

THE
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LAW REVIEW

ELEVENTH EDITION

Editor
Erika C Collins

THE LAWREVIEWS

THE EMPLOYMENT LAW REVIEW

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PREFACE

For the past decade, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. When updating the book each of the past 10 years, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 20 years, and I can say this holds especially true today, as the past 11 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 11th edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

This 11th edition also holds a special place in my heart because it is the first that I have prepared as a shareholder of Epstein Becker & Green, PC (EBG). I joined EBG at this time in part because, in 2019, EBG established an alliance with Deloitte Legal to provide clients with comprehensive and global services relating to employment law and workforce management. The alliance brings together Deloitte Legal's global reach and the strength of its multidisciplinary business approach with EBG's United States labour and employment attorneys and workforce management experience to form a global delivery model. Through this alliance, EBG and Deloitte Legal offer comprehensive employment law and workforce management services to clients. I firmly believe that this alliance is the 'wave of the future', to be able to offer clients integrated professional services, and this notion parallels the mission and purpose of this text.

In 2020 and looking into the future, global employers face growing market complexities, from legislative changes and compliance, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, negotiating collective bargaining arrangements or responding to increasing public attention around harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that no longer can be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources

professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

Our most recent general interest chapter still focuses on the global implications of the #MeToo movement. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media so as to bring awareness to the prevalence of this behaviour in the workplace. In this chapter, we look at the movement's success in other countries and analyse how different cultures and legal landscapes affect the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

Our chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, and the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2019 in nations across the globe, and one of our general interest chapters discusses this. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals in the workforce remain underprotected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter that focuses on social media and mobile device management policies. Mobile devices and social media have a prominent role in, and impact on, both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement bring-your-own-device programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. Bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work, and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and the chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to them. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these five general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 44 jurisdictions around the world. A special thank you to the legal practitioners across the

globe who have contributed to this volume for the first time, including Sedrak Asatryan, Janna Simonyan and Mary Serobyen (Armenia), Stefan Kühteubl and Martin Brandauer (Austria), Ignacio García, Fernando Villalobos and Soledad Cuevas (Chile), Tingting He (China), Jan Procházka and Iva Bilinská (Czech Republic), Véronique Child and Eric Guillemet (France), Guy Castegnaro, Ariane Claverie and Christophe Domingos (Luxembourg), Jack Yow (Malaysia), Charlotte Parkhill and James Warren (New Zealand), Petra Smolnikar, Romana Ulčar and Tjaša Marinček (Slovenia), Fernando Bazán López, Antonio Morales Veríssimo de Mira, Paloma Gómez López-Pintor and Andrea Sánchez Rojas (Spain) and Caron Gosling (United Kingdom). This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my associates, Ryan H Hutzler and Anastasia Regne, for their invaluable efforts in bringing this 11th edition to fruition.

Erika C Collins

Epstein Becker & Green

New York

February 2020

THE GLOBAL IMPACT OF THE #METOO MOVEMENT

*Erika C Collins*¹

I INTRODUCTION

The #MeToo movement went viral on social media when, on 15 October 2017, actress Alyssa Milano tweeted #MeToo. Her tweet encouraged women who have been sexually abused to share their experiences on social media, including the hashtag, to demonstrate the prevalence of sexual harassment. By early November 2017, #MeToo had been retweeted 23 million times in 85 countries.

The current political climate and widespread social media use helped #MeToo promulgate its message and affect numerous industries throughout the United States. Owing to distinct legal and cultural factors, the movement has taken different forms and has had a varying impact across the world.

II UNITED STATES

The Me Too campaign was founded by Tarana Burke in 2007 as part of the work she was doing to provide resources to victims of sexual harassment and assault. The campaign went viral on social media after Alyssa Milano asked followers on Twitter to share their stories of sexual harassment and assault using the phrase 'Me too'. In just 24 hours, more than 12 million posts and reactions had included #MeToo. By 24 October 2017, the media were reporting that more than 1.7 million tweets across 85 countries had included #MeToo.

Milano's tweet was set against a historic Hollywood backdrop: on 5 October 2017, *The New York Times* reported on allegations by numerous women of sexual assault and harassment against former film producer Harvey Weinstein. The allegations spanned three decades and came from women across the entire spectrum of film experience. Weinstein announced his departure from the Weinstein Company the same day; he was officially fired three days later from the powerful production company he had co-founded. On 10 October 2017, *The New Yorker* released another bombshell report of multiple women accusing Weinstein of rape and harassment. Four days later, the Academy of Motion Pictures Arts and Sciences removed Weinstein from its ranks. Numerous other distinguished film groups followed suit in the subsequent weeks. In the months that followed, women broke their silence and accused men working in industries ranging from Hollywood to politics of sexual harassment. The sheer number of allegations could not be ignored, and many men faced swift consequences in their workplace and in the public's opinion. Matt Lauer, Kevin Spacey and Eric Schneiderman

¹ Erika C Collins is a shareholder at Epstein Becker & Green, PC. The author extends special thanks to Ryan Hutzler and Anastasia Regne for their contributions to this chapter.

are just a handful of the numerous prominent, well-known men who were accused of sexual harassment and consequently either left or lost their jobs. Weinstein has since been accused of sexual misconduct by at least 90 women, including for sexual harassment, assault or rape. In December 2019, Weinstein reached a US\$47 million settlement with his former film studio's executive board and several women who had accused Weinstein of misconduct, US\$25 million of which has been designated to go to his accusers. At the time of writing, Weinstein still faces sexual assault charges in New York State court.

The Me Too movement existed for more than a decade before it truly gained momentum and resulted in tangible consequences for those accused. The current political climate is likely to have contributed to #MeToo's success. Many Americans feel more politically inclined and take more political action following the results of the 2016 presidential election. An estimated 5.2 million marchers across 653 affiliated marches attended the first planned Women's March the day after President Trump's 2017 inauguration.² Inspired political action, coupled with social media's influence and widespread use, contributes to an environment that makes #MeToo's success possible.

Still, in the United States, women have been protected from workplace sexual harassment for decades. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on gender. The US Equal Employment Opportunity Commission guidelines and important court decisions, such as *Meritor Savings Bank v. Vinson* in 1986, establish that Title VII prohibits *quid pro quo* and hostile sexual harassment in the workplace. Employers are strictly liable for a supervisor's harassment that results in a negative employment decision, such as dismissing an employee or failing to hire a potential employee. An employer may only avoid liability for a supervisor creating a hostile work environment if it can show that it reasonably tried to prevent or correct the behaviour and the employee did not use the employer's preventative or corrective opportunities. Employers are also liable for prohibited harassment by employees who are not supervisors and non-employees that it controls, if the employer knew or should have known about the harassment and did not take corrective action.³

III EUROPE

i Italy

In 1991, Italy enacted Law 125/1991 to encourage employers to employ women and to combat the existing discrimination against women in the workplace. Law 125/1991 was amended in May 2005 to implement the EU Equal Treatment Directive. As amended, the Law explicitly prohibits direct and indirect discrimination in the workplace, including sexual harassment.⁴ If employers make an adverse employment decision as a consequence of an

2 Erica Chenoweth and Jeremy Pressman, 'This is what we learned by counting the women's marches', *The Washington Post* <<https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/>> (last accessed 10 December 2019).

3 Harassment, US Equal Employment Opportunity Commission, <<https://www.eeoc.gov/laws/types/harassment.cfm>> (last accessed 10 December 2019).

4 Piergiorgio Mandruzzato and Sara Bittolo, *International Labor and Employment Laws*, 6–115 to 6–116 (William L Keller et al. eds., 4th ed. 2015).

employee submitting to or refusing to submit to unlawful sexual harassment, the employment decision is considered invalid. In addition to other remedies, the employer may be required to pay damages, including psychological damages to the victim (employee).⁵

Italian-born film actress and director Asia Argento was one of the first women to report that Harvey Weinstein sexually assaulted her. In the United States, the response was swift: three days after the initial report by *The New York Times* was published, Weinstein was fired from the company he had co-founded.

But the response in Italy was very different. Despite the credibility associated with allegations by more than 50 women across more than 30 years against the same powerful Hollywood mogul, Argento's revelation was not well received in her home country. The media heavily criticised Argento for her report. An op-ed in *Libero*, an Italian right-wing newspaper, noted allegations may be borne out of regret for sex that had originally been consensual.⁶ *Libero's* editor publicly stated that Argento should be grateful that Weinstein had forcibly performed oral sex on her.⁷ Female Italian public figures were similarly unsympathetic. Selvaggia Lucarelli, a feminist writer, characterised Argento's experience as consensual and said that her 20-year reporting delay was not 'legitimate'.⁸ These and numerous other public remarks were enough to force Argento to flee Italy to escape the media's toxic atmosphere of victim-blaming and comparisons to prostitution. In April 2018, it was revealed that Argento had herself entered into a US\$380,000 settlement with actor Jimmy Bennett, who had accused Argento of sexually assaulting him in California when he was 17 years old.⁹ The Los Angeles County Sheriff's department initiated an investigation but no charges were brought against Argento. In September 2018, Bennett appeared on the Italian television show *Non è l'Arena* to discuss his experience, but the show's host questioned Bennett as to how a man could be raped by a woman.¹⁰ After 10 women accused Italian film director Fausto Brizzi of molesting them, Warner Brothers suspended all future work with the director. The media, however, overwhelmingly supported the director.¹¹ Other prominent Italian figures have faced similar experiences as a consequence of the #MeToo movement.

Indeed, it seems that an unsympathetic Italian response is not unique to Argento's story. In December 2017, the president of Italy's lower house of parliament, Laura Boldrini, held a women-only conference to draw attention to the fact that Italian citizens often ignore women's reports of sexual harassment. She noted the #MeToo worldwide movement ignited

5 id.

6 See Sylvia Poggioli, 'In Italy, #MeToo Falters Amid Public Scorn', *NPR* (18 January 2018) <<https://www.npr.org/sections/parallels/2018/01/18/578562334/in-italy-metoo-falters-amid-public-scorn>> (last accessed 13 January 2020).

7 Kenzie Bryant, 'Asia Argento Escapes to Germany After Onslaught of Victim-Blaming in Her Native Italy', *Vanity Fair* (20 October 2017) <<https://www.vanityfair.com/style/2017/10/asia-argento-harvey-weinstein-italian-backlash>> (last accessed 13 January 2020).

8 id.

9 Kim Severson, 'Asia Argento, a #MeToo Leader, Made a Deal With Her Own Accuser', *The New York Times* (19 August 2018) <<https://www.nytimes.com/2018/08/19/us/asia-argento-assault-jimmy-bennett.html>> (last accessed 13 January 2020).

10 Sopan Deb and Kim Severson, 'Asia Argento's Accuser Went on Italian TV. He Was Met With Skepticism', *The New York Times* (24 September 2018) <<https://www.nytimes.com/2018/09/24/movies/asia-argento-jimmy-bennett-italy.html>> (last accessed 13 January 2020).

11 See Poggioli, footnote 6, above.

by the Weinstein report has not ‘had the same effect’ in Italy.¹² As to why, she joked ‘in our country, there are no harassers’.¹³ She went on to admit that harassment was rampant, but Italy’s ‘strong prejudice’ against women causes them to remain silent.¹⁴

Some believe religious education may contribute to Italy’s stance towards sexual harassment. Lorella Zanardo, an Italian women’s rights activist and author, believes Italy’s prejudices towards women are rooted in Catholic education,¹⁵ noting that it preaches gender roles that include a woman being an obedient ‘good wife’.¹⁶ In the #MeToo context, this rigid gender role may discourage reports of unchaste or taboo acts of sexual harassment.

Italian politics may also be a more recent contributory factor to the prejudices against women in the sexual harassment context. Perhaps one of the most well-known Italian politicians in recent times is Silvio Berlusconi, who served as Prime Minister for nine years over three terms between 1994 and 2011. While in office, Berlusconi was known for his ‘bunga bunga’ parties, graphic accounts of which detail women being fondled, kissed and made to grope Berlusconi.¹⁷ He was acquitted of paying for sex with an underage prostitute at a ‘bunga bunga’ party after a court found he did not know the woman was underage.¹⁸

In addition to his political career, Berlusconi is also a billionaire media mogul and his family’s company is the controlling owner of Mediaset, Italy’s largest commercial television broadcaster. Like much of Italian television, Mediaset’s channels largely objectify women as silent provocative dancers and otherwise sexual objects.¹⁹ Though Berlusconi has not held office since 2011, his six-year ban on holding public office for a tax fraud conviction in 2012 was lifted in May 2018 and, a year later, he was elected as a member of the European Parliament. Berlusconi’s prominence surely reinforces stereotypes and prejudices against women.

ii France

#MeToo evoked a different reaction in neighbouring France. The French equivalent of the hashtag, #BalanceTonPorc, translates as ‘rat on your pig’. The hashtag encouraged French women to use social media to name their abusers and inspired hundreds of thousands of

12 See Jason Horowitz, ‘In Italy, #MeToo Is More Like “Meh”’, *The New York Times* (16 December 2017) <<https://www.nytimes.com/2017/12/16/world/europe/italy-sexual-harassment.html>> (last accessed 13 January 2020).

13 id.

14 id.

15 See Poggioli, footnote 6, above.

16 id.

17 See Jason Silverstein, ‘Former Italian Prime Minister Silvio Berlusconi had women kiss penis statue, sing his name at “bunga bunga” sex parties: report’, *NY Daily News* (20 August 2015) <www.nydailynews.com/news/world/book-new-details-silvio-berlusconi-bunga-bunga-article-1.2331839>.

18 See Agence France-Presse in Rome, ‘Silvio Berlusconi’s “bunga bunga” acquittal upheld by high court’, *The Guardian* (20 March 2015) <<https://www.theguardian.com/world/2015/mar/10/silvio-berlusconi-bunga-bunga-aquittal-upheld-by-high-court>> (last accessed 13 January 2020).

19 See Poggioli, footnote 6, above; Elisabetta Povoledo, ‘Women Take On Sexist Image in Italian Media’, *The New York Times* (17 June 2009) <<https://www.nytimes.com/2009/06/18/arts/18iht-women.html>> (last accessed 13 January 2020).

posts. French President Emmanuel Macron's actions stand in stark contrast to Berlusconi's: Macron generally encourages policies promoting gender equality²⁰ and urged that Weinstein's Legion of Honour, which he won in 2011, be revoked.

Still, the conversation sparked in France does not entirely support #MeToo, or the practice of outing one's harasser. Instead, a backlash brought to light a division between feminist theories in France. In January 2018, 100 famous French women, including Catherine Deneuve, penned an open letter to the daily French newspaper, *Le Monde*. The letter denounces #MeToo as 'puritanical' and represents a feminist theory born out of the 1960s sexual revolution.²¹ The letter's signatories believe #MeToo undoes much of the sexual revolution's work of de-censoring sexual desire.²² The #MeToo backlash in France is also likely to be influenced by a culture that encourages flirtation and seduction.²³ The letter also explicitly defends men's right to pester women. Berlusconi described Deneuve's letter as 'blessed words'.²⁴

The divide between the authors and those who support #MeToo is largely generational. Many young women in France believe the days of exalting seduction are over, and the #MeToo movement emboldens women to draw boundaries in the workplace.²⁵ Indeed, French feminists wrote letters in response to Deneuve, disagreeing with her. Caroline De Haas, the founder of a French women's organisation, responded with a letter co-signed by 30 women, which noted that 'it's not a difference of degrees between flirting and harassment, but a difference in nature'.²⁶ In France, #MeToo sparked a clash between an age-old cultural adoration of seduction and a modern understanding that seduction in the form of harassment is not welcome.

20 See Odette Chalaby, 'Macron's fight for gender equality: the policies behind his "grand cause"', *apolitical* (13 March 2018) <https://apolitical.co/solution_article/macrons-fight-for-gender-equality-the-policies-behind-his-grand-cause/> (last accessed 13 January 2020).

21 Agence France-Presse in Paris, 'Catherine Deneuve says men should be "free to hit on" women', *The Guardian* (9 January 2018) <<https://www.theguardian.com/film/2018/jan/09/catherine-deneuve-men-should-be-free-hit-on-women-harvey-weinstein-scandal>> (last accessed 13 January 2020).

22 id.

23 See Elena Berton, 'Why the French are balking at the #MeToo movement', *USA Today* (7 February 2018) <<https://www.usatoday.com/story/news/world/2018/02/07/why-french-balking-metoo-movement/303648002/>> (last accessed 13 January 2020).

24 Peter White, 'Silvio Berlusconi Backs Catherine Deneuve Over Controversial #MeToo Comments', *DEADLINE* (12 January 2018) <<https://deadline.com/2018/01/silvio-berlusconi-backs-catherine-deneuve-over-controversial-metoo-comments-1202241692/>> (last accessed 13 January 2020).

25 See Saphora Smith, 'France in the age of #MeToo grapples with seduction, harassment', *NBC News* (29 January 2018) <<https://www.nbcnews.com/news/world/france-age-metoo-grapples-seduction-harassment-n840501>> (last accessed 13 January 2020).

26 Nancy Tartaglione, 'French Feminists Blast Catherine Deneuve & Co Over #MeToo Slam', *DEADLINE* (10 January 2018) <<https://deadline.com/2018/01/catherine-deneuve-metoo-criticism-backlash-france-1202239864/>> (last accessed 13 January 2020).

IV ASIA

i Japan

Cultural phenomena unique to Japan created a distinctive reaction to #MeToo there. Saving face, or avoiding embarrassment for oneself and others, is considered a high priority in Japan.²⁷ This cultural value may further deter women from reporting sexual harassment. Indeed, in a May 2018 survey of more than 200 large and medium-sized Japanese companies, only 14 per cent of the companies surveyed said they had received complaints of sexual harassment in the past year.²⁸ A 2015 government survey found that only 4 per cent of rape and sexual assault victims reported to the police and more than two-thirds of victims surveyed had not told a single person about the crimes.²⁹ A study released in October 2019 by the Japanese Ministry of Health, Labour and Welfare determined that 19.7 per cent of the women polled reported that they were victims of sexual harassment.³⁰ Japanese culture puts pressure on people to 'bear one's hardship'.³¹ This deters reporting and may help to explain the culture of widespread victim-blaming.

Women's status in the workforce also may account for under-reporting. Though Japanese women participate in the workforce at a higher rate than US women, their prospects for advancement and overall outcomes are often worse.³² According to data published by the Organisation for Economic Co-operation and Development for 2017, just 0.7 per cent of employed women were managers, compared to 3.5 per cent of employed men. Using the United States as a comparison, 9.2 per cent of employed women and 11.9 per cent of employed men were managers. Even more starkly, only 5.3 per cent of seats on boards of the largest publicly listed companies in Japan were held by women in 2017.³³ In the United States, that proportion is 21.7 per cent. Japan ranked 110th of 149 countries in the World Economic Forum's 2018 gender gap report.³⁴ Perhaps women's low status in the workforce deters them from reporting: an April 2018 online poll of 1,000 working Japanese women

27 See Rochelle Kopp, 'Saving face: A little discretion can go a long way in Japan', *Japan Intercultural Consulting* (23 March 2010) <www.japanintercultural.com/en/news/default.aspx?newsID=59> (last accessed 13 January 2020).

28 See 'Sexual harassment policies unchanged at most firms in Japan, despite growing awareness amid global Me Too movement: poll', *The Japan Times* (25 May 2018) <<https://www.japantimes.co.jp/news/2018/05/25/national/social-issues/japan-inc-awareness-harassment-rise-little-movement-toward-improvement-reuters-poll/#.WyhlYaYqQy->>> (last accessed 13 January 2020).

29 Kurumi Mori and Shoko Oda, '#MeToo Becomes #WeToo in Victim-Blaming Japan', *Bloomberg* (9 May 2018) <<https://www.bloomberg.com/news/articles/2018-05-09/-metoo-becomes-wetoo-in-victim-blaming-japan>> (last accessed 13 January 2020).

30 Julie Zaugg and Chie Kobayashi, 'Third of Japanese women with mental health issues blame workplace harassment: report' (4 October 2019) <<https://www.cnn.com/2019/10/04/health/japan-overwork-survey-intl-hnk/index.html>> (last accessed 13 January 2020).

31 '#MeToo Japan: What happened when women broke their silence', *BBC* (25 April 2018) <<https://www.bbc.com/news/world-asia-43721227>> (last accessed 13 January 2020).

32 Jay Shambaugh, Ryan Nunn and Becca Portman, 'Lessons from the rise of women's labor force participation in Japan', *Brookings* (1 November 2017) <<https://www.brookings.edu/research/lessons-from-the-rise-of-womens-labor-force-participation-in-japan/>> (last accessed 13 January 2020).

33 Organisation for Economic Co-operation and Development, Employment: Female share of seats on boards of the largest publicly listed companies <<https://stats.oecd.org/index.aspx?queryid=54753>> (last accessed 28 June 2018).

34 World Economic Forum, 'The Global Gender Gap Report, 2018' <www3.weforum.org/docs/WEF_GGGR_2018.pdf> (last accessed 16 December 2019).

found that 60 per cent of those who experienced sexual harassment at work 'put up with it' to protect their status in the workplace, and only 24 per cent of women surveyed reported it at work or to someone else.³⁵ Yet companies have not prioritised improving sexual harassment policies: a May 2018 survey found that 78 per cent of companies had not strengthened sexual harassment policies and 77 per cent were not considering policy changes.³⁶

To combat cultural factors unique to Japan, which result in women drastically under-reporting sexual harassment, #MeToo has taken a new form in the country. In its place, #WeToo encourages unity between victims and supporters. #WeToo was created in the hope of increasing reporting, as well as a feeling of support, solidarity and validation for victims.

Despite the cultural and workplace barriers Japanese women face, #MeToo has had an effect on at least one case in Japan. A female reporter for TV Asahi told a Japanese magazine that Junichi Fukuda, the finance ministry's top bureaucrat, repeatedly sexually harassed her. Fukuda resigned in mid April 2018, though he admitted no wrongdoing. This was the first time in 20 years that a senior official from the finance ministry had resigned over misconduct. Still, the immediate reaction was not supportive of the reporter's accusation. She took her story to the magazine only after her managers at TV Asahi advised her to remain silent about the harassment. The finance minister initially announced that he had no plans to investigate the claims. Later, the ministry urged female reporters to cooperate with fact-finding. This move was criticised as essentially putting pressure on victims to face their harassers.³⁷

ii India

India's violent and well-documented history of workplace harassment laws began in 1992. That year, Bhanwari Devi worked as an employee of the Rajasthan government's Women's Development Project. As was required by her government job, Devi reported to the police a plan by five upper-caste men to marry off a nine-month-old girl. In response, the men gang raped Devi and beat her husband. Devi reported the rape to the police. This type of rape complaint was very rare in India in 1992, especially against men of a higher caste. Initially, the police did not accept her complaint, but women's groups put pressure on the police to allow Devi's complaint. The five men were acquitted three years later. The judgment was appealed and Devi is still awaiting a final verdict. Devi's experience inspired women's groups to file public interest litigation, which resulted in the first set of workplace harassment guidelines, the Vishaka Guidelines, in 1997.

India enacted more biting prohibitions on workplace sexual harassment in 2013. The Sexual Harassment of Women at Workplace Act was similarly enacted in response to a brutal and widely publicised gang rape. Jyoti Singh was 23 years old when she was gang raped on a public bus and left naked on the side of the road. Singh died two weeks later from injuries sustained during the rape. Thousands of Indian citizens protested to demand the government take greater action to ensure women's safety and impose stricter punishments for sexual crimes. The government responded to this demand in December 2013 with the Sexual Harassment of Women at Workplace Act. The Act requires employers to set up a system for reporting and addressing complaints, which may include an internal complaints committee.

35 See Mori and Oda, footnote 29, above.

36 See 'Sexual harassment policies . . .', footnote 28, above.

37 'MeToo Japan: What happened when women broke their silence', *BBC* (25 April 2018) <<https://www.bbc.com/news/world-asia-43721227>> (last accessed 13 January 2020).

The committee is required to provide certain types of rectifications before beginning its investigation. The Act imposes strict punishments on non-compliant employers: they can be punished with a fine of up to 50,000 rupees. Repeated violations are subject to higher penalties, as well as business delicensing or deregistration.³⁸

As Bhanwari Devi's and Jyoti Singh's stories demonstrate, Indian women face a pervasive threat of sexual harassment everywhere from the public bus to the workplace. Indian feminism has, perhaps out of necessity, focused on issues affecting women such as child marriage, dowry-related violence and even the existential threat of rampant female foeticide.³⁹ As evidenced by the public outcry following the brutal gang rape of Jyoti Singh, Indians also have begun to demand safety for women from sexual assault. Nevertheless, #MeToo faces obstacles in India, where many still see women as inferior to men.⁴⁰ In a common criticism of the movement, many Indians have rejected #MeToo outright as a movement reserved for women privileged enough to be able to demand freedom from sexual harassment in the workplace. This may be a fair criticism, given the causes Indian feminism has traditionally combatted, and the fact that 59 per cent of women in urban areas and 64 per cent of women in rural areas do not have internet access.⁴¹

#MeToo could become a rallying movement, particularly in Bollywood, where many women find it commonplace to be asked for sexual favours in return for acting roles.⁴² One anonymous actress was sexually assaulted by a casting agent. When she reported the event to the police, they told her that people in the film industry can do whatever they want.⁴³ Actresses who refuse sexual advances face the possibility of retaliation or being blacklisted.⁴⁴ However, India's regional film industries are also slowly bringing abuse within the industry into the public eye. Sri Reddy, a 'Tollywood' actress, staged a nude protest in April 2018, videos of which spread over the internet and incited comments that she was merely attempting to further her career.⁴⁵ Radhika Apte, one of the few Bollywood stars to speak out about her experiences of refusing producers' sexual advances, explains one barrier to Bollywood catching onto the #MeToo movement is the system of earning film roles in Bollywood.

38 PRS Legislative Research, 'The Protection of Women Against Sexual Harassment at Work Place Bill, 2010' <www.prsindia.org/billtrack/the-protection-of-women-against-sexual-harassment-at-work-place-bill-2010-1402/> (last accessed 13 January 2020).

39 See Alka Kurian, '#MeToo is riding a new wave of feminism in India', *The Conversation* (1 February 2018) <<http://theconversation.com/metoo-is-riding-a-new-wave-of-feminism-in-india-89842>> (last accessed 13 January 2020).

40 See Vidhi Doshi, 'India's actresses are starting to seize their own #MeToo moment', *The Washington Post* (11 April 2018) <https://www.washingtonpost.com/world/asia_pacific/indias-actresses-are-starting-to-seize-their-own-metoo-moment/2018/04/10/24c45cde-3bde-11e8-912d-16c9e9b37800_story.html?noredirect=on&utm_term=.200c66ccbabc> (last accessed 13 January 2020).

41 Ananya Bhattacharya, 'In India, the internet is a place for cityfolk and men', *Quartz India* (21 February 2018) <<https://qz.com/1211218/in-india-the-internet-is-a-place-for-urban-dwellers-men-and-youngsters/>> (last accessed 13 January 2020).

42 See '#MeToo: Why sexual harassment is a reality in Bollywood', *BBC* (28 April 2018) <<https://www.bbc.com/news/world-asia-india-43881129>> (last accessed 13 January 2020).

43 id.

44 id.

45 See Jeffrey Gettleman, 'Indian Actress Stages a Topless #MeToo Protest', *The New York Times* (8 April 2018) <<https://www.nytimes.com/2018/04/08/world/asia/india-actress-topless-metoo.html>> (last accessed 13 January 2020).

Unlike in Hollywood, where theatre and acting education is highly valued, earning roles in Bollywood is based on professional contacts, personal conduct and appearance.⁴⁶ Bollywood's #MeToo movement may be yet to come, given women's reluctance to report abuse.

V EGYPT

Sexual abuse in Egypt is also common, as indicated by a 2017 UN poll, which ranked Cairo as the most dangerous megacity for women based on factors including the level of protection from sexual assault afforded to women.⁴⁷ Until 2014, Egyptian law did not define or criminalise sexual harassment. A 2014 law punishes sexual harassment with fines up to 5,000 Egyptian pounds and jail sentences of between six months and five years. Harassers who hold a position of power over victims, including in the workplace, face longer sentences.⁴⁸

One potential obstacle to #MeToo's influence in Egypt is the police. Women may feel uncomfortable reporting sexual harassment to male police officers, and there is a dearth of female officers in Egypt.⁴⁹ In 2008, Noha al-Ostaz dragged her assailant to a police station, but the police refused to file a complaint until al-Ostaz's father arrived. Harassment by a policeman inspired Amal Fathy to post a video detailing the harassment and discussing the government's failure to protect women. Fathy was charged with crimes including insulting Egypt.⁵⁰ Perhaps in response to this issue, Egypt's Ministry of the Interior deployed female police officers to crowded areas during the Eid al-Fitr holiday specifically to combat sexual violence against women.

Without simplifying the issue to merely a product of religion, #MeToo has affected Egyptian society's practice of religion. Mona Eltahawy is an Egyptian-American activist and journalist. When she was 15 years old, she travelled to Mecca, in Saudi Arabia, for the holy Islamic pilgrimage called hajj. During a sacred religious moment and while in a hijab, Eltahawy was groped by a stranger. In response to a Pakistani woman's post about a similar experience at hajj, Eltahawy posted her story on Twitter using #MeToo. Her tweet inspired hundreds of posts sharing similar stories. Eltahawy then posted #MosqueMeToo to encourage more women to share their stories from the Muslim world and break the taboo around sexual harassment 'in sacred spaces'.⁵¹ Similar stories of sexual assault in the Muslim

46 See '#MeToo: Why sexual harassment is a reality in Bollywood', footnote 42, above.

47 'EXCLUSIVE – Cairo named most dangerous megacity for women; London best – poll', *Reuters* (15 October 2017) <<https://af.reuters.com/article/africaTech/idAFL8N1L74J3>> (last accessed 13 January 2020).

48 See 'Egypt brings in new sexual harassment laws', *BBC News* (5 June 2014) <<https://www.bbc.com/news/world-middle-east-27726849>> (last accessed 13 January 2020).

49 See Azza Solimon, 'How #MeToo and #TimesUp Are Helping Egyptian Women Break the Silence Around Sexual Violence', *TIME* (17 May 2018) <<http://time.com/5280726/how-metoo-and-timesup-are-helping-egyptian-women-break-the-silence-around-sexual-violence/>> (last accessed 13 January 2020); Patrick Kingsley, 'Egypt criminalises sexual harassment for first time', *The Guardian* (6 June 2014) <<https://www.theguardian.com/world/2014/jun/06/egypt-criminalises-sexual-harassment>> (last accessed 13 January 2020).

50 See Susannah Cullinane, 'Egyptian activist detained over social media video post criticizing government', *CNN* (11 May 2018, 10:54 HKT) <<https://www.cnn.com/2018/05/11/middleeast/egypt-amal-fathy-activist-detained/index.html>> (last accessed 13 January 2020).

51 Malaka Gharib, '#MosqueMeToo Gives Muslim Women A Voice About Sexual Misconduct At Mecca', *NPR* (26 February 2018) <<https://www.npr.org/sections/goatsandsoda/2018/02/26/588855132/-mosquemetoo-gives-muslim-women-a-voice-about-sexual-misconduct-at-mecca>> (last accessed 13 January 2020).

world and during holy Islamic exercises are shockingly common.⁵² Many Muslim women are hesitant to report abuse because they do not want to fuel Islamophobia. Others may fear a conservative backlash that could result in men and women being separated while praying at holy sites.⁵³ #MeToo may face obstacles in societies where religious factors increase women's reluctance to report abuse.

VI MEXICO

Just as actresses in the United States, and, albeit to a much lesser extent, India, are leading the #MeToo movement in their countries, several reports from the Mexican entertainment industry sparked the #MeToo conversation in Mexico. In February 2018, well-known Mexican actress Karla Souza reported she was pressured sexually and later raped by an unnamed Mexican director. Though Souza did not name Gustavo Loza in her report, a major Mexican media company, Televisa, cut the director from its business the next day. Unlike Televisa's action, the Mexican media did not support Souza or others who have similarly reported abuse.⁵⁴ TV host Horacio Villalobos called the women 'irresponsible . . . to go on TV and refuse to name names and make false accusations'.⁵⁵ Just as in Italy, the media's reaction was overwhelmingly critical of women's decisions to report abuse. And as has been the case in India, some in the Mexican entertainment industry have experienced widespread sexual harassment in their industry for decades. Sabina Berman reported that she was molested by the president of the Mexican Writer's Guild for 10 years, beginning when she was 19. Berman made these claims publicly on CNN en Español, where she also accused a casting agency of misconduct involving underage girls. After the agency vehemently denied the accusation, Berman withdrew her allegation against the agency and apologised for her false accusation.⁵⁶

But the media response was not completely one-sided. Security analyst Alejandro Hope published an article in his weekly op-ed column with his explanation of why women choose not to report abuse.⁵⁷ Hope cited numerous factors, including that women who report do not receive judicious outcomes and that they are forced to relive their abuse. Hope also noted that women may be blamed for not knowing men 'think with their genitals' and for misinterpreting flattery and flirting for harassment.⁵⁸ Women utilised the #YoNoDenuncioPorque to explain for themselves why they did not report abuse.

As Hope's cited reasons may indicate, the Mexican culture exalting machismo may affect #MeToo's impact in the country. Machismo, or male entitlement, is widespread and

52 id.

53 id.

54 Carrie Kahn, 'Mexico And The #MeToo Movement', *NPR* (21 March 2018, 08:35 ET) <<https://www.npr.org/2018/03/21/595516892/mexico-and-the-metoo-movement>> (last accessed 13 January 2020).

55 id.

56 id.

57 See Alejandro Hope, 'Ellas no denuncian' [They do not report], *El Universal* (26 February 2018, 2:06pm) <www.eluniversal.com.mx/columna/alejandro-hope/nacion/ellas-no-denuncian> (last accessed 13 January 2020); Carrie Kahn, 'Mexico's #MeToo Faces Backlash After Celebrities Air Accusations Of Rape And Assault', *NPR* (27 March 2018, 09:55 ET) <<https://www.npr.org/sections/parallels/2018/03/27/596662573/mexicos-metoo-faces-backlash-after-celebrities-air-accusations-of-rape-and-assau>> (last accessed 13 January 2020).

58 See Hope, footnote 58, above.

deeply rooted in Mexico's culture and society.⁵⁹ Machismo culture may help to account for gender-based violence against women, which is rife in Mexico: between 2007 and 2015, the femicide rate more than doubled, from 1,086 per year to 2,555 per year.⁶⁰ Rafael Vallejo Gil, a labour and employment partner at the Mexican law firm Gonzalez Calvillo, agrees that deep-seated cultural machismo fosters workplace sexual harassment. Gil believes the Mexican culture of individualistically dealing with one's own problems further deters women from reporting sexual harassment. These cultural values are so deeply ingrained that Gil estimates it will take a concerted effort by the Mexican government and an entire generation to eradicate these values. Until then, #MeToo has moved Mexican professionals to consider other countries' efforts to increase reporting as examples for their companies. Gil has also noticed an increase in companies requiring sexual harassment training. Yet he finds employees receive the training differently based on whether they work for a multinational company or a local company: those working in multinational companies are more likely to view the training as evidence of the companies' social responsibility and appreciate the training, whereas those working for more local companies may view training as worthless and as a shallow attempt by the company to maintain a positive image.⁶¹ On 21 March 2019, political communications consultant and activist Ana González sparked a new wave of Mexico's #MeToo movement when she tweeted that a writer, Herson Barona, had 'beaten, manipulated, gaslighted, impregnated and abandoned (on more than one occasion) more than 10 women'.⁶² While González clarified that she had not been a victim of Barona's alleged conduct, she nonetheless reinvigorated the #MeToo movement with new subsets, including #MeTooJournalists and #MeTooEscritores (meaning #MeTooWriters).⁶³ Professional women throughout Mexico responded, and the attorney general for the state of Michoacán opened an investigation into allegations made by journalists who reported they had been victimised.⁶⁴ Since her tweet in March 2019, González has suffered internet harassment, but insists that she would not have done anything differently.

VII ADVICE TO MULTINATIONAL EMPLOYERS

Sexual harassment cases have arisen out of workplace conduct for decades. #MeToo has had a global impact on how these cases are perceived and addressed. Employers must concentrate on protecting their brand and reputation, which has become increasingly challenging in the social media era. When addressing individual sexual harassment complaints and conducting investigations, it is imperative that multinational companies understand not just the legal differences but also the cultural nuances in the jurisdictions in which they operate.

59 See Paulina Villegas, 'Where Machismo Is Entrenched, Focus Moves to the Trenches', *The New York Times* (23 April 2017) <<https://www.nytimes.com/2017/04/23/world/americas/where-machismo-is-entrenched-focus-moves-to-the-trenches.html?searchResultPosition=>> (last accessed 13 January 2020).

60 id.

61 Telephone interview with Rafael Vallejo Gil, partner at Gonzalez Calvillo (6 July 2018).

62 Paulina Villegas, 'How a Young Activist Set Off a #MeToo Avalanche in Mexico', *The New York Times* (28 March 2019) <<https://www.nytimes.com/2019/03/28/world/americas/mexico-metoo.html>> (last accessed 13 January 2020).

63 id.

64 See 'Mexico's #MeToo movement swells in media, cultural circles', *AP News* (27 March 2019) <<https://apnews.com/b1494cd86ecc44f3b719c4ea0914b377>> (last accessed 13 January 2020).

EMPLOYMENT ISSUES IN CROSS-BORDER M&A TRANSACTIONS

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I INTRODUCTION

Cross-border merger and acquisition transactions give rise to a myriad of employment-related issues that, if not properly managed, can cause headaches for lawyers, human resources professionals and others involved in the deal. In the extreme, these issues can even delay or prevent a deal from progressing. The purpose of this chapter is to provide an overview of employment-related issues that should be considered whenever a corporate deal involving a global workforce is contemplated.

Particularly for US practitioners, the employment issues that can arise in merger and acquisition deals are often unfamiliar, and lawyers and human resources professionals may be called upon both to spot these issues and to assist their business counterparts in understanding these unfamiliar concepts and their potential impact on the deal. Most notably, as is clear from the various country-specific chapters of this book, the concept of ‘at-will’ employment largely does not exist outside the United States. This means that the various parties to a deal will encounter a workforce that enjoys certain rights and benefits by virtue of the existing employment relationships. This can have implications in terms of the costs and liabilities associated with the transaction as well as with respect to matters such as transaction structure and timing.

II DEAL STRUCTURE

When approaching any transaction, before delving into the employment issues, it is important first to understand the structure of the deal, including whether it involves the transfer of stock or assets as well as what entities are sellers, purchasers and targets and where those entities are located. While these decisions are typically driven by tax and similar considerations, the structure chosen can have major implications for the employment issues that arise.

Notably, in stock or cash deals, including tender offers, ‘going private’ transactions and acquisitions of subsidiaries or business units through sales of equity, the employment issues are often less complicated than in other types of transactions. While it is still important to

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conduct thorough due diligence to understand what assets and liabilities are being acquired, transactions that involve a mere change of ownership but that do not change the identity of the employer do not raise many of the thorny employment issues discussed below, particularly with regard to the transfer of employees, because existing employment contracts simply continue under the new ownership. In most jurisdictions, however, the new owner will not be able to change the terms and conditions of employment.

In asset deals, on the other hand, more difficult issues can arise, particularly with regard to the transfer of employees to the acquirer and business presence requirements for employment of transferring employees. These issues are discussed in more detail in Section IV.

III DUE DILIGENCE

Employment lawyers and, in some cases, human resources professionals advising the buyer in a transaction will often be called upon to conduct employment-related due diligence, usually with a goal of identifying potential liabilities or other issues that will affect the valuation of the deal. When conducting such diligence, the following types of documents should be among those requested and reviewed:

- a* a census of all employees worldwide (anonymised where necessary), including part-time and contract employees, preferably including date of hire, complete compensation and job category;
- b* all agreements and information concerning employee benefits, perquisites and retirement plans. Information regarding the value of plans and how plans are funded is critical because in many countries a plan is considered legally funded with mere book reserves as opposed to cash. Unfunded or underfunded pension liabilities discovered during due diligence can be an employment-related deal killer because of the potentially high costs involved;
- c* information regarding change-in-control, golden parachute and other M&A-related clauses in any employment contract or other agreement;
- d* any agreements (such as from a target's previous business acquisitions) that affect or limit employment flexibility (e.g., agreements limiting reductions in force);
- e* the text of all employment agreements, whether individual, collective or with works councils, including contracts designated as 'non-compete', 'confidentiality', 'indemnification' or 'expatriate' agreements;
- f* pay information, including data on salary administration (to, among other things, establish that withholdings are proper and that the target complies with any legally mandated payroll requirements, such as payroll frequency and form of payment) and incentive or bonus plans;
- g* information on stock options or employee ownership programmes (the transfer or replication of which can be particularly complicated);
- h* information regarding any pending employment-related lawsuits, disciplinary proceedings, potential claims, government investigations and unpaid judgments;
- i* information on any lay-offs or other reductions in force conducted in the past several years; and
- j* any social plans or severance plans from previous reductions in force.

Those conducting due diligence also should be aware that in certain jurisdictions, such as EU Member States, Hong Kong and Canada, the release of employees' personal data to the

buyer could give rise to liability for privacy law violations. For example, the European Union's General Data Protection Regulation (GDPR) – enacted in May 2018 – has significantly increased individuals' rights with regard to their personal data, the level of protection companies handling personal information must afford and the penalties for non-compliance. Multinational employers have also felt the ramifications of the GDPR's passing, as the law applies to any entity that processes the data of EU citizens. Accordingly, those representing the buyer should be aware of any potential transfers of personal information between the buyer and the target, and how these transfers may implicate privacy laws in that jurisdiction.

It is also very important to conduct anti-corruption due diligence. In recent years, enforcement of anti-corruption laws has received growing attention globally. For example, prosecutions under the Foreign Corrupt Practices Act in the United States have significantly increased. Anti-corruption laws have also been enacted in France, Mexico, Colombia and Brazil in the past few years. Failure to identify a target's non-compliance with anti-corruption laws can expose the buyer to successor liability and severe penalties, including but not limited to fines, profit disgorgement and even individual criminal liability. Owing to the severity of the potential consequences, it is imperative that the buyer conduct thorough due diligence on the target's compliance with applicable anti-corruption laws and regulations.

IV EMPLOYEE TRANSFERS AND BUSINESS TRANSFER LAWS

A key issue in any merger or acquisition transaction is whether and how the employees of the affected business will transfer to the new owner.

As indicated above, typically, in stock transactions, this is a fairly straightforward process – the acquirer merely steps into the shoes of the seller. Employment contracts remain in place and the employment of the target employees is continuous, so terms and conditions of employment remain unchanged. However, it is necessary to consider the implications of separation of the target companies from the selling parent, particularly if benefit plans such as retirement savings, health and welfare plans or stock plans were maintained at the parent level. It is also important to consider whether post-close transition plans include modifying terms and conditions of employment. Many US-based employers are surprised to learn that, outside the United States, they often will not be able to make changes to existing employment terms without employee consent.

Asset transactions, however, present a more technically complicated situation and different countries have very different mechanisms for employee transfers in these transactions.

Some jurisdictions have business transfer laws that operate automatically to transfer employees of a sold business from the seller to the buyer (or at least to allow the automatic transfer of employees from seller to buyer). These laws exist throughout the European Union, for example, pursuant to the EU Directive on Transfers of Undertakings, and in certain non-European jurisdictions throughout Asia and the Americas, including Brazil, Colombia, Singapore and South Korea. Where these types of laws are present, a fact-specific inquiry is required to determine whether the proposed transaction amounts to a 'business transfer' under the law. While the standards vary between jurisdictions, in general, a business transfer will be deemed to have occurred when an independent business unit is transferred and the activities of that unit continue with the buyer. It is also necessary to assess which employees will transfer. Typically, this inquiry is straightforward with regard to employees who work exclusively for the transferred business, but can be more complicated with regard to employees who support both transferred and non-transferred businesses, particularly employees in shared services

roles. Different jurisdictions have different standards for addressing whether these employees transfer automatically or would need to consent to transfer. Finally, in certain countries, such as South Korea and Germany, employees transfer automatically but have the right to object to the transfer.

In contrast, in other jurisdictions, including Australia, Bahrain, China, Hong Kong, Indonesia, Japan and the United Arab Emirates, employees do not transfer automatically. Instead, the buyer and seller determine which employees they wish to have transferred in the deal and those employees must consent to the transfer (often by agreeing to a mutual termination of their employment with the seller and accepting new employment with the buyer). However, even this seemingly simple approach can raise complex issues. If transferring employees are important to the business, for example, the acquiring company must consider, usually in consultation with the seller, what sort of package should be offered to induce those employees to consent to transfer to the buyer. Usually this involves, at a minimum, replication of all existing terms and conditions of employment and recognition of years of service with the buyer for all purposes (including benefits eligibility, vacation entitlement and severance payout). In some jurisdictions, such as Hong Kong, this arrangement ensures continuity of employment for statutory protection purposes. Retention bonuses or other sweeteners are also frequently considered in these situations. It is also necessary to consider what will happen to employees who refuse to transfer to the buyer. For example, will the seller be able to redeploy them in other areas of its business? If not, will it be possible to make them redundant and, if so, at what cost? Will the buyer share in those costs? In some countries, severance is not owed if an employee refuses to transfer to a buyer offering identical terms and conditions of employment and recognition of years of service, so this also should be considered. The buyer should consider the fact that in some jurisdictions, such as Australia, applicable collective agreements may, by operation of law, transfer to and become binding on the buyer and the transferring employees.

Finally, in some jurisdictions, such as The Bahamas, employees may not transfer by operation of law, at least under certain circumstances, but an employer can agree to assign or transfer employees to a new employer without the employees' consent. Typically, these transfers would require the terms and conditions of employment and recognition of years of service to be maintained, though these rules may vary to some degree by jurisdiction.

V REPRESENTATION AND CONSULTATION

Many corporate transactions give rise to information or consultation rights for employees, a concept that can be particularly unfamiliar to US practitioners, especially those with non-unionised workforces, and that can be unpalatable to the businesspeople involved in the deal because of confidentiality and other concerns.

It is especially common in the European Union for companies to have works councils that serve as employee representatives and have the right to receive information and to be consulted on issues and decisions that can affect employees. The exact scope of the consultation obligation depends on the law of the jurisdiction, but these types of rights and obligations often exist with respect to transactions that will either affect employees directly (such as asset deals where some, but not all, employees will transfer, or deals that will result in redundancies or changes to the terms and conditions of employment) or that will affect the company in a way that might ultimately affect employees (such as where the employing company will make a large outlay of capital as a purchasing entity). Accordingly, although consultation

obligations are more common in asset deals, they can arise in all types of transactions, so it is necessary to consider each transaction, and each country, individually to ensure compliance with these obligations.

It is also important to consider whether any pre-closing restructuring will occur that could give rise to separate information and consultation obligations. In stock transactions, for example, it is common for a number of asset transfers and other mini-transactions to take place before the ultimate stock transfer to prepare the company for the transfer (e.g., creation of new subsidiaries for acquisition and movement of employees and other assets into or out of target companies). Pre-closing restructuring transactions can give rise to information and consultation rights, even if the ultimate stock transfer does not.

While most laws are somewhat vague with regard to the exact timing of consultation, it is clear that consultation is required to occur at a time when it would be 'meaningful', which is generally understood to be before the signing of a binding purchase agreement. This can be problematic both because of concerns regarding confidentiality and because the deal is often in flux right up to the time of signing, making provision of accurate information to employees or their representatives difficult. It is important, therefore, to understand the potential implications of non-compliance, or late compliance, with consultation obligations, so that risks can be assessed properly. In some countries, such as the United Kingdom, the penalty for non-compliance with consultation obligations will be merely financial. In other countries, however, works councils have the ability to delay, or even kill, a deal unless and until the employer complies with its information and consultation obligations. In the Netherlands, for example, a works council can go to court to obtain an injunction preventing a deal from moving forward until the employer complies with its consultation obligations.

While the concept of works councils is fairly specific to the European Union, consultation obligations can also arise in other jurisdictions, particularly with regard to unionised workforces. It is relatively common for collective bargaining agreements to require at least notice, and sometimes consultation or negotiation, regarding transactions that transfer ownership or involve the transfer of employees.

VI RESTRUCTURING AND HARMONISATION OF EMPLOYMENT BENEFITS

An acquiring company may plan to engage in workforce restructuring or to modify the terms and conditions of employment for transferring employees following a transaction, either to address financial instability or to harmonise terms and conditions with those of the acquiring company's existing workforce. In the United States, under the doctrine of at-will employment, there are generally few restrictions on these actions other than in specialised contexts (such as where a workforce is unionised or an employee has contractual rights to certain benefits or a certain period of employment). Elsewhere, restructuring and modifying terms and conditions of employment is often much more difficult.

For example, with regard to restructuring, termination of employment will require a minimum of just cause or a fair process. While economic reasons can frequently be used to justify terminations, in some countries, such as France and Japan, the economic situation must be serious before terminations are legally justified. Moreover, even where terminations are possible, notice and severance are usually required, so these costs should be considered when assessing the financial value of a transaction. In many countries, works councils or other employee representatives have the right to be consulted about planned terminations, and many countries require an employer to agree with those representatives on a 'social plan'

aimed at preventing or lessening the consequences of terminations, which, again, can add further costs. Government notification or approval requirements should also be considered. Where mass redundancies are planned, there are often additional requirements with respect to both consultation with employee representatives and notification to and authorisation of the labour authorities.

Similarly, modifying terms and conditions of employment, either for economic reasons or to harmonise with existing employees, can be difficult. In most non-US jurisdictions, an employer cannot make detrimental modifications unilaterally, and employees who are subject to detrimental modifications may be able either to claim constructive dismissal (thereby entitling them to payments due upon termination of employment) or to bring claims for unpaid wages or benefits. In some jurisdictions, employers may be able to modify terms and conditions for economic reasons if they meet the requirements for redundancy terminations, but similar advance notice may be required. In most jurisdictions, employees can consent to the modification of their terms and conditions, but this is not universal. Brazil, for example, adheres to a principle of no waiver of labour rights, meaning that an employer cannot, under any circumstances, modify employment terms to an employee's detriment, even with his or her consent.

VII BUSINESS PRESENCE ISSUES

Another issue that can arise in certain deal structures is whether the purchasing entity can legally employ acquired employees in a given jurisdiction. This issue arises, in particular, in asset sales that involve the sale of one or more but not all business units of the selling entity in a particular jurisdiction when the acquiring company does not have existing operations in that jurisdiction before the transaction. In such cases, the employees will transfer to, and become directly employed by, the acquiring entity. Often, the acquirer will be a foreign entity, such as the global parent or a special subsidiary incorporated to acquire the assets that are the subject of the transaction, resulting in the transferred employees being employed directly by a foreign entity.

In some countries, including the United Kingdom, direct employment by a foreign entity is possible, but the foreign entity must register with tax and social security authorities, a process that, in some cases, can be particularly onerous. Italy and Spain are examples of jurisdictions in which establishing a branch or subsidiary may be a more straightforward approach, either for tax reasons (Italy) or because the registration process for foreign employers can be particularly onerous (Spain). In other countries, a foreign entity is not permitted to employ employees directly, and a local business presence must be established to employ the transferred employees. To engage employees in China, for example, a foreign company must establish either a wholly foreign-owned enterprise or a joint venture. To hire employees directly in India, a foreign company must establish a branch office (which is not tax-efficient), a liaison office (which may not be useful because there are restrictions on the activities that a liaison office can undertake), a project office, a joint venture or a subsidiary. Similarly, in Brazil and Colombia, although it is technically legally permissible for a foreign employer to hire employees directly, practically speaking it is necessary for a foreign company to establish either a branch or a subsidiary to make the required enrolments to pay taxes and other social charges (although note that in Brazil, this is usually accomplished through a subsidiary because a presidential decree is required to open a branch of a foreign company).

It is important to be cognisant of the business presence issue, because of the implications it can have for deal pacing and structure, and the potential liabilities for the acquiring entity if this issue is not addressed.

In some jurisdictions, including India, it can take two to three months to establish a local branch or subsidiary that can legally employ the transferred employees and enter into a business or asset transfer agreement (as the case may be). In such cases, it may be necessary in the contracts outside that jurisdiction either to have a sufficiently long period between signing and closing to establish a local business presence or to carve out of the deal the employees, and possibly other assets, of the implicated jurisdiction and to have a later closing with respect to that particular jurisdiction once the business presence can be established. In such situations, acquiring companies will sometimes resort to engaging third-party service providers or obtaining services through a transition services agreement with the seller (to the extent permissible) to manage this waiting period. Buyers should beware, however, that some countries prohibit employee leasing, which can be an issue with respect to transition services agreements. Even in countries in which only registration is required, the acquiring entity may need to be prepared to move quickly to comply with the registration requirements.

The employment of individuals in a jurisdiction without registration or a formal business presence, where that is required, can lead to fines and penalties (sometimes criminal) both for the unregistered employment itself and for the consequent non-payment of taxes and social charge contributions.

VIII CONCLUSION

The employment issues that can arise in cross-border M&A transactions are numerous and complex. These issues can be further complicated by the tight timelines and constantly evolving deal structures that now characterise many M&A transactions. Successful management of the employment issues requires careful tracking of the many moving pieces and constant communication with the deal team to keep track of deal structure and other business decisions. Employment practitioners working on cross-border transactions should always consult with jurisdiction and subject matter experts as necessary to ensure compliance with the various and complex requirements.

GLOBAL DIVERSITY AND INTERNATIONAL EMPLOYMENT

*Erika C Collins*¹

I INTRODUCTION

During the past 30 years, many countries have passed some form of regulation to promote diversity in the workplace. Although diversity management is a common imperative for multinational corporations, the evolution of legal and regulatory developments reveals a landscape filled with varied and multidimensional approaches. For several years, different regions of the world have experienced unique successes and challenges in achieving workplace diversity. While many law firms and Fortune 500 companies in the United States have embraced diversity initiatives as a whole, the European Union has pioneered efforts to achieve gender parity in corporate management, and countries in Asia have set progressive quotas to increase the representation of disabled employees. This chapter addresses some of these recent initiatives to promote corporate diversity in the multinational workplace and the particular challenges that corporations with a global presence may encounter in the administration of both internally and legally mandated diversity initiatives. These challenges include barriers to the collection and retention of employee diversity statistics imposed by international privacy regulations, the difficulties in adapting an integrated diversity initiative to regional demands, and the ever-present gaps between legislation and enforcement.

In a world populated by an increasing number of multinational corporations, diversity management has not only become an issue of strategic importance, but also a driver of economic and competitive success. Not only does an increasingly diverse workforce mean better access to resources and customers, greater legitimacy in heterogeneous societies and opportunities for learning and innovation, but corporations also perceive added value in distinguishing themselves from their homogenous competitors. In addition to being driven by business incentives, diversity initiatives sometimes are externally imposed in the form of equal employment opportunity, affirmative action and other initiatives aimed at eradicating prejudices and stereotypes that historically have limited the representation of disadvantaged groups. The proliferation of private and public diversity initiatives in recent years has been the result of these complementary forces.

¹ Erika C Collins is a shareholder at Epstein Becker & Green, PC. The author extends special thanks to Ryan Hutzler and Anastasia Regne for their contributions to this chapter.

II RECENT DIVERSITY INITIATIVES

i Positive discrimination

While most countries have laws prohibiting discrimination against members of protected classes, some jurisdictions have gone a step further by enacting laws requiring 'positive discrimination' (i.e., the practice of giving an advantage to a certain group to increase diversity or combat prejudice). In the United Kingdom, for example, employers are legally required to implement 'positive action' in their recruitment processes under the Equality Act 2010. The Act allows employers to favour an applicant if the employer believes that the applicant experiences a 'disadvantage connected to the [protected] characteristic' and that positive discrimination will 'enable or encourage persons who share the protected characteristic to overcome or minimise that disadvantage'. A similar regulation was signed into law in 2007 in South Africa. The European Union has also passed regulations that allow for participating Member States to take positive action to promote workplace equality.² In 2019, members of the US House of Representatives passed a similar piece of legislation, also named the Equality Act, which would amend and expand the landmark Civil Rights Act of 1964 to embrace a more robust vision of equality, banning discrimination in various areas of people's lives, including employment, public education, housing and credit, among others, on the basis of gender, sexual orientation and gender identity. At the time of writing, the Equality Act has been introduced in the second Congressional chamber, the US Senate, but had not yet passed.

In India, there is a constitutional basis and 'reservation' programme in place to allocate a quota of public service positions for traditionally under-represented groups, which include certain castes and religious minorities. Similarly, Malaysia and Nigeria have affirmative action programmes for public service employees to attain the desired balance of ethnicities. In contrast, however, outright 'quota' programmes have been rejected for the most part in the United States by the Supreme Court, where the prevailing philosophy is for employers to make 'blind' determinations with respect to race, national origin, gender and other protected classes. As typically well-represented groups (e.g., white males) can claim 'reverse' discrimination under Title VII and other discrimination statutes, employers must carefully design diversity programmes to avoid legal claims by employees who claim to have been disfavoured or excluded by diversity initiative programmes.

Further complicating matters for US federal contractors, the Office of Federal Contract Compliance Programs (OFCCP) has set forth regulations for contractors to benchmark, inquire and take positive action to ensure appropriate representation of veterans and individuals with disabilities. In 2015, the OFCCP extended protections against workplace discrimination by prohibiting discrimination based on sexual orientation and gender identity by federal contractors and subcontractors. In 2016, the OFCCP revised its Sex Discrimination Guidelines for the first time in more than four decades. The final rule outlined gender-based discriminatory practices that contractors must identify and eliminate, and clarified how contractors must take affirmative action to ensure that hiring and employment practices do not adversely affect employees on the basis of their gender. For employers in the United States interacting with the finance sector, Section 342 of the Dodd-Frank Act establishes an office at every relevant federal agency to monitor and ensure the fair inclusion of minorities and women for every company and vendor governed by the Act.

2 See, e.g., Racial Equality Directive 2000/43/EC, 2000 OJ (L 180) 22 (EC); Employment Equality Directive 2007/78/EC, 2007 OJ (L 303) 16 (EC).

ii Gender quotas on corporate boards

Legally mandated gender quotas on corporate boards are one effective form of positive discrimination that has taken hold in Europe. These metrics serve as a regimented means of removing inequities in the corporate board room and promoting women's economic interests. Before the first gender quota came into effect in 2003, the problem of female under-representation was strikingly apparent. While the proportion of women in the workforce was continually increasing in most jurisdictions, this growth did not translate into increased representation on corporate boards.

Norway was the first nation to enact a legally mandated gender quota in 2003. Before the quota, women represented a meagre 6.8 per cent of board directors in the country. In response, the Norwegian parliament approved a rule requiring corporate boards to consist of 40 per cent women by 2008. The quota applies to all publicly owned corporations and public limited liability companies in the private sector. Affected corporations had until 1 January 2006 to voluntarily comply with the quota rule, after which time compliance became mandatory. The result was full compliance with the mandate by 2009, and in 2010 the percentage of female directors had increased to 40.3 per cent. In 2018, women represented 41 per cent of the board members of publicly traded Norwegian companies. The gender quota law has had and continues to have an undeniably positive impact as evidenced by Norway's No. 2 ranking in the World Economic Forum's 2018 Global Gender Gap Report.

In the years since Norway enacted its pioneering gender quota, many other countries have followed suit. Belgium, France, Iceland, Italy, the Netherlands, Spain and the United Kingdom have all passed laws establishing quotas for women on corporate boards. Also, in 2015, Germany passed legislation requiring major companies to allocate 30 per cent of seats on non-executive boards to women, although this gender quota has not been as successful as its European counterparts. Specifically, non-complying companies in France and Norway, for example, face fines and other sanctions. Under the German law, however, a company that fails to fill the requisite number of board seats with women must only keep the seats empty until they are filled by female candidates. Similarly, companies in the Netherlands, Finland, and Denmark are simply required to explain their failure to meet the quota. In addition, a voluntary effort known as the '30 per cent club' has helped to increase women's representation on corporate boards substantially. In Australia, the Council of Superannuation Investors and the Australian Institute of Company Directors each launched initiatives to achieve 30 per cent female representation on Australian Security Exchange (ASX) 200 boards by the end of 2017 and 2018, respectively. Moreover, in 2018, the ASX Corporate Governance Council issued a draft consultation recommending that ASX300 boards also achieve a 30 per cent target. In its 2019 consultation response, the Council decided to proceed with the 30 per cent target. As at June 2019, women represented 29.7 per cent of directors on ASX200 company boards, just shy of the 30 per cent goal. A number of other countries also have laws that require that gender be taken into account in appointing board members and that companies report on the gender balance of their boards. And in November 2013, the European Parliament voted in favour of legislation proposed in 2012 that would set an objective that women would make up 40 per cent of non-executive directors at companies listed on stock exchanges no later than 2020. Further in 2017, the European Commission announced its plans to advocate for a similar gender quota.

Legally mandated gender quotas are also starting to appear outside Europe. In 2011, for example, Malaysia's Ministry of Women, Family and Community Development succeeded in passing an amendment to the 2004 regulation requiring 30 per cent of directors on boards

in the public sector being women. Similarly, Brazil has a 40 per cent target, by 2022, for female representation on the boards of state-controlled enterprises; India's Companies Act 2013 requires prescribed classes of companies to have at least one female board member; and Israel and the United Arab Emirates require all companies and government agencies to have at least one woman on the board. In Japan, Prime Minister Shinzo Abe announced in 2015 the goal of increasing the percentage of women in executive positions at Japanese companies to 30 per cent by 2020, and a new law that promotes women's career activities, which took effect on 1 April 2016, requires private and public sector Japanese companies with more than 300 employees to disclose gender diversity targets. In 2018, the US state of California passed a law that mandates that all public companies with their principal executive offices located within the state must have at least one female director on their corporate board by 31 December 2019. As of December 2019, at least one case was brought in a California federal court, alleging that the California quota law is unconstitutional.

iii Pay equity regulation

Equal pay for men and women has also become a hotly discussed topic around the globe. In the area of pay disparity, gender creates the widest gaps of any protected characteristic.

