. Restrictive Covenants

2.1 Non-competes

Although non-competition agreements have been the subject of recent federal regulatory and congressional attention, non-compete law is presently regulated at the state level. In some states, non-compete agreements are governed entirely by common law doctrines, whereas other states have statutory schemes regulating (or entirely prohibiting) non-compete agreements.

A growing number of states have enacted legislation in recent years to limit the use of non-compete agreements or impose additional obligations on employers seeking to enforce them. Among other things, state non-compete statutes may:

- ban non-competes entirely;
- prohibit the use of non-competes for low-wage earners;
- require specific notice to employees;
- set temporal limits on non-compete covenants; and/or
- impose heightened consideration requirements.

Meanwhile, some states have adopted statutes governing the use of non-competes for specific industries or professions, such as physicians. For details of the special rules that apply to non-competes governing physicians in the State of Texas, please refer to the USA – Texas Trends and Development chapter in this guide.

In general, to be enforceable, a non-compete covenant must be tailored to protect a company's legitimate, protectable business interests and be reasonable in scope. Protectable business interests typically include trade secrets and other confidential information, customer relationships, and company goodwill. Conversely, companies may not use non-compete agreements to stifle fair competition or restrict employee mobility; these would not be considered protectable interests.

In determining whether a non-compete is reasonable, courts typically examine the covenant's temporal scope, geographic scope, and substantive scope. If a non-compete is determined to be unreasonable, some states give courts broad discretion to reform or "blue pencil" the agreement, whereas courts in other states do not.

Temporal Scope

The permissible length of a non-compete agreement varies greatly from state to state. In states where restrictive covenants are governed by the common law, one to two years is generally within the time period that courts will consider reasonable. Meanwhile, some state statutes limit non-compete agreements to 12, 18 or 24 months.

Geographic Scope

The permissible scope of a non-compete covenant is typically determined on a case-by-case basis and will vary depending on the employer's

industry and the employee's duties. In general, a non-compete should be tailored to the employee's footprint and duties for the employer.

By way of example, if the employer's business is a storefront or a physician's office that serves customers or patients from a defined geographic area, the geographic scope may be limited to some number of miles or counties surrounding the business. Similarly, if a sales representative's duties are limited to selling products and services in a particular territory, the geographic scope of the non-compete likely could not extend into locations beyond that territory. On the other hand, if an employer's business is national in scope and the employee's duties impact the employer's operations throughout the entire company, a nationwide non-compete may be permissible in some states.

Substantive Scope

A non-compete should generally be limited to the areas of the employer's business the employee worked in or acquired confidential information about. Typically, this will require limiting the non-compete covenant to performing the same or similar type of duties at a competitive business. A non-compete that seeks to prohibit an employee from accepting employment in any capacity within a particular industry is likely to be found over-broad in many states.

Reformation/Blue Penciling

If a non-compete is determined to be over-broad in scope, it may be held to be facially unenforceable in many states. In some states, courts have discretion to "reform" the covenant by narrowing it to a reasonable scope. By way of example, if a court determines that a 50-mile non-compete is over-broad, the court may narrow the covenant to a smaller geographic territory. In some other states, courts are strictly limited to "blue penciling" the agreement by deleting words or phrases, but revisions and additions to the language are not permitted.

Regardless of the approach a state takes to curing or invalidating over-broad agreements, employers should generally endeavour to draft their agreements as narrowly as possible while protecting their legitimate, protectable business interests.

2.2 Non-solicits

Customer Non-Solicits

Like non-compete covenants, customer non-solicitation covenants are governed by the common law in most states – although some states have statutes limiting their use. Non-solicits must also be tailored to an employer's protectable business interests and be reasonable in scope. However, because the scope of the customer restrictions defines the breadth of the agreement, most states do not require a geographic restriction for non-solicitation covenants.

In general, a customer non-solicit should be limited to the customers the employee had material business contact with and/or acquired confidential information about. Some states require the customer to be an active customer in order to fall within the scope of a non-solicit, whereas others permit non-solicits to extend to active prospects.

Employee Non-Solicits

Employee non-solicitation agreements must also be reasonable in scope and protect the employer's legitimate business interests. Protecting against employee departures is typically not considered a protectable business interest, standing alone. Thus, a non-solicitation covenant that extends to a company's entire workforce may be unenforceable in some states.

Best practice for drafting employee non-solicits is to limit them to employees with the ability to harm the company while working at a competitor (such as those employees with access to confidential information, customer relationships, etc) and those employees with whom the departing employee had material contact.

3. Data Privacy

3.1 Data Privacy Law and Employment

Data Protection Laws

Employee data protection laws in other countries are often much more restrictive than in the USA. However, the USA is trending towards more data protection obligations, with an assortment of data protection laws that regulate the collection, use and transfer of employees' personally identifiable information (PII) and personal health information (PHI). These laws are not limited to protecting active employee information, so employers' obligations extend to former employees, job applicants, independent contractors, and other non-employee groups (eg, customers) whose personal information they may obtain.

There are a number of federal data protection laws that impact the employment relationship, including:

- the Health Insurance Portability and Accountability Act (HIPAA), which governs health plan and medical provider conduct, and dictates the circumstances under which PHI may be released and to whom it may be released;
- the Genetic Information Nondiscrimination Act (GINA), which covers genetic information;
- the ADA, which limits when an employer may obtain medical information, how such information may be used and disclosed, and how it may be stored and retained;
- the FMLA, which limits the use and disclosure of medical information collected to administer leaves under the law;
- the National Labor Relations Act (NLRA), which prohibits employers from interfering with workers' rights to engage in concerted activity, including such activity through social media; and
- the Fair Credit Reporting Act (FCRA), which applies to those who use consumer reports, including background checks conducted on applicants and employees.

Another federal law, the Privacy Act 1974, limits the type of information that federal government employers may keep on their employees.

Personal Information Requirements

Most US states impose requirements related to personal information. Every state has enacted laws defining PII and requiring notification of security breaches involving PII. Many states have enacted laws that require companies to keep PII secure and to destroy or dispose of PII – or otherwise make it unreadable or undecipherable – once they are finished with PII they hold.

Many states have also enacted laws to protect social security numbers, with limited exceptions for employers, and some have laws providing expanded protections to PHI or other health information. A significant number of states have also enacted employee social media privacy laws, which limit when and how employers may use social media information about their employees.

Certain states have laws that represent new approaches to data protection and have become a model for similar legislation across the nation. One such example is Illinois, which imposes conditions on the collection and use of biometric

information, including fingerprints, retina scans and facial geometry scans (which could be used to identify individuals through photographs). The Illinois Biometric Privacy Act (BIPA) has a number of requirements, such as written consent and disclosure of policies related to biometric data collection and usage. It also allows private individuals to bring suit and recover damages for violations.

Elsewhere, nearly half of US states have established broad consumer privacy laws, but to date the laws generally provide an exclusion for employment information outside California. In contrast, the California Consumer Privacy Act 2018 (CCPA), as amended by the California Privacy Rights Act 2020, established rights for California residents, including requirements for employers with regard to the information they hold on employees, applicants and contractors. Employers must:

- develop a comprehensive programme to monitor how data is collected, used, shared and destroyed throughout the employment relationship;
- communicate with California residents; and
- process rights requests when received.

New York City and several states place restrictions on the use of AI when processing employment information, particularly in the hiring process. These laws and ordinances place constraints – as well as notice and, in some cases, consent obligations – on those employers using tools that conduct automated decision-making.

Laws concerning personal information and data protection are changing rapidly. In addition to proposed national legislation, new rights and duties for employers are expected in a number of states during the coming years.

4. Foreign Workers

4.1 Limitations on Foreign Workers

US employers are prohibited from hiring or continuing the employment of a worker who is not authorised to work in the USA. The Immigration Reform and Control Act of 1986 (IRCA) places the burden of immigration compliance on employers and prohibits the hiring, recruiting, or referring for a fee of individuals who are not authorised to work in the USA. It also requires employers to confirm the identity and employment eligibility of new employees.

Subject to very few exceptions, a foreign worker must have a work visa permitting them to work in the USA. Employers have the option of participating in the immigration sponsorship process. However, they may not directly ask about a candidate's national origin, citizenship, or immigration status during the hiring process. Instead, employers must use neutral questions to determine whether the applicant requires immigration sponsorship to begin working or to continue employment in the future. Acceptable questions include:

- "Are you legally authorised to work in the USA?"
- "Do you now, or will you in the future, require immigration sponsorship for work authorisation?"

If a candidate answers affirmatively to the second question, the employer may ask more direct questions about the applicant's immigration status and work authorisation in order to make an informed hiring decision.

4.2 Registration Requirements for Foreign Workers

Foreign nationals can obtain non-immigrant (temporary) visas and immigrant (permanent) visas to work in the USA. Most foreign nationals initially enter the USA on a non-immigrant visa. Some common employer-sponsored nonimmigrant visas include the H-1B, L-1 and TN non-immigrant visas.

5. New Work

5.1 Mobile Work

Employers are free to allow employees to work in mobile settings as long as the arrangements comply with generally applicable federal, state and local laws – for example, workers' compensation, the Occupational Safety and Health Act (the "OSH Act"), the FMLA, and the ADA, as well as poster and notice requirements.

Wage and hour issues, as well as leave issues, are top challenges for employers dealing with remote employees. Companies should use a system for hourly employees that pays for all scheduled time, requires accurate reporting of worked time, and does not discourage or impede accurate reporting. For jurisdictions with meal break laws, such as California, employers should set policies and expectations so that remote employees receive these breaks as required.

Working temporarily in a location can trigger paid sick leave obligations for remote employees. By way of example, employees working for 30 days in a year in California gain coverage of the state's paid sick leave law. Remote employees working in Chicago and New York must receive sexual harassment prevention training under state and local laws.

Mandatory federal posters for agencies and laws (the Equal Employment Opportunity Commission (EEOC), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Occupational Safety and Health Administration (OSHA), and the FLSA) must be posted or provided in a way for employees in mobile settings to access them, including on an intranet or directly via email. State and local laws and agencies require certain posters as well, so employers should consult and research each applicable state labour department.

For purposes of workplace safety, OSHA currently has a policy that it does not have any regulations regarding remote work from a home office and it will not conduct inspections of worker home offices. However, OSHA will enforce record-keeping requirements for work-related injuries if they occur in the home of remote workers. As a result, companies should continue to keep records of such injuries and ensure employees in mobile settings attend applicable safety training.

Employers should be mindful of cybersecurity issues for mobile employee arrangements. Options to mitigate risks include:

- use of an encrypted virtual private network (VPN);
- requiring use of company equipment and not allowing personal equipment;
- limiting or banning external drives; and
- restrictions on or monitoring of printing.

5.2 Sabbaticals

In the past, many private sector employers traditionally did not utilise sabbaticals outside academia and other specialised areas. However, employers are using sabbaticals more frequently and giving them greater consideration in the

post-pandemic era in order to attract and retain talent that is more mobile and willing to change jobs.

Sabbatical details, requirements and eligibility vary greatly and mostly depend on the discretion of the employer, unless a union's collective bargaining agreement addresses the issue. Federal, state and local laws do not require sabbaticals, but various obligations or questions may be triggered by the use of sabbaticals.

Typical factors and decisions for sabbaticals include:

- which employees are eligible;
- length of employment before eligibility;
- length of sabbatical;
- whether the sabbatical is fully paid, partially paid, or unpaid; and
- the availability of benefits during the sabbatical.

Continued employee qualification and eligibility for health and other benefits are among the most challenging issues when it comes to sabbaticals. Many health insurance programmes require continued full-time employment and/or continuous service. Employees on sabbatical may be unwilling or unable to forgo such benefits, so employers will have to ensure the benefits can apply to sabbaticals or find another acceptable alternative. The same challenges can arise for insurance coverage. Employers should check to determine if employees on sabbatical can maintain health, disability and life insurance, if a modification to policy requirements can be made, or a substitute policy can be issued. Employers may also want to review contracts and policies relating to deferred compensation and stock vesting so that a sabbatical does not become a trigger for payment unexpectedly.

5.3 Other New Manifestations

Many companies are using "new work" approaches, including wellness programmes, to attract and retain talent. These approaches have some benefits and potential pitfalls. One trend seems to have hit its nadir – open floor plans seems to be diminishing since the pandemic (the set-up was conducive to virus spread), as employers and employees are realising that boundaries and privacy can help with productivity and morale. The new work approach highlights autonomy, technology integration, less hierarchy, additional collaboration, and flexibility.

One concrete example of a new work approach is unlimited paid time off (PTO) or unlimited vacation. This has been attractive to some employers and companies because it highlights autonomy and responsibility. However, one challenge has been that some employees feel they have less ability to use PTO, whereas some employers have encountered what they believe to be excessive use of the policy. Unlimited PTO can also create unexpected legal challenges. In jurisdictions requiring payment of PTO or vacation upon termination, companies can face claims for large payments on the basis of unlimited PTO. Employers using this approach should consider adding provisions that require some employer approval on the timing and length of PTO, criteria for any payout at termination, and the interaction with other leave (medical or family).

Although wellness programmes can help with workforce morale, there are potential legal issues to be aware of. Making wellness programmes voluntary instead of mandatory helps avoid some risks, as does being careful about the type and amount of information requested and collected.

6. Collective Relations

6.1 Unions

The NLRA, enacted in 1935, was designed to provide rules to limit "industrial warfare" following a period of violence and unrest between employers and employees. The NLRA protects employees' rights to engage in "protected, concerted activity" in the workplace regarding the terms and conditions of their employment and, if they choose, to organise a union.

Although 29.5% of American employees belonged to unions in the 1960s, union membership in the private sector has declined steadily since then and currently stands at just 6%. In contrast, the percentage of union employees in the public sector has grown markedly in the past 20 years and currently stands at 33.1%.

The NLRA prohibits private sector employers from interfering with, restraining or coercing employees in the exercise of their rights to organise a union or their rights to engage in other concerted activities for mutual aid or protection. The NLRA also protects employees' right not to organise a union and not to engage in other concerted activities.

6.2 Employee Representative Bodies

Section 9 of the NLRA prescribes general rules concerning the election process. The NLRB and the courts have also developed processes through which employees have the opportunity to cast an informed vote in an election to determine a union's representation status.

In December 2023, the NLRB issued new guidelines on the conduct of representation elections, thereby revising rules implemented under the prior administration that were considered by unions to have tilted the process in favour of employers. The newly revised rules seek to advantage union interests in the election process. This is not surprising, as the current administration is openly pro-union and decisions from the NLRB reflect these pro-union leanings.

Once elected, the role of the union is to represent the interests of the employees in the bargaining unit fairly and negotiate the terms and conditions of employment with the company. These include wages, benefits, and other terms and conditions such as seniority, overtime and work schedules.

Under the NLRA, subjects of bargaining are divided into two categories:

- "mandatory" (which the parties must negotiate); and
- "permissive" (which neither party can be forced to negotiate).

6.3 Collective Bargaining Agreements

When employees choose a union to represent them, the employer and the union are required to meet at reasonable times and places to negotiate in good faith in order to reach a binding agreement that sets forth the terms and conditions of employment. The employer and union are not required to adopt any proposal made by the other; however, they are required to bargain in good faith in order to try to reach an agreement. Failure to reach an agreement may result in a strike or lockout or could prompt the union to resort to other economic weapons.

If the parties do not reach agreement despite good-faith bargaining, the employer may declare an impasse and unilaterally implement its bargaining proposals. The union could, however, file an unfair labour practice charge with the NLRB if it contends the employer failed to bargain in good faith. The NLRB can order the employer

back to the bargaining table and to rescind any unilateral changes the employer may have made based on a claim of impasse.

For workforces that are organised, bargaining typically takes place at the company level. However, some employers bargain with unions through associations, which may result in a uniform agreement for certain types of work performed by numerous different employers (eg, across an industry such as construction).

7. Termination

7.1 Grounds for Termination

Employment is generally presumed to be "at will", meaning either the employee or the employer can end the employment relationship without notice at any time for any reason – be it good or bad – or for no reason at all. There are four major exceptions to the "employment at will" doctrine – namely, where there is:

- a dismissal due to discrimination or retaliation that is in violation of a federal, state or local law;
- an express or implied contract, including a collective bargaining agreement;
- an implied covenant of good faith and fair dealing; and
- a discharge that would violate the state's public policy – for example, firing an employee for seeking worker's compensation benefits following a work-related injury.

The laws surrounding these exceptions vary considerably by state.

Unless provided for by the terms of an employment contract or collective bargaining agreement, procedures do not differ depending on the grounds for dismissal.

Lay-Offs

In the USA, the term "lay-off" is often used for instances in which an employer eliminates a number of jobs owing to economic reasons or a business need to restructure.

Although a group of at-will employees may generally be dismissed by an employer at any time, the federal Worker Adjustment and Retraining Notification Act (the "WARN Act") and certain state law equivalents require employers to give employees advance notice of a lay-off or plant closing in some circumstances. In addition, if an employer seeks a release of federal age discrimination claims in connection with an exit incentive programme or other group employment termination, the employer must provide certain disclosures to the employees being separated. Lastly, an employer may have additional obligations when dismissing a group of employees under a collective bargaining agreement or – in some cases – if the employee works in the public sector.

7.2 Notice Periods

Unless specified in an employment contract or collective bargaining agreement, there generally are no notice requirements. There is, however, one caveat – in some circumstances involving a plant closing or mass lay-off, an employer may have to give employees 60 days' notice of the lay-off under the WARN Act or an applicable state law equivalent. Some of these analogous state laws are more expansive in terms of coverage and employee rights.

Similarly, except where provided for by an employment contract, severance pay is not required. Employees are generally not entitled

to compensation on dismissal beyond pay up until their final day of employment and any other business expenses owed to them at the time of dismissal. Depending on the law of the state in which the employee works, an employee may be entitled to receive temporary and partial wage replacement (known as "unemployment compensation"), which is generated by the state government from a special tax paid by employers.

7.3 Dismissal for (Serious) Cause

Given that employment is generally presumed to be "at will", an employer may dismiss an employee for any reason, with or without cause or notice. The only exceptions are where:

- any applicable employment contract or collective bargaining agreement provides otherwise; or
- the employee is dismissed for a reason proscribed by federal, state or local law (eg, an employee's age, disability, race, sex, or national origin).

In a collective bargaining relationship, there are recognised principles of just cause. The employee must have notice of the rule that is the subject of the dismissal, the rule must be reasonable, the employer must have conducted a fair investigation and ascertained evidence of the violation, and the penalty must fit the "crime". The determination of just cause must include an assessment of the prior points, in addition to the employee's seniority and work record.

7.4 Termination Agreements

Termination agreements are permissible. In general, there are no specific procedures or formalities required for termination agreements.

The Older Worker Benefit Protection Act (OWBPA) provides procedural safeguards where an employer seeks a paid release of federal age discrimination claims. Additionally, special rules exist for the release of claims based on violations of the FLSA, which requires minimum wage and overtime pay for most employees. Several federal agencies, such as the SEC and the NLRB, have also brought enforcement actions against employers whose release agreements impede a person from exercising their right to provide truthful information to governmental or regulatory bodies.

7.5 Protected Categories of Employee

There is no specific protection against dismissal for particular categories of employees, except where provided by the anti-discrimination laws, the NLRA, or other federal or state statutes.

8. Disputes

8.1 Wrongful Dismissal

Employment is generally assumed to be "at will", meaning either the employee or the employer can end the employment relationship at any time for any or no reason; this is determined by state law. However, there are four common exceptions, which are discussed in **7.1 Grounds for Termination**. Therefore, employees may have grounds for a wrongful dismissal claim in situations where employment is terminated as a result of whistle-blowing, filing a worker's compensation claim, or refusing to engage in unlawful conduct.

The remedies available depend on the law under which those claims are asserted. However, they generally include some combination of back pay, lost benefits, front pay, liquidated damages, compensatory damages (including emotional

distress damages), punitive damages, and attorney's fees and costs – in addition to equitable relief such as reinstatement.

8.2 Anti-discrimination

Discrimination

Employment discrimination is prohibited by a variety of federal, state and local laws. Federal law prohibits employment discrimination based on the protected characteristics of race, colour, national origin, sex (which includes sexual orientation and gender identity), pregnancy, religion, age, disability, citizenship status, genetic information, and military affiliation. Federal law also prohibits retaliation against employees who oppose unlawful discrimination (or who participate in proceedings challenging unlawful discrimination) or who seek benefits under federal law (eg, under the ADA, the PWFA, the PUMP Act or the FMLA).

Most state and some local laws contain analogous prohibitions. Certain jurisdictions have expanded the list of protected categories to include such characteristics as marital and/or familial status, political affiliation, language abilities, use of tobacco products, firearm ownership, and public assistance status, as well as height, weight, hairstyles and personal appearance.

Prohibited Practices

Prohibited discriminatory practices generally include bias in all terms, conditions and privileges of employment, including hiring, promotion, evaluation, training, discipline, compensation, classification, transfer, assignment, lay-off and discharge. Where disadvantageous to the employee, these activities are often referred to as "adverse actions". To demonstrate discrimination, an employee must establish a connection between the protected characteristic and the adverse action or condition.

Prohibited discriminatory practices also include failing to reasonably accommodate an employee's request for a disability or religious accommodation. The standards for evaluating each type of accommodation differ and religious accommodations are an evolving area under US law.

Harassment

Workplace harassment is also unlawful. Although many harassment cases involve allegations of sexual harassment, harassment based on other protected characteristics is also actionable. Employer liability in harassment cases depends on:

- who engaged in the harassment;
- whether the harassment resulted in a tangible employment action; and
- the employer's efforts to prevent and correct the harassment.

Retaliation

It is unlawful to retaliate against employees who raise concerns about unlawful discrimination or harassment. An employee need not prove that discrimination occurred in order to prove that an employer's response to the employee's complaints constituted unlawful retaliation. Rather, an employee simply needs to prove a causal connection between the complaints and the adverse action.

Proving Discrimination

Generally, employees must first prove that:

- they are a member of the protected class;
- they were qualified for the job and/or satisfactorily performed the job;

- they were subjected to an adverse employment action; and
- the adverse employment action occurred under circumstances giving rise to an inference of discrimination.

The employer must then establish that the adverse employment action was taken for a legitimate, non-discriminatory reason. If the employer does so, the employee must prove that the reason offered by the employer was a cover-up (or pretext) for discrimination. An employee is also generally required to show that the employer intended to discriminate, except when claiming a particular practice or policy has a disparate impact based on a protected characteristic.

There are also affirmative defences to discrimination claims that may apply in limited circumstances and depending on the nature of the claim. Employers are generally allowed, for example, to discriminate on the basis of sex, age, religion or national origin if such a characteristic constitutes a bona fide occupational qualification (BFOQ). A BFOQ exists when a specific characteristic is necessary for the performance of the job. Gender may be a relevant factor, for example, in job performance for a model of women's clothing. The BFOQ defence is very narrowly restricted and should not be relied on in most situations.

Remedies available for discrimination claims depend on the law under which those claims are asserted, but generally include some combination of back pay, lost benefits, front pay, liquidated damages, compensatory damages (including emotional distress damages), punitive damages, and attorney's fees and costs – as well as equitable relief such as reinstatement.

8.3 Digitalisation

Employment disputes may include in-person or virtual depositions. Virtual court proceedings are increasingly permitted in the USA, including court conferences, settlements and mediations, and trials. Even where the proceeding itself is in person, more judges are allowing witnesses to appear virtually. This is generally a court- or judge-specific determination – although the parties may agree to conduct depositions or mediations virtually.

9. Dispute Resolution

9.1 Litigation

Employment litigation is a robust practice, with tens of thousands of lawsuits filed by employees annually. Most employment lawsuits take place in federal court pursuant to federal statutes, such as Title VII, the ADA and the FLSA. However, many employment claims may also be filed in state court, and certain state statutory schemes make state court litigation more common than in other states.