In the United States, the issue has become a linchpin of congressional debate since the early years of this century. In January 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act to supplement existing pay equity legislation. The Act effectively extends the time in which an individual can bring an equal pay discrimination claim. In 2014, President Obama signed a Presidential Memorandum that required federal contractors to submit data on employees' compensation by race and gender to help ensure fair pay. In addition, in 2016, the US Equal Employment Opportunity Commission announced new EEO-1 pay equity reporting requirements to assess allegations of pay discrimination and to provide equal pay for equal work by increasing transparency. Notably, however, some of these actions have been rolled back by the Trump administration. For example, in 2017, President Trump signed an executive order that revoked the Fair Pay and Safe Workplaces rule that was enacted by President Obama's executive order in 2014. Additionally, the Trump administration effectively froze the aforementioned 2016 equal pay data collection rule. In several US jurisdictions, including Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nebraska, North Dakota, New Jersey, New York, Oregon, Pennsylvania, Puerto Rico, Utah, Vermont and Washington, governors have signed measures into law aimed at narrowing the gender wage gap and closing loopholes that employers use to defend unfair wage practices. However, the pay disparity between men and women in the United States still hovers around 20 per cent.

Other countries also continue to confront pay disparity issues. Although foundational treaties in the European Union guarantee equal pay for work of equal value for all citizens, the gap between men's and women's hourly gross earnings throughout the European remains at approximately 16 per cent, and several Member States have adopted remedial measures. The French parliament introduced legislation in 2006 that required firms to develop a framework to eliminate pay disparity by 2010, and in the United Kingdom, the Equality Act 2010 obliges a corporation with more than 250 employees to disclose pay information, with the intent to expose gender discrepancies. In 2014, the European Commission published a recommendation focusing on pay transparency that proposed measures for Member States to facilitate wage transparency in companies, such as improving the conditions for employees to obtain information on pay or establishing pay reporting and gender-neutral job classification

systems from companies, among others. In 2017, Germany's Pay Transparency Act came into effect, which grants employees in companies with more than 200 workers access to information about how their wages compare to their colleagues' and provides for mandatory pay equity reporting for companies that have 500 or more employees. In 2018, France passed a law requiring that companies publish gender pay gap information, and plans to phase in companies with 250 employees or more beginning in January 2019 and the remaining companies by January 2020.

The issue of pay equity has garnered attention outside the European Union as well. In the Philippines, for example, the Senate approved a bill in 2012 that would protect women from discriminatory compensation policies in all areas, including wages, salary and employment benefits. In early 2018, Iceland passed legislation requiring that public and private companies with 25 or more employees certify that they are providing equal pay for equal work. Icelandic employers must confirm their compliance every three years or risk daily fines.

iv Sexual and moral harassment policies

An uptick in sexual and moral harassment legislation also evidences an increased focus on diversity awareness and sensitivity in the workplace. This has been especially true in the United States, where New York authorities passed legislation in October 2018 requiring that employers maintain written anti-sexual harassment policies and implement mandatory annual sexual harassment prevention training as soon as possible. Since then, several other US jurisdictions have enacted similar laws, including California, Connecticut, Delaware, Illinois and Maine. Developments in India have focused on gender and gender programmes, with India's Supreme Court recognising the legal rights and status of transgender individuals as a 'third' gender and the Indian parliament's enactment of a wide-reaching sexual harassment law. The sexual harassment law mandates workplace committees and a range of penalties to protect women from unwelcome sexual advances, comments and conduct in the workplace. This law is unique in that it also covers third parties in the workplace, including clients, customers and daily wage workers. Similarly, other Asian nations, such as Bangladesh, Nepal and Pakistan, recognise a legal third gender for intersex and transgender individuals. Among EU nations, both France and Germany recognise gender identity beyond woman and man and, in Denmark, citizens may self-determine their legal gender without any medical approval. Though not a Member State, in 2019, Georgia adopted its own sexual harassment law, defining and criminalising this type of conduct. South American countries that recognise non-binary gender include Argentina and Uruguay.

In the European Union, some Member States have addressed the problem of workplace harassment by placing an affirmative duty on employers to prevent and redress this behaviour. These Member States have implemented specific anti-discrimination and sexual harassment legislation. In Germany, the General Act on Equal Treatment, enacted in 2006, places a duty on employers to protect employees from discrimination not only from superiors and co-workers but also from third parties, such as customers. In France, as of 1 January 2019, large French employers are required to designate someone at the company to whom employees can report concerns or allegations of instances of sexual harassment. The Croatian Labour Act similarly requires that employers protect their workers from the harmful, unwanted conduct of superiors, colleagues and third parties. And sexual harassment appeared as prohibited conduct in Turkish legislation for the first time in 2003. Additionally, the European Union

has issued a directive on sexual harassment (Directive 2002/73/EC), which implemented the principle of equal treatment for men and women concerning access to employment, vocational training and promotion as well as working conditions.

Also interesting is the passage of sexual harassment legislation in several countries that have not historically focused on these issues. China, for example, passed progressive legislation that gives victims of sexual harassment a cause of action under Chinese law. In 2005, China's national legislature amended the Law on the Protection of Women's Rights and Interests to explicitly prohibit workplace harassment, but, at the time, the law did not impose obligations on employers to prevent harassment in the workplace. In 2012, however, the Special Provisions on Occupational Protection for Female Employees took effect and gave victims of harassment a mechanism to redress their claims under Chinese tort law. Under these regulations, unless an employer establishes a corporate anti-harassment policy, it may be liable for negligently or intentionally failing to stop harassment that it knew or should have known could occur. Moreover, in 2018, Chinese authorities took their anti-sexual harassment initiative a step further and formulated new Civil Code provisions creating an affirmative duty on employers to establish reasonable anti-sexual harassment measures. The provisions are due to be reviewed in 2020. Similarly, in Bangladesh, the initiative to protect equal rights of women and non-discrimination has gained momentum, and has successfully mobilised women to uphold their rights. The Bangladeshi government has adopted policies, legislation and strategies to empower its women. However, weak enforcement of these laws remains common.

Progress also is apparent, although not as far-reaching, with respect to anti-discrimination initiatives for lesbian, gay, bisexual and transgender (LGBT) employees in the global workplace. In Europe, the EU's Charter of Fundamental Rights was the first international instrument to explicitly include the term 'sexual orientation', and Article 13 of the European Commission Treaty prohibits discrimination based on sexual orientation. Also, Article 19 of the Treaty on the Functioning of the European Union provides that the European Union will 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Member States vary in their application of this anti-discrimination law. The Equality Act in the United Kingdom makes it direct discrimination to treat LGBT employees unfavourably on the grounds of their sexual orientation. The anti-discrimination provision applies to all areas of employment, including terms of contracts, pay, promotions, transfers, training and dismissal. Similarly, in Germany, the 2006 General Act on Equal Treatment defines sexual orientation to encompass discrimination against transsexual and intersexual as well as lesbian, gay and bisexual employees. These policies stand in stark contrast to the laws of several countries where homosexuality and homosexual acts are legally prohibited. Countries such as Algeria, Libya, Nigeria, Singapore and Somalia permit employers to discriminate based on sexual orientation and some even punish homosexual acts with protracted periods of imprisonment.

Until 2018, India was indicative of this dichotomy. As noted above, in April 2014, India's Supreme Court recognised transgender people as constituting a legal third gender, grounding its decision on rights guaranteed by the nation's Constitution as well as international law, and determining that gender identity and sexual orientation are fundamental to the rights to self-determination, dignity and freedom. In December 2013, however, a two-person bench of India's Supreme Court put a colonial-era portion of the Penal Code (Section 377), which described homosexual acts as 'against the order of nature' and punishable by up to life in prison, back into law after a 2009 ruling by the High Court of Delhi struck down

Section 377 as unconstitutional. Although the Supreme Court ruled that only Parliament can make changes to the law that bans consensual same-sex sexual activity, it recently re-examined the issue and reversed its decision. In holding that consensual same-sex sexual activity is now legal, the court reasoned that '[c]riminalising carnal intercourse is irrational, arbitrary and manifestly unconstitutional'.

Stop-and-go progress on LGBT rights is a common theme around the world. In the United States, the Supreme Court has paved the way for gay marriage. Additionally, several US jurisdictions have outlawed discrimination based on sexual orientation and the Equal Employment Opportunity Commission concluded in 2015 that Title VII of the Civil Rights Act of 1964 prohibits sexual orientation or gender identity discrimination in employment because it is a form of sex discrimination. Pending before the US Supreme Court are three cases regarding whether, under Title VII, the term 'sex' encompasses sexual orientation, and whether Title VII prohibits discrimination on the basis of gender identity. During its 2019 term, the Court heard oral argument, and a decision is expected no later than June 2020. Back in 2015, New York State Governor Andrew Cuomo announced that he would take executive action to protect transgender people from discrimination in housing and employment, among other areas. Governor Cuomo noted that this action was long overdue, explaining that the law 'left out the T' because transgender people had been left out of previous anti-discrimination laws protecting gay and bisexual men and women. Further, in 2018, Governor Cuomo signed an executive order banning state agencies and authorities from conducting business with any 'entities that promote or tolerate discrimination'. Despite this progress, including the help of the Affordable Care Act, there remain significant obstacles to equality for transgender individuals, who continue to face discrimination, harassment and barriers to access in the healthcare system, as well as in society generally. For example, in 2016 and 2017, several states, including Arkansas, Tennessee, Mississippi and North Carolina, introduced or enacted anti-LGBT legislation. In 2017, the Department of Justice announced that Title VII of the Civil Rights Act of 1964 does not prevent workplace discrimination based on gender identity. As mentioned above, however, the Equal Employment Opportunity Commission still considers discrimination based on gender identity as unlawful. In addition, many employers still struggle with policy decisions regarding health insurance coverage of transgender employees, including, for example, whether to cover sex-change surgeries. As this issue continues to make headlines, there are likely to be many more legal developments on LGBT protections in the coming years.

III CHALLENGES FACING MULTINATIONAL CORPORATIONS

It is clear that with such varied legislation across the globe, multinational employers must keep abreast of a panoply of regulations, laws and international policies. On top of this challenge, global corporations also may face a unique set of difficulties in implementing and administering internal diversity initiatives. These challenges include adapting an integrated diversity policy to a specific locale, gathering statistical data to measure the success of diversity programmes and understanding the complexities of the source of law and enforcement in each region.

i Global integration versus local responsiveness

For a global diversity policy to be successful, it must be tweaked to accommodate the culture and social context of each region and continually monitored and adjusted. Studies have shown that policies created in one country and exported to another often lack the cultural legitimacy to be effective in other management situations. Differing attitudes towards corporate diversity and distribution of power among groups are common examples of the cultural differences that make the wholesale export of a diversity management programme difficult. For example, an overt emphasis on employee heterogeneity is uncommon in France, where it is illegal to register employees as members of an ethnic group. In China, gender stereotypes from thousands of years of feudal despotism still linger in a modernised, industrial society. As a result, lax diversity policies often result in tokenism rather than substantive change. Finally, differences in protected categories may cause difficulties in translating anti-discrimination policies aimed at remedying historical disadvantages. In Hong Kong, for instance, local ordinances prohibit discrimination on the grounds of gender, pregnancy, marital status, disability, race and family status. However, although the Labour Department has in place guidelines and codes of practice to prevent age and sexual orientation discrimination in the workplace, Hong Kong does not offer protection on the bases of age, religion or sexual orientation. Moreover, in India, caste is a protected category. International corporations should be aware of these differences throughout the implementation of an integrated diversity strategy.

ii Tracking progress

To gauge the success of corporate diversity policies, employers must also be able to gather statistics on employees and measure progress. However, the collection of sensitive data is difficult in light of regulations aimed at protecting data privacy. In the European Union, employers collecting identifying information regarding employees must disclose the purpose of these statistics before storing and transferring the data. Employers must obtain consent from employees when seeking to use the information for purposes other than those communicated or when transferring the information to a third party for a different purpose. Indeed, the enhanced protections offered to employees under the General Data Protection Regulation (GDPR), which took effect in May 2018, further emphasise the need for multinational employers to appropriately ensure employee data protection. Moreover, individual Member States often have their own data privacy laws that further complicate data collection and reporting. The French Data Protection Act, for example, largely prohibits employers from collecting and processing ‘sensitive data’, including information relating to racial or ethnic origins, political, philosophic or religious opinions, trade union affiliation, health or sexual identity. The Act also limits the length of time that employers may store employees’ personal data. These regulations make it extremely difficult, if not impossible, for employers to track the progress of their diversity programmes.

Statutes similar to the EU model have been enacted in India, Malaysia, Mexico, South Africa, South Korea, Brazil and the Philippines, among other jurisdictions. In India, the 2011 Information Technology Rules not only distinguish ‘personal information’ from ‘sensitive personal information’, but also require corporate entities that collect, process and store personal data, including sensitive personal information, to comply with certain procedures. In Malaysia, the Personal Data Protection Act 2010 imposes strict limitations on the transfer of personal data outside the country, with limited exceptions similar to those embedded within the US–EU Privacy Shield principles. In Brazil, the Brazilian General Data Protection Law, which was passed in August 2018, contains numerous provisions similar to those in

the GDPR, including requiring entities headquartered or handling personal information in Brazil to establish appropriate protective measures, and imposing hefty sanctions for non-compliance. In Serbia, the National Assembly enacted the Personal Data Protection Law, effective in August 2019, which is also modelled after the GDPR but imposes notably lower sanctions for non-compliance. The 2010 Law on the Protection of Personal Data Held by Private Parties and the related 2011 Personal Data Regulations, 2013 Privacy Notice Guidelines and 2014 Parameters for Self-Regulation enacted in Mexico are more lax in that they allow cross-border transfer of data within a corporation as long as Mexican employees are given rights of access and objection (for a valid reason), and the corporation meets certain security requirements. In 2016, the Turkish parliament enacted the Law on Protection of Personal Data, which distinguishes the transfer of personal data to third parties in Turkey from the transfer of personal data to third countries. In 2008, the US state of Illinois passed the Illinois Biometric Privacy Act, a broad state law that protects employees and others in Illinois against the improper collection, use, storage, transmission and destruction of biometric information, including biometric identifiers, such as retina scans, fingerprints, voiceprints or scans of the face or hand geometry. During the past few years, Illinois has seen a wave of litigation brought against employers under the Privacy Act.

As a greater number of countries consider, introduce and enact detailed data protection and privacy laws, multinational corporations must continue to be sensitive to regional legislation and maintain strict compliance with local laws.

iii 'Unconscious' bias training

An increasingly popular trend related to diversity and inclusion initiatives is the recognition of, and mitigation against, 'unconscious' or 'subconscious' bias in decision-making through awareness training. For example, unconscious assumptions can often overlap with common stereotypes: 'women are more emotional than men', 'assertive women are too ambitious', 'persons with disabilities cannot perform as well' and 'older people are out of touch with technology'. Though unconscious biases may not necessarily lead to biased decisions in the workplace, they may predict discriminatory non-verbal, subtle behaviours, such as sitting further away from someone, cutting interviews short, evaluating someone more poorly or disciplining someone more frequently. These types of behaviours can lead to negative consequences, such as poor morale, bad publicity, loss of time and productivity as well as erosion or loss of client relationships.

Significantly, employment courts in the United Kingdom have long accepted that discrimination can be a result of subconscious and unintentional bias. For instance, the Equality and Human Rights Commission has written, as part of non-binding guidance, that: 'Employers may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the worker differently because of a protected characteristic.' In the United States, there have been cases in which plaintiffs' employment attorneys provided information and analysis about unconscious bias in jury instructions prior to releasing the jury for deliberation. As plaintiffs' bars around the world are likely to proffer this variety of 'evidence' to prove indirect discrimination, companies are increasingly taking a closer look at how to eliminate less overt bias in the workplace. For example, employers can encourage employees to make thoughtful, deliberate decisions in the workplace, and can use objective frameworks, such as checklists at key decision points, to encourage less biased outcomes. While hiring and promoting employees, employers can agree beforehand to basic merit criteria, militating against any biased tendencies that may influence

decision-making. Employers can also conduct regular audits of key decisions, including hiring and promotion, to ascertain whether any patterns exist that could evidence unconscious bias in any particular parts of the business, and to ensure that diverse groups of people are represented on the panel of reviewers. However, companies should weigh the potential downside should a record be created that may prove damaging in the event of litigation.

IV CONCLUSION

Both for strategic reasons and in response to legal developments throughout the world, highly successful multinational corporations are focused on promoting diversity in the workplace and implementing robust diversity management programmes. These corporations are grappling with a complex set of legal issues that are relatively new in many regions of the world and remain untested in the global marketplace. As developments continue to unfold in the legal landscape, corporations will have to monitor and adjust their diversity programmes to remain compliant. Corporations in the United States can serve as a model for many business entities that are just beginning to promote diversity. Owing to a highly diverse population and a history of racial, ethnic, gender and LGBT inequality, the United States has been very proactive in working towards workplace equality, although this progress is not without setbacks. Europe is quickly catching up with legislation to address the increasingly diverse population resulting from the free movement of workers throughout the European Union.

As corporations become more diverse at all levels, these global initiatives will become not only more important for success in the marketplace but also more complex. Companies wishing to stay competitive will rely on their human resources professionals and legal advisers to aid them in navigating the wide range of regulations that affect this area.

SOCIAL MEDIA AND INTERNATIONAL EMPLOYMENT

*Erika C Collins*¹

I INTRODUCTION

The early part of the 21st century has been characterised by the rapid proliferation of mobile devices and social media platforms. The most recent statistics show the following:

- a* It is estimated that, in 2019, more than 5 billion people had mobile devices, an increase of 100 million (2 per cent) from the previous year, and that more than half of these connections were smartphones.
- b* The number of internet users in 2019 was 4.39 billion, an increase of 366 million (9 per cent) as compared to January 2018.
- c* There were 3.48 billion social media users in 2019 and the worldwide total has grown by 288 million (9 per cent) since 2018.
- d* In January 2019, 3.26 billion people used social media on mobile devices, a growth of 297 million new users, representing a year-on-year increase of more than 10 per cent.

These figures illustrate that internet use continues to both grow and accelerate, with more than 366 million new users coming online during the past year. India, in particular, stands out, with internet users increasing by nearly 100 million in the past year, representing annual growth of more than 20 per cent. Internet penetration in India now is approximately 41 per cent, an increase of 10 per cent as compared to a year ago. This means that India now is responsible for more than a quarter of the global growth in the past 12 months. Overall, Asia-Pacific represented 55 per cent of the annual growth figure, with China adding another 50 million new users in the past year. The United States continues to expand internet user growth as well. Despite already having an internet penetration rate of 88 per cent a year ago, US internet user growth increased by nearly 9 per cent year-on-year, totalling more than 310 million users in January 2019, reflecting a 95 per cent penetration. African nations represent the fastest growing internet communities, although many begin with relatively small bases. Western Sahara had the greatest year-on-year relative gains, with the reported number of internet users in the country increasing almost fivefold since January 2018.

Specific to social media, this use is not evenly distributed across the world, and penetration rates in parts of Africa still remain in single digits. Middle East nations, specifically the United Arab Emirates and Qatar, continue to top the social media penetration rates. In the past year, China added the most new social media users, with the country's total rising by nearly 100 million. Data suggests that more than 1 billion people in China use social

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media. India's social media growth continues as well, with more than 60 million users signing up to social media for the first time during 2018. The global social media audience also has matured, as people around the age of 30 now account for the largest share of the world's social media users. Senior audiences are better represented as well, and Facebook's various platforms report a greater number of users over the age of 55 than users under the age of 18.

Further, people are spending more time than ever on social media. The average social media user now spends more than two hours on social platforms each day, equating to one-third of their total internet time and one-seventh of their waking lives. Interestingly, time spent on social media varies considerably across cultures, with internet users in Japan spending an average of just 36 minutes on social media each day while those in the Philippines spend the most time (more than four hours each day). Facebook, arguably the most popular form of social media, has reached 2.41 billion active users per month; 88 per cent of Facebook users access the site on mobile devices and 95 per cent of visits are made on smartphones and tablets. Furthermore, Instagram (which is owned by Facebook) has more than 1 billion monthly active users, Twitter has 330 million monthly active users and LinkedIn has 303 million monthly active users (although LinkedIn has more than 610 million members). In China, WeChat, Tencent's popular messaging app, is estimated to have passed 1 billion monthly active users. Finally, 5G service is gradually being rolled out across the United States and China. China also has launched research and development work for its 6G mobile networks.

The message of these statistics is that mobile devices and social media are a ubiquitous part of everyday life around the world, including in the workplace, and are becoming increasingly so. One industry survey has indicated that 90 per cent of businesses use social media for business purposes, nearly 80 per cent of businesses have social networking policies and 70 per cent of businesses report having to take disciplinary action against employees who misuse social sites. In addition, nearly 60 per cent of businesses monitor employees' use of social media at work. In turn, employers must be cautious about what actions they take when monitoring employees' behaviour online, because, depending on the jurisdiction, ownership of the device and other circumstances, this can implicate a wide range of employee protection and privacy laws.

It is important, therefore, to write social media policies that achieve company business goals while remaining compliant with local laws. For example, China, Iran, North Korea and Syria ban Facebook, YouTube or Twitter (or all three) in some capacity. Additionally, if a company wishes to join the 36 per cent of employers who ban use of social media at work (one in five companies block Facebook, 15 per cent shut out Twitter and nearly 14 per cent ban YouTube), there are potential issues to consider. For example, in Argentina, Japan and Spain, although employers may ban social media use and block access to those sites on company-provided equipment, employers cannot actually interfere with employees' use of employee-owned devices. In any event, if a company seeks to prohibit the use of social media during work time, which is generally permissible, it is well advised to communicate these policies clearly and connect the policies to a cogent business reason, such as ensuring worker productivity or availability. While employers have legitimate concerns about employee productivity while on company time, employers should be aware that some jurisdictions have strong protections for employees' and individuals' otherwise seemingly trivial social media use because of past experiences with despotism and totalitarianism.

What remains universal in today's workplace is that social media pervades every aspect of the employment life cycle: recruitment, potential bullying and harassment, productivity levels, potential discrimination, the protection of confidential information, trade secrets

and intellectual property, an employee's rights to a private life and freedom of expression, reputational issues for all parties, legal and regulatory obligations, defamation, privacy considerations, termination and even post-termination.

Accordingly, the key question for global employers is what policy and approach should be used to leverage the benefits and address the challenges posed by these technologies in the workplace.

II RECRUITMENT

Employers must determine, for example, the extent to which social media will have a role in employee recruiting efforts. Throughout the world, most employers require some form of background information on candidates. In some jurisdictions, such as the United Kingdom, employers generally rely upon a reference provided by a former employer. In others, such as the United States and China, employers typically require a thorough background check carried out by a third-party provider. In addition to these formal mechanisms, however, employers also occasionally seek to gather information through informal channels. While some employers and those involved in recruitment still gather anecdotal information about candidates through 'word of mouth', there is now the greater temptation to review a candidate's online profile, and information posted on social networking sites and the internet. One survey in 2019, for example, found that 91 per cent of employers use social media for recruitment purposes. In addition, a 2018 study found that 43 per cent of employers use social media to check on current employees. Also, a 2018 survey found that 57 per cent of employers decided not to hire a candidate because of information found on social media. Similarly, from a job seeker perspective, a 2019 study found that 55 per cent of potential applicants who find a negative review about a potential employer do not apply for an open position with that employer. Information on these sites and the wider internet is very difficult to take down, so tagged pictures taken from a drunken night out could follow a candidate throughout his or her career. While the result of this information permanence is a potential source of useful information for employers when considering applicants for employment, there is widespread debate – as evidenced, for example, by the debate across the European Union over the 'right to be forgotten'² – about whether this information should be reviewed and considered by employers during the recruitment process. And this debate is reflected in the widely varying laws on this topic throughout the world.³ Indeed, in September 2019, the European Court of Justice ruled that search engine operators are not required to carry out a de-referencing on all versions of a search engine to comply with the 'right to be forgotten' under the General Data Protection Regulation. In practice, this means that the 'right to be forgotten' online does not extend beyond the borders of the European Union. Search engines, however, still are required to discourage EU citizens from accessing those non-EU domains.

The general view is that if an employee exposes his or her personal information publicly on social media networks, this is viewed as the problem of the employee and not

2 The Data Protection Law Enforcement Directive entered into force in May 2016, and the General Data Protection Regulation became valid in European Economic Area [EEA] countries (including Iceland, Liechtenstein and Norway) on 20 July 2018, after the EEA Joint Committee and the three countries agreed to follow the Regulation.

3 In 2016, Turkey attempted to harmonise its data protection regime with that currently in force in the EU, which Turkey still is striving to join.

a public policy issue. In France, as long as information about a candidate is deemed public (i.e., as long as it is not published on spaces with access restricted to preselected 'friends' or 'followers') and the collection of information does not involve a violation of the right to private correspondence or privacy, then potential employers and any third parties (including recruitment agencies) are entitled to look at the information. However, the candidate must be informed of the social media-based data collection process. On the other hand, in Italy, it is not permissible to refer to social networking sites to make decisions about recruitment and selection of candidates because referring to social media sites in such a context would be an infringement of an individual's right to privacy. Similarly, in Canada, using social media in the recruitment and selection process may risk violating privacy laws. If businesses collect information from social media sites in the recruitment and selection process, it may make it challenging to comply with privacy laws, as set forth in guidelines and decisions of Canadian privacy regulatory authorities.

In 2017, an EU data protection working party released non-binding recommendations that employers should have 'legal grounds' to search applicants' social media. In Germany, for example, employers may not obtain any information from social media sites to answer questions that they would not have been permitted to ask of a candidate directly. Furthermore, employers should only consult purely business-focused networks, such as Xing or LinkedIn, provided that the employer informs the employee about this in the job advertisement. In addition, employee data should be acquired only directly from the employee, the employer is not allowed to collect any information about a severe disability or equal treatment, and the employer may only solicit information from a previous employer if it has the consent of the candidate. Similarly, in the United Kingdom, employers must be familiar with the UK Information Commissioner's Office (ICO) Employment Practices Code and the Employment Practices Code Supplementary Guidance. The ICO recommends that an employer should only seek personal information about a candidate if it is relevant to the job decision being made and that it views the gathering of the information as a form of vetting. Further guidance is available from the UK's Advisory, Conciliation and Arbitration Service in its fact sheet on the use of social networking in recruitment. A failure by an employer to comply with these laws or guidance may result in the employer facing an employment tribunal claim, an action for damages or a complaint to the ICO.

The effects of social media during recruitment cannot be overstated. This is, in part, because millennials and members of Generation Z account for more than one-third of the workforce. In the next 10 years, that figure is estimated to pass 50 per cent, making the youthful generations the most dominant in the workplace. Because these groups of employees have grown up communicating actively via many diverse social media sites and using several devices, the use of social media is a workplace trend with staying power for the foreseeable future.

In any case, employers should be aware of discrimination claims that may arise as a result of the alleged improper use of information gleaned from social media. Before accessing social media, and certainly before making decisions based on information found on social media, employers should carefully consider:

- a* the evidentiary weight to be given to information obtained from a social media site;
- b* that information posted may be inaccurate, out of date, not intended to be taken at face value, or even posted by someone other than the person who is the subject of the enquiries;

- c* that relying on information contained in social media sites creates a risk of discrimination, either because someone is treated less favourably by reason of a protected characteristic, or a condition is imposed that has a disparate effect on a particular group; and
- d* that any use of social media sites when making employment decisions should comply with data privacy requirements (including in relation to the secure storage and deletion of information after it is no longer needed) and any internal policies about the monitoring of these sites.

III BRING-YOUR-OWN-DEVICE POLICIES

Company work is increasingly being conducted on employees' personal mobile devices. Even when there are no formal policies permitting or addressing it, employees are already using their personal devices for work purposes by using workarounds such as forwarding work emails to personal email accounts, taking conference calls from personal smartphones and using the calendar features on their personal devices to track both business and personal appointments. Accordingly, prudent employers are left with little choice but to embrace this trend and put into place policies and limitations that will prevent the employer from being caught flat-footed in a situation in which it needs to access, review or delete company information on an employee's personal device.

These policies, if well crafted, can also offer significant benefits for both employers and employees. For employees, these types of policies are desirable because they cut back on the number of devices that employees must carry around and check, and allow employees to choose which device or operating system is most comfortable for them. These policies can also result in cost savings for the employee if the employer provides a technology allowance or covers a portion of the service costs for the employee's use of a personal device for work purposes. Employers also can realise significant savings as the costs of providing a technology allowance or paying a portion of service costs are likely to be significantly less than the hardware and service costs of providing a separate company-issued device. Moreover, as employees – and especially young employees – increasingly cite workplace flexibility and other similar 'intangible' benefits as key in their assessment of a company's desirability as an employer, any efforts that companies can make to give them an edge in this regard will be beneficial.

Once employees have been hired, employers must have in place policies to guide and manage employees' use of technology in the workplace. Bring-your-own-device (BYOD) programmes in particular can raise thorny issues for employers, despite their many obvious benefits for both employers and employees. For example, there are a number of situations in which an employer will want to be able to access, review or even delete data and other information held on a device. In conducting an internal investigation, for example, an employer may need to review an employee's work-related emails or text messages. An employer might be obliged to produce this type of information in a litigation or government investigation. The device could also include confidential business information or trade secrets that would need to be protected, particularly if the employee resigns or the device is lost or stolen. Accordingly, in enacting mobile device management policies, employers seek to ensure that their data, trade secrets and other proprietary information are secure and accessible to the company, even when held on a device owned by an employee. Because of these concerns, companies generally seek to craft policies that limit to the greatest degree possible their employees' expectation of privacy with respect to activity conducted and data stored on a mobile device. Employees, by contrast, expect a certain degree of privacy with

respect to their use of mobile devices and particularly their personal information stored on personally owned devices. Especially outside the United States, that expectation of privacy is often protected by the law.

Specifically, the privacy and data protection laws of many jurisdictions place limitations on a company's ability to access information on an employee's mobile device (especially when that device is owned by the employee and therefore assumed to contain non-work-related personal information). Some countries are particularly restrictive. In Brazil, for example, accessing or deleting any personal information about an employee will be problematic, even if the company issues a clear and specific policy that indicates that it may do so, and obtaining an employee's consent to such a policy is unlikely to bring access within the bounds of the law. Similarly, in Germany and the Netherlands, monitoring, accessing or deleting personal information on an employee's mobile device (whether company-issued or personally owned) is permissible only if there is circumstantial evidence that an employee is engaged in serious misconduct, such as fraud, sexual harassment or disclosure of the company's confidential information and there are no less intrusive methods to achieve the company's legitimate business objectives. Moreover, in Germany, accessing the personal information of a third party (such as a family member or non-business acquaintance of the employee) on an employee's mobile device without the third party's consent could violate German data protection, telecommunications and even criminal laws. Because it would be nearly impossible to avoid this on an employee's personally owned device, companies should access these devices only in severe cases where there is no other viable means available to achieve the company's purpose in accessing the information. Finally, in many European countries, an employer that wishes to implement a mobile device or BYOD policy will need to inform and consult with the works council before doing so.

By contrast, in India and Mexico, employers have more flexibility, provided that they are transparent with employees about the terms of their mobile device management policy and offer employees a choice about the degree of access that the company will have to employees' personal information.

If an employee refuses to consent to the terms of a BYOD policy, or later withdraws his or her consent, the company should work with the employee to ensure that all company information is deleted from the employee's personal device, and the employee should from then on be required to work only from a company-issued device (and not to conduct personal business or store personal information on that device). In light of this, BYOD-only policies can be particularly problematic because they do not offer employees a real choice as to whether or not to consent to the processing of their personal information.

IV MONITORING

As a general matter, an employer's legitimate interest in protecting its business must be weighed against an employee's right to privacy (and data protection concerns). Accordingly, as a best practice, employers should consider the following steps:

- a* put in place clear, well-defined and well-communicated policies or contractual provisions concerning the appropriate use of social networking sites and the sanctions for non-compliance;
- b* ideally, employees should consent explicitly to such policies in writing. In some jurisdictions, such as the Netherlands and France, however, express consent will not be sufficient in and of itself to allow monitoring;

- c* monitoring should go no further than is necessary to protect the employer's business interests;
- d* monitoring should be conducted only by designated employees, who have been adequately trained to understand the limits on their activities;
- e* personal data collected as a result of any monitoring should be stored safely, not tampered with, not disseminated more widely than is necessary and not stored longer than is necessary;
- f* train management and employees in the correct use of information technology; and
- g* be able to particularise and document any misuse of social media sites by employees.

Different jurisdictions have slight deviations from this approach that must be factored in before making a global social media or technology policy. Although surveillance of employees' use of social networking sites by the employer is permitted in Canada, monitoring must be reasonable and not rise to the level of an invasion of privacy. Notably, in 2012, the Court of Appeal for Ontario recognised a common law right of action for invasion of privacy (i.e., intrusion upon seclusion). In Argentina, Italy and Spain, even in circumstances where monitoring of social media may be permissible, employers are not allowed to monitor its content. As a general rule of thumb in the United Kingdom and Ireland, monitoring should be proportionate to the business need and its level of intrusiveness on an employee's private life. In 2017, the European Court of Human Rights held that employers can monitor employees' emails if the employees are notified in advance. Finally, consultation with works councils, worker representative committees and even health and safety committees may be necessary in various parts of either the promulgation or execution of a social media policy in jurisdictions such as China, France, Germany and the Netherlands.

A somewhat anomalous protection for employees exists under federal labour law in the United States. The National Labor Relations Act (NLRA), a statute primarily dealing with unions and unionised workforces, extends protections for those employees engaging in protected concerted activities over their terms and conditions of employment. The NLRA has been broadly interpreted by its responsible agency to cover employees' social media use. Significantly, from a monitoring perspective, employers must not promulgate or maintain a policy that is perceived to 'chill' employees' exercise of their rights under the NLRA.

V DISCIPLINE AND TERMINATION

The lawful grounds for termination of employment will vary between jurisdictions depending upon the local definitions of gross misconduct, cause or personal reasons. Again, social media sites and mobile devices are increasingly playing a part in this key stage of the employment relationship. The central issue for most employers is whether they can terminate the employment for postings made on social media sites about their employer, colleagues, products or customers. These types of situations are arising with increasing frequency as participation in social networking becomes more widespread.

For example, in an unreported case from China that hit the press in December 2012, an air stewardess lost her labour arbitration claim against the airline from which she was dismissed following an internal investigation after it was discovered that she had posted negative comments on her employer's official Weibo page deriding the airline's public announcement about improvements to its food service. The labour arbitrator upheld the company's dismissal on the grounds that her comments had greatly damaged the company's reputation.

The answer to whether employees' contracts can be terminated for this type of behaviour, arguably, is yes, if the postings constitute behaviour that would be actionable if it took place in the 'real' (offline) world: bullying and harassment; discrimination; defamation; or breach of confidential information, trade secrets or intellectual property. However, the employer still needs to consider factors such as whether the postings are made during work time and from work equipment, the circumstances that led to the posting, whether the company has a policy prohibiting the relevant conduct and whether it has tangible evidence of the breach or violation. Case law indicates that the blanket justification for dismissal of bringing the employer's business or name into disrepute is not a reliable catch-all. Once again, however, there is fairly wide variation among jurisdictions as to what type of behaviour will be found to be actionable.

In many jurisdictions, the degree to which an employer can discipline or terminate the contract of an employee on account of the employee's use (or misuse) of technology will depend on the policies that are already in place. In Germany, for example, an employer's ability to use employee data obtained from social media with respect to a termination depends on the employer's policy on internet use in the workplace. Along the same lines, in China, whether an employer can justify a termination based upon comments posted on social networking sites turns on whether the act in question can be seen as a material violation of work rules set by the employer.

Other jurisdictions give broader rights to employers, though generally at least some restrictions exist. In the United States, for example, an employer is permitted to rely on information obtained from social media sites such as Facebook and Twitter to terminate employment of an employee, subject to certain limitations, but the use of the data in employment decisions increases the risk of employment litigation. The NLRA, for example, covers certain social media activity of non-supervisory employees when the activity constitutes protected concerted activity for collective bargaining or 'other mutual aid or protection'. This means that if a non-supervisory employee posts a workplace complaint on a social media site to encourage other employees to take a stand against a workplace policy, or if other non-supervisory employees comment on the post, it is likely that the employer would be prohibited, under the NLRA, from terminating or taking other adverse action against those employees based on their posts, even if the posts were critical of the employer. Employers are also prohibited under certain state laws from demanding that their employees or job applicants turn over their social media passwords to their employer, and a number of other states are considering legislation banning employers from making these requests. In the United Kingdom, an employer is permitted to rely on evidence from social networking sites when it terminates employee contracts even if the conduct takes place outside working hours and on personal equipment. The key to the successful use of this type of evidence by the employer is whether the evidence amounts to gross or serious misconduct that justifies the employer's decision to terminate the employment relationship. Regard should also be had as to the appropriate evidential weight given to the evidence, which may be unreliable or inaccurate.

VI RECOMMENDATIONS

Advance planning is the best form of defence when dealing with mobile device and social media management. Prudent companies will work to put policies into place that will ensure they are in the best position when difficult situations arise. With respect to social media, companies should consider the following:

- a* determining, as a matter of principle, whether personal use of social networking sites is permitted during work time or from work equipment and any rules on off-duty conduct;
- b* whether certain sites can or should be blocked or whether employees can or should be expressly prohibited from mentioning their employer, place of work, customers and colleagues on social media sites;
- c* whether, as a matter of principle, business use of social media sites is permitted, and set out clear examples of acceptable behaviour;
- d* encouraging employees to draw a distinction between their personal correspondence and use and their working life;
- e* prohibiting the disclosure of confidential, business, client or personal information and trade secrets and making derogatory or defamatory comments; and
- f* prohibiting anonymous communications to ensure that there is no risk of employees being perceived to promote or comment on the employer's products and to reduce the risk of bullying and harassment.

With respect to mobile device (including BYOD) policies, companies should consider the following:

- a* informing employees that there is no expectation of privacy with respect to company equipment, including their use of social media sites, and notifying employees that the employer monitors employees' use of social media sites, the internet and company equipment;⁴
- b* coordinating legal, human resources and IT colleagues and advisers to ensure that the policies and technology are consistent;
- c* providing transparent information to employees about how information on mobile devices (whether company-issued or personally owned) will be accessed, processed, reviewed, transferred, disclosed and deleted; and
- d* obtaining informed and uncoerced consent to the processing of personal information (recognising that BYOD-only policies may make obtaining uncoerced consent practically impossible).

Finally, in general, companies should:

- a* set out the sanctions for a violation or breach of the relevant policies and link these to any disciplinary rules, harassment and whistle-blowing policies;
- b* ensure that the policies are clear, up to date and well known and that reminders are circulated regularly;

⁴ In many jurisdictions, employees will, in fact, have an expectation of privacy with respect to their use of social media and mobile devices (even if those devices are owned by and provided to the employee by the employer), but having policies that clearly limit the employees' expectation of privacy will best position the company in the event that it wishes to access, review or delete information contained on a device or on social media.

- c* educate and train employees and managers on the policies; and
- d* ensure that the policies are enforced in a consistent manner.

If an employer already has a policy in place, it should review the policy to ensure that it is 'fit for purpose' bearing in mind developments in case law. Put simply, as technology develops, attitudes change and the global employer needs to be ahead of the game by ensuring that its policies and documentation reflect those developments. For example, a small number of employers have taken the next step of revising employment contracts to tighten the definition of confidential information, specify ownership of LinkedIn contacts, place a duty on the employee to delete contacts on termination and provide when online activity will breach post-termination restrictions against solicitation and competition.

VII CONCLUSIONS

Global employers must deal with the issues set out in this chapter through their policies and employment documentation and be prepared for the additional challenges posed by local culture and changing social attitudes to technology, social media and privacy in relation to conduct within or outside the workplace. Otherwise, multinational companies risk facing and potentially losing high-profile employment litigation that could damage both the reputation and value of the business.

RELIGIOUS DISCRIMINATION IN INTERNATIONAL EMPLOYMENT LAW

*Erika C Collins*¹

I INTRODUCTION

Religion plays a critical role in the lives of individuals throughout the world. It influences the workplace, and employees are directly affected by the ways in which employers protect employees' religious beliefs. In an era when transnational corporations are key actors in the global economy, there is a heightened need for businesses to understand different national approaches to accommodating religion in the workplace. This chapter compares how the United States, France, Germany, Turkey, Saudi Arabia and India each manage religious discrimination in the workplace. In light of the legal debate surrounding the donning of headscarves in the workplace, discussion is included on the relationship between headscarf bans and religious discrimination in the workplace in each of these nations.

II UNITED STATES

i Backdrop

The United States has long recognised the importance of freedom of religion. Early US history demonstrates that many of the original settlers were fleeing religious persecution and sought to challenge the degree to which religion should be integrated into politics. Thus, the US Constitution was written in the context of a deeply pluralist society. The notions of freedom of religion and separation of church and state developed early on, and were enshrined in the First Amendment to the US Constitution.

The doctrine of religious accommodation in the workplace grew not only out of the Constitution but also out of the Civil Rights Movement of the 1950s and 1960s and the passing of Title VII of the Civil Rights Act of 1964. Title VII statutorily mandates that employers must accommodate religion in the workplace.² For years, the Supreme Court has grappled with the correct application of both the US's constitutional language and that of Title VII.

In a simple sense, religious freedom in the US suggests both individual freedom of religion and overall freedom from state interference. Religious tests for political office are unconstitutional, there are no religious political parties and the government is proscribed

1 Erika C Collins is a shareholder at Epstein Becker & Green, PC. The author extends special thanks to Ryan Hutzler and Anastasia Regne for their contributions to this chapter.

2 Title VII of the Civil Rights Act of 1964, 42 USC § 2000e(j) (2010).

from sponsoring or promoting any religious activity in public spaces. Simultaneously, a rich jurisprudence of case law concerning freedom of religion and the duty to accommodate religious beliefs in the workplace illustrates the US's commitment to an egalitarian society.

ii Laws

The First Amendment to the US Constitution provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.³ The first half of this sentence, known as the establishment clause, 'prevents the government from using its power to promote, advocate, or endorse any particular religious position'.⁴ The second part, known as the free exercise clause, specially protects religion from government interference.⁵

Title VII of the Civil Rights Act prohibits employers from discriminating against employees because of their religion.⁶ Additionally, employers cannot treat employees or job applicants more or less favourably with regard to hiring, firing and the terms and conditions of their employment on the basis of religious beliefs.⁷ Title VII also requires employers to 'reasonably accommodate' any religious beliefs or practices sincerely held by their employees that conflict with an employment requirement, unless the employer can show that the accommodation would cause undue hardship to its business.⁸

A reasonable accommodation is any adjustment to the work environment that will allow the employee to practise his or her religion. These reasonable accommodations may include allowing flexible scheduling and voluntary substitutions or swaps of shifts, days off or job assignments. An employer can show undue hardship if accommodating an employee's religious practice requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation.

iii Important cases

Under Title VII, employers are required to reasonably accommodate their employees' religious beliefs while still ensuring that an employee's religious acts or symbols do not offend others. In 1977, the Supreme Court elucidated the reasonable accommodation standard in *Trans World Airlines Inc v. Hardison*.⁹ The case involved an employee of a department that needed to remain open 365 days per year. However, the employee's religion required that he observe the Sabbath each Saturday. Owing to the seniority system in the collective bargaining agreement between the employer and the union, the employee was unable to select shifts that accommodated this. After refusing to work on Saturdays, he was fired for insubordination.

3 US Constitution Amendment I.

4 Michael W McConnell (2000), 'The Problem of Singling Out Religion', *DePaul Law Review*, 50(1): 43.

5 id.

6 42 USC § 2000e-2.

7 42 USC § 2000e-2(a)(1)-(2).

8 42 USC § 2000e(j).

9 *Trans World Airlines Inc v. Hardison*, 432 US 63 (1977).

The Supreme Court held that the company met its duty to accommodate, which does not require employers to breach contractual provisions.¹⁰ Specifically, the Court explained that Title VII does not require more than a *de minimis* cost to an employer.¹¹

Although *Hardison* seemingly established a lenient standard for employers to meet so as to not accommodate an employee's religious beliefs, in practice, the doctrine has fluctuated over the decades. The Supreme Court discussed the nature of this duty in *EEOC v. Abercrombie & Fitch Stores Inc.*¹² The case concerned a plaintiff who applied for a position at her local Abercrombie store. When attended for interview, she was wearing a headscarf, but did not discuss her religious beliefs or her reasons for wearing a headscarf. Despite rating her as adequately qualified, Abercrombie refused to hire the plaintiff, assuming that it would need to accommodate her religious beliefs. The Supreme Court held that Abercrombie's actions violated Title VII.¹³ Furthermore, the Court explained that to prevail on a disparate treatment claim under Title VII, the applicant need only show that the need for an accommodation was 'a motivating' factor in the employer's decision, not that the employer actually knew of the need.¹⁴

III FRANCE

i Backdrop

As in the United States, France is committed to having a religiously neutral society and to maintaining the separation of church and state. This ideology was inherited from the French Revolution, which overhauled the Catholic establishment and instituted an anti-clerical state.¹⁵ Since then, France has maintained a secular national ideology to promote equality, tolerance and fairness to the French people, free from religious intrusion into the public space.¹⁶

The French word for its secular philosophy is *laïcité*. *Laïcité* requires a strict and formulaic interpretation of equality, under which the state is neutral and does not recognise the religious differences between citizens.¹⁷ Similarly, there is no concept of 'minority rights' or 'minority groups'.¹⁸ The overall aim of the system is to create a society with a strong individual sense of belonging to the French national community, as opposed to a specific racial, ethnic or religious community.¹⁹ Some scholars have described France's unique

10 id., at 81 ('It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others').

11 id., at 84 ('To require TWA to bear more than a *de minimis* cost . . . is an undue hardship').

12 *EEOC v. Abercrombie & Fitch Stores Inc.*, 575 US 768 (2015).

13 id., at 2033.

14 id.

15 Derek H Davis (2004), 'Reacting to France's Ban: Headscarves and other Religious Attire in American Public Schools', *Journal of Church and State* 46: 221, 221.

16 id.

17 Frederick M Gedicks (2006), 'Religious Exemptions, Formal Neutrality, and *Laïcité*', *Indiana Journal of Global Legal Studies* 13: 473, 475.

18 See Erik Bleich, 'Race Policy in France' (2001), Brookings Institute <<https://www.brookings.edu/articles/race-policy-in-france/>>.

19 See generally, Patrick Simon, 'French National Identity and Integration: Who Belongs to the National Community?' Transatlantic Council on Migration (May 2012).

approach to religious liberty as the 'privatisation of an individual's faith',²⁰ while others have argued that maintaining *laïcité* involves an irreconcilable encroachment on religious freedom, as it forces citizens to choose between religious fidelity and national loyalty.²¹

ii Laws

Article 1 of the 1958 French Constitution declares: 'France shall be an indivisible, secular, democratic and social Republic [and] shall ensure the equality of all citizens before the law, without distinction of . . . religion.'²² Thus, the French government is legally forbidden from recognising any religion.

As a member of the European Union, France abides by the principles of the 2000 EU Employment Equality Directive (Council Directive 2000/78/EC), which proscribes direct discrimination (Article 2(2)(a)), indirect discrimination (Article 2(2)(b)), harassment (Article 2(3)) and victimisation (Article 11) at the workplace on the basis of religion.²³ France also has signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), which prescribes the right to 'freedom of thought, conscience and religion'.²⁴ This includes the right to manifest one's beliefs or religion alone or with others in public or private through 'worship, teaching, practice, and observance'.²⁵ However, the European Convention advises that this right may be limited to protect the 'rights and freedoms of others'.²⁶ As such, in 2010, the National Assembly banned the wearing in public spaces of niqabs, burqas and other articles of clothing that conceal the face, finding the covering of the face to be 'incompatible with the values of the Republic' and contrary to the 'ideal of fraternity' and the 'minimum requirement of civility' that is 'necessary for social interaction'.²⁷ Furthering the discourse on the ban on headscarves, the French Senate passed a law in 2019 banning mothers who chaperone school trips from wearing headscarves during the excursions. While the law passed the Senate (by 186 to 100, with 159 senators abstaining), the law was rejected by the French parliament's lower house, the National Assembly.²⁸

20 Bruce Crumley, 'Too Muslim to be French?', *Time Magazine* (12 July 2008) <<http://content.time.com/time/world/article/0,8599,1822189,00.html>>.

21 Lucy Vickers, 'Religion and Belief Discrimination in Employment – the EU Law', Directorate-General for Employment, Social Affairs and Equal Opportunities (European Commission) (2007), 40.

22 1958 Constitution 1 (France).

23 Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, 2000 OJ (L 303/16).

24 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Article 9, 4 November 1950.

25 See Gedicks, footnote 17 (above), at 477.

26 *id.*

27 See Martin Wählisch, 'ECHR Chamber Judgment Case of S.A.S. v. France: Banning of burqas and niqabs legal?', *Cambridge International Law Journal* (21 July 2014) <<http://cilj.co.uk/2014/07/21/echr-chamber-judgment-case-s-s-v-france-banning-burqas-niqabs-legal/>>. However, in 2018, the United Nations Human Rights Committee found that France's niqab and burqa ban violated Muslim women's human rights. 'French "burqa ban" violates human rights, rules UN committee', *DW.com* (3 January 2020) <<https://www.dw.com/en/french-burqa-ban-violates-human-rights-rules-un-committee/a-46007469>>.

28 Jon Stone, 'French Senate votes to ban mothers who wear headscarves from accompanying children on school trips', *Independent* (17 May 2019) <<https://www.independent.co.uk/news/world/europe/france-burqa-ban-niqab-school-senate-vote-islam-children-republicans-a8918741.html>>.

iii Important cases

In 2014, *SAS v. France* was brought before the European Court of Human Rights (ECtHR). This case challenged the 2010 French law banning all facial coverings in public space.²⁹ The applicant was a French woman of Pakistani origin who wore both the burqa, which covered her eyes, and the niqab, which covered all but her eyes. The ECtHR upheld France's national laws, finding that the laws did not violate any Articles in the European Convention. In addition, the Court explained that national authorities are better placed to evaluate local needs and conditions than international courts. Although not directly in the employment context, this outcome bolsters employers' ability to ban headscarves to maintain religiously neutral workplaces.

Two similar cases, *Dogru v. France* and *Kervanci v. France*, were decided by the ECtHR on 4 December 2008.³⁰ The applicants, two French nationals, were enrolled in secondary school in France. During physical education classes, the applicants were asked to remove their headscarves on the premise that scarves were incompatible with sports. After refusing to take off their headscarves, the applicants were expelled from the school for breaching the duty of assiduity by failing to participate actively in the physical education classes. The ECtHR held that while the requirement to remove headscarves was a restriction on the right to freedom of religion under Article 9 of the European Convention, it was permissible in France, where the legitimate aim of the French government is to protect not only the rights and freedom of others but also public policy.

Two additional cases highlight the headscarf ban debate. First, in 2015, in *Ebrahimian v. France*, the ECtHR ruled against a French Muslim woman who claimed that workplace rules forcing her to remove her headscarf was discriminatory. Ms Ebrahimian, a hospital social worker, had repeatedly ignored requests to remove her headscarf and, as such, the hospital decided not to renew her contract. The ECtHR upheld the ban on public sector employees wearing headscarves and other religious symbols, concluding that it did not violate freedom of religion under Article 9 of the European Convention because Article 1 of the French Constitution specifically provides for the principles of secularism and strict religious neutrality on public officials in discharging their functions.

Second, in 2016, in *Boungaoui v. Microple SA*, a Muslim woman employed by a private-sector French IT consultancy was dismissed because she refused to remove her headscarf. The French Court of Cassation asked the Court of Justice of the European Union (CJEU) whether, under EU anti-discrimination rules, a requirement not to wear a headscarf during employment was discriminatory. An Advocate General for the Court of Justice ruled that, specifically in the private sector, the dismissal amounted to direct discrimination because Ms Boungaoui was treated less favourably on the grounds of her religion and there was nothing to suggest that she was unable to perform her duties because she wore a headscarf. The Advocate General also observed that a company policy imposing an entirely neutral dress code would be likely to result in indirect discrimination as well, unless the policy pursued a legitimate aim and was proportionate.

Notably, however, in 2017, the CJEU considered the case, but was asked to decide whether an employer's enforcement of the wishes of a customer who does not want to work with an employee wearing a headscarf constitutes a 'genuine and determining occupational requirement' under the EU Employment Equality Directive. When an employer's internal

29 *SAS v. France*, App No. 43835/11, 2014 ECtHR.

30 *Dogru v. France*, App No. 27058/05, 2008 ECtHR; *Kervanci v. France*, App No. 31645/04, 2008 ECtHR.

policy results in different treatment of persons of different religions because of the nature of the occupational activities, the policy is not discriminatory as the subject characteristic is a 'genuine and determining' requirement of the position. The CJEU ruled that the employer's willingness to take the customer's wishes into account cannot be considered a 'genuine and determining occupational requirement' as it was not related to occupational activities and instead related to a characteristic of religion.

IV GERMANY

i Backdrop

As with France and the United States, Germany supports the separation of church and state and adopts a policy of state neutrality.³¹ Germany's method of achieving state neutrality is largely shaped by its history and the dramatic change in its population since the mid 20th century. In 1950, more than 96 per cent of the population in the Federal Republic of Germany belonged to one of the major Christian confessions.³² However, since the 1960s, there has been a steady migration of Muslims from Turkey and various Arab countries into Germany. It is estimated that at least 6 per cent of Germany's population are Muslims.³³ By 2050, it is estimated that approximately 8.7 per cent of the German population will be Muslim.³⁴ Consequently, the importance of all non-Christian religions, and in particular Islam, is rapidly increasing.

Although xenophobia has existed in Germany for centuries, certain reports suggest that, since the turn of the 21st century, there has been a shift from general xenophobia to a more anti-Islamic attitude.³⁵ This may be due in part to developments in work politics, debates on terrorism and security, and Islamism.³⁶ Nonetheless, Germany neither strictly opposes state and religious communities nor entirely separates itself from them.³⁷ Rather, Germany instructs authorities to assist and support the various denominations.³⁸

The German Constitution grants religious groups considerable autonomy because all religious societies regulate and administer their affairs independently within the limits of the law.³⁹ This autonomy allows each religious group to define what is legitimately classified as

31 Davis, footnote 15 (above), at 222.

32 Stefan Koriath and Ino Augsberg, 'Religion and the Secular State in Germany', German National Reports to the 18th International Congress of Comparative Law (2010), 320.

33 'The Growth of Germany's Muslim Population', Pew Research Center (29 November 2017) <www.pewforum.org/essay/the-growth-of-germanys-muslim-population/>.

34 id.

35 Hakan Tosuner, 'Germany: Discrimination of Muslims in employment in Germany', Tolerance Research Project at Centre for Social Studies, Associate Laboratory University of Coimbra, 5 <www.ces.uc.pt/projectos/tolerance/media/WP3/WorkingPapers%203_Germany.pdf>.

36 id.

37 Koriath and Augsberg, footnote 32 (above), at 325.

38 id.

39 Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) [Basic Law], 23 May 1949, Article 140, BGBl. I 140.

religion and religiously connoted behaviour, and places the government equally distant from all religious communities.⁴⁰ However, the Constitution still allows the state to intervene and conduct a 'plausibility check' if it believes that a group is misusing this freedom.⁴¹

ii Laws

Germany's Constitution mandates that each of the 16 federal states remains neutral towards religion.⁴² Article 3 explains: 'No person shall be favoured or disfavoured because of their gender, parentage, race, language, homeland and origin, faith, or religious or political opinions.'⁴³ In addition, Article 4 lays out the individual right to religious freedom and obliges the state to respect the religious activities of its citizens and to secure their free development.⁴⁴

Germany's constitutional mandate of neutrality only applies to public sector employers.⁴⁵ Similarly, decisions of the Federal Constitutional Court are legally binding on public authorities.⁴⁶ Thus, private sector employees are not absolutely protected by the federal German employment discrimination laws, although they may be protected when civil law judges interpret the general constitutional clauses under civil law.⁴⁷

There is some private-sector recourse available under Section 75 of the Works Constitution Act.⁴⁸ Under this Act, employers and works councils must ensure that all employees are treated in conformity with the principles of law and fairness, and, in particular, that no employee is discriminated against 'on grounds of race, ethnic origin, descent or other origin, nationality, religion or belief, disability, age, political or trade union activities or convictions, or on the grounds of gender or sexual identity'.⁴⁹ The Works Constitution Act applies to all private sector companies in which a works council must be founded.⁵⁰ The Act does not apply to discrimination in recruitment, but instead only to discriminatory treatment of current employees.⁵¹ It also does 'not apply to companies and establishments that directly and predominantly pursue political, coalition, religious, charitable, educational, scientific or artistic objectives'.⁵² With such broad exemptions, private sector employees often lack legal recourse beyond invoking the employer's general obligation to take care of its employees.⁵³

In 2017, the German parliament approved a partial headscarf ban, which would prohibit civil servants, judges and soldiers from wearing full-face veils (including the burqa and niqab) while at work. Also in 2017, the upper house of the German parliament approved legislation that prohibits drivers from having their faces completely or even partially covered, which has been interpreted as a burqa ban.

40 Koriath and Augsburg, footnote 32 (above), at 323.

41 *id.*

42 Basic Law, footnote 39 (above), Articles 3 and 4.

43 *id.*, at Article 3.

44 *id.*, at Article 4; see also Koriath and Augsburg, footnote 32 (above), at 322.

45 Raphael Won-Pil Suh and Richard Bales, 'German and European Employment Discrimination Policy', *Oregon Review of International Law* (2006), 8: 263, 271.

46 *id.*

47 *id.*

48 Betriebsverfassungsgesetz [Works Constitution Act], 15 January 1972, BGBl I Section 75.

49 *id.*

50 These are companies with at least five permanent employees. See Suh and Bales, footnote 45 (above), at 273.

51 *id.*

52 Works Constitution Act, footnote 48 (above), Section 118(1).

53 Suh and Bales, footnote 45 (above), at 273.

iii Important cases

In 2016, a German court found that a Muslim law trainee had the right to wear a headscarf while working. In this case, Aqilah Sandhu began a traineeship with the Bavarian judicial system after completing her state law examinations, but was told in a letter that she was not allowed to interrogate witnesses or appear in courtrooms while wearing her headscarf. Ms Sandhu requested an explanation for the rule and was informed that religious clothing or symbols ‘can impair the trust in religious neutrality of the administration of justice’. The German court agreed with Ms Sandhu that there was no legal basis for banning her from wearing religious dress at work.

In addition, two related cases reflect the current trend of religious discrimination in the German workplace. One of these concerned a teacher wearing a headscarf.⁵⁴ The Federal Constitutional Court held that public school teachers could not be prohibited from wearing headscarves at work so long as the federal states in which they taught did not have laws specifically banning the display of religious symbols in public classrooms.⁵⁵ The immediate consequence of the decision was that several German states immediately enacted laws forbidding teachers from wearing religious symbols in classrooms.⁵⁶

However, in a later decision, the Federal Constitutional Court arrived at the opposite conclusion.⁵⁷ In 2015, the Court held that prohibiting a teacher or social worker from wearing a headscarf in a public school violated Articles 3 and 4 of the German Constitution and unjustifiably interfered with an individual’s freedom of religion. The Court reasoned that, despite the state’s legitimate desires to achieve religious neutrality and to secure the educational rights of all its citizens, a ban on all headscarves was a disproportionate measure to achieve those goals. It explained that any general ban on visible religious symbols or clothing, such as headscarves, kippas, and nuns’ or monks’ habits violates the right to freedom of religion.⁵⁸ Despite the Federal Constitutional Court’s shift in ideology, however, some lower courts’ rulings continue to support prohibiting headscarves in the workplace.

V TURKEY

i Backdrop

Unlike nearly all majority-Muslim states, Turkey has a strictly secular system of governance that controls all religious activity.⁵⁹ This ideology can be traced back to a few key periods. First are the Tanzimât reforms that were enacted during the Ottoman Empire.⁶⁰ During these reforms, the phrase ‘religion of the state is Islam’ was removed from the Turkish Constitution

⁵⁴ Bundesverfassungsgericht [Federal Constitutional Court], 24 September 2003, BVERFGE 108, 282, 300 (in German).

⁵⁵ *id.*

⁵⁶ Koriath and Augsburg, footnote 32 (above), at 326.

⁵⁷ Federal Constitutional Court, 27 January 2015, Case Nos. 1 BvR 471/10, 1 BvR 1181/10 (in German).

⁵⁸ *id.*

⁵⁹ Türkiye Cumhuriyeti Anayasası [Constitution of Turkey], Article 2.

⁶⁰ William L. Cleveland and Martin Bunton, *A History of the Modern Middle East* (2009), 82.

of 1924.⁶¹ Subsequently, in reforms implemented by Turkey's first president, Mustafa Kemal Atatürk, during the Second Constitutional Era, the nation officially adopted a democratic and secular ideology known as Kemalism.⁶² Finally, nine years after its introduction, *laïcité* was explicitly established in Article 2 of the Turkish Constitution.

Although the Turkish notion of *laïcité* derived from France, in Turkey, *laïcité* does not call for a strict separation of religion and the state, but rather it describes the state's stance as one of 'active secularism'.⁶³ For this reason, the Constitution contains a number of affirmative government duties to restrict religious expression. For example, Article 136 of the current Constitution establishes the Presidency of Religious Affairs,⁶⁴ which is mandated '[t]o offer services according to the principles of citizenship without distinction of sect, understanding and practice regarding religion'.⁶⁵ Additionally, the Presidency of Religious Affairs appoints and pays all prayer leaders (*a'imma*) and preachers (*hatips*).⁶⁶

ii Laws

The current Turkish Constitution was adopted in 1982. Article 2 lays out the nation's secular ideology,⁶⁷ and Article 10 protects citizens from discrimination on the basis of religion.⁶⁸ These provisions of the Turkish Constitution provide similar protections of religious freedom to many Western constitutions. In addition, Turkey's secularism resembles that of France, insofar as it restricts religious expression in public. However, unlike both France and the United States, Turkey permits considerable affirmative government influence in religious activities.⁶⁹

In addition to Turkey's secular constitutional provisions, in the public sphere, the By-law on the Garments of Public Personnel covers officials and workers employed in the public sector because the prevalent idea is that they must represent state neutrality, and as such, public officials and public sector workers must conform to specific dress codes.⁷⁰ Thus, both men and women are prohibited from wearing religious garments or symbols in the workplace and are required to work bareheaded. Women who work in the public sphere generally cannot wear Islamic outfits, including hijabs, niqabs and burqas.⁷¹ In recent years,

61 Özlem Kaya, 'On the Way to a New Constitution in Turkey: Constitutional History, Political Parties and Civil Platforms', *Friedrich Ebert Stiftung* (October 2011) <www.fes-tuerkei.org/media/pdf/Publikationen%20Archiv/Ortak%20Yay%C4%B1mlar/2011/2011%20On%20the%20Way%20to%20a%20New%20Constitution%2013102011.pdf>.

62 'Atatürk's reforms', *All About Turkey* (2015) <www.allaboutturkey.com/reform.htm>.

63 'Turkey: AKP's Hidden Agenda or a Different Vision of Secularism?', *Nouvelle Europe* (7 April 2011) <nouvelle-europe.eu/node/1091>.

64 Constitution of Turkey, footnote 59 (above), Article 136.

65 See Pakistan Defence Forum, 'Basic Principles and Objectives: Should Pakistan copy the Turkish state system for religious affairs?', Presidency of Religious Affairs (27 September 2016) <<https://defence.pk/pdf/threads/should-pakistan-copy-the-turkish-state-system-for-religious-affairs.451871/>>.

66 Nurhan Süral, 'Islamic Outfits in the Workplace in Turkey, A Muslim Majority Country', *Comparative Labor Law and Policy Journal* (2009), 30: 569, 575.

67 'Public peace, national solidarity and justice within the Republic of Turkey, being respectful of human rights, is linked to Atatürk nationalism, initially based on the fundamental principles of a democratic, secular and social state of law.'

68 'Everyone is equal before the law without discrimination because of language, race, colour, gender, political thought, philosophical belief, religion, sect and similar reasons.'

69 Constitution of Turkey, footnote 59 (above), at Article 136.

70 Süral, footnote 66 (above), at 584.

71 id.

however, the headscarf ban in Turkey has largely been lifted in certain sectors and for certain people, including on university and high school campuses, in some state institutions and for female police and army officers.

Article 5 of Turkey's Labour Act of 2003 contains the most extensive provision prohibiting discrimination.⁷² This Article regulates the principle of equal treatment, prohibiting discrimination on the basis of race, gender, language, religion and sect, political opinion or philosophical belief, among others.⁷³ However, the Labour Act does not impose a duty of non-discrimination on hiring in the private sphere.⁷⁴ Similarly, there is no duty on employers to make reasonable accommodations for the religious needs of staff.⁷⁵ While government oversight of private employer activities is slightly more relaxed, the government still employs a number of agencies to regulate religious activity in nearly any context. Thus, the Constitution's secularism pervades both the public and private sphere.

iii Important cases

One of the most important Turkish cases surrounding the headscarf debate occurred in 2005. *Sahin v. Turkey*⁷⁶ was heard before the ECtHR but was largely influenced by the 1989 decisions of the Turkish Constitutional Court. The *Sahin* case involved a medical student who challenged the Turkish bans on wearing Islamic headscarves at universities and state institutions. The Court explained that Turkish headscarf bans in schools and public places do not breach the religious freedom of individuals, and held that fundamental freedoms are not violated when a secular country bans the wearing of religious clothing in institutions of higher education. Although the case involved an educational setting, and not an employment setting, it had important implications for headscarf bans in the workplace, as it bolstered general Turkish secularism.

The holding in *Sahin* is consistent with another ECtHR's holding, in *Karaduman v. Turkey*.⁷⁷ In that case, a Turkish university student was denied a certificate of graduation because the school required a photograph of her without a headscarf, and she refused to be photographed without one. The Court found that the state was entitled to place restrictions on the wearing of a headscarf if it was incompatible with the goal of protecting the rights and freedoms of others, public policy and public safety. As such, the Court held that, under Article 9 of the European Convention on Human Rights, the university did not violate the student's right to freedom of religion.⁷⁸

These decisions evince why Turkish courts are likely to find that an employer's desire to have a politically neutral workplace outweighs employees' freedom in respect of dress and religious expression.⁷⁹

72 id., at 587.

73 id.

74 id., at 588 (noting, however, that there is a general exception that prohibits discriminatory job advertisements).

75 id.

76 *Sahin v. Turkey*, App No. 44774/98, 2005 ECtHR.

77 *Karaduman v. Turkey*, App No. 16278/90 2003 ECtHR.

78 id.

79 Süral, footnote 66 (above), at 591.

VI SAUDI ARABIA

i Backdrop

The Kingdom of Saudi Arabia is a political monarchy currently ruled by King Salman bin Abdulaziz Al Saud, whose father unified the country in the early 20th century. As the birthplace of Islam, Saudi Arabia is one of the most traditional Muslim societies in the world.⁸⁰ Not only is Islam a central aspect of the nation's historical identity, but it is also the basis of the legal system, political system and social outlook.⁸¹

The governing legal system is known as shariah law (shariah), and it is deeply rooted in traditional Islamic law.⁸² Shariah is based on religious texts and works of Muslim jurists and Muslim states during the past 15 centuries.⁸³ Adherents of shariah believe that law and religion overlap and that 'law in Islam is divine, sacred and comprehensive'.⁸⁴ Consequently, national policies do not legally recognise or protect religious freedom.⁸⁵

ii Laws

Shariah combines the Hanbali School of Law and the Wahhabi Doctrine.⁸⁶ The Hanbali School is the official school of Islamic law for the courts of Saudi Arabia, under which judges have the discretion to make rulings according to understandings derived from shariah or other schools of Islam.⁸⁷ Ultimately, Saudi judges are constrained 'solely by their own conscience in determining the will of God'.⁸⁸ The Wahhabi Doctrine opposes innovation in religion and rejects interpretations of law and religion that are not based on sources of law drawn from traditional texts.⁸⁹

In 1992, King Abd al-Aziz attempted to create a more modern legal system and enacted the Basic Law of Governance.⁹⁰ However, it was drafted absent any public debate and there was no referendum to ratify it.⁹¹ Article 1 of this law explains that the Constitution of the Saudi Kingdom is 'the book of God and the Sunna (Traditions) of his Messenger'.⁹² Article 5 establishes that Saudi Arabia is a monarchy and that rule is limited to the sons of the

80 Hossein Esmaili, 'On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System', *Arizona Journal of international and comparative law* (2009), 26(1): 7-8.

81 *id.*, at 7.

82 *id.*

83 *id.*

84 *id.*

85 See references to Saudi Arabia in 'International Religious Freedom Report for 2013', US Department of State, Bureau of Democracy, Human Rights and Labor, 3 <<https://2009-2017.state.gov/j/drl/rls/irf/2013religiousfreedom/index.htm#wrapper>>.

86 Esmaili, footnote 80 (above), at 7.

87 Katherine Scully, 'Blocking exit, stopping voice: How exclusion from Labor Law protection puts domestic workers at risk in Saudi Arabia and around the world', *Columbia Human Rights Law Review* (2010), 41: 825, 850.

88 *id.*, at 848 (quoting Charles P Trumbull, 'Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts', *Vanderbilt Law Review* (2006), 59: 609, 630).

89 Esmaili, footnote 80 (above), at 5.

90 *id.*, at 29.

91 *id.*

92 *id.*

founder, King Abd al-Aziz, and the sons of his sons.⁹³ Article 44 describes some separation of powers, with the caveat that the King shall be the final authority over the three branches of government.⁹⁴

The state prohibits public practice of any religion other than Islam.⁹⁵ Women must wear a headscarf and a long cloak (*abaya*) that covers the entire body, head and face at all times.⁹⁶ The law severely restricts all forms of public religious expression other than its own interpretation and enforcement of Islam.⁹⁷ In public, women must always be accompanied by a male relative.⁹⁸ In the workplace, men and women must be segregated.⁹⁹ In addition, the Islamic police force patrols the streets to enforce gender segregation.¹⁰⁰

In shariah courts, a woman's testimony is only worth half that of a man's testimony in capital punishment cases.¹⁰¹ This effectively means that the burden of proof is much higher for women than it is for men. In divorce and family law cases, women must generally deputise male relatives to speak on their behalf.¹⁰² In other types of cases, such as adultery and rape cases, women are required to solicit either four male witnesses or a direct confession by the perpetrator.¹⁰³ Although women often ask male relatives to speak on their behalf, these burdensome evidentiary standards frequently discourage women from attempting to seek legal recourse at all.

Certain reports suggest that there have been some improvements for women in the workplace since 2005, when Saudi Arabia overhauled its labour laws and instituted special labour courts to adjudicate labour complaints.¹⁰⁴ Moreover, as of June 2018, women are permitted to drive.¹⁰⁵ Also in 2018, a woman was an anchor for the main evening news broadcast on the national television station for the first time. However, Saudi Arabia is still designated as a 'Country of Particular Concern' under the International Religious Freedom Act in view of its engagement in or tolerance of particularly severe violations of religious freedom.¹⁰⁶

93 id.

94 id.

95 'International Religious Freedom Report 2013', footnote 85 (above), at 1.

96 Scully, footnote 87 (above), at 862 to 863 and footnote 274.

97 See, e.g., 'Saudi blogger receives first 50 lashes of sentence for "insulting Islam"', *The Guardian* (10 January 2015) <www.theguardian.com/world/2015/jan/09/saudi-blogger-first-lashes-raif-badawi>.

98 Scully, footnote 87 (above), at 862.

99 "As If I Am Not Human": Abuses against Asian Domestic Workers in Saudi Arabia', Human Rights Watch (July 2008), 20 <www.hrw.org/sites/default/files/reports/saudi-arabia0708_1.pdf>.

100 Scully, footnote 87 (above), at 863.

101 'International Religious Freedom Report 2013', footnote 85 (above), at 4.

102 'Saudi Arabia: Country Reports on Human Rights Practices', US Department of State, Bureau of Democracy, Human Rights and Labor (4 March 2002) <<https://2009-2017.state.gov/j/drl/rls/hrrpt/2001/nea/8296.htm>>.

103 id.; see also Scully, footnote 87 (above), at 859 and footnote 243.

104 Scully, footnote 87 (above), at 827.

105 'Saudi Arabia Agrees to Let Women Drive', *The New York Times* (26 September 2017) <www.nytimes.com/2017/09/26/world/middleeast/saudi-arabia-women-drive.html>.

106 'International Religious Freedom Report 2013', footnote 85 (above), at 2, 18.

iii Important cases

Because women must wear a headscarf at all times, headscarf discrimination in Saudi Arabia does not exist. But even under shariah law, women in the workplace face a host of challenges. For example, because workplaces are completely segregated by gender, women can be subjected to harsh penalties for intentionally or accidentally mingling with men in the workplace, even if the mingling was the result of a man's actions.

In one instance, a woman was convicted of illegal mingling after her employer entered the women's section of the workplace.¹⁰⁷ At trial, the judge did not address the woman's allegation that her employer raped her. Despite inconclusive evidence as to what transpired, the woman was sentenced to 70 lashes and deportation for failing to complain that her employer had entered the women's section.¹⁰⁸ Similarly, Saudi Arabia criminalises contact between unmarried individuals of the opposite sex, which places rape victims at risk of prosecution for illegal mingling as well.¹⁰⁹ In the high-profile *Qatif* case, a court convicted a victim of gang rape of illegal mingling and blamed her for going out alone.¹¹⁰

VII INDIA

i Backdrop

India gained independence from Britain in 1947 and enacted its Constitution in 1950. Pre-colonial Indian society was organised by the caste system, which segregated the population by inherited social status. In the 21st century, India has been making drastic efforts to overcome the bleak legacy of its caste system and to build a more egalitarian society.¹¹¹ To advance this goal, it has enacted a large-scale affirmative action programme known as a 'reservation system' (also known as 'compensatory discrimination' or 'quota programme') that applies to the public sector, civil service, and state and private educational institutions.¹¹²

The reservation system is designed to promote minority populations and historically oppressed groups. Under the system, a proportion of jobs (which cannot exceed 50 per cent) are reserved for 'backward communities', 'scheduled castes' and 'scheduled tribes' as defined by the government.¹¹³ Individuals who belong to one of these disadvantaged minority groups may be able to enter public posts more easily and enjoy relaxed promotion requirements.¹¹⁴

107 Human Rights Watch, footnote 99 (above), at 90 to 91.

108 *id.*

109 *id.*, at 21, 91.

110 The court initially doubled the victim's sentence to six months' imprisonment and 200 lashes for reaching out to the media. However, following an international outcry, King Abdullah later pardoned the young woman. Nonetheless, the case still reflects some of the injustices that many women face in the Saudi Arabian legal system. See also Human Rights Watch, footnote 99 (above), at 21.

111 Katayoun Alidadi, 'Opening Doors to Muslim Minorities in the Workplace? From India's Employment Quota to EU and Belgian Anti-Discrimination Legislation', *Pace International Law Review* (2011), 23: 146, 172, 175.

112 *id.*, at 150.

113 *id.*

114 *id.*

ii Laws

India's Constitution is arguably the most comprehensive in the world. It contains almost 400 articles, numerous annexes and has been amended more than 100 times.¹¹⁵ The Preamble defines India as 'a sovereign socialist secular democratic republic'. India has ratified the International Labour Organization's 1958 Discrimination Convention and 'thus agreed to pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination'.¹¹⁶ There is also an Equal Opportunity Commission, which reviews grievances of deprived groups and correlates them to a diversity index to ensure equal opportunities in education, governance, private employment and housing, among others.¹¹⁷

Article 14 of the Constitution establishes equal protection.¹¹⁸ Article 15 contains the non-discrimination principle on the basis of religion, race, caste, gender and place of birth that specifically applies to 'access to shops, public restaurants, hotels and places of public entertainment'.¹¹⁹ Article 16 establishes the principles of equality of opportunity and non-discrimination in public employment, but allows for reservations for backward classes.¹²⁰ Article 38 urges the state to minimise inequalities in income and status, and Article 46 promotes the educational and economic interests of weaker sections of society, in particular the scheduled castes and scheduled tribes.¹²¹ Notably, the Indian private sector is not subject to the reservation system.¹²² Article 17 is the only provision that binds both the public and private sectors, and the Article outlaws untouchability and forbids its practice in any form.¹²³ As such, only victims suffering a discriminatory act by a public body can seek constitutional legal remedies.¹²⁴ During the past year, Indian religious minorities, including Muslims, have faced extensive discrimination, including violence.¹²⁵ The rise in violence against non-Hindu Indians is attributed to the rise of Bhatatiya Janata Party, India's Hindu Nationalist Party.¹²⁶ Raveesh Kumar, a spokesman for the Ministry of External Affairs, rejected a US report

115 id., at 175.

116 Alidadi, footnote 111 (above), at 174 (internal citation and quotation marks omitted).

117 id., at 170.

118 Constitution of India, Article 14 : The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

119 id., at Article 15. This Article has been amended twice to allow for special measures to advance any social and educationally backward classes of citizens, Scheduled Castes or Scheduled Tribes. See also Alidadi, footnote 111 (above), at 176.

120 Alidadi, footnote 111 (above), at 176.

121 id.

122 id., at 187 to 188.

123 'Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India', Publications Office of the European Union (February 2012), 46 <<https://op.europa.eu/en/publication-detail/-/publication/014f442a-abe3-4dfd-b688-43cda49c15db>>.

124 id.

125 "'This Is It. I'm Going To Die': India's Minorities Are Targeted In Lynchings', *NPR* (21 August 2019) <<https://www.npr.org/2019/08/21/751541321/this-is-it-im-going-to-die-indias-minorities-are-targeted-in-lynchings>>.

126 id.

that discussed the increased discrimination. Mr Kumar stated: 'India is proud of its secular credentials, and its status as the largest democracy and a pluralistic society with a long-standing commitment to tolerance and inclusion.'¹²⁷

iii Important cases

In 1963, the Supreme Court of India, in *Balaji v. State of Mysore*, held that the sum of reservations generally could not exceed 50 per cent.¹²⁸ In 1976, in *State of Kerala v. Thomas*, the reservation system was again contested.¹²⁹ *State of Kerala* involved government jobs for which the government decided to exempt members of the backward castes from taking mandatory tests to gain promotions. The Supreme Court upheld these policies under the Indian Constitution. The case granted the government broad flexibility in designing and implementing affirmative action programmes and reflected India's persevering ideology that affirmative action is not only constitutional, but also necessary to uplift disadvantaged communities.

As India's reservation system does not apply to private sector jobs, private sector workers do not have anywhere near as much protection from religious discrimination as those members of the designated backward castes in the public sector. Recent stories illustrate that private sector employers have essentially no obligation to refrain from direct or indirect discrimination on the basis of religion.¹³⁰ For example, a Muslim Mumbai resident and MBA graduate who applied for a job at a private diamond export firm was denied the job because the firm only hired non-Muslims.¹³¹ Under present Indian laws, the student has no legal recourse against the firm's discriminatory policies.¹³² This story highlights how India's lack of laws prohibiting private sector employers from direct religious discrimination is in sharp contrast with the United States and most of Europe.

VIII CONCLUSION

Although employers around the globe must deal with religious discrimination in the workplace, employers' approaches in different nations vary greatly. This variance is largely a consequence of each nation's unique history, which profoundly influences the political philosophies and legal systems.

It makes sense that in the United States, a nation founded by many settlers who fled religious persecution, religious freedom laws are broad and strive to maintain a pluralist society. Similarly, when looking at India's past history with the caste system, one can understand the sensibility of a large-scale quota programme, designed to ensure that disadvantaged classes

127 'India religious minorities face increased violence under Modi – report', *Deutsche Welle* <<https://www.dw.com/en/indian-religious-minorities-face-increased-violence-under-modi-report/a-49346394>> (last accessed 3 January 2020).

128 *Balaji v. State of Mysore*, AIR 1963 SC 649.

129 *State of Kerala v. Thomas*, AIR 1976 SC 490.

130 Nayantara N, 'How do private firms get away with religious discrimination? It's the laws', *The News Minute* (23 May 2015) <www.thenewsminute.com/article/how-do-private-firms-get-away-religious-discrimination-its-laws#sthash.KKV5t4g9.dpuf>.

131 id.

132 id.; see also Abhishek Sudhir, 'Religious apartheid: India has no law to stop private sector from discriminating on grounds of faith', *Scroll.in* (4 June 2015) <<http://scroll.in/article/731392/religious-apartheid-india-has-no-law-to-stop-private-sector-from-discriminating-on-grounds-of-faith>>.

have the opportunity to gain additional employment opportunities. For similar reasons, Saudi Arabia's complete integration of religion and the state, while strikingly different from many Western nations, corresponds closely to its history as the birthplace of Islam.

Interestingly, France, Germany and Turkey all share similar ideologies with regard to the predominantly neutral role that the state should play in regulating religion, and yet each nation implements state neutrality differently. The French notion of *laïcité* mandates that the government refrains from taking any stance on religious ideas; the Turkish notion of *laïcité* allows for considerable government involvement; and the German notion of neutrality builds in safeguards so that the state and religious organisations can cooperate when necessary. While each nation's employment laws reflect its own history and societal views, the consequences of religious discrimination in the workplace often spread beyond the workplace. Thus, when addressing sensitive issues, such as how to accommodate headscarves in the workplace, modern businesses should be cognisant of both the nuanced cultures in which they operate and the potentially wider and long-term effects of their policies. In the global business environment, the challenge for companies will be to adequately accommodate their employees' core values, yet respect national sovereignty and cultural identities.

ARGENTINA

*Enrique Alfredo Betemps*¹

I INTRODUCTION

Labour laws in Argentina include:

- a* general laws;
- b* statutes for specific activities;
- c* collective bargaining agreements (CBAs) for different activities, trades and companies; and
- d* individual agreements and employer practices.

The Labour Contract Act (Act No.20,744, as amended) (LCA) regulates all aspects of the employment relationship, such as hiring the employee; the economic, organisational and disciplinary rights of the employer; working conditions; labour registrations; holidays and leave; and mandatory severance. There are other important labour laws that govern union associations (Act No.23,551), working hours (Act No.11,544), illness and labour-related accidents (Acts Nos. 24,557, 26,773 and 27,348, as amended) and immigration issues (Act No.25,871).

There are also special statutes regulating certain industries, positions and regimes, including the construction industry (Act No.22,250), travelling sales employees (Act No.14,546), persons in charge of rental housing (Act No.12,981), journalists and administrative employees of media companies (Act No. 12,908), the regime applicable to private household workers (Act No.26,844) and the agrarian regime (Act No.26,727). Labour rules are enacted by the Federal Congress.

In principle, a CBA should apply to the personnel and geographical area corresponding to the labour representation of the union that executed the CBA. However, the Ministry of Labour may extend the application of a CBA to a larger geographical area. To be enforceable, a CBA should be ratified by the Ministry of Labour, which determines whether it is in accordance with applicable law.

Through CBAs, the parties may establish labour conditions applicable to all the employees of the industry or of the company within the respective geographical area, not limited to the members of the union. CBAs or individual agreements cannot set forth terms less favourable for the employees than those established by the LCA or other relevant labour laws.

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Individual agreements or employer practices may grant employees more rights than those set forth by the relevant labour laws or CBAs. Employees may not waive or forfeit rights established by labour laws. If there is any doubt regarding the existence of a labour relationship, the law favours the employee.

Labour disputes are conducted pursuant to the laws and codes of procedure of each jurisdiction (the city of Buenos Aires and the provinces). In some jurisdictions, including Buenos Aires, a mandatory conciliatory process must be completed before the initiation of a labour lawsuit.

If a conciliatory agreement is reached by the parties and approved by the relevant settlement service authority after determining whether it is in accordance with law, the agreement is deemed to be *res judicata*.

Most jurisdictions have courts of first instance (of one individual judge), courts of appeals (three-judge courts) and provincial supreme courts. Decisions taken by the courts of first instance may be appealed before the courts of appeals. There are also provinces – including Buenos Aires, which is the most important in the country – that have three-judge courts of original jurisdiction. In limited cases, decisions can be challenged before the provincial supreme courts. The national Supreme Court of Justice has final jurisdiction, although it is limited to specific cases and extraordinary appeals.

Labour claims may be raised in the jurisdiction where the employment relationship existed or where the employee lives. The employee can choose the jurisdiction in which to initiate the lawsuit.

II YEAR IN REVIEW

On April 2019, a draft bill was filed by a congressman of the same political party as the government on the regulation of unregistered employment, against evasion of social security and labour registration. This draft bill is similar to one of the chapters of the broad labour reform promoted by the government in 2016, which later failed as a result of the lack of union support. It contemplates the laundering of unregistered or improperly registered labour relations initiated prior to the Act. The registration implies the extinction of the criminal action and the release of the infractions, fines and sanctions of any nature corresponding to the regularization, as well as the registration of the employers with the Argentine labour sanctions registry (known as REPSAL).² As regards social security contributions, regularisation within a calendar year, counted from the date of the regulation of the Act, will signify that 100 per cent of the debt is cancelled. The employees included in the regularisation will be able to count up to 60 months of services with contributions for pension purposes. Debts that are under discussion in administrative or judicial proceedings fall within the scope of application of the draft. If the existence of unreported or irregularly registered employment relationships is verified after the acceptance of the regularisation, the benefits granted will decline, with employers having to pay the proportion of the debt redeemed, plus interest and the corresponding penalties. Employers who adhere to the regularisation process will be exempt for two years after registration from contributions of the regularised amounts in respect of regularised employees. The chapter referring to the promotion of employment establishes that employers who, during the calendar year counted from the date of regulation of the Act, hire new people, will be exempt for two years from paying social security contributions.

2 Registro Público de Empleadores con Sanciones Laborales (REPSAL).

The draft modifies Sections 7, 8, 9, 10 and 15 of Act No.24,013, considerably reducing the aggravated compensations contemplated by these provisions, establishing instead the payment of an aggravated compensation in favour of the employee of 25 per cent of the vital and mobile minimum wage for each unregistered or improperly registered monthly period. It also provides that the employer must deposit an equal amount in favour of social security. Finally, the draft simplifies the process for granting labour certificates. Owing to the 2019 presidential elections and the lack of necessary congressional support, the government decided not to force the enactment of the bill during 2019.

Resolution No.346/2019 of the Ministry of Production and Labour was issued in June 2019, making it possible for employers to issue salary receipts in both paper and digital formats. This Resolution establishes that employers may choose to issue salary receipts in either paper or digital format. Whichever format is chosen, the employer must comply with the respective labour regulations. If opting for digital receipts, these must be signed digitally, and the employee may sign in disagreement. The system should allow employees to save their digital receipts and keep a copy of them.

Emergency Decree No.665/2019, which was issued in September 2019 with the purpose of ‘maintaining the purchasing power of salaries’, established a non-remunerative payment – not subject to contributions to the social security system – equivalent to 5,000 Argentine pesos for all private sector employees. Employees within the national, provincial and municipal public sector are excluded, as are those who work in the agrarian sector and private homes. This non-remunerative payment was due to be made either in October 2019 or in accordance with the terms and conditions drawn up by the signatory parties to a CBA. If the services are rendered for less than the legal or conventional working day, employees will receive a proportionate amount of the non-remunerative payment. The Emergency Decree also provides that the non-remunerative payment will be offset in the next salary revisions and that employers who have granted, unilaterally or by extraordinary agreement, other increases as of 12 August 2019, may offset them up to the amount of the non-remunerative payment.

On 27 October 2019, a new government was elected, made up of members of a different political party from the ruling one. Since the term of office started on 10 December 2019, only a few measures relating to employment matters have been taken by the new government, although it has been made clear that one of its principle aims is the protection of employment.

The new government also expressed the intention of having a social agreement, in the context of which salary increases shall be set by the Executive Branch instead of by means of collective agreements.

In this context, on 13 December 2019, Emergency and Urgency Decree No.34/2019 was published in the Official Gazette. This Decree, by invoking the need to address the current situation of the least protected sectors and avoid the lack of protection afforded to formal employees, established a Public Emergency in Occupational Matters for 180 consecutive days. Although the projected term of validity is until 11 June 2020, an extension of the measure could be expected. The Decree provides, in Section 2, that ‘in the case of dismissal without cause during the term of this Decree, the worker shall have the right to receive twice the corresponding severance in accordance with current legislation’. Section 3 of the Decree establishes that ‘the duplication provided for in the preceding Section includes all compensatory items arising from the termination without cause of the employment contract’. In accordance with this Decree, in the case of dismissal without fair cause of an employee in

a 'normal' situation (that is, not included in a special protection such as those corresponding to cases of recent or forthcoming marriage, or pregnancy or maternity in the case of female personnel, or medical sick leave, etc.), the 'duplication' would include:

- a* compensation for seniority;
- b* compensation for the lack of notice of termination, at the rate of the 13th month's salary;
- c* integration of the month of dismissal with the rate of the 13th month's salary.

Although it is expected that there may be disputes about this ruling, duplication would not apply in respect of the special compensation due to those employees who are dismissed because of their marriage or pregnancy, since the regulations that require the double payment of severance are in respect of 'normal' circumstances; that is to say, what an employee usually receives as compensation for being dismissed (disregarding those special cases such as maternity and marriage, since they are subject to exceptions) is dealt with differently.

Section 4 of Decree No. 34/2019 provides that it is not applicable to new hiring, neither does it apply to cases of dismissal with fair cause or based on a lack of work not attributable to the employer. If it is determined that the cause invoked is insufficient (such as arises in the case of indirect dismissals), the employee would be entitled to duplication of compensation. Conclusions of labour relations by mutual consent of the parties are also outside the scope of the Decree.

On 20 December 2019, the National Congress approved the Social Aid and Productive Reactivation Act No. 27,541, published in the Official Gazette on 23 December 2019, which declared a public emergency in respect of economic, financial, fiscal, administrative, social security, tariff, energy, health and social matters and delegated certain legislative powers to the Executive Branch. Among others, regarding labour issues, Act No. 27,541 establishes that the Executive Branch is empowered to:

- a* mandatorily require that private sector employers pay their employees the minimum salary increases;
- b* temporarily exempt employers from the obligation to pay social security contributions with respect to salary increases resulting from the power set out in point (a); and
- c* make reductions to the social security contributions limited to jurisdictions and specific activities or in critical situations.

In the context of the aforementioned public emergency in labour matters provided for by Emergency and Urgency Decree No. 34/2019 and within the framework of the Social Aid and Productive Reactivation Act, on 4 January 2020, Decree No. 14/2020 was published in the Official Gazette. This Decree has the stated purpose of 'maintaining the purchasing standards of remunerations' and established a minimum and uniform salary increase for all employees in the private sector. According to the text of the Decree No. 14/2020, it is applicable to 'all employees in an employment relationship in the private sector'; therefore, the salary increase thereby established must be paid to all employees, whether or not that employee is subject to a CBA. The Decree is not applicable to employees within the public sector or those working in the agrarian sector and private homes. The amount of the increase shall be 3,000 Argentine pesos that must be paid with the January 2020 salary, with a further 1,000 Argentine pesos that must be paid with the February 2020 salary. Since the increase is of a remunerative nature, social security contributions must be made. All micro, small and medium-sized companies that have a MiPyME certificate in force will be exempted from payment of employer contributions to the Argentine pension system in relation to

the salary increase for three months, or a shorter term if the increase is to be compensated by future salary negotiations. All micro, small and medium-sized companies that do not have a MiPyME certificate in force will be subject to the exemption described above if they obtain a certificate within 60 days of the effective date of Decree No. 14/2020. It is further established that the salary increase 'shall be compensated by future salary negotiations'. The Decree also provides that the increase shall not be used as a basis for the calculation of any additional salary item, such as a bonus for perfect attendance. Nevertheless, as the increase is of a remunerative nature, it shall be taken into consideration when calculating the mid-year 13th month salary as well as holidays. It must be recorded on the salary receipt as a separate entry, as a 'social aid increase'. Although not expressly stated in Decree No. 14/2020, we understand that this requirement applies to employees whether or not they are subject to a CBA.

Those employees who work for less than the legal or conventional working day will receive a proportionate amount of the increase. Although not expressly stated in Decree No. 14/2020, considering that the salary increases for employees who are subject to CBAs will be compensated with future salary negotiations, it is reasonable to understand that salary increases for employees who are outside the scope of a company's CBA shall also be compensated with future increases granted by the company. Taking into account that by application of Section 15 of Act No. 26,427 relating to the Educational Internship System, interns are paid a non-remunerative sum as an incentive that is based on the basic salary under the company's CBA, the increase established by Decree No. 14/2020 shall apply to the amount paid as an incentive to interns.

A significant and noticeable growth of work using digital platforms continues to attract the attention of labour attorneys, who are analysing the impact of this new method of working in light of the current labour legislation, and are suggesting ways to make this form of business compatible with individuals' labour rights. Therefore this issue has been the subject of several publications, which have offered different and contrary views. It was also one of the main topics at the XI Congress of Labour Law and Working Relations held in Mar del Plata.

A particular concern for employers during 2019 was the high number of labour lawsuits. Special attention was given to the significant amounts of money claimed in connection with illnesses and labour-related accidents, and to the non-registration or undue registration of labour relations.

There were also many union conflicts during 2019. Most of the unions and employers have agreed on increases and revisions in salaries through collective agreements.

III SIGNIFICANT CASES

On 7 February 2019, in *Paganini Nicolás Ariel v. Cargill SACI in re dismissal*, Court V of the Labour Court of Appeals accepted the complaint raised by the plaintiff, who claimed to have been the victim of a discriminatory action by the defendant employer, who dismissed plaintiff without cause immediately after he returned from medical leave taken because of a serious problem relating to the use of drugs. The Labour Court of Appeals considered that since the plaintiff alleged to have been the victim of a discriminatory act and provided reasonable grounds to state his case, the burden of proof – pursuant to which the party that alleges a fact should prove that fact – shall be inverted, and consequently it was the defendant who should

have evidenced that the dismissal was not based on the employee's illness. According to the Court, the employer did not provide sufficient grounds to eliminate the presumption that the dismissal was based on the drug issue and granted the plaintiff moral damages.

On 13 February 2019, in *Ceballos Diego Alberto v. Cibie Argentina in re summary procedure*, Court VII of the Labour Court of Appeals accepted the complaint raised by the plaintiff, who claimed to have been the victim of a discriminatory action based on his alleged union activity. The employer had dismissed the plaintiff without cause. The Labour Court of Appeals considered that since the plaintiff alleged to have been the victim of a discriminatory act and provided reasonable grounds to state his case, it was the defendant who should have evidenced that the dismissal was not based on the employee's union activity. According to the Court, the employer did not provide sufficient grounds to eliminate the presumption that the dismissal was based on the plaintiff's union activity. In this case, the plaintiff had requested reinstatement to his former position; however, the Court rejected this claim on the ground that it impossible to maintain an employment relationship that one of the parties considers unbearable. Instead, the Court granted the plaintiff moral damages.

On 12 March 2019, the Supreme Court of Justice of Argentina (the national Supreme Court) issued a decision in *Martín Alejandro Ceferino v. Argenova SA in re dismissal*, whereby it partially left without effect a court decision issued by the Labour Court of Appeals, which had held that the employer and the Risk Insurance Company should pay the plaintiff 1.8 million Argentine pesos, in acknowledgement of physiological damages suffered by the plaintiff as a consequence of a shipwreck. With respect to the amount granted to the plaintiff, the national Supreme Court considered that the Labour Court of Appeals had set the amount of the award without providing any supporting reasons. In reaching its decision, the Supreme Court especially took into consideration the fact that the amount of the award was five times higher than the amount granted by the court of first instance and seven times higher than the amount sought by the plaintiff.

On 16 April 2019, the national Supreme Court issued a decision in *Pastore Adrián v. Sociedad Italiana de Beneficencia en Buenos Aires in re dismissal*, whereby it left without effect a court decision issued by the Labour Court of Appeals, which had decided that the relationship of 33 years between a medical doctor and the defendant was an employment relationship, granting the plaintiff very significant labour compensations. The Sociedad Italiana de Beneficencia en Buenos Aires filed an extraordinary appeal with the national Supreme Court, arguing that its relationship with the plaintiff was not an employment relationship. In reaching its decision, the Supreme Court took into consideration that the plaintiff:

- a* charged fees when rendering services rather than receiving a regular salary;
- b* assumed the risk of the business because he was paid only when the healthcare entities collected the amount due for the services rendered;
- c* carried out services for different healthcare entities; and
- d* was not subject to a disciplinary regime similar to those applicable to employees.

As a consequence, the national Supreme Court confirmed the decision of the court of first instance that had decided to reject the original lawsuit.

On 22 October 2019, the national Supreme Court issued a decision in *Morón Humberto José v. Grupo Asegurador la Segunda and others*, whereby it left without effect a court decision issued by the Supreme Court of the province of Mendoza, which had decided that the relationship of 40 years between an insurance producer and the defendant was an employment relationship, granting the plaintiff very significant labour compensations. Grupo Asegurador

la Segunda filed an extraordinary appeal with the national Supreme Court, arguing that the relationship between the plaintiff and the defendant was not an employment relationship. In reaching its decision, the national Supreme Court took into consideration that:

- a* the activity of insurance providers does not imply subordination or an employment relationship;
- b* the plaintiff was a business owner of an important organisation with material and human resources and was registered as such with the tax administrator;
- c* the plaintiff assumed the risk of the business because he was paid the corresponding commissions only when the insurance companies were paid by their clients;
- d* the fact that the plaintiff had to follow certain directives does not imply *per se* the existence of an employment relationship; and
- e* after the relationship with the defendant had ended, the plaintiff continued to render essentially the same services to a different insurance group.

As a consequence, the national Supreme Court ordered the issuance of a new court decision, taking account of the above-mentioned guidelines.

On 5 November 2019, the national Supreme Court issued a decision in *Zechner Evelina Margarita v. Centro de Educación Médica e Investigaciones Clínicas Norberto Quirno (CEMIC) and others*, whereby it left without effect a court decision issued by the Labour Court of Appeals, which had decided that the relationship of 23 years between a medical doctor and the defendant was an employment relationship, granting the plaintiff very significant labour compensations. CEMIC filed an extraordinary appeal before the national Supreme Court, arguing that its relationship with the plaintiff was not an employment relationship. In reaching its decision, the national Supreme Court took into consideration that:

- a* the plaintiff issued non-correlative invoices;
- b* her activities were not carried out exclusively for the defendant;
- c* the plaintiff carried out her activities for a significant number of years without raising any claim; and
- d* the plaintiff had to pay the rent for offices and operating theatres at the CEMIC premises, circumstances that evidence the existence of an autonomous activity.

As a consequence, the National Supreme Court ordered the issuance of a new court decision, taking account of the above-mentioned guidelines.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Written employment contracts are not required by law, with the exception of fixed-term employment contracts and employment agreements for crew members (employees who render services on vessels). Since every aspect of an employment relationship is regulated in detail by the applicable labour laws, there is no need to execute a written employment contract. However, written contracts are implemented by employers in the case of high-ranking employees or when the parties want to regulate aspects of the employment relationship, such as bonuses, golden parachutes, retention plans, or confidentiality or non-compete clauses. It is understood that as employees usually cover the permanent needs of the employer, labour hiring is on permanent basis. However, it is accepted that fixed-term employment contracts meet temporary requirements.

The LCA establishes that an employment contract for a fixed term should include the term of its duration and should evidence that 'the features of the work or of the activity, reasonably evaluated, justify that type of contract'. If the employment relationship does not have a ground that justifies (as the law requires) a fixed-term contract, it will become an indefinite-term employment contract. Labour courts seldom find the existence of a cause that justifies a fixed-term contract. Court decisions have invalidated fixed-term employment contracts where the fixed-term clause is very broad, without specific reference to the particular temporary circumstances that justify the contract.

In the event of dismissal without cause prior to expiry of the term of the contract, the employer should pay damages in addition to the severance due as a result of the termination. Generally, case law has determined that the damages should be equivalent to the salary for the agreed term. However, the employee is not entitled to severance pay if the contract was terminated because its term expired and the employee has been employed less than a year. If employed for a year or more, the employee is entitled to half the compensation based on seniority (one month's salary per year of service or a further month's salary for any part of a year that exceeds three months (see Section XIII.i, 'Compensation based on seniority')). A fixed-term contract should not last more than five years.

There are other non-permanent contracts, such as temporary contracts for accomplishing specific goals of the employer relating to extraordinary services and when it is not possible to foresee the term of the contract.

The employer can make changes to employment conditions (*ius variandi*), provided that they do not result in moral or material harm to the employee. The validity of the *ius variandi* is a matter of fact that is subject to the functional needs of the company and the personal situation of the employee involved. The employee affected by an illegitimate change to working conditions has the right to file a claim for constructive dismissal or to seek restoration of the altered conditions, until a final judgment is issued.

The parties to a labour contract may, by mutual consent, modify with effect in the future, the conditions initially established in the employment contract (objective novation), provided that they maintain the minimum standards guaranteed by the labour laws, the applicable CBA, and the terms and conditions of the individual employment contract. Agreements that only reduce labour conditions without any consideration for the employee are not admissible.

ii Probationary periods

During the first three months of an employment relationship, indefinite-term contracts are subject to a probationary period, which means that the employer or the employee may decide to terminate the contract without cause and the employer has no obligation to pay severance. The only obligation is to give notice of termination 15 days in advance. If notice is not given, the other party is entitled to compensation.

iii Establishing a presence

The legal system is based on the principle of 'territorialism' and, thus, it does not contemplate the possibility of applying foreign laws to relationships performed in the country (regardless of whether they were entered into abroad), as well as applying Argentine law in a reverse situation (relationships negotiated in Argentina and performed abroad). Hence, services rendered under an employment contract within Argentina are mandatory subject to domestic regulations, which includes labour and social security laws. Pursuant to these regulations,

employees rendering services in Argentina should be registered in the labour records of an Argentine entity. Both employers and employees should pay social security contributions to the Retirement and Pension System, the National Institute of Social Services for Retirees and Pensioners, the Family Allowances System, the National Employment Fund and to healthcare providers. The social security contributions are taken as a percentage of the employee's salary. The Social Aid and Productive Reactivation Act No. 27,541, establishes a contribution of 20.4 per cent by employers whose activity is the rendering of services and commerce, provided that the total annual sales are higher than certain thresholds. All other employers shall pay a contribution of 18 per cent. In addition, all employers should pay a contribution of 6 per cent to healthcare providers. In turn, employees' contributions amount to 17 per cent; note that part of employees' salary is exempted from the payment of contributions. Also, no employee contributions should be made with respect to salaries higher than a certain amount, currently 159,028.80 Argentine pesos.³

A foreign company may not hire an employee in Argentina unless it does so through a branch or a subsidiary in the country. While the hiring of an independent contractor is admissible, there is always the risk that the relationship will be deemed a *de facto* labour relationship. Under the LCA, the provision of services by an individual contractor gives rise to the presumption of an existing underlying employment contract, unless there is evidence to the contrary. To establish whether there is an employment relationship or an independent contract, the following circumstances, among others, should be taken into account:

- a* whether the person is involved in a third party's business, or his or her own business;
- b* whether the person performs services on an exclusive basis or for different clients;
- c* whether the person runs his or her own business organised as a company or as an individual;
- d* whether the business has its own address, which is different from the personal address of the owner;
- e* whether the business has its own employees; and
- f* whether the individual assumes the risks associated with the business.

The rendering of services by an independent contractor in Argentina may establish the existence of a permanent business. The lack of registration of a permanent business may create contingencies in relation to the local tax authorities regarding taxes, interest and penalties.

A company hiring employees must do the following:

- a* register as an employer with the tax administrator;
- b* register the mandatory labour records with the local labour authority;
- c* register each employee in the labour registries;
- d* report the hiring of the respective employee to the tax administrator;
- e* secure an insurance policy from a risk insurance company to cover the risks of illness and labour-related accidents;
- f* request that the employee chooses a healthcare provider and register him or her with that healthcare provider, and report the registration to the tax administrator; and
- g* request information regarding the employee's pension system status.

3 At the time of writing, roughly equivalent to US\$2,525.

V RESTRICTIVE COVENANTS

Pursuant to the law, employees cannot engage in competing activities with the employer while the employment relationship is in force. Case law establishes that if an employee carries out activities (in his or her own name or on behalf of others) that (1) are similar to the employer's business activities and (2) may potentially affect the interests of the employer, the employee will be in violation of his or her duty not to compete (unless the employer has given consent for the competing activities). If these duties are violated, the employer will be entitled to terminate the labour relationship with cause and may also bring a claim against the employee to recover losses resulting from the violation. The duties of the employee cease after the termination of the labour relationship.

While post-employment non-compete agreements are neither prohibited nor expressly regulated under Argentine law, the enforceability of such agreements may be questionable in light of the constitutional right to work, as contemplated by Section 14 of the Constitution. Based on case law, to be enforceable, a post-employment non-compete agreement should be justified by the position of the employee (e.g., chief financial officer, chief executive officer), be limited to specific activities and territory, have a time limit⁴ and be subject to reasonable consideration.

VI WAGES

i Working time

Working hours must not exceed eight hours per day and 48 hours per week, and night shifts (9pm to 6am) must not exceed seven hours. Working hours in unhealthy places (e.g., where the employee may be exposed to hazardous substances or a higher risk of injury) should not exceed six hours per day or 36 hours per week. Regarding rotating shifts or teams, the duration of the working hours may be extended beyond eight hours per day or 48 hours per week, but under no circumstances may they exceed 144 hours every three weeks. These rules apply uniformly throughout the country.

The distribution of working hours is an exclusive right of the employer and no administrative authorisation is required to establish labour schedules.

ii Overtime

Overtime is work rendered in excess of the standard working hours. Employees who work overtime receive an additional payment of 50 per cent of their salary on weekdays, and double their salary on Saturday afternoons, Sundays and holidays. Case law has determined that services rendered in excess of the working hours agreed by the parties, but not beyond the working hours established by law, do not give rise to payment as overtime.⁵

4 In *LEML v. Nidera SA and other in re nullity claim* (Labour Court of Appeals, 2006), a non-compete agreement of 10 years was upheld.

5 *D'Aloi v. Selsa SA*, plenary decision 226 (Labour Court of Appeals, 2006).

VII FOREIGN WORKERS

Foreign nationals are protected by the same local employment laws as Argentine nationals.

There is neither an obligation for employers to keep a registry of foreign employees nor a limit on the number of foreigners in the workplace or company.

To be entitled to hire foreign individuals, the employer should be registered with the National Registry of Foreign Applicants. The requirements for hiring foreign employees depend on whether the individual comes from a country that is a member or associate member of Mercosur (Argentina, Brazil, Paraguay, Uruguay, Venezuela, Bolivia, Chile, Colombia, Ecuador, Guyana, Peru and Surinam) or from any other country. Foreign employees from Mercosur countries only need a visa evidencing their nationality. However, foreign employees coming from other countries need to have an employment contract with an Argentine entity and to obtain a work permit granted by the National Immigration Office.

Work permits are granted for 12 months and can be renewed three times until the foreign national is entitled to apply for a permanent visa. Foreign nationals performing scientific, technical or consulting activities, and executives, technicians and administrative personnel who have been moved from foreign countries to fill positions within their companies, receiving a fee or salary in Argentina, may also obtain a residential permit for up to three years. Sportsmen, artists and academics may also obtain temporary authorisations to render remunerated services in Argentina. In turn, crew members of international transport, seasonal workers, academics and technicians may obtain transitory permits of 30 days, which can be renewed.

Employers should comply with the same rules as with respect to locals. In the field of social security regulations, the only exception are services rendered by individuals protected by an international reciprocity agreement, who are, in general, exempt from paying social security contributions for up to two years. Professionals, researchers, scientists and technicians temporarily residing in the country, for a maximum of two years, may also be exempt from paying social security contributions.

VIII GLOBAL POLICIES

There are no labour regulations requiring employers to have internal disciplinary rules. Internal rules do not need to be approved by either a government authority or a representative body. As every aspect of the employment relationship is regulated in detail by the applicable labour laws (with the exception of large or international companies), the practice of issuing internal policies is still not prevalent.

In most cases, these rules pertain to the issuance of computers, phones, tablets and electronic devices, and the correct use of email accounts and internet browsing. Based on court precedents, employers usually state in their respective policies that these devices are granted exclusively for labour purposes, that the employee cannot have an expectation of privacy regarding their use, and that the employer may control, monitor, audit, intercept and make public all documents and messages stored, sent or received on them.

In spite of the fact that discrimination, sexual harassment and corruption are all issues expressly regulated by statutory provisions, disciplinary rules may also address manners to deal with them. However, internal policies cannot affect the rights granted to employees by applicable laws and CBAs.

Even though it is not mandatory, it is highly advisable that these types of rules are written in Spanish, or at least that a Spanish version of them be made available.

As a version of the rules posted on the company intranet may not constitute reliable evidence, it is also recommended that a signed copy of them is held on the personal file of employees. Otherwise, if the rules are challenged, the employer may be obliged to appoint a computer expert witness, which may generate unnecessary additional expenses (a percentage of the amount claimed in the lawsuit).

On 1 October 2018, the Anti-Corruption Office approved Resolution No.27/2018, which requires that companies abide by the guidelines set forth in the Criminal Liability Act (Act No.27,401) regarding the liability of legal entities for crimes against the public administration, and bribery. Resolution No.27/2018 sets forth the guidelines for ‘integrity’ programmes that prevent, detect and correct irregularities and unlawful acts as established by the Criminal Liability Act. This Resolution provides that companies should have integrity programmes involving a code of ethics or conduct that includes policies and procedures applicable to all directors, administrators and employees, to prevent the commission of the crimes contemplated by the Criminal Liability Act. It also requires there to be internal channels for reporting irregularities, protection policies against reprisals and an internal manager in charge of the issues relating to this law. Although integrity programmes are not mandatory, they can be advantageous as any company that self-reports an irregularity or unlawful act and reimburses the benefits obtained from the irregularity or unlawful act, may be exempted from criminal liability, or potential criminal sanctions may be reduced. Even though this is not an employment law regulation, it is important that the Criminal Liability Act and Resolution No.27/2018 be understood because integrity programmes would generally be handled by human resources departments with the assistance of labour law attorneys. As a result, companies interacting with the public sector will have to carefully consider the implementation of integrity programmes.

IX PARENTAL LEAVE

Women are entitled to an unpaid maternity leave for a total of 90 calendar days – 45 calendar days before the delivery and 45 calendar days after the delivery date.

Male employees are not entitled to paternity leave. In spite of the fact that employers are under no legal obligation, some companies are granting rights to male employees associated with paternity. It has also been noted that there are some projects seeking to grant male employees paternity rights. The exercise of these rights is not subject to seniority requirements (for female employees). During the period of unpaid maternity leave, the social security department pays female employees a maternity allowance that is equivalent to 100 per cent of the usual salary.

There are no prohibitions against the employer dismissing a pregnant employee. However, if the employer dismisses a pregnant employee during the protection period, the employee is entitled, in addition to the regular severance payments, to a special compensation of one year’s salary. The law provides for a protection period of 7.5 months before delivery and 7.5 months after delivery.

X TRANSLATION

Since the official language of Argentina is Spanish, all public documents and records should be drawn up in Spanish. This means that any document that may need to be filed with a labour or public authority (e.g., labour and immigration registries), or courts, will necessarily

be in Spanish. If it is necessary to file documents in other languages with the labour or public authorities or courts, these documents will have to be translated into Spanish by a public translator. If issued abroad, the signatures of the documents must be certified by a notary public. The documents must then be legalised following the procedure established by the Hague Convention of 1961, or at the Argentine embassy if the country in which the document is granted has not ratified this Convention.

No law provides that offer letters, employment contracts, confidentiality agreements, restrictive covenants, proprietary information, assignment agreements, bonus or other incentive compensation plans, employee handbooks or other policies need to be in Spanish. However, it is best practice to have them translated into Spanish or at least to have a version in Spanish available. Otherwise, in the event of a claim, the employer may be obliged to require the appointment of a public translator, which may generate significant costs (a percentage of the amount claimed in the lawsuit). There is also always the risk that the employee may claim that he or she did not fully understand the document, creating doubt that may be resolved in favour of the employee.

XI EMPLOYEE REPRESENTATION

Union associations have been characterised as those set up as permanent entities to defend the professional interests of employees.

There is a very important distinction between employee associations with union status representation (see below) and registered unions without union status representation: by law, only the former have union status representation rights. Employee associations with union status representation are entitled to enter into CBAs and to participate in collective negotiations, to manage their own healthcare providers, to defend and represent the individual and collective rights of the employees, and to monitor the enforcement of labour legislation and social security provisions. Employers should act as withholding agents regarding the fees owed by union members to unions with union representation status. As mentioned above, registered employee associations do not have union status representation rights, which means they do not have bargaining and collective union rights.

The Argentine union system is based on the existence of only one employee association with union status representation per occupation or activity. To have union status representation, the employee association must be considered the most representative, which means it must be registered with the labour authority, have been operative for at least six months and represent more than 20 per cent of the employees of the activity.

In spite of the foregoing, the national Supreme Court has issued decisions declaring the unconstitutionality of certain provisions of Act No. 23,551 that require representatives and members of union boards to be members of a union with union status representation,⁶ grant union protection only to these unions,⁷ and prevent registered unions from representation of collective interests in a judicial action.⁸ Courts of lower rank must follow the decisions of the national Supreme Court.

According to Act No. 23,551, representatives of employees whose term of employment with a company shall not exceed two years should be members of the union with union status

6 *Association of Employees of the Public Sector v. Ministry of Labour in re Unions Association Act*, 2008.

7 *Rossi Adriana María v. National Government – Argentine Navy*, 2009.

8 *Association of Employees of the Public Sector in re unconstitutionality action*, 2013.

representation and be elected for that purpose. A company must have the following number of employee representatives depending on its size: one representative for 10 to 50 employees; two representatives for 51 to 100 employees; and, for more than 101 employees, an additional representative for every 100 employees. Employees appointed to elective or representative positions in legally recognised unions or in entities that require union representation, or employees holding public office, and representatives in the company and candidates, are granted union protection. These employees cannot be suspended or dismissed, and the conditions of their employment cannot be altered without a previous judicial order lifting the union protection by means of an extraordinary summary proceeding. If the employer breaches that union protection, the employee may request his or her reinstatement by means of an extraordinary summary lawsuit, plus the payment of unpaid salary; or to put himself or herself in a situation of constructive dismissal (termination of labour relationship), being entitled to dismissal compensation and an additional amount equivalent to his or her annual salary, plus an additional year. A labour representative may be suspended at the employer's request if he or she endangers the safety of personnel or harms the employer's property.

XII DATA PROTECTION

i Requirements for registration

Pursuant to the Data Protection Act (Act No.25,326), its complementary regulations and the interpretation of these regulations by the Data Protection Agency, all databases must be registered with the Agency, with the exception of those maintained for personal rather than business reasons.

Even though not expressly established in the relevant regulations, the Data Protection Agency recommends that employers register the database containing their employees' information with the Agency. To register a database, a company must complete a form, stipulating, among other things, the number of employees and the personal information to be provided. As employers are required by law to collect and store personal as well as sensitive data, no notification or consent is necessary.

In the context of their activities, companies are entitled to disclose who their employees are as well as the necessary information, but must avoid disclosing information that is not necessary or is sensitive. In general terms, Act No. 25,326 establishes that companies should adequately protect information, but it does not specify the manner in which this protection should be granted. In 2018, the Data Protection Agency issued some non-mandatory technical recommendations regarding protection, for example only allowing certain authorised individuals in the company to access the database. In the event of a breach, companies who have followed these recommendations are likely to be treated more favourably by the Agency.

ii Cross-border data transfers

No regulation requires the registration of transfers of data.

Transfers of personal data (any kind of information, including full name, address, identification number) to countries or international organisations that afford adequate levels of protection does not require notification or consent. The transfer of an employee's personal data to other countries or international organisations that do not afford adequate levels of protection is, in principle, prohibited, unless the employee consents to the transfer or the employer and the foreign third party agree, in writing, with terms and conditions for the transfer set forth by the Data Protection Agency. Also, if a company follows the Guidelines

for Binding Corporate Rules issued by the Data Protection Agency, international transfers of personal data to companies of the same economic group in countries that do not afford adequate levels of protection are allowed.

iii Sensitive data

Sensitive data can only be collected when there are reasons of general interest provided by law; however, no person is obliged to provide this type of information. Sensitive data is, among other things, personal data relating to an individual's ethnic or racial origin, political opinions, religious, philosophical or moral beliefs, trade union registrations, sexuality, and health or medical background. This data cannot be transferred, even with the consent of the employee.

iv Background checks

It is not unlawful to conduct background, credit or criminal record checks. However, the prospective employer should carry out these checks discreetly, out of respect for the candidate, and in a non-discriminatory manner. Employers are prohibited from making enquiries about a candidate's religious or political beliefs, union membership, or information relating to his or her private life.

Resolution 11-E of the Ministry of Labour states that 'job offers should not contain restrictions for reasons such as race, ethnicity, religion, nationality, ideology, political or union opinion, sex, gender, economic position, social status, physical features, disability, residence, family responsibilities or criminal records of those who have served their entire sentence'. This provision applies exclusively with respect to applicants. The purpose of this rule is to avoid discrimination based on the existence of criminal records, 'especially' regarding those who have served the entire sentence.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

The labour system is one of 'improper permanency', meaning that, in principle, an employer may dismiss any number of employees at any time (other than union representatives). There is no legal obligation for an employer to notify the union of prospective dismissals.

Dismissals in Argentina are a delicate issue. If an employer decides to carry out mass dismissals, it may be subject to actions by the relevant authorities (labour and non-labour). If the number of dismissed employees is significant, the labour authority may decide to initiate the 'compulsory conciliatory procedure' applicable to collective conflicts, which may suspend or impede the dismissals. Additionally, some recent precedents issued by the Labour Court of Appeals ordered the reinstatement of employees dismissed without cause and without following the crisis procedure applicable in the case of dismissals for lack of work beyond the employer's control, which authorised payment of reduced severance, on the grounds that the employees were entitled to maintain their respective labour relationships.⁹

⁹ For example, *Gómez Leandro Javier and others v. Pepsico de Argentina SRL in re request of precatory measure*, 2017.

Dismissal without cause

In cases of dismissal without cause, employees are entitled to severance payments, as follows.

Compensation based on seniority

The employee is entitled to receive one month's salary for every year worked and a further month's salary for any part of a year that exceeds three months. For instance, if the employee rendered services for three years and four months, he or she will be entitled to compensation equivalent to four months' salary. This compensation is not subject to social security contributions, or income tax payments or withholdings. To calculate the compensation based on seniority, the basis shall be the best monthly, normal and regular salary received during the last year of service or during the time of rendering the service. This compensation is subject to a cap, depending on the applicable CBA, which cannot be lower than 67 per cent of the employee's monthly salary.

Compensation for lack of notice of termination

The employee is entitled to receive notice prior to the termination of the labour relationship. In the event that notice is not given, the employee is entitled to receive compensation amounting to: 15 days' salary if the period of employment is no more than three months; one month's salary if the period of employment is no more than five years; and two months' salary if the period of employment is more than five years. This compensation is not subject to a cap; however, it must reflect the normal income of the employee and be equivalent to the salary that the employee would have received during the period of the omitted notice. The compensation is not subject to social security contributions or withholdings, but is subject to income tax payable by the employee. In addition, the proportional part of the 13th salary must be calculated, which will be added to the compensation (see below).

Payment in full of the dismissal month

In the month of dismissal, the employee is entitled to receive the full salary regardless of the fact that he or she rendered services for a shorter period. This amount is not subject to a cap, or to social security contributions or withholdings, but is subject to income tax payable by the employee. The amount of the payment depends on the day of termination.

Compensation for unpaid holiday

The employee is entitled to receive compensation for unpaid holiday in an amount equivalent to the holiday to which the employee would have been entitled according to the period of the year worked. This amount is not subject to a cap and is not subject to social security contributions or withholdings, but it is subject to income tax payable by the employee. The amount of the payment depends on the number of days' holiday to which the employee was entitled.

Remuneration (salary and 13th month's salary)

The employee is also entitled to receive remuneration corresponding to the proportional part of the year worked. In this regard, the employee must receive a salary corresponding to the days effectively worked during the month of dismissal and the proportional part of the 13th salary corresponding to the part of the year worked. The amount of the salary depends on the day of termination.

Duplication pursuant to Emergency and Urgency Decree No. 34/2019

In the context of the Public Emergency in Occupational Matters, which is applicable for 180 consecutive days (effective from 13 December 2019), in the case of dismissal without cause, employees are entitled to twice the corresponding severance. The ‘duplication’ would include the following:

- a* compensation for seniority;
- b* compensation for the lack of notice of termination, at the rate of the 13th month’s salary;
- c* integration of the month of dismissal with the rate of the 13th month’s salary.

The duplication does not apply to cases of dismissal with fair cause or based on lack of work not attributable to the employer. If it is determined that the cause invoked is insufficient – as can arise with indirect dismissals – the employee would be entitled to the duplication of compensation. Conclusions of labour relations by mutual consent of the parties are outside the scope of Decree No. 34/2019.

Dismissal for cause

In the event of dismissal for cause, the employee is not entitled to mandatory severance. If the employee challenges the dismissal and a court considers that the cause for the dismissal is not sufficiently significant to be deemed a breach of the main obligations of the employment contract, the court may award the employee mandatory severance.

In addition, if based on the employer’s rejection of the claim by the employee, the employee is forced to raise a claim against the employer through administrative or judicial means, the court may grant the employee the aggravated compensation set forth by Section 2 of Act No. 25,323 (equivalent to 50 per cent of the mandatory severance).

The employer may be obliged to pay higher severance in respect of dismissals of women who are pregnant or have recently given birth, women who have just got married or are soon to be married, and dismissals during sick leave.

As Argentina has become a controversial jurisdiction in terms of employment relationships, it may be prudent to execute a conciliatory agreement before the labour authority that includes a general release. If the conciliatory agreement is approved by the relevant settlement service authority after determining whether it is in accordance with applicable law, the agreement is deemed to be *res judicata*.

ii Redundancies

The law also provides that employers may dismiss employees invoking objective reasons – lack of work beyond the employer’s responsibility, *force majeure* or technological causes – in which case the employer is obliged to pay half the compensation based on seniority (half of one month’s salary per year of service or a further month’s salary for any part of a year that exceeds three months) instead of paying the full compensation based on seniority.

The crisis procedure must be followed where dismissals for objective reasons affect more than 15 per cent of the payroll if the company employs fewer than 400 employees, 10 per cent of the payroll if the company employs between 400 and 1,000 employees, and 5 per cent of the payroll if the company employs more than 1,000 employees. The purpose of the crisis procedure, which should be carried out before the labour authority, is to prevent

and mitigate the adverse consequences that may affect employment by promoting direct negotiations between the employer and the union. During the crisis procedure, the employer cannot carry out any dismissals, and the employees cannot carry out industrial action.