In a routine single-plaintiff employment discrimination or retaliation case, an employee typically must file a charge of discrimination with the EEOC (or analogous state agency) prior to filing suit. The agency will investigate the claim and may choose to litigate the claim in federal court on behalf of the employee or it may issue the employee a "right to sue" letter authorising the employee to file suit in court.

Class actions are also permitted for some employment claims. Whether to certify a class action is often a hotly contested issue, with significant financial implications in certain types of cases, such as wage and hour disputes. In determining whether to certify a class, courts

consider a number of elements, including whether there are common issues of law or fact that apply throughout the proposed class.

9.2 Alternative Dispute Resolution

Arbitration agreements are used by many employers as an alternative to litigation. Federal law generally favours the enforcement of arbitration clauses and courts will often compel the parties to arbitrate where an arbitration agreement exists. In addition, employers generally may enforce arbitration agreements containing class action waivers. However, certain types of labour and employment claims (eg, sexual harassment and assault claims and unfair labour practice claims) are not subject to arbitration.

9.3 Costs

A number of employment statutes, including federal anti-discrimination laws, typically permit the prevailing party to recover attorney's fees and costs.

USA – CALIFORNIA

Trends and Developments

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Shook, Hardy & Bacon LLP (SHB)'s national employment litigation and policy practice represents corporate employers in complex class action (employment discrimination and wage and hour issues) and Equal Employment Opportunity Commission (EEOC) litigation. Chambers USA: America's Leading Lawyers for Business describes SHB as "a powerhouse" and "truly one of the best litigation firms in the nation". Innovation and collaboration are SHB hallmarks. As for the firm's national employment litigation and policy practice, Chambers USA writes: "Shook Hardy & Bacon's broad litigation group helps to add value to an already deep employment and labour team. The group handles complex single-plaintiff cases and also excels in class actions in a variety of contexts. As well as providing top litigation services, the firm acts as national counsel to many large clients, dealing with federal compliance, background checks, privacy and internet issues. A network of national offices supports the employment litigation team, and pleased clients say they have had 'absolutely excellent experiences'."

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William C Martucci of Shook, Hardy & Bacon LLP practises globally in complex class action (employment discrimination and wage-and-hour issues, including in California) and Equal Employment Opportunity Commission (EEOC) litigation. Chambers notes that "Bill Martucci is worth having on any dream team for employment litigation and policy issues". His jury work has been featured in The National Law Journal. Bill holds an LLM in employment law from Georgetown University in Washington, DC, where he now teaches multinational business policy and the global workplace.

Laura M Booth of Shook, Hardy & Bacon LLP is an accomplished litigator with more than 20 years' experience. She represents corporate employers across industries in class action and other complex business and employment litigation matters in California and nationwide. Laura has experience defending wage and hour class actions and in a wide variety of state and federal employment matters including age, race, disability and sex discrimination, retaliation and harassment. She also has experience of dealing with the California Employment Development Department and the California Unemployment Insurance Appeals Board in wrongful termination and misclassification claims, guiding clients through the administrative charge process, and successfully defending those clients in administrative proceedings.

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Ashley N Harrison of Shook, Hardy & Bacon LLP's practice focuses on representing clients nationally in commercial disputes and employment matters. Ashley's work includes defending companies in litigation involving a variety of employment-related issues – such as non-compete agreements, harassment and discrimination claims, and high-stakes wage and hour matters – in addition to defending complex class action and collective action claims. She has extensive experience of trying cases in federal and state courts, as well as handling commercial and employment arbitrations, including trying an arbitration to final award before the American Arbitration Association. Ashley regularly works with clients in the insurance, construction, retail, sports, food and beverage, healthcare IT, staffing and lending industries.

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Dynamic Employment Litigation Trends in California

American law and employment litigation comprise dynamic, ever-evolving developments and trends. Recognising the variety of developments throughout the 50 states of the USA, California stands out as the most dynamic and far-reaching in its workplace protections and in the corresponding employment-related litigation. California is extraordinary in its dynamism both in employment law protections and in employment litigation. This article highlights key trends related to California employment law and litigation in a practical, innovative fashion, providing insights for moving forward in what is one of the world's largest gross national incomes and most diverse populations.

California jury considerations and jury verdicts: high stakes in the California courts

Jury trials are on the decline nationwide. While trial frequency may be declining, for those cases that do reach trial, plaintiff win rates have increased. Even more disheartening for employers, the percentage of large trial awards (5 million or more) has also increased. This is the California experience.

California is the most challenging venue in the nation for jury trials, securing special recognition on the American Tort Reform Foundation (ATRF)'s Annual "Judicial Hellholes" list. The ATRF characterises California as the "plaintiffs' bar's laboratory for finding new ways to expand liability".

With the increase in number of filed claims, jury verdicts in employment cases have continued to skyrocket in recent months and years. There is no sign that they are levelling off.

California has experienced runaway verdicts in recent years, particularly in the Los Angeles Superior Court. In June 2024, a Los Angeles jury awarded a plaintiff nearly USD1 billion in damages for workplace sexual assault. The defendant, billionaire Alkiviades David, was hit with a staggering USD900 million verdict in favour of his former employee, who filed suit against him in 2020 alleging years of sexual assault, battery and harassment. The plaintiff was hired as a "brand ambassador" at one of David's companies. She alleged she was subjected to sexual harassment, sexual assault and rape during the course of her employment. The jury awarded the former employee USD100 million in compensatory damages and USD800 million in punitive damages in what is one of the largest verdicts in a sexual assault case in history.

In November 2023, a jury delivered a verdict of USD14.17 million consisting of USD1.17 million in past and future lost earnings and USD13 million in emotional distress damages in a wrongful termination and gender discrimination case. The plaintiff was a former branch manager of a bank who alleged she was fired because she took medical leave to care for her ill husband. The jury found the plaintiff was fired because she took medical leave; the jury determined she was the victim of gender discrimination and that the bank had failed to take reasonable steps to prevent it. The bank claimed plaintiff was fired for using her position and power to abuse her subordinate employees, including putting her hands on one of those employees on at least three occasions.

In December 2023, a jury delivered a massive USD41.5 million verdict in a whistle-blower retaliation case. The verdict included USD2.5 million in past and future lost earnings, USD9 million in emotional distress damages, and USD30 mil-

lion in punitive damages. The plaintiff worked as a nurse in a neonatal intensive care unit and alleged that she was fired after she raised concerns over patient safety.

In June 2022, a Los Angeles jury awarded USD464 million to two plaintiffs who alleged they were retaliated against for making complaints about sexual and racial harassment in the workplace. One plaintiff brought complaints to management about the alleged sexual harassment of two female employees. His claim asserted he was then constructively discharged. The other plaintiff made anonymous complaints to the internal ethics hotline about racial and sexual harassment of himself and other co-workers. After a two-month trial, the jury awarded one plaintiff USD2 million in compensatory damages and USD40 million in punitive damages, and the other plaintiff USD22.4 million in compensatory damages and USD400 million in punitive damages.

A December 2021 jury verdict from Los Angeles Superior Court awarded USD5.4 million in compensatory damages and USD150 million in punitive damages to a discharged insurance company executive who alleged discrimination and retaliation. The judge reduced the verdict to USD18.95 million in punitive damages but the total verdict still topped USD20 million.

Increasingly employers are looking to enter into arbitration agreements with employees and prospective employees. This trend is likely to continue in light of the runaway verdicts plaguing California's court system. Enforceable arbitration agreements remain a safeguard for employers against catastrophic verdicts like these – catastrophes that are occurring with ever-greater frequency in the trial courts of California.

Complex California wage and hour class action litigation

The plaintiffs' bar continues to utilise class action litigation to reap large damages from employers. That increase has not been lacking in wage and hour litigation, especially in California. Both collective actions under the federal Fair Labor Standards Act (FLSA) and class actions pursuing California law are powerful tools for employees litigating wage and hour claims.

Employees may bring federal wage and hour claims under the FLSA. A plaintiff suing on FLSA claims may seek certification of a collective action of "similarly situated" employees, who "opt in" to the lawsuit after certification is granted. Employees may also bring claims against an employer for violating California state wage and hour laws. In contrast to the FLSA collective action, Federal Rule of Civil Procedure 23 and equivalent state class action rules allow a plaintiff to pursue a class action if certain prerequisites are met, including:

- the numerosity of class members, the presence of common questions of fact or law, the typicality of the representative members' claims in comparison to the class, and the adequacy of class counsel; and
- usually, the predominance of common questions of fact and law, and the superiority of the class action to other methods of adjudication.

Other plaintiffs do not "opt in" to a Rule 23 class action – instead, they "opt out" after receiving notice of the litigation.

Within both collective action and class action litigation, plaintiffs' attorneys commonly use statistics to avoid issues of individual proof and to establish common liability at the class

certification stage. The use of statistics in this context refers to the surveying of employee experiences – including job requirements, activities performed throughout the workday, wage and payment details, hours spent working, and management practices – and the analysis of the results of those surveys.

Setting the stage: Dukes, Duran, and Tyson Foods

As class litigation and the use of statistics have increased during the past 15 years, seminal cases from the US Supreme Court and the California Supreme Court have guided parties and the lower courts on the uses and limitations of statistics in class litigation.

In 2011, in Wal-Mart Stores, Inc v Dukes ("Dukes"), the US Supreme Court reversed certification of a nationwide class of 1.5 million female employees who alleged sex discrimination. The proposed method of analysing class claims, approved of by the Ninth Circuit, included depositions of a sample to determine liability and extrapolation of damages: "A sample set of the class members would be selected, as to whom liability for sex discrimination and the back pay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average back pay award in the sample set to arrive at the entire class recovery –without further individualised proceedings."

Writing for the court, Justice Scalia "disapprove[d] that novel project", emphasising that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims". Following Dukes, courts around the country used the decision to enforce narrowed applications of statistics in class litigation.

Three years after Dukes, in 2014, the California Supreme Court issued its Duran v US Bank decision ("Duran"), undermining plaintiffs' use of statistics in class litigation. Duran involved wage and hour claims brought as a class action under California's unfair competition law. The plaintiffs claimed US Bank misclassified 260 loan officers as exempt from overtime payments. Interestingly, the plaintiffs in Duran employed the same expert as in Dukes and attempted to use statistical sampling beyond certification to prove class-wide liability.

The California trial court permitted the plaintiffs to prove liability and damages on behalf of the entire 260-member class using a small sample of 19 class members and two named class representatives. Even more problematic, the trial court refused to allow US Bank to present testimony of employees who claimed they spent more than 50% of their time on exempt duties. Based on the testimony of the sample group alone, the trial court determined US Bank misclassified every class member. The lower court then approved damages based on a calculation derived from the sample group, leading to a USD15 million award with interest.

The California Supreme Court reversed and ordered the class decertified. According to the court, the statistical method caused a "manifest" injustice to US Bank and was "profoundly flawed". Duran advised that "[t]he sample relied upon [to prove liability or damages in wage and hour litigation] must be representative and the results obtained must be sufficiently reliable to satisfy concerns of fundamental fairness". The court provided three reasons why the sampling

employed by the plaintiffs did not meet this criteria, as follows.

- A sample size of 19 class members and two named representatives was too small relative to the variability of the class members. As explained by the court, "[i]t is impossible to determine an appropriate sample size without first learning about the variability in the population". Variability – or the differences that exist in the total population – can be determined by an expert using existing data, timesheets, other personnel records, or surveys. Ultimately, it is important to remember that sample size cannot be random; it must be based on the population's distribution.
- The statistics were plagued by non-response bias and selection bias. Non-response bias occurs where individuals who receive the survey but fail to answer differ in significant ways from those who participate. Selection bias occurs where individuals are selected by the survey administrator to be included or excluded from the survey. These biases cause the results to be unreliable. It is best to ensure participants are truly randomly selected (eg, by a computer) and that an expert analyses the data to ensure that non-respondents do not differ meaningfully from those who do respond.
- The plaintiffs' statistical model was plagued by a high margin of error, as is common with small sample sizes. Such a high margin of error renders the results unreliable. As Duran noted, "the court must determine [with the help of experts] that a chosen sample size is statistically appropriate and capable of producing valid results within a reasonable margin of error". Only then will the court meet its burden of ensuring that the proposed methodology will produce reliable results. To avoid an erroneously high margin of error, it is again important to ensure that the statistical model is appropriately developed with a proper sample size.

Following Duran, litigants and the lower California courts used these factors – sample size, non-response bias and selection bias, and margin of error – to evaluate the representativity of proposed statistical models and to distinguish proposed models from the "trial by formula" that Dukes rejected.

Two years after Duran, in 2016, the US Supreme Court in Tyson Foods, Inc v Bouaphakeo ("Tyson Foods") affirmed certification of a class of employees who alleged that Tyson's failure to pay them for donning and doffing protective gear violated the FLSA. In doing so, the court permitted the plaintiffs to use representative statistical evidence to establish the number of individual hours each employee worked, so as "to fill an evidentiary gap created by the employer's failure to keep adequate records". In finding that the use of a sample was an appropriate method of proving class-wide liability, the US Supreme Court noted that "one way" to establish the sample was permissible was "by showing that each class member could have relied on that sample to establish liability if [they] had brought an individual action".

In Tyson Foods, individual employees could rely on the sample owing to Tyson's failure to keep adequate records. Importantly, the court noted that – although "[r]epresentative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked" – Tyson did not raise any challenge to the plaintiffs' experts' methodology under Daubert (ie, using the above-mentioned

factors to undermine the reliability of the statistical model).

At bottom, Tyson Foods held: "Whether a representative sample may be used to establish class-wide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as [the plaintiff's expert's study] has been permitted by the [c]ourt so long as the study is otherwise admissible." Where the employer fails to maintain adequate records of how much overtime each employee worked, Tyson Foods determined plaintiffs are permitted to establish class-wide liability on wage and hour claims through representative evidence.

Application by the California courts

Against this backdrop, the California lower courts have issued numerous decisions analysing litigants' use of statistics in wage and hour litigation, providing factors for parties to consider at the certification and de-certification stages.

Denial of class certification

Following the Dukes and Duran decisions, several federal district courts in California rejected plaintiffs' statistical methodologies at the class certification stage. By way of example, in 2014, the plaintiffs in Sirko v IBM Corp sought to certify a Rule 23 class of exempt IT employees who were allegedly misclassified and denied overtime by IBM. In an effort to gain class certification, the plaintiffs concocted a 47-question survey concerning putative class members' work duties. The Central District of California rejected the survey, determining it "lack[ed] basic indicators of reliability". Specifically, the survey:

- was devised and administered by plaintiffs' counsel, not a statistician or expert;
- included some questions that required non-binary answers, rather than a simple "yes" or "no", which are not easily quantifiable through statistics; and
- likely included biased results, given that respondents were provided a cover letter that noted their potential ability to recover damages in the class action.

Likewise, in 2020, the Northern District of California in Santos v UPS ("Santos") rejected the plaintiffs' use of nine declarations out of more than 2,000 putative class members, finding the nine handpicked examples likely suffered from selection bias. The Santos court cited Duran, noting that putative classes may rely on statistical sampling from a qualified expert to show evidence of a consistently applied policy, but the "degree of consistency" required to certify a class is likely to depend on the circumstances. The court emphasised that statistical samples cannot be too variable and thus a court may conduct a preliminary assessment to determine the level of variability.

The California Court of Appeal similarly denied class certification in McCleery v Allstate ("McCleery") in 2019, after finding that the plaintiffs' trial plan was inadequate and unfair. There, the plaintiffs relied on an expert's declaration that liability could be determined and damages calculated class-wide through statistical analysis of results obtained from an anonymous, double-blind survey of a sampling of class members. Citing Duran, the McCleery court found that the survey did not necessarily fail as a scientific measurement procedure, but that it failed as a trial plan because it failed to enable the plaintiffs to establish defendants' liability on a class-wide basis.

First, the expert's survey did not ask key questions essential to establishing liability. Additionally, anonymising responses from survey participants unfairly insulated the survey from any meaningful examination. Although the plaintiffs intended to answer the ultimate question of class-wide liability solely using expert testimony regarding the survey responses, the court found that the testimony was based on multiple layers of hearsay that the defendants could never challenge. The court held that the defendants had the right to defend against the plaintiffs' claims by impeaching the evidence supporting them, but the proposed procedure utilising only the anonymous survey forestalled the exercise of that right.

Class certification granted

While the foregoing decisions – among many others – invoked Dukes and Duran to deny class certification, other courts post-Tyson Foods have become increasingly more receptive to class certification, even in the face of less statistically sound representative evidence.

Shortly after the Tyson Foods decision, in 2016, the Ninth Circuit affirmed certification of a California wage and hour class in Vaquero v Ashley Furniture Indus, Inc. There, the defendants relied on Dukes to argue that the use of representative evidence would inevitably change the substantive rights of the parties by preventing defendants from individually cross-examining and challenging each class member's claims. The court disagreed: "[The] defendants' reliance on Dukes, in this regard, is misplaced. As the [c]ourt made clear in Tyson Foods: '[Dukes] does not stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability.'"

Noting Tyson Foods expressly permitted the use of representative evidence to establish class-wide liability, the court found the lower court's grant of class certification did not expand the plaintiff's or the class' substantive rights. Instead, the court determined that the defendants could challenge the viability of the representative evidence at a later stage, but class certification was appropriate.

In 2019, the Northern District of California denied a motion to decertify a wage and hour class in DeLuca v Farmers Ins Exchange ("DeLuca"). There, the plaintiffs sought unpaid overtime wages for themselves and a group of current and former employees. The case covered a total of 78 individuals. The plaintiffs' trial plan proposed using two groups of testifying opt-in plaintiffs from the same sample of 20 trial witnesses. The defendant complained that no explanation was provided regarding the methodology behind the sample, other than that class counsel selected witnesses to represent a range of geographic areas and levels of experience, showing concern that the plan was based on non-random, cherry-picked testimony of only named or opt-in plaintiffs (ignoring the 40 absent class members). The defendant relied on Tyson Foods to argue that "[r]epresentative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked". The defendant further expressed concerns that the sample size had not been determined using a statistical approach by first selecting a desired confidence level.

However, the court held that Tyson Foods "does not require [p]laintiffs to apply statistical principles to ensure representativity". It explained that Tyson Foods "did not discuss expert statistical studies because they are the only way a plaintiff

may prove [their] claim by representative evidence… but because those plaintiffs offered such a study". The court emphasised: "[T]he standard is just and reasonable inference and not mathematical certainty and trial can proceed on a representative basis… Furthermore, there is no rigid requirement that the number of [p] laintiffs and absent class members who testify must meet the margin of error threshold set forth under statistical principles." Although the defendant raised concerns about sample size and selection bias, the court held that "the law does not require [p]laintiff's proposed sample to meet a particular statistically significant threshold or be designed to generate results within a certain confidence level and margin of error" – instead, the results simply need to be representative.

Practical considerations for employers

While a court's receptiveness to the use of statistics to either certify or decertify a class action will depend greatly on the size of the class, the claims at issue, and the statistical methodologies proposed, these recent decisions provide helpful insight to employers who are confronted with statistical models in wage and hour litigation. Employers who are confronted with proposed statistical models from plaintiffs should still consider the Duran factors in determining whether to combat the proposed models:

- sample size used;
- presence of non-response bias;
- presence of selection bias;
- potential for large margin of error;
- whether the model was created by counsel or a non-expert;
- whether the model calls for non-binary responses; and
- whether the survey will be or was provided with a cover letter that describes the potential for class-wide payouts.

Following Tyson Foods (and as emphasised in DeLuca), any arguments regarding the impropriety of a sample should consider the availability of other evidence upon which class members could rely (especially in the absence of a record-keeping failure) and should be rooted in representativity.

In summary, California and national wage and hour litigation continues to threaten employers. As the use of class actions to pursue these claims continues, so does the use of statistics by plaintiffs to establish the appropriateness of a class model for both liability and damages. Employers need to understand how they can combat unreliable statistical models that may lead to erroneously large damages awards. Keeping in mind the courts' lessons about combating plaintiffs' statistical models will go far in evading class liability and damages in wage and hour litigation.

Conclusion

As the trends analysed illustrate, California is a trendsetter in its dynamic employment litigation. Addressing these matters requires a thoughtful, strategic approach. The most effective strategy blends an understanding of the law and the litigation dynamics with the human dimension of respect, fulfilment, and promise. California's public policy protections present remarkably far-reaching implications and nuances for even the most sophisticated employers.

USA – MARYLAND

Law and Practice

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Contents

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Shawe Rosenthal LLP

Shawe Rosenthal LLP is one of the first law firms in the USA devoted exclusively to the representation of management in labour and employment matters. It represents employers throughout the country in federal and state courts and arbitral forums, as well as before the Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, and other administrative agencies. Shawe Rosenthal's 18 attorneys have joined from judicial clerkships and federal agencies, as well as large and small firms, to bring a wealth of practical experience on labour and employment matters. Shawe Rosenthal is the sole Maryland law firm belonging to two major alliances of management labour and employment lawyers, the Employment Law Alliance and the Worklaw Network. This membership affords the firm access to resources of the highest calibre across the USA and around the world, with which to better serve its clients, wherever they may be.

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1. Employment Terms

1.1 Employee Status

As under federal law, employees in Maryland are designated as either exempt or non-exempt from the minimum wage and overtime requirements set forth in state law.

Non-exempt employees must receive at least the state minimum wage rate of USD15 per hour. They must receive overtime pay at the rate of one-and-a-half times their regular hourly rate for all hours worked in excess of 40 hours in a working week.

Bona fide executive, administrative or professional (EAP) employees are exempt from these minimum wage and overtime provisions. This exemption is commonly referred to as the "white-collar" exemption. To qualify for this exemption, a white-collar employee must meet three tests:

- the employee must be paid on a salary basis;
- the employee's salary must be at least USD844 per week (or USD43,888 annually), with an increase on 1 January 2025 to USD1,128 per week (or USD58,656 annually); and
- the employee's primary duties must meet requirements specific to the EAP exemption in question.

Maryland recognises other work-based but non-employee relationships, including interns and independent contractors. Notably, the Maryland Department of Labor (MDOL) has a particular interest in the issue of employee misclassification – ie, when an employee is incorrectly designated as an independent contractor, thereby enabling the employer to avoid paying employment taxes and benefits. Where the MDOL finds that an employer has knowingly misclassified workers, a penalty in the amount of no more than USD5,000 per employee is payable for a first violation and USD10,000 per employee for subsequent violations. There is also a separate misclassification law specific to the construction and landscaping industries.

Whether an individual is deemed to be an employee or an independent contractor is subject to different tests depending on the law at issue. By way of example, the Maryland Unemployment Insurance Law and the Maryland Workplace Fraud Act (which applies only to the landscaping and construction industries) utilise the ABC test, under which a worker is presumed to be an employee unless all of the following criteria are met:

- the individual is free from direction and control;
- the individual is customarily engaged in an independent business of the same nature as that involved in the work; and
- the work is outside the usual course of business of the person for whom it is performed or the work is performed outside any place of business of the person for whom it is performed.

On the other hand, both the Maryland Workers' Compensation Act and the common law apply a "right to control" test, under which an employer-employee relationship exists when the employing entity has the right to control and direct the individual performing the services. Many factors are reviewed under the "right to control" test – none of which are individually determinative.

1.2 Employment Contracts

In Maryland, employment agreements are not required, and the employment relationship is otherwise presumed to be "at will". This means

that either the employer or employee may terminate the relationship at any time – with or without cause or notice – so long as the termination is not prohibited by law, by an individual contract or by a collective bargaining agreement.

An individual contract that modifies the at-will relationship may be either express or implied and may be based on either verbal statements or written documents, such as offer letters, employee handbooks, or employment agreements that provide for a term of employment or termination for cause. An employer may expressly disclaim the creation of such contracts by placing a clear and conspicuous disclaimer in all such written documents that reiterates the employee's at-will status.

Additionally, although the implied covenant of good faith and fair dealing is an implied term of a contract under state law, Maryland does not recognise this implied covenant in at-will relationships.

In the context of the "Me Too" movement, Maryland passed the Disclosing Sexual Harassment in the Workplace Act, which prohibits an employer from requiring a waiver of future sexual harassment or retaliation claims and prohibits an employer from taking adverse action against an employee for refusing to enter into an agreement with such a waiver.

1.3 Working Hours

There is no limitation on the number of hours that most employees may be scheduled to work per day or per week. The employer may agree to or require a part-time schedule. Regardless of whether it is part-time or full-time, the schedule may be set at the discretion of the employer. The only statutory limitations on the number of hours that may be worked each day are for those under the age of 18 and for registered nurses, who cannot be required to work more than their regularly scheduled hours except in certain emergency situations. Additionally, full-time, non-managerial retail employees are entitled to one day of rest each week on Sunday or their Sabbath.

As mentioned in **1.1 Employee Status**, most non-exempt employees must receive overtime pay at the rate of one-and-a-half times their regular rate for all hours worked in excess of 40 hours in a working week. Like federal law, Maryland recognises exemptions from the overtime requirements for certain salaried EAP employees, as well as outside salespersons, commissioned employees, and minors under 16 years old. Maryland does not recognise the federal exemption for highly compensated employees, however. Maryland further provides overtime exemptions to a lengthy list of specialised jobs and industries, including some railway, lodging, and entertainment categories. Non-exempt employees in certain other industries are entitled to overtime pay only after a higher number of hours worked, such as 48 hours for those providing on-premises care to sick, aged or disabled individuals, and 60 hours for agricultural workers.

1.4 Compensation

The minimum wage rate in Maryland is USD15 per hour, applicable to all employers regardless of size. The law permits an employer to pay a training wage at 85% of the state minimum wage rate for employees under the age of 18 years. Tipped employees must be paid at a rate of USD3.63 per hour. The tipped wage rate for tipped employees, together with any tip credit, must meet the applicable minimum wage, with employers responsible for making up any shortfall.

Several Maryland counties have a higher wage rate. In Montgomery County, effective 1 July 2024, the rate is USD17.15 per hour for employers with more than 50 employees, USD15.50 for those with 11–50 employees, and is currently at the state minimum wage rate of USD15 for all other employers – with future annual increases to be determined by Montgomery County. In Howard County, the current USD15 state rate will rise on 1 January 2025 to USD16 per hour for employers with 15 or more employees, whereas smaller ones will increase to at USD15.50 on 1 January 2026.

Maryland has a prevailing wage law, under which contractors on certain public work contracts must pay employees working on such contracts a wage rate established by the Commissioner of Labor and Industry. Maryland also has a living wage law, under which contractors on certain state service contracts must pay an enhanced wage rate set by the Commissioner of Labor and Industry.

Bonuses and other incentive payments are not required by law. However, if non-discretionary, any such payments are considered wages and must be paid even after the employee has left employment.

1.5 Other Employment Terms

Maryland has a number of laws that govern or provide for certain leave rights, as well as offering other employee protections.

Vacation

Maryland does not require an employer to provide vacation leave. However, if the employer does provide vacation leave, the vacation benefit must be paid out upon termination unless the employer has provided notice of the vacation benefit upon hiring and the vacation policy specifically states that vacation benefit will not be paid out at termination.

Other Statutory Leaves

Beyond vacation, Maryland has a number of legally mandated leaves. One recent major development is a family and medical insurance (FAMLI) programme that will provide eligible employees with 12 weeks of paid family and medical leave, with the possibility of an additional 12 weeks of paid parental leave (for a possible total of 24 weeks of paid leave). This USD1.6 billion programme will be administered by the state and funded by contributions from employers and employees. Contributions begin 1 July 2025 and benefits will be paid starting 1 July 2026. The MDOL will issue regulations to implement the provisions of the law.

Maryland law also provides for statutory leave in the following circumstances.

- The Healthy Working Families Act requires employers with 15 or more employees to provide up to 40 hours of paid leave to eligible employees for specified sick and safe (ie, domestic violence) purposes, whereas smaller employers must provide unpaid leave.
- The Parental Leave Act requires employers with 15–49 employees to provide six weeks of unpaid leave to eligible employees to care for a child after birth, adoption or foster placement.
- The Flexible Leave Act – although not providing for a separate bank of leave – allows employees to use any existing paid leave for illness or bereavement of an immediate family member (meaning child, spouse or parent).
- The Organ Donation Leave Act requires employers with 15 or more employees to provide eligible employees with:

(a) up to 60 business days of unpaid leave during any 12-month period to serve as an organ donor; and
(b) up to 30 business days of unpaid leave during any 12-month period to serve as a bone marrow donor.

- The Deployment Leave Act enables eligible employees to take leave on the day that an immediate family member of the employee is leaving for or returning from active duty outside the USA as a member of the US armed forces.
- The Essential Workers Protection Act, enacted in the context of the COVID-19 pandemic, requires essential employers to provide their essential workers with paid public health emergency leave to be used for certain specified reasons during a declared catastrophic health emergency related to a communicable disease – albeit only if there is federal or state funding for the leave.

Other Aspects of Employment Relationship

There are also state laws governing other aspects of the employment relationship, including the following.

Military preferences in hiring

Maryland law allows employers to grant a preference in hiring or promotion to the spouse of an eligible military member without violating state or local equal employment opportunity laws. This preference extends to eligible veterans, as well as veterans who have a service-connected disability, or – if such veteran is deceased – the veteran's spouse.

Medical questions

Under the Medical Questions Law, Maryland employers may not require an applicant to answer oral or written questions that relate to a physical, psychiatric or psychological disability, illness, handicap or treatment unless that condition has a direct, material and timely relationship to the capacity or fitness of the applicant to perform the job properly. Employers may, however, require a proper medical evaluation by a physician to assess the applicant's ability to perform the job.

Wage transparency and salary history ban

Effective 1 October 2024, the Maryland Equal Pay Act will require an employer to provide the wage range, benefits and any other compensation for the position in question in any internal or external job posting. The law also prohibits an employer from asking about or relying upon an applicant's wage history in screening, hiring or determining wages. Employers may not retaliate against an applicant for exercising their rights under the law. The law acknowledges that an applicant may voluntarily provide their wage history and, after a conditional offer of employment is made, permits the employer to confirm and to rely on this information to support a higher wage offer than initially offered.

Lie detector testing

Applicants and employees may not be required to undergo lie detector testing. The law specifies that Maryland applications must contain – in bold-faced, upper-case type – the following statement, with a separate signature line: "UNDER MARYLAND LAW, AN EMPLOYER MAY NOT REQUIRE OR DEMAND, AS A CONDITION OF EMPLOYMENT, PROSPECTIVE EMPLOYMENT, OR CONTINUED EMPLOYMENT, THAT AN INDIVIDUAL SUBMIT TO OR TAKE A LIE DETECTOR OR SIMILAR TEST. AN EMPLOYER WHO VIOLATES THIS LAW IS GUILTY OF A MISDEMEANOUR, AND SUBJECT TO A FINE NOT EXCEEDING $100."

Drug testing

Maryland has passed a law that permits employers to drug test applicants and employees. The law contains detailed requirements that must be met, including the use of state-approved laboratories, specific notice requirements, and restrictions on the type of specimens (blood, urine, saliva, and – in the pre-employment context – hair samples) that may be used. If the applicant or employee tests positive, the employer must provide the employee with a copy of the lab results, the employer's written substance abuse policy, notice of any intent to take adverse action, and a statement or copy of the statutory provisions regarding the employee's right to request independent testing of the same sample.

Anti-Strikebreakers Law

Maryland employers may not refer, obtain or recruit for employment individuals who customarily and repeatedly offer to be employed in place of labour strikers.

Credit history checks

Under the Job Applicant Fairness Act, employers are prohibited from using an applicant's or employee's credit report or credit history to deny employment, terminate employment or otherwise make decisions about compensation or other terms of employment – except where expressly authorised by the law.

The law does not apply to employers that are required by federal, state or local law to check an individual's credit history, nor does it apply to financial entities that are required to register as investment advisers with the SEC. Employers are permitted to procure the credit reports or credit histories of applicants (after a conditional offer of employment is extended) or employees if the employer has a bona fide reason for obtaining the information that is substantially job-related, as defined in the law, and the employer discloses in writing that a report is being procured.

Social media checks

The User Name and Password Privacy Protection Act was the first workplace social media privacy law in the nation. Under this law, Maryland employers are prohibited from requiring employees or applicants to turn over passwords needed to access private websites, including those used for social media. Specifically, the law bars employers from requiring or even requesting that an applicant or employee divulge their "user name, password, or other means for accessing a personal account or service through an electronic communication device". Employers may, however, require employees to divulge passwords for "non-personal accounts or services that provide access to the employer's internal computer or information systems".

Criminal background checks

Maryland's "Ban the Box" law prohibits employers with 15 or more employees from asking about an individual's criminal record prior to the first in-person interview. During that interview, however, such information may be required to be disclosed. There are exceptions where an employer is required or authorised to seek such information by federal or state law or where an employer provides programmes, services, or direct care to minors or vulnerable adults. Of note, the law specifically does not pre-empt any local ban-the-box laws – for example, those previously enacted by Baltimore City, Prince George's County, and Montgomery County, which impose greater restrictions on employers than this law.

On the other hand, state law requires certain employers to conduct criminal background checks on applicants. These include schools,

childcare centres, day or residential camps and recreation centres, and employers providing adult dependent care services.

The Maryland Second Chance Act permits an individual to petition the court to shield certain specific misdemeanour convictions from public disclosure, including to employers, unless an exception applies. The law further specifically prohibits employers who conduct a criminal background check from requiring applicants to disclose if they have any such shielded convictions or from discharging or refusing to hire an individual because that person refuses to disclose shielded convictions.

2. Restrictive Covenants

2.1 Non-competes

Maryland law prohibits employers from including a non-compete or conflict of interest provision in an employment contract with an employee earning less than 150% of the applicable minimum wage, as well as licensed veterinary professionals. Such provisions restricting the ability of the employee to work for a new employer or become self-employed in the same or similar business or trade are void as against public policy.

Effective 1 July 2025, non-compete or conflict of interest provisions are banned for licensed healthcare professionals earning USD350,000 or less in total annual compensation. For those licensed healthcare professionals earning more, any non-compete or conflict of interest provision cannot exceed one year from the last day of employment, and any geographical restriction may not exceed 10 miles from the primary place of employment. Employers, however, may still prohibit all employees from taking client lists or other proprietary client- or patient-related information.

As regards higher-wage employees in other industries, restrictive covenants such as non-compete or non-solicitation agreements are generally enforceable in Maryland, as long as the restrictions as to geographic area and duration are reasonably necessary for the protection of the employer's business, do not impose an undue hardship on the employee and do not disregard the public interest. Continued employment is considered sufficient consideration to support a non-compete agreement. Maryland courts may "blue pencil" or revise such agreements if they deem the original provisions to be too onerous and thereby unenforceable.

Maryland employers may protect confidential and proprietary business information, including trade secrets, through the use of a confidentiality agreement that specifically identifies the protected information. Of relevance to this issue, Maryland has adopted the Model Uniform Trade Secrets Act. There are two types of trade secrets under the Act – namely, internal operating information and technological developments. Employers may seek injunctive relief for actual or threatened misappropriation of trade secrets, as well as damages for actual loss, unjust enrichment and – if the actions were wilful and malicious – attorney's fees and exemplary damages.

2.2 Non-solicits

As mentioned in **2.1 Non Competes**, non-solicitation agreements – whether as to customers or other employees – are generally enforceable in Maryland as long as the restrictions are reasonably necessary for the protection of the employer's business, do not impose an undue hardship on the employee and do not disregard the public interest. As with non-compete

agreements, continued employment is considered sufficient consideration to support a non-solicitation agreement, and Maryland courts may "blue pencil" or revise such agreements if they deem the original provisions to be too onerous and thereby unenforceable.

3. Data Privacy

3.1 Data Privacy Law and Employment

Maryland has several laws that govern data privacy in the employment context.

The Maryland Wiretap Act prohibits an employer from listening to or recording a confidential communication without the consent of all parties. The law further prohibits the interception of oral, wire or electronic communications and thereby encompasses the monitoring of email. Employers should inform employees through a written policy or a message at the point of logging into the communications system that their communications are not private and may be monitored and that employees consent to such monitoring by using the system.

The Maryland Personal Information Protection Act governs the disposal of personal information, including employee data, and provides for notification of the breach of electronically maintained personal information. Of particular interest, the definition of personal data includes biometric data.

Maryland has also enacted a law governing the use of facial recognition technology in the hiring process. The Facial Recognition in Employment Act prohibits the use of a facial recognition technology during an applicant's interview without their consent, which must meet specific statutory requirements.

The Wage Payment and Collection Act prohibits the display of social security numbers on employee checks, notices of direct deposit or notice of wage credits to debit cards or card accounts.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Maryland has not enacted any laws specific to foreign workers. Immigration issues and the use of foreign workers are governed by federal law.

4.2 Registration Requirements for Foreign Workers

See **4.1 Limitations on Foreign Workers**.

5. New Work

5.1 Mobile Work

Maryland has not enacted any laws related to mobile work. Remote workers performing services in Maryland may be entitled to state-mandated benefits, such as sick and other leaves (including the forthcoming FAMLI leave), and unemployment insurance, as well as other employee protections.

5.2 Sabbaticals

Maryland has not enacted any laws related to sabbatical leave. The granting of such leave and any related conditions are at the employer's discretion.

5.3 Other New Manifestations

Maryland has not enacted any laws regarding new manifestations in the field of "new work."

6. Collective Relations

6.1 Unions

Maryland has experienced an increased and well-publicised interest in union membership, initially arising out of workplace challenges from the COVID-19 pandemic and the "Black Lives Matter" movement. The prospect of lay-offs in the face of economic uncertainty, along with increased worker activism, has also led to a rising interest in unionisation of companies and organisations that have historically remained union-free.

The percentage of those employed in Maryland who are union members has increased in recent years, reversing a years-long decline, according to the US Bureau of Labor Statistics. There have been high-profile and successful union-organising campaigns in this state, including the first Apple store to be unionised, as well as the Baltimore Museum of Art, the Walters Art Gallery, the University of Maryland Medical Center, and St Agnes Hospital. Additional efforts are ongoing at other hospitals, Starbucks stores, Amazon warehouses, and within the burgeoning cannabis industry. Given the Biden administration's support for unions, it is expected that union membership in Maryland will continue to grow.

6.2 Employee Representative Bodies

Unions typically serve as the representative bodies for employees in the USA, including in Maryland. Employee selection of union representation is governed by federal law and typically involves either voluntary recognition by the employer or a secret ballot election overseen by the National Labor Relations Board.

6.3 Collective Bargaining Agreements

If employees have unionised, their union and employer will negotiate a collective bargaining agreement that governs wages, hours, and other terms and conditions of employment for those employees. This process is governed by federal – not Maryland – law.

7. Termination

7.1 Grounds for Termination

Termination of at-will employees may take place at any time, with or without cause or notice. If the employee has a contract for a specific period or that provides for termination only for cause, then the terms of the contract must be followed. Similarly, if the employee is subject to a collective bargaining agreement, termination must comply with the terms of the collective bargaining agreement.

7.2 Notice Periods

No notice is required for the termination of an individual at-will employee. With regard to mass or group lay-offs, Maryland has a notice law similar to the Federal Worker Adjustment and Retraining Notification (WARN) Act. Compliance with the state law, the Economic Stabilization Act, was originally voluntary but this law was amended in 2020 to make its requirements mandatory and further amended in 2021 to better – but not wholly – conform to the federal law. The mandatory provisions will not be enforced, however, until the MDOL issues final regulations to implement the revisions.

Under that state law, employers with at least 50 employees will need to provide 60 days' advance notice to employees and certain other entities of a reduction in operations, which is defined as:

- the relocation of a part of the employer's business from one workplace to another existing or proposed site that may result in

the reduction in the number of employees by at least 25% or 15 employees, whichever is greater; or
- shutting down a workplace that reduces the number of employees by the greater of at least 25% or 15 employees over a three-month period.

There are certain statutory exceptions to this notice requirement. If there is a violation, the Maryland Secretary of Labor can issue an order compelling compliance and may assess a discretionary civil penalty of up to USD10,000 per day.

In addition, the law is intended to provide assistance to employers and employees to mitigate the impact of a reduction. Through its "Quick Response Program", the Department of Economic and Employment Development provides services such as on-site registration for mass unemployment claims, job placement, and referrals for job training opportunities.

7.3 Dismissal for (Serious) Cause

No cause is required for the termination of an at-will employee. If the employee has a contract or is subject to a collective bargaining agreement, termination for cause will be governed by that agreement.

7.4 Termination Agreements

Termination agreements containing a release of claims in exchange for severance pay are permissible under state law. The release must contain certain language to comply with federal law (eg, Age Discrimination in Employment Act language, carve-out for filing of charges with the Equal Employment Opportunity Commission (EEOC), and whistle-blower language), but there are no specific state requirements.

7.5 Protected Categories of Employee

Maryland has no statutory protections against dismissal for particular categories of employees.

8. Disputes

8.1 Wrongful Dismissal

In addition to applicable federal laws, numerous Maryland laws contain protections against adverse employment actions – including termination from employment – for exercising rights under those laws. The following are among the more significant state laws with such protections:

- the Civil Rights Law (prohibiting discrimination and harassment) (Sections 20-601 et seq of the Maryland Code, State Government);
- the Healthy Working Families Act (requiring paid sick leave) (Section 3-1301 of the Maryland Labor and Employment Code);
- the Occupational Safety and Health Act (Sections 5-101 et seq of the Maryland Labor and Employment Code);
- the Wage and Hour Law (Sections 3-401 et seq of the Maryland Labor and Employment Code);
- the Wage Payment and Collection Law (Sections 3-501 et seq of the Maryland Labor and Employment Code); and
- the Workers' Compensation Act (Sections 9-101 et seq of the Maryland Labor and Employment Code).

Maryland also recognises a cause of action for "abusive discharge" in violation of public policy as an exception to at-will employment. The public policy must be clearly articulated in law. Thus, employers may not terminate an employee for refusing to engage in conduct that violates the law or for asserting rights protected by law.

This cause of action is not available where the law contains a specific statutory procedure and remedy for violations.

8.2 Anti-discrimination

Maryland law protects employees, independent contractors, and interns from employment discrimination and harassment on the basis of race, protective hairstyles (arising from the heightened awareness of racial equity issues), colour, religion, sex, age, pregnancy, national origin, marital status, military status, sexual orientation, gender identity, disability, or genetic information (or because of the individual's refusal to submit to a genetic test or make available the results of a genetic test). In addition, individuals are protected from retaliation for asserting rights under the law. The law further requires employers to provide reasonable accommodations to employees and applicants with disabilities, specifically including conditions caused or contributed to by pregnancy.

The law applies to employers with 15 or more employees, unless a harassment claim is involved – in which case, it applies to employers with a single employee. Revisions to the law in 2018 and 2022, spurred by the "Me Too" movement, expanded the definition of harassment beyond the federal law. Until then, state law was consistent with federal law in requiring conduct to be "severe or pervasive" (among other things) in order to constitute unlawful harassment. Now Maryland law specifically removes that requirement in the following three situations involving "unwelcome and offensive conduct":

- where submission to the conduct is made a term or condition of an individual's employment, whether explicitly or implicitly;
- where submission to or rejection of the conduct is used as the basis for employment decisions about the individual; and
- where, based on the totality of the circumstances, the conduct unreasonably creates a working environment that a reasonable person would perceive to be abusive or hostile.

The law also adds a new definition of "sexual harassment" as conduct "that consists of unwelcome sexual advances, requests for sexual favours, or other conduct of a sexual nature". Again, such conduct need not be severe or pervasive under the same three circumstances set forth here.

Maryland's Equal Pay for Equal Work Statute prohibits discriminatory pay practices based on sex or gender identity – and, as of 1 October 2024, sexual orientation, religious beliefs, and disability – against employees who work in the same establishment and perform work of comparable character or work on the same operation, in the same business or of the same type. The law also contains pay transparency provisions that protect employees' rights to discuss their pay and, as of October 2024, wage range posting requirements.

8.3 Digitalisation

Maryland has no laws or regulations regarding the digitalisation of employment disputes. At this time, state courts and agencies are utilising both remote and in-person proceedings, at their discretion.

9. Dispute Resolution

9.1 Litigation

Different types of employment claims may be subject to different processes under Maryland law.

Discrimination and Harassment Claims

An employee, intern, or independent contractor who believes that they have been a victim of discrimination or harassment may file a complaint with the Maryland Commission on Civil Rights (MCCR) within 300 days of any alleged discriminatory act or within two years of any alleged harassment. Such complaints are considered "dual filed" with the federal EEOC. One of the agencies will conduct an investigation into the complaint. If the MCCR concludes that discrimination or harassment occurred, it will attempt to settle the matter through conciliation. If the parties cannot reach agreement, the case may be certified for a public hearing, an MCCR attorney will prosecute the matter, and a subsequent finding of violations will result in damages being awarded to the employee or independent contractor (interns are only eligible for non-monetary remedies). If the MCCR concludes that there has been no discrimination, it will dismiss the matter..

The agency filing is an administrative prerequisite to bringing a lawsuit in court, and an employee or independent contractor may file suit even if the MCCR finds no discrimination. Any lawsuit must be filed within two years of the alleged discriminatory act or three years of the alleged harassment – although this period is tolled (ie, put on hold) during the administrative proceedings before the MCCR or the EEOC. The damages available under Maryland's anti-discrimination law generally mirror those under federal law, including back pay, front pay, injunctive relief, attorney's fees and costs, and the tiered caps on punitive and compensatory damages:

- USD50,000 for employers with 15-100 employees;
- USD100,000 for employers with 101-200 employees;
- USD200,000 for employers with 201-500 employees; and
- USD300,000 for employers with more than 500 employees.

Class action claims are permitted under the state anti-discrimination law. Such claims may be brought by the Maryland Attorney General separate from this administrative process.

Minimum Wage and Overtime Claims

Under the Maryland Wage and Hour Law, an employee who failed to receive either the minimum wage rate or premiums can bring a claim before the state circuit court for the amount that was underpaid. The court may award the difference in wages, attorney's fees and costs. In addition, the court may award an equal amount of the wage differential as liquidated damages, unless the employer can show that it acted in good faith and reasonably believed it was in compliance with the law – in which case, the court may either waive or reduce the liquidated damages amount. An employee may also request the Commissioner of Labor and Industry to take an assignment of the claim in trust for the employee and the Commissioner of Labor and Industry may then direct the Attorney General to bring an action on behalf of the employee. This process may be utilised for class actions as well.

In addition, any violations of the law – including the employer's failure to co-operate with the Commissioner of Labor and Industry's investigation into a complaint or retaliatory action against

an employee who asserts rights under this law – will result in the employer being found guilty of a misdemeanour and subject to a fine not exceeding USD1,000.

Wage Payment Violations

Under the Maryland Wage Payment and Collection Law, if wages are not timely paid, the employee may file a complaint with the Commissioner of Labor and Industry. If the Commissioner of Labor and Industry finds a violation, they may attempt to mediate the dispute or may direct the Attorney General to bring suit on behalf of the employee. If the amount in dispute is less than USD5,000, the Commissioner of of Labor and Industry may issue an order to pay the wages – in response to which, the employer may request an administrative hearing. The Commissioner of Labor and Industry may seek enforcement of a wage order in district court. Additionally, violations will be considered a misdemeanour and subject the employer to a fine not exceeding USD1,000.