If the dismissals based on objective reasons affect fewer employees than the aforementioned minimum percentages, the employer must give notice of the decision to the labour authority 10 days before the dismissals and provide the relevant union with a copy of the notice.

Even though contemplated by the law, owing to the reduced redundancy payments, courts have been very sceptical with regard to objective reasons for dismissals.

XIV TRANSFER OF BUSINESS

For a transfer of business, there must be a change of employer, credit and debt relating to the activity of the business. This includes the sale, assignment, donation, transfer of goodwill, temporary lease or transfer of the facilities, succession *mortis causa* and merger of companies.

In the event of a transfer of business by any title, all labour obligations of the transferor with its employees at the time of the transfer will pass to the successor or acquirer, even those arising from the transfer. Regarding existing obligations at the time of transfer, the previous employer and the purchaser are jointly and severally liable. Regarding future obligations, the new employer is exclusively liable.

Where there has been a transfer of business, the employment contract will continue with the successor or acquirer, and the employee will keep the seniority acquired with the transferor and the rights derived therefrom. In other words, all the obligations arising from the individual employment contracts in force at the time of the change of owner are transferred to the new owner. The acquirer of a business is also liable for the obligations arising from labour relationships terminated prior to the transfer.¹⁰ The basis of the law is to protect employees against possible fraudulent manoeuvres, for example the transfer of the business to an insolvent acquirer.

The sole transfer of the business does not entitle an employee to consider himself or herself dismissed. The employee may put himself or herself in a situation of constructive dismissal only if, as a result of the transfer, he or she suffers significant damage (e.g., because the company has changed its core business, or a change in position or the size of the company results in a reduction of the employer's patrimonial liability).

In respect of the assignment of an employment contract, without including the business, the express and written acceptance of the employee is required. Once the assignment has been executed, the assignor and the assignee are jointly and severally liable for all the obligations resulting from the assigned relationship. Joint and several liability is limited to the debts accrued at the time of the transfer, and does not apply to those arising thereafter.

XV OUTLOOK

The measures already taken by the new government that took office on 10 December 2019 (as discussed in Section II) have been for the purpose of protecting employment.

10 *Baglieri Osvaldo v. Nemec Francisco y Cia*, plenary decision 289, Labour Court of Appeals, 1997.

The new president has said he will not go ahead with the labour reform promoted by the outgoing government and that during his administration there will be no general rules of flexibility. He affirmed that although labour reforms are needed, they must be achieved by each sector through the modernisation of CBAs and without introducing changes to the labour laws, which imply a loss of rights or salary reductions. He also maintained that he will approve any dealings between companies and unions that propose such a concept.

It would not be surprising if the new government decides to take measures regarding work via digital platforms, granting more protection and rights to the individuals affected by this method of working.

It is expected that there will be a similar trend to that seen during 2019 with regard to litigation and union conflicts.

ARMENIA

*Sedrak Asatryan, Janna Simonyan and Mary Serobyanyan*¹

I INTRODUCTION

Employment relationships in Armenia are regulated by the Constitution of the Republic of Armenia, the Labour Code of the Republic of Armenia, various laws (e.g., the Law on the Minimum Monthly Salary, the Law on Trade Unions) and other legal acts (such as decisions by the government or by ministers). There are also a number of applicable ratified international treaties, such as the revised European Social Charter, the International Labour Organization's Forced Labour Convention, among others.

Employment (or service) relationships for persons holding political, discretionary or civil positions, those for civil servants, officers of other state (special) bodies and local self-government bodies, and those for employees of the Central Bank of the Republic of Armenia are mainly regulated by appropriate laws (such as the Law on the Civil Service or the Law on Public Service).²

Labour disputes are investigated in the manner prescribed by the Civil Procedure Code of the Republic of Armenia,³ by courts of general jurisdiction. Labour disputes concerning employees in public service positions are investigated by a specialist administrative court.

The decisions of the courts of the first instance can be appealed to the Court of Appeal, and thereafter to the Court of Cassation.

However, cassation appeals are accepted into proceedings in exceptional cases; the court examines cases in which the decision on the issue raised may have particular significance for the uniform application of law (e.g., if there is an issue of development of law). Thus, in practice, appeals against first-instance decisions are generally examined on merits in the Court of Appeal.

Under labour law, the parties can also agree to resolving employment disputes by means of private arbitration.⁴

There are a number of government agencies with competence for enforcement of employment law, the main ones being the Ministry of Labour and Social Affairs, the Ministry of Health, the Health and Labour Inspectorate and the State Employment Agency.

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2 Labour Code of the Republic of Armenia [Labour Code], Article 7(7).

3 *id.*, at Article 264(1).

4 *id.*, at Article 264(2).

II YEAR IN REVIEW

There have been several changes to the Labour Code during the past year. One is a new article about the prohibition of discrimination. This principle was already observed in the Constitution and labour legislation, but now there is more detailed regulation.

Second, additions have been made to the article that regulates fixed-term employment contracts. These changes provide a new guarantee for employees, according to which, if the term of an employment contract is extended for the same job, or if an employment contract is signed with the same employer for the same job for the second time within a month, then the employment contract is considered to be valid for an indefinite term.⁵ However, the law provides some exceptions to this provision.

Concurrent employees (i.e., those who work in two or more places) are no longer on the list of those with whom it is permitted to conclude fixed-term employment contracts. At the same time, employees who have been appointed for a term prescribed by law have been added to this list.

An addendum requiring employers with 10 or more employees to pay their salaries by a means other than cash, unless the employee has applied in writing to be paid in cash, has been fully adopted and signed.⁶

A Law on amendments to the Law on the Minimum Monthly Salary has also recently been fully adopted, and the minimum monthly salary is increased accordingly with effect from January 2020.⁷

Further, the National Assembly has fully adopted a draft law that envisages entrusting the full implementation of state control over the enforcement of labour legislation, and collective and employment contracts, to the State Labour Inspectorate (previously, its jurisdiction was exclusively ensuring the health and safety of workers). Thus, the aim of the proposed changes is to ensure full state control over the enforcement of the requirements of labour legislation.⁸ The state had full control over the enforcement of labour legislation in the past, but later refused to exercise it.

It is difficult to predict the outcome of this initiative; one possibility is that it could put an unnecessary burden on businesses.

Another draft law relates to addenda and amendments to the Code on Administrative Offences, which adds several instances of liability; for example, violations of the requirements for hiring or work permits, failure to fulfil the instructions of officials from the State Labour Inspectorate, and obstruction of inspections, investigations or administrative proceedings conducted by the relevant inspection body. It sets out the scope of cases examined by inspection bodies that may be subject to administrative penalties.⁹ This draft law has also been fully adopted and signed.

5 *id.*, at Article 95 (2.1).

6 Draft of law on making addenda to the Labour Code RA, by Gevorg Papoyan (30 April 2019).

7 Draft of law on making Amendments to the Law on the Minimum Monthly Salary, by Varazdat Karapetyan, Babken Tunyan, Narek Zeynalyan (21 May 2019).

8 Draft of law on making amendments and addenda to the Labour Code RA, by Narek Zeynalyan, Heriknaz Tigranyan (11 September 2019).

9 Draft of law on making addenda and amendments to the Code on Administrative Offences RA, by Narek Zeynalyan, Heriknaz Tigranyan (12 September 2019).

III SIGNIFICANT CASES

The Constitutional Court rendered a decision¹⁰ referring to the procedures for terminating an employment contract based on changes to the essential working conditions. The Court stated that the right of the employer to change the essential working conditions does not imply that the employer has complete freedom to impose any new conditions; any change to essential conditions must be reasonable and necessary; and the process of changing the essential working conditions must be clearly worded from a legal point of view, that is, the employer must substantiate the need for change and its compliance with the requirements of the applicable code.

Further, reference was made to the reorganisation of organisations. The Court stated that it did not in itself imply any change in the conditions of production or economic, technological or work organisation and any change that derives from the essential working conditions.

A new decision from the Court of Cassation addressed the issue of accountability of civil servants. Guided by the requirement for clarity and reasonableness of the Administrative Act, the Court found that the Administrative Act (the order holding the civil servant accountable) is invalid. The Court invalidated the Act because it did not specify the amount of damages; the extent of a civil servant's liability; cite a specific Labour Code rule under which an employee may be held liable; and did not provide a statute of limitations for the administrative authority's to reduce an employee's salary in the event that there was liability.

Another decision¹¹ of the Court of Cassation addressed the issue of the enforcement and application of an individual legal decision. According to law, the moment of entry into force of an individual legal decision regarding the termination of an employment contract is the moment when a copy of the decision is given to the employee in question. The Court therefore stated that if the addressee of the action is not informed about the decision in the prescribed manner, whether or not that legal decision in its content complies with the requirements of the law, it cannot be applicable because it has not entered into force.

The Court also noted that on the basis of the loss of confidence in an employee, the employer can either:

- a* terminate an employment contract without any obligation to notify the employee in advance; or
- b* take disciplinary action, including terminating the employment contract, in which case the employer is obliged to observe certain procedures relating to disciplinary actions.

Concerning the time allowed for appeal of disciplinary penalties, the Court emphasised that although the standard limit is one month, this term is only applicable to penalties such as reprimand and severe reprimand. If, however, an employment contract is terminated as a disciplinary penalty, the decision can be appealed during the two months following receipt of the individual legal action or (document). Two months is also the window for appeal when an employee contests the employer's decision to terminate the employment contract.

10 Decision SDO-1449 of 19 March 2019 on determining the issue of identity.

11 Decision of Cassation Court EDC/4054/02/16.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employment relationships arise on the basis of an employment contract or hiring order.¹² Any work done without such an agreement is considered illegal.¹³ Employers who have given their consent or who require individuals to carry out work without a formal employment relationship shall bear the responsibility as prescribed by law.

It is essential to conclude an employment contract both to comply with legal requirements and to clarify the relationship, rights and obligations of the parties and to avoid disputes between the parties. The employment contract is concluded in written form, with two copies of the document drawn up. These must be signed by the parties. One copy of the signed contract must be given to the employee; the other one remains with the employer.¹⁴

Employment contracts may not contain any conditions that are harmful to employees, or have working conditions that do not comply with specifications laid down by labour legislation and other regulatory legal acts containing the norms of labour law. Where the conditions laid down by employment contracts contradict these laws and regulations, these contractual conditions shall have no legal force.¹⁵

According to the general rule, an employment contract is concluded for an indefinite duration, except for certain cases provided by the law.¹⁶ A fixed-term employment contract is appropriate when a labour relationship cannot be set for an indefinite period on account of the conditions or the nature of the work. The law also provides for some specific positions for which contracts can be concluded for a fixed term:

- a* elected officials;
- b* persons appointed for a specified term as prescribed by law;
- c* seasonal workers;
- d* employees providing temporary work (up to two months);
- e* employees who replace temporarily absent employees;
- f* foreigners for the period of validity of a work permit or right of residence; and
- g* persons who are eligible for a pension and are over 63 years old, or who are not eligible for a pension and are over 65 years old, based on an evaluation of a person's professional capacity for the position offered by the employer.

The employment contract shall state the following:

- a* the date (day, month and year) of conclusion of the employment contract;
- b* the name and surname (or, at his or her wish, the patronymic) of the employee;
- c* if the employer is a natural person, the title of the employer (name and surname or, at his or her wish, the patronymic);
- d* the structural subdivision (if available);
- e* the date (day, month and year) on which the work commences;
- f* the job title and a list of responsibilities;
- g* the basic salary or the manner of determining it (or both);

¹² Labour Code, Article 14(1).

¹³ *id.*, at Article 102.

¹⁴ *id.*, at Article 85(1).

¹⁵ *id.*, at Article 6.

¹⁶ *id.*, at Article 95.

- b* remunerations to which employees are entitled;
- i* the term of the employment contract (if necessary);
- j* if there will be a probationary period, its duration and conditions;
- k* working time mode (normal, short-term, etc.);
- l* type of annual leave (minimum, additional, extended) and the employee's entitlement; and
- m* the position, name and surname of each person signing the legal decision.¹⁷

From the date stated in the employment contract, the employee is obliged to start work, and the employer shall, accordingly, perform the duties prescribed by law and contract.

The parties may at any time by mutual agreement amend the employment contract. In some cases, the law unilaterally grants such a right to the employer: for example, it is permitted to change the essential conditions of employment if required because of a change in production capacity, or any economic, technological or organisational conditions of employment.¹⁸

ii Probationary periods

A probationary period is permissible with the consent of the parties.¹⁹ The party who initiated the probationary period may terminate the contract by giving the other party three days' notice in writing.²⁰ The other party shall be guided by the general principles of notification when terminating the contract.

iii Establishing a presence

A foreign company cannot hire employees either in person or through an agency or a third party without being officially registered to carry on business in Armenia.

A foreign company not officially registered in Armenia may hire independent contractors in the form of both natural and legal persons. Independent contractors in their turn may set up a branch or a representation of a foreign company in Armenia or register a subsidiary company through which they may hire employees. With regard to subsidiary company registration, the subsidiary company itself shall be liable for its obligations, and for registration of a branch or representative office, a foreign company that has registered a representative or branch office shall be liable for its obligations.

The primary payment made to the state budget by employers on behalf of employees is income tax. Individuals' income tax is calculated and maintained by the tax agent.²¹ It is the employer's obligation to calculate, withhold and pay taxes or payments when paying an income to the individual. Thus, the employer is considered a tax agent for the employee.

To be a tax agent, a non-resident organisation must first register a representative office, a permanent establishment or a new organisation in Armenia and then register with the tax authority.

17 *id.*, at Article 84.

18 *id.*, at Article 105.

19 *id.*, at Article 91(1).

20 *id.*, at Article 93.

21 Tax Code of the Republic of Armenia [Tax Code], Article 152(1).

V RESTRICTIVE COVENANTS

According to the Labour Code, an employer has the right to terminate an employment contract on the basis of loss of confidence of an employee if that employee has disclosed state, official, commercial or technological secrets or has revealed any of this information to a competing organisation.²² According to the Civil Code, a contracting party that has published or used official, commercial or banking information in breach of an employment contract is obliged to compensate the other party for damages.²³

Restrictive covenants have no other legislative regulations and are usually specified in the contractual framework. Nonetheless, the parties shall be guided by the constitutionally guaranteed rights of the individual (such as freedom of choice of employment, freedom of economic activity) and the legality of the limitations and conditions set by them.

To summarise, it should be noted that Armenian legislation does not permit the inclusion in employment contracts of provisions regarding refusal of competition.

VI WAGES

i Working time

Normal working time may not exceed 40 hours per week. A normal working day must not exceed eight hours, except in specific circumstances stated by law. The maximum working time, including overtime work, must not exceed 48 hours per week and 12 hours per day (including rest and lunch breaks).²⁴

Shorter working times shall be set for children (the maximum limit depends on the age of the employee) and for employees who work in an environment where, for technical or other reasons, it is not possible to reduce the level of workplace hazards to the permitted levels as legally defined. In these circumstances, working time shall not exceed 36 hours per week.²⁵

There are no specific limits on the amount of night work that may be performed.

ii Overtime

A supplementary rate of not less than one and a half times the normal hourly rate is prescribed for overtime work.²⁶

Overtime is the work performed beyond the duration of the normal, daily or part-time work prescribed by law or longer than the working time scheduled for that employee.²⁷

Overtime work shall not exceed four hours during two successive days and 120 hours per year.²⁸

22 Labour Code, Article 122.

23 Civil Code of the Republic of Armenia, Article 141.

24 Labour Code, Article 139.

25 *id.*, at Article 140.

26 *id.*, at Article 184.

27 *id.*, at Article 144.

28 *id.*, at Article 146.

VII FOREIGN WORKERS

Employers are not obliged to keep a register of foreign workers, and there is no limit on the number of foreign workers a workplace or company may have.

However, an employment contract with a foreign worker can only be concluded if the foreign worker has a permit to work in Armenia. The employment contract can be concluded for the same period for which the work permit is valid.²⁹

In general, a foreign worker needs both a visa to enter Armenia³⁰ and a working permit to be able to work in Armenia. However, citizens of some countries enjoy a visa-free regime arrangement with Armenia. Further, in some cases, it is permitted to conclude an employment contract with a foreign worker who does not have a work permit: for example, workers who have permanent or special residency status, or temporary residency status for a special purpose, cross-border workers, and foreign lecturers invited to study at educational institutions.³¹

An employer pays the same taxes and other fees for foreign workers as it would for Armenian citizens.

Foreign citizens in Armenia have the same legal capacity as Armenian citizens unless otherwise provided by law.³² The law guarantees equality between the parties engaged in the labour relationship, regardless of their nationality or citizenship.

VIII GLOBAL POLICIES

The law requires employers to adopt internal policies in only one respect: the health and safety of workers.³³ However, the law also recognises the need for the disbursement of information and notification with regard to several internal processes and procedures (for example, the transfer of employees' personal data within the organisation, the work regime, and encouragement and disciplinary measures for employees). These issues must be clearly stated in an employment contract, in an organisation's internal rules or in general legal regulations.

Further, an employer may prescribe mandatory rules, and deem that failure to comply with them may result in disciplinary sanctions against an employee. The internal disciplinary rules may also provide a list of the employees in managerial positions, and state that that work performed by those employees that exceeds the prescribed working time shall not be considered overtime, according to the law.

In this regard, employers will benefit from having internal disciplinary rules and regulating specific issues.

Employers' internal or individual policies may be adopted in the form of orders or instructions.³⁴ They must be approved by the body prescribed by the charter of the company (e.g., general meeting, council or director).

Any internal and individual legal ruling adopted by an employer enters into force upon duly informing the concerned persons of that action.³⁵ However, there is no requirement to obtain the approval or agreement of employees or government authorities.

29 Law on Foreigners of the Republic of Armenia, Article 27.

30 *id.*, at Article 6.

31 *id.*, at Article 23.

32 Labour Code, Article 15.

33 *id.*, at Article 248(3).

34 *id.*, at Article 5(1).

35 *id.*, at Article 5(4).

Internal legal policies shall be published in a separate section on the employer's official website; if the employer does not have an official website, then it must be placed in a place that is visible and accessible to the persons to whom it is directed. The employer is obliged to indicate the date of publication of the ruling and to publish the incorporated version of the ruling after making amendments and supplements thereto.³⁶

In practice, it is acceptable, as an alternative, for either the executive director or other member of company management to send a signed version of the internal policy to all employees via the corporate email address, or for each employee to sign a relevant document to certify that he or she is aware of and understands the internal legal ruling. This approach is widely accepted, and used in practice, for newly hired employees. When an employee is hired, he or she signs and confirms that he or she is familiar with all applicable internal legal policies of the employer. In general, it is essential that employers ensure proper notification to all employees, as if an employee is not properly notified about a ruling, the ruling cannot be applied to that employee.

Fundamental principles of labour law (such as the equality of parties in labour relationships, the stability of labour relationships, freedom of work, and the prohibition of forced labour and violence against workers) are prescribed either by the Constitution or legislation. Thus, as a practical matter, there is no requirement to implement these rules in internal policies.

The state language of Armenia is Armenian, which is employed in all spheres of life in the Republic.³⁷ Thus, in general, companies should draw up all paperwork in Armenian. Foreign state bodies, enterprises, institutions and organisations are required to have a version in Armenian of any documents that are subject to state control (such as internal policies).³⁸

Tax legislation sets forth regulations that are specific to tax matters, requiring translations into Armenian (without notarisation) of accounting documents that are drawn up in languages other than Russian and English.³⁹

IX PARENTAL LEAVE

Three types of parental leave are prescribed by law:

- a* pregnancy and maternity leave;⁴⁰
- b* parental leave to be taken before a child is three years old (granted to whoever is raising the child, whether it be the mother (or stepmother), father (or stepfather) or guardian);⁴¹ and
- c* unpaid leave for the husband of a woman who is on pregnancy, maternity or parental leave before the child is one year old.⁴²

36 Law on Normative Legal Acts of the Republic of Armenia, Article 23(7).

37 Law on the Language of the Republic of Armenia, Article 1.

38 *id.*, at Article 4.

39 Tax Code, Article 33(1.6).

40 Labour Code, Article 172.

41 *id.*, at Article 173.

42 *id.*, at Article 176.

Parental leave as described in points (a) and (b) is paid. A woman on pregnancy and maternity leave is paid a maternity allowance for the full duration of that leave in lieu of her normal salary.⁴³ (The monthly allowance is equivalent to the average of normal salary over 12 months.) Parents, adoptive parents or guardians, who are taking parental leave to care for a child up to three years of age, have the right to receive childcare benefits (the amount of which is prescribed by the government) until the child is two years old – this benefit is paid out of the state budget.⁴⁴

The law also provides that an employer may not terminate an employment contract with a pregnant employee from the time that she has submitted a pregnancy certificate to the employer until one month after the end of the maternity leave following the pregnancy. This policy also applies to a person who is not on parental leave but is responsible for the care of a child who is at least one year old, except for certain exceptions provided for by law.⁴⁵

X TRANSLATION

The law establishes a common linguistic obligation for Armenian citizens and institutions to uphold the principles arising from a language policy in all areas of public life.⁴⁶

The law also states that enterprises, institutions and organisations located in the territory of Armenia must communicate with state bodies, enterprises, institutions, organisations and citizens of other states in a mutually acceptable language.

Foreign state bodies, enterprises, institutions and organisations located in Armenia are obliged to hold an Armenian version of all documents that are subject to state control.⁴⁷

It follows that institutions and organisations in Armenia must conduct all paperwork in Armenian; foreign companies are only obliged to have Armenian versions of the documents that are subject to state control. The law does not specify any particular requirements for Armenian translations, such as notarisation or the availability of an accredited translator.

The law also stipulates that government bodies, enterprises, institutions and organisations in Armenia are responsible for non-Armenian paperwork, the design of non-Armenian signboards, forms, stamps, seals, international postal envelopes and advertisements.⁴⁸

As to the use of foreign language documents during lawsuits, the codes of administrative, civil and criminal procedures require that all court documents be submitted either in Armenian or in another language with a proper translation into Armenian (i.e., with notarial certification). If this requirement is not complied with, the submitted documents will not be considered or allowed by the court.

43 Law on Temporary Disability and Maternity Benefits of the Republic of Armenia, Articles 6(2), 11(1), 22(1).

44 Law on State Benefits of the Republic of Armenia, Article 27(1).

45 Labour Code, Article 114.

46 Law on the Language of the Republic of Armenia, Article 1.1.

47 *id.*, at Article 4.

48 The Code on Administrative Offences of the Republic of Armenia, Article 1893.

XI EMPLOYEE REPRESENTATION

Employees are free to create and join trade unions to protect and represent their rights and interests.⁴⁹

Representation in a collective labour relationship shall arise if a representative represents the interests of more than half the employees in an undertaking.⁵⁰

A trade union can be established by a decision during a meeting convened by its founders, which must be attended by at least three employees. This founding meeting approves the charter of the organisation, and elects the management and overseeing bodies. The organisation must obtain state registration.⁵¹ The law does not define the length of a representative's term of service.

Employee representatives have the right to receive information from the employer, to submit suggestions to the employer on the organisation of work, to conduct collective bargainings in the organisation, to sign collective agreements, exercise non-governmental supervision over the implementation of labour legislation and other normative legal rulings containing norms of labour law, appeal to the court against the decisions and actions of the employer or persons authorised by the employer, if they do not comply with the legislation, collective agreements and labour contracts.⁵²

The employer must respect the rights of employee representatives and not interfere with their activities when they are making decisions that may affect the legal status of employees. The employer must hold consultations with employee representatives as and when required. Further, the employer must consider any proposals submitted by employee representatives and respond to them in writing within one month.⁵³

Employee representatives have the benefit of certain legal guarantees, for example employees elected to representative bodies cannot be dismissed from work at the initiative of the employer without the preliminary consent of the representative body during the period for which they fulfil their authorisations, except in certain cases specified in law.⁵⁴

The supreme body of the trade union is its assembly (conference, congress), which shall be convened within the timeframe established by its charter, but not less than once every five years.⁵⁵

XII DATA PROTECTION

i Requirements for registration

Companies in Armenia have no obligation to register with a data protection agency or other government body, and do not need to identify with particularity any such information that is being processed.

49 Labour Code, Article 21.

50 *id.*, at Article 22.

51 The Law on Trade Unions of the Republic of Armenia [Law on Trade Unions], Articles 4, 9.1.

52 Labour Code, Article 25.

53 *id.*, at Article 26(1).

54 *id.*, at Article 119.

55 Law on Trade Unions, Article 8.

Armenia's Personal Data Protection Agency only maintains a register of personal data processors. The law provides four grounds for inclusion on this register:

- a* legal entities that process personal data may apply to the Personal Data Protection Agency for the purpose of recognition and registration of the electronic data processing systems in their possession, which must provide a sufficient level of security;⁵⁶
- b* before processing personal data, a data processor may notify the agency of its intention to process data;⁵⁷
- c* a processor must notify the agency, if the agency requests notice;⁵⁸ and
- d* a processor must notify the agency, if the processor intends to process biometric or special categories of personal data.⁵⁹

Personal data processing is deemed lawful if either the data subject has consented to the processing, except in circumstances provided by law, or the processed data is obtained from a publicly available source.⁶⁰

While processing the personal data of its employees, an employer must:⁶¹

- a* not convey any personal data of employees to third parties without the written consent of the employee, except when it is necessary for preventing a threat to the life or health of the employee, as well as in other circumstances prescribed by the law;
- b* provide the right to be familiar with the personal data of employees only to parties with special authorisation; moreover, these authorised parties may receive only the personal data that are required for a specific purpose;
- c* use encryption keys and other appropriate technical and organisational measures;⁶² and
- d* prevent unauthorised access to processing technologies and ensure that only lawful users access processed data.⁶³

ii Cross-border data transfers

The law allows processors to transfer personal data to third parties provided that either the data subject has consented to the transfer, or the transfer is necessary to implement the purpose of the processing.

To transfer personal data to a third country, the processor must obtain permission from the Personal Data Protection Agency. The Agency will grant permission if it considers the data transfer agreement will ensure an adequate level of protection of personal data. The Agency's permission is not required if a processor transfers personal data to a country that ensures an adequate level of protection of personal data.

An adequate level of protection is presumed where personal data is transferred either in compliance with international agreements, or to a country included in a list officially published by the Agency.⁶⁴

⁵⁶ Data Protection Law of the Republic of Armenia [Data Protection Law], Article 19 (9).

⁵⁷ *id.*, at Article 23(1).

⁵⁸ *id.*, at Article 23(3).

⁵⁹ *id.*, at Article 23(2).

⁶⁰ *id.*, at Article 8.

⁶¹ Labour Code, Article 134, Paragraphs (1), (5).

⁶² Data Protection Law, Article 19(1).

⁶³ *id.*, at Article 19(2).

⁶⁴ *id.*, at Article 27. The list is published online, in Armenian only, at <http://moj.am/storage/uploads/Cucak-2019.pdf>.

Data transferred to another country should not be further processed for purposes that are incompatible with the original purpose of the transfer.⁶⁵

The employer must also warn the parties receiving the personal data of the employee that these data can be used only for specified purposes about which the employees have been informed. The parties receiving the personal data shall keep them confidential.⁶⁶

iii Sensitive data

The law defines a special category of personal data as information relating to a person's race, national identity or ethnic origin, political views, religious or philosophical beliefs, trade union membership, health and sex life. Biometric personal data is defined as information relating to a person's physical, physiological and biological characteristics.⁶⁷

Before processing any personal data, a data processor must notify the Personal Data Protection Agency of its intention to include special category or biometric personal data in that process. A processor may only process data without the data subject's consent in the following circumstances:

- a* special category data: if directly permitted by law;⁶⁸
- b* biometric data: if directly permitted by law and if the purpose pursued by law can only be achieved by the processing of the biometric data.⁶⁹

iv Background checks

To conclude any employment contract, the employer must request the following documents from the candidate: identification document, social security card, certificate of education or required qualification and, if the contract is for a job that requires an initial and recurring medical examination, a statement of the candidate's health. An employer is not entitled to require any documents that are not enumerated in the law and other normative legal rulings.⁷⁰

During the course of the working relationship, an employer is permitted to process an employee's personal data but only for the purposes of ensuring the fulfilment of the requirements of the laws and other normative legal rulings, to support the employee's continued employment, training and promotion, to ensure the employee's personal security, for controlling the quality and quantity of the work performed, and for the protection of property.

The employer cannot acquire or process personal data relating to an employee's political, religious and other persuasions, membership of non-governmental organisations or activities in trade unions, or private life. With regard to activities directly linked to labour relations, the employer is allowed to acquire and process data concerning the private life of an employee but only with his or her written consent.⁷¹

65 Agency for Protection of Personal Data: 'Guidelines for the protection of personal data in employment relations'.

66 Labour Code, Article 134(3).

67 Data Protection Law, Article 3.

68 *id.*, at Article 12.

69 *id.*, at Article 13.

70 Labour Code, Article 89.

71 *id.*, at Article 132.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

The Labour Code provides an exhaustive list of bases on which an employment contract may be terminated; in all other circumstances, termination is illegal. Thus, an employer does not have the right to terminate an employment contract without reference to one of the grounds prescribed by law.

The law provides for two situations in which an employer is required to notify government authorities or representatives of the employees about a dismissal. One is in relation to the dismissal of employee representatives, as discussed in Section XI.

The other is mass dismissals. In the event of the liquidation of an organisation or a reduction in the number of employees, at least two months in advance of a planned dismissal of more than 10 per cent of the total number of employees (but not fewer than 10 employees), the employer must submit details of the proposed number of dismissed employees to the appropriate authorities and the employee representatives.⁷²

The law prescribes the circumstances under which an employer must offer an employee another position, taking into account the employee's professional skills, qualifications and state of health. These include termination of an employment contract:

- a* based on a reduction in the number of employees or staff (because of production needs or changes in production capacity, or economic, technological or organisational conditions of labour);
- b* when an employee is reinstated in a previous job; or
- c* when an employee is not suitable for the position they hold or the work required.

An employer is entitled to terminate an employment contract if the employee rejects the offer of another position. If it is not possible to offer alternative work, the employment contract can be terminated without such an offer.⁷³

A dismissed employee may apply for a job with his or her former employer, but this will be on the same basis as all other applicants (i.e., without any privileges derived from the former employment). The law does not require the implementation of social programmes.

When an employer initiates the termination of an employment contract, the law sets clear deadlines for notifying the employee. These terms vary depending on the basis on which the employment contract has been terminated. If the employer fails to comply with these terms, he or she must pay the employee a penalty;⁷⁴ the employee has a right to demand payment of this penalty. However, the employee cannot demand payment in lieu of notice.

Termination of an employment contract by the employer is prohibited in a number of circumstances:

- a* at a time when an employee is temporarily unable to work;
- b* when an employee is on leave;
- c* after a decision on calling a strike is adopted, the employee takes part in the strike in the manner defined by law;
- d* during the implementation of duties imposed on the employer by state and local self-governance bodies;

⁷² *id.*, at Article 116.

⁷³ *id.*, at Article 113(3).

⁷⁴ *id.*, at Article 115.

- e* concerning pregnant women, from the time that she has submitted a pregnancy certificate to the employer until one month after the end of the pregnancy and maternity leave; and
- f* concerning a person who is not on leave but has care of a child who is not less than one year old, except for certain exceptions provided for by law.⁷⁵

The law provides for some instances when an employer has to pay an employee severance pay on terminating the employment contract. These are instances then the employment contract is terminated through no fault of the employee, such as the liquidation of the organisation, reduction of staff positions or disability of the employee.⁷⁶

The law also allows the termination of an employment contract by mutual agreement. One party offers, in writing, to terminate the contract. If the other party agrees to the offer, he or she must notify the other party within seven days. If the parties thus agree to terminate the contract, they shall execute a written agreement specifying the terms of the termination and other conditions. If the party that received the offer to terminate the contract does not give notice of its agreement within the prescribed period, the offer shall be deemed rejected.⁷⁷

ii Redundancies

An employer can terminate an employment contract on the basis of a reduction to the workforce because of production needs, or changes in production capacity or economic, technological or organisational conditions of labour.

In any such circumstances, an employer must offer an employee another position, taking account of professional skills, qualifications and state of health. If the employee rejects the offer, the employer is entitled to terminate the employment contract.

If it is not possible to offer other work, the employment contract can be terminated without any offer being made. In these circumstances, the principle of protection against dismissal is applicable to the categories of employees listed in Section XIII.i.

Further, an employer must notify an employee in writing no later than two months in advance of a termination; however, there is no the obligation on the employer to notify the government or trade union. In addition, the employee receives severance pay from the employer at the rate of one month of the employee's average salary.

Unlike mass dismissals, the employer has no obligation to notify any state body or employee representative about the dismissal. No social plan is required either. If the dismissed employee wishes to be re-employed by the same employer, the general rules for recruitment are applicable (the employer is free to make decisions on recruitment).

See also Section XIII.i regarding mass dismissals.

XIV TRANSFER OF BUSINESS

According to the Labour Code, the reorganisation of a company, as well as a change in the persons who have obligations or other rights thereon, shall not be a ground for termination of an employment contract, unless the number of employees or staff (or both) is reduced.⁷⁸

⁷⁵ *id.*, at Article 114.

⁷⁶ *id.*, at Article 129.

⁷⁷ *id.*, at Article 110.

⁷⁸ *id.*, at Article 126.

Other than this, there is no specific law that provides more detailed regulations in respect of transfers of business.

However, see Section III regarding the Constitutional Court's position on changes to working conditions.

XV OUTLOOK

The main trend expected in the coming year is to ensure full state control over compliance with labour law requirements. Employers must be prepared for this in all respects: they need to be fully aware of the new powers held by inspection bodies, and their implementation procedures, and must strictly comply with labour law requirements.

A working group, including employers' representatives, has been established by the relevant ministry to prepare amendments to the Labour Code. As proposed by the employers' representatives, this will include discussion about a number of changes that will take some of the unnecessary burden off employers' shoulders.

AUSTRIA

Stefan Kühteubl and Martin Brandauer¹

I INTRODUCTION

Employment law is extensively regulated by statutory mandatory law to ensure the protection of employees. Unlike in other countries, Austrian employment law is extremely fragmented and not codified in one single codex of law. Since Austria's accession to the European Union in January 1995, EU law has played an increasingly significant role in Austrian employment law. Apart from EU and codified law, collective bargaining agreements (i.e., written agreements between employers and employee associations) set out special regulations for specific trades and industries.

All labour and employment-related disputes are subject to the jurisdiction of the labour and social courts. Several authorities in Austria are competent to enforce statutory employment law. The most important authority in this respect is the Labour Inspectorate, which monitors the compliance of employers with statutory safety regulations such as working time and workplace security.

II YEAR IN REVIEW

i Harmonisation of blue-collar and white-collar workers

Austrian employment law has historically distinguished between blue-collar workers (*Arbeiter*) and white-collar employees (*Angestellte*). In 2019, further steps were taken to harmonise the legal frameworks for blue-collar workers and white-collar employees. The main difference is the lack of mandatory minimum notice periods and termination dates for blue-collar workers. In some industries, this has led to blue-collar workers not being given any notice period at all, which makes their employment agreements, in essence, at-will contracts.

To further reduce the differences between the two categories, with effect from 2021, the mandatory notice periods and termination dates that apply to white-collar employees will also be applicable to blue-collar workers.

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ii Regulations on flexibility of working time and rest time

In autumn 2018, the former federal government passed the largest flexibility package on working and rest time regulations in years (BGBl 2018/53). The flexibility package includes the following main amendments:

- a* increasing the maximum daily working time from 10 to 12 hours;
- b* increasing the maximum weekly working time from 50 to 60 hours. However, during a period of 17 weeks, the average weekly working time must not exceed 48 hours, although a collective bargaining agreement may extend this period up to 52 weeks;
- c* further exemptions from the scope of mandatory working and rest-time provisions for senior employees and family members; and
- d* the provision to agree with employees on additional working time for up to four weekends or on public holidays required during a period of extraordinary demand for the business.

Although the amendments have led to a certain degree of flexibility, working and rest-time legislation remains one of the most complex areas in Austrian employment law.

III SIGNIFICANT CASES

i ECJ C-64/18, C-140/18, C-146/18 & C-148/18 (*Maksimovic*)

To protect the Austrian labour market from wage dumping, Austrian law sets out strict documentation and notification requirements for the posting or secondment of employees to Austria from abroad. These wage dumping regulations and the documentation and notification requirements are strictly enforced by Austrian authorities and sanctioned with severe fines (up to €50,000 per violation). Until the *Maksimovic* case,² Austrian authorities applied the principle of cumulation for administrative fines – that is, that each violation would sum up to a total fine, without any cap.

In *Maksimovic*, 217 third country employees were posted to an Austrian construction company without the necessary documents and work permits. Owing to the cumulation principle, the fines for the managers totalled approximately €20 million. If the defendants fail to pay the fine, as an alternative, a custodial sentence of up to four years would apply.

The European Court of Justice (ECJ) ruled that the cumulation of administrative fines without a cap and alternative custodial sentences contradicts the free movement of services and is thus contrary to EU law.

ii ECJ C-16/18 (*Dobesberger*)

In this case,³ the ECJ once again had to consider high administrative fines (€1.3 million) for violations of the current Austrian laws against wage and social dumping.

The Austrian rail company used a service provider for catering on certain international train routes. This service provider engaged a Hungarian subcontractor, which, in turn, used Hungarian leased employees for provision of the services. The leased employees of the

² *Zoran Maksimovic and Others v. Bezirkshauptmannschaft Murtal and Finanzpolizei*; judgment of the Court (Sixth Chamber) of 12 September 2019

³ *Michael Dobesberger v. Magistrat der Stadt Wien*; judgment of the Court (Grand Chamber) of 19 December 2019.

subcontractor all had Hungarian employment contracts and were subject to Hungarian social insurance. Further, the start and end times of each working day for these employees was in Hungary, whereas the majority of the work was carried out on trains travelling through Austria.

The Austrian Labour Inspectorate qualified the rendering of services on trains as a secondment to Austria, with the consequence that the minimum wages and statutory provisions of Austrian law were applicable, and fined the managing director of the non-complying subcontractor. However, the ECJ ruled that the rendering of services on trains should not qualify as a secondment if (1) the start and end of each working day is in Hungary and (2) a substantial proportion of each working day is rendered in Hungary. Therefore, the Austrian courts will most likely remit the imposed fine.

iii Potential effects on Austrian codified law

Both the *Maksimovic* and the *Dobesberger* judgments are expected to lead to far-reaching adaptations of the currently rather strict laws against wage and social dumping in Austria.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

It is generally not mandatory for employers in Austria to issue written employment contracts, as an employment agreement may also be agreed orally or even by implication. Only in a very few exceptional cases, such as for apprentices, must an employment contract be concluded in writing. A violation of this requirement may render an agreement invalid.

However, if no written employment agreement is concluded, the employee is entitled to receive from the employer, immediately upon the commencement of the employment relationship, a written statement in which the main aspects of the employment relationship are summarised.

As a minimum, the content of employment contracts and written statements must include:

- a* name and address of the employer;
- b* name and address of the employee;
- c* commencement date of the employment relationship;
- d* applicable notice period;
- e* termination or end date, if a fixed-term employment contract;
- f* envisaged location of work;
- g* classification of the employee's salary scheme (according to the applicable collective bargaining agreement);
- h* job title;
- i* amount of base salary and further parts of remuneration (e.g., holiday and Christmas payments);
- j* due date of remuneration;
- k* the amount of annual leave;
- l* agreed daily or weekly normal working time;
- m* applicable collective bargaining agreement; and
- n* name and address of the staff pension fund.

It is legally permissible to conclude a one-off fixed-term employment agreement in Austria; however, consecutive fixed-term agreements are only lawful to a very narrow extent and solely provided that specific economic or social requirements are met. If this is not the case, even the first extension to a fixed-term agreement may be qualified as an ineffective chain employment agreement (*Kettenarbeitsverträge*). A chain employment agreement is considered an indefinite employment agreement with a commencement date of the first day of the original fixed-term agreement.

ii Probationary periods

Probationary periods are common in Austria and are often included in employment agreements. According to the Austrian Salaried Employees Act, a probationary period may be agreed for a maximum duration of one month for white-collar employees. For blue-collar workers, the applicable collective bargaining agreement may stipulate a shorter maximum probationary period.

During the probationary period the employment relationship may be terminated by either party at any time without observing notice periods or end dates, and without being required to provide any reason for the termination.

Apprenticeship contracts may include a probationary period of up to three months.

iii Establishing a presence

It is not necessary for foreign companies to establish a subsidiary in Austria to hire employees or to engage an independent contractor. However, if a foreign company conducts business in Austria frequently and with employees in Austria, the foreign company may be obliged to register with the Austrian commercial registry. In addition, the competent authority (trade authority, financial market authority, etc.) and the competent economic chamber must be informed about the start of business.

All employees in Austria are subject to the mandatory Austrian Social Insurance System, which includes, *inter alia*, contributions for health insurance, insurance against accidents at work, pension insurance and unemployment insurance. The employer is obliged to calculate the employee's share of these contributions, deduct them from the employee's salary and process the contributions, as from 1 January 2020, to Austrian health insurance. Further, the employer must deduct the employee's income tax and forward it to the competent financial authority.

V RESTRICTIVE COVENANTS

During the term of an employment contract, employees are subject to a statutory non-compete obligation, which, in essence, covers competitive activities in the employer's area of business. In addition, it is permissible to agree upon a notification obligation for any secondary activity during the term of the employment agreement.

An employer and an employee may also agree on a post-contractual non-compete covenant, which is limited to a maximum duration of one year following the termination of the employment relationship. However, the enforceability of a post-contractual non-compete covenant depends on several conditions (e.g., amount of monthly remuneration, professional education, certain kind of termination, definition of restricted territory, etc.). Any post-contractual non-compete covenant concluded after 1 January 2016 is only effective if the employee's monthly remuneration exceeds €3,580 (the basis for 2020) gross per

month (special payments are not included). In addition, the law prohibits post-contractual non-compete covenants that are equivalent to a ban on the profession of the employee. Labour courts evaluate in each individual case whether a covenant is legally permissible.

Further, a post-contractual non-compete covenant only applies in certain types of terminations, such as ordinary termination by the employee, immediate termination for good cause by the employer or immediate termination without good cause by the employee. In the case of ordinary termination of the employer, the employer is entitled to enforce the post-contractual non-compete covenant by paying the employee the equivalent of his or her most recent monthly remuneration during the post-contractual non-compete covenant period.

If the employment is terminated by a mutual agreement, it is at the parties' discretion whether to agree on a post-contractual non-compete covenant.

VI WAGES

i General principles

There is no statutory minimum salary in Austria, but individual collective bargaining agreements set out mandatory minimum salaries. Salaries are usually paid in 14 instalments: the 13th and 14th instalments (referred to as 'special' payments) are taxed at a much lower rate. If an employer fails to pay an employee the applicable minimum salary, penalties apply, based on the Austrian Law against Wage and Social Dumping (LSD-BG).

ii Working time

The statutory normal working time is 40 hours per week or eight hours per day. Collective bargaining agreements may provide for a shorter time (very often 38.5 hours).

The maximum working time permissible is 60 hours per week and 12 hours per day. Over a period of 17 weeks, the average weekly working time must not exceed 48 hours but collective bargaining may further limit or extend this maximum period from 17 weeks up to 52 weeks.

In general, it is not permissible for employees to work on Saturdays after 1pm, on Sundays or on public holidays, unless legal provisions or applicable collective bargaining agreements grant an exemption.

Employers must also ensure that their employees' working time includes daily and weekly rest periods.

Night-time work between 10pm and 6am is permissible in general. However, pregnant employees and employees under the age of 18 must not work during the night. Furthermore, employees who regularly work during the night are entitled to regular medical examinations and treatment and longer rest periods.

iii Overtime

The Austrian Working Time Act defines overtime hours and additional hours differently. Overtime occurs if the normal daily working time (eight hours) or the normal weekly working time (40 hours) is exceeded. For these extra hours, a supplementary payment of 50 per cent of the normal hourly rate applies. The employee has the option of being paid the overtime plus a supplement or to take 1.5 hours as time off in lieu. Collective bargaining agreements often provide for higher supplementary payments for overtime hours, night-time

work or working time on Sundays and public holidays. Part-time employees may be entitled to a supplementary payment of 25 per cent of the normal hourly rate for additional hours (additional work performed by the employee but not exceeding 40 hours a week).

The Austrian Working Time Act and collective bargaining agreements stipulate several exemptions and potential flexibility measures (e.g., flexi-time, overtime calculation periods) to reduce overtime hours.

As an alternative, an employer and an employee may agree on an 'all-in' remuneration, whereby all additional hours and overtime entitlements are covered by the agreed salary. An all-in remuneration must set out the applicable base salary, which must be at least the minimum salary of the applicable collective bargaining agreement. The difference between the base salary and actual salary payments shall cover all additional hours and overtime entitlements of the employee. The employer needs to evaluate at the end of each year whether the difference between the base salary and the actual salary received covers all additional and overtime work performed by the employee.⁴ If it does not, the difference needs to be paid subsequently.

VII FOREIGN WORKERS

i General

Since Austria's accession to the European Union, EU citizens may live and work in Austria without restriction. Some restrictions apply to Croatian citizens, but these are applicable only until 30 June 2020. To protect domestic employees in Austria, the employment of third country citizens (that is, not Austrian or from an EEA Member State) is subject to various restrictions, including the obligation to obtain residence and work permits.

It is permissible that employment agreements are governed by non-Austrian law. However, if employees render services in Austria, specific mandatory provisions – which are more favourable for the employee – will apply.

ii Seconded and posted employees

Any employee seconded to Austria by an employer based in an EU or EEA Member State or third country is subject to the regulations of the LSD-BG. The LSD-BG grants certain employment standards to employees while they are employed in Austria and provides for registration procedures and other regulations to be observed during a secondment or posting.

Employers based outside Austria are required by law to pay their employees during their secondment or posting to Austria at least the minimum salary and any special payments set out in the applicable Austrian collective bargaining agreement or other statutory regulations.

It is of key importance to ensure compliance at all times with the regulations as set out in the LSD-BG as the Austrian authorities strictly enforce the LSD-BG and impose high administrative fines.

VIII GLOBAL POLICIES

It is common in Austria for employers to stipulate certain rules and regulations in their internal policies (e.g., travel or car use, code of conduct), although there is no legal obligation to do so. These types of policies do not have to be included in the employment agreement, as

⁴ This procedure is known as *Deckungsprüfung*.

the employer has a unilateral right to instruct employees to comply with the policies. There are no requirements to complete or sign a form, or the like, so an email, letter or link to an intranet site is sufficient. For evidentiary purposes, it is advisable that the employee accepts a German version of the internal policy in writing (e.g., via a short letter of acknowledgment).

Exceptions to the aforementioned rules apply if an internal policy is subject to the co-determination rights of an Austrian works council. This could apply, for example, to the implementation of an internal disciplinary rule that is subject to the prior approval of a works council via a shop agreement.⁵ If a shop agreement is concluded, the internal disciplinary rules are binding for each employee. If there is no works council, it is legally impermissible to agree via individual contracts on internal disciplinary rules.

IX PARENTAL LEAVE

Expectant mothers are prohibited to work for eight weeks prior to giving birth and eight weeks afterwards. These consecutive 16 weeks are the maternity protection period, during which the mother receives a maternity allowance, in an amount corresponding to her most recent salary, from Austrian health insurance.

Subsequent to the maternity protection period, mothers or fathers are entitled to parental leave until the child reaches the age of two years. During parental leave, the parent who is on parental leave receives the children's nursing allowance from Austrian health insurance and is protected against termination.

The employee is entitled to work part-time until the child reaches the age of seven, provided the employee (1) is living with the child in a joint household and (2) has been employed for at least three years with the employer and (3) the employer has more than 20 employees. If one of these conditions is not fulfilled, the employer and the employee may agree that the employee may work part-time on a voluntary basis.

Employees on parental part-time working enjoy special protection against termination starting from the notification of the request to work part-time until the end of the agreed part-time period or – at the latest – until the child reaches the age of four. However, even after the child has reached the age of four and until the child's seventh birthday, employees on parental part-time working still enjoy protection against termination, albeit at a slightly lower level.

X TRANSLATION

There is no legal obligation to conclude an employment agreement in German or in the employee's native language; the only prerequisite is that the employee is able to understand the content of the document.

However, it is recommended to issue at least a German or English translation of the employment agreement. If the employee is seconded or posted to Austria, the regulations of the LSD-BG must be complied with at any time (see Section VII.ii).

5 The German term is *Betriebsvereinbarung*.

XI EMPLOYEE REPRESENTATION

According to Austrian employment law, a works council generally needs to be established if a business has five or more employees. However, there is practically no sanction if no works council is established (in practice, many small businesses do not have a works council). The employees must take the initiative to elect a works council, as there is no obligation for the employer to do so.

Works councils do not have to be members of a trade union (although many of them are). The works council is the only representative body by law and every employee older than 18 may stand for election as a works council member. The term of office is four years. Works councils are elected for a specific business unit and not for the legal entity. The number of members of the works council will depend on the number of employees.

Members of a works council enjoy special protection against termination. A termination is only possible after obtaining the prior consent of the competent labour court and provided that specific reasons as stipulated by law are met. Members of the election board and candidates for the works council election also enjoy special protection against termination.

A works council is entitled to monitor the employer's compliance with the applicable labour law regulations and may participate in social and personnel matters (relocation, hiring of new employees, etc.).

The most important participation right of a works council is that the employer is obliged to inform the works council seven days in advance of any proposed notice of termination. Within the seven days following receipt of such a notification, the works council may declare its position on the intended termination of the employment agreement. This statement may also affect how the employee is able to challenge the termination in court. However, if the employer (1) does not notify the works council at all or (2) gives notice to the employee during the first seven days or before the works council issues its statement, then the notice of termination is null and void.

Furthermore, the employer and the works council may conclude shop agreements. For certain sectors, the Austrian Employment Constitution Act provides a works council with the legal power to veto certain actions planned by an employer. Other employer actions cannot be vetoed but do require prior consent in the form of a shop agreement concluded with the works council.

XII DATA PROTECTION

i Requirements for registration

As of 25 May 2018, the EU General Data Protection Regulation (GDPR) and the amended Austrian Data Protection Act (DPA) apply in Austria. Accordingly, the processing of personal data is only legitimate if the controller has a lawful basis for the given data processing (Article 6, GDPR).

Employers are allowed to process data to the extent that it is required for the fulfilment and the purposes of the employment relationship and may process data such as name, address, social security number, age, gender, citizenship, education and work experience.

ii Cross-border data transfers

There are no specific rules for data transfers within the European Union as the rules of the GDPR apply EU-wide. If the processing is legitimate, data can be transferred to recipients in all EU Member States without limitation.

Data transfers to third countries, however, are subject to strict and detailed regulations. Therefore, data may only be transferred to third countries if an adequate level of data protection is guaranteed according to Chapter V of the GDPR. For US-related data transfers, an adequate level of data protection is guaranteed if the US recipient is certified under the EU-US Privacy Shield.

iii Sensitive data

The GDPR grants additional protection to special categories of personal data. Any data that reveals the person's racial or ethnic origin, political opinion, religious or philosophical beliefs, union membership, health, sex life or sexual orientation qualifies as sensitive data. The processing of sensitive data by the employer is only permissible under very limited circumstances, as stipulated in Article 9 of the GDPR.

iv Background checks

Background checks are not very common in Austria, although there is no explicit restriction in this regard. Employers usually ask employees to provide a criminal record declaration on their first working day or with their CV during the application process. However, checks on criminal and credit records are only allowed if the employer's interests outweigh the employee's privacy interests and only to the extent necessary for the specific job position. Therefore, criminal and credit checks are permissible, for example, for employees working in a bank or an insurance company but not for an employee in the construction business. Medical checks and drug tests are only legally permissible for certain employees (e.g., aviators, doctors, train supervisors).

Further, the Austrian Supreme Court has stated several times that certain questions in job interviews regarding a potential pregnancy, sexual orientation, membership of a union or religion are invalid and applicants have the right to answer these questions falsely without having to fear future consequences.

XIII DISCONTINUING EMPLOYMENT

Austrian employment law differentiates between (1) a termination with immediate effect for cause (dismissal), (2) ordinary termination and (3) mutual termination.

i Dismissal

Every employment relationship may be terminated by the employee or the employer with immediate effect for cause. In this event, no notice period and no termination date have to be observed. In general, termination for cause is only admissible if circumstances make it unreasonable to continue the employment relationship (even for the duration of the applicable notice until the termination date). Reasons for termination with cause are stipulated by law, and include severe breach of contractual obligations rendering the employee untrustworthy, incapacity to perform the agreed services, violation of a non-compete agreement and rude behaviour by the employee or the employer.

Ordinary termination

An ordinary notice of termination is not restricted to specific causes, although statutory notice periods and termination dates apply. The notice periods and termination dates to be observed are stipulated by statutory law, a collective bargaining agreement or a specific contractual agreement.

White-collar employees

Employers may dismiss white-collar employees, subject to the appropriate statutory notice period, which depends on the duration of the employment relationship:

Years of service	Termination notice period
Less than 2 years	6 weeks
More than 2 years and up to 5 years	2 months
More than 5 years and up to 15 years	3 months
More than 15 years and up to 25 years	4 months
More than 25 years	5 months

Individual agreements may deviate from the statutory notice periods if they are more favourable for the employee. Besides stipulating notice periods, the applicable law also stipulates termination dates. According to the Salaried Employees Act, termination dates on which the employment relationship effectively ends are the end of each calendar quarter (i.e., 31 March, 30 June, 30 September and 31 December).

If employment is terminated by a white-collar employee, the applicable notice period is one month and the termination date is the end of the next calendar month. However, the employee's notice period may be contractually extended if the agreed notice period is not longer than the notice period the employer has to observe, and provided that it does not exceed a maximum of six months.

If explicitly stipulated in an employment agreement, it is legally permissible to agree to termination dates for employees and employers on the last or the 15th day of a calendar month, which is very often the case in Austria.

Blue-collar workers

Section 77 of the Austrian Industrial Code stipulates a two-week notice period for blue-collar workers, whereby no termination date needs to be observed. This regulation is not mandatory and there may be no notice period at all. In practice, the applicable collective bargaining agreement stipulates the notice periods and termination dates for blue-collar workers. As of 1 January 2021, the notice periods and termination dates for white-collar employees will also apply to blue-collar workers.

In principle, and provided that neither the employment contract nor the collective bargaining agreement do not specify otherwise, no formal requirements apply to a notice of termination. It is necessary to inform the works council, if any, at least seven days in advance of any proposed notice of termination.

Certain employees (such as works council members, pregnant employees, disabled employees, apprentices) are subject to special protection against termination. In these cases, the prior approval of a court or other competent authority is required.

Mutual termination and fixed-term contracts

Besides termination by notice, employment relationships may be terminated by mutual agreement. An employer and employee may agree freely on a termination date of their choice, without taking into account the statutory or contractual notice periods or effective dates. Employment agreements for a fixed term will automatically end when the contract period has elapsed but may only be terminated by ordinary termination under certain circumstances and if that option has been explicitly agreed in advance.

Severance systems

Austria has two systems of statutory severance pay. One applies to employment contracts that commenced before 1 January 2003⁶ and the other to employment contracts that commenced on or after 1 January 2003.⁷ Employees who are subject to the pre-2003 system generally have a direct claim against the employer for a severance payment upon termination of employment, unless an employee terminates the employment relationship or is dismissed for cause. The severance claim is calculated based on the employee's length of service and his or her most recent remuneration (including bonuses, if any) and may amount up to 12 monthly remunerations after 25 uninterrupted years of service. In general, severance pay under the pre-2003 system is due and payable immediately upon termination of employment (also when the relevant employee retires). Under the new system, the employer pays 1.53 per cent of the employee's gross monthly salary to a severance fund. Employees who are subject to the new system have a severance claim against the fund only.

ii Redundancies

According to Section 45a of the Labour Market Promotion Act, an employer must notify its local branch office of the Employment Service (AMS) if the employer intends, within a period of 30 days, to dismiss as redundant:

- a* at least five employees in a business with more than 20 but fewer than 100 employees;
- b* at least 5 per cent of the employees in a business with between 100 and 600 employees;
- c* at least 30 employees in a business with more than 600 employees; or
- d* irrespective of the size of the business, at least five employees aged 50 or older.

Starting with this notification, a 30-day retention period applies, during which no employment agreement may be terminated. If the employer fails to notify the AMS or terminates any employee's employment before the end of this 30-day period, all terminations will be null and void and the affected employees could claim for reinstatement. Prior to the notification to the AMS, the works council, if any, must be informed.

The employer must also notify the AMS if the relevant number of employees is offered a mutual termination agreement or the relevant number of employment agreements are terminated by mutual consent within the 30-day term.

In companies with at least 20 employees, a social plan might be enforced by the works council to protect the employees from substantial disadvantages resulting from the collective dismissal. According to business practice, when it is required that the AMS is notified of a collective dismissal, a social plan shall be offered to the works council. If the employer

6 The old system – *Abfertigung Alt*.

7 The new system – *Abfertigung Neu*.

and the works council fail to agree on a social plan, the works council may address the conciliation body at the competent labour court. Typically, social plans include voluntary severance payments.

XIV TRANSFER OF BUSINESS

As an EU Member State, Austria has implemented the Acquired Rights Directive. In the event of a transfer of business, employees automatically transfer to the new employer, which has to maintain all rights under the existing employment agreements.

If working conditions that are dependent on a collective bargaining agreement or works council agreement change because of the transfer of business to the substantial detriment of the employees, the employees may terminate their employment relationship on the employer's terms within one month. Any transfer-related termination of employment (prior to or following the transfer) is null and void. In other words, a termination needs to be justified by termination grounds independent of the transfer of business. Neither statutory law nor case law set out a timeline for this restriction. As a rule, the closer to the transfer date the termination notice is given, the more reason to suspect the termination happened because of the transfer.

There is no general right for employees to object to or opt out of a transfer. According to law, employees may only object to a transfer of their employment if the transferee does not take on (1) special termination rules set forth in an applicable collective bargaining agreement, or (2) company pension commitments.

A works council, if any, needs to be informed in advance of the transfer by providing information about (1) the reason for the transfer, (2) the legal, economic and social consequences for the employees and (3) the envisaged measures regarding the employees. Consultation with the works council is only obligatory if explicitly demanded by the works council during the information process. Austrian law does not set out a specific timeframe regarding the notification process. However, it is generally recommended – as a matter of good employee relations – to notify the works council one to two months prior to the proposed transfer taking effect. Nevertheless, in practice, violations of the works council's information and consultation rights in relation to a transfer of business are not sanctioned.

XV OUTLOOK

Austria faced a certain amount of political turbulence during 2019 that led to the first technocratic government in Austrian history and the election of a new federal parliament in autumn 2019. As a result, little new employment law and few legislative proposals have been passed in 2019. As the new federal government (a coalition between a conservative party and the Green Party) has taken office at the beginning of 2020, it is unclear what changes to employment law Austria may face during the coming year.

BELGIUM

*Chris Van Olmen*¹

I INTRODUCTION

Employment law in Belgium draws mainly on international and domestic sources. International sources include international treaties, European law, including case law of the European Court of Justice, and International Labour Organization conventions. Domestic sources of law include the Constitution, legislation, in particular the Act on Employment Contracts (AEC) of 3 July 1978, decrees issued by the regions and communities, royal and ministerial decrees, collective labour agreements (CLAs), employment contracts, work rules and customs.

Furthermore, case law, in particular that of the Supreme Court and the Constitutional Court, can have considerable influence on the state of the law.

When rules deriving from different sources appear to be inconsistent with one another, different sets of rules apply to determine the rule that will prevail. For example, international law prevails over national law whenever it is directly applicable, and inconsistency between national sources is resolved by Article 51 of the Collective Labour Agreements and Joint Committees Act of 5 December 1968, establishing a hierarchical classification for most of these sources. For example, a custom or a verbal individual agreement deviating from a written individual agreement serves no purpose legally.

In Belgium, labour courts deal with disputes in relation to employment relationships. Labour courts are independent judicial bodies whose jurisdiction covers all matters relating to labour and social security law. The bench comprises one professional judge and two lay judges, one representing the employers and the other the employees. The procedure is accessible to litigants in person. Litigants may be represented by a member of the Bar. Furthermore, employees may be represented by a member of the trade union to which they belong. Enforcement of labour law provisions may also be initiated by other authorities, including the labour inspectorate or tax and social security authorities. The decisions of the labour courts may be reviewed by a labour court of appeal, which has a composition similar to that of the labour courts. Appeals against decisions by a labour court of appeal that would constitute a violation of the law may be lodged with the Supreme Court.

The General Directorate for Supervision of Social Legislation (also called the Social Legislation Inspectorate), which is a department within the Federal Public Service for Employment, Labour and Social Dialogue, provides information to employers and employees, gives advice, arbitrates and verifies whether labour law and the various CLAs are complied with. It has an important role with regard to disputes in individual labour law. Its actions range from preparing drafts of bills and overseeing the operation of existing employment

¹ Chris Van Olmen is the founding partner of Van Olmen & Wynant.

legislation, to registering CLAs and publishing practical comments on legislation. Belgian labour law is related to criminal law, with the exception of the Act on Employment Contracts of 3 July 1978 (see Section II). The Social Legislation Inspectorate can draw up an official report, which could lead to criminal prosecution of the employer.²

II YEAR IN REVIEW

The federal government of Michel I dissolved in December 2018. Michel II took over as a caretaker government following the elections held in May 2019 and continues to manage the country pending the formation of a new government (which, at the time of publication, is still ongoing). The legislative powers of a caretaker government are limited, therefore the important innovations in employment law are mostly results of earlier government decisions or connected to collective bargaining by social partners.