If the failure to pay lasts longer than two weeks, an employee also has the option to file a private lawsuit with the circuit court. If a court or jury finds a violation, the employer will be liable for the amount of the withheld wages and – if the withholding was not the result of a bona fide dispute – up to three times the amount of the lost wages, in addition to attorney's fees and costs. Notably, an individual owner or supervisor with the power to hire and fire, supervise and control terms and conditions of employment, determine the rate and method of payment and maintain employment records can be held individually liable under the law.

In addition, Maryland has enacted a wage lien law providing a mechanism for an employee or the Commissioner of Labor and Industry to obtain a lien on an employer's personal or real property in order to secure an amount of unpaid wages and penalties allegedly due before any judgment has been entered.

Other Statutory Claims

All of the various employment laws in Maryland provide for complaints to the Commissioner of Labor and Industry, who may mediate the dispute or direct the Attorney General to bring suit on behalf of the employee for damages, injunctive relief or other relief. The employer may also be liable for administrative or civil penalties.

In addition, some but not all of the laws provide a private right of action for violations of those laws and specify the damages that may be obtained. In addition to the anti-discrimination, wage and hour, and wage payment laws, these laws include:

- the Healthy Working Families Act;
- the Parental Leave Act (Sections 3-1207 et seq of the of the Maryland Labor and Employment Code); and
- the Workplace Fraud Act (Section 3-911 of the Maryland Labor and Employment Code).

Contract and Tort Claims

In addition to statutory discrimination or harassment claims or wage claims, employees often bring contract or tort claims against their employer. These claims are governed by state law. Contract claims arise from the breach of a formal employment agreement, but employees have also asserted contract claims based on – among other things – handbook policies, oral statements, and offer letters Tort claims are premised on emotional or other harm experienced by an employee in the context of their employment. (Physical injury is covered by workers' compensation.)

Claims based on contracts and torts may be brought before Maryland district courts or circuit courts. Maryland district courts hear civil cases involving claims up to USD30,000; circuit courts hear cases exceeding USD5,000 (there is concurrent jurisdiction between USD5,000–USD30,000). In addition, state contract and tort claims may be asserted in a lawsuit in federal court as pendant claims to a federal claim or if there is federal diversity jurisdiction between the parties.

There is a one-year statute of limitations for assault, libel and slander claims. All other tort claims – such as for abusive discharge, negligent misrepresentation, negligent hiring or supervision or tortious interference with contractual relations – are subject to a three-year statute of limitations. Contract claims are also subject to a three-year statute of limitations.

In a contract claim, a plaintiff may obtain actual damages arising from the breach of contract. Liquidated damages are not available unless the contract provides for their recovery. As for tort claims, a plaintiff may receive compensatory damages and – if actual malice is shown by clear and convincing evidence – punitive damages. There is no cap on economic compensatory damages; however, for 2024, there is a USD935,000 cap on non-economic compensatory damages such as pain and suffering.

9.2 Alternative Dispute Resolution

Maryland has adopted the Uniform Arbitration Act, mirroring the federal Uniform Arbitration Act (under which, an agreement to arbitrate is enforceable). In the employment context, any arbitration agreement must specify that the Maryland Uniform Arbitration Actapplies. Otherwise, the arbitration will be governed by Maryland common law – under which, the agreement is enforceable only where both parties mutually promise to submit to arbitration and the agreement provides for a neutral forum to resolve any disputes.

9.3 Costs

Whether a prevailing employee or employer can be awarded attorney's fees or other costs depends on the applicable statute. Certain statutes provide for the award of such relief, whereas others are more limited. For the most common claims, which arise under the state anti-discrimination laws or wage and hour/wage payment laws, attorney's fees and costs are recoverable.

USA – NORTH CAROLINA

Law and Practice

Contributed by:
Phillip Strach, Alyssa Riggins, Nathaniel Pencook and Christian Hermann
Nelson Mullins Riley & Scarborough LLP

Contents

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Nelson Mullins Riley & Scarborough LLP

Nelson Mullins Riley & Scarborough LLP is based in Raleigh, North Carolina and has more than a century of labour and employment experience representing clients in federal and state courts and ADR venues both in North Carolina and throughout the USA. The employment team's experience includes litigating federal and state anti-discrimination laws, wage and hour complaints, non-compete disputes, occupational safety concerns, and immigration and labour law issues. The team also has a long and experienced track record in litigating, trying and winning employment cases.

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Phillip Strach is a partner at Nelson Mullins Riley & Scarborough LLP, regularly representing management in labour/employment law and related matters. Phil advises clients on non-compete agreements and litigates claims involving restrictive covenants, trade secrets, and other business-related litigation. He also regularly defends management and employers in employment discrimination cases and counsels management on how to prevent or reduce the risk of these lawsuits.

Alyssa Riggins is a senior associate at Nelson Mullins Riley & Scarborough LLP, focusing her practice on employment and labour matters. Alyssa has routinely counselled companies, including one in the Fortune 500, on reduction in force, Older Workers Benefit Protection Act, and Worker Adjustment and Retraining Notification Act matters. At the height of the COVID-19 pandemic, she counselled clients on furloughs, layoffs, return-to-work, and vaccination issues. Alyssa has experience in all stages of litigation, including a federal First Amendment trial, a trial involving novel claims under the North Carolina Constitution, and an Equal Pay Act claim that was part of a case involving six counts of employment discrimination.

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Nathaniel Pencook is a senior associate at Nelson Mullins Riley & Scarborough LLP, focusing his practice on complex business disputes, outside general counsel services, and employment law. He serves as a trusted advisor to clients at the most difficult and pivotal moments in their personal and professional lives, in matters ranging from regulatory and fraud investigations to contractual and business tort-based litigation. Nate also handles constitutional law matters at all stages, including trial. He has experience of representing clients in state and federal courts, including on appeal.

Christian Hermann is a partner at Nelson Mullins Riley and Scarborough LLP, where he focuses on business immigration law. Christian is a trusted advisor to companies on the US immigration sponsorship options available to employ foreign national employees at the professional level on both a temporary and permanent ("Green Card") basis. This includes policy development and benchmarking for a diverse range of employers including small to large companies from varying industries and geographies. Christian's practice is limited to federal immigration law, which allows him to have a nationwide practice using his California and South Carolina bar admissions.

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1. Employment Terms

1.1 Employee Status

Under the Fair Labor Standards Act (FLSA) and the North Carolina Wage and Hour Act, employees are either exempt or non-exempt. An employee's classification by default is "non-exempt" – meaning that if the employee works more than 40 hours per week (or, in some industries, exceeds the hours in an approved 8/80 schedule), the employee is entitled to overtime pay at a rate of one-and-a-half times their hourly rate. However, there are several exceptions to this for learned professionals, highly compensated executives, computer professionals, some creative positions, and administrative positions.

Employees who are exempt can be paid a salary – provided the salary meets the minimum threshold – and are not eligible for overtime. Misclassification of employees as exempt when they should be non-exempt can result in fines, back pay, additional punitive damages in the form of treble or double damages, and attorney's fees.

1.2 Employment Contracts

Employment contracts are not required in North Carolina. In fact, in the absence of a contract for a definite period of time, all North Carolina employees are employed "at will". If employers enter into contracts with employees they must be:

- in writing;
- signed; and
- for a definite period of time.

1.3 Working Hours

Under North Carolina law, there are no limitations to how many hours adults can work in a working week. However, as mentioned in **1.1 Employee Status**, all non-exempt employees must be paid overtime (one-and-a-half times their hourly rate) for any time more than 40 hours per week. Youth employees may only work a maximum of 18 hours during the school week, when school is in session. Youth employees must also be given a rest break of at least 30 minutes after five consecutive hours of work. Flexible work arrangements are allowed. While there is no employment law defining full-time versus part-time employment, IRS regulations require that full-time employees work – on average – at least 20 hours per week or 130 hours per month.

1.4 Compensation

North Carolina and Federal Minimum wage is USD7.25 per hour. As of 1 July 2024, the new threshold for exempt salaried employees is USD43,888 per year, and that will increase to USD58,656 per year on 1 January 2025. This means that in order to be considered an exempt salaried employee, the employee in question must meet one of the duty exceptions outlined in **1.1 Employee Status** and be paid at least USD58,656 per year. Otherwise, employees will need to be paid overtime for any hours exceeding 40 hours per week. Any earned but unpaid commissions or bonuses will need to be paid out upon termination, unless the employer has an advance written policy notifying employees that any earned commission or bonus will be forfeited upon termination.

1.5 Other Employment Terms

Employers may, but are not required to, provide for paid vacation or sick time. Any accrued paid sick or vacation time must be paid out upon termination, unless the employer has an advance written policy informing the employee of the forfeiture of these accrued benefits upon termination. Employers are required to provide unpaid leave as required for Family and Medical Leave Act (FMLA) or Americans with Dis-

abilities Act (ADA) qualifying events. Employers must give unpaid time off to vote and four hours per school year for a parent to volunteer in their child's school. Confidentiality and/or non-disparagement clauses are allowed in employee agreements or severance agreements, within the confines of National Labor Relations Board (NLRB) guidance.

2. Restrictive Covenants

2.1 Non-competes

The Federal Trade Commission (FTC) recently decided to ban non-compete agreements (issued on 23 April 2024). The FTC's new rule makes it unlawful, in violation of Section 5 of the Federal Trade Commission Act (FTCA), to enter into non-compete agreements with workers on or after the date the decision was released. As for non-compete agreements that existed prior to the decision's release, the FTC has adopted two different approaches. Non-compete agreements entered into by senior executives prior to the date of the new decision shall remain in full force. However, non-compete agreements entered into by other workers prior to the date of the new decision shall be deemed unenforceable. While there are several legal challenges to this FTC ruling, employers should be prepared to review and revise their non-compete agreements as appropriate in anticipation of this sweeping federal regulation.

Setting aside federal law, to be enforceable under North Carolina law, restrictive covenants must be:

- in writing;
- part of an employment contract or in connection with the sale of a business;
- supported by valuable consideration;
- reasonable as to time and territory; and
- reasonable as to scope of activities covered by the restriction.

Valuable consideration is a key component of an enforceable non-compete under North Carolina law. Continued employment is insufficient consideration. Instead, there must be some new consideration – a promotion, a raise, a bonus, or some combination thereof – for a restrictive covenant to be valid under North Carolina law for a current employee.

Although North Carolina does not have a hard-line rule on the reasonableness of time restrictions, generally North Carolina courts approve of two-year restrictions. The duration and geographic scope of a restrictive covenant are considered together to determine if it is reasonable. Courts may approve longer restrictions if the geographic territory is relatively small – likewise, courts may approve broader geographic territories if the duration of the restriction is relatively short. Regardless, courts rarely approve restrictions of five years or more.

Courts will look at the following six factors when determining whether a non-compete or non-solicitation agreement is reasonable as to time and territory:

- the geographic area of the restriction;
- the area where the employee was assigned to, and actually did, work;
- the area in which the company does business;
- the nature of the business; and
- the nature of the employee's duty and the employee's knowledge of the business operation.

Additionally, the scope of the activities covered by the non-compete must be tied to the work performed for the employer. Courts have refused to enforce non-competes that prevent an employee from doing any work for a competitor, regardless of whether it is the same nature of the work performed for the employer. Additionally, non-competes that preclude "direct or indirect" competition have been unenforceable owing to the scope preventing, for example, ownership of a mutual fund holding shares of a competitor.

2.2 Non-solicits

Non-solicitation clauses have gained renewed attention in light of recent legal developments calling into question the longevity and effectiveness of non-competition agreements. The enforceability of non-solicitation clauses under North Carolina law is analysed in the same way as other restrictive covenants – ie, they must be in writing, part of a contract for employment, for valuable consideration, and reasonable as to time and territory. Non-solicitation agreements tailored to the employer's customers and employees are routinely upheld, even when there is no geographic restriction. Even so, employers should limit those restrictions to customers and employees of the employer for a period of time (usually a year) prior to termination, as North Carolina courts deem the look-back period part of the temporal restriction that needs to be reasonable to be enforced.

3. Data Privacy

3.1 Data Privacy Law and Employment

Protection of personal data has become a focus of legislative efforts at all levels. With increased scrutiny on data privacy practices arising in European countries, many states across the USA are beginning to follow suit. Now more than ever, employers must be cognisant of previously established privacy-related laws, along with industry trends towards over-inclusivity.

Industry groups such as the International Association of Privacy Professionals (IAPP) offer more in-depth guides for navigating privacy concerns across various employment sectors.

Federal Considerations for Multi-state and Multinational Employers

Common privacy issues and areas global employers should consider include:

- employee health information and records;
- records relating to and obtained via background checks;
- response standards and mechanisms for data breaches;
- possession and use of student or education-related data; and
- the use of and marketing or sale of Personally Identifiable Information (PII).

The following examples of laws and areas of work may carry increased potential implications of employee personal privacy issues:

- the Health Insurance Portability and Accountability Act (HIPAA) and the protections of employee personal health records;
- the ADA, which regulates when, how, and for what purposes an employer may access employee health information;
- the FMLA and the limits on obtaining and/or disclosing certain information relating to covered employee leave;
- the Fair Credit Reporting Act (FCRA) and its applications to conducting employee background checks;

- the Family Educational Rights and Privacy Act for any company operating in spaces including student data; and
- enforcement actions by various federal agencies including the FTC, the Department of Health and Human Services (DHHS), the Consumer Financial Protection Bureau (CFPB), the Federal Communications Commission (FCC), the Equal Employment Opportunity Commission (EEOC), and others.

With ever-increasing data breaches, many global employers have also instituted internal policies and response mechanisms, with some even hiring designated privacy teams. Currently, there are no federal laws regarding standardised responses relating to data breaches. It is in this area that many employers look abroad for guidance.

A growing trend in data privacy has seen companies turning to foreign and domestic guidance in crafting privacy policies and dealing with related issues. In recent years, an increasing number of employers have begun self-certifying pursuant to the strict General Data Protection Regulation (GDPR) standards via either contractual commitments or participating in the federal government's Data Privacy Foundation certification ("US Privacy Shield").

While there is no absolute way to guarantee universal compliance, global employers operating in the USA should strongly consider opting for stricter self-governance and applying standards that may be stricter than required. The GDPR's standards – along with compliance with long-standing laws such as those discussed earlier – are quickly becoming a recommended industry norm, especially if an employer is involved in any way with the retention or handling of employee health records and data.

State Law Considerations for Employers

If the GDPR is considered the benchmark for international privacy laws, then California and the California Consumer Privacy Act (CCPA) can rightfully be seen as the domestic guidepost not only for states looking to enact their own privacy laws, but also for employers seeking to be proactive in their compliance and policies. California was the first state to enact comprehensive data privacy legislation, signing the CCPA into law on 8 June 2018 (effective 1 January 2020). Since then, 18 other states have followed suit, signing into law their own comprehensive data privacy laws – many of which are modelled on the CCPA. Included in this list are states such as Delaware, with its reputation for attracting foreign and domestic companies alike. Proposed bills in six additional states – North Carolina, Illinois, Massachusetts, Michigan, Ohio, and Pennsylvania – would grant rights similar to those found in existing data privacy legislation.

Global employers operating in the USA are well-advised to stay abreast of all evolving data privacy regulations and laws. Failure to comply has and may continue to result in serious fines and penalties, in addition to loss of customer and employee trust and goodwill.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Employment of foreign workers in the USA is strictly controlled, with clearly outlined categories of temporary work visas. Unless a person is a "US worker," which for the most part includes US citizens, nationals or Permanent Resident Card ("Green Card" holders), as well as a much smaller group granted temporary protected status, refugee status or political asylum, a foreign worker must generally have either a valid work-

authorised visa or an Employment Authorization Document (EAD) to engage in productive employment in the USA.

The term "work permit" is used globally and suggests an ability to gain generalised employment authorisation. This is not a term found in the US immigration system, which is much more discerning and limited. Under the Immigration and National Act (INA), Congress and the agency (the legacy Immigration and Naturalization Service (INS), now known as the United States Immigration and Naturalization Services (USCIS)) delineates very specific categories of temporary visas that generally favour professional-level positions, with candidates who have traditional post-secondary educational credentials (namely, a bachelor's degree or higher). As a result, not every foreign worker can be employed in the USA. The alphabet soup of visa categories attempts to cover a range of potential activities in the USA by the global community and it extends beyond just work visas, including students, diplomats, and religious workers (among others).

The list of work visas (eg, E-3, H-1B, L-1 and TN) falls far short of US employer needs, particularly today in an economy where the USA continues to have low rates of unemployment, resulting in a shortage of available workers. The work visa categories themselves are also limited in terms of what positions can be sponsored. There is no solution to fill the ranks for occupations across a broad spectrum of industries, including science, technology, engineering and mathematics (STEM)-related occupations to fill much-needed software engineering, IT and data analytics-related roles (to name a few). It is fair to say that virtually every company in the USA has needs in these areas and for years many have had to look to non-US workers to fill their ranks. Many times, these individuals are already in the USA, often as F-1 students who are identified as top job candidates through standard on-campus recruiting efforts and the like.

Beyond these professional-level roles, other sectors of the economy – for example, construction, farming, manufacturing and the meat and poultry industry – have significant needs for workers. The USA provides only a couple of solutions for these types of roles, including the H-2A and H-2B visas, which are for temporary peak and seasonal positions. The only long-term solution in these areas is to sponsor a foreign worker for a Green Card, which is not terribly practical as it could take between two and three years to obtain and the candidate may not be able to work for the company in the USA in the interim.

A related concept is that of the "business visitor" who can enter the USA for a short period to engage in a limited set of brief activities, such as meetings, conferences, training, contract negotiations and some other related matters – all of which must stop short of productive employment or work. Obtaining a B-1/B-2 visa (B-1 for business, B-2 for tourism) can often be obtained much more easily than a work-authorised visa, so it can seem attractive for a foreign worker to use it as a workaround. The US government is well aware of abuses of the B visa, and the US Customs and Border Protection Agency (CBP) is generally on high alert to sniff out potential offenders.

A wrench can be used as a simple way to differentiate between appropriate business visitor activities and work. As a business visitor, a foreign national can meet with colleagues or customers and talk about a project involving the eventual use of wrenches, learn about how to use wrenches, negotiate and sign a contract that involves wrenches, but the moment a for-

eign worker starts turning a wrench to achieve a productive end and gets paid for that service, they have entered the realm of work that requires employment authorisation. In reality, there are many occupations that do not fit neatly into the wrench example and the determination of the appropriateness of a B entry is usually made subjectively by an individual officer who has quite extensive discretion. "Work" is a four-letter word to the CBP and a foreign worker who utters it as the intended scope of their trip to the USA may be taken quite literally and possibly denied entry.

There are penalties for employing foreign workers without valid work authorisation if such unauthorised work is discovered, so it is important to put appropriate limitations in place for business visitors and to secure a work-authorised visa when there is productive employment involved. Employers should also keep in mind that only physical presence in the USA triggers the need for a work visa, so if they would like to employ someone remotely from another country, they are free to do that – at least from an immigration perspective. There could be other implications relating to employment law in the person's home country, and other practicalities such as processing payroll, tax deductions, and benefits, so it is important to vet those as well.

4.2 Registration Requirements for Foreign Workers

All foreign workers seeking to engage in productive employment (work) in the USA must either apply for an appropriate visa that grants work authorisation or have an otherwise valid form of employment authorisation, such as an EAD. Most work visa categories are company-sponsored, a process that usually starts with a petition filing by the employer on behalf of the foreign worker with USCIS. At a high level, a typical work visa is obtained through the following three steps:

- USCIS petition filing by the employer;
- visa appointment/interview with a US consulate or embassy to obtain a visa sticker in the passport; and
- entry to the USA and issuance of an I-94 admission record.

It is important to remember that not every foreign worker will qualify for a visa, so it may be just a select few who can proceed through these steps. Additionally, there can be pitfalls along the way. By way of example, USCIS could ask additional questions at Step 1 and issue a Request for Evidence, or Notice of Intent to Deny, which will delay the process while the company and its counsel prepare a response and attempt to overcome the stated deficiencies. The primary visa category used by companies to employ foreign workers in professional level positions is the H-1B. There is annual allocation of H-1B visas each year (85,000) and, based on demand for the past 20 years or so, USCIS conducts a lottery to distribute them. In most years, the chances of selection are in the range of 30%, so even when a company chooses to offer immigration sponsorship, there are no guarantees it will be successful.

Additionally, after USCIS approves the petition, the foreign worker schedules and attends a visa appointment. The US State Department, which runs the US consulates and embassies throughout the world, will conduct a background check and may otherwise review the foreign worker's "admissibility" to the USA across three broad areas, including economic, health and security-related grounds. If there is something suspicious (or blatant) in the foreign worker's history or profile, the US consulate could decide not to issue

the visa. If approved, the US consulate issues a visa sticker in the passport, which acts like a ticket for entry to the USA.

The last step is for the foreign worker to enter the USA. The admission process involves the person interfacing with CBP officers, who are stationed at all ports of entry, including international airports and land-border crossings. The CBP processes the foreign worker for admission and, if entry is allowed, they will receive an I-94 admission record. The I-94 is the most crucial of the documents in the visa process, as it is the primary document used to demonstrate work authorisation for I-9 purposes, and its expiration controls the foreign worker's duration of stay in the USA. The I-94 also facilitates Social Security Number applications, as well as issuance of state driver's licences. Most foreign workers will begin paying taxes immediately, including Federal Insurance Contributions Act (FICA) withholdings, whether or not they intend to live permanently in the USA and take advantage of Social Security and Medicare benefits into retirement.

A separate group of foreign workers may be in the USA and already have an independent basis for work authorisation. By way of example, they could have a family-sponsored Green Card application pending that provides an interim EAD until the permanent residency process is complete and the Green Card issued. These individuals will not need employment sponsorship for a work visa, but that could vary depending on the facts.

Foreign workers are required to report any US address changes to USCIS within ten days of moving. Otherwise, however, the USA does not have any further registration requirements – such as with the local police department – that are seen in some other countries.

5. New Work

5.1 Mobile Work

Mobile or remote work has become commonplace in the post-pandemic world. While mobile work provides new opportunities and flexibilities for employers and employees, employers must manage the legal complexities of such arrangements to ensure compliance with relevant laws and regulations. Some key areas to consider are as follows.

Wage and Hour Compliance

Mobile workers are subject to the same compensation and overtime laws (federal and local) as in-office employees. The challenge this poses to employers offering mobile work arrangements is tracking working and non-working time. As many have come to find, the line between being "off the clock" and "on the clock" is often blurred. Employers should clearly outline a timekeeping policy requiring accurate recording of all time worked and requiring advance approval before working any overtime, including minor tasks such as after-hours communications. The policy should set out disciplinary steps for violations.

Health and Safety

Employers are responsible to ensure a safe and healthy working environment – even for mobile/remote employees. By way of example, the Occupational Safety and Health Act (the "OSH Act") requires employers to ensure a safe work environment, including ergonomic considerations and addressing potential hazards in the home workspace.

Further, workers' compensation benefits cover injuries "arising out of and in the course of the employment". There is no limitation based on where a work-related accident occurs. Employees have the burden of proof to show that an injury is work-related – although arguably even a broken bone from a fall when the employee is walking between their home office and the kitchen could fall within the coverage.

Thus, the health and safety of remote workers should be expressly addressed to the extent feasible in order to limit the employer's potential liability. Best practices for employers include providing guidance on ergonomic considerations (workstation set-up and equipment provision), mental health support (resources and regular check-ins), safety policies and training (specific "at home" or "mobile" work policies), and regular reviews/risk assessments.

Privacy and Data Security

Mobile work brings increased dangers of privacy and data breaches. Employees often have access to sensitive or proprietary business information, trade secrets, and other sensitive materials, personnel information, and confidential customer data.