On 24 December 2018, the 'single permit' procedure became applicable. Citizens of countries that are not part of the European Entrepreneurial Region who want to live and work in Belgium, and their employers, have to follow this new procedure. The single permit procedure replaces the former procedure of separate residence permits and work permits.

Further, on 11 February 2019, a Royal Decree laid down the conditions and procedure to set up positive actions by private enterprises, whereby companies can promote the employment or better participation of (candidate) employees who belong to a group people who are often victims of discrimination.

Belgium was hit by a national strike on 13 February 2019. The collective actions were caused by the discontent of the trade unions with the national wage bargaining system, which they argue limits their freedom to negotiate higher wage increases. Nonetheless, the national social partners concluded a collective agreement on 24 April 2019 on some important future measures of employment and social security law. The outcome of the negotiations was highly uncertain as the socialist trade union did not agree with a cap on wage increases of 1.1 per cent proposed in the midst of difficult discussions about raising the minimum wage. Eventually, the discussion about the minimum wage was postponed and taken out of the negotiations. Alongside the 1.1 per cent wage increase for 2019–2020, the agreement included, *inter alia*, an increase in the number of voluntary overtime hours from 100 to 120 per year, an increase in employers' contributions to public transport, and an increase in the age limits set within the various systems of unemployment with company contributions (the former bridge pension system).

To reduce the number of company cars and the resulting congestion and exhaust emissions, the Belgian government introduced a cash-for-car system in 2018. On 1 March 2019 a second option entered into force to promote alternative ways of getting around: the mobility budget. The aim of the new system, established by the Act of 29 February 2019, is to give more freedom of choice to the employee, who can now choose to exchange a company car for a mobility budget, which is equal to the annual gross employer's cost of a company car. This budget offers employees three possible alternative mobility options: (1) a more environmentally friendly car; (2) alternative and sustainable modes of transport; and (3) the remaining balance of the budget, paid in cash.

Every four years, Belgian companies within the private sector hold social elections for the worker representatives on works councils and health and safety committees. The Act of

2 Act of 6 June 2010 introducing the Penal Social Code.

4 April 2020 has amended the general Act on Social Elections of 2007 to introduce some innovations for the forthcoming elections in May 2020. Most important is the introduction of an active voting right for temporary agency workers if they meet certain conditions.

Further, a Royal Decree of 5 May 2019 has made it possible to take parental leave for one-tenth of standard working time (one day per two weeks), after this was laid down by the Act of 28 September 2018. Finally, the Act of 17 May 2019 introduced a time credit system for informal carers of close family members to reduce their working time.

Since May, no new legislation or employment law of substantial importance has been introduced.

III SIGNIFICANT CASES

In a judgment of 4 February 2019 (No. 29/2019), the Constitutional Court ruled that trade union representatives who are delegated with the tasks of a health and safety committee (CPPW) in companies with fewer than 50 employees also should receive the same dismissal protection as members of the CPPW, even if they do not actually execute any task related to the CPPW.

The Labour Court of Leuven, in a judgment of 11 April 2019, declared a sectoral collective agreement to be non-applicable as it linked wage increases to the seniority of the employee; the Court held that this was in contradiction with the prohibition of discrimination based on age. The CLA stretched the concept of seniority too far in the eyes of the Labour Court, which interpreted as relevant professional experience any professional experience in any profession (even if completely different from the position held in the current company) of any nature (including small part-time jobs) and periods of incapacity equated with actual professional experience, such as absences resulting from illness, accidents, unemployment and thematic leave.

On 16 May 2019, the Belgian state was convicted by the Court of Justice of the European Union (CJEU) (C-509/17) for a contravention of Article 4 of Directive 2001/23/EC, which states that the transfer of an undertaking may not in itself constitute grounds for dismissal for a transferor or transferee. However, the Belgian Continuance of Undertaking Act of 2009 gives a transferee the right to choose which employees he or she wishes to take over, based on technical, economic and organisational reasons, without there being any prohibited differentiation. Employees who are not chosen by the transferee are therefore dismissed and are implicitly, but necessarily, employees for whom no technical, economic or organisational reason dictates the transfer of their contract of employment in the eyes of the transferee, but that does not alter the fact that the transferee is in no way obliged to prove that the redundancies in the context of the transfer are due to technical, economic or organisational reasons. It follows that the protection of employees against unjustified dismissal in the event of judicial reorganisation by transfer under judicial authority is not guaranteed by the Continuance of Undertaking Act.

In a judgment of 20 May 2019 (AR S. 17.0063.F), the Belgian Supreme Court (the Court of Cassation) responded to the question of whether benefits provided by a third party to an employee should be seen as part of his or her salary, on which social security contributions need to be paid. Pursuant to Article 2 of the Wage Protection Act of 12 April 1965, on the protection of the remuneration of workers, remuneration should be understood to mean the salary to which the worker is entitled to charge the employer, because of his or her commitment. The remuneration allocated to workers for work carried out in performance of their employment contract therefore constitutes remuneration within the meaning of the

Wage Protection Act, and it is this concept of remuneration that is taken into account for the calculation of social security contributions. Thus, the benefits that a third party pays to the employees of a company, in order for them to sell the third party's product at their place of work to the customers of their employer, constitute 'compensation for the work performed in execution of the existing employment contract between the employees and the company'.

In another important European case, the CJEU (20 June 2019, C-404/18) ruled that witnesses of discrimination are not sufficiently protected by Belgian legislation on discrimination against dismissal, because Belgian law demands a formal written complaint to be filed (with the prevention adviser), which did not happen in the case at hand.

On 16 September 2019, the Supreme Court (AR S.17.0079.F – S.18.0042.F) had to rule on the question of whether an employee has to pay back undue wages in gross or net form to the employer. Specifically, the question arises as to whether, in addition to the net salary, the employee must first reimburse the withheld tax on wages and, second, the employee's social security contributions. The Court stated that the withheld tax on wages should be reimbursed by the employee, but not the employee's social security contributions, as the relevant laws have explicitly foreseen a claim for employers against the National Office of Social Security.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

In principle, an employment contract may be in writing or oral. Nevertheless, many provisions must be provided in writing, including:

- a* training clause;³
- b* non-compete clause;⁴
- c* employment contracts concluded for a definite period of time or for a specific project;⁵
- d* part-time work;⁶
- e* temporary work or interim work;⁷
- f* work from home;⁸
- g* employment contracts concluded with a foreign worker in certain cases;⁹
- h* employment contracts concluded to replace an employee who is temporarily absent (e.g., on maternity or sick leave);¹⁰ and
- i* employment contracts concluded with a student.¹¹

For some of these exceptions, the contract must be signed before employees actually commence work. Sanctions range from nullity (e.g., for a non-compete clause) to the legal presumption that the contract has been concluded for an indefinite period (fixed-term employment contracts or those for a specific project).

3 Act on Employment Contracts [AEC], Article 22 *bis*.

4 *id.*, at Articles 65, 86 and 104.

5 *id.*, at Article 9.

6 *id.*, at Article 11 *bis*.

7 Act of 24 July 1987.

8 AEC, Article 119.1 to 119.12.

9 Royal Decree of 9 June 1999, Articles 12 and 13.

10 AEC, Article 11 *ter*.

11 *id.*, at Article 123.

Parties can amend an employment contract orally – the law does not impose the presence of a written agreement. The agreed conditions or stipulations of the labour contract cannot be changed unilaterally. However, parties can specify that the employer has the right to change the job function or the working location unilaterally. Without prejudice to the above-mentioned stipulations, the law does not, in principle, impose the presence of particular clauses in the employment contract. The imperative legal and regulatory conditions, as well as the CLAs in general, are, however, deemed to form an integral part of the employment contract and no clause may validly depart from this.

With regard to work rules, these must contain certain clauses, particularly with respect to the duration and hours of employment, reprehensible behaviour and associated disciplinary sanctions, the method and period for payment of remuneration, and terms and conditions for the allocation of annual leave. These clauses are also deemed to form an integral part of the employment contract, except in cases of individual written exceptions.

Employment contracts concluded for a definite period of time, or for a specific project, must give precise indications of the definite period, the specified work (i.e., the job performed) or mention that the contract is for the replacement of an employee (who is identified in the contract). Part-time contracts for a fixed work schedule must state the agreed system and hours to be worked, but for flexible work schedules, the contract need only refer to the provisions of the work rules pertaining thereto. In the absence of a written document containing these specifications, the employee may choose the system and hours of part-time work most favourable to him or her, among those provided for in the work rules or in any other company document.

When it is in written form, a contract of employment must be drawn up in French, Dutch or German. The rule about which language is applicable depends on the location of the employer's operational headquarters (see Section IX).

ii Establishing a presence

Every company that employs workers in Belgium must be registered with the Belgian National Office for Social Security (NOSS). This registration is done automatically by the immediate declaration of employment via the Dimona system. This declaration must be made through the NOSS website.¹² For certain specific activities, such as temporary work, an agreement must be obtained. The social security contributions of employees are withheld at source and paid by the employer to the mutual insurance organisations responsible for administering the social security system. The employer is also required to deduct taxes monthly.

Non-Belgian employers who wish to employ someone in Belgium must declare these activities in advance, using the mandatory International Migration Information System (Limosa) declaration.¹³ In certain cases, the foreign employer must apply for an employment authorisation for its activities in Belgium and its employees must have a Belgian work permit. This obligation is applicable to service provision in the form of temporary employment agency work, provision of labour, exchanges between related companies and the execution of (sub) contracting agreements.

If a foreign employer employs Belgian residents in Belgium, this foreign employer will be deemed to have a Belgian establishment. In this respect, the foreign employer must comply with various tax formalities. It must make the professional income tax deductions,

12 www.socialsecurity.be.

13 www.limosa.be.

file special individual forms¹⁴ as well as a summary form¹⁵ to report the salaries paid to its Belgian employees. If Belgian employees carry out operations that are subject to Belgian value added tax (VAT), the foreign employer will have to register with the Belgian VAT authorities. In this respect, monthly or quarterly VAT returns should be filed.

V RESTRICTIVE COVENANTS

Non-compete clauses can be executed during or after employment. Non-compete clauses must be in writing and are valid if the employee's annual gross remuneration exceeds €35,761. There are also restrictions on their applicability if the annual gross remuneration does not exceed €71,523 (these amounts, applicable for 2020, are updated annually).

In general, a non-compete clause is valid if it is limited to activities similar to those currently performed by the employee and to a well-defined geographical area limited to the national territory, if the new employer is a competitor, and provided the clause does not exceed 12 months. Except for sales representatives, the clause must provide for the payment of an indemnity to the employee equal to at least 50 per cent of the salary corresponding to the duration of the non-compete provision. The clause is not applicable if the employer terminates the contract with a notice period or an indemnity in lieu of notice or if the employee puts an end to the agreement on the basis of a serious breach committed by the employer. Specific rules apply to international companies.

Provided that some specific requirements are met, various departures from the conditions of the general non-compete clause may be made, which means it is a special non-compete clause. This clause may only be used for certain categories of enterprises and for white-collar employees (except sales representatives) with specific functions.

The enterprises concerned have to comply with one of the following conditions:

- a* they must have an international activity or considerable economic, technical or financial interests in the international markets; or
- b* they must have their own research departments.

In such enterprises, the special non-compete clause may be applied only to those employees whose work allows them to acquire, directly or indirectly, a practice or knowledge peculiar to the enterprise, the use of which outside the enterprise could be prejudicial to it.

If these conditions are met, it is possible to deviate from the general non-compete clause on the points of limitation to the national territory and the maximum period of 12 months. The special non-compete clause may also be applicable when the employment contract is terminated by the employer without just cause after six months from the beginning of the contract and if the contract is terminated during the same six months.

Since 2014 it is prohibited to include probationary periods in an employment contract, except in the cases of agency work and student work.

14 For example, Form 281.10.

15 For example, Form 325.10 for employees.

VI WAGES

i Working time

Working time means the time during which an employee is available to the employer (in other words, the time during which he or she is under an employer's authority) and that the employee cannot use freely as he or she sees fit. Accordingly, working time may be more extensive than the periods during which work is actually performed (e.g., on-call periods during on-call duty). Working time may not exceed eight hours a day. Moreover, daily work must, in principle, be performed between 6am and 8pm because of the ban on working at night.

In some cases, however, daily working time may be increased as follows:

- a* to nine hours if the employee does not work more than five-and-a-half days a week (and has a work schedule in which the employee, in addition to his or her weekly day of rest, has at least half-a-day's rest); and
- b* to 10 hours if the employee is absent from home for more than 14 hours a day because of the distance between the workplace and his or her place of residence or temporary accommodation.

Except for derogations (laid down by royal decree or collective agreement), the length of each work session must be more than three hours.

Working time may not exceed 40 hours a week. On 1 January 2003, a rule was introduced under which working time was generally reduced to 38 hours a week. Under this general reduction to 38 hours, the weekly work schedule that can be applied in undertakings is either 38 effective hours a week, or 38 hours on average over a specified reference period that allows employers to maintain a work schedule of 40 hours per week by granting compensatory days off.

In principle, night work is prohibited. Night work means any work performed between 8pm and 6am. This rule applies without distinction between male and female employees. There are a number of derogations from this principle relating to industrial sectors, particular activities or particular employees. A number of derogations are provided for by law concerning cases in which night work is regarded as normal or inherent in the activity pursued (e.g., the transport sector, energy distribution companies, hospitals, the catering sector (hotels, restaurants, off-licences), surveillance activities and particular cases of force majeure). Night work may also be permitted by royal decree in particular industrial sectors, undertakings, occupations, or for the execution of particular types of work.

ii Overtime

Particular types of overtime require:

- a* prior authorisation by royal decree for:
 - transport operations, loading and unloading (up to a maximum of 11 hours a day and 50 hours a week);
 - sectors in which the substances processed can degenerate very quickly (up to a maximum of 11 hours a day and 50 hours a week); and
 - work, the execution time of which cannot be clearly defined because of the nature of that work (up to a maximum of 11 hours a day and 50 hours a week); or

- b* prior authorisation by the trade union representative and the district inspector or head of the General Directorate for Supervision of Social Legislation (or, in the absence of a trade union representative, authorisation by the inspector or head of district suffices) in the event of an exceptional increase of work (up to a maximum 11 hours a day and 50 hours a week).

Overtime may also be performed in the event of force majeure:

- a* without any particular formality, to carry out:
 - work for third parties to deal either with the threat of an accident or with an accident that has occurred;
 - urgent work on machinery or equipment for third parties;
 - work within the undertaking to deal with the threat of an accident or an accident that has occurred; or
 - urgent work within the undertaking on machinery or equipment; or
- b* with the prior agreement of the trade union representative (or *a posteriori* information to the representative) and notification of the inspector or head of district for work necessary because of unforeseen circumstances (up to a maximum 11 hours a day and 50 hours a week).

The normal working time limits may also be exceeded for stock-taking (up to a maximum of 11 hours a day and 50 hours a week). This derogation may be used only in respect of work effectively carried out for a period of seven days per employee and per calendar year.

In most cases in which the normal limits on working time may be exceeded, compensatory rest periods must be granted to ensure that the normal weekly working time (38 hours or that determined by collective agreement) is complied with over a reference period. In principle, this reference period is three months (one quarter). However, it may be increased to one year by royal decree, a collective agreement or, in the absence of a royal decree or collective agreement applicable to the undertaking, by the undertaking's terms and conditions of employment.

Derogations giving rise to compensatory rest periods are:

- a* working in successive shifts;
- b* continuous work for technical reasons;
- c* work to which the normal working time limits cannot be applied;
- d* preparatory and follow-up work;
- e* transport operations, loading and unloading;
- f* work whose execution time cannot be determined;
- g* working with substances that degrade quickly;
- h* exceptional increase of work;
- i* work necessary because of unforeseen circumstances; and
- j* work to deal with the threat of an accident or an accident that has occurred, or urgent repairs to machinery or equipment by employees of a third party.

Apart from the rules concerning the granting of compensatory rest periods, particular instances in which the normal working time limits are exceeded also give rise to overtime payment as a supplement to the normal wage or salary.

All work done in excess of the limits of nine hours a day and 40 hours a week (or lower limits determined by a collective agreement involving an effective reduction to the length of

daily or weekly working time) give rise to entitlement to an overtime payment (that the first hour of overtime may be compensated only by rest). The rate of overtime payment is 50 per cent extra for hours worked during the week, including on Saturdays, and 100 per cent extra for hours worked on Sundays or public holidays. Overtime payments must be calculated on the basis of ordinary remuneration (i.e., the average hourly wage that should be paid for the day or week when the employee did overtime).

Derogations giving rise to overtime payment are as follows:

- a* preparatory or follow-up work;
- b* transport operations, loading and unloading;
- c* work for which the execution time cannot be determined;
- d* working with substances that may degenerate very quickly;
- e* exceptional increase in workload;
- f* work justified by unforeseen circumstances;
- g* work carried out to deal with either an accident that has occurred in the past or a new accident, or urgent repair work to machinery or equipment; and
- h* work on stocktaking and preparing balance sheets.

The Act of 5 March 2017 introduces a system of voluntary overtime hours. The employee may ask his or her employer to work a maximum of 120 overtime hours on top of his or her ordinary hours with a view to enhance his or her remuneration.¹⁶ A written agreement is needed prior to commencing voluntary overtime. This agreement is valid for six months and may be renewed. However, the limits of 11 hours a day and 50 hours a week cannot be exceeded. Voluntary overtime hours may be accomplished without any specific procedure or particular reason for doing so.

VII FOREIGN WORKERS

There is a general obligation to notify the Belgian authorities of foreign employed or self-employed persons.

Some categories of persons are exempt from this notification, however, because of the nature or short duration of the activities being carried out in Belgium (artists, international transport sector employees, diplomats, participants in scientific conferences, etc.). Belgian law requires, with a number of exceptions, every employer to draw up terms and conditions of employment and to maintain a staff register.

If posting an employee to Belgium, an employer who has served a Limosa notification (see Section IV.ii) or who enjoys dispensation in this regard, is exempt from the obligation to draw up and maintain social documents, such as a staff register, for six months.

As the terms and conditions of employment contain particular information (schedules of working hours, the method of wage and salary payment, etc.), it constitutes a basic document against which it is verified whether certain fundamental rules of labour law are being applied correctly (working time, rest time, etc.). It is also an important instrument for the employer to detail a number of special obligations for its employees.

Through the staff register, an employee can be lawfully listed.

In principle, nationals from Member States of the European Economic Area (EEA) may be hired without specific restrictions, whereas other foreigners need to obtain a work

¹⁶ This amount was increased in 2019; previously, the maximum was 100.

permit. In 2019, the single permit was introduced, combining the work permit and residence permit into one procedure. Exceptions do exist, however. For example, Belgium-based headquarters of Belgian or foreign companies are not required to obtain work permits for non-EEA citizens employed in a managerial position (e.g., project managers, leaders of research and development teams, planning engineers, chief executive officers, chief financial officers) provided well-defined conditions are met.

In general, foreign employees are subject to the majority of the rules that apply to Belgian employees. Moreover, all social law stipulations subject to penal sanctions (the vast majority) are also applicable to employees temporarily posted to Belgium.

VIII GLOBAL POLICIES

Work rules must be established in every enterprise, even if there is only one employee present. The works council is competent to draft and amend the work rules and to take all steps required for informing employees thereof. If there is no works council, the trade union representatives or the employees themselves must approve the rules. The Act of 8 April 1965 lays down the procedure to be followed. If there is no works council, proposals for the establishment of work rules must be made by the employer, who must bring such proposals to the attention of the employees by posting notices.

The work rules must specify the offences and their related sanctions and the possibilities of redress open to employees who wish to object to the sanctions. All applicable sanctions (fines, suspension, etc.) must be specified in the work rules. On the first working day after becoming aware of an infringement by an employee, the employer or its representative must communicate the sanctions to the employee. The employee's name, the date, justification and sanction have to be registered. Although work rules are binding on both employer and employees, they can be derogated from in an individual contract of employment. Work rules are only binding on individual employees when they have received a copy of them from their employer, even if they were informed through different channels.

Belgian law generally prohibits direct and indirect discrimination. Equal treatment is the subject of an Act of 10 May 2007, which combats discrimination based on gender. This Act also prohibits discrimination on the basis of pregnancy, birth, maternity or change of gender. Another Act of 10 May 2007 concerns the prohibition of certain forms of discrimination, creating a general framework for the prevention of discrimination on the grounds of age, sexual orientation, civil status, birth, finances, religion or belief, political opinions, language, present or future health, disability, physical or genetic characteristics, or social origin. This Act applies to all individuals in both the public and private sectors, including in relation to employment issues. Further, the Act of 30 July 1981 (adjusted in 2007) combating racism and xenophobia prohibits discrimination based on nationality, race, colour, descent, or national or ethnic origin. Finally, Chapter V *bis* of the Act of 4 August 1996 contains measures aimed at preventing harassment and violence at work as well as a procedure for handling harassment and violence claims, and punishing harassment or violent misconduct in the workplace.

IX PARENTAL LEAVE

Female employees are entitled to maternity leave lasting 15 weeks (17 for twins). Pre-natal leave (during the pregnancy) can be granted for up to six weeks. Every pregnant employee is obliged to stay home from work from the seventh day before the expected date of birth of

the child. The period of rest starting from the day of the birth (post-natal leave) must be at least nine weeks. A maternity allowance is provided by the employee's health insurance fund; the amount is fixed as a percentage of salary. During the first 30 days of maternity leave, the allowance shall be calculated on the basis of the full salary. Afterwards, a capped salary is taken into account. Pregnant employees are protected against dismissal from the day they notify their employer of the pregnancy until one month after the end of post-natal leave.

Male employees are entitled to paternity leave for 10 working days. These days have to be taken within four months of the birth, but fathers are not obliged to take their paternity leave. During the first three days of paternity leave, the employee retains his full salary. For the days that follow, the employee receives an allowance from his health insurance fund. When there is no genetic father, a co-parent can claim the same leave. If the mother dies in childbirth or if she is hospitalised, a part of the maternity leave can be transformed into paternity leave. In any case, employees who take paternity leave are protected against dismissal.

In addition to maternity leave and paternity leave, parents are entitled to four months of parental leave. Full-time employees can take these months as full months or in separate full weeks (if the employer agrees) or split the leave by reducing their working time by one-half, one-fifth or even one-tenth (if the employer agrees). Parental leave can be taken at any time until the child turns 12 years old. A parent can take his or her parental leave if, during the 15 months preceding a written notification to the employer, he or she has been associated for 12 months with an employment contract with the employer. During parental leave, the parent can receive a benefit from the National Employment Office. Employees who take their parental leave are protected against dismissal.

X TRANSLATION

Belgium is a multilingual federal state made up of regions (Brussels, Flanders and Wallonia) and communities (French, Flemish¹⁷ and German).

The language for 'social relations' between employers and employees, and for company documents prescribed by law, varies from one linguistic region to another.

The rules that apply depend on the location of the employer's operational headquarters. If this is in Flanders, the language used must be Dutch;¹⁸ if it is in Wallonia, the language used must be French;¹⁹ and if it is in the German-speaking community, the language used must be German.²⁰ If it is in the bilingual Brussels region, either French or Dutch may be used, depending on the first language of the employee.²¹ The employer may add a translation into one or more languages.

In Flanders and Wallonia, these language requirements also apply to any other official written documents and oral communications. If they are not observed, the documents and communications concerned are deemed null and void.

In the Brussels region and in the German-speaking community, the above-mentioned language rule applies to any official written documents, but not to oral communications.

17 It is the Flemish community, but Flemish is not a language. The language of Flanders is Dutch.

18 Decree of 19 July 1973.

19 Decree of 30 June 1982.

20 Laws on the use of languages coordinated by Royal Decree of 18 July 1966.

21 id.

Failure to use the correct language does not have any direct consequences as long as the employer issues a new document to replace the incorrect one: the replacement applies *ab initio*.

Given the broad interpretation of social relations by Belgian courts, all documents containing instructions, communications and specific information for employees should be drafted in the correct language.

In a judgment of 16 April 2013,²² the CJEU ruled that EU law must be interpreted as precluding legislation of a federated entity of a Member State, such as that applicable in Flanders, which requires all employers whose established place of business is located in that entity's territory to draft cross-border employment contracts exclusively in the official language of that federated entity, failing which the contracts are to be declared null and void by the national courts of their own motion.

The Flemish Decree on the use of languages in social relations has been modified with a view to ensuring compliance with that ruling. It now provides that a version having legal force may be established for employment contracts in one of the languages of the European Union understood by all the parties concerned in cases where the employee may claim free movement rights on the basis of EU law or of any other international or supranational treaty. In the event of any conflict with the Dutch version, the Dutch version of the contract will prevail.

XI EMPLOYEE REPRESENTATION

A works council is a joint committee at enterprise level designed to foster employer and employee consultation and collaboration. It comprises the head of the enterprise, assisted by a number of senior executives and an elected workers' delegation. The works council has competence in four areas:

- a* the right to information;
- b* advisory competence;
- c* decisive competence; and
- d* managerial competence.

In terms of content, works councils are competent at the technical, economic and social levels.

At companies operating within the private sector (i.e., technical operating units), and employing at least 100 people, works councils must be set up through social elections. These elections are held every four years by the employer (head of the enterprise), who is statutorily obliged to do so. Electoral guidelines are regulated by the Act of 4 December 2007, largely along established lines.

The works council meets at least once a month at the request of the head of the enterprise or at least one-third of its members. The premises and supplies required for meetings shall be made available by the employer, and the employer must also give the representatives the necessary time off – with pay – and facilities to enable them to perform their task as well as possible. Under certain conditions, the representatives are entitled to participate in labour education programmes during working time, while retaining their pay. Workers' representatives and non-elected candidates enjoy special protection against dismissal.

22 Case C-202/11.

At the company level, there are three representative bodies: the works council, the committee for prevention and protection in the workplace, and the staff representatives' delegation. At any enterprise employing at least 50 people, a committee for prevention and protection in the workplace must be set up; its main purpose will be responsibility for the enterprise's prevention and security policy.

The members of the works councils and the committees are elected by all staff members (even if they are not part of a trade union) from electoral lists presented by the three most important trade unions. If there are more than 15 employees with higher qualifications (e.g., a master's degree) who are employed in managerial positions (known as *cadres*), a separate representation is provided for them in the works council. As far as the nominations for the candidates are concerned, the monopoly of the traditional representative trade unions is no longer in place. Nominations can now be made by the traditional representative trade unions, the representative unions of *cadres*, or by 10 per cent of the *cadres* in the enterprise, thus allowing for independent candidates to be considered for election.

XII DATA PROTECTION

The protection of personal data concerning employees is regulated by, among other legislation, the GDPR.

The GDPR lays down certain conditions that have to be met when an employer wants to collect or process personal data. The processing of data is allowed only for legitimate purposes, such as the good execution of an employment contract, internal communications or the processing of data in connection with recruitment practices. The processing of data is also allowed with the voluntary authorisation of the employee. The employer must keep a register of processing operations, which should include the following information relating to personal data:

- a* the purpose of processing the data;
- b* what data is being processed and the person to whom it belongs;
- c* who receives the data, including those outside the European Union;
- d* how long the employer keeps the data; and
- e* how the employer protects the data.

The employer must, in certain cases, also appoint a data protection officer, who will supervise compliance with the GDPR. There are also means for the employees to control the processed data and, if necessary, ask for incorrect data to be corrected.

Biological tests, medical examinations or other reasons for gathering medical information (orally) regarding the state of health of an employee or a candidate for a job (or of their family) may only be performed for reasons relating to the actual state of health of an employee with regard to the specific requirements of the job. Predictive genetic examinations and AIDS/HIV tests are prohibited.²³ It is forbidden to gather data that could indicate racial or ethnic origin, political opinions, religious or philosophical convictions, membership of trade unions, or information concerning the sex life of citizens in general and employees alike. The processing of sensitive personal data is allowed if it is necessary for specific reasons, such as public interest, legal claims, labour law and social security.²⁴

23 Act of 28 January 2003.

24 See GDPR, Article 9 and Act of 30 July 2018, Article 9.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Since 1 April 2014, all employees have the right to know the concrete reasons that have led to their dismissal. Previously, except in certain situations, only blue-collar employees and employees dismissed for serious wrongdoing enjoyed that right. Employees may also seek damages if they consider that they have been dismissed on manifestly unreasonable grounds. In practice, the grounds for termination will often be stated in the document that employers submit to the National Employment Office. This document is communicated to the employee at the same time, to enable him or her to claim unemployment benefits.

Normally, there are no notification or consultation procedures unless there is a collective dismissal or plant closure, or if a collective bargaining agreement provides for a specific procedure. Offers of suitable alternative employment are not required.

The termination of an employment contract is always definitive. The only remedy is financial compensation. There is no possibility for obligatory reinstatement of the employee. Certain categories of employees are statutorily protected against dismissal, such as members and candidates of the works council, members of a trade union delegation, pregnant employees and employees on maternity or parental leave.

Employment contracts concluded for an indefinite period may only be terminated by one of the parties through prior notification of a notice period. Termination for a serious reason constitutes, in principle, the only permissible circumstance for unilateral termination without prior notice. In practice, however, it is possible for either of the parties to terminate the contract without prior notice, provided compensation is paid.

Since 1 January 2014, notice periods are the same for all employees in all sectors, subject to exceptions. It is not clear whether the employer and employee are able to agree on a notice period different from that contained in the AEC, but there is no provision in the AEC that would suggest that it is prohibited, as long the different provision is favourable to the employee.

ii Redundancies

Where multiple redundancies qualify as a collective dismissal, the legislation on collective dismissals applies and possibly the legislation regarding the closure of enterprises. A collective dismissal triggers the prior information and consultation obligations towards the employees (either through the works council or, if there is none, the union delegation, or, failing this, the employees in person). The intention to proceed with collective dismissal must also be communicated to the competent administration (the director of the subregional employment office). In principle, a collective dismissal gives rise to the payment of a special monthly compensation payment in addition to any indemnity due in lieu of notice.

In the majority of cases, employers and trade union organisations establish a social plan granting additional compensation to the workers concerned and other measures with a view towards reducing the consequences of collective dismissal (e.g., early retirement schemes).

Note that the concept of collective dismissal varies according to whether consideration is given to the right of employees to prior information and consultation, or the employees' right to receive compensation.

In some sectors, there will also be specific obligations for employers if the multiple redundancies do not meet the thresholds of the national legislation.

XIV TRANSFER OF BUSINESS

Under Belgian law, the consequences for employees of a transfer of an undertaking or a part thereof are governed by the Collective Labour Agreement No. 32 *bis* of 7 June 1985 (CLA 32 *bis*), which transposed into Belgian law EU Council Directive 77/178/EC of 14 February 1977 (replaced by Council Directive 2001/23/EC).

i Information and consultation prior to the transfer

Under Belgian law, an employer who intends to amend the structure of the company (merger, concentration, takeover, closure or other important structural amendments negotiated by the company) has an obligation to inform and consult the employees' representatives (i.e., the representatives in the works council, the committee for prevention and protection in the workplace or the trade union delegation) or the employees directly about such a project.

The relevant information should be provided and the consultation should take place before the decision on the planned change in structure. The employees' representatives must be consulted, in advance, in particular with regard to the repercussions on the employment prospects for the personnel, the work organisation, and the employment policy in general.

Failure to comply with this obligation would render the employer liable to criminal sanctions (a fine of between €400 and €34,000 to be multiplied by the number of employees employed within the company, up to a maximum of €400,000), in accordance with Article 196 of the Penal Social Code.

ii Consequences of transferring employment contracts

Automatic transfer of contracts

In the event of a transfer within the meaning of CLA 32 *bis*, the rights and obligations of the transferring employer arising from the employment contracts existing on the date of transfer are automatically transferred to the new employer (transferee). In some sectors, the transfer of the contracts is quasi-automatic (i.e., it is always deemed to fall under CLA 32 *bis*) – for example, in the cleaning and security sectors – which makes it impossible to dismiss the employees.

The transferee automatically takes over all rights and obligations of the transferring employer, without any specific formalities having to be complied with. Only for old age, health-related or survivors' benefits, under complementary company or inter-company schemes, does CLA 32 *bis* not provide for an automatic transfer.

After the date when the transfer takes effect, the transferee must respect all individual and collective employment agreements under the same conditions as the transferring employer. It follows that all essential employment conditions (including remuneration, job status, acquired seniority, place of performance and working conditions) should remain unaffected; the new employer may not modify them unilaterally after the transfer date.

Liability

After the date when the transfer takes effect, the transferee becomes solely liable for all debts resulting from the transferred employment contracts, including payment of indemnities in the event of dismissal of any of the transferred employees. For debts already existing at the date of transfer (e.g., salary arrears), the transferor and the transferee will both be liable (*in solidum*).

Prohibition against dismissal

Principles

Pursuant to CLA 32 *bis*, it is prohibited to dismiss employees on the grounds of the transfer of the undertaking within which they are employed. This prohibition applies to both the transferor and the transferee. Moreover, it concerns not only the dismissal concomitant to the transfer, but also any dismissal occurring a short time before or after the transfer.

Failure to comply with this obligation would render the employer liable to an administrative penalty consisting of a fine of between €80 and €800, multiplied by the number of employees affected, up to a limit of €80,000.

In addition to these administrative sanctions, any employee illegally dismissed by the transferor is entitled to initiate a court procedure against both the transferor and the transferee to obtain the payment of a termination indemnity or damages (the illegality of the dismissal does not have as a consequence that the dismissal would be considered null and void). Case law generally sets the amount of damages between €500 and €10,000.

Derogations

CLA 32 *bis* provides for some derogations to the prohibition against dismissal. They concern, on the one hand, some categories of employees (such as those nearing retirement age and students) and, on the other hand, some reasons for dismissal. This second kind of derogation relates to dismissal for serious reasons or based on technical, economic or organisational grounds implying changes in employment within the undertaking. If an employee is dismissed without any of these reasons being present before the moment of transfer, then according to the case law of the CJEU, this employee must still be considered as an employee of the enterprise, meaning that his or her employment contract will have to be regarded as legally transferable to the transferee. If the transfer ultimately results in a significant change in working conditions to the detriment of the employee, the employment contract will be considered to be breached by acts on the part of the employer (i.e., constructive dismissal).

These protection rules apply in the event of a transfer of enterprise by virtue of an agreement. When a transfer occurs within the framework of a legal composition procedure, CLA 32 *bis* provides for some exceptions to these rules. As a result of the Act of 31 January 2009 concerning the continuance of undertaking, the legal composition procedure has been replaced by a new procedure. Article 61 of this Act regulates the position of the employees in the event of a transfer of enterprise under judicial authority. The regulation applied here means that the protection rules are defined less stringently so that the transferee has more flexibility. For example, it is easier for a transferee to change the collective and individual working conditions, and he or she is no longer obliged to take over all employment contracts (however, refer to the significant cases).

XV OUTLOOK

As employment law is mostly a federal competence and Belgium is still waiting for a new federal government to be formed, there are currently no major new projects ahead. Most new legal initiatives will depend on which political parties will be included in the majority coalition, on the plans in their coalition agreement and on the politician who will be appointed as Minister of Work. In the meantime, the national social partners continue to talk about social issues, including the increase in the minimum wage (for now, unsuccessfully).

BERMUDA

Juliana M Snelling and Olga K Rankin¹

I INTRODUCTION

The Employment Act 2000 (the Act) is the governing employment legislation in Bermuda. The Act applies to employees working or performing services wholly or mainly in Bermuda for remuneration under a contract of employment, subject to certain statutory exceptions. The parties may not contract out of the requirements of the Act except where the Act expressly allows it.

Employees may bring a complaint to an inspector employed by the government's Labour Relations Department within three months of an employer's alleged breach of duty under the Act, including for unfair dismissal.

If the inspector has reasonable grounds to believe that an employer has not complied with the Act but is unable to cause a settlement to be reached, the inspector will refer the complaint to the Employment Tribunal (the Tribunal), which will hold a hearing on the matter as soon as practicable and must give the parties or their representatives a full opportunity to present evidence on oath and make submissions. The Tribunal comprises a chairman, a deputy chairman and no more than 12 members appointed by the Minister responsible for labour. The panel hearing a complaint will normally comprise three persons drawn from the Tribunal, which may or may not include an attorney. Except where provided in the Act, the Tribunal regulates its own proceedings as it sees fit.

If the Tribunal determines that an employer has breached the Act, it must notify the parties in writing of the reasons for its decision and has the power to order various remedies. There is a right to appeal to the Supreme Court from an order of the Tribunal on a point of law. The appeal process is governed by the Employment Act (Appeal) Rules 2014.

Employees may also pursue a common law claim for breach of contract or wrongful dismissal in the courts, notwithstanding the right to pursue statutory remedies for unfair dismissal under the Act. The Supreme Court has original jurisdiction to hear claims valued at Bd\$25,000 or higher; breach of contract claims valued at less than Bd\$25,000 are brought in the lower magistrates' courts. Appeals against Supreme Court judgments are made to the Bermuda Court of Appeal and, in certain stipulated circumstances thereafter, to the Judicial Committee of the Privy Council in London.

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II YEAR IN REVIEW

The government's Labour Force Survey Report of May 2019 recorded Bermuda's working population as 35,083, the median gross annual income from a main job as Bd\$62,695 and average weekly working hours to be 39.7. The island's unemployment rate was 5.2 per cent.

Bermuda's restrictive immigration policies came under strict scrutiny because the resident population is shrinking and ageing, causing a reduced tax base and revenue stream for the island. It is felt that without a clear and welcoming immigration policy, Bermuda will be unable to attract the global expertise and capital needed to overcome the challenges of a stagnant economy and decreasing workforce.

The Public Service Superannuation Amendment Act 2019² was passed in July 2019, raising the mandatory retirement age for public service workers from 65 to 68 years. The Act does not force public service workers to work past the age of 65, but gives them the option to do so.

III SIGNIFICANT CASES

i **The Minister of Home Affairs and another v. Barbosa**³

In what was considered an important test case, the Privy Council upheld the judgment of the Court of Appeal that Mr Barbosa did not qualify as a person who belongs to Bermuda for the purposes of Section 11 of the Constitution, which would have afforded him protections of freedom of movement and from discrimination against 'non-belongers'. He is one of approximately 300 people who were born in Bermuda to foreign nationals and who obtained British Overseas Territories citizenship by birth. He was granted indefinite leave to remain in Bermuda and was a British citizen, but was unable to apply for Bermudian status (citizenship).

It was held that he had no common law right to belong to Bermuda and neither did he belong to Bermuda under the Constitution since he did not fall within any of the categories of 'belongers' exhaustively listed therein; further that the common law could not overwrite those constitutional provisions through judicial interpretation.

ii **Attorney General for Bermuda (Appellant) v. Ferguson and others (Respondents)**⁴

On 26 November 2018, the Court of Appeal had declared same-sex marriage legal, upholding the Supreme Court's ruling that the Domestic Partnership Act 2018 (DPA) was unconstitutional on the basis that the DPA interfered with the respondents' freedom to manifest their beliefs. Additionally, the Court held that the DPA was passed for religious reasons and thus was unconstitutional. The government has since received permission to appeal to the Privy Council, which will be heard in 2020. If the Privy Council upholds the lower courts' decisions, this may cause Bermudians who heretofore have felt unwelcome at home to repatriate to the local workforce.

2 Police officers, firefighters and Bermuda Regiment soldiers are not affected by this change.

3 [2019] UKPC 41 (11 November 2019).

4 JCPC 2019/0077.

iii X Limited v. Y⁵

The Supreme Court held that deferred settlement payments owed to a former employee under a separation agreement in the private commercial context may potentially be prohibited by the Bribery Act 2016. The employer sued for a declaration that payments due to its former employee breached the 2016 Act because of a conflict arising between its own interests and those of the new employer, where the employee's new functions required impartiality, and the receipt of a financial advantage from the former employer compromised that impartiality.

While holding that the Act was potentially engaged, the Court dismissed the application on the employee's undertaking not to carry out any duties that a reasonable person would expect he could not properly discharge in relation to transactions involving the former employer. However, the Court noted that the Act's scope is wide and can apply to the private sector since private employees may be subject to fiduciary duties, or duties of good faith or impartiality.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employment contract in the summarised form of a statement of employment (SOE) must be entered into between an employer and an employee under the Act no later than one week after an employee begins employment, and must be signed and dated by both parties. The SOE must contain:

- a* the full names of the employer and employee;
- b* the date when the employment began;
- c* the job title and a brief description of the work;
- d* the place or places of work;
- e* the gross wage and the intervals at which it is to be paid;
- f* the normal days and hours of employment or the normal pattern of shifts;
- g* the entitlement to holidays, including public holidays and paid annual vacation;
- h* the entitlement to paid sick leave;
- i* the length of notice that the employee is obliged to give and receive to terminate the contract of employment;
- j* details of any pension provided;
- k* any disciplinary and grievance procedures applicable;
- l* where the employment is not expected to be permanent, the period for which it is expected to continue or the date on which it is to end;
- m* any probationary period;
- n* any dress code;
- o* the existence of any collective agreement; and
- p* such other matters as may be prescribed.

The SOE may also contain other details relating to the terms and conditions of employment.

5 [2019] SC (Bda) 58 Civ (11 September 2019).

Where there are no particulars to be entered into under points (k) to (o), above, that fact must be noted in the SOE. The SOE may refer to a collective agreement or another document for its terms. Agreed amended terms must be confirmed in writing and signed by both parties within one month.

Fixed-term employment contracts are permissible, in which case the SOE must state the date on which the contract is to end.

Often parties will have more complex written contracts of employment that go beyond what is required to be included in the SOE by the Act. These types of contracts may be amended pursuant to ordinary contract law principles.

ii Probationary periods

The Act provides that new employees may be required to serve a probationary period. The SOE must state what that period is and must also state if no probationary period applies. During the probationary period, the employer or employee may terminate the contract of employment for any reason (or no reason) and without notice. If a reason is given, it must be lawful (see Section XIII.i).

iii Establishing a presence

All new companies in Bermuda hiring employees must be registered with the Registrar of Companies, which is responsible for tracking, processing and administering all limited liability companies, including local companies, exempted companies, overseas companies and foreign sales corporations. A company that is not registered may not hire employees.

If a foreign company that is based overseas hires employees through an agency or third party in Bermuda, the agency will be the employer for the purposes of Bermuda law. However, the foreign company may, in certain circumstances, be deemed to be the real employer and may be sued in Bermuda for any cause of action arising in Bermuda under the External Companies (Jurisdiction in Actions) Act 1885.

V RESTRICTIVE COVENANTS

Bermuda law permits non-compete clauses in employment contracts subject to the following principles.

During employment, the employee is under an implied duty of good faith and fidelity. Thus, regardless of the express terms that exist in the contract, a court may prevent an employee from competing with his or her employer, or otherwise acting outside his or her employment, if those activities are harmful to the business. Breaching this implied duty may justify summary dismissal of the employee for serious misconduct. It is easier for the employer to rely on an express non-compete clause than on this implied duty.

Post-termination, an express non-compete clause must be in place to lawfully prevent competition. However, Bermuda common law regards covenants in restraint of trade as *prima facie* unlawful. The court will enforce the covenant only if it goes no further than is reasonably necessary to protect the legitimate interests of the employer (for example, trade secrets or similar, highly confidential information, trade connections and workforce stability); it will strike down clauses that are unreasonably wide in time, geographical extent and scope of the restricted activity.

There may also be a 'garden leave' clause in the employment contract. This allows the employer to prohibit the employee from working during the notice period while he or she continues to be employed and receive normal wages and benefits.

If the contract contains neither type of clause, the employer may try to rely on the implied post-termination duty on an employee not to disclose or misuse the confidential information of his or her former employer. However, this is difficult to enforce.

Courts will more readily enforce non-solicitation or non-dealing clauses that prevent employees from soliciting or dealing with clients of the former employer and thus protecting trade connections. Courts will also prevent the poaching of key employees to protect the stability of an employer's workforce.

VI WAGES

i Working time

There are no regulations on maximum working hours applicable to adults working in Bermuda, save that the Act mandates that employers provide employees with a rest period of at least 24 consecutive hours in each week, excluding police, prison and fire officers, medical practitioners and nurses.

The Employment of Children and Young Persons Act 1963 provides that no child under 13 is permitted to be employed without having a weekly continuous rest period of at least 36 hours. Children under 16 cannot be employed during school hours on school days and may only be employed for up to two hours on school days outside school hours. Persons under 18 may not lawfully be employed at night unless they are over the age of 16, and then only until midnight.

ii Overtime

The Act provides for mandatory overtime pay, unless the parties expressly contract out of the requirement. Mandatory overtime pay does not apply to a professional or managerial employee whose SOE provides that his or her annual salary has been calculated to reflect that his or her regular duties are likely to require him or her to work, on occasion, more than 40 hours a week.

Otherwise, an employee who works for more than 40 hours in a week is entitled to be paid at the overtime rate of one-and-a-half times the normal hourly wage. Alternatively, the employee may be paid the normal hourly rate for the extra hours and be given the same number of hours off in lieu.

Many collective agreements provide for overtime pay, including double pay for hours worked on Sundays and public holidays.

There are no limits to the amount of overtime that may be performed in a given period, save for the mandatory rest period (see Section VI.i).

iii Proposed new minimum wage legislation

On 30 July 2019, the Employment (Wage Commission) Act 2019 came into force, setting up a commission tasked with recommending a minimum hourly wage (a single hourly rate of gross pay) and a living wage (the amount of income necessary to afford an employee and his or her household a socially acceptable standard of living). Labour specialists hotly debate what effect this will have on the labour market.

VII FOREIGN WORKERS

All workers in Bermuda must either be exempt from immigration control (e.g., possess Bermuda status or have some other qualifying exemption under the Bermuda Immigration and Protection Act 1956) or be in possession of a work permit from the Department of Immigration.

There are no arbitrary restrictions on the number of foreign workers who may be employed in Bermuda, but to obtain a work permit, the position must either be exempt from advertising or the Department of Immigration must be satisfied that there is no Bermudian, spouse of a Bermudian or Permanent Resident Certificate holder who is qualified and has applied for the position.

Foreign workers are protected by the same employment laws and generally pay the same taxes as local workers. On 15 October 2019, Parliament passed the National Pension Scheme (Operational Pensions) Amendment Act 2019, which, for the first time, requires pensions to be paid by employers in respect of expatriate workers who have been granted permission to work in Bermuda for at least one year. Self-employed expatriate workers are also now required to contribute to a pension scheme.

VIII GLOBAL POLICIES

Internal rules on discipline are not required by Bermuda law. Where disciplinary procedures exist, the SOE must contain the particulars, and where there are none, the SOE must state this. There are no other mandatory workplace ‘rules’ (as opposed to laws) that apply.

However, employers will often set out their internal disciplinary procedures in the employee handbook or on the intranet. Employees are commonly required to sign an acknowledgment that they have read the policies and agree to comply.

The Act provides that an employer may take disciplinary action, including issuing a written warning or suspending an employee, after taking into account:

- a* the nature of the conduct in question;
- b* the employee’s duties;
- c* the terms of the contract;
- d* any damage caused by the employee’s conduct;
- e* the employee’s length of service and his or her previous conduct;
- f* the related circumstances;
- g* the penalty imposed by the employer;
- h* the procedure followed by the employer; and
- i* the usual practice of the employer in similar situations.

IX PARENTAL LEAVE

Effective 1 January 2020, the Employment (Maternity Leave Extension and Paternity Leave) Amendment Act 2019 extends paid maternity leave from eight weeks to 13 weeks and introduces five days of paid paternity leave, provided, in both instances, the employee has worked for more than one year. If the length of service is less than one year, the maternity benefit is 13 weeks of unpaid leave (up from eight weeks) and five days of unpaid paternity leave (new under this Act).

Employment contracts may not be terminated while an employee is on parental leave; employment is deemed to be continuous during parental leave.

X TRANSLATION

English is the written and spoken language in Bermuda. There is no law requiring that contracts of employment be translated into the employee's native language. However, if the employer is aware that the employee does not understand the contractual terms, the contract may not be enforceable under common law unconscionable bargain or undue influence principles.

Foreign nationals coming to work in Bermuda under the Portuguese Accord and those employed in construction are required to have a working knowledge of English to ensure that work duties are carried out safely. In cases where English language skills are questionable, the person will be landed (i.e., legally admitted) for seven days and may be required to undergo testing by the Department of Immigration as a condition of residence.

XI EMPLOYEE REPRESENTATION

The Trade Union Act 1965 provides that every employee has the right to be a member of a trade union, and the right not to be a member of any trade union or to refuse to be a member of a particular trade union.

Where an agency shop agreement is in force, an employee does not have the right to refuse to be a member of the relevant union unless he or she agrees to pay appropriate contributions either to the trade union in lieu of membership or to a charity of his or her choice.

An employee who is a union member has the right to:

- a* take part in the activities of the trade union (including with a view to becoming a union official) at the 'appropriate time' (i.e., outside working hours or at a time agreed by the employer);
- b* seek or accept appointment or election; and
- c* hold office if elected.

An employer who interferes with these rights commits an offence.

A union's constitution sets out the election and removal procedures for union officer representatives (by a secret ballot of union members), the length of their terms and the frequency of meetings. There is no fixed ratio of representatives to employees.

Employers must comply with the trade union certification procedures as set out in the Trade Union Act 1965 and must deal with unions that have obtained certification in good faith for the purposes of collective bargaining.

Employers commit an offence if they do not allow representatives of a union that is certified in respect of a bargaining unit in the business reasonable access to the employer's premises for the union's lawful activities, but employers may impose reasonable restrictions in the interests of safety or to avoid undue disruption of the business. Further, employers may, by notice in writing addressed to a certified union, require that a representative not engage in union activities on the premises without its prior permission.

XII DATA PROTECTION

i Requirements for registration

The preliminary provisions of the Bermuda Personal Information Protection Act 2016 (PIPA) were introduced in 2016 but the substantive provisions have not yet come into force. The PIPA will regulate the use of personal information by organisations in Bermuda by protecting both the rights of individuals and the need for organisations to retain and use personal data for proper purposes. Personal information means ‘any information about an identified or identifiable individual’, except for information that is publicly available. Every employer will be required to appoint a privacy officer. The operation of the PIPA will be overseen by a privacy commissioner, responsible for handling data breach complaints. The complaint process will start with mediation, followed by an inquiry, followed by possible criminal sanctions.

ii Cross-border data transfers

All personal information protection policies apply to cross-border data transfers.

iii Sensitive data

The PIPA defines sensitive data as ‘any personal information relating to an individual’s place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information’.

iv Background checks

Background checks, credit checks and criminal record checks are permitted in Bermuda. Practically, the person being checked must consent to the release of information, but there are no legal requirements *per se* regarding consent. The Credit Association provides credit checks in certain industries and provides results to paying members. Criminal conviction records will not be released by the court or police without the express consent of the offender. Protection comes with the common law duty of confidence, which prohibits the disclosure or misuse of confidential information. The PIPA will protect personal information provided by employees during background checks when its main provisions come into effect.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

An employee who is not on a fixed-term or project-based contract, or who has successfully completed a probationary period, may not be dismissed without a valid reason connected with the ability, performance or conduct of the employee, or the operational requirements of the employer’s business. Warnings must be given in the event of repeated misconduct (falling short of serious misconduct) or unsatisfactory performance, giving the employee time to improve. The employer must provide the employee with a certificate of termination stipulating the reason for the termination if requested by the employee, as well as formal employment details.

If the termination of a contract is for an invalid reason or for no reason, it constitutes an unfair dismissal meriting a complaint to an inspector. Termination at-will clauses are unlawful and unenforceable.

Further, the Act provides that an employee's dismissal is unfair if it is based on any one of a list of specified reasons, many of which involve protected characteristics under the Human Rights Act 1981.

The notice requirements of the Act must be satisfied. The employer is not allowed to give notice of termination during absences for certain types of leave.

Employees are entitled to at least one week's notice if they are paid weekly, two weeks' notice if they are paid every two weeks and, in other cases, one month's notice. If the contract stipulates a greater amount of notice, the longer notice period will apply. An employer may elect to make payment in lieu of notice and confer all other benefits that would have been due up to the end of the employee's notice period. If the employee leaves without giving proper notice, the employer need only pay salary plus any accrued but unused vacation and benefits, up to the last day worked. If the employer suffers loss, it may sue the employee for compensatory damages, but in practice this rarely happens.

As to rehire rights, if the Employment Tribunal upholds an employee's complaint of unfair dismissal, the Tribunal has the statutory power to award either reinstatement or re-engagement of the employee in comparable work. However, the Tribunal practically will not order this relief against an unwilling employer, just as the courts will not specifically enforce a contract of employment at the suit of either party, since it is undesirable to compel an unwilling party to maintain continuous personal relations with another.

In the event of an unfair dismissal, the amount of compensation that the Tribunal orders must not be less than two weeks' wages for each completed year of continuous employment for employees with no more than two completed years of continuous employment, and not less than four weeks' wages for each completed year of employment thereafter, up to a maximum equivalent of 26 weeks' wages.

The parties are free to enter into a settlement agreement, which is construed and enforced in accordance with normal contract law principles. Stamp duty of Bd\$25 should be applied to the agreement to be enforceable (unless the employer is an exempted company), pursuant to the Stamp Duties Act 1976. If a complaint has been filed with the Department of Labour Relations, written confirmation of the fact of settlement signed by both parties must be sent to the Department for it to close its file. The terms need not be disclosed.

ii Redundancies

An employee is redundant under the Act when his or her termination is, or is part of, a reduction in the workforce that is a direct result of any of the conditions of redundancy, namely:

- a* the modernisation, mechanisation or automation of all or part of the employer's business;
- b* the discontinuance of all or part of the business;
- c* the sale or other disposal of the business;
- d* a reorganisation of the business;
- e* a reduction in business, necessitated by economic conditions, contraction in the volume of work or sales, reduced demand or surplus inventory; or
- f* the impossibility or impracticality of carrying on the business at the usual rate or at all, as a result of:
 - a shortage of materials;
 - a mechanical breakdown;
 - an act of God; or
 - other circumstances beyond the control of the employer.

A lay-off that exceeds a period of four months amounts to a termination by redundancy. A redundant employee is entitled to the following:

- a* Notice – the employer must provide sufficient notice of termination, or payment in lieu of notice (see Section XIII.i).
- b* Severance allowance – if an employee has completed at least one continuous year of employment, he or she is entitled to be paid severance allowance. The amount depends on the length of service, the statutory minimum being two weeks' wages for each year of completed service up to 10 years, and three weeks' wages for each year of completed service thereafter, subject to a maximum of 26 weeks' wages. If the contract provides for a greater amount of severance, it will prevail. Severance allowance is not payable when an employee unreasonably refuses to accept the employer's offer of re-employment at the same place of work under no less favourable terms than those under which he or she was employed prior to the termination.
- c* Certificate of termination – see Section XIII.i.
- d* Itemised pay statement – at or before the payment of any wages, including his or her final payment. Deductions that were not agreed beforehand are unlawful.
- e* Pension transfer – the employee's pension is transferable on redundancy, including the employee's vested contributions, which will vest one year after the employment commenced.
- f* Notice to trade union – the Act mandates that, before making an employee redundant, as soon as practicable, the employer shall inform the trade union or other representative of:
 - the existence of the relevant condition of redundancy;
 - the reason for the termination contemplated;
 - the number and categories of employees likely to be affected; and
 - the period over which the termination is likely to occur.

Further, the employer must consult on:

- a* the possible measures that could be taken to avert or minimise the adverse effects of the redundancy on employment; and
- b* the possible measures that could be taken to mitigate the adverse effects of any termination on the employees concerned.

Often there will be a collective agreement delineating the requirements to be followed and the benefits to be paid in the event of an intended lay-off or redundancy.

No notification of redundancies needs to be given to the government, but it is advisable as a matter of good labour practice to inform the minister responsible for labour relations of impending redundancies affecting a sizeable pool of Bermudian workers.

The employee has no rehire rights save those that might otherwise be provided in any relevant collective bargaining agreement.

No specific categories of employees are protected from dismissal (including redundancy), and no social plan is required in the event of a dismissal or redundancy.

The parties are free to enter into a settlement agreement to settle their disputes (see Section XIII.i).

XIV TRANSFER OF BUSINESS

There is no specific protection for employees whose employment is threatened by a transfer of business or undertaking. The Act provides that when a business is sold, transferred or otherwise disposed of, the period of employment with the former employer shall be deemed to constitute a single period of employment with the successor employer, if the employment was not terminated and severance pay was not paid under the Act. Acceptance of severance pay by an employee has the effect of terminating the employee's employment.

There is no legal prohibition to outsourcing work, and this is an increasing trend given the high cost of local labour. However, where this leads to job losses for Bermudians, unionised workplaces may engage in protests, including work stoppages.

XV OUTLOOK

There is growing serious disquiet about cost increases placed on employers and the effect these will have on employment, including increased social insurance contributions, payroll tax and healthcare premiums, and higher regulatory compliance costs. The new obligation for employers to pay pensions to foreign workers and increased paid parental leave will add to the burden.

The employment market continues to pin its hopes on fintech to deliver jobs with a regulatory framework in place. The government is allowing fintech companies to bring in five employees, provided they also hire and train Bermudians. Circle International Bermuda became the first major crypto-finance firm to be licensed in Bermuda.

The Bermuda reinsurance landscape continues to contract with a series of mergers and takeovers. Nonetheless, there is good reason to believe Bermuda will remain a global reinsurance hub as it provides a gold star regulatory environment and is one of only two countries in the world that has regulatory equivalence with both the United States and the European Union. The Insurance Linked Securities market continues to thrive, although the catastrophic losses of the past two years have curbed the enthusiasm of investors.

Given the great uncertainty that Brexit brings for Bermudians who live and work in Europe, as well as for businesses that operate in both jurisdictions, the government is forming a post-Brexit working group to examine the impact Brexit will have on the island.

BRAZIL

Dario Abrahão Rabay, José Daniel Gatti Vergna, and Vinicius Sabatine¹

I INTRODUCTION

Basic employment rights in Brazil are provided for in the Federal Constitution of 1988.

The Consolidation of Labour Laws (CLT), enacted in 1943, is the major statute that regulates the labour and employment relations. In addition, specific regulations are set forth in federal laws for certain professionals (such as engineers, physicians, attorneys) and there are regulations relating to occupational health and safety issued by the labour agency (currently connected with the Ministry of Economy). The labour agency is responsible for controlling compliance with legislation and for regulating employment relations in Brazil on matters ascribed to it by federal law.

In addition to establishing material rights, the CLT also regulates the entire labour court procedural system. There is no discovery phase or trial by jury, as a labour claim must be filed with a labour court and evidence is produced in the proceeding and before the judge who will rule on the case.

Claims can be individual or class; the former is most common. Class actions may be brought against an employer by the union that represents the employees or by the Labour Prosecution Office.

There are three levels of employment courts. The first includes the lower labour courts in which a judge rules on cases at the local level. Next are the regional labour courts, which are generally located in the state capitals. The third level is the Superior Labour Court, which is in Brasília, the federal capital. In addition to the labour courts, the Supreme Court, which is the highest adjudicative body of the Brazilian legal system, also hears labour cases when lower court decisions violate constitutional provisions.

From the administrative standpoint, in addition to audits conducted by the labour agency, the Labour Prosecution Office monitors compliance with legislation through investigative proceedings. The Labour Prosecution Office acts by means of an indictment, which may or may not be anonymous, and also when urged by the labour courts or by a professional union. If any irregularity is found, the Labour Prosecution Office can propose a settlement, granting the company a period in which to remedy the irregularity subject to the imposition of a fine, or file a public civil action against the company.

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II YEAR IN REVIEW

On 11 November 2019, the government issued Executive Order 905, which amends the CLT and adds new employment provisions. In brief, the following are the principal changes that are proposed:

- a* a employment contract to boost new job positions for young people (between 18 and 29 years old) (the green and yellow contract);
- b* implementation of a disability rehabilitation programme to assist in the rehabilitation of workers who suffer a work-related accident;
- c* creation of a loan programme to support small businesses;
- d* employers authorised to record labour and employment documents electronically;
- e* standardisation of administrative fines;
- f* employers do not need to request the authorisation from the labour authorities to work on Sundays and holidays;
- g* food benefits are not regarded as part of salary for labour and tax law purposes (no incorporations and no payment of social contributions);
- h* the payment of gratuities by third parties should follow several proceedings (e.g., the distribution criteria relating to tips and payments need to be provided under a collective bargaining agreement or a decision of the employees' general assembly);
- i* establishing a new term of 'adjustment of conduct', to be approved by the Ministry of Economy;
- j* removal of the 10 per cent tax on employee severance indemnity fund (FGTS) fines in terminations without cause (affirmed by Law 13,932 of 2019);
- k* implementation of several changes to the profit-sharing programme; and
- l* establishing new criteria for premium payments.

The Executive Order will be in effect until 20 February 2020; this term may be extended for an additional 60 days until 20 April 2020. During this time, Congress will decide whether to convert the Executive Order into law. If it does not become a new law, then Congress must define its limits and effectiveness for the period it remained valid.

III BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Brazilian law does not require the execution of a written employment contract but most companies and employees follow this practice.

In general, written employment contracts establish the duties to be performed, salary, working hours, corporate benefits, possibility of transfer, confidentiality and non-disclosure obligations, obligations to comply with internal policies, payment for damage caused by employees, payroll deductions in addition to the legal deductions.

Employment contracts in Brazil are usually executed for an indefinite term. Contracts executed for a fixed term are limited to two years. To be valid, contracts for a fixed term must be executed only for services whose nature or temporary measure justifies a definite term, or for temporary business activities.