Employees should establish protocols for access, storage, transmission and use of this data. Best practices include data encryption, strict access controls (eg, multi-factor authentication), data minimisation (eg, regular review and deletion of unnecessary data), employee training, remote-work policies, and use of company-issued devices. Further, given the increase of data breach incidents during the past few years, employers would be wise to establish a clear data-breach response plan.

Employers must also consider the privacy of the mobile employee. Although monitoring a mobile employee's activities is often an appropriate and even necessary measure to ensure and assess performance, such measures should avoid invading a remote employee's privacy. By way of example, the Electronic Communications Privacy Act (ECPA) prohibits the interception and monitoring of electronic communications without consent. If employers intend to monitor such communications, they must ensure that they have provided notice and obtained consent. Any monitoring or surveillance should also not infringe on employees' rights to engage in protected activities under the National Labor Relations Act (NLRA).

Tax Obligations and Social Security

Employers must carefully plan and manage tax obligations and compliance for mobile employees. This is because companies with mobile employees located in difference states or countries may trigger withholding requirements for the employer. By way of example, a remote worker's presence in a state can create a "nexus" with that state, which may subject the employer to state income tax, sales tax, and other business tax obligations. In other words, in determining tax obligations, employers must give careful attention to the location of the mobile employee – not just the location of the employer. Navigating the tax implications of remote work can be complex and employers are advised to consult tax professionals to ensure compliance and optimise outcomes.

Employers must navigate similar issues in the landscape of social security. Although the rules differ from those applicable to income tax, employers with cross-border remote workers could be responsible for social security taxes/contributions in the home country, the host

country, or both. Compliance with these regulations requires careful planning and often the assistance of legal and tax professionals to ensure that both employers and employees meet their social security obligations.

5.2 Sabbaticals

Employers may, but are not required to, provide sabbatical leave. Sabbatical leave can take many forms and can arise for a variety of reasons. Although not uniformly defined, a sabbatical is typically an extended leave of absence from work done in order to pursue personal or professional interests. Employers may grant an employee sabbatical leave for reasons such as personal travel and studies or so the employee can pursue an additional degree or specialised education. Depending on the employee's purpose in requesting the leave, a sabbatical may range in length from a couple of weeks to several months or up to a year.

Most employers address sabbatical leave in their handbooks or policy guidelines. By way of example, an employer may set standard procedures for requesting the leave, such as a required advance notice period or a written submission justifying the nature or purpose of the leave. Similarly, an employer may choose to specify purposes for sabbatical leave, such as allowing it for educational or professional study purposes but not for personal travel. A good example of how the federal government addresses sabbatical leave can be found in Section 3396 of Title 5 of the US Code, which specifies certain employees who may receive sabbatical leave for certain specified purposes.

Another relevant consideration for employers looking to establish a standard sabbatical leave policy is how the employee taking the leave will be paid. Many employers offer incentives for certain purposes, such as reimbursement of educational expenses or travel. Employers should still take care to ensure compliance with all applicable wage and hour laws – for instance, an employer should pay special attention if the employee's leave is taken for purposes contemplated by the FMLA. Although some employers may allow employees to take qualifying FMLA leave concurrently with approved sabbatical leave, it is recommended to have clear policies and procedures in place to ensure all statutory requirements are met.

Finally, if an employer is confronted with an instance where they are denying an employee's request for sabbatical leave, it is important to remember that any denial should be done for legitimate, non-discriminatory reasons. This consideration further reinforces the recommendation to have a clearly defined sabbatical leave policy.

5.3 Other New Manifestations

As employees return to the office (some part-time), many employers are leasing less office space in favour of new work ideas such as desk-sharing or "hoteling", whereby no one person is assigned a single workspace but instead have non-assigned spaces where employees can work on the various days they come in. Other employers are opting to simply rent portions of a collaborative workspace from places such as We Work instead of having dedicated private office space. If employers choose either of these options, they should be mindful of how they are asking employees to safeguard confidential information. By way of example, employers should institute policies regarding printing and proper secure disposal of confidential company information or regarding taking phone calls out of non-employees' earshot.

6. Collective Relations

6.1 Unions

North Carolina is a "Right to Work" state, which means that employees cannot be forced to join a union or pay dues in order to become or remained employed. Union activity nationally has been on the rise, with 1,316 petitions filed in 2023. Compared to other states, North Carolina does not have many unions – in fact, the state only has 404 unions, employing 1,318 people across the state. These are primarily large, nationwide unions.

However, despite the small number of unions in North Carolina, there has been increased unionising activity. A large hospital system in the state unionised in the past few years, and the United Auto Workers union initiated a strike at the Daimler Truck auto manufacturing plant in High Point earlier this year.

6.2 Employee Representative Bodies

Employee representative bodies, also called employee resource groups or affinity groups, are a growing trend among employers. One of the most significant benefits of affinity groups is their power to connect people and promote inclusion among groups that are often under-represented in the workplace. The connection experienced in these groups translates remotely across physical offices and organisational groups – they can bring together employees at different levels and across departments and build a sense of shared community and belonging.

However, employers should be aware of legal issues surrounding these groups. By way of example, affinity groups should be open to everyone and treated equally. Employees who do not feel welcome to join an affinity group or to attend its events may feel excluded – or even threatened – by this employer-backed organisation. Employers must ensure they properly compensate non-exempt employees for time spent attending or participating in workplace affinity group meetings or activities. Moreover, employers risk violating federal labour law if they bargain with affinity groups regarding employees' terms and conditions of employment by:

- dominating or interfering with the formation of an affinity group and treating it as a labour organisation; or
- failing to bargain with a union that already represents employees.

Employers often sponsor, contribute funds to, or otherwise support workplace affinity groups. As a result, an employer risks committing an unfair labour practice (ULP) by treating the affinity group like a labour organisation and "dominating" or "interfering" with it.

6.3 Collective Bargaining Agreements

The NLRA gives employees the right to bargain collectively with their employer through a representative or, typically, a labour union. The employer and collective employees can negotiate over employment benefits such as pay structure, health insurance and grievance procedure. The NLRA imposes an obligation on both parties to bargain in good faith about wages, hours, and other terms and conditions of employment until the parties agree on a "collective bargaining agreement". If the parties reach a stand-off or "impasse" before they can come to terms on an agreement, the employer may impose any terms and conditions offered to the collective employees before the impasse was reached. Once an employment contract is in place, neither the employer nor the employees may deviate from its terms without the other party's consent.

In North Carolina, the negotiation of collective bargaining agreements between public employers and employees is prohibited by law. However, public employees do retain the right to organise or otherwise join employee associations. This means that public employees can negotiate with their employer for benefits, but any collective bargaining agreement entered into between the parties would be deemed void as an illegal contract.

7. Termination

7.1 Grounds for Termination

Motivation and Procedures for Dismissal

As North Carolina is an "at-will employment state", employers do not need grounds for terminating employment. This means that no motivation is required to justify the termination of an employee.

There are exceptions to the employment-at-will doctrine. These exceptions are:

- the employee has contracted for a definite term of employment;
- the employee's termination is in violation of state or federal anti-discrimination statutes; and
- the employee's termination violates North Carolina public policy.

Contracts for a definite term of employment

Regarding the first exception, employers should communicate details surrounding the employment relationship explicitly at its inception to better maintain control of the termination process and to prevent unwanted litigation. The employer also needs to determine the likelihood of an employment dispute and document the termination accordingly. If the employer is already on notice of the likelihood of dispute, counsel should be consulted to review the evidence supporting a termination and to ensure that no relevant documents or communications are deleted.

Violation of federal or state anti-discrimination law

Regarding the second exception, employers must ensure that the rationale for ending the employment relationship does not violate federal or state law. The employer may not terminate someone owing to their membership of a protected class or in retaliation for the exercise of certain rights, for example. Employers should be cognisant of certain protections for individuals over the age of 40 under federal and North Carolina law. The federal Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Act (OWBPA) prohibit discrimination based on age.

When an employer grants a release or is involved in a settlement with an employee over the age of 40, the ADEA and the OWBPA require the employer to give the employee 21 days to consider and accept the terms of any agreement. The ADEA and the OWBPA also require employers to allow the employee seven days to rescind the agreement after signing. When an employer undertakes a reduction in the force or a group lay-off, the ADEA and the OWBPA require the employer to provide affected employees with certain statistical information regarding the other individuals affected by the termination.

Violation of North Carolina public policy

Within this third exception, North Carolina Courts have recognised three distinct scenarios where termination of employment was in violation of public policy in the state. These scenarios where termination would violate public policy are when:

- the termination stems from an employee refusing to break the law at the request of the employer;
- where the employee was fired for "engaging in a legally protected activity"; and
- "based on some activity by the employer contrary to law or public policy".

Employees who maintain a claim for wrongful termination in violation of public policy can sometimes provide more expansive remedies than those available under federal law.

Group Redundancies

In North Carolina, a "group lay-off" is when a group of 20 or more workers are either partially or totally terminated from their employment at the same time. The North Carolina Supreme Court held in Gorski that when a group lay-off occurs, the employer must notify the local employment security office prior to the termination date and allow the employees to collect up to four weeks' pay without the employee having to prove that they are available to work.

7.2 Notice Periods

North Carolina is an at-will employment state. This means that unless an employer contracted with an employee to work for a certain period of time, with certain terms calling for a specific period of notice, an employer can terminate an employee's employment at any time for any non-discriminatory purpose. This means that an employer can give little to no notice prior to termination.

7.3 Dismissal for (Serious) Cause

As mentioned in **7.2 Notice Periods**, North Carolina is an at-will employment state, so an employer who does not enter into an employment contract with an employee giving that employee the right to only be terminated "for cause" can terminate an employee at any time for any non-discriminatory purpose. For employees with a contract containing a "for cause" termination provision, the employer must follow the terms of those procedures carefully. In drafting "for cause" provisions, employers should carefully consider the terms to make them tailored to the specific industry and favourable to the company. Before sending out an employment contract with a "for cause" termination provision, it is advisable for companies to speak with a local employment lawyer.

7.4 Termination Agreements

Termination agreements are generally enforceable in North Carolina. This stems from North Carolina's interest in allowing freedom of contract, specifically in the context of modifying at-will employment agreements. Agreements providing for severance in the event of termination are common and courts generally hold them to be enforceable. In the past, termination agreements providing for restrictive covenants such as non-compete provisions have been enforceable by North Carolina courts. By way of example, in United Laboratories, Inc v Kuykendall, the North Carolina Supreme Court upheld a non-compete provision contained within a sale representative agreement as enforceable, despite the discharged employee arguing otherwise.

As discussed in **2.1 Non-competes**, the FTC has taken action to hold non-competes unlawful for all except senior executives. Despite the new rules regarding non-compete agreements, employers still have a means of lawfully protecting themselves and their investments. The FTC recommends non-disclosure agreements as an alternative to non-compete agreements in order to lawfully protect an employer's IP and investments in skills training. The FTC also points to

both federal and state trade secrets laws as a form of governmental protection of employers.

Another form of agreement that can arise following the termination of employment is a release agreement, whereby an employee releases bringing any past and future legal claims that they may have grounds to bring against their former employer. In North Carolina, it is common practice to enter into a general release of claims agreement, which includes a non-exhaustive list of released claims. These general releases may include the release of claims such as wrongful discharge, emotional distress, and claims under the North Carolina Persons with Disabilities Protection Act (PDPA). However, it is unlawful in North Carolina to agree to release certain claims, including claims under the North Carolina Wage and Hour Act (NCWHA), workers' compensation claims or rights to benefits under the North Carolina Workers Compensation Act, and waiver of unemployment benefits. The inclusion of one of these claims in a general release agreement can render an otherwise enforceable agreement invalid.

7.5 Protected Categories of Employee

Protected classes under federal law include race, colour, national origin, religion, sex (including pregnancy, childbirth and other related medical conditions), sexual orientation and gender identity, disability, age (40 years of age or older), citizenship status, and genetic information. Therefore, and despite the "at will" element of North Carolina law, employers cannot dismiss or terminate protected employees without a non-discriminatory reason.

Some specific protections that employees and employers should be cognisant of include protections for individuals affected by pregnancy, childbirth, or related medical conditions and individuals over the age of 40. By way of example, the Pregnant Workers Fairness Act (PWFA) recently went into effect and requires employers to provide reasonable accommodations to individuals affected by pregnancy, childbirth, or related medical conditions, unless the accommodation causes the employer undue hardship. The PWFA prohibits employers from retaliating against qualified individuals who have sought reasonable accommodations.

Further, as discussed in **7.1 Grounds for Termination**, employers must provide employees over the age of 40 with 21 days to consider and accept the terms of any agreement under the ADEA and the OWBPA, along with seven days to rescind the agreement after signing. When an employer undertakes a reduction in force or group lay-off, the ADEA and the OWBPA require the employer to provide affected employees with certain statistical information regarding the other individuals affected by the termination.

8. Disputes

8.1 Wrongful Dismissal

North Carolina employees have a private right of action for wrongful termination in violation of the following federal claims:

- the ADA, which prohibits discrimination against disabled workers or candidates;
- the Pregnancy Discrimination Act (PDA), which prohibits termination based on pregnancy-related facts;
- the PWFA, which expands the rights of workers affected by pregnancy, childbirth, or related medical conditions;
- Equal Employment Opportunity (EEO) laws;

- the ADEA, which prohibits discriminating against employees based on age (more specifically, if they are aged 40 or older); and
- Title VII of the Civil Rights Act ("Title VII"), which prohibits:
  (a) wrongful termination due to classification of a protected class including race, colour, religion, sex (including pregnancy, gender identity, and sexuality), and national origin; and
  (b) retaliation for reporting unsafe, illegal work practices or for any asserted protected rights.

North Carolina specific laws largely mirror federal laws, with the addition of the following state claims.

- The North Carolina Equal Employment Practices Act (EEPA) prohibits discrimination based on race, religion, color, national origin, age, sex, or handicap (disability).
- The PDPA prohibits discrimination against persons with disabilities.
- The Retaliatory Employment Discrimination Act (REDA) prohibits retaliation based on an employee's good faith participation in certain activities, including:
  (a) filing or threatening to file a wage and hour claim;
  (b) filing or threatening to file a workplace health and safety claim;
  (c) filing or threatening to file a workers' compensation complaint or claim;
  (d) on the basis of genetic testing;
  (e) possessing the sickle cell trait;
  (f) being a haemoglobin C carrier;
  (g) National Guard service;
  (h) participation in the juvenile justice system;
  (i) seeking domestic violence protective orders;
  (j) pesticide exposure; and
  (k) reporting activities of their employers under the Paraphernalia Control Act.

Employees can seek compensatory damages, including lost pay and lost benefits, as well as punitive, mental anguish, emotional distress, or pain and suffering damages for employer actions that are particularly egregious.

8.2 Anti-discrimination

As mentioned in **8.1 Wrongful Dismissal**, under federal Title VII, it is unlawful to discriminate on the basis of race, colour, national origin, religion, sex (including pregnancy, childbirth and other related medical conditions), sexual orientation and gender identity, disability, age (40 years of age or older), citizenship status, and genetic information. The EEPA also allows for a private right of action for discrimination claims brought pursuant to the same protected classes as Title VII. Under North Carolina law it is also unlawful to terminate someone for any reason that violates North Carolina Public Policy, which includes public policy set forth in the EEPA.

The statute of limitations for these state law claims is three years, meaning that employees could bring claims of discrimination past the traditional statute of limitations under Title VII. North Carolina courts have adopted similar tests to the federal McDonnell Douglas framework for state discrimination claims. Like federal claims, damages can include back pay and front pay, as well as compensatory damages, emotional distress damages and – in some instances – punitive damages.

8.3 Digitalisation

During COVID-19, most North Carolina counties conducted hearings virtually via Webex. Most counties have returned to full in-person hearings.

However, several of the larger, more urban counties such as Mecklenburg and Wake (Charlotte and Raleigh areas respectively) are conducting some portion of their hearings via video. Trials in North Carolina are not being conducted virtually. As of 1 July 2024, remote notarisation for affidavits needed in court proceedings is allowed. This makes it significantly easier for witnesses to prepare affidavits. The North Carolina Secretary of State maintains a searchable database to locate eNotaries, making it easy for employers to locate one, should the need arise.

9. Dispute Resolution

9.1 Litigation

North Carolina does not have any forums specific to employment disputes; however, employment disputes are frequently litigated in the North Carolina Business Court, which has mandatory jurisdiction over cases involving trade secrets. Unlike most cases filed in North Carolina superior courts, only one judge is assigned to each case in the North Carolina Business Court, and those judges are particularly familiar with the law and cases falling under their jurisdiction.

Class actions claims are available under both federal and state law. Typically, class action employment claims involve claims of wage and hour violations, employment discrimination, or Employee Retirement Income Security Act (ERISA) violations.

9.2 Alternative Dispute Resolution

Ever since the passage of the Federal Arbitration Act (FAA), which provides that arbitration agreements are generally enforceable, the frequency of arbitration provisions in employment contracts has steadily risen. Arbitration provides many desirable features, such as the following, that many employers prefer.

- Confidentiality – unlike a case in court, arbitration filings are typically not publicly available, leading to increased privacy during the litigation. Similarly, some arbitration agreements contain confidentiality provisions to ensure the matter is not publicised.
- Expeditious and cost-effective resolution – arbitration awards are generally afforded the same binding effect as a court order or jury verdict. However, the resolution itself can often be attained much quicker than a typical court case.
- Standard rules and procedures – although formal rules of evidence and civil procedure do not typically apply in arbitration, many established arbitration organisations such as the American Arbitration Association (AAA) have thorough sets of rules governing their proceedings.

Arbitration agreements can be effective tools for privately handling everything from contractual disputes to statutory discrimination claims. However, the FAA has several express carve-outs for certain types of claims for which a pre-dispute arbitration agreement either is not effective or cannot be used to waive any party's rights. These claims include those arising under certain sections of the Dodd-Frank Act, as well as those provided by certain Commodity Futures Trading Commission (CFTC) regulations.

While arbitration agreements are common tools to determine the forum for a dispute before it arises, there are a few important considerations for employers looking to implement them. By way of example, the agreement must be mutually agreed upon; it cannot be the product of force or coercion on the employee. Similarly,

although the agreement may be drafted to set a specific forum, rules, and type of arbitration or arbitrator, the terms cannot excessively favour the employer at the expense of the employee.

Drafting a pre-dispute arbitration agreement can be helpful to an employer for many reasons. However, it is recommended that employers speak with counsel to ensure the agreement is enforceable and effective.

9.3 Costs

Prevailing party costs are governed by statute in North Carolina. Currently, the North Carolina Court of Appeals has conflicting opinions as to whether awarding costs to prevailing parties under the main costs statute, North Carolina General Statutes Section 6-20, is mandatory or discretionary. The North Carolina Supreme Court has yet to take up this issue. But what is clear is that once a court moves forward with awarding prevailing party costs, those costs are limited to very specific enumerated categories under North Carolina General Statutes Section 7A-305. And counsel seeking recovery of costs must usually prove that the costs incurred were reasonable and necessary expenses in prosecuting or defending the case. The enumerated categories most pertinent to employment law litigation include:

- witness fees;
- expenses incurred in service of process by certified mail or by publication;
- costs on appeal of the original transcript of testimony;
- personal service and civil process fees;
- mediator fees;
- deposition stenographic and videographic fees;
- deposition transcript costs; and
- expert witness fees.

USA – TEXAS

Law and Practice

Contributed by:
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Contents

Bell Nunnally & Martin has a record of success spanning more than four decades. It is among the most-respected business law firms in Texas and one of the 25 largest in North Texas. The firm provides a full range of services, including litigation, appellate law, commercial finance, corporate and securities, creditors' rights, bankruptcy, health law, IP, immigration, real estate, entertainment, M&A, tax, white-collar criminal defence, and labour and employment. Bell Nunnally's employment attorneys advise business owners and HR professionals in navigating the day-to-day maze of federal and state employment laws in Texas and across the USA. Given that employment problems can – and frequently do – turn into administrative charges or lawsuits, Bell Nunnally's employment lawyers are skilled advocates before US agencies and in the courtroom. The lawyers have litigated virtually every type of labour and employment case. Such considerable trial experience provides unique insights with which to advise employers on the steps needed to avoid litigation.

Authors

Alana Ackels of Bell Nunnally & Martin advises employers on how to minimise risk, protect their businesses, and navigate the multitude of compliance obligations governing the employer-employee relationship. She advises business leaders and HR teams on how to minimise litigation risks and prepares employment agreements, confidentiality agreements, non-compete agreements and employee handbooks, as well as other policies that mitigate risk for employers. Alana has extensive experience of litigating disputes in state and federal courts, as well as experience in arbitration. She routinely defends employers against Equal Employment Opportunity Commission charges, trade secret litigation, non-compete matters and wage and hour claims, as well as claims involving discrimination, harassment and retaliation, and wrongful termination.

Katie Beaird of Bell Nunnally & Martin works with business managers, in-house legal departments, and HR managers to ensure compliance with a wide array of federal, state and local employment laws, including Title VII, the Fair Labor Standards Act, the Family Medical Leave Act, and the Fair Housing Act. Katie has experience of defending employers against claims of discrimination, harassment and retaliation before the Texas Workforce Commission and the US Equal Employment Opportunity Commission, as well as in both state and federal court. She also counsels clients on employment agreements, severance agreements, non-compete and non-solicitation agreements, and employment policies and handbooks.

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1. Employment Terms

1.1 Employee Status

Texas follows the federal wage and hour laws. Under the federal law governing wage and hour disputes (the Fair Labor Standards Act (FLSA)), jobs are classified as either exempt or non-exempt from overtime requirements. Employees that are non-exempt from overtime are typically paid on an hourly basis and are entitled to be paid overtime for any hours worked in excess of 40 hours in a single working week. The overtime rate of pay is 1.5 times the non-exempt employee's regular rate of pay. In order to avoid a claim of unpaid minimum wage or overtime, it is imperative for employers to ensure non-exempt employees are accurately recording and reporting their hours worked.

Exempt employees are typically paid on a salary basis and are not entitled to be paid overtime. Thus, if an exempt employee works more than 40 hours in a working week, the employee is not entitled to be paid any additional money beyond their weekly salary. Additionally, tracking hours is not required. Sometimes employers are inclined to classify employees as exempt in order to avoid tracking hours and paying overtime, but employers must ensure that the employee properly qualifies as exempt to avoid potential liability.

To be exempt from overtime, an employee must meet all the criteria of an applicable exemption. There are several exemptions, including the professional exemption, administrative exemption, and highly compensated employee exemption. Each exemption has its own specific requirements in order for the employee to qualify.

Employers who violate the FLSA are liable for economic damages in the form of unpaid overtime wages. If there is a violation, the employee is also entitled to liquidated damages or "double damages" that match the amount of the unpaid overtime wages, unless the employer proves it acted in good faith and had reasonable grounds to believe its actions did not violate the FLSA. Additionally, if the employee proves the violation was wilful, the statute of limitations period extends beyond the standard two years to a third year. In the largest category of damages, workers are also often entitled to recover their attorney's fees if they prevail.

1.2 Employment Contracts

Texas is an "at will" employment state, which means that – in the absence of an agreement otherwise – either party can end the relationship at any time, with or without notice. Employment contracts are not required except in the case of collective bargaining agreements with unionised employees. However, employment contracts may be entered into if desired between the employee and employer, and the contract should be in writing.

What an employment contract includes is customisable and there are no required terms. If the intention of the employer is to limit how the parties can end the employment relationship, this should be carefully drafted with defined terms and specifying when the relationship can be terminated upon notice, without notice, and what the repercussions of the termination will be. It is also recommended that the agreement includes a carefully drafted outline of the employee's compensation plan (including bonuses, equity, and commissions, if applicable) and states whether the employer can change that compensation plan proactively without entering into a new agreement.

When an employer does choose to enter into an employment agreement that sets out a specific term of employment and under what circumstances the employee and employer can end the relationship, this is typically referred to as termination "for cause". In such situations, it is not uncommon for disputes to arise concerning:

- whether proper cause was present to end the employment;
- whether the terminating party followed all the requisite steps to terminate the employment;
- whether any severance is required; and
- how the termination affects the employer's obligation to pay out bonuses and commissions or to implement their equity agreements.

These disputes are highly variable depending on the contract language, including the remedies set out in the agreement. The main remedy is typically the "benefit of the bargain" or what the party would have received had the breach not occurred. Additionally, in some situations, the prevailing party will be entitled to their attorney's fees incurred.

Contractual disputes can also arise when the employee's employment contract sets out how they will be paid (salary, bonuses, equity options, etc) but the compensation is not paid according to the contract provisions. Contractual disputes regarding pay also typically arise when an at-will employee has a commission agreement and disputes that their commissions have been calculated and paid correctly under the contract.

1.3 Working Hours

Texas employees can work full time (typically 35–40 hours a week) or part-time (typically 30 or less hours a week). An employee's status as part-time and full-time is determined by the hours worked, not by agreement.

Texas requires employers to pay overtime to a non-exempt (full-time or part-time) employee who works more than 40 hours in a single working week. However, Texas does not set a maximum of total hours allowed, so potential overtime earnings can be significant. Exempt employees are generally full-time, are not entitled to overtime pay and have no limit on hours worked in a week.

Although generally Texas does not have a maximum of daily hours worked for exempt or non-exempt employees, certain exceptions apply in safety-sensitive industries such as nursing and for truck drivers.

1.4 Compensation

Both Texas and federal US law require Texas employers to pay the federal minimum wage, which is currently USD7.25. Texas presently sets its minimum wage based on the applicable federal rate. Thus, if the federal rate increases, the Texas minimum wage rate would also increase.

Cities are permitted to require employers pay the employees who work within city limits a higher minimum wage. By way of example, the city of Austin, Texas requires a USD15 minimum wage for employees who work within Austin, Texas.

Employees can also be paid on a salary basis, which is when an employee is paid the same amount each week regardless of hours worked. Both hourly and salary employees can earn bonuses if offered by their employers, but bonuses are not required. If a bonus plan is enacted, it is important to define when the bonus is earned, how it is calculated, and how the employee's separation from employment will affect whether the bonus will be paid.

1.5 Other Employment Terms

Paid Leave and Time Off

Texas does not require employers to provide any paid leaves of absence, including maternity, disability, family, medical, or sick leave. However, there are several laws requiring Texas employers provide unpaid leave for certain reasons, including for disabilities and serious health conditions and to care for newborn or adopted babies.

Additionally, many Texas employees provide paid leaves to attract and retain employees. Providing paid time off (vacation and sick leave) for full-time employees is generally expected of Texas employers. If paid time off is provided to employees, Texas does not require an employer pay out accrued but unused paid time off at the time an employee resigns or is terminated, unless the employer has a policy stating it will or the employee has an agreement stating such pay is owed.

Limits on Confidentiality and Non-disparagement Clauses

The US Congress also passed the Speak Out Act, which became effective on 7 December 2022. In the event of allegations of sexual assault and/or sexual harassment, any related non-disclosure and non-disparagement clauses entered into "before the dispute arises" are rendered unenforceable under this law. This means that, unless a dispute related to sexual harassment or sexual assault is being resolved by virtue of a settlement containing confidentiality and non-disparagement language, broad-sweeping confidentiality and non-disparagement language in other agreements may not be enforceable. This could impact multiple standard agreements, including typical non-disclosure agreements and severance agreements. Those templates should be examined for compliance with these new laws.

Texas passed sweeping legislation (effective as of September 2021) imposing more stringent sexual harassment laws on employers in the state. Key changes under the law include:

- additional time for employees to bring claims;
- expanded coverage to any company with one or more employees (previously 15 or more employees);

- personal liability for supervisors or managers or anyone else acting directly in the interests of the employer; and
- liability if the employer fails to act "immediately" once the employer or its agents knew (or should have known) about the harassment.

Please refer to **6.2 Employee Representative Bodies** and **7.4 Termination Agreements** for other limitations on non-disparagement and confidentiality clauses set out by the National Labor Relations Board (NRLB).

2. Restrictive Covenants

2.1 Non-competes

In Texas, non-competes are governed by Section 15.50 of the Texas Business and Commerce Code. Under this provision, a covenant not to compete is enforceable if it:

- is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made;
- contains limitations as to time, geographical area, and scope of activity to be restrained; and
- the limitations are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the company.

Typically, the payment of money cannot form the consideration for a non-compete agreement. It must have some special, unique consideration, such as access to confidential information, specialised training, investment of the company's business goodwill, or equity.

Enforcement

In enforcement actions, courts scrutinise the reasonableness of the time, geography, and scope of the activity prohibited in relation to the business interests the company is trying to protect. By way of example, if a salesperson was assigned the Dallas, Fort Worth market as their sales territory, then a non-compete preventing the salesperson from working in Houston would likely be found to be over-broad. However, if a salesperson was assigned all of Texas as their market (and did in fact market and converse with customers across the state), then a non-compete preventing the salesperson from working anywhere in the state would likely be upheld as reasonable. Non-competes should be tailored to the job the employee is performing for the company and the relevant business interests the company is trying to protect.

The damages typically available to a business enforcing a non-compete include injunctive relief and lost profits that result from the breach. Most non-compete cases focus on enjoining the conduct at issue to protect the business.

Reformation

If a court finds that a non-compete is over-broad then it must reform and narrow the agreement to make it enforceable. This is called "blue pencil-ing." However, if the court has to blue pencil the non-compete, then the party seeking to enforce the non-compete may not recover money damages and is limited to injunctive relief.

Additionally, if the court finds that the business knows at the time it imposed the non-compete that it was more broad than necessary to protect its business interests, then the court may award the employee their costs and reasonable attorney's fees incurred in defending the action to enforce the non-compete.

Physicians

Special rules apply to non-competes governing physicians in the State of Texas. A covenant not to compete relating to the practice of medicine is only enforceable against a licensed physician if the covenant complies with all the following requirements.

- The non-compete may not deny the physician access to the list of patients whom the physician saw or treated within the year immediately preceding termination of the contract or employment.
- The non-compete must provide access to medical records of the physician's patients upon authorisation from the patients.
- The non-compete must provide that patient lists or medical records can be provided in the format in which they are normally maintained, unless the parties agree otherwise.
- The non-compete must provide for a buyout of the covenant by the physician at a reasonable price or at a price determined by an arbitrator.
- The non-compete must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.

The buyout clause for a non-compete is unique to physicians in Texas. Often, this buyout amounts to the equivalent of one to two years of the physician's earnings.

Sale of a Business

Although outside the scope of this employment-related article, it is important to note that non-competes in the context of a sale of business are given much greater deference in Texas. These non-competes are allowed to be much more broad than non-competes in the employment context.

Possible Nationwide Ban on Non-competes

A current federal regulation issued by the Federal Trade Commission (FTC) seeks to ban all non-competes in the employer–employee context. Lawsuits have been filed to block the ban and, in August 2024, a Texas judge blocked the FTC rule, which was set to go into effect on 4 September 2024. The ruling will be appealed and work its way through the appellate courts. If the regulation goes into effect, nearly all non-competes across the USA in the employer–employee context will be invalidated. Practitioners should follow this litigation closely before advising clients on non-compete matters at the state level.

Further information on the prospective ban on non-competes can be found in the USA – Texas Trends and Development chapter in this guide – in which non-competes are discussed in more detail.

2.2 Non-solicits

Non-solicitation agreements are often referred to as non-competes, but the two are not synonymous. Whereas a non-compete prohibits an employee from working elsewhere (within certain temporal, geographic and industry limitations), a non-solicit allows the employee to work anywhere but prohibits the employee from soliciting certain categories of people – typically the people they worked with during their employment (including employees, vendors, contractors, customers and investors).

In Texas, non-solicits are treated very similarly to non-competes in terms of enforcement. They must be reasonable in time, geography and scope and narrowly tailored to protect the business interest at issue. Practitioners should tie the

non-solicit to the relationships at risk that they are trying to protect. By way of example, the non-solicit could prevent a departing employee from taking their team with them – although a court may not enforce a non-solicit that prohibits the hiring of any person who works for the company, even if they never spoke to or interacted with the departing employee. Such a broad non-solicit could run afoul of antitrust rules.

There is a growing trend in Texas and many other states to remove non-competes from agreements and rely on non-solicits to protect the applicable business interest. In other words, the employee can go work wherever they want, but they cannot solicit the company's employees, customers, etc.

Non-solicitation agreements are not subject to the FTC ban on non-competes (see **2.1 Non-competes**), which is set to take effect on 4 September 2024 if it is not enjoined. For further details on this ban and on non-solicitation agreements in Texas, please see the USA – Texas Trends and Development chapter in this guide.

3. Data Privacy

3.1 Data Privacy Law and Employment

The biggest privacy issue facing companies is the intermingling between the personal and professional lives of workers caused by the drastic rise in consistent remote work. Prior to 2020, remote work was not unheard of; however, it was not the norm it is presently. Accordingly, there are both worker-specific and business-specific considerations to which companies must pay attention.

From the worker end, companies must make sure that none of their monitoring equipment or systems unlawfully intrude on the worker's right to privacy. That level of privacy varies by state. In Texas, employers should adopt policies making it clear that the employee has no right to privacy on company equipment or systems, including phone, email, chat and voicemail.

From the company end, businesses must require and enforce adequate protections to ensure their confidential information and any trade secret material does not become compromised (either by accident or intent). This requires heightened attention to information security and meticulous enforcement of policies and practices for remote workers or those who regularly deal with such information outside of the confines of a business' physical premises.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Foreign (ie, non-US) workers looking to work in Texas are required to have some form of authorisation, which typically comes in the form of a work visa. There is a waiting list of more than a year for visa interviews in some countries. The USA is still feeling the effects of the COVID-19 pandemic-era state department shutdowns and this is expected to continue to be felt for the foreseeable future. Thus, employers must allow for a delay in the application process when arranging for their foreign workforce to start employment in the USA.

Additionally, many H-1B workers have taken advantage of the work-from-home opportunities in the past few years and have relocated to areas outside their approved H-1B locations without filing amendments to their H-1B petitions. This causes a change of status for employees and impacts the renewal of visas, requiring the

employees to return to their previous country. Identifying and remedying these issues far in advance of the renewal process may alleviate complications.

4.2 Registration Requirements for Foreign Workers

Apart from the application process with the United States Citizenship and Immigration Services (USCIS) for the applicable employment-based visa, the USA and Texas do not have requirements to register foreign workers.

5. New Work

5.1 Mobile Work

As the world continues to adapt after the pandemic and with new generations entering the workforce and management, remote or hybrid work is the expectation and norm in some industries. Although there are many benefits to remote work, certain legal issues that were not commonplace before have arisen during the past few years.

Accurate Logging of Hours by Remote Workers

As discussed in **1.3 Working Hours**, employers in Texas must track their hourly non-exempt employees' hours and pay them the proper wages, including overtime. Tracking hours can be challenging in a remote work setting, with employees having more freedom to multi-task work and non-work activities. Employers should establish policies regarding tracking and reporting hours and may want to implement software to monitor work hours if productivity seems to have dipped compared to hours worked. If software is implemented, employers should give notice to employees.

Duty of Employers to Ensure Safety of Remote Workers

It is an employer's duty to provide a safe work environment for their employees. But what if the work environment is now the employee's home or a shared office space? Employers should implement policies regarding locations for work, including policies that prohibit conducting work calls, meetings or emails while operating a vehicle or conducting non-work activities (eg, taking a work call while hiking). Additionally, employers may evaluate providing equipment that would prevent certain ergonomic issues.

Duty of Remote Workers to Report Any Change of Address

Remote workers sometimes do not see the importance in updating their employer as to where exactly they are working from. Although it may not matter if an employee works remote temporarily while visiting another state, there has been a sharp increase in government agencies finding that employers failed to register to do business in the proper state and did not pay the proper employment taxes because an employee moved to a state other than that which the employer had accounted for. This can also cause issues in workers' compensation, unemployment insurance, and other programmes run on the state level. Thus, it is important to have remote workers update or confirm their address on a biannual basis and have a policy that the employer must approve any move outside their current city by remote employees. Even an employee moving cities within the same state can have a detrimental impact – for example, a minimum-wage employee moving from Dallas, Texas (where the minimum wage is USD7.25 per hour) to Austin, Texas (where it is USD15 per hour) would not earn the applicable minimum wage as a result.

5.2 Sabbaticals

It is very uncommon in Texas for employers to have a sabbatical leave policy, except for some governmental employers. Rather, Texas employers are only required to provide unpaid leave for certain reasons, including for disabilities and serious health conditions and to care for newborn or adopted babies. Employers are given the option to approve leaves that do not fall under these laws, which some employers have opted for. In that instance, employers should have a carefully drafted leave policy that is uniformly applied to all employees so as to avoid claims of discrimination.

If an employee does take an extended leave of absence from work, without an agreement or policy otherwise, the employer has no obligation to return that employee to their position at the end of such leave. Additionally, employers would not be required to maintain certain benefits during the employee's absence.

5.3 Other New Manifestations

New work is a social concept that focuses on creating an environment where employees work to live rather than live to work. New work encompasses innovative approaches to work that address changing technologies, organisational structures, and employee expectations. Recent manifestations in this field reflect a shift towards more flexible, collaborative and technology-driven work environments.

The goals of new work initiatives are to:

- increase job satisfaction;
- improve quality of life;
- improve productivity;
- increase engagement levels;
- establish better working relationships with colleagues;
- provide more time for leisure and self-care activities outside work hours; and
- give better accessibility for neurodivergent employees.

Most recently, new work combines modern practices such as:

- flexible and remote work;
- desk sharing or unconventional office spaces; and
- flat hierarchies.

While most people understand flexible and remote work as it is, advances in virtual and augmented technologies to explore remote collaboration and training are expected. In other words, remote work may not feel so remote if employees can attend a virtual reality meeting with their colleagues.

Some cities and industries in Texas have embraced new work set-ups, while others show no signs of embracing the new trends. For those that are moving in the "new work" direction, it will be necessary to still maintain clear expectations of productivity, work quality, and standards of conduct. These details can get lost in the shuffle of new work arrangements, which will make documenting working hours and disciplining employees for not meeting expectations difficult.

6. Collective Relations

6.1 Unions

Unions in the USA surged during the Second Industrial Revolution in the late 1800s and early 1900s. However, in the 1970s and 1980s, the USA experienced the age of computers and a Presidential administration (under Ronald Reagan) that was largely anti-union. Between 1975

and 1985, union membership fell by five million. By the end of the 1980s, less than 17% of American workers were unionised. Until recently, unions were traditionally thought of as being only for the public sector or certain industries (eg, the airline, transit and automotive industries).

The current union activity in the USA is in markets and industries that have not traditionally been unionised – in particular, retail and hospitality. Recently, more than 200 Starbucks stores officially voted to unionise, according to the NLRB. First-ever unions have also been formed at an Apple Store in Maryland, Trader Joe's grocery store, and national retailer REI. What differentiates this union activity from previous union activity is that it is concentrated among young workers and sometimes college-educated young workers who feel over-worked, underpaid and over-educated for the jobs they have. Many have decided to band together to demand more. According to Gallup data from 2021, there is a 77% approval rate for unions among young adults aged 18 to 34.

Generally, the top reasons employees cite for joining a union are:

- "the company ignores my complaints and does not care about me";
- "my boss does not respect me";
- "the company does not care about safety";
- "I do not like my pay or benefits" or "I do not understand how pay and benefits are calculated and awarded"; and
- "my boss plays favourites and I am not treated fairly".

What the USA experienced immediately after the pandemic had not been seen for decades or maybe ever – employees are asking for more and they are, in many respects, controlling the market. This has tapered off a bit as experts predict a US recession; however, in the meantime, there has been a large resurgence of unions. Companies need to be aware of these issues and make sure that they are being addressed in the workplace. Even in states such as Texas that are largely anti-union, there is growing popularity for union organisation.

6.2 Employee Representative Bodies

Under the Biden administration, the NLRB has been more active and aggressive in pro-employee rulings. The National Labor Relations Act (NLRA) was passed by Congress in 1935 to encourage collective bargaining by protecting workers' full freedom of association. Although many have viewed the NLRA as antiquated because it protects union activity and organising efforts, there has been more NLRB activity with the new surge of organising efforts in the USA.

Even outside a unionised workforce, the NLRB safeguards employees' right to engage in protected concerted activity. This means that discussions or comments regarding wages, hours, working conditions, or other terms and conditions of employment by more than one employee – or by someone speaking on behalf of others – cannot be restricted and are protected under the NLRA. The NLRB has cracked down on company social media policies in recent years where these policies appear to restrict protected concerted activity by employees on social media.

In McLaren Macomb, Case 07-CA-263041, the NLRB ruled that an employer cannot demand that a laid-off employee refrain from publicly disparaging the company or otherwise keep confidential the terms of the employee's severance as part of a severance agreement. The NLRB decision overruled decisions of the board issued just a few years prior. Under the Biden admin-

istration, the NLRB reversed course and found that an employer's use of severance agreements that contain sweeping non-disparagement and confidentiality provisions interferes with a laid-off employee's Section 7 rights. In response to this ruling, employers using severance agreements with confidentiality and non-disparagement clauses should ensure the clauses are narrowly tailored and contain appropriate language to carve out conduct protected by Section 7 of the NLRA.

Companies from overseas expanding into the US market should be aware of these NLRA regulations and ensure that their policies – especially policies that might limit employees' ability to discuss wages and other terms of employment – are not restricted.

6.3 Collective Bargaining Agreements

Collective bargaining agreements are agreements between employers and representatives of their employees (eg, unions), which address the wages, hours and other conditions of employment.

Collective bargaining agreements exist and operate under the statutory framework established by the NLRA. Most collective bargaining agreements contain the following common elements:

- union recognition clause;
- management rights clause;
- union rights provisions;
- prohibits on strikes and lockouts;
- union security clause;
- non-discrimination provisions;
- grievance and arbitration procedures;
- provisions establishing the terms and conditions of employment;
- provisions addressing changes in the employer's business; and
- terms defining the scope of the agreement.

A collective bargaining agreement will typically require "just cause" (as defined in the agreement) for an employer to terminate employment. If the employee disputes that the employer had just cause, this will likely proceed under the grievance procedures until a determination is finalised.

7. Termination

7.1 Grounds for Termination

At-Will Employment

When facing termination of the employment relationship, companies should look to see whether the employee is party to any employment contract or collective bargaining agreement that governs the termination or the employment relationship itself. The default rule in 49 states (including Texas) is that employees are "at will", meaning the employee or the business can terminate the employment relationship for any reason or no reason at all, so long as the reason or no reason is not "illegal" – something that is typically tied to a protected classification.

Employment Contracts and Collective Bargaining Agreements

If there is an employment contract, the business must determine what steps – if any – are needed to end the relationship. By way of example, some employment contracts may require a severance payment or certain notice if the employee is terminated without cause (which should be defined in the agreement). A collective bargaining agreement will typically require "just cause" (as defined in the agreement) for an employer to terminate employment.

Best Practices to Minimise Risk

Assuming there is no contractual relationship or collective bargaining agreement with the employee that governs the termination, the employer should still ensure it has legitimate business reasons for the termination and no decision is tied to a protected classification or in response to a workplace complaint. If a protected classification listed in Section 7.5 is motivating the termination, liability could be found against the employer. There are many state and federal statutes that protect against discrimination, harassment and retaliation, which employers should heed.

The best defence against such a claim is to ensure that the employer documents important events during the entire employment relationship, such as discipline given, performance issues, absences/tardies, and verbal counselling provided. In Texas, there is no requirement that businesses use progressive discipline to coach an employee, but it can serve as a valuable legal defence against any claim of unlawful action.

Additionally, having clear and concise policies and guidelines (often found in an employee handbook) – in addition to appropriate non-disclosure and confidentiality agreements for private information – will help establish the rules and framework that will govern the employment relationship. Pay and position adjustments during the employee's tenure, as well as performance reviews, should likewise be documented. Perhaps the most significant defence to employment claims concerns the real-time documentation of performance or conduct issues of employees. Many employers opt to implement progressive discipline polices, which typically (albeit not in all cases) require levels of warning or addressing of the performance or conduct issue before an ultimate termination.

7.2 Notice Periods

In the absence of an employment contract, notice is not required for either an employee or employer to terminate the relationship. For employers who wish to get the "professionally courteous" two-week notice from their employees, the employer could pay out accrued and unused paid time off if the notice is given and worked or provide some other type of incentive. However, an employer cannot withhold any pay for hours or days already worked if an employee does not provide any notice of the decision to leave their employment.

7.3 Dismissal for (Serious) Cause

As discussed in **7.1 Grounds for Termination**, Texas does not require an employer to follow a progressive discipline policy. Accordingly, an employer can terminate the employment relationship for any reason or no reason at all, so long as the reason or no reason is not "illegal" – something that is typically tied to a protected classification.

However, an immediate termination can be viewed as a violation of anti-discrimination or anti-retaliation laws if the employer is not consistent in treating the preceding offence as grounds for immediate termination. By way of example, if one employee is terminated on the spot for workplace violence but another employee engaged in substantially similar violence and was not terminated a few months prior, the terminated employee may have grounds to claim discrimination. Accordingly, it is imperative that an employer is consistent in how it applies its discipline and termination policies, especially in the case of an immediate termination.

7.4 Termination Agreements

Severance agreements are frequently used by Texas employers to obtain a release of any claims

the employee may have against the employer. Severance agreements must follow the typical contract rules, such as having consideration (the severance payment), being in writing, and being agreed to (the signature).

Limitations to Severance Agreement

There are certain claims that cannot be released in a severance agreement, such as the employee's right to:

- be paid for hours worked or business expenses incurred prior to the termination;
- bring an administrative charge;
- file for unemployment benefits; or
- file for workers' compensation benefits.

Additionally, the NLRB has instructed that any confidentiality and non-disparagement clause in a severance agreement must be narrowly tailored and provide appropriate language to carve out conduct protected by Section 7 of the NLRA.

Employees Over Age 40

If the severance agreement is for an employee who is over the age of 40 by the time they are presented with the severance agreement, the employer must ensure that the severance complies with the Older Workers Benefit Protection Act. This includes:

- ensuring the agreement is clear and understandable;
- refers to the Age Discrimination in Employment Act and the employee's right to waive their claims under it;
- advising the employee to consult with a lawyer before signing; and
- providing at least 21 days (45 days if a group termination) before signing and seven days to revoke their signature after signing.

If it is a group termination, employers must provide employees over the age of 40 included in the group termination with information about the factors that determine eligibility, the ages and job titles of employees who were laid off, and the ages and job titles of employees who were not laid off.

7.5 Protected Categories of Employee

Applicants, employees and former employees are protected from employment discrimination based on:

- race;
- colour;
- religion;
- sex (including pregnancy, sexual orientation, or gender identity);
- national origin;
- age (40 or older);
- disability; and
- genetic information (including family medical history).

Such protected classification cannot be used when determining any term or condition of employment, including hiring, promotion, pay rate, and termination.

Texas law provides that if the same person that hired the employee is the decision-maker with regard to the termination, there is a presumption that no discrimination occurred. The reasoning being that the choice to hire the person shows no animus towards their protected class. Of course, this presumption would not apply if the employee's inclusion in a protected category begins while in employment, such as becoming pregnant, turning 40, or developing a disability.

In recent years, there has been an increase in claims alleging "reverse discrimination" filed by

non-minority employees, claiming a minority group or employee is getting preferential treatment and that the non-minority is thereby being discriminated against. Thus, it is critical for an employer to ensure that its policies with regard to hiring, promotion, pay rates, discipline and terminations are applied in a consistent manner without regard for such protected classes.