The principal employment rights are the following:

- a* monthly salary;
- b* transport vouchers;
- c* five days' paid paternity leave;

- d vacation pay, plus one-third vacation bonus;
- e 13th-month salary, equivalent to one-twelfth of the monthly salary for each month worked. This is calculated based on the salary for December and paid in two instalments, the first between the months of February and November and the second on 20 December;
- f monthly contribution to the FGTS, equivalent to 8 per cent of monthly remuneration, deposited monthly with a government bank;
- g 120 days' maternity leave (this is actually a social security right, rather than an employment right, as the Social Security Agency pays the maternity benefit);
- h rights provided for in a collective bargaining agreement; and
- i severance pay.

The remuneration paid to employees generates social security contribution obligations, the percentages of which (as of March 2020) vary according to the amount of salary paid:

Salary (for the purpose of social security contributions) (reais)	Index (%)
Up to 1,039.00	7.5
Between 1,039.01 and 2,089.60	9
Between 2,089.61 and 3,134.40	12
Between 3,134.41 and 6,101.06	14

Employees must pay income tax on the full amount of compensation, which must be deducted by the employer. Employers are required to withhold tax and pay the deductions directly to the Federal Revenue Office, providing the employee with annual information that is required for the preparation of an annual tax return. Withholding percentages vary according to the amount of salary paid:

Monthly tax base (reais)	Rate (%)	Amount of tax to be deducted (reais)
Up to 1,903.98	–	–
Between 1,903.99 and 2,826.65	7.5	142.80
Between 2,826.66 and 3,751.05	15.0	354.80
Between 3,751.06 and 4,664.68	22.5	636.13
More than 4,664.69	27.5	869.36

In addition to the payments based on employees' salaries, employers must pay social charges to social security services.

The basic social tax rate applicable to the company on the salary paid, payable or credited to an employee who provides services is 20 per cent. The calculation is based on the total compensation paid, payable or credited for work on any account during the month to socially insured employees providing services.

Sums are added to this 20 per cent contribution to cover the cost of occupational accident insurance, and for contributions intended for social security services that are specific to each activity carried out by the company. The average rate that results from this addition is 28.8 per cent but may vary depending on the economic activity of the company.

Regarding non-employees, the social security contribution rate payable by the company that contracts them is 20 per cent on total remuneration paid or credited to any account. Contributions are not levied to cover the cost of occupational accident insurance, or social security services that are specific to the economic activity of the company.

ii Probationary periods

Pursuant to Brazilian law, a Brazilian company can execute an employment contract containing a probationary period of a maximum of 90 days, and that may be extended once if it has been executed for a term that is less than the legal limit.

If the probationary period has expired and the employee continues working, the contract is automatically deemed to be for an indefinite term.

iii Temporary work

Federal Law No. 6,019 of 1974 on temporary employment authorises that in the legal event of the temporary substitution of regular and permanent staff arising from an increase in business demand, temporary workers may be hired for up to 180 days, which can be postponed by 90 days if the increase in business demand arises from unpredictable factors, or predictable factors relating to intermittent, periodic or seasonal features.

The contracting company is responsible for ensuring that health and safety conditions are met when temporary workers perform services on its premises. Medical facilities and meals that are granted to the contracting company's own employees must be provided also to the temporary workers.

iv Establishing a presence

If an employee is hired by a foreign company to work in Brazil, Brazilian law and jurisdiction will prevail regardless of any other provision established by the employment contract.

The employee, consultant or service provider of a foreign company providing services in Brazil may not perform any acts that could be construed as 'doing business in Brazil'. Regarding the concept of doing business in Brazil, Brazilian domestic legislation does not provide for the notion of 'permanent establishment' as that term has been construed by international tax doctrine, foreign laws and model conventions to avoid double taxation.

The most similar aspect to regulations on a permanent establishment is Article 147 of the Brazilian Income Tax Regulations, which sets forth very specific situations in which Brazilian tax legislation subjects non-residents to the same tax regime applicable to Brazilian tax residents. In this sense, Article 147 lists hypothetical circumstances in which non-residents would be deemed to be doing business in Brazil by means of an organisation of persons or assets. As a result of the application of Article 147, income derived by the non-resident through the organisation of persons or assets would no longer be subject to territorial taxation (which is the standard regime applicable to non-residents) and would be subject to the general tax regime applicable to Brazilian resident legal entities to the extent that the income can be attributed to activities carried out in Brazil.

In this context, while Brazilian law acknowledges the legal personality of foreign legal entities, it does not embrace the freedom of establishment of those entities, as is the case in several other countries. In other words, Brazilian law requires foreign legal entities to obtain authorisation to carry out their activities in Brazil.

If a foreign company establishes a subsidiary in Brazil, it will not be able to hire employees until it has filed its organisational documents (articles of association or by-laws) with the commercial registry of the state where the subsidiary is located.

There is no legally provided time frame for the incorporation of a company.

Hiring consultants or service providers through an intermediary company is possible.

IV RESTRICTIVE COVENANTS

During the term of the employment contract, the employee has a duty of loyalty to the employer and therefore cannot carry out competing activities unless the employer has given authorisation in this regard. Exclusivity does not apply to employees hired on demand (i.e., for work on occasional days, weeks or months).

On account of the constitutional principle of the freedom of every person to work, the employee may carry out competing activities after a contractual termination of employment, unless he or she has executed a non-compete agreement with the employer.

Based on court precedents, a non-compete agreement must be executed at the moment of hiring (either included in the employment contract or in a separate document) and must meet the following requirements: (1) it must be limited in geographical area; (2) the former employee is compensated during the non-compete period; (3) it must be for a limited period of time; and (4) it must be limited to the business area of the employer. Although there is no regulatory legislation, the labour courts have judged non-compete agreements to be valid only when these four requirements are present and provided that the compensation established for the period of non-competition is equal to the salary received by the employee during the term of the employment contract. Note that upon contractual termination, if the employer requires the employee to execute a non-compete agreement, the employee is not under an obligation to do so.

Regarding confidentiality and non-solicitation agreements after termination of the employment contract, these will be valid and payment of an indemnity will not be necessary. For these obligations to be valid after termination of the employment contract, an express agreement in this regard is required.

The employment contract must also contain provisions governing the protection of intellectual or industrial property to the extent applicable and particularly in accordance with the duties being performed by the employee. Regarding provisions concerning inventions created by employees (works made for hire) that are the property of the employer, the contract must provide that compensation paid already includes compensation for intellectual property comprising inventions and enhancements.

V WAGES

i Working hours

The Federal Constitution establishes that the maximum number of hours to be worked by an employee is eight hours per day, 44 hours per week and 220 hours per month.

Special working hours may include continuous rotating shifts, which may only last a maximum of six hours per day, and may be extended to up to eight hours per day subject to a collective bargaining agreement in this respect.

The company must grant a break for rest and a meal whenever the working period is more than four hours, which will be 15 minutes for a working period of up to six hours and of one to two hours for a working period of more than six hours. The break for rest and a meal is not included as part of the working hours.

Working hours do not apply to employees whose working day is proven to include 100 per cent external work with no control of time or hours worked (including employees under home office schemes), as well as to employees who are shown to hold positions of trust, in other words, employees who perform management (or administration) activities as legal representatives of the company and who are not subject to time or hours worked, or monitoring or control. These employees do not have the right to payment of overtime.

Companies with more than 20 employees are required to maintain control of working days for employees who are subject to compliance with working hours. Records of working hour may be manual, mechanical or electronic, so that employees may record the times of entry, exit and breaks.

ii Overtime

If an employee works beyond his or her contractual working day, the company must remunerate the excess hours as overtime, with a minimum rate of 50 per cent more than the ordinary wage for an hour, although there are collective bargaining agreements that establish higher percentages. The employee may work only two overtime hours per day, so that the working day is limited to a maximum of 10 hours.

Hours worked on Sundays or holidays, if not offset in the subsequent week, must be remunerated by 100 per cent of the ordinary wage, irrespective of whether they exceed the daily or weekly limit.

VI FOREIGN WORKERS

Foreign workers may work in Brazil if they hold a residency visa, which is temporary. Requirements for granting visas are set forth in the law and in the regulations of the Ministry of Justice.

For the granting of a temporary residency visa, among other requirements, the foreigner must receive a job offer from a Brazilian company (subsidiary or not) or show evidence that he or she has a graduate degree.

In relation to a temporary visa for an employee who has an employment contract with a Brazilian company, subject to fulfilling the qualification and experience requirements for the job, the maximum term is two years, which can be postponed subject to application and confirmation by the immigration authorities. The permitted number of foreigners holding this visa is limited to a proportion of one-third of the total number of Brazilians hired by the company, in addition to compliance with the rule of two-thirds of payroll salaries. Furthermore, if a foreigner is performing work that is also performed by a Brazilian employee, other requirements such as salary parity may apply, as provided for by the Ministry of Justice. The proportionality requirement is only applicable for the purposes of immigration. The employee must receive remuneration in Brazil and, if he or she continues to receive remuneration from the company abroad, he or she must submit his or her full monthly earnings (in Brazil and abroad) for the purposes of taxation in Brazil. Thus, the Brazilian company must consider for tax and FGTS purposes the amounts received by the foreigner abroad. It should be determined whether there is a tax treaty in place between Brazil

and the country of origin for the purposes of offsetting taxes. Dependants of a holder of a temporary visa may also work in Brazil provided that they request authorisation from the immigration authority.

When working in Brazil, a foreign worker who has the status of an employee of a Brazilian company is protected by Brazilian labour legislation, irrespective of the provisions of a foreign employment contract. Thus, the company must afford the foreigner the same rights guaranteed by law to Brazilian workers and it is advisable that he or she be included in the local benefits policy.

The provision of services by a foreign worker who does not hold a work visa, or whose visa has expired or is irregular, may result in administrative sanctions for the company and deportation of the foreigner.

Foreigners holding visit visas (for tourism or business) are not authorised to perform work activities in return for payment. Exceptions apply for audits, consultancy, news coverage (journalism), and working on flights or vessels as a crew member.

VII GLOBAL POLICIES

Brazilian legislation does not prohibit the application of global policies to employees, provided that they do not violate Brazilian law and it is not necessary to obtain approval by the employees or by any government agency for the policies to be implemented. Policies on discrimination, sexual harassment and corruption must comply with applicable Brazilian law.

A global policy should be implemented with care, because concepts, expressions or even words may have a different legal effect if applied in Brazil, giving rise to consequences that would otherwise not occur in other countries. An example is anti-corruption legislation, such as the US Foreign Corrupt Practices Act – practices may be in accordance with the legislation of the country of origin, but as far as the policy in other countries is concerned, including with regard to the form of a potential investigation, certain practices may have legal implications. Thus, prior analysis of the possibility of application of the policy is recommended.

The policies become constituent parts of employment contracts, including disciplinary measures, and may not be altered to the detriment of employees. The policies should be implemented in Portuguese to avoid any allegation by the employee of lack of understanding thereof and so that they can be enforceable. As for the form, they may be written or distributed via the company's intranet.

It is important for a company to have written or documentary evidence that its employees are aware of the policies, particularly if, based upon the terms of those policies, an employee could fail to receive any payment due to him or her, or be subject to a disciplinary measure. In the event of subsequent implementation, depending upon the nature of the policy (e.g., a code of conduct or ethics), it is recommended that the company offer training for its employees and have evidence thereof, on account of the potential civil liability of the company in the event of damage caused by the employee to another employee or to third parties. If the company so wishes, it may also hold a copy to be available to employees.

VIII PARENTAL LEAVE

Maternity leave entitlement is 120 days. An employee may opt to commence paid leave up to 28 days before the expected birth date or just after the child is born.

An employee who has an abortion is still entitled to maternity leave but only for two weeks. The law permits abortion in limited situations; voluntary abortion is not one of them.

Adoption or child custody also entitles a parent to parental leave, the duration of which depends on the child's age:

- a* under one year: 120 days;
- b* between one and four years: 60 days; or
- c* between four and eight years: 30 days.

Maternity and paid leave may be extended to 180 and 20 days, respectively, if the employer joins a government programme called Company-Citizen. In recognition of participation in this programme, employers are entitled to specific tax benefits.

Paternity leave is five days only. During both maternity and paternity leave, an employee continues to receive his or her base salary plus related employment benefits.

IX TRANSLATION

Pursuant to the Civil Code of Brazil, documents must be translated into Portuguese by a certified translator.

It is recommended that all documents, including job offers, employment contracts, internal policies, confidentiality agreements and bonus policies, be executed in Portuguese (or Portuguese and another language).

X EMPLOYEE REPRESENTATION

The Federal Constitution provides that in companies with more than 200 employees, an employee must be elected with the exclusive purpose of representing fellow employees in discussions with the employers.

According to the CLT, which regulates this matter, the number of employees who may be elected depends on the size of the company:

- a* between 200 and 2,999 employees: three representatives;
- b* between 3,000 and 4,999 employees: five representatives; and
- c* more than 5,000 employees: seven representatives.

These representatives have provisional job tenure for one year after they have completed their term as a representative.

In addition, in respect of representation with unions, the law determined that employers and employees must be represented by unions regardless of their acceptance or membership.

Only unionised employers and employees have to pay union dues. In addition to monthly dues, unionised employers and employees are also required to pay other types of contributions to the union.

Employees are also represented by an internal committee for the prevention of occupational accidents, which must be set up by employers, according to the level of risk of the company's activity and the number of employees. Employees elected to this committee will have employee rights during their term of office and for up to one year thereafter.

XI DATA PROTECTION

i Requirements for registration

In addition to the Brazilian General Data Protection Law, which was enacted in 2018 and will come into force in August 2020, a principle in the Federal Constitution already protects employees' privacy and confidentiality.

Personal data that can be requested by an employer is that which is inherent to the hiring of an employee (to fulfil the employment agreement), or is required by labour legislation. These types of personal data do not include sensitive data.

Personal medical information about employees may not be disclosed to third parties; in fact, only the employee, his or her private physician, or the company's physician may have access to this information. If it should be necessary to use medical data, the employee must provide his or her express consent.

Employee data that may be required by the government includes that which relates to the federal government through the annual report on social information, the general report on employment and unemployment, and the severance fund payment receipt and social security information.

On account of the constitutional principle of the right to privacy, information on employees cannot be made available to third parties, unless the employee provides his or her express consent.

It is recommended that the use of data, and the transfer and maintenance of information in a database handled by third parties, be preceded by express authorisation of the employee. In addition, the company should include such terms in employment contracts or even maintain a policy relating to the protection of personal data, in the sense of stating what data will be used, transferred and maintained in databases used by third parties, together with the express agreement of the employee. Likewise, it is also recommended that the policy state that the company's systems are monitored and that any personal data entered by the employee on the company's system may be at risk of disclosure.

ii Background checks

The CLT has no specific provisions on the types of background checks an employer may conduct to investigate a job applicant or an employee during the employment relationship, nor any provisions setting limits on employers undertaking such investigations. Thus, background checks are reviewed according to the principles of the Federal Constitution relating to the protection of employees' privacy and confidentiality. Certain practices relating to background checks can be adopted by employers, provided that they are reasonable and proportional to the work to be performed by the employee. Certain regulations and court precedents permit background check for prospective employees who will assume specific job positions (e.g., finance managers of certain entities, domestic workers).

XII DISCONTINUING EMPLOYMENT

i Dismissal

There is no law forbidding termination of employment in Brazil, except in the cases of vested employee rights provided for by law, such as for a pregnant employee, a representative of the workplace's internal committee for the prevention of occupational accidents, an employee who has suffered an occupational accident, a union official or in a case of vested employee rights provided for in a collective bargaining agreement or internal policy.

ii Redundancies

If an employer needs to terminate employee contracts because of new technology rendering their services unnecessary, the need to cut costs or if the activities of the company are to be terminated or transferred, the employer may simply terminate employment contracts without cause, but with notice and the payment of severance to the affected employees, which is mandatory in such cases.

If redundancy terminations are necessary, a review should be undertaken to determine whether the company employs any workers possessing vested employment rights, as these employees may not be dismissed as a result of redundancy.

Certain collective bargaining agreements grant benefits or provide for indemnities upon terminations deriving from redundancy, and certain employers offer payments that are higher than those provided for by law when contractual termination occurs as a result of discontinuance of a job or function. In these circumstances, it is also sometimes the case that consultation with the union is required before the terminations.

XIII TRANSFER OF BUSINESS

Labour legislation provides that changes to corporate shareholdings do not affect employment contracts with employees. Thus, in the event of a change of control, a previously existing employment contract is maintained and employees may challenge any alteration made to the employment contract that is to their detriment.

Employment succession will be considered whenever there is continuity of the business. Thus, even if only the assets of the Brazilian company are being acquired (totally or partially), labour succession of employers will still be considered and existing contractual employment conditions must be maintained.

Likewise, if the successor company continues to employ its employees, but in the future ceases to pay employment rights or its partners cease to exist, nothing can hinder employees, including those that came with the business, from holding the company that acquired the assets, totally or partially, liable for the obligations. The predecessor company will only be held jointly and severally liable with the successor if there was fraud in the transfer of business.

The law provides that former shareholders are liable for labour-related debts relating to the period in which they were shareholders. This liability is limited to labour lawsuits filed up to two years after the company's by-laws were amended to allow for removal of the shareholders. Before proceeding with enforcement attempts against a former shareholder, the plaintiff must try to enforce the award first against the company and then against its current shareholders. In the event of fraud in the change of the corporate shareholders structure, the former shareholders will be jointly and severally liable for labour-related debts.

Legal compensation

The labour rights relating to mandatory severance pay vary according to the type of termination, as follows.

Termination without cause at the employer's initiative

- a* Prior notice of 30 days, increased by three days for each year of service for the same company;
- b* salary balance in the termination month;
- c* unused earned vacations and one-third additional payment;
- d* prorated vacation and one-third additional payment;
- e* 13th-month salary (or prorated 13th-month salary, depending on the date of the termination);
- f* FGTS: a deposit in the employee's dedicated FGTS account (equivalent to 8 per cent of severance pay as specified by law);
- g* a 40 per cent FGTS fine based on the amount deposited in the employee's dedicated FGTS account;
- h* any other labour right relating to the termination provided for in the current collective bargaining agreement; and
- i* any other compensation or benefit contractually agreed with the employee.

Termination with cause at the employer's initiative

- a* Salary balance in the month of termination;
- b* earned vacation and one-third additional payment; and
- c* FGTS: a deposit in the employee's dedicated account (equivalent to 8 per cent of severance pay as specified by law).

Termination as a result of resignation by the employee

- a* Salary balance in the termination month;
- b* 13th-month salary (or prorated 13th-month salary, depending on the date of the termination);
- c* earned vacations and one-third additional payment;
- d* prorated vacation and one-third additional payment; and
- e* FGTS: a deposit in the employee's dedicated account (equivalent to 8 per cent of severance pay as specified by law).

Termination by mutual agreement is also possible. In this situation, severance pay is the same as stipulated for a termination without cause at the employer's initiative, except for (1) the notice, which is reduced by half, and (2) the FGTS fine, which is also reduced by half (from 40 per cent to 20 per cent). Moreover, the employee may collect only 80 per cent of the FGTS deposited in his or her severance fund account.

In any termination, the law provides the employer with a limit of 10 days from the date of termination for paying severance.

XIV OUTLOOK

The new government under the administration of President Jair Bolsonaro has completed its first year in January 2020.

The composition of the Brazilian Congress is considered favourable for the new government's agenda of liberal reforms, considering that centre-left and leftist parties lost ground in the last election:

Leftist-Centre = 178 (from 209 in 2014);

Rightist-Centre = 335 (from 304 in 2014);

Constitution Amendment Threshold = needs 308;

The political spectrum is more fragmented (30 parties), however, making negotiations more difficult, and the President has not managed to improve the public's opinion of him. In a survey carried out in July 2019, 33 per cent rated him as excellent or very good and 33 per cent rated him as bad or very bad.²

However, the reality of Brazil's current financial status has generated debate about relevant reforms – such as Brazilian social security and tax reforms – which has led to an increase in popular support for the necessity of a substantial overhaul.

The social security reform was approved at the end of 2019, which will lead to a sizeable volume of savings during the coming decade. It should also bring some respite to market participants in the short to medium term, which should help to restore confidence and to allow for a stronger currency and lower base interest rate.

Having emerged from an economic crisis, Brazilian Central Bank's Focus Report (published in 2019) demonstrates that economic activity is expected to accelerate in the future, in terms of:

- a* a lower level of real interest rates, which is expected to boost credit and consumption;
- b* the new government's approach to controlling expenses, which will be a key factor in controlling inflation; and
- c* low exposure to foreign debt as compared with the country's peers and high reserve levels to protect the Brazilian currency.

Markets are expected to start growing at higher rates if critical reforms are approved and investors' confidence increases. The recent enactment of the social security reform confirms this tendency.

Since the election of President Bolsonaro, markets have improved significantly on the back of positive news reporting.

2 Source: Datafolha.

CANADA

Robert Bonhomme and Michael D Grodinsky¹

I INTRODUCTION

Canada is a federal state consisting of 10 provinces² and three territories.³ The form of government is a constitutional monarchy derived from the United Kingdom. The division of powers between the federal and the provincial governments under the Canadian Constitution⁴ is premised on having every possible subject matter fall under either exclusive federal or exclusive provincial jurisdiction.

The nature of the business carried on by an employer determines whether its relationships with its employees (whether unionised or non-unionised) are regulated by federal or provincial law. Most employers in Canada are provincially regulated. There is a relatively small number of industries that are federally regulated, including banking, navigation and shipping, railways, inter-provincial transport, air transport, communications and broadcasting.

Canada has two legal systems in civil matters. In Quebec, the Civil Code of Quebec (CCQ)⁵ governs the contract of employment between an employee and an employer. In all other provinces and territories, the common law governs the employment relationship between the parties. The differences between common law and civil law systems in Canada relate primarily to the creation and termination of individual employment relationships, as well as the enforceability of post-employment restrictive covenants.

In the federal jurisdiction, the Canada Labour Code⁶ (CLC) applies to federally regulated employers and sets forth minimum standards of employment. The Canadian Human Rights Act⁷ and the Employment Equity Act⁸ prohibit workplace discrimination and promote employment practices that benefit historically under-represented groups. Employment litigation in the federal jurisdiction may, depending on the circumstances and issues at stake, take place before the federal or provincial courts. However, complaints filed

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2 British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador.

3 Nunavut, Yukon and the Northwest Territories.

4 Constitution Act, 1867, 30 & 31 Vict, C 3, Sections 91 to 92.

5 1991, c. 64.

6 RSC, 1985, c. L-2.

7 RSC, 1985, c. H-6.

8 SC, 1995, c. 44.

under the CLC will proceed before specialist labour adjudicators. Employees who are eligible to file complaints under the CLC may request reinstatement of their employment, among other remedies.

At the provincial level, each province has mandatory employment standards legislation that will apply to provincially regulated employers operating within its jurisdiction. Generally, employment standards that are regulated by provincial statutes will include, among others, wages, annual vacation, statutory holidays, termination notice requirements and hours of work provisions. Occupational health and safety legislation exists in all provinces, as do workers' compensation regimes that provide for assistance to workers who are injured while at work.

Employment litigation at the provincial level is usually conducted before the civil courts of each province, specialist labour tribunals or human rights tribunals.

Unionised employees at either the federal or provincial levels will generally be regulated by collective agreements that are subject, depending on the activities and operations of the employer, to federal or provincial labour laws. Grievances filed under collective agreements in Canada will generally be heard by specialist labour arbitrators, who usually have exclusive jurisdiction to decide on matters that are arbitrable under the collective agreement.

II YEAR IN REVIEW

Canadian employers were faced with many significant changes in 2019.

Important changes were introduced to the CLC, with the introduction of Bill C-65, which proposed amendments regarding workplace violence and harassment (including psychological and sexual harassment) in federally regulated workplaces.⁹ It is expected that the amendments set forth under Bill C-65 will come into force in 2020.

Additional changes will also affect the CLC as a result of the coming into force of two significant pieces of legislation: Bill C-63,¹⁰ which received royal assent in December 2017, and Bill C-86,¹¹ which received royal assent in December 2018. These Bills result in several amendments to Part III of the CLC, setting out minimum labour standards for employees of federally regulated employers. Many of these amendments came into force on 1 September 2019, such that the entitlements of federal jurisdiction employees are now generally in line with the entitlements of provincial jurisdiction employees across Canada. In particular, these amendments include the following:

- a* federally regulated employers are now required to give their employees 96 hours' prior notice before the start of a new work schedule;
- b* expansion of entitlements to overtime pay;
- c* expansion of entitlements to break periods;
- d* employees with six consecutive months of continuous employment have a right to request a flexible work schedule relating to the number of hours, work schedule or work location;
- e* increases in vacation entitlements;
- f* increases in medical leave; and

9 An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act 2017.

10 Budget Implementation Act, 2017, No. 2.

11 Budget Implementation Act, 2018, No. 2.

- g new categories of leave:
- for personal reasons;
 - for reasons associated with family violence; or
 - to accommodate traditional aboriginal practices.

Provincial employment legislation was also the subject of important changes in 2019, including in the provinces of Alberta, Quebec and British Columbia.

Alberta's new Employment Standards Code was updated, effective 22 January 2019.¹² The changes introduced were aimed at protecting workers under the age of 18. Under the new legislation, a director of employment may now issue permits for adolescents and children under 12 to be employed for artistic endeavours. The director may now also impose certain conditions on the employment of an individual under 18 years of age if the director deems it necessary to do so.

In Quebec, Bill 176 came into force on 12 June 2018,¹³ amending Quebec's Act Respecting Labour Standards.¹⁴ Several of the amendments set forth under Bill 176 came into force in 2019. Notably, since 1 January 2019, employees are entitled to three weeks of paid vacation after three years of continuous service with their employer (prior to this change, the requirement was five years of continuous service). Moreover, since 1 January 2019, employers in Quebec are now mandated by law to have psychological harassment policies in place for their personnel.

On 30 May 2019, Bill 8, the Employment Standards Amendment Act, was passed and brought forth several changes to the existing labour standards in place in British Columbia. Notably, collective agreements are now required to meet or exceed the entitlements under the Employment Standards Amendment Act, which include, but are not limited to, hours of work, overtime, statutory holidays and vacation time and pay. Bill 8 also enacted new unpaid leave of absence relating to the death of an immediate family member. It also modified certain provisions regarding the termination of employment during a resignation period.¹⁵ This legislation also increased wage recovery periods for employees, and now explicitly prohibits employers from withholding gratuities from their employees. Provincially regulated employers in British Columbia are also required to extend their record-keeping obligations by retaining certain employment records for four years.¹⁶

12 RSA, 2000 c. E-9.

13 An Act to Amend the Act Respecting Labour Standards and Other Legislative Provisions Mainly to Facilitate Family-Work Balance.

14 Act respecting Labour Standards (Quebec), RSQ, c. N-1.1.

15 Under the new legislation, an employee is entitled to the lesser of the wages the employee would have earned during the resignation notice they provided, or the pay in lieu of the notice termination the employee is entitled to under the Employment Standards Amendment Act.

16 These records include payroll records, averaging agreements as well as agreements regarding special workplace clothing and statutory holidays.

III SIGNIFICANT CASES

i **Kativik School Board v. Association of Northern Quebec Employees**¹⁷

This decision by the Quebec Court of Appeal examined the applicable criteria for managing employees with serious performance deficiencies, who were deemed incompetent. The Court of Appeal's involvement in the matter followed an arbitration ruling between the parties and a review by the Superior Court of Quebec, the latter in 2017, which cast doubt on the state of the law for dismissing incompetent employees.

Prior to the Superior Court's ruling, the applicable criteria for dismissing incompetent workers in Quebec were those stated in the Quebec Court of Appeal's 2005 decision in *Costco Wholesale Canada Ltd v. Laplante (Costco)*.¹⁸ These criteria were composed of the following:

- a The employee must be made aware of the company's policies and expectations in his or her regard.
- b The employee's performance deficiencies must have been addressed with him or her.
- c The employee must have received the necessary support to correct those deficiencies and achieve the required performance goals.
- d The employee must have benefited from a reasonable period of time to meet the required performance goals.
- e The employee must have been advised that dismissal was a possible outcome, should there be no improvement on his or her part.

The facts in the *Kativik School Board* case were as follows. At first instance, an arbitrator overturned the dismissal of an employee for incompetence, because the employer had failed to fulfil its obligation to reassign the employee to a less demanding position within the employer's organisation. The employer filed to contest this decision, arguing that the obligation to make reasonable efforts to reassign employees before terminating their employment was not part of the criteria established by the Court of Appeal in *Costco*. The arbitrator found that, under the circumstances, the employer had not fulfilled its duty to consider other possible outcomes, rather than termination of employment.

The Superior Court, after being seised on judicial review, took this one step further by stating that the employer had an obligation to find an alternative position for the incompetent employee. The employer appealed the Superior Court's decision.

The Quebec Court of Appeal dismissed the employer's appeal. The Court determined that in reaching its decision, the arbitrator had not sought to impose any systematic obligations on the employer to reassign the employee to an alternative position before terminating employment for administrative reasons. The Court added that the decision to dismiss an employee for incompetence is dependent on the applicable circumstances of the employment relationship. In this case, the Court found that it was not necessarily improper for a grievance arbitrator to rule that such a termination was unjustified where the employer had failed to identify any other available alternative positions.

The Court of Appeal thus clarified that the criteria established in *Costco* remained unchanged. Depending on the facts of the case, an employer may be required to make additional efforts, such as taking reasonable measures to find an employee a more suitable position within the organisation, prior to the termination of the employment relationship.

17 *Commission Scolaire Kativik v. Association des employés du Nord québécois* 2019 QCCA 961.

18 2005 QCCA 788.

ii **Heller v. Uber Technologies Inc**¹⁹

In this decision, the Ontario Court of Appeal examined the validity of an arbitration clause within Uber's driver service agreement.

The plaintiff, a UberEATS driver, intended to file a class-action lawsuit against Uber for violating the provisions of the Ontario Employment Standards Act 2000 (ESA). Uber submitted that the class action was not receivable in Ontario because the arbitration clause in the driver service agreement signed by the plaintiff required that all disputes be submitted to mediation proceedings under the International Chamber of Commerce (ICC) Mediation Rules and this, pursuant to the laws of the Netherlands. The plaintiff argued that the arbitration clause was an attempt by the employer to contract out of the applicable standards imposed by the ESA and was therefore unlawful.

Uber was successful in having the proceedings stayed before the Ontario courts, until such time as the matter was dealt with through arbitration, in the manner set forth under the driver service agreement.

On 2 January 2019, the Ontario Court of Appeal granted the plaintiff's appeal and found that the arbitration clause was invalid for two reasons. First, the Court determined that the arbitration clause unlawfully deprived the plaintiff of the protection afforded by Section 5(1) of the ESA, which states that no employer shall contract out or waive an employment standard and that any such contracting out is void. Second, the Court ruled that the arbitration clause was unconscionable. In reaching this decision, the Court referenced the four criteria established in the *Titus* case,²⁰ citing that the clause was unconscionable for the following reasons:

- a* The arbitration clause represented a substantially unfair bargain, requiring an individual with a small claim to pay significant fees to file an arbitration with the ICC.
- b* There was no evidence that the appellant had any legal advice prior to entering into the service agreement.
- c* There was a significant inequality in bargaining power between the plaintiff and Uber.
- d* Uber chose this arbitration clause to enhance its position to the detriment of its drivers.

On 23 May 2019, the Supreme Court of Canada granted Uber leave to appeal the decision of the Ontario Court of Appeal. It is expected that the Supreme Court's decision on the matter will be issued at some point in 2020.

iii **Modern Cleaning Concept Inc v. Comité paritaire de l'entretien d'édifices publics de la région de Québec**²¹

In this decision, the Supreme Court of Canada was asked to determine whether a franchisee performed services as an employee or as an independent contractor in accordance with the Quebec Act Respecting Collective Agreement Decrees (the Act).

¹⁹ 2019 ONCA 1.

²⁰ *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573.

²¹ 2019 SCC 28.

The franchisor in question, Modern Cleaning Concept, operated a building maintenance services business that generally serviced public commercial or industrial buildings. Modern assigned building maintenance services contracts to its various franchisees, who were then responsible for performing the required cleaning and janitorial services.

As mandated by the Act, a parity committee had been established to ensure that the provisions of the Act were followed and to ensure compliance with certain labour standards relating to salary, work hours, vacation and overtime pay, among others. The parity committee was also tasked with representing building maintenance employees for claims against their employers.

In 2014, the parity committee filed legal proceedings against the franchisor, Modern, claiming more than C\$9,000 in unpaid salary and other benefits on behalf of the franchisee. In defence, Modern submitted that the franchisee was an independent contractor and not a salaried employee. It took the position that the Act did not apply to independent contractors, who were exempt. The trial judge agreed with this position.

The Quebec Court of Appeal overturned the trial judge's decision. On appeal, the Supreme Court of Canada agreed with the Court of Appeal's position and determined that the relationship between the parties was in fact that of employer-employee. Judge Abella, speaking for the majority of the Supreme Court, stated in her decision that the presence of a franchise contract cannot be used to mask the true nature of the employment relationship. In this case, the Supreme Court ruled that the franchisee did not assume any risks relating to the franchisor's enterprise, that the franchisee was under the *de facto* control of the franchisor and that the franchisee was not given an opportunity to realise any profits, as his salary was limited to the value of the assigned service contract. The Supreme Court therefore determined that the franchisee was actually employed by the franchisor and thus subject to the provisions of the Act and the applicable labour standards arising thereunder.

In this decision, the Supreme Court restated the principle that determining the existence of an employment relationship rests heavily on the factual circumstances at play. The Court further expanded the possibility of employment relationships existing outside non-traditional settings, such as, in this specific case, that of a franchisor-franchisee relationship.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

There is extensive regulation of individual contracts of employment by both provincial and federal statutes that govern minimum standards of employment, which may not be contracted out of by the parties to the employment relationship.

Individual contracts of employment are often not in writing. That being said, it is generally recommended that they are in writing, particularly if the employer wishes to assert a right arising from the agreement (e.g., a termination clause or a restrictive covenant). Fixed-term employment agreements are permissible. Absent a sufficiently detailed fixed-term provision, employees will be considered to be employed for an indefinite period of time.

ii Probationary periods

Probationary periods are a common feature of most Canadian employment agreements. They may be determined by contract and generally range from three to six months in duration, although shorter or longer periods may exist. Most collective agreements in Canada will also include probationary periods. In the event that an employee is dismissed during the

probationary period, and provided he or she is exempt from qualifying for statutory notice requirements, an employer will be able to terminate the employment relationship during the probationary period without financial consequences.

iii Establishing a presence

Foreign employers will generally be able to hire Canadian personnel, even if they are not registered to do business in Canada. In such a case, the employee's employment will be governed by the laws of the Canadian jurisdiction in which their work and duties are performed, notwithstanding the employer's lack of registration in Canada. The employee's compensation will be subject to applicable provincial and federal source deductions, which the employer will be required to remit.

V RESTRICTIVE COVENANTS

Generally, it is implied that, during their employment, employees have a duty of loyalty and honesty towards their employer. Employees are also obliged to comply with the lawful directions of their employer within the scope of their employment, and to perform their employment with diligence and with an appropriate standard of skill and competency.

It is generally accepted that, absent a restrictive covenant, post-employment competition and solicitation by an employee is permissible. However, employers may protect their interests by resorting to written contracts of employment restricting certain post-employment activities. There are three general types of restrictive covenants used in Canadian employment contracts: non-solicitation covenants, which restrict departing employees from soliciting clients, customers, suppliers or other employees; non-competition covenants, which restrict departing employees from commencing employment with competitors or from setting up competing businesses; and non-disclosure covenants, which restrict departing employees from disclosing confidential information. In the absence of a non-disclosure covenant, employees still have a legal duty (whether under common law or civil law) not to disclose confidential information or trade secrets.

Restrictive covenants are viewed as a restraint of trade and will be approached by the courts with great scrutiny.²² The enforceability of non-competition covenants depends largely on their duration and geographical scope, the wording of the contract, the nature of the business and the legitimacy of the interests that the employer is seeking to protect. The law is clear in maintaining that a non-competition covenant must go no further than is reasonably necessary to protect the employer's legitimate proprietary interests. Should a non-competition covenant be viewed as excessive or overreaching, Canadian courts will be likely to strike the covenant in its entirety, rather than reduce or rewrite it to a lesser version.

22 Courts in certain jurisdictions, such as Ontario, have greatly limited the use of non-competition covenants. Other jurisdictions, such as Quebec, have recognised the validity of non-competition covenants, provided the covenants meet the applicable criterion (Civil Code of Quebec [CCQ], Article 2089) and are not used where an employee has voluntarily resigned or employment has been terminated without serious reason (CCQ, Article 2095).

VI WAGES

i Working time

The employment standards legislation that exists in each Canadian jurisdiction sets forth rules governing working hours for employees. Certain jurisdictions provide for limits on the number of hours that can be worked per week or per day. In the federal jurisdiction and in Ontario, the weekly maximum for most employees is 48 hours of work per week and eight hours per day.²³ Saskatchewan establishes a maximum of 44 hours of work per week.²⁴ In Alberta, a daily maximum of 12 work hours is applicable.²⁵

Meal and break periods are usually required after a specified duration of work. Generally, these break periods are without pay, although employees may be required to be compensated if they are not allowed to leave their work station. This is the case in Quebec, for example.²⁶

ii Overtime

All Canadian jurisdictions have established thresholds for overtime pay eligibility. Although this legislation differs in detail from jurisdiction to jurisdiction, the standards that exist are generally similar.

Where permissible, employees may be required to work in excess of the statutory maximums but must be paid overtime, usually at one-and-a-half times their regular hourly rate.²⁷ Not all employees are eligible for overtime. Managerial employees are almost always excluded,²⁸ and certain jurisdictions exclude professional employees from overtime eligibility.²⁹ In Quebec, employees may contractually agree to be exempt from overtime entitlement, provided they are paid an annual salary that is more than the minimum wage, do not record their hours of work and do not have an established hourly wage. In such a case, an appropriately detailed employment agreement is required to substantiate the employee's exclusion from overtime pay.

Certain Canadian jurisdictions allow for averaging agreements to be implemented, to avoid the triggering of overtime and hours of work thresholds under employment standards legislation.³⁰ All jurisdictions have provisions in their employment standards or day-of-rest statutes requiring that employees be allowed at least one day off per week.³¹ In practice, a 40-hour, Monday-to-Friday working week is virtually universal in offices.

23 Section 17 of the Ontario Employment Standards Act 2000, SO 2000, c. 41, and Section 169 of the Canada Labour Code [CLC].

24 Section 2-12 of the Saskatchewan Employment Act, SS 2013, Section S-15.1.

25 Section 16 of the Alberta Employment Standards Code, RSA c. E-9.

26 Section 79 of the Act respecting Labour Standards (Quebec).

27 See, for example, Section 55 of the Act respecting Labour Standards (Quebec).

28 See, for example, CLC, Section 167.

29 See, for example, Section 2 of the Nova Scotia General Labour Standards Code Regulations, RSNS 1989, c. 246.

30 See, for example, Section 53 of the Act respecting Labour Standards (Quebec).

31 See, for example, Section 18 of the Ontario Employment Standards Act 2000.

VII FOREIGN WORKERS

As a general rule, all persons who are not Canadian citizens or permanent residents require a work permit to work in Canada. The duration of work permits assigned to foreign workers will vary. A work permit is normally granted only if there is no qualified Canadian available to fill the position in question. This is usually done by way of a Labour Market Impact Assessment, which must demonstrate that the hiring of a foreign worker will not have a negative impact on the Canadian labour market.

However, there are several situations in which a work permit is unnecessary, or is much easier to obtain. For example, business visitors may enter Canada without the need for a work permit. In addition, certain international trade agreements³² to which Canada is a party facilitate the temporary entry of certain categories of workers who are nationals of one of the other Member States. Intra-company transferees who serve in senior executive, managerial or specialised positions, who are employed by a branch, subsidiary or parent of a company located outside Canada, may also be considered for temporary employment in Canada for a related Canadian company.

Generally, foreign workers who are able to lawfully work in Canada will be protected by applicable labour and employment laws.

VIII GLOBAL POLICIES

Comprehensive policies governing employment and labour relations are generally adopted by Canadian employers, particularly those with a large workforce. Employment policies are usually distributed in paper or electronic format, or are posted online or on company intranets. These policies are generally unilaterally imposed by employers, and Canadian employment laws usually do not require employee consultation or approval, except for unionised workplaces that are governed by collective agreements.

Internal discipline rules that are adopted in employment policies generally follow the progressive discipline approach, that is, to mandate a series of disciplinary measures leading to an eventual termination of employment (e.g., verbal or written warnings, suspensions or other forms of corrective action). Employment policies frequently include prohibitions against harassment, discrimination and workplace violence, and, in certain cases, respond to legislative requirements to have written policies and procedures relating to these types of workplace issues. Canadian employers are not usually required to file employment policies with government authorities.

IX PARENTAL LEAVE

Employees across all Canadian jurisdictions have entitlements that apply for maternity and parental leaves, which typically provide for time off work for birth parents and adoptive parents of a newborn child. The duration of these leaves differ between the jurisdictions. For example, in Ontario, pregnant employees may take up to 17 weeks of maternity (pregnancy) leave, followed by up to 61 weeks of parental leave. Employees in Ontario who have given birth but who have not taken maternity leave may receive up to 63 weeks of parental leave.

32 For example, the North American Free Trade Agreement or the Canada European Union Comprehensive Economic and Trade Agreement.

In Quebec, 18 weeks of maternity leave is offered, with an additional 52 weeks of parental leave. Employees may be eligible for extended maternity or parental leave, in circumstances in which the medical condition of the child or the birth parent is compromised. Paternity leave for a period of five consecutive weeks is offered to the birth parent of a newborn child in Quebec.

Maternity, parental and paternity leaves are generally unpaid. However, employees in Quebec may qualify for government-provided benefits from the Quebec Parental Insurance Plan. Employees in other Canadian jurisdictions may qualify for benefits provided by the federal government.

X TRANSLATION

Canada has two official languages, English and French. Quebec, which is predominantly French-speaking, recognises French as the official language of the state. The Province of Quebec's Charter of the French Language³³ contains provisions that require Quebec-based employers to make written communications to their staff, and to provide offers of employment or promotion, in French.³⁴ Collective agreements for unionised employees in Quebec must be drafted in French.³⁵ However, employment agreements and collective agreements may be translated into a language other than French, provided that the parties to these agreements both agree. This is important as employers in Quebec are generally prohibited from imposing English-language employment agreements without the employee's consent.

The Charter also requires employers in Quebec to implement the use of French in the workplace (francisation). Depending on the size of the workforce, Quebec-based employers may be subject to francisation requirements, which are aimed at promoting the widespread use of French in the workplace. Francisation requirements under the Charter generally commence once the employer has reached the 50-employee threshold.³⁶ The Charter also affords protection to workers, notably by prohibiting employers from demanding language skills other than French for employment, unless the duties of the position require knowledge of a second language.³⁷

XI EMPLOYEE REPRESENTATION

All Canadian jurisdictions recognise by statute the right of trade unions to organise and represent employees, and to engage in collective bargaining. Collective bargaining consists of negotiations between an employer and a group of employees regarding the terms and conditions of employment. The result of collective bargaining is a collective agreement.

Provincial and federal labour legislation includes provisions that grant exclusive bargaining rights to certified trade unions that postpone the right to strike or lockout until after the expiry of a collective agreement, prohibit unfair labour practices, recognise and

33 RSQ, c. C-11.

34 *id.*, at Section 41.

35 *id.*, at Sections 43, 44 and 50.

36 *id.*, at Section 135 et seq.

37 *id.*, at Sections 45 and 46.

enforce collective agreements, and provide for the resolution of disputes through arbitration.³⁸ While the precise nature of these provisions varies from jurisdiction to jurisdiction, these features are common to all Canadian jurisdictions.

Employees have the right to belong to a trade union of their choice, free of any coercion or interference by the employer. Employers have a duty to recognise and bargain in good faith with the trade union chosen by their employees.³⁹ Labour relations tribunals supervise the organisation of employees and, to some extent, the collective bargaining process.

Employers and employees have different rights and obligations under a collective agreement than under individual contracts of employment, where there is no trade union. The right to notice under the common law (or the CCQ) prior to termination does not exist for unionised employees. However, statutory requirements under employment standards legislation are usually required.

Union certification procedures vary widely across Canadian jurisdictions. Certain jurisdictions certify trade unions on the basis of signed membership cards, while others require secret ballot votes prior to certification.⁴⁰ In the event a secret ballot vote is required, Canadian jurisdictions have varied thresholds for unionisation to occur. Certification votes are generally supervised by a labour relations board, and usually take place within a relatively short period (varying from several days to more than a week). Remedial certification (e.g., in the event of an unfair labour practice) is possible in some, but not all, jurisdictions.⁴¹

XII DATA PROTECTION

i Requirements for registration

Canadian law provides for privacy legislation in both the private sector and the public sector. Depending on the jurisdiction in which they operate, private sector employers in Canada are subject to either federal or provincial legislation governing the collection, use and disclosure of personal information.

The federal Personal Information Protection and Electronic Documents Act⁴² (PIPEDA) applies to federally regulated employers, as well as provincially regulated employers that operate in provinces and have not adopted substantially similar privacy legislation. To date, Quebec, Alberta and British Columbia have enacted personal information legislation, which has been recognised as substantially similar to PIPEDA.⁴³ In 2013, Manitoba passed private sector privacy legislation that is not yet in force.⁴⁴ It has not yet been determined whether this legislation is substantially similar to PIPEDA.

38 See, for example, the Quebec Labour Code, c. C-27, or the Labour Relations Act (of Manitoba), CCSM c. L10.

39 See, for example, Section 17 of the Ontario Labour Relations Act 1995, SO 1995, c. 1, Sched. A.

40 British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario and Saskatchewan all require secret ballot votes before a trade union can be certified. Alberta, Quebec, New Brunswick, Prince Edward Island and the federal jurisdiction all permit union certification on the basis of signed membership cards.

41 See, for example, Section 11 of the Ontario Labour Relations Act 1995, SO 1995, c. 1, Sched. A.

42 SC 2000, c. 5.

43 The Personal Information Protection Act (British Columbia), SBC 2003, c. 63, the Personal Information Protection Act (Alberta), SA 2003, c. P-6.5, and the Act respecting the Protection of Personal Information in the Private Sector (Quebec), RSQ c. P-39.1.

44 The Manitoba Personal Information Protection and Identity Theft Prevention Act, CCSM c. P33.7.

In addition to PIPEDA and provincial legislation dealing specifically with the collection, use and disclosure of personal information in the private sector, employers may have additional statutory privacy obligations. For example, several provinces have enacted legislation, such as the British Columbia Privacy Act,⁴⁵ which makes it an actionable wrong for one person, wilfully and without claim of right, to violate another's privacy. In Quebec, the CCQ and the Quebec Charter of Human Rights and Freedoms⁴⁶ provide for additional privacy obligations.

ii Cross-border data transfers

Canadian privacy legislation addresses the notion of cross-border data transfers. In this regard, the transfer of personal information outside Canada must be disclosed in an employer's privacy policy, to meet the openness and safeguarding principles that apply to PIPEDA and similar privacy legislation. Further, employees whose personal information is collected must be informed of the transfer to any foreign entities and must be provided with appropriate contact information for obtaining details on the privacy obligations of those entities. While this has been held to exist as an implicit requirement in privacy legislation across Canada, it is made explicit in Alberta's Personal Information Protection Act, which also differs from other Canadian privacy law in that it imposes specific breach notification obligations on organisations.

iii Sensitive data

Under all Canadian privacy legislation, personal information is broadly defined as 'information about an identifiable individual', with certain exclusions. Sensitive data that would generally fall under the ambit of 'personal information' in Canadian privacy legislation would include, in particular, financial information, medical information, educational history, union membership or information relating to an employee's family background.

iv Background checks

The validity of background checks varies greatly across Canadian jurisdictions. Generally, employers may perform a background check on prospective employees; however, certain jurisdictions limit criminal or credit checks. Human rights legislation and privacy legislation across the jurisdictions will limit the use of criminal or credit background check results, even if these types of background checks are permitted. Employee consent to background checks is almost always preferred, if not required in most Canadian jurisdictions.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

In the absence of an express agreement regarding the consequences of termination, the law holds that employees who are dismissed without cause (without 'serious reason' in Quebec) are entitled to reasonable notice of termination of employment, and may recover damages if no such notice is given. In providing reasonable notice, an employer may require the employee to continue to work through the notice period (working notice) or may provide pay in lieu of

45 RSBC, 1996, c. 373.

46 RSQ, c. C-12.

working notice. All employment standards statutes contain minimum periods for notices of termination and, if applicable, severance pay. Employers will generally be required to provide employees with both statutory notice of termination and notice of termination under the common law or the CCQ. The duration of common law or CCQ notice that is reasonable is determined by the circumstances of each case (reasonable notice). The courts will usually take into account the employee's age, position, length of service, overall compensation and the availability of similar employment, among other factors.

Written employment contracts may also contain an express provision that specifies the amount of notice that will apply to a termination without cause. However, these provisions may not always be enforceable before the courts, depending on the jurisdiction, drafting and content of the clause.⁴⁷ In particular, such a provision will not be enforceable where the notice period is less than that to which the employee would have been entitled under the applicable employment standards legislation, where the clause otherwise fails to provide an employee with minimum statutory entitlements, or where it is too vague or ambiguous. If a termination provision in an employment contract is unenforceable, the reasonable notice entitlement under the common law or the CCQ will apply and the employee will be entitled to reasonable notice based on the factors described above.

Only where just cause for termination exists can an employee be summarily dismissed without notice. The Supreme Court has recently confirmed that federally regulated employers are not permitted to terminate employment of non-managerial employees under the CLC, unless there is just cause, with certain exceptions.⁴⁸

What constitutes just cause varies greatly, although theft, gross misconduct and insubordination would generally qualify. It is advisable for an employment contract to provide a non-exhaustive list of examples of what would constitute just cause. In addition, Canadian law recognises the notion of constructive dismissal, in such cases where an employer has made one or more substantial changes to the essential terms of an employee's employment. Examples of constructive dismissal may include, in particular, significant changes to an employee's compensation, a significant reduction in the employee's duties or responsibilities, a demotion to a more junior position or a significant change to the employee's hours of work. In such a case, an employee may assert a claim of constructive dismissal and allege that the changes are tantamount to an outright dismissal by the employer.

A dismissed employee who is not unionised may bring an action before the civil courts alleging an unjust dismissal. In the federal jurisdiction, Quebec and Nova Scotia, employment standards legislation allows certain employees with a specified length of service to have their dismissals adjudicated by an arbitrator. In those cases, reinstatement is generally an available remedy.⁴⁹

A unionised employee can generally request that the union bring a grievance contesting the dismissal under the collective agreement. This grievance will be heard by an arbitrator or a

47 See, for example: *Wood v. Fred Deeley*, 2017 ONCA 158; *Roden v. Toronto Humane Society*, O.J. No. 3995 (Ontario Court of Appeal). In Quebec, Article 2092 of the CCQ states: 'The employee may not renounce his right to obtain an indemnity for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive.'

48 *Wilson v. Atomic Energy of Canada Inc.*, 2016 SCC 29.

49 Section 124 of the Act respecting Labour Standards (Quebec), Section 240, CLC and Section 71 of the Nova Scotia Labour Standards Code, RSNS, 1989, c. 246.

board of arbitration. If the dismissal is found not to be made for just cause, then the employee will be reinstated, normally with full back pay. Should the arbitrator find that a period of suspension was warranted, the amount of back pay will be adjusted accordingly.

Upon termination of employment, whether for cause or without cause, employers are required to report the employee's interruption in earnings to the federal government. If eligible, employees may receive employment insurance benefits following a termination of employment. Generally, dismissals for just cause will disentitle an employee for such benefits.

It is common across Canadian jurisdictions for employers to enter into settlement agreements with employees following a termination of employment, particularly in the case of a without-cause termination. In such a case, the terms of the settlement agreements are usually kept confidential between the parties, except where disclosure is permitted by law or for some other specific reason agreed to by the parties.

ii Redundancies

Terminations made for economic reasons (i.e., redundancies) are permissible across Canadian jurisdictions. In these circumstances, the termination of employment is considered to have been made on a without-cause basis and the employee will be entitled to the notice requirements specified in Section XIII.i. When a mass termination has been triggered, the employer may be required to provide longer periods of statutory notice, and there may be an obligation to report the mass termination to a government entity. The criteria applicable to a mass termination will vary depending on the jurisdiction.

Temporary lay-offs (without severing the employment relationship) are used by many Canadian employers, particularly where the employer's activities are seasonal in nature or there is a lack of work. Statutory notice requirements that apply to temporary lay-offs will vary from jurisdiction to jurisdiction.

XIV TRANSFER OF BUSINESS

Canadian jurisdictions have all adopted successor-rights provisions that make a union certification and a collective agreement binding on the purchaser. The tendency among Canadian labour relations boards has been to require the transfer or sale of all or part of a going concern, as opposed to a sale or transfer of assets. Labour boards have emphasised that what constitutes a going concern will vary from industry to industry and that each case will be determined by its specific facts.

Successor rights concepts applied in the labour relations context have only limited relevance for individual employment. Where a business is sold or otherwise disposed of, employment standards legislation typically deems employment to be uninterrupted for the purposes of applying minimum employment standards that depend on length of service. This employment standards legislation has been broadly interpreted, so that rights acquired by employees cannot readily be circumvented by the new employer.

XV OUTLOOK

Canadian employers will be monitoring various legislative changes that are expected to move into force during 2020. These include, for example, amendments to the CLC that apply to workplace harassment and violence rules, modifications to existing procedures for unjust dismissal complaints, restrictions that apply to temporary employment agencies and changes to the mass (group) termination provisions under the CLC. In addition, Canadian employers will be reviewing the federal government's introduction of pay transparency rules that will require federally regulated employers in the private sector to list salary rates for designated employees. Finally, it is expected that the federal Pay Equity Act (which was passed in December 2018) will be proclaimed in force at some point in 2020. Under that Act, federally regulated employers with more than 10 employees will be subject to pay equity requirements, which will include, in particular, putting a pay equity plan in place.

CHILE

Ignacio García, Fernando Villalobos and Soledad Cuevas¹

I INTRODUCTION

i Legal framework

The rights and duties of employers and employees in Chile arise from different statutory sources, including the National Constitution, the Labour Code, statutes and decrees, and judicial and administrative decisions. The role of the Labour Directorate in issuing opinions on the interpretation of statutes is relevant and opinions may change from time to time.

Employment agreements

Individual and collective bargaining agreements (CBAs), as well as mandatory employers' internal regulations, may create rights for employees in addition to those provided by law. In such cases, employers must comply with the greater level of benefits as provided for by applicable agreements.

National Constitution

The Constitution of Chile establishes several rights relating to employment and social security, including the following:

- a* the right of all people to work in the profession of their choice. It prohibits employment discrimination based on characteristics other than personal ability.² However, it does allow for conditions to be set regarding legally established qualifications for employment in certain professions, including the requirement of a university degree;³
- b* employees – not unions – shall decide whether to engage in collective bargaining;
- c* a law or public authority may not require that individuals be affiliated to or not affiliated to a particular organisation or entity as a condition of carrying out any task or performing any employment;⁴ and
- d* certain rules regarding unions, collective bargaining, strikes and social security.

Laws

Most of the laws currently governing employment relationships in Chile originated as legislated statutes or executive decrees issued under legislative authority.

1 Ignacio García is a partner, Fernando Villalobos is a senior associate and Soledad Cuevas is an attorney at Porzio Ríos García.

2 Constitución Política de la República (Constitution of Chile), Article 19, Section 16, Paragraph 2.

3 id.

4 id., at Article 19, Section 16, Paragraph 3.

Relevant laws are: Law No. 17,322 on social security payments; Law No. 16,744 on occupational accidents and diseases, and its Executive Regulation; Decree Law 3,500 on the pension system and its Executive Regulation; Law No. 20,609 on prohibiting discrimination; Law No. 19,799 on HIV treatment; Executive Law Regulation No. 2 of 1967 on organisation of the Labour Directorate; Law No. 19,728 on unemployment insurance; and Supreme Decree No. 594 on basic health and environmental conditions in the workplace.

Further, International Labour Organization Conventions apply, such as those on unions and collective bargaining (Nos. 87 and 98) and the elimination of employment discrimination (Nos. 100 and 111). There are also several international conventions for the avoidance of double social security requirements (27 bilateral and 1 multilateral).

Legislation on union activity, which came into effect on 1 April 2017, boosted the legal and economic weapons available to unions during a collective bargaining. This legislation introduced essential new rules, which state that strikers may not be replaced (neither by external nor internal personnel), collective agreement coverage may not be extended to non-union employees unless agreed by the union, and relevant payroll information must be disclosed to unions in anticipation of a collective bargaining process.

Judicial and administrative decisions

Because Chilean labour statutes are sometimes light on details, court and administrative decisions play an important part in determining rights and obligations in employment relationships, but the jurisprudence itself is sometimes contradictory.

ii Labour courts and enforcement agencies

The main administrative enforcement agency is the Labour Directorate, which is primarily responsible for ensuring that employers comply with the labour laws. To this end, the Labour Directorate conducts compliance inspections on its own initiative or following receipt of a complaint by workers or their representatives.

The Labour Directorate has the authority to apply fines against violators. It is also authorised to interpret the labour laws and has developed a large body of administrative jurisprudence on this subject.

Other relevant enforcement agencies are the Regional Health Authority, Workmen's Compensation Agency, Social Security Superintendency, Pension Superintendency and Vocational Training Service.

Chile has specialised labour courts; the judicial structure is as follows:

- a* court of labour of first instance; typically a first instance dispute takes between three and six months;
- b* court of appeal, with faculties to review court of labour decisions in specific limited cases;
- c* Supreme Court, only with the faculty to unify case law if *certiorari* is granted; and
- d* labour collection courts, the aim of which is to enforce court decisions and other documents, the fulfilment of which is binding.

The main factor determining court jurisdiction is the defendant's domicile or the place where the employee rendered services, at the employee's volition.

In general, the burden of proof is with the plaintiff. For wrongful dismissal claims, the employer has the burden of proof on the veracity of the facts stated in the letter of notification regarding the termination of employment.

II YEAR IN REVIEW

The main development during the past year was the proposal to reform the maximum working hour regulation. This reform reduces the maximum working hours from 45 to 40 per week. The bill has not yet been approved but has been passed to the Senate for review and could be approved and released soon.

Another development is Law No.21,165,⁵ the main purpose of which is to lower the rate of unemployment among Chilean youth. This Law is aimed at young people aged between 18 and 24 who are studying at an officially recognised university, or professional or technical higher education institution, who wish to work throughout their studies.

The purpose of this law is to amend the Labour Code to encourage the hiring of students and to increase their formal employment, introducing mechanisms such as flexible working hours and payment of a family allowance, among other benefits.

III SIGNIFICANT CASES

In a ruling in 2015,⁶ the 24th Civil Court of Santiago declared that a defendant union lacked 'union spirit' and had given rise to an illicit purpose and cause in its constitution. The Court therefore ordered that, once its ruling has been agreed and enforced, the Labour Directorate should be notified to cancel the registration of these types of unions.

The 24th Civil Court of Santiago decided that the defendant unions, although they were created in compliance with the applicable legal formalities, had not carried out any union activity aimed at promoting and defending the professional and labour interests of their members, and that therefore it could be presumed that the unions were created without any real desire to form a union and with the sole intention of granting labour immunity to their leaders.

Although this ruling has a pending resolution by the Supreme Court, it is relevant because it is the first time that a civil court has declared the nullity of a union because of illicit purpose and cause for not being created for the purposes that the law provides.

Another significant case concerns privacy violation. An employee who was on medical leave sent offensive and violent messages through a WhatsApp group about another employee who was not a member of that group. These messages went viral and when the affected employee became aware of the offensive messages, he informed the company for which they both worked. The company fired the employee who sent the messages, citing workplace harassment and serious breach of the employee's obligations as set forth in the employment agreement.

However, the labour court⁷ convicted the company for violation of fundamental rights during the dismissal. This decision was based on the fact that, despite the author of the offensive messages not expressly authorising the viral spread of those messages, workplace harassment involves a repetition of events and the informed behaviour had been just one act. Further, since the conduct had occurred during a period of medical leave, it was difficult to prove there had been a breach of the employment agreement.

5 <https://www.leychile.cl/Navegar?idNorma=1134237>.

6 Case No. C-27.177-2015, 24th Civil Court of Santiago.

7 Case No. S-30-2018, Antofagasta Labour Court.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employment agreements are required by law for all dependent workers (employees) and must be executed in writing no later than 15 calendar days after the starting date, or five calendar days for employment contracts for less than 30 days. If a company fails to put the employment contract in writing, the terms and conditions of the employment shall be presumed to be those claimed by the employee and a fine may be imposed on the company by the Labour Directorate. So, putting an employment agreement in writing actually protects the employer from this assumption.

The minimum terms and conditions that must be included in an employment contract are the following:

- a* date and place of execution;
- b* nationality and date of birth of the employee;
- c* starting date;
- d* description of the services to be performed by the employee and location or city where the services are to be performed;
- e* remuneration and time of payment;
- f* number of working hours and work schedule (unless the company has a shift system in place, in which case the company's internal regulations apply);
- g* duration (i.e., fixed term, subject to completion of a task, project-based or indefinite); and
- h* any other terms and conditions agreed by the company and employee (e.g., non-compete or confidentiality obligation, or other similar covenants).

Fixed-term contracts are permissible. The duration of a fixed-term contract must not exceed one year, and may be renewed once, but the total duration, including the renewal, must not exceed one year. In the case of managers and employees with a professional or technical qualification from a higher education institution, a fixed-term contract may have a duration of up to two years.

Certain specific conditions may be modified unilaterally by the company under certain circumstances. The company may change the nature of the work to be performed, or the workplace, as long as the new tasks are similar to the old ones, the new workplace is in the same area or city, and the change is not to the detriment of the employee.