8. Disputes

8.1 Wrongful Dismissal

Wrongful termination claims are typically split into two groups:

- wrongful termination in breach of an employment agreement that limits the employer's ability to dismiss the employee except for certain reasons; or
- wrongfully dismissing an employee for an unlawful reason, such as discrimination or retaliation.

Contractual Claims

When an employer chooses to enter into an employment agreement that sets out a specific term of employment and the circumstances under which the employee and employer can end the relationship, dismissal is typically referred to as termination "for cause". In such situations, disputes arise concerning:

- whether proper cause was present to end the employment;
- whether the terminating party followed all the requisite steps to terminate the employment; and/or
- whether any severance is required.

These disputes are highly variable depending on the contract language, including the remedies set out in the agreement. The main remedy is typically the "benefit of the bargain" or what the party would have received had the breach not occurred. Additionally, in some situations, the prevailing party will be entitled to their attorney's fees incurred.

Discrimination and Retaliation

Unlike contractual reasons, most employees in Texas have the right to not be terminated from their employment for discriminatory or retaliatory reasons. The details of a discrimination claim are outlined in **8.2 Anti-discrimination**.

For retaliation, an employer is prohibited from terminating an employee because the employee opposed an unlawful employment practice or made a charge, testified, or assisted in an investigation into an unlawful employment practice. This is referred to as "protected activity". However, not all employment complaints are protected activities that give rise to a retaliation claim. Rather, the complaint, charge, or opposition must be about an action that the employee reasonably believed violated an employment law. By way of example:

- if an employee reports to HR that they believe they did not receive a promotion because of their race, and points to instances of disparate treatment leading up to the promotion, this would likely qualify as protected activity because such alleged discrimination would be unlawful; but
- if an employee complains to their boss that a colleague called them a curse word but does not relate the curse word to the employees' protected class, this would likely not qualify as protected activity because it is not unlawful or a colleague to be rude.

After showing they engaged in protected activity, the employee must also show that – "but for" the protected activity – they would not have been terminated.

If an employee is successful in proving retaliation, the employee can recover:

- the wages and value of benefits the employee would have earned if not for the retaliation;
- mental anguish damages;
- attorney's fees; and
- punitive damages if the employee can show the discrimination was intentional and malicious.

8.2 Anti-discrimination

Applicants, employees, and former employees are protected from employment discrimination based on race, colour, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, age (40 or older), disability, and genetic information (including family medical history).

For each type of discrimination, the employee must prove a different set of elements. However, most require the employee to show:

- that the employee is in one of the protected classes;
- that the employee was qualified for the job they had or applied for;
- that they experienced an adverse employment action (eg, termination, suspension without pay, or severe harassment); and
- that the adverse employment action was due to their protected class.

Once the employee shows this, the employer must be able to articulate a legitimate, non-discriminatory reason for the adverse employment action. If able to do so, the burden shifts back on to the employee to prove that the adverse employment action was in fact due to the employee being in the protected class and not only due to the legitimate, non-discriminatory reasons.

If an employee is successful in proving discrimination, the employee can recover:

- the wages and value of benefits the employee would have earned if not for the adverse employment action;
- mental anguish damages;
- attorney's fees; and
- punitive damages if the employee can show the discrimination was intentional and malicious.

8.3 Digitalisation

Since the pandemic, the manner in which employment disputes play out in Texas has remained almost unchanged. Although Texas courts may entertain certain preliminary hearings via video conference, most are requiring all hearings and proceedings to be conducted in person, including the final trial. Even in arbitration, discussed further in **9.2 Alternative Dispute Resolution**, arbitrators are requiring final hearings to be conducted in person. However, courts and arbitrators alike are increasingly approving certain out-of-town witnesses to testify remotely by video conference, and jurors are more open to receiving such testimony.

One aspect of employment litigation that there has not been a quick return to in person is the pre-hearing mediations conducted. Mediation is the parties' chance to have settlement discussions with a third-party neutral who assists in the negotiations. Prior to the pandemic, mediations typically occurred in the mediator's office and

both parties travelled in for the meeting. However, mediations have largely remained remote, with both parties conferencing via video. In fact, some mediators have chosen to only offer remote proceedings. This is beneficial in keeping the cost of mediation down and being more efficient, but some larger disputes may warrant an in-person mediation in order to conduct the necessary negotiations.

9. Dispute Resolution

9.1 Litigation

In Texas, as in other states, a class action is a legal procedure that allows one individual or more to sue on behalf of a larger group of individuals who have similar claims. For employment claims, this could involve issues such as wage and hour violations, discrimination, or wrongful termination.

Eligibility for a Class Action

To proceed with a class action, the claim must meet certain criteria, as follows.

- Numerosity – the class must be so large that individual lawsuits would be impractical.
- Commonality – there must be common legal or factual issues that affect all class members.
- Typicality – the claims or defences of the representative parties must be typical of the claims or defenses of the class.
- Adequacy – the representative parties must fairly and adequately protect the interests of the class.

Filing a Class Action

The procedure for filing a class action is as follows.

- Complaint – the process begins when a plaintiff (or a group of plaintiffs) files a complaint in court, outlining the claims against the employer.
- Certification – the court must certify the class before it can proceed as a class action. This involves a hearing where the judge will evaluate whether the case meets the requirements for class action status discussed above.
- Notice – once the class is certified, notice is generally sent to all potential class members informing them of the class action and their rights.

Types of Employment Claims Suitable for Class Actions

Common employment issues that might be addressed in a class action include:

- wage and hour claims – allegations of unpaid overtime, misclassification of employees as exempt, or other wage violation;
- discrimination – claims of systemic discrimination based on race, gender, age, disability, or other protected characteristics; and
- unlawful termination – cases where multiple employees claim they were wrongfully terminated under similar circumstances.

In class actions, it is crucial to have experienced legal representation. Attorneys specialising in employment law and class actions can help navigate the complexities of the case, including certification, litigation, and settlement negotiations.

9.2 Alternative Dispute Resolution

With a well-written agreement, most Texas courts are quick to enforce an arbitration agreement signed by the employee. If the employee signs electronically, it is important to provide the agreement in a secure fashion and save certain

signature authorisation data from the e-signature. These agreements are typically entered into as part of the employee's hiring paperwork and can apply to any future claim arising from the employee's employment, with the exception of certain claims (eg, sexual harassment claims and workers' compensation claims).

At the federal level, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) came into effect on 3 March 2022. Under this law, an employer cannot mandate forced (confidential) arbitration of claims related to sexual harassment and sexual assault. It also renders class action waivers of sexual harassment and sexual assault claims unenforceable.

If the agreement includes a provision that requires mediation prior to filing a lawsuit or arbitration, this will also typically be enforced by Texas courts.

9.3 Costs

Under applicable Texas and federal law, employees are entitled to their attorney's fees and costs if they prevail on claims of discrimination, harassment and retaliation, hostile work environment claims, or claims that they were not paid the proper overtime or minimum wage. However, employers who successfully defend against such claims typically have no claim for their fees unless they can show that the employee brought it in bad faith, which Texas courts have held to be a very high – nearly impossible – standard.

Employees are also entitled to their attorney's fees and costs if they are successful on a breach of contract claim, which typically arises when an employee claims they were not paid properly under their employment contract before or after termination. In these cases, if an employer successfully defends itself, it can typically recover attorney's fees.

Trends and Developments

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Bell Nunnally & Martin has a record of success spanning more than four decades. It is among the most-respected business law firms in Texas and one of the 25 largest in North Texas. The firm provides a full range of services, including litigation, appellate law, commercial finance, corporate and securities, creditors' rights, bankruptcy, health law, IP, immigration, real estate, entertainment, M&A, tax, white-collar criminal defence, and labour and employment. Bell Nunnally's employment attorneys advise business owners and HR professionals in navigating the day-to-day maze of federal and state employment laws in Texas and across the USA. Given that employment problems can – and frequently do – turn into administrative charges or lawsuits, Bell Nunnally's employment lawyers are skilled advocates before US agencies and in the courtroom. The lawyers have litigated virtually every type of labour and employment case. Such considerable trial experience provides unique insights with which to advise employers on the steps needed to avoid litigation.

Author

Alana Ackels of Bell Nunnally & Martin advises employers on how to minimise risk, protect their businesses, and navigate the multitude of compliance obligations governing the employer-employee relationship. She advises business leaders and HR teams on how to minimise litigation risks and prepares employment agreements, confidentiality agreements, non-compete agreements and employee handbooks, as well as other policies that mitigate risk for employers. Alana has extensive experience of litigating disputes in state and federal courts, as well as experience in arbitration. She routinely defends employers against Equal Employment Opportunity Commission charges, trade secret litigation, non-compete matters and wage and hour claims, as well as claims involving discrimination, harassment and retaliation, and wrongful termination.

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Restrictive Covenant Trends

The overarching term "restrictive covenant" typically refers to multiple types of agreements between an employer and a worker all aimed at protecting a business' confidential information, special relationships, and good will. These covenants include non-disclosure agreements, non-compete agreements, and non-solicitation agreements. Non-disclosure agreements are generally found to be a valid enforceable mechanism to protect businesses, but certain laws require that workers retain certain reporting rights, such as the right to report securities fraud or the right to report workplace misconduct.

During the past few years, non-compete agreements have come under strict scrutiny by courts and legislatures across the USA. Many states have implemented outright bans on all non-competes, whereas others have implemented industry bans for certain professions, imposed pay thresholds to prevent the imposition of a non-compete on low-wage earners, or imposed other compliance requirements (eg, garden leave or notice requirements).

While non-competes continue to be enforceable in Texas (unless pre-empted by federal law, as discussed later), some companies are trending towards the removal of non-compete agreements and the imposition of strict non-disclosure and non-solicitation agreements instead.

Non-disclosure agreements in Texas

Texas courts generally recognise the ability of a business to protect its confidential information, which can be defined by the company in a non-disclosure agreement. These agreements can be broad and last in perpetuity, unlike non-competes and non-solicits, which must be limited in duration as set forth infra.

Even in the absence of a contract agreement to keep a company's information confidential, a company may still be able to avail itself of protections if the information they are trying to protect qualifies as a trade secret. Texas has adopted the Texas Uniform Trade Secret Act (TUTSA). TUTSA defines a "trade secret" as "information – including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers – that:

- derives independent economic value (actual or potential) from not being generally known to – and not being readily ascertainable by proper means by – other persons who can obtain economic value from its disclosure or use; and
- is the subject of efforts that are reasonable under the circumstances to maintain its secrecy".

The second point is often what companies cannot prove in litigation. It is critical that the company can show it has taken reasonable measures to protect the information at issue. By way of example, is it saved on a locked drive with limited access? Has the information only been disseminated to a limited number of people? If a business wants to avail itself of the protections under TUTSA, it must take steps to ensure that it is trying to maintain the secrecy of the information.

TUTSA allows businesses to seek injunctive relief in the event of misappropriation of a trade secret, but also in the event of threatened misappropriation. A business may recover actual damages from the breach, exemplary damages (up to two times the actual damages), and their reasonable and necessary attorney's fees.

Non-compete agreements in Texas

In Texas, non-compete agreements are governed by Section 15.50 of the Texas Business and Commerce Code. Under this provision, a covenant not to compete is enforceable if it:

- is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made;
- contains limitations as to time, geographical area, and scope of activity to be restrained; and
- the limitations are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the company.

Typically, the payment of money cannot form the consideration for a non-compete agreement. It must have some special, unique consideration, such as access to confidential information, specialised training, investment of the company's business goodwill, or equity.

Enforcement

In enforcement actions, courts scrutinise the reasonableness of the time, geography, and scope of the activity prohibited in relation to the business interests the company is trying to protect. By way of example, if a salesperson was assigned the Dallas, Fort Worth market as their sales territory, then a non-compete preventing the salesperson from working in Houston would likely be found to be over-broad. However, if a salesperson was assigned all of Texas as their market (and did in fact market and converse with customers across the state), then a non-compete preventing the salesperson from working anywhere in the state would likely be upheld as reasonable. Non-competes should be tailored to the job the employee is performing for the company and the relevant business interests the company is trying to protect.

The damages typically available to a business enforcing a non-compete include injunctive relief and lost profits that result from the breach. Most non-compete cases focus on enjoining the conduct at issue to protect the business.

Reformation

If a court finds that a non-compete is over-broad then it must reform and narrow the agreement to make it enforceable. This is called "blue pencil-ing". However, if the court has to blue pencil the non-compete then the party seeking to enforce the non-compete may not recover money damages and is limited to injunctive relief.

Additionally, if the court finds that the business knows at the time it imposed the non-compete that it was more broad than necessary to protect its business interests, then the court may award the employee their costs and reasonable attorney's fees incurred in defending the action to enforce the non-compete.

Physicians

Special rules apply to non-competes governing physicians in the State of Texas. A covenant not to compete relating to the practice of medicine is only enforceable against a licensed physician if the covenant complies with all the following requirements.

- The non-compete may not deny the physician access to the list of patients whom the physician saw or treated within the year immediately preceding termination of the contract or employment.
- The non-compete must provide access to medical records of the physician's patients upon authorisation from the patients.

- The non-compete must provide that patient lists or medical records can be provided in the format in which they are normally maintained, unless the parties agree otherwise.
- The non-compete must provide for a buyout of the covenant by the physician at a reasonable price or at a price determined by an arbitrator.
- The non-compete must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.

The buyout clause for a non-compete is unique to physicians in Texas. Often, this buyout amounts to the equivalent of one to two years of the physician's earnings.

Sale of a business

Although outside the scope of this employment-related article, it is important to note that non-competes in the context of a sale of business are given much greater deference in Texas. These non-competes are allowed to be much more broad than non-competes in the employment context.

Possible nationwide ban on non-competes

On 23 April 2024, the United States Federal Trade Commission (FTC) announced a nationwide ban on nearly all non-competes. According to the FTC's estimates, one in five (ie, nearly 30 million) US workers are subject to non-competes. The FTC's unprecedented ban will therefore have a massive impact on the contractual rights and obligations and recruiting and retention strategies of employers and employees across the country and create a tidal wave of litigation.

The FTC rule is a nationwide ban of non-competes for all workers after 4 September 2024 (effective date). As discussed below, the FTC rule was recently blocked by a Texas judge.If the rule goes into effect following the appeals process, after the effective date, it will be an unfair method of competition – and therefore a violation of Section 5 of the FTC Act – for employers to enter into non-competes with workers.

The enforceability of a non-compete that existed before the effective date of the final rule is dependent on whether the non-compete involves a "senior executive".

For workers classified as "senior executives", existing non-competes will remain in full force and effect, subject to existing state laws. "Senior executives" are defined as workers earning more than USD151,164 annually who are in a "policy-making position". Even though the term leaves some room for interpretation, it appears to cover only the highest-level decision-makers in an organisation with "policy-making authority".

Existing non-competes with workers other than senior executives will not be enforceable after the effective date. The FTC estimates that fewer than 1% of workers will be classified as senior executives. Not only will these agreements be rendered useless upon the effective date, but employers must also proactively provide workers with existing non-competes with written notice that their non-competes are no longer enforceable by the effective date, if the FTC rule ever goes into effect.

The FTC rule includes exceptions for "bona fide sales of business" and "existing causes of action". Specifically, the FTC rule provides that its requirements shall not apply where:

- a non-compete clause is entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets; and/or
- a cause of action related to a non-compete clause accrued prior to the effective date.

Non-solicitation clauses are not expressly covered by the FTC rule.

Lawsuits have been filed to block the ban and, in August 2024, a Texas judge issued a ruling blocking the FTC rule across the country. The ruling will likely be appealed and, if the FTC rule goes into effect, nearly all non-competes across the USA in the employer-employee context will be invalidated. Practitioners should follow this litigation closely before advising clients on non-compete matters at the state level.

Non-solicitation Agreements in Texas

Non-solicitation agreements are often referred to as non-competes, but the two are not synonymous. Whereas a non-compete prohibits an employee from working elsewhere (within certain temporal, geographic and industry limitations), a non-solicit allows the employee to work anywhere but prohibits the employee from soliciting certain categories of people – typically the people they worked with during their employment (including employees, vendors, contractors, customers and investors).

In Texas, non-solicits are treated very similarly to non-competes in terms of enforcement. They must be reasonable in time, geography and scope and narrowly tailored to protect the business interest at issue. Practitioners should tie the non-solicit to the relationships at risk that they are trying to protect. By way of example, the non-solicit could prevent a departing employee from taking their team with them – although a court may not enforce a non-solicit that prohibits the hiring of any person who works for the company, even if they never spoke to or interacted with the departing employee. Such a broad non-solicit could run afoul of antitrust rules.

There is a growing trend in Texas and many other states to remove non-competes from agreements and rely on non-solicits to protect the applicable business interest. In other words, the employee can go work wherever they want, but they cannot solicit the company's employees, customers, etc.

Non-solicitation agreements are not subject to the FTC ban on non-competes, which is set to take effect on 4 September 2024, if it is not enjoined.

Conclusion

Restrictive covenants have always been a critical tool used by companies to protect their businesses, their information, their special relationships, and their goodwill. They are a critical aspect in mitigating risk for any company. However, this area of the law is changing and evolving rapidly across the country. Businesses and practitioners from other jurisdictions should always check federal and state laws related to the use of non-disclosure agreements, non-compete agreements, and non-solicitation agreements in the employment and independent contractor contexts. There is an emerging trend for regulation in this arena that requires constant examination.

ZIMBABWE

Law and Practice

Contributed by:
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Wintertons

Contents

Wintertons has a labour and employment team of four legal practitioners. The team represents clients in a full array of employment-related matters, including ADR, litigation, drafting and reviewing employment contracts, handbooks and policies, disciplinary and grievance procedures, collective bargaining negotiations with unions and employee representatives, retrenchments, wrongful terminations and dismissals, and training management on how to identify and avoid disputes.

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1. Employment Terms

1.1 Employee Status

Zimbabwean law does not utilise the terms "blue-collar" and "white-collar" when classifying workers. There is a distinction between managerial and non-managerial employees, however, which is recognised by statute. Non-managerial employees are generally subject to industry-level collective bargaining agreements (CBAs), whereas managerial employees are rarely subject to CBAs. CBAs regulate the terms and conditions of employment, such as grading, wages, benefits and working hours. They also prescribe the minimum wage that is applicable to each grade.

The term "non-managerial employee" can apply to both blue-collar and white-collar employees – for instance, the non-managerial employees in an agricultural enterprise may comprise general labourers (blue-collar workers) and clerical staff (white-collar workers). Although the distinction is not explicitly recognised at law, the grading system is implicitly aware of the distinction. Unskilled labour is generally placed in the lowest grades with the least pay.

In addition to the distinction between managerial and non-managerial employees, employment contracts are categorised along the lines of:

- whether the contract is for an indefinite period or for a fixed term;
- whether it is seasonal or casual; or
- whether it is for hourly work.

These different types of contracts are discussed in greater detail in **1.2 Employment Contracts**.

1.2 Employment Contracts

The following are the main types of employment contracts.

- Contracts without limit of time – these employment contracts are open-ended and do not have a termination date. They are otherwise referred to as "permanent" contracts.
- Fixed-term contracts – these are employment contracts for a fixed duration (ie, they have a fixed start and end date).
- Contracts for hourly work – these are employment contracts whereby an employee is paid only for the hours that the employee actually works (see **5.3 Other New Manifestations** for further detail).
- Casual work contracts – these are contracts for work for which an employee is engaged for not more than a total of six weeks in any four consecutive months. An example of a casual contract is a contract for off-loading delivery trucks as and when the work is available.
- Seasonal work contracts – these are contracts relating to work that is, owing to the nature of the industry, performed only at certain times of the year. An example of seasonal labour is planting or harvesting crops.
- Apprenticeship contracts – these provide on-the-job training and have a stipulated start and end date.

A contract of employment does not have to be in writing. In terms of Zimbabwean law, oral contracts are valid and enforceable. However, Section 12(2) of the Labour Act (Chapter 28.01) obliges the employer to inform an employee in writing of the following particulars upon engagement:

- the name and address of the employer;
- the period, if limited, for which the employee is engaged;
- the terms of probation, if any;
- the terms of any employment code;

- the employee's remuneration, its manner of calculation and the intervals at which it will be paid;
- the hours of work;
- any bonus or incentive production scheme;
- vacation leave and vacation pay; and
- any other benefits provided under the contract of employment.

1.3 Working Hours

Hours of Work

Maximum working hours are generally regulated under the relevant CBA. In the absence of an applicable CBA, the employee should be informed of the ordinary hours of work within the context of Section 12(2)(g) of the Labour Act, which is referred to in **1.2 Employment Contracts**.

Generally, employees work an eight- or nine-hour day, with shift workers in some industries working up to 12 hours per day. In terms of Section 14C of the Labour Act, an employee must have at least 24 hours of continuous rest per week. Employers may permit their employees to work on a flexitime basis. This is, however, not regulated.

Contracts of employment for part-time workers must stipulate the hours that they are required to work per day, week or month, as well as the applicable remuneration. As mentioned in **1.2 Employment Contracts**, employers and employees may also enter into contracts for hourly work – under the terms of which the employee will be paid only for the hours actually worked (see **5.3 Other New Manifestations** for further detail).

Overtime

Overtime for employees who are subject to a CBA is regulated in terms thereof. In some industries, the employer may compel its employees to work overtime, whereas in others the employer may only ask its employees to do so. Managerial employees are generally not entitled to overtime pay unless the employment contract provides for it.

Overtime pay is usually calculated at a rate that is higher than the ordinary hourly wage – in some cases, it is up to double the regular hourly wage. Employees in some industries may also be compensated for overtime by way of time off corresponding to the overtime worked, calculated at a rate that is generally higher than the actual overtime worked.

1.4 Compensation

Section 20 of the Labour Act empowers the government minister responsible for the administration of the Labour Act to promulgate a statutory instrument specifying minimum wages and benefits for any class of employees in any undertaking or industry.

The Labour (Specification of Minimum Wages) Notice 1996 (Statutory Instrument 70 of 1996) was gazetted in accordance with and to give effect to Section 20 of the Labour Act. In terms thereof, the minister specifies the minimum wage that should be paid to certain groups of employees, with the exception of:

- employees who are subject to a National Employment Council agreement;
- employees in the agricultural sector; and
- domestic workers.

The minimum wage was last reviewed by Statutory Instrument 101 of 2022, which came into effect on 20 May 2022.

In addition to Section 20 of the Labour Act, Section 74(2) of the same act allows registered trade

unions and registered employer organisations or federations thereof to negotiate and agree on rates of remuneration and minimum wages for different grades and types of occupations. The resultant agreed wages are recorded in industry- or sector-specific CBAs. Those CBAs made under Section 74 of the Labour Act are binding on all employers and employees in the sector or industry to which the agreements relate.

Neither the Labour Act nor the Minimum Wage Regulations make it compulsory for employers to pay a bonus or 13th-month salary. However, some CBAs – such as the CBA for the Banking Undertaking (SI 273/00) – make it compulsory for employers to pay a 13th-month bonus. In all other cases, the entitlement to a bonus is a discretionary matter that is regulated by the terms of the contract between the parties.

1.5 Other Employment Terms

Vacation Leave

Under the terms of Section 14A of the Labour Act, an employee who would have completed their first year of service with an employer is entitled to fully paid vacation leave at the rate of one calendar month per year or two-and-a-half days per month. An employee who has no accrued vacation leave may take unpaid vacation leave.

Special Leave

An employee is entitled to paid special leave not exceeding 12 days per calendar year under the terms of Section 14B of the Labour Act. An employee may be allowed to take special leave for the following reasons:

- certified contact with an infectious disease;
- a subpoena to attend any court in Zimbabwe as a witness;
- to attend as a delegate and office-bearer any meeting of a registered trade union that represents employees within the undertaking or industry in which the employee is employed;
- when detained for questioning by the police;
- the death of a spouse, parent, child or legal dependant; or
- on any justifiable compassionate ground.

Weekly and Public Holiday Rest

Under Section 14C of the Labour Act, an employee is entitled to at least 24 hours of continuous rest per week. An employee is also entitled to a leave of absence on public holidays. If they consent to work on public holidays, they will be entitled to at least double their ordinary daily remuneration rate.

Maternity Leave

Female employees are entitled to fully paid maternity leave for a period of up to 98 days under the terms of Section 18 of the Labour Act. An employee who requires maternity leave that exceeds the prescribed limit may be granted unpaid maternity leave. Zimbabwean law does not provide for paternity leave.

Sick Leave

A sick employee is defined as a person who is prevented from attending duties because of illness or injury, or who is undergoing medical treatment. The illness should be certified by a registered medical practitioner.

Under the terms of Section 14 of the Labour Act, a sick employee is entitled to 90 days of fully paid sick leave per year, as well as a further 90 days of sick leave on half pay. If the medical condition persists thereafter, the employer is entitled to terminate the employment contract by reason of the employee's incapacity.

Confidential Information

There is nothing in the Labour Act that regulates the disclosure of confidential information. This is regulated by the common law, which generally prohibits an employee from disclosing confidential information without authorisation from the employer. Employers are also at liberty to include a confidentiality clause in their employment contracts.

Non-disparagement

The Labour Act does not prohibit employees from speaking negatively about the employer, its products or its services. The employee's duties at common law, however, imply a duty to further the employer's best interests and avoid bringing the employer into disrepute. The contract of employment may, at the parties' election, also contain a non-disparagement clause. In addition, some employment codes of conduct make it an offence to say or do anything that brings the employer into disrepute.

An employee who speaks negatively about the employer, its products or its services may – in addition to facing disciplinary action – face a claim for damages. Such a claim would not be subject to any limitation of liability, unless the contract of employment provides otherwise.

2. Restrictive Covenants

2.1 Non-competes

A non-compete clause is generally enforceable if it is reasonable and not contrary to public policy. A non-compete or restraint of trade clause will usually affirm that the employee accepts that the restraint is reasonable, both in scope and duration.

It is not a legal requirement that restrictive covenants be accompanied by independent consideration for the same. Resultantly, employees do not generally receive compensation in return for entering into non-compete agreements with their employers.

An employee who breaches a non-compete clause may be subject to a claim for damages by the employer. The onus of proving the quantum of such damages lies with the employer, unless the quantum of the same is specified in the non-compete clause.

2.2 Non-solicits

Clauses that prohibit an employee from contacting the employer's customers following the termination of the contract are a common feature of employment contracts. Non-solicitation clauses in relation to fellow employees are less common.

Non-solicitation clauses are generally enforceable, and – in the event of breach – the employer may make a claim for damages. Such damages may be quantified with reference to the business lost as a result of the breach. The damages may also be liquidated – that is, a certain sum may be stipulated in the contract as comprising the damages due in the event of breach by the employee. In addition to making a claim for damages, the employer may also seek an order prohibiting the former employee from soliciting its customers or employees.

3. Data Privacy

3.1 Data Privacy Law and Employment

The general position is that employee data collected by the employer should be treated as confidential and only used for the purposes for

which it was collected. Employee data should be collected with the employee's consent.

In addition, the collection, processing and storage of employee data is governed by the Cyber and Data Protection Act (Chapter 12:07) – according to which, a data controller is required to ensure that:

- the processing of data is necessary; and
- data is processed fairly and lawfully.

Within the employment context, sensitive data may be processed without the data subject's consent if the processing is necessary to carry out the obligations and specific rights of the controller in the field of employment law. Sensitive data is defined in the Cyber and Data Protection Act as (among other things) the racial or ethnic origin, political or religious affiliations, criminal history, or sex life of the data subject.

Employees, however, have the right to privacy. This is enshrined in Section 57 of the Constitution of Zimbabwe, which is used to prohibit an employer from breaching an employee's right to communications privacy and their right not to have their medical information disclosed.

4. Foreign Workers

4.1 Limitations on Foreign Workers

The Zimbabwe Investment and Development Agency Act (Chapter 14.38) permits foreign investors to employ senior expatriate staff in the capacity of a senior manager, technical and operational expert or adviser. There is no prohibition against employing foreigners under any other law, subject to the requirement that such foreign employees should be lawfully resident in Zimbabwe and in possession of an employment permit as required by the Immigration Act (Chapter 4.02) (as read with the Immigration Regulations (Statutory Instrument 195 of 1998)).

4.2 Registration Requirements for Foreign Workers

An employer who wishes to employ a foreign national is required to apply for the issuance of a temporary employment permit to the foreign national under Section 22 of the Immigration Regulations (Statutory Instrument 195 of 1998). The application for the employment permit should be accompanied by:

- a job offer from the employer;
- the prospective employee's educational and professional qualifications; and
- proof of the prospective employee's work experience.

The temporary employment permit will be issued for a period not exceeding five years.

5. New Work

5.1 Mobile Work

There are no restrictions on mobile work, which remains unregulated. However, in terms of data protection, the Cyber and Data Protection Act (Chapter 12:07) governs the storage and processing of data – not only by a data controller who is physically present in Zimbabwe but also by a data controller who is not permanently established in Zimbabwe – if:

- the means used for processing or storing the data, whether electronic or otherwise, is located in Zimbabwe; and
- such processing and storage is not for the purpose of the mere transit of data through Zimbabwe.

As regards occupational safety and social security, the National Social Security Authority Accident Prevention and Workers' Compensation Scheme (Prescribed Matters) Notice 1990 (Statutory Instrument 68 of 1990) excludes outworkers – defined as persons to whom articles or materials are given out by an employer to be made up, cleaned, washed, ornamented, finished, repaired, or adapted for sale on premises not under the control of the employer – from the definition of "worker". The result is that such workers are excluded from the scheme established under the Regulations for the compensation of workers who sustain injuries arising from their work or who contract diseases during the course of performing their work.

5.2 Sabbaticals

Zimbabwean legislation does not utilise the term "sabbatical". However, under Section 25A of the Labour Act (Chapter 28:01), the works council may negotiate the terms on which paid educational leave may be granted to employees – whereas, under Section 74 of the Labour Act, the same negotiations may be carried out at employment council level. There is no legislative regulation of other forms of sabbatical leave, meaning that any such leave will be subject to the terms of the employment contract as a result.

5.3 Other New Manifestations

Section 18A of the Labour Act (Chapter 28:01) as amended by the Labour Amendment Act 2023 (No 11), which was gazetted on 14 July 2023, introduces the concept of contracts for hourly work. As mentioned throughout **1. Employment Terms**, under such contracts, an employee will be paid only for the hours actually worked – provided that their remuneration in any consecutive two-month period does not amount to less than the prescribed minimum monthly wage for the type of occupation in which the employee is engaged. In addition, the employer may not prohibit the employee from working for another employer during the time when the employee is not in fact engaged by the first-mentioned employer.

6. Collective Relations

6.1 Unions

Under Section 27 of the Labour Act, any group of employees may form a trade union, which will become a body corporate capable of suing and being sued in its own name upon its registration.

The role of trade unions is generally to represent the interests of its members in matters relating to their employment. The rights that are granted to trade unions under Section 29(4) of the Labour Act include:

- the right of access to employees for the purposes of advising them on how the law relates to their employment, assisting them to form workers' committees and ensuring that their rights are observed;
- the right to be provided by employers with the names and other relevant details of their members;
- the right to make representations to a determining authority or to the labour court;
- the right to form or be represented on any employment council; and
- the right to recommend collective job action.

6.2 Employee Representative Bodies

Workers' Committees

Workers are represented in the workplace by workers' committees. These are composed of employees that have been elected or appointed to the workers' committee by their fellow

employees. It is not mandatory that there be a workers' committee in every undertaking.

Managerial employees may not be elected or appointed to a non-managerial employees' workers' committee and vice versa. Employees are entitled to assistance from a labour officer or a trade union when setting up the workers' committee.

Employers are under a legal obligation to negotiate in good faith with the workers' committee.

As set out in Section 24 of the Labour Act, the functions of a workers' committee are:

- to represent the employees in any matters affecting their rights and interests;
- to negotiate a CBA with the employer concerning the terms and conditions of employment;
- to recommend collective job action to the employees; and
- to represent the employees at works council level.

Works Council

The works council is a workplace forum made up of equal numbers of workers' committee members and managerial representatives. It exists in order to allow employer and employee representatives alike to discuss issues relating to employee welfare, productivity, workplace safety, among other things. The role of the worker representatives in the works council is to represent and advance the interests of the workers.

6.3 Collective Bargaining Agreements

The two types of CBAs recognised under Zimbabwean law are:

- CBAs negotiated between the workers' committee and the employer under the terms of Section 24 of the Labour Act; and
- CBAs negotiated between a registered trade union and a registered employer organisation.

Workplace-Level CBAs

CBAs that are negotiated between the employer and the workers' committee may address the terms and conditions of employment for employees who are represented by the workers' committee. They are subject to ratification by at least 50% of the employees and by whichever trade union is mandated to represent the employees. They are binding only on the employer concerned.

In the case of conflict between a CBA negotiated by the workers' committee and one negotiated between an employer's organisation and a registered trade union, the latter prevails unless the former has more favourable conditions.

Industry-Level CBAs

CBAs between employer organisations and registered trade unions are negotiated at National Employment Council level. They may regulate any conditions of employment, including working hours, overtime, leave entitlement, health and safety standards, and minimum wages and benefits.

Industry-level CBAs must be registered and published as statutory instruments, thereafter becoming binding on all the employers and employees in the industry or sector to which the agreement relates. The provisions relating to minimum wages and benefits are reviewed regularly – in some cases, several times per year.

7. Termination

7.1 Grounds for Termination

Termination/Dismissal

Zimbabwean law creates a distinction between termination and dismissal. Although dismissal for misconduct is a form of termination, it is distinct from other forms of termination and is governed by a separate set of rules.

In the absence of misconduct, an employment contract may be terminated either:

- by mutual agreement;
- through the employee's resignation;
- as a consequence of retrenchment; or
- through retirement.

Dismissal for misconduct is permitted only where it is effected according to the terms of an employment code of conduct or – in the absence of an employment code of conduct – under the national employment code of conduct. The applicable code of conduct will define what constitutes misconduct on the part of an employee. It is, however, accepted that codes of conduct do not contain an exhaustive list of offences and that some acts of misconduct may be determined from the common law or the terms of the employment contract.

The procedure to be followed where an act of misconduct has been discovered is outlined in the applicable code of conduct. Generally, the employee is notified of the commencement of investigations, whereafter a charge sheet is issued. Suspension may follow, depending on the nature of the offence and the provisions of the code of conduct. A disciplinary hearing will be held, at which the employee is entitled to be present with witnesses and a representative. A determination and the imposition of a penalty will mark the conclusion of the proceedings.

There is, in all cases, a right of appeal against the initial determination. The appellate body may be an internal appeals committee or authority or it may be external (eg, the labour court). There is also a right to seek a review of the disciplinary proceedings on the basis of procedural irregularities.

A dismissal will be set aside if it was procedurally irregular or the appellate body finds that the act of misconduct was not proved or that the penalty was excessive. If the dismissal is set aside, an order for the reinstatement of the employee will be issued – with an alternative of damages for unlawful dismissal. In the case of a dismissal being set aside on the basis that the penalty was excessive, an alternative penalty will be imposed.

Collective Redundancies

An employer is entitled to retrench employees whose positions or duties have become redundant as a result of technological changes or the reorganisation or restructuring of the workplace. Employees may also be retrenched to reduce expenditure or costs or as a consequence of the closure of the enterprise in which they are employed.

An employer who intends to carry out a retrenchment exercise must give notice of such intent to the works council established for that undertaking. In the absence of a works council, the notice should be issued to the National Employment Council for the sector or industry. The notice should be copied to the retrenchment board and, where the retrenchment package has not been agreed by the employer and the affected

employees, the notice must also be sent to the employees.

The retrenchment board is required to issue a notification certificate to the employer within 14 days of receiving notification of the retrenchment from the employer. The notification certificate will confirm the retrenchment on the basis of the minimum retrenchment package or an agreed retrenchment package (as the case may be).

Retrenchment packages

Section 12C of the Labour Act was amended by the Labour Amendment Act 2023 (No 11) to make provision for four types of retrenchment packages – namely, an agreed retrenchment package, the minimum retrenchment package, an enhanced retrenchment package, and a retrenchment package that is less than the minimum package.

An agreed retrenchment package refers to a package that would have been agreed between the employer and the employees being retrenched. It is a requirement that an agreed package must be more favourable than the minimum retrenchment package.

The minimum retrenchment package refers to the package that is stipulated by statute. In Section 12 of the Labour Act prior to its amendment, the minimum retrenchment package was defined as one month's salary or wages for every two years of service. In effecting the amendment, however, the legislature omitted the definition of the term "minimum retrenchment package" and – even though the term is employed in the retrenchment provisions – its meaning is not clear from the Labour Act as a result. It is anticipated that the relevant provisions will be amended in order to address this omission.

The retrenched employees may make an application to the retrenchment board or relevant employment council to compel the employer to pay a package which is above the minimum retrenchment package. Such a package is known as an enhanced retrenchment package. The retrenchment board or the employment council is required to call a hearing before making a determination on the employer's capacity to pay an enhanced retrenchment package.

The fourth type of retrenchment package is a reduced retrenchment package. An employer may apply to the retrenchment board or to an employment council for an exemption from paying a part of the retrenchment package due to financial incapacity. The maximum exemption that may be granted is 75% of the minimum retrenchment package.

A retrenchment exercise that does not follow the stipulated procedure – or one carried out in the absence of duly recognised causes of redundancy – may be treated as an unfair dismissal, thereby rendering it susceptible to being set aside.

An employer's failure to pay the retrenchment package on time or at all constitutes an unfair labour practice.

7.2 Notice Periods

A contract of employment may only be terminated on notice where:

- the termination is by mutual consent;
- the contract is terminated pursuant to a retrenchment exercise; or
- the termination is through the resignation or retirement of the employee.

The procedure relating to termination pursuant to a retrenchment exercise has been discussed in **7.1 Grounds for Termination**. In the case of termination by mutual consent, there are no stipulated formalities, except that the termination agreement must be in writing.

The applicable notice periods in relation to all the forms of termination listed under Termination on Notice are stipulated in Section 12(4) of the Labour Act as follows:

- three months for contracts for a period of two years or more;
- two months in the case of a contract for a period of one year or more but less than two years;
- one month in the case of a contract for a period of six months or more but less than one year;
- two weeks in the case of a contract for a period of three months or more but less than six months; and
- one day in the case of a contract for a period of less than three months or in the case of casual or seasonal work.

An employer may elect to pay the employee cash in lieu of notice, rather than requiring them to serve the stipulated notice.

In addition, an employee whose permanent contract is terminated on notice through a mutual termination agreement is entitled to a severance package. This is calculated in accordance with Section 12C of the Labour Act, which provides for the compensation of retrenched employees. The parties are, however, entitled to negotiate a severance package that surpasses the stipulated minimum.

No external advice or authorisation is required in order to effect a termination on notice unless the termination is by reason of redundancy or retirement – in which case, respectively:

- the retrenchment board must be notified of the retrenchment; and
- the National Social Security Authority and the applicable pension fund must be informed of the retirement.

7.3 Dismissal for (Serious) Cause

Summary dismissal occurs when an employee is dismissed from employment without notice as a consequence of a grave act of misconduct. The dismissal will be preceded by disciplinary proceedings under the applicable code of conduct. The applicable procedure has been outlined in **7.1 Grounds for Termination** and can be summarised as follows:

- the employer identifies the offence as defined by the code of conduct;
- the employee is notified of the commencement of investigations;
- the employee may also be suspended with or without pay;
- a charge sheet is issued informing the employee of the charge that they are facing;
- a disciplinary hearing will be held at which the employee is entitled to be present with their witnesses and representative; and
- a determination will be made and a penalty imposed in line with the penalty that is stipulated in the code of conduct.

An employee who is dismissed for misconduct is not entitled to notice or notice pay. They are, however, entitled to terminal benefits comprising:

- any unpaid salaries and benefits due at the date of dismissal;
- cash in lieu of accrued vacation leave; and
- any gratuity that may be due under the CBA.

A dismissed employee has the right to appeal against the dismissal to any internal appellate bodies and, thereafter, to the labour court. An appeal may also lie, at the election of the aggrieved party, to a labour officer as set out in Section 101(5) of the Labour Act.

7.4 Termination Agreements

The employer and employee may agree to terminate the employment contract. This is referred to as mutual termination. The agreement has to be in writing. Best practice requires that the termination agreement should record:

- the effective date of the termination;
- the agreed termination package;
- the date on which or by which the package should be paid; and
- any other consequences of the termination, such as the return of the employer's property by the employee.

In the event that the termination relates to an employee who was employed on the basis of a contract without a fixed term, the employer is obliged to pay the minimum termination package stipulated in the Labour Act, unless the parties agree to the payment of a package exceeding the minimum. There are no other formalities that are required by law.

7.5 Protected Categories of Employee

All employees are equal and may be subjected to disciplinary action if the circumstances so require. This is also the case for employee representatives. However, if it can be demonstrated that a dismissal amounts to the victimisation of employee representatives, the dismissal will be considered unlawful.

8. Disputes

8.1 Wrongful Dismissal

Every employee has the right not to be unfairly dismissed. An employee is unfairly dismissed if the employer fails to show that the employee was dismissed under the terms of a registered employment code of conduct. In the absence of an employment code of conduct, the employer must show that the dismissal was carried out in accordance with the terms of the model or national code of conduct.

Disciplinary Proceedings

Disciplinary proceedings that are procedurally irregular may be set aside on review, particularly where the irregularity prejudiced the employee in the conduct of their defence. Examples of procedural irregularities include:

- the use of an inapplicable code of conduct;
- a failure to constitute the disciplinary authority or committee as stipulated in the code of conduct; or
- a failure to permit the employee to be accompanied by their legal representative.

Appeals

A dismissal may be found to have been unlawful on appeal if there was insufficient evidence to prove that an act of misconduct was committed as alleged. A successful appeal or application for review will result in the setting aside of the disciplinary proceedings, with or without loss of salary and benefits. If the dismissal is set aside and the employee is reinstated without loss of salary and benefits, the employer will be required to pay all the unpaid salaries and benefits that

would have been due to the employee between the date of dismissal and the date on which the order for reinstatement was made.

Damages

An employer who elects not to reinstate the employee following an order for reinstatement will be required to pay the employee damages for loss of employment. These are calculated on the basis of the salary that would be due to the employee for the period of time it would take them to secure alternative employment.

In applications for the review of disciplinary proceedings, a finding that the proceedings were irregular may result in the dismissal being set aside and the matter being remitted to the employer for a re-hearing in a procedurally proper manner.

8.2 Anti-discrimination

Under the terms of Section 5 of the Labour Act, employees and prospective employees are protected from discrimination on the grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or disability.

In addition to being subject to a claim for damages, an employer who contravenes the right of an employee or prospective employee to equal treatment may face criminal charges according to the terms of Section 5(3) of the Labour Act. An employee who has been subjected to discrimination may also seek an order directing the employer to cease the discriminatory conduct.

An employee who makes a civil claim for damages arising from discriminatory conduct – or for an order directing the employer to cease such conduct – has the onus of proving the allegation of discrimination on the balance of probability. In the event that criminal charges are brought against the employer, the applicable standard of proof is proof beyond a reasonable doubt.

8.3 Digitalisation

The Labour Court (Amendment) Rules (Statutory Instrument 3 of 2023), which were gazetted on 6 January 2023, as read with the Judicial Laws Amendment Act No 5 2023, which was gazetted on the 16 June 2023, provide for:

- the filing and service of court process through electronic means; and
- the conduct of proceedings through videoconferencing.

The Zimbabwe Integrated Electronic Case Management System (IECMS) was implemented in the labour court on 1 February 2023. Under this system, pleadings are filed electronically on the IECMS platform and matters may be heard via videoconferencing. The digitalisation of labour court proceedings was preceded by the digitalisation of proceedings in the Supreme Court during May 2022.

9. Dispute Resolution

9.1 Litigation

The following are the authorities and courts that have the jurisdiction to hear labour matters.

Labour Officer

This is an official employed by the Ministry of Labour under the terms of Section 121 of the Labour Act. Labour officers are generally tribunals of first instance and they conduct conciliation proceedings in accordance with Section 93 of the Labour Act. In the event that conciliation fails, they are required to refer the dispute to arbitration. They have, in addition, been granted

the jurisdiction to hear appeals from internal disciplinary proceedings under the terms of Section 101(5) of the Labour Act. Their powers in hearing appeals are however confined to those that are set out in Section 93 of the Labour Act – that is – to attempt to settle the dispute through conciliation, and failing such settlement, to refer the dispute to arbitration. They have no adjudicatory powers.

Designated Agent

This is an individual employed by an employment council under the terms of Section 63 of the Labour Act. They have the same jurisdiction as labour officers to conduct conciliation proceedings. Their jurisdiction is, however, limited to matters that arise in the industry in which the employment council is registered.

Labour Court

Under Section 89(1) of the Labour Act, the labour court has the jurisdiction to hear applications and appeals in terms of the Labour Act or any other enactment. In the exercise of its functions, the labour court may refer a dispute to a labour officer, designated agent or arbitrator. The labour court also has powers of review over labour matters. An appeal on a question of law against a decision of the labour court lies with the Supreme Court.

Class Action Claims

According to the terms of the Class Actions Act (Chapter 8.17), a class action may be brought before the High Court on behalf of any class of persons. The class action should be preceded by an application for leave to bring the action. Although the law does not provide for class actions in the labour court, proceedings in the labour court or before labour officers or designated agents may be instituted by or against several named appellants, applicants or respondents.

Representation

Litigants may be represented in proceedings before labour officers, designated agents or the labour court by legal practitioners, trade union officials or employer organisation officials. Litigants may also represent themselves. In proceedings before the Supreme Court, employees may either represent themselves or be represented by a legal practitioner, whereas corporate employers must be legally represented.

9.2 Alternative Dispute Resolution

A dispute may be resolved through arbitration in circumstances where:

- the dispute is referred to arbitration by the labour court under the terms of Section 89(1)(d) of the Labour Act;
- the parties agree for the referral of the dispute to arbitration under Section 93(1) or 93(5)(b) of the Labour Act, which is known as voluntary arbitration; and
- the dispute is a dispute of interest and the parties are engaged in an essential service.

In the third above-mentioned scenario, the labour officer to whom the dispute is referred is required in accordance with Section 93(5)(a) of the Labour Act to refer the dispute to compulsory arbitration if it is not resolved through conciliation.

Arbitration proceedings may also be held in accordance with an arbitration agreement – in which case, they will be conducted in accordance with the provisions of the Arbitration Act (Chapter 7:15). An appeal on a question of law against an arbitral award that is issued following

referral to arbitration under Sections 89 or 93 of the Labour Act lies with the labour court.

An award issued pursuant to arbitration proceedings that are held in accordance with an arbitration agreement is, however, not subject to appeal. It may only be set aside following an application to the High Court under the terms of Articles 34 and 35 of the Schedule to the Arbitration Act. Such an application will succeed only if it is demonstrated that the award:

- contravenes public policy; or
- is subject to some irregularity – for instance, the dispute cannot be resolved through arbitration.

9.3 Costs

The court or arbitrator is endowed with the discretion to make an appropriate order of costs. Usually, costs are awarded to the successful party on the party-and-party scale, which is lower than the attorney-and-client scale. Where circumstances warrant, however, costs will be awarded to the successful party on the attorney-and-client scale. An example of such circumstances would be where the unsuccessful party's conduct was reprehensible and thus deserving of a punitive order of costs.

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