If extraordinary circumstances arise that affect a company's operations, the company may unilaterally amend the employees' work schedule, changing the starting or ending time of the working day by up to 60 minutes. In these cases, the company must give notice to the employees concerned at least 30 days in advance. Any employee affected by this type of modification may file a complaint with the Labour Directorate, but must do so within 30 days of the modification or receipt of notice from the company.

ii Probationary periods

Probationary periods are generally not allowed under Chilean law (except for workers providing domestic help). In general, probation is conducted by means of short, fixed-term contracts. It is customary to agree on an initial duration of two to three months after hiring, after which the company may terminate the employment relationship or convert it to an indefinite term.

Termination of employment before the agreed date may expose the company to full payment of the salaries that would have been accrued by the employee until the agreed end date.

iii Establishing a presence

A foreign company may hire employees and engage independent contractors who are not officially registered to carry out business activities in Chile. In this type of case, the employees will be liable for withholding and paying their own taxes and social security contributions.

An independent contractor may create a permanent establishment (PE) of the company in Chile, for which the requirements will depend on the country in which the domicile of the company is located and whether that country has a double tax treaty in force with Chile. In general, contractors who act in Chile with the power to negotiate commercial terms and conditions and close contracts may trigger the risk of a taxable PE.

The consequences of setting up PE are that all income generated and allocated to the PE will be subject to taxation and penalties in Chile.

V RESTRICTIVE COVENANTS

Restrictive covenants to be enforced during an employment relationship, such as non-compete and confidentiality, are allowed as long as they are agreed between the parties.

No specific legislation governs post-contractual restrictive covenants. However, Chilean courts and practice have recognised that post-contractual non-compete clauses are not prohibited under Chilean law and may in fact be valid under limited circumstances. These clauses are customary for people in strategic positions who handle confidential or sensitive information about the company.

The following requirements must be met:

- a* employees' explicit consent;
- b* a legitimate supporting reason to protect the business interests of the former employer (e.g., avoiding facilitation to direct competitors);
- c* a limited scope and time of effectiveness; and,
- d* consideration (i.e., employees have to be compensated in return for such covenants).

VI WAGES

i Working time

Working time should not exceed 10 hours a day and 45 hours per week. The 45 hours may be distributed across no more than six days and no fewer than five days a week. Employees subject to these limitations shall sign an attendance record or register in a punch card system. There are no limits for night work, only for child labour.

Some positions are exempted from these limits to working hours: (1) managers, administrators and representatives with administrative powers and those who work without direct supervision; (2) employees hired to render services from their homes or another place freely determined by them; (3) employees not carrying out services within the company's facilities; (4) employees who render services on board fishing boats; and (5) employees hired to render services outside the company's premises, using telecommunications means.

The Chilean Labour Code provides for daily rest periods, a midday meal (a least half an hour), a weekly rest day on Sunday and national holidays. Employees delivering services as

part of continuous operations owing to technical requirements, and working in public shops or within the entertainment business and therefore required to work on Sundays and national holidays, shall be provided with rest days on different days.

ii Overtime

Overtime must be paid at a rate of 1.5 times the employee's regular hourly remuneration, on top of the regular salary.

Overtime is permitted for special or exceptional working schedules and only when it is essential to guarantee operational continuity. The maximum overtime permissible in Chile is two hours per day, or 10 hours per week. This affects employees who are subject to a working hours limit. If employees distribute their working week across five days, the sixth day may be used for overtime purposes, capped at 7.3 overtime hours. In any event, no more than 12 hours of overtime per week is permitted. Chilean labour law does not allow any agreement in respect of fixed overtime hours. Overtime must be agreed only in exceptional circumstances, through a special agreement that must state the reasons why overtime is necessary, and the period during which overtime may be worked shall not exceed 90 days.

All employees who are subject to specified working hours must register their start and end times. According to the law, the company must provide an attendance register, a punch card system or another system that allows employees to register their entry and exit times. Employees who do not have a specific working hours limit (worktime control) may not receive compensation for overtime.

VII FOREIGN WORKERS

Employers are not required to keep a register of foreign workers. However, if a company has more than 25 employees, at least 85 per cent of the workforce must be Chilean nationals. Foreign technicians and foreign employees with a Chilean spouse or children do not count as foreign employees for this purpose. There is no restriction on the number of foreign employees that may be hired by companies hiring up to 25 employees.

All foreign employees must hold a visa or work permit, which may be granted subject to different criteria.

Foreign employees are subject to Chilean social security regulations unless they qualify for exemption. In other words, social security bilateral treaties allow for foreign professionals and technicians to be exempted from social security contributions in Chile and remain under their home country's social security system, provided that the home country social security covers events of disease, disability, retirement and death.

VIII GLOBAL POLICIES

Companies with 10 or more employees must have in place an internal order, and hygiene and safety regulation. This is a mandatory document that is applicable to all employees. All the rules with the internal order, hygiene and safety regulation are considered part of employment contracts.

There is no need to obtain individual consent from employees in respect of the internal order or hygiene and safety regulation, or approval from government authorities or a representative thereof. It only needs to follow a notification process that involves publication of the draft in a visible place at the company for 30 days, to enable employees to be aware of

it, and registration with the Ministry of Health and the Ministry of Labour. A copy of the internal order and the hygiene and safety regulation must be provided to all employees of the company.

As a minimum, the document must include the following:

- a* the times of the start and end of the working day and of each shift;
- b* the times of breaks during the working day;
- c* the different types of remuneration granted by the company;
- d* the place, day and time of payment of remuneration;
- e* the obligations and prohibitions to which the workers are subject;
- f* the designation of the executive or dependent positions of the establishment before whom the workers must raise their requests, claims, queries and suggestions. Companies with 200 or more employees must keep a register of all the different positions within the company, describing their essential technical requirements;
- g* any special rules applicable to different kinds of tasks, according to the age and gender of the workers, and to the necessary adjustments and support services that enable workers with a disability to carry out their work adequately;
- h* verification of compliance with social security regulations, compulsory military service, national identification and, in the case of minors, of having completed the obligatory level of schooling;
- i* the rules and instructions relating to hygiene and safety prevention that should be observed within the company;
- j* the sanctions that may be applied for any infringement of the obligations set forth in the internal regulations, which may consist only of a verbal or written reprimand and a fine of up to 25 per cent of the daily remuneration;
- k* the procedure that must be followed in respect of the application of the sanctions referred to in point (j);
- l* the procedure, protective measures and sanctions that will be applicable in cases of complaints of sexual harassment; and
- m* the procedure governing the protection of equal remuneration for men and women who carry out the same work.

IX PARENTAL LEAVE

i Maternity leave

The general rule provides for fully paid maternity leave for six weeks before childbirth (pre-natal), 12 weeks after childbirth (post-natal) and 12 additional weeks (post-natal parental) after post-natal leave. The employee can extend the post-natal parental leave to a total of 18 weeks (partial rest). During maternity leave, the working mother is entitled to a subsidy equivalent to her monthly remuneration, which will be paid by the health insurance institution (Isapre/Fonasa); in other words, the employer is not obliged to pay the remuneration during this time.

Working mothers are entitled to the following mandatory leave:

- a* pre-natal maternity leave: from the 34th week of pregnancy (i.e., six weeks prior to the expected date of delivery); and
- b* post-natal maternity leave: 12 weeks after childbirth.

In addition to the above-mentioned mandatory leave, working mothers may choose between different types of additional parental leave:

- a* Total leave: 12 weeks following the end of post-natal maternity leave (point (b) above). If the employee gives no notification to her employer, it will be assumed that this option has been selected.
- b* Part-time leave: A working mother may choose to return to work part-time. In this case, the additional parental leave is 18 weeks following the end of post-natal maternity leave. To avail of this option, the employee must inform her employer at least 30 days in advance (by the end of her post-natal maternity leave) by means of a certified letter, and send a copy to the Labour Directorate.
- c* Transfer of leave to the father: A working mother may decide to transfer part of her additional parental leave to the father, subject to a maximum of six weeks full-time. If a working mother chooses the 18-week part-time additional parental leave, she may transfer a maximum of 12 weeks to the father.

The mother of a child less than two years old – or a father who is in charge of a child's tuition – is entitled to one hour of nursery paid leave per day. This right may be exercised in one of three ways: delaying the beginning of the working day; anticipating the end of the working day; or during the working day. A parent who is on nursery paid leave must not be subjected to discriminatory treatment.

Companies with 20 or more female employees must grant them a daycare benefit. Employees shall be entitled to use the daycare until a child reaches the age of two. This benefit may be transferred to the father, or to a child's appointed custodian if the mother dies.

From the beginning of her pregnancy and until one year after the end of post-natal maternity leave, the company may only terminate a mother's employment contract with a prior authorisation from a labour court. This authorisation may only be requested if the employer wishes to terminate the contract within the period for which the employee was hired, or for any of the termination grounds set forth in Article 160 of the Chilean Labour Code (termination for cause).

ii Paternity leave

Fathers are entitled to five days of paid leave, which should be taken within the first month following the birth. The five days may be taken in whatever way the employee deems appropriate, either continuously or as separate days.

X TRANSLATION

It is not a legal requirement that employment documents should be drafted in Spanish, but it is highly recommended because employment authorities usually require a translation for inspection purposes. Employers must be in a position to prove that an employee was able to understand a language other than Spanish if the employment documents are drafted in that other language.

XI EMPLOYEE REPRESENTATION

All employees, regardless of their job, remuneration, seniority, or any other circumstance, may form or join a union. No prior authorisation from a public authority is required to form a union. The required number of employees must be in line with specific formalities contemplated in the law, and varies, depending on the total number of workers employed by the company.

Unions normally represent employees from a single company. Trade unions are not common in Chile and do not have the same rights as company unions (for instance, they may not force the company to enter into a collective bargaining process, whereas company unions can). Unions are entitled to represent employees in their claims and proposals to the employer, and represent employees in a collective bargaining process. If the company and the union do not agree on the terms of the collective agreement in a formal bargaining process, the union is entitled to engage in a strike.

Certain employees may be excluded from collective bargaining, under Article 305 of the Chilean Labour Code, namely managers, sub managers, executives, agents and employees having general managerial faculties.

Some employees engaged in union activities are protected with what the legal doctrine calls *fuero*. It protects some union members from without-cause termination of employment in certain circumstances.

Another type of representative body is a safety and hygiene committee. Companies with 25 or more employees must have a safety and hygiene committee, formed by three representatives of the employees and three representatives of the company, which shall adopt prevention measures to be proposed to the employer.

XII DATA PROTECTION

i Requirements for registration

Privacy has constitutional protection in Chile – Article 19, No.4 assures every person ‘the respect and protection of private life and honour of individuals and their families’. Moreover, even though courts have lately accepted data privacy under that section of the Constitution, a recent amendment to the Constitution⁸ included the right of protection of personal data as a constitutional right. The employer is obliged to maintain the confidentiality of all employees’ information and private data that has been accessed during the employment relationship.

Personal data⁹ relates to any information concerning an identified or identifiable individual: anyone can process personal data as long as the owner of the data gives his or her consent, unless it has been collected from public sources.

There is no data protection agency in Chile, and companies do not need to register with any other government body. Employees have a right to obtain copies of any personal information that is held by their employer.

⁸ See <https://www.leychile.cl/Navegar?idNorma=242302>.

⁹ Law No. 20.575 <<https://www.leychile.cl/Navegar?idNorma=1037366&buscar=20575>>.

ii Cross-border data transfers

It is not necessary to obtain a licence or permit to collect or transfer personal data. Law No. 20,575 provides that anyone can process personal data, if it is authorised by law, or the data subject consents, unless the information has been collected from public sources. Prior to giving consent, the individual must be informed of the reason for the data collection, and the eventual communication to the public or third parties, if that is the case.

No such authorisation or consent is necessary if the personal data is:

- a* economic, commercial, financial or banking information and has been originated or collected from public sources;
- b* contained in lists relating to a class of persons and is limited to indicating information such as the fact of belonging to a particular group, the person's profession or business activity, educational degrees, address or date of birth;
- c* necessary for direct response commercial communications or direct sale of goods and services; or
- d* processed by private legal entities for their exclusive use, or the exclusive use of their associates and affiliated entities, for statistical or rate-setting purposes or other purposes of general benefit to those private legal entities.

iii Sensitive data

There is a special category of personal data that refers to an individual's physical and moral characteristics, or facts or circumstances of private life or intimacy, such as personal habits, racial origin, ideologies and political opinions, religious beliefs or convictions, psychic or physical health, and sexual life. These are considered to be sensitive data and there are more stringent rules for their treatment. Sensitive data may not be processed except when authorised by the law, the subject data authorises it explicitly or it is necessary data for the determination or granting of health benefits for the subjects.

iv Background checks

Employers are entitled to carry out pre-employment checks, as long as they are justified as a legitimate occupational requirement for the position for which the applicant is being considered (e.g., criminal record checks are exceptionally allowed for positions that involve working with minors who have disabilities). Otherwise, the company's conduct may be found to be discriminatory or a violation of the right to a private life.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

An employment agreement may only be terminated for the causes listed in the law. The dismissal letter must be delivered to the employee personally or by certified letter to the employee's domicile indicated in the employment contract. A copy must also be sent to the Labour Directorate.

Pregnant employees, employees who are under medical leave, employees who are union directors and the president of the company's health and safety committee are protected from dismissal.

Termination causes may be classified as those that provide employees with a right to severance payment and those that do not.

Causes for termination not providing a right to severance pay

This category is divided into two subgroups:

- a* Where there is no fault on the part of the employee:
 - agreement of the parties;
 - resignation of the employee;
 - death of the employee;
 - expiry of the term of a fixed term employment agreement;
 - completion of the specific work or service for which the employee was hired; or
 - act of god or force majeure.
- b* Where the termination is a result of employee misconduct:
 - lack of probity in carrying out duties, sexual harassment, physical aggression, harassment, inflicting injuries, or serious immoral behaviour affecting the company;
 - carrying out activities in the same line of business as the company;
 - unjustified absence: (1) two consecutive days or for two Mondays in a month or for a total of three days in a month; or (2) if the employee in question is in charge of an activity or machine whose abandonment or stoppage implies a serious disruption to the carrying out of the company's work;
 - abandonment of work by the employee: (1) unjustified departure (without the company's permission) from the workplace during working hours; or (2) refusal to perform the services set out in the employment agreement;
 - conduct affecting the safety or functioning of the business or the safe performance of work by other employees or the health of other employees;
 - wilful act of damage against the facilities, machinery, tools, products or goods of the company; or
 - a serious breach of the employee's obligations in the employment agreement.

Causes for termination providing a right to severance payment

- a* Business necessities, namely those causes deriving from circumstances such as the company's modernisation or rationalisation, decreases in productivity, or changes in the economy or the market.
- b* Employer termination with no need for justification. This is only applicable to employees who are (1) entitled to represent the company (i.e., managers, assistant managers, agents or those having power of attorney), as long as, in all these cases, they have power of attorney, and (2) within the confidence of the company.
- c* Company bankruptcy.

Mandatory compensation upon termination of employment

Compensation in lieu of prior notice

This is applicable when the employment agreement is terminated for a cause that provides the right for an employee to receive a severance payment. The company must give notice of at least 30 calendar days to the employee, and send a copy thereof to the Labour Directorate. This advance notice may be waived if the company gives the employee a severance payment equivalent to one monthly remuneration capped at UF90.¹⁰

¹⁰ The unidad de fomento [UF] is a non-monetary index that increases according to the rate of inflation. As at December 2019, 1 UF equals 28,220 Chilean pesos (approximately US\$35).

Severance

This is applicable when the employment agreement is terminated for a cause that provides the right for an employee to receive a severance payment. If the employment agreement has been in force for more than one year, the employer must pay the severance agreed by the parties, or the statutory severance if no agreement exists. The latter is equivalent to 30 days of remuneration for each year of service and fraction thereof greater than six months. The agreement regarding the severance may not be less than the statutory severance.

There are two caps for this type of severance: (1) the length of service may not exceed 11 years; and (2) the monthly remuneration may not exceed UF90 per month.

Pending or proportional vacation days

Laid-off employees are entitled to the payment of any pending or proportional days of vacation regardless of the ground for termination of employment. This calculation of this payment takes account of the employee's full remuneration.

Employment release

This is a document that describes the payable compensation upon termination. It must be available for signature and payment by the employer within 10 business days of the termination date. Usually this document serves as a waiver and release to prevent any future claims.

The employee's signature on the employment release must be verified before a notary public.

ii Redundancies

There is no provision for redundancy under Chilean labour law.

XIV TRANSFER OF BUSINESS

Whenever there is a total or partial modification of ownership or possession of a company, or the sale of all or part of its assets, statutory regulations establish that employment and labour rights remain with the buyer, and all labour and social security rights transfer. Employees cannot be dismissed unless the business transfer causes a business need whereby the position held is eliminated or subject to relevant change.

XV OUTLOOK

Chile is currently undergoing a series of reforms that include a 'social agenda' that may affect employment relationships in several ways. The most important reform that is currently under discussion is a reduction in the number of working hours from 45 to 40, without any reduction in salary, and the economic consequences for Chilean society. Other reforms, such as a pension reform and an increase in the minimum wage, are also being discussed.

CHINA

*Gordon Feng and Tingting He*¹

This chapter sets forth national laws and regulations and does not address provincial or municipal regulations, which may differ significantly from their national counterparts.

I INTRODUCTION

Employment law in China affords employers and employees a certain degree of freedom in creating the terms of their working relationships. Nonetheless, the National People's Congress (NPC) has supreme authority to enact laws governing employment. The Ministry of Human Resources and Social Security (MOHRSS), a department within the State Council, is responsible for drafting national employment laws and for overseeing the enactment of local regulations by the labour administrative departments of regional governments. The local people's congress, government, and human resources and social security bureaus have responsibility for issuing local employment regulations and enforcing the national and local laws and regulations. The most significant statutes regulating employment in China are the Labour Law, promulgated on 5 July 1994 and revised on 27 August 2009, the Employment Contracts Law (ECL), promulgated on 29 June 2007 and revised on 28 December 2012, and the Social Insurance Law, promulgated on 28 October 2010 and revised on 29 December 2018.

The laws of China may be interpreted by the judiciary, which comprises three levels of courts: the Supreme People's Court, the provincial people's courts (further divided into three levels of authority) and special people's courts (intellectual property, internet, military and maritime courts). The judicial interpretation by the Supreme People's Court has almost the same effect as laws enacted by the NPC. Local people's courts also release 'internal' guidelines or meeting minutes from time to time regarding employment law issues. Although, in theory, the local interpretation has no legal binding force, it is still followed by local judges as a matter of fact. China does not have a case law system. As such, judgments released by the courts do not constitute binding precedents as they would in common law jurisdictions, but the courts and labour arbitration commissions may rely on them as persuasive authority in subsequent employment arbitration and litigation.

Most employment disputes must first be heard by the local labour arbitration commission. The decision of the labour arbitration commission may be final and binding on employers for disputes involving small amounts and for certain claims, such as social insurance benefits. However, most decisions of the labour arbitration commission can be appealed to the people's courts for litigation. In a litigation process, most employment cases

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may be heard at up to two instances, namely trial and appeal. In very rare circumstances, a case can be heard in a retrial proceeding by the provincial high people's court or even the Supreme People's Court.

China generally is viewed as a pro-employee jurisdiction. Employment laws and regulations are more restrictive on employers, and in general, are administered and enforced in favour of employees. Under Chinese law, employers are required to give employees written employment contracts. The use of temporary labour is restricted in certain ways. The concepts of 'termination at will' and 'unilateral termination without cause' do not exist in China. An employee's contract may only be terminated based on certain limited grounds explicitly set out in the ECL and, as a result, firing employees is a quite difficult process and costly.

II YEAR IN REVIEW

i Significant legislation and legislative developments

In February 2019, the MOHRSS, the Ministry of Education, the Supreme People's Court and other four ministerial departments jointly released a notice reiterating the probation on discrimination against women in recruitment and promoting the employment of women. It is the first time that the central government has made it clear that employers are not allowed to ask a female candidate about her marital and family status during the recruitment process.²

In April 2019, to reduce the financial burden of employers during challenging economic circumstances, the State Council decided to reduce employers' social insurance contributions. The pension insurance rate for the employer's share is reduced from between 18 per cent and 20 per cent to 16 per cent, and the occupational injury insurance contribution rate is reduced by 20 per cent or 50 per cent. In addition, local governments are required to lower the upper and lower limits of the base amounts of social insurance contributions.³

In May and July 2019, the Cyberspace Administration of China (CAC) published two regulations regarding data security. They were drafted to support the implementation of the China Cybersecurity Law. These two regulations request the network operators to meet different security requirements if they need to transfer important data and personal information out of China.⁴ The final versions of the drafts will probably be published in 2020.

In September 2019, the State Council issued the Guiding Opinions regarding enhancing governments' supervision of mid-matters and post-matters. The aim of the Guiding Opinions is to set up a whistle-blower system to award and protect those reporting material violations of law, and risks and defects. The whistle-blower system will create a new challenge for employers, not only in respect of compliance but also regarding responses to employees' related claims and demands.⁵

2 Details of the Notice on Further Regulating Recruitment and Promoting Women's Employment are available on the website of the Ministry of Human Resources and Social Security [MOHRSS] <www.mohrss.gov.cn/SYrlzyhshbzb/dongtaixinwen/buneyaowen/201902/t20190222_310728.html>.

3 Details of the Comprehensive plan for reducing social insurance contribution rates are available on the MOHRSS website <www.mohrss.gov.cn/gkml/zcfg/gfxwj/201904/t20190430_316631.html>.

4 The Measures for the Administration of Data Security were published on 28 May 2019 and the draft Measures for Security Assessment on the Export of Personal Information were published on 13 June 2019.

5 Details of the Guiding Opinions on Strengthening and Regulating Government's Supervision Management During and After an Event are available on the State Council website <www.gov.cn/zhengce/content/2019-09/12/content_5429462.htm>.

In November 2019, the MOHRSS released the Interim Measures for Hong Kong, Macao and Taiwan Residents to Participate in Social Insurance in Mainland China. From 1 January 2020, citizens of Hong Kong, Macao and Taiwan who are working in mainland China are required to participate in mainland China's social insurance system. Employers need to register these employees with the social insurance authorities, and both the employers and the employees must make social insurance contributions. If an employee has participated in local social insurance in Hong Kong, Macao or Taiwan, the employee can be exempted from participating in the mainland China social insurance system.⁶

ii Statistics

According to the latest report from the MOHRSS,⁷ at the end of 2018, the total number of workers in China is 755.86 million, of which 434.19 million work in urban areas. The registered unemployment rate in urban areas in 2018 was 4.9 per cent.

Labour arbitration commissions in China heard 1.826 million employment dispute cases in 2018, a decrease of 9.6 per cent as compared with 2017.

III SIGNIFICANT CASES

China does not have a case law system. Arbitration and court decisions are neither binding nor regularly reported. There has been increasing willingness on the part of the judiciary to publish decisions, but it is difficult to determine with accuracy what significant matters have been decided or what cases are truly significant. Notwithstanding the lack of their binding authority, court and arbitration decisions that are publicly released, particularly those of the Supreme People's Court, may have significant persuasive value in subsequent employment arbitration and litigation.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employers must provide every full-time employee with a written employment contract, which must be signed by both parties and should be in Chinese.⁸ The contract must contain the following:

- a* employer's name, address and legal representative;
- b* employee's name, address and resident identity card number;
- c* term of employment;
- d* job description and work location;
- e* working hours and leave entitlement;

6 The full text of Interim Measures for Hong Kong, Macau and Taiwan Residents to Participate in Social Insurance in Mainland China is available on the MOHRSS website <www.mohrss.gov.cn/gkml/zcfg/bmgz/201911/t20191130_344467.html>.

7 Statistics issued by MOHRSS <www.mohrss.gov.cn/SYrlzyshshzb/zwgk/szrs/tjgb/201906/W020190611539807339450.pdf>.

8 Employment Contracts Law [ECL], Article 10; Labour Law, Article 19; Letter from the Ministry of Labour and Social Security to Dalian Labour and Social Security Bureau, in response to the 'Application for Instructions on the Issue Regarding the Legal Validity of a Labour Contract Written in Both Chinese and Foreign Languages', effective 28 January 1994, Article 1.

- f* remuneration;
- g* social insurance benefits; and
- h* information about work safety, work conditions, and the prevention and protection from occupational hazards.⁹

The parties must execute an employment contract within one month of the date on which the employee starts work.¹⁰ For each month after the first month that the employee works for the employer without a written employment contract, the employee is entitled to twice the wages during this period (capped at 11 months' wages).¹¹ The employer and employee will be deemed to have entered an open-ended employment contract if they fail to execute a written employment contract within one year of the date on which the employee starts work.¹²

Changes to the terms of an employment contract are generally subject to employee consent, unless they are in favour of the employee (e.g., a salary increase).

Part-time employees are not required to have written employment contracts.

ii Probationary periods

Probationary periods are permissible, but they must be included as a term in employees' employment contracts. Furthermore, there are maximum lengths for probationary periods, which vary according to the length of the contract term:

- a* for a contract lasting between three months and one year, the probationary period may not exceed one month;
- b* for a contract lasting between one year and three years, the probationary period may not exceed two months; and
- c* for a contract lasting at least three years, or for an open-ended contract, the probationary period may not exceed six months.¹³

An employer may not impose a new or second probationary period on an employee, even in the event of a rehire or transfer of position.¹⁴

Termination of employment is comparatively easier for both an employer and employee during the probationary period than it is afterwards. An employee is required to give three days' notice of termination, unless there are grounds to terminate the employment relationship immediately. An employer may terminate the employment of an employee during the probationary period without prior notice if the employer can demonstrate that the employee fails to meet the requirements of the position.¹⁵

iii Establishing a presence

A foreign company must establish a legal presence in China before it can carry on business or hire local employees.

9 ECL, Article 17.

10 *id.*, at Article 10.

11 *id.*, at Article 82.

12 *id.*, at Article 14.

13 *id.*, at Article 19.

14 *id.*

15 *id.*, at Articles 37 and 39.

If a foreign company establishes a representative office in China, the representative office does not qualify as a legal person under Chinese law and therefore it may only employ Chinese nationals (excluding residents of Hong Kong, Macao and Taiwan) through a staffing agency (such as the Beijing Foreign Enterprise Human Resources Service Co or the China International Intellectual Corporation), which can hire Chinese nationals as a nominal employer and then second them to work for the representative office.¹⁶ Foreign nationals and residents of Hong Kong, Macao and Taiwan must be hired as representatives of a representative office. A representative office can have, at most, only four representatives, including the chief representative.¹⁷

On the other hand, a joint venture or a wholly foreign-owned enterprise constitutes a legal person and may employ workers directly by entering into employment contracts once it is established.

If a foreign company engages local Chinese individuals to perform services on its behalf, effectively as independent contractors, the foreign company may face myriad penalties, including:

- a* an employment-related penalty for hiring workers without having a legitimate legal presence and not providing the workers with an employment contract (which only a legally established entity may do, as noted above);
- b* foreign exchange penalties for paying workers in a currency other than Chinese currency;
- c* penalties for not contributing to the social insurance scheme for workers;
- d* penalties for not withholding individual income taxes for workers; and
- e* taxes and penalties for the permanent establishment created by locally hired workers.

While in practice it may be difficult for the Chinese government to assert jurisdiction over the foreign entity, a prohibited activity could affect the foreign entity's future ability to establish a legal presence in China.

An employer must make contributions for its employees (except foreign national employees who are from countries that have social insurance exemption treaties with China) to the mandatory social insurance and public housing fund schemes, which include the following:

- a* pension insurance;
- b* medical insurance;
- c* work-related injury insurance;
- d* unemployment insurance;
- e* maternity insurance; and
- f* the public housing fund.

The ratio and basis for contributions to these schemes vary in different locations. The social insurance and public housing fund schemes are funded through employer and employee

16 The Interim Regulations Regarding Administration of Foreign Enterprises' Permanent Offices in China, effective as of 30 October 1980, Article 11.

17 The Regulations on Administration of the Registration of Resident Representative Offices of Foreign Enterprises, effective as of 1 March 2011, Article 11.

contributions, and the local government generally adjusts the respective contribution rates and amounts once a year. An employer is responsible for deducting both its own and their employees' contributions and submitting them to the applicable local authorities.

Similarly, an employer, as a withholding agent for income taxes, is responsible for reporting and withholding the income taxes due each month on behalf of its employees.¹⁸

V RESTRICTIVE COVENANTS

Restrictive covenants prohibiting employees from engaging in the same type of business as their current or previous employer are permissible. Restrictive covenants that are effective during an employee's employment term should be included in the employment contract, and senior officers have a statutory obligation not to compete with their current employer.¹⁹

Post-termination non-compete agreements may not exceed two years, counted from the end of the employment relationship. Furthermore, they may apply only to senior managers, senior technical personnel and other employees with access to trade secrets.²⁰ There are no national statutory restrictions on the amount of consideration, geographical scope or damages for such agreements. Nonetheless, for a non-compete agreement to be legally viable, the former employer must pay financial consideration to the former employee at least monthly during the restricted period. The Supreme People's Court's most recent judicial interpretation suggests that the financial consideration should not be less than 30 per cent of the employee's average wage during the 12 months before the termination.²¹ Some provinces, municipalities and industrial zones have enacted their own local regulations to set the minimum amount of consideration that is required. For instance, in Beijing and Shanghai, the financial consideration may not be less than 20 per cent of an employee's annual wage for each year of non-competition. Continuous failure to pay the consideration for the non-compete agreement during the post-termination restricted period for three months or more, will give the employee the right to declare the non-compete obligation null and void.²² However, an employer is allowed to release an employee from a non-compete obligation and stop paying the non-compete compensation before or part way through the non-compete period, and in the latter case, the employer must pay the employee three months' non-compete compensation as damages.²³

VI WAGES

i Working time

There are three types of working hours systems in China: regular (or standard), flexible (or irregular) and comprehensive. The default system is the regular working hours system under which the vast majority of employees in China are employed. Under this system, a working

18 See Interim Rules on Withholding and Deductions of Individual Income Tax, effective from 1 January 2006, Articles 2 to 4.

19 Company Law, Articles 148 and 149.

20 ECL, Article 24.

21 See the Chinese Supreme Court's Interpretation on Certain Questions on Application of Law in Employment Disputes (No. 4), effective from 1 February 2013, Article 6.

22 *id.*, at Article 8.

23 *id.*, at Article 9.

day is generally limited to eight hours and a working week is limited to 40 hours.²⁴ Subject to the approval of the local labour authorities, both the flexible and the comprehensive working hours systems may apply to certain employees who are unable to follow the regular working hours system owing to the nature of their jobs (such as senior management and sales staff) or industry (e.g., farming or fishing).

Currently, there are no national regulations regarding working hours at night but some local regulations provide that employees who work between 10pm and 6am should work one hour less than the standard daily working hours and also should receive extra remuneration for working at night. Notably, the draft Regulations on Special Working Hours Systems²⁵ provide that employees who work between 10pm and 6am should receive an additional payment, the level of which would be set by the local labour authorities. Further, there are local regulations²⁶ that prohibit pregnant employees from working at night, or working overtime, once they reach the seventh month of pregnancy.

ii Overtime

Under the regular working hours system, overtime pay must be paid if an employee is required to work outside normal business working hours. Employers must compensate employees at the following overtime rates: 150 per cent of the regular rate of pay on regular working days, 200 per cent for working at weekends or on regularly scheduled days of rest, and 300 per cent on statutory holidays. Employers may only opt to give employees compensatory time off in lieu of double time for work performed at weekends or on regularly scheduled days of rest.²⁷ Under current Chinese law, overtime should not exceed one hour per day, or under special circumstances where an extension of working hours is required, overtime may not exceed three hours per day. The total number of overtime hours may not exceed 36 hours per month.²⁸

Under the flexible working hours system, employees' working hours vary in accordance with the business needs of the employer. Employees working under this system are generally not entitled to overtime compensation, although in some jurisdictions, they may be entitled to overtime compensation for work performed on a national holiday.²⁹

Under the comprehensive working hours system, employees' working hours are calculated according to a particular period, which could be weekly, monthly, quarterly or annually (calculation periods). This system is typically used for seasonal businesses or for employees whose work schedules ebb and flow, such that employees' average weekly working

24 Labour Law, Article 41; Decision of the State Council on Revising the Provisions of the State Council on Work Hours of Workers and Staff, State Council Order No. 174, effective as of 1 May 1995 (Decision of the State Council), Article 3 (superseding the applicable provisions of the Labour Law and reduced the working week to 40 hours).

25 The draft Regulations on Special Working Hours Systems was released by MOHRSS for public comments in May 2011. As of January 2020, the final regulations have not been promulgated.

26 See Special Regulations on Occupational Protection of Female Employees, effective 28 April 2012, Article 6.

27 See Interim Rules on Payment of Wages, effective 1 January 1995, Article 13; Labour Law, Article 44.

28 Labour Law, Article 41.

29 See Chinese Measures on Approval of Adopting Flexible Working Hours System and Comprehensive Working Hours System in Enterprises, effective 1 January 1995 (Chinese Wage/Hour Measures), Article 7; see also Shanghai Measures on Payment of Enterprise Wages, issued by the Shanghai Labour and Social Security Bureau on 7 January 2003.

hours are generally 40.³⁰ If employees' average working hours exceed the limit for the calculation period (e.g., 500 hours if the calculation period is a quarter) or employees are required to work on public holidays, then the employer must pay overtime compensation.

VII FOREIGN WORKERS

A Chinese employer must obtain an employment licence to engage a non-Chinese worker, and the worker in question must obtain a permit to work legally in China. Immigration requirements and procedures are largely carried out at a local level and each province has its local practice in this regard. However, there are certain requirements that typically need to be met:

- a* the foreign worker should have special skills and a certain number of years (normally two years) of relevant experience;
- b* the foreign worker's work permit application will need to be sponsored by a locally registered company in China;
- c* the foreign worker will need primarily to live and work in the same location as his or her sponsoring company; and
- d* a medical examination will be required.

The immigration process generally involves the following steps:

- a* the foreign worker attends a physical examination;
- b* the Chinese employer (or sponsoring company) applies for an employment licence from the local labour authority;
- c* the Chinese employer applies for a work visa invitation letter from the local commerce authority;
- d* the foreign worker obtains a Z visa (a work visa) from a Chinese embassy or consulate;
- e* after arriving in China on a Z visa, the foreign worker has his or her temporary residential address registered with the local public security bureau;
- f* the foreign worker applies for a work permit from the local labour authority, and
- g* the foreign worker applies for a residence permit from the local public security bureau.

The entire process will usually take one to two months if everything goes smoothly. The work permit and residence permit are valid for up to five years, but in reality, validity for just one or two years is quite common.

Foreign workers employed by Chinese entities are subject to Chinese individual income tax, which employers are required to withhold from the salaries of foreign expatriates.³¹ Deductions should also be made on behalf of foreign workers, from their salaries, for social insurance contributions (except those foreign workers from countries that have social insurance exemption treaties with China) .

Chinese laws, regulations and rules govern all direct employment relationships formed between Chinese entities and foreign workers. If a foreign worker is seconded from an

30 See Chinese Wage/Hour Measures, Article 5.

31 Interim Rules on Withholding and Deductions of Individual Income Tax. Effective 1 January 2006, Articles 2 to 4.

overseas entity, however, Chinese laws may or may not govern the employment relationship, depending on which law is specified in the employment or secondment agreement, and the local rules and practice at the location of the employer or local entity in China.

Residents of Hong Kong, Macao and Taiwan do not need a work permit or residence permit to work in mainland China.

VIII GLOBAL POLICIES

The ECL provides that employers must promulgate internal rules and policies that delineate the employees' rights and obligations.³² A policy manual may be contractually binding if an employment contract explicitly incorporates its terms. However, to enforce legally binding compliance with a policy manual, employers must make it available to their employees. To establish that employees have received the policy manual in the event of a dispute, it is recommended that an employer distribute hard copies of the manual, preferably in Chinese, and obtain the employees' signatures in hard copy acknowledgements of receipt of the manual. These steps will facilitate the employer's requirement to meet its burden of proof in a labour arbitration involving the company's internal rules.

An acceptable and legal basis for termination of an employment agreement is the serious violation of an employer's work rules. While Chinese law does not mandate any specific due process requirements, if an employer fails to provide its work rules to an employee or the employer cannot establish that it provided the work rules to an employee, those rules may not form the basis for a termination.

Further, as of the implementation of the ECL, employers are required to consult their employees about any issues that bear directly on the material terms and conditions of their employment. While there is little guidance as to what constitutes 'effective' or 'legally sufficient' consultation, generally employers must review the proposed policies or rules with the trade union, employee representative congress, or all the employees, collect and consider their opinions and then implement the policies or rules, taking into account the opinions of the respective bodies. Internal policies or work rules that, for example, affect remuneration (such as bonus or commission plans), leave, employee training, job safety and labour conditions, benefits and social insurance, working hours or work quotas, or that may result in discipline, must go through a consultation process for them to be binding on the employees.³³

IX PARENTAL LEAVE

i Maternity leave and breastfeeding breaks

Female employees in China are entitled to 98 days of maternity leave.³⁴ In special circumstances, such as complications during delivery, an additional 15 days of maternity leave may be granted. For multiple births, an additional 15 days is granted for each additional infant produced from a single pregnancy.³⁵

32 Labour Law, Article 4; ECL, Article 4.

33 ECL, Article 4.

34 Provisions on Labour Protection for Female Employees, Article 7.

35 *id.*

Female employees who comply with family planning requirements further enjoy additional maternity leave under local rules. For example, in Shanghai, the additional maternity leave is 30 days. Female employees who have miscarried are also entitled to a short period of leave of between 15 and 42 days.

Female employees are also entitled to a one-hour paid break per workday when they return to work after maternity leave, until one year after childbirth. For multiple births, another hour is granted for each additional infant. Additionally, female employees with children under 12 months old may not be required to work overtime.³⁶

Female employees receive a maternity subsidy from the maternity insurance fund. In certain cities, an employer is required to make up the difference if a female employee's pre-maternity salary is higher than the maternity subsidy.³⁷

Employers may not reduce the salaries of female employees during their pregnancy, maternity leave or nursing period (one year after childbirth) without justification.

During the pregnancy, maternity leave and nursing period, the employer must ensure that the scope of the female employee's work complies with relevant laws and regulations. For example, pregnant women past their seventh month of pregnancy may not work between 10pm and 6am and must be given rest time during working hours. Female employees who cannot perform their regular job functions as a result of pregnancy or breastfeeding may have their workload reduced or be transferred to more appropriate positions.

Finally, employers may not dismiss female employees during pregnancy, maternity leave or the breastfeeding period except for gross misconduct.

ii Paternity leave

There is currently no national regulation mandating employers to provide paternity leave. Availability of paternity leave varies across jurisdictions and is premised on the childbirth complying with relevant family planning requirements. Men are generally able to take between 10 and 30 days of paternity leave; for example, in Shanghai, men are entitled to 10 days of paternity leave.³⁸

X TRANSLATION

Employment documentation, such as contracts, handbooks and any other agreements or policies, such as confidentiality agreements or non-compete agreements, that an employer wants to be binding on its employees should be provided in Chinese.³⁹ It is at the discretion of the employer whether to execute the documents in a foreign language as well. Further,

36 *id.*, at Article 9.

37 *id.*, at Article 8.

38 Regulations of Shanghai Municipality on Population and Family Planning, Article 31.

39 Letter to Dalian Labour and Social Security Bureau in response to the 'Application for Instructions on the Issue Regarding the Legal Validity of a Labour Contract Written in Both Chinese and Foreign Languages', promulgated by the Ministry of Labour and Social Security, effective 28 January 1994, Article 1; Chinese Supreme Court's Interpretations Concerning Certain Questions on the Application of Law in Labour Dispute Cases (No. 1), effective 30 April 2001, Article 19 (requiring that any revision to the employment handbook must be published to the employees to have a binding effect on them, and implying that publication must be in Chinese).

when employing a foreign national, an employment contract must be provided in Chinese to enable the foreign employee to obtain a work permit. The authorities will not accept an employment contract in English.

If employment documents are not translated and a dispute arises regarding the meaning or interpretation of a clause or work rule, then the employer may be at a disadvantage. First, if an employee challenges his or her understanding of the meaning of the work rule provided only in English, it will be virtually impossible for the employer to demonstrate that the employee has a strong command of the English language and must have understood the accurate or intended meaning of the provision. Second, the arbitration commission or court will only accept documents in Chinese, so the employer will need to submit a translation that is certified by approved translators. To the extent that the employee submits a different translation that supports his or her interpretation of the provision in dispute, the employer will not be able to control the translation that the labour arbitration commission or court accepts or credits. Often, the labour arbitration commission or court will find in favour of the employee, if there is any doubt. Third, when a foreign-invested company does not provide its employment documents in Chinese, the labour arbitration commission or court, or both, often form a bias against the foreign employer for not adhering to Chinese rules. More often than not, to the extent that the disputed provision was the basis of a termination decision, a labour arbitration commission or court will in all likelihood deem the provision unenforceable and therefore deem the termination grounds unjustified. In such a case, the employee would be entitled to reinstatement, if he or she so requests, or double the statutory severance for wrongful termination.

XI EMPLOYEE REPRESENTATION

The All-China Federation of Trade Unions (ACFTU) is the only union recognised by the Chinese government, which sponsors and administers the union. All trade unions in the country are branches of the ACFTU, as independent trade unions are not permitted. The State Council encourages employers to establish units of the ACFTU, which all employees who are Chinese citizens have the right to join. Unit members have the right to form a representative congress, which may elect a committee to manage the union.

A trade union's primary responsibilities include:

- a* objecting to any inappropriate disciplinary actions against employees;
- b* negotiating with an employer on behalf of employees;
- c* participating in investigations of work-related accidents;
- d* initiating arbitration and bringing any necessary appeals to settle disputes about individual or collective contracts; and
- e* assisting workers in concluding and performing employment contracts.⁴⁰

40 Trade Union Law, effective 3 April 1991, amended 27 October 2001, Articles 20 to 28; ECL, Articles 4, 6, 43, 51 and 56.

The ECL further provides that the trade union should establish a collective bargaining mechanism.⁴¹ Under the Chinese Constitution, a trade union does not have the explicit legal right to strike. Indeed, the trade union is mandated to help an employer to restore work and production as soon as possible if work is suspended for any reason.⁴²

Employers are responsible for contributing dues to the trade union equal to 2 per cent of their gross monthly payroll.⁴³ A percentage of this amount is returned to the company trade union for its use, and the remaining funds go to the ACFTU's local branches and national headquarters.

If a company has a trade union, it is required to consult with the trade union on matters that affect the 'immediate interests' of employees, such as remuneration, working hours, benefits, job safety, training and discipline, as noted in further detail above.⁴⁴ If an employer fails to consult with the union or consider its opinion regarding internal rules and policies that affect employees' 'immediate interests', the rules or policies may not be enforceable or effective.

Further, if an employer intends to terminate an employee's employment relationship unilaterally or engage in a workforce reduction, then it must consult and give prior notice to the trade union and consider the trade union's opinions on the matter. Failure to do so could render the employee terminations invalid.⁴⁵

In terms of establishing a trade union, an employer with 25 or more trade union members shall establish a basic-level trade union committee; if an employer has fewer than 25 employees, a basic-level trade union committee may be established separately by one entity or jointly by two or more entities, or an organiser may be elected to organise activities for the employees. If the number of female employees is relatively large, a trade union committee for female employees may be established under the leadership of the equivalent level of trade union; if the number of female employees is relatively small, the trade union committee may reserve seats for female employees.⁴⁶

The basic term of office is generally three or five years. There are no regulations with respect to how often the trade union should meet.⁴⁷

The establishment of a basic-level trade union, local trade union at all levels, or a national or local industry trade union must be submitted for approval by the trade union organisation at the next highest level. The trade union at the higher level may assign personnel to assist and supervise a company to ease the establishment of a trade union.

Trade union representatives, and particularly the chairperson of the trade union, enjoy greater protections against the termination of their employment. First, their employment contract extends by operation of law to correspond with the last day of their term as a representative, to the extent that the contract is scheduled to expire before that date.⁴⁸ However, their employment may be terminated if they reach retirement age or commit a

41 ECL, Article 6.

42 Trade Union Law, Article 27.

43 *id.*, at Article 42.

44 ECL, Article 4.

45 *id.*, at Articles 41 and 43.

46 Trade Union Law, Article 1.

47 *id.*, at Article 15.

48 *id.*, at Article 18.

serious violation of the employer's work rules. Second, before any termination of employment takes place, in practice, approval is required from the upper-level trade union, which is independent of the employer.

The ACFTU, with certain other Chinese authorities, issued the Provisions on the Democratic Management of Enterprises on 13 February 2012. These provisions require that an employee representative congress (ERC) be established, in addition to a trade union, in all types of enterprises, including state-owned and non-state-owned enterprises, as a platform for employees to participate in the management of enterprises in a democratic manner. The 2012 provisions define the powers, duties, organisational structure and working rules of an ERC. The major powers of an ERC include review of employment rules and policies, approval of collective bargaining agreements and electing an employee director and employee supervisor. The provisions also require an enterprise to share certain information with its employees (e.g., important matters regarding business operations, work rules involving employees' immediate interests and the integrity of the management personnel). This disclosure is meant to solicit the employees' comments and to subject management to a degree of supervision by the employees. These rules do not contain any punishment clauses, which makes it unclear what the legal consequences will be for non-compliance with the rules.

XII DATA PROTECTION

i Requirements for registration

Data privacy and data protection is an emerging area under Chinese law. There are no requirements for an entity that collects personal data to register with any government body, and there is no centralised data protection authority, other than certain industry-specific bodies, such as the Ministry of Industry Information Technology in the telecommunications sector. An employer must keep its employees' personal data confidential and must obtain an employee's written consent if the employer wants to make that employee's personal data public.⁴⁹ Except for this general rule, there are no workplace-specific privacy laws in China that govern the ability of employers to collect, use and disclose employees' personal data. Notwithstanding the foregoing, China has enhanced online data privacy protection in recent years, and relevant government authorities have passed a series of laws, regulations, guidance and standards in this regard, two of the most important of which are the Cybersecurity Law, which took effect on 1 June 2017, and the Information Security Techniques –Personal Information Security Specifications (the Personal Information Security National Standards), which took effect on 1 May 2018. Although neither the Cybersecurity Law nor the Personal Information Security National Standards specify whether the requirements provided therein apply in the employment context, it is recommended that employers should act in compliance with these requirements to avoid any uncertainty.

ii Cross-border data transfers

Data localisation is a trend in China. The Cybersecurity Law includes a general requirement that critical information infrastructure providers (CII providers, the definition of which must be clarified) must store personal information and important data they collect within China. If there are business reasons for CII providers to transfer the information or data outside China,

49 Regulations on Employment Service and Employment Management, effective 1 January 2008, Article 13.

security assessments must be conducted. Owing to the fact that certain details concerning the data localisation requirement (detailed rules for security assessments) need to be clarified, it has not yet been implemented in earnest.

To implement the new Cybersecurity Law, on 11 April 2017, the Chinese government released the draft Security Assessment Measures for Cross-Border Transfer of Personal Information and Important Data, which is intended to be a major set of implementation rules for the new Cybersecurity Law. However, in 2019, the CAC issued two sets of draft rules, for individual information and data outside China, respectively.

The draft Measures for the Administration of Data Security, which was published on 28 May 2019, requires a network operator who wants to transfer important data across borders must conduct a security assessment and obtain approval from the appropriate industry regulator or the provincial branch of the CAC.⁵⁰

The draft Measures for Security Assessment on the Export of Personal Information, which was published on 13 June 2019, requires a network operator who wants to transfer personal information across borders must obtain the permission of the data subjects and conduct a risk assessment. Further, the network operator must provide a security assessment report to the local provincial government.⁵¹

Although the Cybersecurity Law and the two draft rules do not specify whether the above-mentioned requirements apply in the employment context, it is recommended that employers should comply with them. Based on the foregoing, it is advisable that an employer obtains written consent from the concerned employees and conducts a self-imposed security assessment before it transfers the employees' personal data out of China. Once the two draft rules have been passed, an employer may also be required to pass a government-run security assessment if personal data and other important data needs to be transferred abroad.

iii Sensitive data

The national standards on the security of personal information make a distinction between general personal information and sensitive personal information. The latter is defined as the personal information that, if leaked, illegally provided or used without proper authorisation, may harm personal or property safety, personal reputation, or physical or mental health, or lead to discrimination towards the data subject. Examples of sensitive personal information include a natural person's identity card number, biometric information, bank account number, correspondence records and contents, property information, credit information, location tracking, lodging information, health and physiological information, transaction information and personal information regarding minors under 14 years old. Expressed consent must be obtained from the data subject before sensitive data is collected from that data subject.

iv Background checks

There is no specific Chinese law prohibiting an employer from conducting a background check or credit check on an employee employed in China but, in practice, getting relevant and accurate information can be challenging for employers. An individual's credit report is available from the People's Bank of China and the Central Bank of China and its local

50 The full context of the draft Measures for the Administration of Data Security in Chinese is available on the Cyberspace Administration of China [CAC] website <www.cac.gov.cn/2019-05/28/c_1124546022.htm>.

51 The full context of the draft Measures for Security Assessment on the Export of Personal Information in Chinese is available on the CAC website <www.cac.gov.cn/2019-06/13/c_1124613618.htm>.

branches, but usually the individual in question must apply for the report in person. Criminal records information is available to employers as this information should be recorded on the official government personnel file maintained on all Chinese citizens who work for a company. Employers might also request an employee to provide a no-crime certificate issued by the local notary public or the police station as a condition of employment.

An employer should keep all such information strictly confidential. According to the General Principles of the Civil Law, NPC decisions and relevant judicial interpretations, activities that publicise private data, or disclose an individual's private information, either in writing or orally, without the individual's prior consent, are considered a civil injury to the employee and may constitute a criminal offence.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Chinese law is much more protective of employees than the laws of many Western countries. Under Chinese law, employers cannot terminate an employment contract without cause: only employees have the right to terminate an employment contract without cause, subject to giving 30 days' written notice (which will be reduced to three days' notice during a probationary period). Employers can only terminate an employment contract based on certain specific grounds provided in the relevant Chinese labour laws and regulations.

Generally, an employer may legally terminate an employment contract on the following grounds.

Termination by mutual agreement

An employment contract can be terminated at any time by mutual agreement between the employer and the employee.⁵² If a termination by mutual agreement is initiated by the employer, the employer will be required to pay statutory severance to the employee (see 'Calculation of statutory severance', below).⁵³

Unilateral termination by employer without notice or compensation

An employer is allowed to terminate an employment contract without giving the employee prior written notice and without paying statutory severance in the following circumstances:

- a* the employee fails to meet the employment requirements during the probationary period;
- b* the employee seriously violates the employer's policies;
- c* the employee is guilty of serious dereliction of duties, corruption or causes the employer to suffer significant losses;
- d* the employee is working for another employer at the same time, which has seriously affected his or her performance of tasks as assigned by the employer, and has refused to rectify the situation after being requested to do so by the employer;

⁵² ECL, Article 36.

⁵³ id., at Article 46.

- e* the employee used fraudulent or coercive tactics to obtain the employment contract or to amend the contract; or
- f* the employee is the subject of a criminal prosecution.⁵⁴

Termination under any of these grounds requires that the employer provide advance notice to the trade union.⁵⁵

Unilateral termination by employer by giving prior written notice and compensation

An employer is allowed to terminate an employment contract under any of the following circumstances, provided that it gives the employee 30 days' prior written notice or pays one month's salary in lieu of notice:

- a* after undergoing medical treatment for a period, the employee, owing to illness or a work-related injury, is unable to perform his or her original duties or other work as arranged by the employer;
- b* the employee is not competent to perform the work required and remains incompetent even after training or reassignment to another post; or
- c* an employment contract can no longer be performed owing to changes in the objective circumstances that were relied upon as the basis for the contract, and no agreement can be reached between the parties to amend the contract. Statutory severance is required to be paid in this case.

Notwithstanding the foregoing, employers will not be permitted to terminate an employment contract based on these grounds if:

- a* the employee has been exposed to occupational disease hazards and has not undergone a pre-departure occupational health check, is under medical observation, or there is reason to believe he or she has contracted an occupational illness;
- b* the employee has contracted an occupational illness or suffered a work-related injury while working for the employer and is confirmed to have wholly or partially lost his or her ability to work;
- c* the employee is suffering from illness or a non-work-related injury and the stipulated period of medical treatment has not expired;
- d* a female employee is pregnant, on maternity leave or breastfeeding; or
- e* the employee has worked for the employer for at least 15 years consecutively, and is less than five years from legal retirement age (protected employees).⁵⁶

Termination by operation of law

An employment contract will automatically terminate by operation of law under the following circumstances:

- a* the employment contract expires and is not renewed by the employer and the employee;
- b* the employee retires;
- c* the employee dies, or is declared deceased or missing by a court of competent jurisdiction;

⁵⁴ id., at Article 39.

⁵⁵ id., at Article 43.

⁵⁶ id., at Articles 40, 42 and 46.

- d* the employer decides to dissolve; or
- e* the employer is declared bankrupt, its business licence is rescinded or it is ordered to close down in accordance with the law.

In the event of termination under points (a) (unless the employer proposes to renew the contract on the same terms, or terms that are more favourable to the employee but the employee does not agree to the renewal), (d) and (e), above, the employer is required to pay statutory severance to the employee.⁵⁷

Calculation of statutory severance

As discussed in the foregoing, an employer will be required to pay statutory severance to an employee under certain circumstances. The statutory severance equals an employee's average monthly wage (AMW) during the 12 months immediately before the termination date, multiplied by the number of years of service with the employer. The AMW is capped at three times the local average wage in the previous year (a fixed number published annually by the local government). For example, in 2018, the local average wage per month was 10,592 yuan in Beijing and 8,765 yuan in Shanghai. The cap is not applicable to severance for service years before 1 January 2008. Any period of service of less than six months is rounded up to half a year, and any period of six months or more is rounded up to a whole year. For example, for the purpose of calculating statutory severance, a service period of four years and five months will be deemed four-and-a-half years, and a service period of four years and six months will be deemed five years.

The statutory severance is merely a minimum amount required by law. In practice, in the event of termination by mutual agreement or massive lay-off, employers usually offer a higher severance to obtain consent and cooperation by employees.

Notification requirements

Although there is a general requirement under Chinese law that notice must be given to the relevant trade union in the event of unilateral termination of employment by an employer, this requirement has not been seriously implemented in practice. If an employer does not have a trade union, the notice usually should be given to the upper level union in the employee's local area. Failure to give notice to a trade union may cause the termination be held illegal during a wrongful termination lawsuit. The deadline to give notice to the trade union is before the wrongful termination case enters court proceedings.

Following the termination of employment, employers are required to issue termination certificates to the affected employees and inform them of their right to unemployment insurance benefits. Employers are also required to inform the social insurance agency of any terminations within a certain number of days of their occurrence.⁵⁸

ii Redundancies

Mass lay-offs are generally not permissible, unless the individual terminations fall under one of the grounds set forth in Section XIII.i, or in the event of economic lay-offs (as defined below), provided employers follow the statutory procedures.

⁵⁷ id., at Articles 44 and 46.

⁵⁸ Unemployment Insurance Regulation, effective 22 January 1999, Article 16.

An economic lay-off is defined by the relevant Chinese labour laws and regulations as a lay-off of either 20 or more employees or 10 per cent of the workforce for one of the following reasons:

- a* the employer is undergoing organisational restructuring pursuant to Chinese bankruptcy law;
- b* the employer is falling into serious production and business difficulties;
- c* the employer is undergoing a change of production, significant technological reform or change of mode of operation, and after amendment of employment contracts, there is still a need for redundancies; or
- d* the circumstances upon which the conclusion of the employment contracts is based have significantly changed and, as a result, the employment contracts can no longer be performed.⁵⁹

If an employer wishes to carry out an economic lay-off, it must give at least 30 days' notice and explain the circumstances to the labour union or all its employees, consider the opinions of the labour union or employees, and report the lay-off plan to the local labour authority.⁶⁰ Notwithstanding the foregoing, protected employees cannot be laid off until the circumstances for which they are protected (e.g., pregnancy or a stipulated period of medical treatment) no longer exist, unless they agree otherwise.

Laid-off employees are entitled to priority in hiring if the employer re-engages staff within six months of the lay-off. In addition, certain categories of employees are to be given preference for retention by the employer in an economic lay-off, including those who have relatively longer employment contracts with the employer, those who have concluded open-ended employment contracts with the employer, and those who are the only working member of a household and are supporting an elderly person or minor.⁶¹

Laid-off employees are also entitled to statutory severance (see Section XIII.i). Although the law does not require any enhanced severance payment in the event of an economic lay-off, the employer, in practice, may need to provide a greater level of severance benefits to obtain consent and cooperation from the employees and the labour authorities.

XIV TRANSFER OF BUSINESS

China does not have an equivalent to the UK Transfer of Undertakings (Protection and Employment) Regulations or transfer-of-business rules pursuant to which employees are automatically transferred when a business is transferred. Except in very limited circumstances (such as mergers, as described in Section XIV.i), the transfer of employees involved in a business transfer deal may only be effected through termination (or resignation) and rehire.

i Merger

In a merger of two or more companies, employees of the merged companies automatically transfer to the surviving company or a newly established company by operation of law, with their prior service being recognised or compensated for. No employee consent is required unless the terms of the employment contract are changed.

⁵⁹ ECL, Article 41.

⁶⁰ *id.*

⁶¹ *id.*

ii Company split

In practice, employee transfer in a company split is more complicated than in a merger deal, although Chinese laws and regulations provide for the same employee transfer rule for both (i.e., the employment contracts of the merged or split company shall be succeeded by the successor company or companies). The complex issues involved in company split deals are how to determine which successor company an employee will be with and whether the employee has the right to choose. Unfortunately, relevant laws and regulations do not provide specific guidance in this regard, and this leaves uncertainty for employee transfer in company split deals.

iii Equity acquisition

As in many other jurisdictions, an equity acquisition in China does not trigger an employee transfer issue as the buyer merely steps into the shoes of the seller and the employment of the target employees remains unchanged.

iv Asset acquisition

In an asset acquisition in which the buyer takes over the assets of an existing company, employees do not transfer automatically. Instead, the buyer and seller determine which employees they wish to be transferred as part of the deal, and those employees must consent to be transferred (often by agreeing to a mutual termination of their employment with the seller and accepting new employment with the buyer). The prior service of the transferred employee must be recognised or compensated for in these circumstances.

In practice, we have seen a lot of cases in China where employees have protested against unsatisfactory plans for their transfer in business transfer deals. Therefore, it is important that employee transfer plans are carefully designed from both a legal and business perspective before announcing them to the affected employees.

XV OUTLOOK

The draft Measures for the Administration of Data Security and the draft Measures for Security Assessment on the Export of Personal Information have completed the public consultation stage. At the time of writing, the two drafts are at the discussion stage, and it is possible that the formal legislative procedure will be conducted in 2020.

CZECH REPUBLIC

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I INTRODUCTION

National laws in the Czech Republic regulate employment relationships extensively. As a result, employees receive a high level of statutory protection. Modifications of rights and duties in employment relationships are limited. The rights and duties of an employee may only be modified by a bilateral agreement and modifications to the employee's disadvantage are not permitted. The main employment regulation is the Czech Labour Code. In addition to national legal acts, government regulations and EU law are the key sources of Czech employment law rules. Case law is used as an interpretation source but is not binding.

Some aspects of employment relationships can be regulated by collective bargaining agreements, specifically those at a higher level, concluded between employers' associations and sector trade unions, which are binding for all employers active in the relevant economic sector. Collective bargaining agreements of a higher level are published on the website of the Czech Ministry of Labour and Social Affairs.

Employment law-related disputes are subject to the jurisdiction of special employment law senates. The court system comprises three levels: regional courts, district courts and the Supreme Court.

The main government agency with authority to enforce employment law is the State Labour Inspectorate, which monitors compliance with statutory laws relating to a wide range of matters, including working conditions, health and safety, remuneration and employment-related documents. Other authorities involved in employment relationships are the Office for Personal Data Protection, the Foreign Police Department and the Customs Administration; the latter has the authority to monitor employment of foreigners.

II YEAR IN REVIEW

i Abolishment of three days' unpaid sickness leave

A Labour Code amendment that came into effect at the beginning of July 2019 has abolished a controversial provision, under which employees were not entitled to any sickness compensation during the first three days of being temporarily unable to work. As a result of the amendment, employees now receive compensation from the first day of a temporary sickness. The first two weeks of sickness are compensated by the employer, after which payment of compensation is covered by statutory state insurance.

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ii New Labour Code amendment

There is a further major amendment to the Labour Code in the pipeline, which in particular contains a reform to the calculation of annual leave (i.e., working hours as the basis for calculation instead of working days). It is also expected to introduce shared working and to implement Directive (EU) 2018/957 of the European Parliament and of the Council, amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the New PWD Directive).

It is expected that the amendments relating to the framework of the New PWD Directive will be effective from July 2020. The rest of the amendments are expected to take effect from 2021.

iii New PWD Directive

The freedom of movement of persons and the freedom to provide services are two of the fundamental principles of the European Union and have become significant tools within the EU employment market.

More than 20 years after the implementation of Directive 96/71/EC, the regulation of posted workers was amended by the adoption of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 (the New PWD Directive). The deadline for implementation of the New PWD Directive by EU Member States is 30 July 2020.

The PWD Directive regime applies to situations in which employees from one EU Member State are posted by their employer to work temporarily for a company in another EU Member State; either to perform work for another company on the posting employer's behalf, and under its direction, or within the same group of companies.

The New PWD Directive implements two categories of posting: (1) short-term (less than 12 months), which may be extended up to 18 months and (2) long-term. It also sets down a rule that if an employee replaces another employee and performs the same duties in the same location, the durations of those postings must be combined. The employer is therefore obliged to monitor instances and durations of postings in which employees replace others in the same position.²

Under the New PWD Directive, all minimum components of the salary must be granted to each posted employee. In the Czech Republic, this means a premium for overtime work and a premium for work during the night or at weekends. Employers will also have to monitor applicable collective agreements. In addition, posted employees will be entitled to compensation for travel and lodging expenses.

iv Labour authority inspections

The State Labour Inspectorate has been focusing on illegal employment and illegal provision of agency workers. Both these administrative offences may be subject to significant fines. Typically, we see cases in which a company believes it is using agency workers but the provider of those workers does not have the relevant authorisation. Another common typical inspection matter is a situation in which a company uses independent contractors who

2 The purpose of adding up successive postings is to prevent situations in which employers might 'rotate' the posted workers by replacing them with each other so as not to fall under the stricter posting regime. Although no maximum period of posting is explicitly stipulated, a posting should be temporary in its nature, even while being 'long-term'.

nevertheless do not work independently but actually work according to the same regime as employees who are under the instructions of the employer, using the employer's tools, and whose working time is determined by the employer.

III SIGNIFICANT CASES

On 11 April 2018, the Czech Supreme Court delivered a ruling on the highly sensitive question of whether members of a company's statutory body may at the same time perform activities (falling within the scope of the activities of the corporation's statutory body) for the same company within an employment relationship.

The Supreme Court found that although the relationship between a member of the company's statutory body and the company should reasonably be governed by the executive services agreement, the parties may agree that their relationship will be governed by the Labour Code. However, it does not mean that the employment relationship is established by this agreement; it remains a commercial-law relationship. It is only governed by those Labour Code provisions that are not at variance with the obligatory commercial law provisions regulating (in particular) the status of the company's statutory body and the individual's relationship with the company (e.g., the duty to exercise an office with due managerial care, or the consequences of a breach of the duty to exercise an office with due managerial care).

As in previous years, the Czech courts repeatedly dealt with questions relating to the (in)validity of termination of an employment relationship for a breach of work discipline. On 8 July 2019, the Constitutional Court dealt with a query as to whether an employee's unexcused absence for eight days establishes a ground for immediate termination of the employment relationship.

The Constitutional Court concluded that a long-term absence itself might not lead to the conclusion that an employee has breached work discipline in an especially gross manner, and therefore would not suffice as a ground for termination with immediate effect. The Court repeated that it is necessary to properly assess all consequences of a breach of an employee's duties. To assess the degree of severity of the given breach of duties, it is necessary to take into account, among other things, an employee's personality, the specific job performed by the employee, the employee's current attitude to the performance of work tasks, the time and situation during which the employee breached his or her duties, the degree of fault, the manner and the intensity of the breach of the employee's duties, the consequences of the breach for the employer and damage caused to the employer.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

A written employment contract is required by law and it should be executed before the employment relationship commences. If there is no employment contract in place and the employee starts to perform work for the employer, an employment relationship will be created and the employee will be granted all statutory rights, duties and protection, including from termination of employment. An employment contract must include at least (1) the type of work, (2) the place or places where the work is performed, and (3) the date of the commencement of work. The employer must provide the employee, in writing, with further details of the employment relationship, such as a description of the tasks involved in the job, weekly working hours and duration of annual vacation, no later than within one month

of the commencement of the employment relationship, if the information was not already provided in the employment contract. Terms and conditions of an employment contract may only be amended in writing by mutual agreement between the employer and the employee.

Fixed-term employment contracts are allowed but the duration of a fixed-term employment relationship cannot exceed three years and cannot be repeated more than twice, that is to say, the maximum term for which an employee can be employed on a fixed-term contract is nine years. There are limited cases in which exceptions apply, such as seasonal employment in the agriculture sector. Should an employee work for an employer in breach of these fixed-term contract limitations, an employment relationship for an indefinite term will be created automatically.

ii Probationary periods

The employer and the employee can agree on a probationary period. That agreement must be in writing and the probationary period may not exceed three consecutive months from the commencement of the employment relationship in respect of non-managerial employees or six consecutive months in respect of managerial employees. In the case of a fixed-term contract, the agreed probationary period must not be longer than half of the agreed term of the employment relationship.

A probationary period may be agreed not later than on the date that was agreed as the date of commencement of work or the date specified as the date of appointment to a managerial position. An agreed probationary period cannot be subsequently extended.

iii Establishing a presence

Foreign companies do not have to register in the Czech Republic to hire employees but non-EU companies must register a subsidiary or a branch in the Czech commercial register to conduct business here. Business presence will also often create a permanent establishment for tax purposes. The company will have to obtain the relevant authorisation to conduct its business (i.e., a trade licence or other relevant licence) and register as an employer with the Czech social security and health insurance system to pay the relevant contributions for its employees.

Statutory deductions from each employee's monthly salary include advance payments for personal income tax, social security insurance, unemployment contribution, health insurance and sickness insurance. Generally, all statutory contributions are calculated, deducted and paid by the employer for its employees.

Foreign companies can engage independent contractors in the Czech Republic.

V RESTRICTIVE COVENANTS

An employee is prohibited by Czech employment law to perform any gainful activity (with the exception of scientific, pedagogical, journalistic, literary and artistic activities) that is identical to the activities of his or her employer, unless the employer provides the employee with a prior written consent to the performance of that gainful activity.

An employee and an employer may agree on a non-compete clause that becomes applicable after the termination of an employment relationship. It must be in writing, either as part of the employment contract or in as a separate agreement. The non-compete agreement can only prohibit the employee from conducting a gainful activity that is of the same nature or competes with the activity of the employer. The duration of a non-compete clause is limited to a maximum of one year after the termination of an employment relationship and it must

be justifiable with respect to the nature of the employee's work. The employer must provide the employee with a statutory compensation corresponding to a minimum of 50 per cent of the employee's monthly average earnings for each month of the duration of the non-compete obligation. The employee and the employer may agree on an adequate contractual penalty that the employee will be obliged to pay if he or she breaches the non-compete agreement. Upon payment of the contractual penalty, the non-compete obligation ceases to exist.

The employer may only withdraw from a non-compete agreement during the existence of the employment relationship and only for reasons established in the agreement. The employee may terminate the non-compete agreement if the employer failed to provide him or her with compensation within 15 days of its due date. In that case, the agreement ceases to be valid on the first day of the calendar month following the delivery of the notice.

VI WAGES

i Working time

The standard working time is 40 hours per week, which also is the statutory maximum for employees working in a single-shift regime. The working week for employees in a two-shift or three-shift regime (whereby they regularly mutually switch between two and three shifts within 24 consecutive hours) is 38.75 or 37.5 hours, respectively.

An employer may distribute working hours evenly (over five working days during the week), or unevenly, in a more complex pattern over a balancing period exceeding one week. A single shift (without overtime work) may not exceed 12 working hours and the employer must distribute working hours so that the employee has a rest between shifts of at least 11 consecutive hours and uninterrupted weekly rest of at least 35 consecutive hours (including Sunday, if possible).

Night work means work performed between 10pm and 6am the following day, and the duration of a night shift may, as a rule, not exceed eight hours within 24 consecutive hours. For night work, employees are entitled to additional pay of at least 10 per cent of their average earnings (unless otherwise agreed).

ii Overtime

Overtime work is defined as work in excess of the full-time weekly working hours determined in the work shifts schedule. Employers should only require overtime work from employees as an exceptional measure.

Unless agreed otherwise, overtime work performed by an employee may not exceed eight hours in a single week and 150 hours in a calendar year. If the employee agrees to perform overtime work exceeding the yearly limit of 150 hours, that work may not exceed, on average, eight hours per week over a balancing period of 26 or 52 consecutive weeks. As a result, employees may actually perform a total of 416 hours of overtime work in a year, subject to his or her individual consent.

For performance of overtime work, employees are entitled to their salary and additional pay of at least 25 per cent of their average earnings, unless an employer and an employee agree that the employee will be provided with compensatory time off corresponding to the amount of overtime work. An employer and an employee may agree that the salary of the employee includes performance of overtime work. The statutory limit for including overtime work in a regular salary is 150 hours per calendar year for standard employees and 416 hours per calendar year for managing employees.

VII FOREIGN WORKERS

Citizens of Member States of the European Union and European Economic Area (EEA) and of Switzerland may seek employment in the Czech Republic freely without a working permit or visa. These citizens may be also posted to the Czech Republic by their employers for a limited period when meeting the conditions of the New PWD Directive and related regulations. Third country citizens need to obtain a residence and a work permit, Employee Card or Blue Card; the latter combine the residence and work permit.

The Employee Card is a long residence permit for third country citizens whose purpose for staying in the Czech Republic is employment. Holders of the Employee Card are entitled to reside and work in the territory of the Czech Republic in the job for which the Employee Card was issued or for which the consent was granted. The Employee Card is usually issued for the duration of the employment, to a maximum of two years, with an option to repeatedly extend its validity. The Blue Card is similar to the Employee Card and is intended for third country citizens to perform a highly skilled job.

An employer is obliged to keep records of its foreign workers, containing basic information such as identification data, the type of work and the date of commencement of the work. The number of foreign workers an employer may have is not limited.

Employers are obliged to notify in writing the competent regional labour office of the employment of a foreigner on the day the worker commences performance of work, at the latest. In respect of workers posted in the European Union, the posting employer must send this notification. Employers are further obliged to inform in writing the competent regional labour office within 10 calendar days, at the latest, that a foreigner ended performance of his or her work or that the posting has concluded.

A foreign worker may be subject to Czech taxation, especially to income tax, if he or she is a permanent resident in the Czech Republic or is present in the Czech Republic for more than 183 days in a calendar year. When an employee is considered a resident in more than one country, tax residency is usually determined according to the applicable double taxation treaty.

Whether a foreign employee is protected under local employment law depends on the law applicable to the employment contract and to the time spent in the territory of the Czech Republic in respect of a posting in the European Union. Pursuant to the PWD Directive and its implementation to the Czech Labour Code, the local legal provisions apply particularly in the following areas: the maximum length of working hours, the minimum length of rest periods, annual leave, minimum wage, occupational health and safety.

VIII GLOBAL POLICIES

There is no statutory requirement for companies to have any disciplinary rules. Most employers issue internal regulations to regulate employment relationships in respect of rights and duties that do not have to be set down in the employment contract. Disciplinary rules would typically be established by internal regulations, not in an employment contract. Internal regulations, like a code of business conduct, have been more typically used by international groups of companies that implement global policies but similar internal regulations are increasingly being implemented by other employers.

An employer issues internal regulations unilaterally. They take effect as of the date of an announcement to employees or any other later date specified in the regulation. Upon the issuance of an internal regulation, all its changes and its abolishment must be announced

to employees within 15 days. The text of an internal regulation must be available to all employees and the employer must archive each internal regulation for 10 years after its expiry. The law prescribes no form of announcement or publishing; email and the company intranet are increasingly used. If trade unions are established within the organisation, they must be consulted in most cases regarding regulations, but no consent is required and non-compliance with this obligation does not make a regulation invalid.

There is no legal obligation to have internal employment regulations drawn up in Czech but since, in the event of any dispute, the employer must prove that employees have understood the regulations, it is recommended in most cases that Czech is used for internal employment regulations.

IX PARENTAL LEAVE

Czech law distinguishes between three types of leave in connection with the care of a child. All types of childcare-related leave are also available for parents who are taking a child into their care in place of the biological parents.

Maternity and parental leave are considered protected periods, during which the relevant employee is protected from dismissal. Employers have a statutory obligation to provide an employee returning from maternity leave with the same position as was held before the maternity leave (or parental leave to the extent of the maternity leave). Employers also have a statutory obligation to provide an employee returning from parental leave with a position corresponding to the employment contract.

i Maternity leave

In connection with childbirth and care for a newborn child, a female employee is entitled to maternity leave for 28 weeks. Should an employee give birth to two or more children at the same time, the employee is entitled to maternity leave for 37 weeks. Maternity leave usually commences at the beginning of the sixth week prior to the expected date of birth, but not before the beginning of the eighth week prior to the expected date of birth.

During maternity leave, employees are entitled to financial support in maternity (PPM),³ which is fully funded by the state. The amount of PPM corresponds to 70 per cent of the gross average salary of the employee; the law also stipulates the minimum and maximum amounts of financial help due.

ii Paternity leave

The father of a newborn child is entitled to seven days leave, which must be used within six weeks of the date of birth of the child. Similar rules as in case of maternity leave apply.

iii Parental leave

The mother is entitled to parental leave after the expiry of maternity leave and the father from the birth of the child. The maximum duration is until the third birthday of the child. An employee on parental leave is entitled to a parental allowance funded by the state.

³ *Peněžitá pomoc v mateřství.*

X TRANSLATION

Czech law does not require employment documents to be translated into Czech or into an employee's native language. However, in the event of a dispute, the employer must be able to prove that its employees have understood all documents relating to the employment relationship, such as the employment contract, employee handbooks, internal policies or confidentiality agreements.

It is recommended that documents are prepared in bilingual version, with one of the languages being Czech. This approach is also practical since the State Labour Inspectorate may request these documents during an inspection and the employer must be prepared to provide a translation if one does not already exist.

XI EMPLOYEE REPRESENTATION

Employees in the Czech Republic are permitted, but not obliged, to form representative bodies (trade unions or works councils) or elect a representative for occupational safety and health protection. Pursuant to the applicable EU legislation implemented in the Czech Labour Code, employees are also permitted to create a works council. The employer is obliged to inform or consult employee representatives about certain organisational or personnel changes, or must fulfil these obligations towards employees individually if there are no active employee representatives. There are no strict requirements for the frequency with which employee representatives should meet.

i Trade unions

The right to form trade unions results from the Czech Charter of Fundamental Rights and Freedoms. A trade union may operate with an employer only if (1) it is authorised to such operation in its statutes and (2) at least three members of the trade union are employed by the respective employer. Upon meeting these conditions, an unlimited number of trade unions may be active with the employer. The employer may neither prohibit its employees from becoming members of a trade union nor discriminate against them in connection with their activities within the trade union. Trade unions active with an employer always represent all employees, including those who are not members of the trade unions.

Employers must keep trade unions informed on several matters, such as the economic situation, working conditions, occupational health and safety protection or equal treatment, and in particular must consult trade unions regarding the employer's economic situation, workload and work pace, changes in the organisation of work, the system of employee remuneration, dismissals and other important matters pursuant to the Labour Code. The trade unions also approve holiday schedules and may enter into collective agreements with the employer and influence or participate on some employer's decisions. The employer must consult the trade unions in respect of each termination with a notice period or immediate termination; however, the trade union may not veto a termination.

Trade unions may decide on the election procedures for their body members and the length of their term of office. Trade union members who hold an office in the union enjoy special protection during their term of office (and for a period of one year afterwards), in that the employer may not dismiss these employees without the prior consent of the trade union.

ii Works councils and representatives for occupational health and safety protection

Works councils and representatives for occupational health and safety protection may be constituted for each employer individually. A works council may have between three and 15 members (the number of members must be always odd).

The number of representatives for occupational health and safety protection depends on the total number of employees of the employer, since a maximum of one representative per 10 employees may be appointed. Representatives are elected for three years.

For elections to these bodies, one third of an employer's employees must sign and deliver a written proposal, upon which the employer is obliged to organise an election within three months of delivery of the proposal.

XII DATA PROTECTION

In May 2018, a new complex personal data protection regime was implemented by Regulation 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC, also known as the General Data Protection Regulation (GDPR).

i Requirements for registration and other general obligations

Employers have no obligation to register with the Czech Office for Personal Data Protection (the Office). All employers in their role as data controllers are obliged to maintain a register of their data processing activities, particularly with respect to personal data processed systematically and with respect to all employee personal data. The Office monitors compliance with this obligation and a register of data processing activities must be provided to the Office in the event of an inspection.

Employers have an obligation to inform employees about the processing taking place, and secure the processed data by implementing appropriate technical and organisational measures depending on the type of data processed and its extent. Recommended best practices are maintaining a strong password policy, clean desk policy or regular employee training.

Employers should only process data that they need to fulfil their statutory rights and duties and no employee consent is required for this type of processing.

ii Cross-border data transfers

Transfers of personal data to countries within the European Union and EEA are allowed under the same conditions as domestic data processing. They do not have to be notified to the Office but they have to be described in the register of processing activities.

Transfers of personal data to countries outside the European Union and EEA are only permitted if the recipient of the data can ensure an adequate level of protection. The European Commission identified certain countries outside the European Union as having an adequate level of protection, including Switzerland, Japan, Canada and the United States (the EU-US Privacy Shield was adopted in 2016). In other countries, an adequate level of protection can be ensured by individual agreements with the data recipient, binding corporate rules, certification mechanism, codes of conduct, and the like.

iii Sensitive data

The processing of personal data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, a natural person's sex life or sexual orientation shall be prohibited. Sensitive data can only be processed by the employer in exceptional situations when this is explicitly permitted or required by statutory provisions (typically, notification duties with respect to social and health security insurance).

iv Background checks

Background checks by the employer are allowed but must be limited to matters that are relevant for the specific job. An employer cannot require from a potential employee information concerning pregnancy, family and property situation, sexual orientation, racial or ethnic origin, trade union membership, affiliation with political parties, or religion. Criminal record checks can be requested based on the general principle that it must be important and adequate for the specific position.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

There are three possible types of dismissal: termination with a notice period, immediate termination for serious cause, and termination during a trial period. The employer or the employee may terminate the employment during a trial period without stating any cause. Once the trial period has expired, the employer may terminate an employment agreement only for one of the reasons set out in the Czech Labour Code. However, the parties may terminate the agreement at any time by mutual agreement.

Termination with notice period or immediate termination are subject to consultation with trade unions, and trade unions members are subject to special protection (see Section XI). In the case of individual terminations, which do not fall under collective dismissal (see Section XIII.ii), the employer is not obliged to inform any state authorities. The employer has no obligation to provide a social plan or to offer any alternative employment to the affected employees.

Form of dismissal

The termination notice must be in writing, delivered to the employee and stipulate the reasons for termination, except in the case of a termination during a trial period, when no reasons are required.

Notice period

In respect of a standard termination notice, the employment terminates upon the expiry of the notice period. The standard notice period is two months; it can be longer if agreed in the employment contract and by both the employer and the employee. The notice period starts on the first day of the calendar month following the month in which the termination notice was delivered to the employee. Pay in lieu of the notice period is not permissible. Employment continues during the notice period but garden leave is often used, whereby employers release employees from their duty to work during the notice period.

When an employee is dismissed for serious cause by an immediate termination, the employment is terminated with immediate effect. During the trial period, employment is terminated without a notice period, usually as of the day of delivery of the termination notice, unless the notice stipulates a later date within the trial period.

Special dismissal protection

Some groups of employees enjoy protection with respect to dismissal. The Labour Code introduced a special protection period during which the employment contracts of certain employees may not be terminated. This applies to employees who are pregnant, on maternity leave, or while employees are absent because of illness, serving a term in public office or on military exercises, among others.

Severance pay

An employee is entitled to severance pay for termination with notice or by agreement in the event that the employer's undertaking, or a part of it, is closed down or relocated or if the employee becomes redundant. The amount of the severance pay depends on the length of the employment. An employee is entitled to at least (1) the equivalent of his or her average monthly earnings if the length of service is less than one year, (2) twice his or her average monthly earnings if the length of service is at least one year but less than two years, or (3) three times his or her average monthly earnings if the length of service is two years or more.

If the reason why an employee is dismissed with notice or by agreement is because of his or her incapacity to work resulting from a work injury, occupational disease or a threat of occupational disease, the employee is entitled to severance pay amounting to at least 12 times his or her average monthly earnings (unless the employer is entirely relieved from liability for the work injury or occupational disease).

ii Redundancies

As stated in Section XIII.i, an employer may terminate an employment agreement only for one of the limited reasons set out in the Labour Code, of which one is redundancy. Employees becomes redundant following a decision by an employer to make organisational changes.

Collective dismissal

Special rules for collective dismissal apply if the same employer dismisses a certain number of employees (depending on the total number of its employees) within 30 calendar days for organisational reasons. The employer is obliged to inform the trade unions and the works council in writing at least 30 days in advance of the collective dismissal, stating the reasons. If there is no trade union or works council, the employer must inform each affected employee individually. At the same time, the employer is obliged to inform the competent regional labour office of the planned collective dismissal and provide a written report on the decision leading to that collective dismissal and the conclusions of consultations with the employee representatives. If an employer fails to inform the labour authority, the employment relationships of the affected employees will not be terminated.

XIV TRANSFER OF BUSINESS

Employees affected by a transfer of business are protected by rules set down by EU Council Directive 2001/23/EC of 12 March 2001 (the Acquired Rights Directive). The Directive has been implemented in the Czech Labour Code.

The legal definition of a transferring business is rather extensive: a transfer of rights and duties of employees occurs if the activity or a part of the activity of an employer or tasks or a part of tasks of an employer (the transferring business) are transferred and the transferee continues to operate it. As a consequence, all employment relationships that are allocated to the transferring business transfer with all rights and obligations to the transferee by operation of law. The employment conditions remain unchanged and working conditions should not be worse as a result of the transfer.

The transferor and the transferee are obliged to notify the employees who are subject to a transfer of their employment relationship 30 days before the planned date of transfer. There is an administrative fine of 200,000 koruna for non-compliance with the information obligation but non-compliance does not affect the outcome of the transfer.

An employee affected by a transfer of business may terminate his or her employment with effect from the actual date of the transfer. An employer cannot terminate the employment of an employee because of the transfer of business.

XV OUTLOOK

Employers should be prepared for significant legislative changes in labour law during 2020, as an amendment to the Labour Code is expected to be adopted. The aim of the amendment is to adapt the Labour Code to meet current trends and needs in employment practice, noting the following changes in particular:

- a* the calculation of annual leave;
- b* shared working places;
- c* regulation of the delivery of documents relating to employment relationships; and
- d* regulation of the transfer of rights and obligations arising from employment relationships.

The amendment will also reflect the new (updated) EU legislation on the posting of a worker within the European Union (Directive (EU) 2018/957 of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services). For further discussion on the amendment, see Section II.

Employers should increase their vigilance in ensuring compliance with applicable labour law regulations. It is expected that the activity of the State Labour Inspectorate will be intensified in 2020. The Inspectorate verifies compliance with legal obligations relating to general working conditions and safety at work in the Czech Republic. As in previous years, the Inspectorate shall focus mainly on illegal employment, in particular employment of foreign workers without a permit, and concealed agency employment.

DENMARK

Tommy Angermair, Mette Neve and Caroline Sylvester¹

I INTRODUCTION

Danish employment law is based on a ‘flexicurity’ model. According to this model, employers have substantial flexibility to make staff adjustments (headcount management, changing employment terms and conditions, etc.) and there is a high degree of job mobility, but this is balanced by comprehensive social security (unemployment benefits) and an active labour market policy that involves several measures to counter unemployment.

The employment relationship is governed by a combination of statutory rules applicable to all employee categories, special rules for certain employee categories and a number of general unwritten principles.

Some significant employment issues are governed by statutory rules applicable to all employees (e.g., holiday, working environment, employment contract requirements, personal data protection and discrimination), whereas other significant issues are not (e.g., minimum salary, normal working hours and overtime pay).

Employees are roughly divided into three categories: white-collar workers (salaried employees), blue-collar workers and chief executive officers (CEOs).

The employment relationships of white-collar employees are mainly governed by the Salaried Employees Act, which addresses minimum notice periods, protection against unfair dismissal, restrictive covenants and pay during sick absence. No particular law applies solely to manual workers, but in practice their terms and conditions are predominantly governed by collective agreements negotiated with relevant trade unions. With a few exceptions, CEOs are not covered by statutory employment laws and their terms and conditions of employment are generally subject to freedom of contract.

The labour market is regulated by collective agreements to a great extent. These agreements typically govern the terms and conditions of employees within a field or sector, such as the industrial sector or the financial sector, as opposed to the terms and conditions of employees who are members of a particular union.

A collective agreement is applicable to the extent that the employer is a member of an employer organisation that is a party to, or covered by, the collective agreement in question, or has acceded to the collective agreement by way of an agreement with the relevant union or unions.

An employee’s membership of a union does not in itself imply that the employer is bound by any of the collective agreements applicable to that union.

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Danish employees are unionised to a fairly wide extent (currently, about 60 per cent), which is mainly attributable to the Danish labour market tradition.

Employment-related disputes that are not settled by way of negotiation are ultimately settled by the ordinary Danish courts, which consist (in hierarchical order) of several city courts, two high courts (as well as the Maritime and Commercial Court), and the Supreme Court, assuming that dispute resolution by way of arbitration has not been agreed. Before reaching the courts system, certain types of disputes are tried by special tribunals, such as the Equal Treatment Tribunal. Disputes within the collective agreement system are normally settled by way of industrial arbitration or by the Labour Court.

Apart from the above-mentioned dispute resolution system, employment law rules and principles are enforced by several government bodies within their respective areas of competence.

II YEAR IN REVIEW

The business and financial climate has generally been very favourable, and the outlook for the coming years is positive.

In recent years, including 2019, Denmark has consistently been ranked by the World Bank² as one of the top five best countries in which to do business.

One significant, positive sign was the substantial decrease in the unemployment rate from July 2017 to January 2019; and between February and November 2019, the employment rate was 3.7 per cent. In relation to gender equality regarding employment and pay, Denmark is above the EU average. Generally, Denmark focuses on making education more flexible and linking it closely to the labour market, and it spends more than 6 per cent of gross domestic product on education, whereas the EU average is 4.6 per cent.³

One of the hottest topic in Danish employment law is still the EU General Data Protection Regulation (GDPR), which became effective on 25 May 2018. Employers in all sectors have allocated very substantial internal and external resources to their GDPR compliance effort. Among the main challenges are meeting data retention periods, handling data subject requests and managing data processor requirements.

The Danish Parliament adopted a new Holiday Act in 2018, which will be effective from 1 September 2020. The new Act will fundamentally alter the Danish holiday system. The largest change is the transition from a staggered holiday system to a concurrent holiday system, which implies that holiday is accrued and taken in the same holiday year or no later than 31 December in the following year. The new Holiday Act includes a transitional rule, which means it became partially effective on 1 January 2019.

III SIGNIFICANT CASES

On 19 August 2019, the Supreme Court gave a ruling regarding wrongful summary dismissal. In this case, an employee had audio recorded a meeting (without the knowledge of the other participants), during which he had thrown a computer mouse across the room. These events resulted in summary dismissal of the employee, which he claimed was wrongful. The Supreme Court found that, under the circumstances, throwing the computer mouse was not

2 www.doingbusiness.org.

3 See <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8270&furtherPubs=yes>.

a sufficiently fundamental breach of the employment contract to justify a summary dismissal. In relation to the audio recording, the Court found that whether an audio recording is a fundamental breach of the employment contract depends on a specific assessment, in which the purpose and the reason for the audio recording must be considered. Furthermore, it must also be considered what information the employee expected or intended to record. In the specific case, the Court found that the summary dismissal was wrongful.

During 2019, the Maritime and Commercial Court gave three rulings regarding a dismissal with reduced notice (one month) because of sick leave amounting to at least 120 days pursuant to Section 5(2) of the Salaried Employees' Act (see Section XIII.ii). The Court found that Sundays, public holidays and other days off work must be included in the 120 days when an employee is on sick leave full-time. This has also been the general practice to date. All three rulings have been appealed.

On 19 November 2019, the Supreme Court gave a ruling in a case regarding calculation of compensation for lost commission during holiday, to which, according to the Holiday Act, an employee is entitled. The employee had claimed that the compensation should be based on the prior three months' commission with correction for absence. The Court ruled in favour of the employer and found that the employee was entitled to 12.5 per cent of the commission earned in the previous calendar year (year of accrual).

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Pursuant to the Employment Contract Act, employees are required to have a written employment contract, provided the employment is for more than one month and the employee's weekly working hours are at least eight hours on average.

Under the Act, employers are required to inform their employees in writing of all the material terms and conditions of employment within one month after the commencement of employment.

Certain minimum information that is always required is mentioned explicitly in the Act, such as the name and address of the employer and employee, the place of work, the employee's right to holiday, rules on notice periods, and salary, supplements and time of payment. In addition, the employer must provide a description of other material terms and conditions, such as special benefits (e.g., company car, newspapers, telephone), the right to participate in an incentive compensation scheme, restrictive covenants and special employee policies (e.g., regarding IT, expenses or smoking). Typically, these terms (except for the special policies) are reflected in the employment contract, but it is permitted to provide a description of the terms in one or more other documents, such as an employee handbook. If so, that document must be referenced in the employment contract.

The Act provides that in the event of an employer's violation of the Act, the employer will be liable to pay compensation to the employee up to 13 weeks' salary (20 weeks' salary if there are aggravating circumstances). The compensation level was further determined in the Supreme Court ruling of 17 December 2010, according to which the typical compensation level ranges from zero to 25,000 Danish kroner. Generally, any such compensation claims are only initiated in connection with a non-amicable termination of employment.

With regard to amendments to employment terms, the decisive criterion is whether the amendments are materially detrimental to the employee (i.e., material changes).

Non-material changes can be implemented unilaterally by the employer without notice or consent by virtue of the employer's right of management, but normally notice is given.

Material changes implemented by the employer require consent or a notice equal to the employee's individual notice of termination (or longer), regardless of any contractual wording stipulating the contrary (which is often seen in Anglo-American contracts). Material changes imposed without consent will not become effective until after the expiry of the notice period. Any such changes will entitle the employee to consider himself or herself dismissed with effect from the expiry of the notice period, in which case the normal rules on termination will apply.

If material changes are implemented without sufficient notice or consent, the employee may potentially claim constructive dismissal and terminate the employment without notice.

Fixed-term employment contracts are permissible. However, the Act on Fixed-term Employment provides for certain restrictions, including a prohibition against discriminatory treatment of fixed-term employees with regard to employment terms. Also, according to the Act, fixed-term employment contracts can only be renewed once, unless there are objective reasons to do so.

Under the Holiday Act, all categories of employees are entitled to 25 days' holiday per holiday year, which runs from 1 September to 31 August. As discussed in Section II, the new Holiday Act became partially effective on 1 January 2019 and will take full effect on 1 September 2020. Employees are entitled to 2.08 paid holidays per month and can take the holiday in the same holiday year or no later than 31 December the following year. The employer is required to pay a holiday supplement equal to 1 per cent of the employee's total remuneration. When the employment relationship ends, the employer is required to pay compensation in lieu of untaken paid holiday to the Danish Labour Market Holiday Fund (at least 12.5 per cent of the total remuneration in the calendar year during which the employment ends). Subsequently, the employee can withdraw the compensation when he or she takes the outstanding holiday (i.e., typically with a new employer).

Salaried employees are entitled to full pay during sick leave, whereas blue-collar workers have no such right, unless otherwise stipulated in a collective agreement.

Taxes are deducted at source and the employer is required to report and withhold income taxes from the salary payments made to employees.

ii Probationary periods

For salaried employees, probationary periods of up to three months are allowed. During the probationary period, which must be explicitly agreed, the employment can be terminated with 14 days' notice by the employer and without notice by the employee, assuming the notice period expires during the probationary period. It is possible to agree on a mutual 14-day notice period, which is very common. The only significance of the probationary period is that the employment can be terminated with a shorter notice period than the normal minimum notice of termination (see Section XIII.ii).

There are no statutory rules applicable to blue-collar workers or CEOs and, consequently, there is no maximum probationary period, unless the employee is covered by a collective agreement providing for a maximum period.

iii Establishing a presence

A foreign employer can hire employees in Denmark without setting up a business in Denmark, but the employer must be registered with the Danish Business Authority.

An employer that is not officially registered in Denmark can engage an independent contractor. If a foreign employer has hired one or more employees to work habitually in Denmark, the employer will, as a rule of thumb, be deemed to have a permanent establishment in Denmark, assuming the employees have, and habitually exercise, a general authority to conclude contracts in Denmark on behalf of the employer. The main consequence of having a permanent establishment in Denmark is that the income and costs allocated to the permanent establishment will be subject to Danish taxation. A foreign employer temporarily providing services via employees present in Denmark must report certain information for the Register of Foreign Service Providers (the RUT). Lack of reporting can result in a fine of up to 10,000 Danish kroner.

Foreign employers must comply with all employer obligations under Danish law with regard to workplaces subject to Danish law, including the obligation to pay certain social contributions and to provide certain benefits to the employees.

Compared to other European countries, the level of social security payments required from the employer is low (roughly 15,000 Danish kroner per employee per year).

V RESTRICTIVE COVENANTS

In general, the law permits that three types of restrictive covenants are concluded, namely non-compete covenants, covenants for the non-solicitation of customers and other business contacts (non-solicitation of customers), and non-solicitation of employees. In the absence of any such clauses, the employer has no substantial protection against the post-employment activities of former employees in Danish law, except for the general protection of trade secrets in the Trade Secrets Act .

A Restrictive Covenants Act was adopted with effect from 1 January 2016. The Act replaced the radically different rules in the Salaried Employees Act, the Act on Job Clauses and the Contract Act with regard to restrictive covenants agreed on or after 1 January 2016. The previous rules still apply to restrictive covenants agreed before 1 January 2016.

i Covenants agreed before 1 January 2016

The Salaried Employees Act, which applies only to salaried employees, covers non-competition and non-solicitation of customer covenants, whereas the Act on Job Clauses is applicable to salaried employees and blue-collar workers, and covers non-solicitation of employee clauses. The Contract Act applies to all contracts and, therefore, all types of restrictive covenants.

In terms of blue-collar workers and CEOs, no specific rules apply to non-competition and non-solicitation of customer covenants, apart from the requirements in the Contract Act that the covenants must be on reasonable terms (not excessive) and that a non-competition covenant will lapse automatically if a worker's employment is terminated by the employer and that worker has not given reasonable justification for having breached the terms of his or her employment contract (e.g., the reason for the termination being a restructuring of the company or the company's financial situation). However, in practice, the courts are likely to deem restrictive covenants that are agreed with blue-collar workers as unreasonable and therefore set them aside in whole or in part.

For a non-compete covenant agreed with a salaried employee to be valid, the employee must hold a particularly trusted position pursuant to the Salaried Employees Act. This requirement does not apply to other types of restrictive covenants.

The validity of a non-competition or non-solicitation of customers covenant is conditional upon the conclusion of a written agreement stipulating the extent of the covenant and a right for the employee to receive compensation equal to at least 50 per cent of total remuneration (as at the expiry of the notice period) during the period from the end of employment until the expiry of the covenant. If the employee finds suitable alternative employment during the term of the covenant, the employer will be entitled, to a certain extent, to set off the income from that employment. If the employee becomes self-employed, the employee will – as a general rule – forfeit the right to receive compensation as from the start of the self-employment.

A non-solicitation of customers covenant can be extended to cover any customer or other business contact (e.g., a supplier or prospective customer) with which the employer has had commercial contact in the course of the 18 months preceding the notice of termination and with whom the employee has had personal contact, or who appears on a list provided to the employee before the termination.

Covenants on non-solicitation of employees (job clauses) are subject to special rules in the Act on Job Clauses. It is an express condition that the limitations of the employee's job opportunities, and an entitlement to compensation during the limitation period equal to at least 50 per cent of the employee's total compensation, are reflected in a written agreement with the employee whose job opportunities are limited. If the requirements in the Act are not complied with, the job clause will be entirely null and void, regardless of any severability clause.

ii Covenants agreed on or after 1 January 2016

The three above-mentioned types of restrictive covenants are covered by the Restrictive Covenants Act. The key differences from the rules applicable to clauses agreed before 1 January 2016 are:

- a* the rules apply to all types of employees;
- b* there are substantially stricter validity criteria for non-competition and non-solicitation of customers covenants; for example, the non-solicitation clause only covers customers, suppliers or other business partners (1) with whom the employee has had a business relationship during the 12 months preceding the date of the notice of termination, and (2) which explicitly appear on a list of the customers, etc. provided by the employer in connection with the employee or the company giving notice of termination;
- c* job clauses are generally null and void, with certain exceptions;
- d* restrictive covenants can apply for a maximum of 12 months;
- e* combined non-competition and non-solicitation of customers covenants can apply for a maximum of six months;
- f* the minimum level of compensation to which an employee is entitled has been increased to 60 per cent, if a non-competition or a non-solicitation of customers covenant applies for between seven and 12 months, or a combined non-competition and non-solicitation of customers covenant is agreed. The minimum level of compensation has been decreased to 40 per cent if a non-competition or a non-solicitation of customers covenant applies for up to six months; and

- g the right to set off against compensation because of other employment or self-employment is further restricted. If the employee finds alternative suitable employment, the minimum level of compensation to which an employee is entitled is either (1) 16 per cent of the employee's remuneration effective from the third month after the date of termination, if a non-competition or a non-solicitation of customers covenant applies for up to six months, or (2) 24 per cent of the employee's remuneration effective from the third month after the date of termination, if a non-competition or a non-solicitation of customers covenant applies for between seven and 12 months or a combined non-competition and non-solicitation of customers covenant is agreed.

VI WAGES

i Working time

The normal working hours are not determined by law and are therefore subject to freedom of contract as a general rule. The same applies to an employee's obligation to work overtime.

According to best practice (and most collective agreements), the normal working hours are 37 hours per week, inclusive or exclusive of a 30-minute lunch break. However, it is set forth in the Act on Working Time (which implemented Directive 93/104/EC) that the average week must not exceed 48 hours, including overtime, within a four-week reference period.

Under the Working Environment Act, employees must have at least one day off that must be directly linked to a daily rest period within each seven-day period. The Act also provides the general rule that working hours must be arranged so that employees have a rest period of at least 11 consecutive hours within each 24-hour period.

These rules and principles also apply to night work.

ii Overtime

The law does not require overtime compensation and consequently it is common within the private sector that employees are required to work overtime without separate remuneration, according to their employment contracts.

Most collective agreements require paid overtime or time off in lieu and, considering that most blue-collar workers are covered by collective agreements, the practical main rule is that most blue-collar workers are entitled to overtime compensation.

VII FOREIGN WORKERS

In terms of living and working in Denmark, the decisive factors are the employee's nationality and qualifications.

If the person is a citizen of the European Union or European Economic Area (EEA), or is a Swiss citizen, neither a visa nor a work permit is required, but the applicant will need a registration certificate from the Danish Agency for International Recruitment and Integration (SIRI) to reside in Denmark for more than three months. A registration certificate simply confirms the rights already held by the person in question according to the EU regulations on free movement of persons and services.

Citizens from a number of non-EU and non-EEA countries, such as the United States, are not required to obtain a visa to enter Denmark, but all non-EU and non-EEA or Swiss citizens must have a work permit to work in Denmark. In certain cases, however, certain limited work-related activities may be performed while legally staying in Denmark.

A number of schemes, e.g., the Fast-track, Pay Limit and Positive List, have been introduced to make it easier for highly qualified professionals to obtain a work permit and thereby gain access to the Danish labour market. The Fast-track scheme makes it quicker and easier for certified companies to recruit foreign employees with special qualifications to work in Denmark. This means that highly qualified employees can have a quick and flexible job start in the certified company. An employee can use the Pay Limit scheme if the annual salary is at least 436,000 Danish kroner, and the Positive List can be used if the employee's job is listed on SIRI's website as a profession that is currently experiencing a shortage of qualified professionals.

The employer is not required to register the number of foreign nationals it employs. However, if a foreign employer posts employees to work in Denmark (while remaining in employment with a foreign employer), certain information must be registered with the Danish authorities. Generally, there is no limit on the number of foreign employees a workplace or company may have.

The employer obligations to withhold or report on tax mainly depend on the employee's tax status in Denmark (subject to unlimited or limited taxation), the employee's salary and whether the employer is Danish or foreign.

Foreign workers subject to Danish employment law are protected by those laws to the same extent as Danish employees.

VIII GLOBAL POLICIES

Danish law prohibits discrimination against employees by employers and this fundamental principle is reflected in a number of statutes and substantial case law. Internal disciplinary rules are not required by law, but it is generally recommended to prepare, implement and enforce written rules on discipline and appropriate conduct, and other key workplace-related matters.

Typically, these rules are part of an employee handbook or similar document that covers numerous workplace-related matters, such as use of the employer's IT facilities, paid and unpaid leave, and sick absence. As a general rule, neither the employees nor any government authority or other third party is required to approve or agree to such rules.

The employer is free to decide on the process for implementing the rules. It is common that rules are simply posted on the employer's intranet and that the employment contract includes a reference to the location of the rules. Any new policies or policy changes resulting in material changes to the detriment of individual employees (e.g., a bonus scheme being abolished) must take place in accordance with the general principles for implementing material changes (see Section IV.i).

It is recommended to use a process that allows the employer to establish documentation stating that the rules have been duly implemented (i.e., introduced and made easily available to the employees) so as to promote enforceability of the rules.

The rules (as well as any other document setting out terms and conditions of employment) must be prepared in a language the employees can be reasonably expected to understand. If the normal working language is English, it will typically be sufficient to issue the rules in English. However, to reduce the risk of disputes on the basis of (alleged) language barriers or misunderstandings, it is advisable to prepare a Danish translation of the key rules.

To comply with the Employment Contract Act, the employment contract must include a reference to any company rules, including material terms and conditions.

IX PARENTAL LEAVE

Pursuant to the Act on Entitlement to Leave and Benefits in the Event of Childbirth, employees are entitled to pregnancy, maternity, paternity and parental leave from the beginning of the employment relationship.

A pregnant employee is entitled to pregnancy leave starting four weeks before the expected date of childbirth. After the birth, female employees are entitled to 14 weeks' maternity leave, of which the first two weeks after the birth are compulsory. The father or the co-mother is entitled to two consecutive weeks' leave after the birth or, subject to agreement with the employer, within the first 14 weeks after the birth. Each parent has an individual right to 32 weeks' parental leave after the child is 14 weeks old. However, the father or co-mother is entitled to begin the parental leave within the first 14 weeks after the birth. A parent can choose to extend the parental leave by eight or 14 weeks.

A pregnant salaried (white-collar) employee is entitled to half salary (including benefits and bonus) from the employer from four weeks immediately before the expected date of birth until 14 weeks after childbirth. In the absence of a collective agreement, blue-collar workers have no right to salary from the employer during pregnancy, maternity, paternity and parental leave. However, it is customary for employers to pay full salary during pregnancy, paternity and maternity leave. Furthermore, it is fairly common for employers to pay full salary during parental leave to both men and women to a certain extent. As a clear starting point, the employee is entitled to maternity benefit from the government (a maximum of 4,355 Danish kroner per week (2019) before tax) during pregnancy, maternity and paternity leave, if the employee does not receive any salary from the employer while taking leave. Moreover, if parents are not entitled to salary from the employer while taking leave, they are jointly entitled to maternity pay for 32 weeks.

Employers are entitled to reimbursement from the government of salaries paid to employees during pregnancy, maternity, paternity and parental leave. However, this entitlement only applies if an employee would have been entitled to maternity benefit had he or she not been receiving salary.

Pregnant employees and employees on paternity, maternity or parental leave have a special protection against dismissal according to the Equal Opportunities Act. In the event of a dismissal, the employer must be able to show that the dismissal was neither in whole nor in part based on pregnancy or paternity, maternity or parental leave (see Section XIII.i).

X TRANSLATION

Employment documents are generally not required to be prepared in Danish, but must be prepared in a language that employees can be reasonably expected to understand. If the normal working language is English, it will typically be sufficient to issue the rules in English. However, to reduce the risk of disputes on the basis of (alleged) language barriers or misunderstandings, it is recommended to prepare a Danish translation of the key documents, such as the employment contract and bonus scheme or other incentive compensation plans.

An important exception is the requirement in the Stock Option Act to deliver a written employer statement in Danish to each participant, assuming the employer has put certain types of share-based incentive compensation programmes in place.

If an employer fails to provide employment documents in a language that the employees can be reasonably expected to understand, the documents in question will potentially be rendered partially or wholly unenforceable in court. Furthermore, the employer may be liable to pay compensation for violating the Employment Contract Act (see Section IV.i).

There are no specific formalities for translation, when required.

XI EMPLOYEE REPRESENTATION

Rules on employee representation are set out in the employment law and company law frameworks. Danish employment laws contain several provisions for employees' rights to be represented in different situations. As an example, if a public or private limited company has employed an average of a minimum of 35 people within the past three years, employees of that company have a right to employee board representation. Companies with more than nine employees must establish a health and safety committee constituted of a representative of the employer or management of the company, certain managers or middle managers and employee representatives (working environment representatives).

Apart from employee representation rights in specific contexts, the employer's obligation to inform and consult its employees follows from either the Act on Informing and Consulting Employees (implementing Directive 2002/14/EC), which covers any employer with at least 35 employees that is not party to any collective agreement, or a collective agreement pursuant to which the employer has set up a works council and consults the works council in relation to certain workplace-related matters.

Under the above Act, the works council must be consulted with regard to, *inter alia*, the employer's financial situation, the latest and future developments, and any significant changes in the organisation of the work and working conditions. The employer is free to decide on the election process, the timing, method and contents of the information and consultation, but the employer must ensure an appropriate level of both.

Thus, consultation must occur at the relevant level of management and representation for the subject under discussion. Finally, consultation must be carried out in such a way as to enable the employee representatives to meet the employer and obtain a response, and to give the reasons for that response, to any opinion they might formulate with a view to reaching an agreement on decisions within the scope of the employer's powers.

It should be emphasised, however, that the employer is not required to follow the proposals from the employee representatives.

Rules on employee representation in public or private limited companies are set out in the company law legislation. A Danish employer that employs at least 35 employees is required to inform and consult employees about all employer-related matters of significant importance to the employees.

In the context of business transfers and collective redundancies, special rules apply in respect of information and consultation.

XII DATA PROTECTION

i Requirements for registration

The rules governing the processing of personal data are set forth in the GDPR and the supplementary Danish statute, the Data Protection Act (DPA), both of which were adopted in May 2018.

There is no general obligation for companies operating in Denmark to register with the Danish authorities in relation to their processing of personal data regarding employees, applicants and others (the data subjects).

Certain fundamental requirements applicable to all processing of personal data are provided in the GDPR and in the DPA. In particular, the GDPR requires that the processing of personal data is conducted for an explicit and legitimate purpose and only to the extent required by that purpose.

Another fundamental employer requirement is to provide certain information to data subjects in connection with the employer's collection of personal data regarding data subjects (whether from the employee in question or a third party). The mandatory information is set forth in the GDPR (Articles 13 and 14) and includes (1) the identity of the data controller, (2) the purpose of the data processing, (3) the types of personal data collected and processed, and (4) any further information that is necessary, having regard to the specific circumstances in which the personal data is collected, to enable the data subject to safeguard his or her interests (e.g., retention periods, the recipients, if any, and information regarding any transfers outside the EEA, including which appropriate safeguards have been provided).

All fundamental requirements must be satisfied regardless of whether consent is obtained from the data subject.

Under the GDPR, an employer is – as a general rule – permitted to process personal employee data, without obtaining employee consent, to a normal and reasonable extent in connection with the employer's administration of personnel.

Access levels to personal data must be limited to ensure that any access is given for a legitimate business purpose, namely on a need-to-know basis.

The employer is required by the GDPR to implement appropriate technical and organisational security measures to protect data against accidental or unlawful destruction, loss or alteration, and against unauthorised disclosure, abuse or other processing in violation of the provisions laid down in the GDPR.

Infringement of data protection law may result in a number of different sanctions, such as agency orders, fines and an obligation to indemnify any damage suffered by the data subject (and others, if relevant) as a result of the infringement, along with criticism from the Danish Data Protection Authority (DDPA). As the maximum fine has been increased very significantly (the higher of 4 per cent of annual group turnover or €20 million), any company should be aware of the financial risks associated with GDPR violations. Furthermore, infringement will most likely result in significant negative press coverage and bad will. The rulings of the DDPA are usually published on the DPA's website, which is monitored by the press to a certain extent. In April and June 2019, respectively, the DDPA announced that the first two companies had been reported to the police for GDPR violations, with proposed fines of 1.2 million kroner and 1.5 million kroner, respectively. The highest fine for data protection violations to date is 25,000 kroner. If the police reports result in indictments by the prosecution (as clearly expected) then the fines will be tried in criminal court proceedings. For constitutional reasons, the DDPA is not authorised to issue fines.

ii Cross-border data transfers

Any processing of personal data must be conducted in accordance with the fundamental requirements of the GDPR, including cross-border transfers. Cross-border transfers within the EEA are subject to the normal rules regarding disclosure of personal data in the GDPR. There is no requirement to register the transfer with the DPA.

Transfers of personal data outside the EEA is subject to special rules. The GDPR restricts transfers of data outside the EEA, unless the recipient is located in a geographical area approved by the European Commission, or if the data controller or processor has provided appropriate safeguards for protecting the personal data in question. According to Chapter 5 of the GDPR, the following three approaches are possible:

- a* Adequacy decisions: the European Commission is empowered to designate a country or a territory as providing an adequate level of data protection. According to the GDPR, the transfer of personal data is allowed to a country or territory that has this 'adequacy decision'. The European Commission makes its decisions based on factors such as the rule of law and respect for human rights. An example of this decision is the EU-US Privacy Shield. Countries and areas approved by the European Commission are listed on the Commission's website.
- b* Establishment of appropriate safeguards: the GDPR permits cross-border transfers of data, if the data controller or processor has provided the safeguards mentioned in Article 46 of the GDPR. This could be binding corporate rules, which define an intra-company policy, which, when approved by the relevant supervisory authority, establish appropriate safeguards with regard to transfers of personal data between companies within the EEA and companies outside the EEA. Appropriate safeguards can also be provided with the agreement of the European Commission's standard contractual clauses, which comprise standard data protection clauses adopted by the European Commission. The standard contractual clauses have standard formats for data transfer between data controllers, and data transfer between data controllers and data processors. The standard contractual clauses are available on the European Commission's website.
- c* Specific derogations: Article 49 of the GDPR includes specific approaches that permit data transfers in the event of failing to use the mechanisms described in points (a) and (b). For example, a data transfer may, under certain circumstances, take place with the data subject's consent.

iii Sensitive data

Generally, the legal basis for the processing of personal data depends on the type of data being processed – mainly, whether the data should be considered sensitive or not. According to the GDPR, the term 'sensitive data' is no longer used; instead, the GDPR introduces the term 'special categories of personal data' in Article 9. This category comprises genetic, biometric and health data as well as personal data revealing racial and ethnic origin, political opinions, religious or ideological convictions, or trade union membership. According to the GDPR, the processing of special categories of personal data requires consent from the data subject or other legal grounds specifically mentioned in the GDPR, but according to the DPA, the processing of special categories of personal data may take place (1) when the processing is necessary for the purpose of observing and respecting employment law obligations and the rights of the employer or the data subject as laid down by other laws or collective agreements, or (2) when the processing is necessary to enable the employer or a third party to pursue a legitimate interest that arises from other laws or collective agreements, provided the interests or fundamental rights or freedom of the data subject are not overridden.

Social security numbers are not special categories of data according to the GDPR, which means that this information is subject to the general processing rule in Article 6 of the

GDPR. However, according to the DPA, the processing of social security numbers requires a legal ground (e.g., consent from the data subject or that the processing activity is required by law).⁴

According to Danish administrative practice, records regarding criminal background checks are categorised as information regarding criminal offences and subject to the processing rule in Article 10 of the GDPR, unless the record is clean, in which case the information is subject to the general processing rule in Article 6 of the GDPR. However, according to the DPA, the processing of information regarding criminal offences requires a legal ground (e.g., consent from the data subject).⁵

iv Background checks

Background checks are allowed in general, though some, such as credit checks and criminal records checks, are permitted, subject to special requirements.

Credit checks are allowed with regard to employees in a position of trust or applicants applying for such positions (e.g., financial controllers, finance managers, key account managers or others with a certain financial responsibility and access to funds). The sole fact that a position involves access to funds does not imply that the position is considered a position of trust. As a general rule, credit checks require the consent of the employee or the applicant.

The employer is only permitted to collect information revealing criminal actions if that information is relevant to the position applied for by the applicant or undertaken by an existing employee, such as a crime committed for the sake of enrichment where the position involves financial responsibility (e.g., a managing director, chief financial officer or financial controller). Private employers do not have access to public criminal records. Generally, access to these records requires written consent by the applicant or employee in accordance with the Regulation on the Central Criminal Register.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Salaried employees

Under the Salaried Employees Act, a dismissal must be reasonably justified by the circumstances of the employer or the employee (e.g., redundancy and poor performance, respectively), assuming the employee has been employed for at least one year (as at the date notice is given). Otherwise, it will be unfair.

In other words, employees who have been employed for less than one year are not protected against unfair dismissal. However, they will be protected against any discrimination from the start of the employment under anti-discrimination legislation.

In the event of an unfair dismissal, the employee will be entitled to compensation of between one and six months' total remuneration, depending on length of service and other factors.

As a general rule, a dismissal on grounds of redundancy will be deemed fair, provided that the employer can demonstrate that the redundant position has not been immediately refilled.

⁴ See Part 3, 11 of the Data Protection Act.

⁵ See Part 3, 8 of the Data Protection Act.

In this situation, the employer – as a general rule – has discretion to select the employee who is redundant, and the employer is not required to use specific selection criteria. However, in terms of employees enjoying special protection against termination, the employer will typically need to justify having selected the protected employee instead of another employee and to demonstrate that no suitable alternative position was available at the time of termination.

A performance-based termination will generally not be considered fair unless the termination is based on a prior written warning.

According to Danish law, an employee may be dismissed because of sick leave provided that the sick leave is not related to pregnancy, disability or other circumstances affording the employee special protection against dismissal. In fact, pursuant to Section 5(2) of the Salaried Employees' Act, the employer may dismiss the employee because of sick leave amounting to at least 120 days during 12 consecutive months on the condition that the notice of dismissal is given immediately after the expiry of the 120 days of sick leave and while the employee is still absent.

Blue-collar workers

In the absence of a collective agreement, there is no protection against unfair dismissal. Any collective agreement typically provides rules on compensation for unfair dismissal with regard to workers with at least nine months' continuous service (as at the date notice is given). The compensation may amount to up to 52 weeks' salary but will normally be fixed at a considerably lower amount.

Employees enjoying special protection against dismissal

Certain employee categories enjoy special protection against dismissal according to the law, including, pregnant employees, employees on paternity, maternity or parental leave, employee-elected board members, employee-elected work environment representatives and union representatives.

Special protection does not rule out a lawful dismissal. However, in the event of dismissal, the employer must be able to show that it was neither in whole nor in part based on the conditions on which the special protection is based.

In the case of a termination in contravention of the rules affording special protection, the employer may be liable to pay significant compensation amounting to between three and 12 months' salary, as well as a penalty for violating the applicable collective labour agreements, if any. The compensation level is mainly dependent on the employee's period of continuous employment and the seriousness of the violation.

Moreover, special anti-discrimination legislation protects employees from dismissal on the basis of factors such as race, ethnic origin, age and disability. Employees who have been discriminated against may be awarded compensation of between six and 12 months' salary, based on recent case law.

ii Notice

Salaried employees

The minimum notice required from the employer to terminate an employment relationship is dependent on the employee's length of continuous service, and is between one and six months, to expire at the end of a calendar month. The minimum notice required from the employee is one month, to expire at the end of a calendar month.

The minimum notice periods required to be given by the employer are:

Employment period	Notice period
Up to 5 months	1 month
Up to 2 years and 9 months	3 months
Up to 5 years and 8 months	4 months
Up to 8 years and 7 months	5 months
More than 8 years and 7 months	6 months

After 12 or 17 years' continuous service, the employee will be entitled to statutory severance pay amounting to one or three months' total remuneration, respectively, if the employee is dismissed (provided the dismissal is not justified by material breach).

Blue-collar workers

Typically, the worker will be covered by a collective labour agreement setting out minimum notice periods for both parties. The notice required from the employer typically depends on the employee's length of continuous service with the employer.

Workers not covered by a collective agreement are not entitled to any particular minimum notice except for the notice agreed in their employment contract.

Salaried employees and blue-collar workers

The employer is not required to provide a social plan and is not required to notify a government authority or other third party, unless otherwise set forth in the applicable collective agreement, if any. Some of the laws relating to employees enjoying special protection against unfair dismissal provide a right of reinstatement; however, in practice, a dismissed employee is never reinstated.

Until the expiry of the notice period, employees are entitled to receive their normal base salary, variable salary (commission, bonus, etc.) and their usual benefits, such as insurance and pensions. Employees are required to continue working for the employer under the usual conditions during the notice period, unless they are released from their duties or put on gardening leave, which the employer may choose at its discretion. If the employee is released from his or her duties, the employer may – to a limited extent – offset any income earned from another employer during the notice period against the current salary.

The parties may choose to conclude a severance agreement outlining the rights and obligations resulting from the termination. There are no particular formalities required. This approach is mainly taken by companies to mitigate specific legal risks, for company policy reasons, or both.

Payment in lieu of notice is generally inconsistent with the employment law framework and is typically not recommended for a number of reasons.

In the event of the employee's material breach of the employment agreement, the employer can terminate the employment relationship without notice, or with notice at the employer's discretion.

iii Redundancies

The principles and rules applicable to dismissals (see Section XIII.i and ii) also apply to redundancies, with the exception of the special rules applicable to collective redundancies discussed hereunder.

The execution of collective redundancies must take place in accordance with the Act on Collective Redundancies (implementing Directive 98/59/EC), which sets forth a specific mandatory information and consultation procedure before the final decision to proceed.

The Act applies where the number of redundancies within 30 days exceeds:

- a* 10 employees in undertakings with between 20 and 100 employees;
- b* 10 per cent of the employees in undertakings with between 100 and 300 employees; or
- c* 30 employees in undertakings with more than 300 employees.

Under the Act, the employer must, at the earliest possible time, notify the Regional Employment Council and initiate consultations with the employees or their representatives for the purpose of reaching an agreement to either avoid or limit redundancies, and to alleviate the effects, for example by reallocating or retraining the affected employees.

If the employer proceeds with the redundancies after consultation, the employer must notify the Regional Employment Council, and the redundancies will be effective no earlier than 30 days (in some cases eight weeks) after that notification.

In the event that the mandatory procedure is not followed, the employer may be liable to pay compensation payments to the affected employees and possibly a fine.

Special rules on collective redundancies are often set forth in collective agreements.

XIV TRANSFER OF BUSINESS

The legal rights of employees in connection with a business transfer are governed by the Transfer of Undertakings Act (which implemented the EU Acquired Rights Directives).

In the event of a business transfer covered by the Transfer of Undertakings Act, the transferee will automatically assume the employment rights and obligations of the transferor in relation to the employees who are employed on the date of the takeover.

The transfer of rights and obligations applies to all terms and conditions regardless of whether the rights and obligations are based on the individual employment contract, a collective agreement or other grounds. The transfer only applies to employment relationships existing as at the date of the takeover.

As a result of the automatic transfer of employment, the transferee will become liable for all obligations (and the transferor will be released from its obligations), irrespective of whether the obligations pertain to the period before the transfer.

A business transfer does not in itself justify a dismissal of one or more employees. Dismissal resulting from a business transfer will only be deemed fair if justified by economic, technical or organisational reasons requiring changes in the workforce. For example, in a merger where, prior to the merger, both the transferor and the transferee have a chief financial officer (CFO), but following the merger only one CFO will be needed, the dismissal of either CFO will typically be regarded as fair.

Under the Transfer of Undertakings Act, the transferee can decide to renounce the collective agreements covering the employees of the acquired business by notifying the relevant unions within three weeks of the date of the takeover.

XV OUTLOOK

The hottest topic in 2020 will probably be the GDPR. It is our forecast that in the next year or so – as in 2019 – a combination of several factors will attract attention. Among these are the rapidly growing commercial pressure for having a responsible approach to processing data; the increased awareness of data subject rights; the high number of ongoing complaints to the national data protection regulators, which will result in several fines, some of which are likely to be very substantial; and the anticipated increase in the exercise of data subjects' rights and forthcoming disputes regarding the processing of personal data.

Further, the new Holiday Act will continue to attract attention because it becomes effective on 1 September 2020, and because the new Act fundamentally changes the current holiday system. This legal development is significant for legal professionals, employers and the public in general, who must prepare for this new holiday system before it becomes effective.

DOMINICAN REPUBLIC

*Rosa (Lisa) Díaz Abreu*¹

I INTRODUCTION

The legal framework that governs employment in the Dominican Republic is comprised of the Dominican Labour Code, which is enacted through the following:

- a* Law 16-92 dated 29 May 1992, as amended (the Labour Code);
- b* Regulation for the Implementation of the Labour Code No. 258-93;
- c* Law No. 87-01, which institutes the Social Security System of the Dominican Republic, as amended;
- d* all International Labour Organization agreements ratified by the Dominican Republic; and
- e* regulations issued by the Ministry of Labour of the Dominican Republic.

Labour laws have a territorial effect,² therefore any company that employs personnel in the Dominican Republic, or whose personnel provide services in the country, shall be subject to the Labour Code and implementing regulations, which govern labour contracts, labour conditions, unions, economic conflicts, strikes, work stoppages, salaries and benefits, among others. For foreign employees, or employment agreements with international elements or of an international nature, the Private International Law No. 544-14 admits the possibility of another substantive law applying to an employment agreement when the services provided by the employee have more ties with the jurisdiction of another country.

Labour laws are very protective of employees' rights, which are well defined and widely enforced. Employees' rights are inalienable, meaning that courts will deem any formal waiver of rights by employees as void and unenforceable.³

Labour courts have exclusive jurisdiction to solve disputes that arise between employers and employees, or solely between employees, in connection or related to the application of the labour laws, enforcement of contractual provisions or provisions of collective bargaining agreements. Labour courts also have jurisdiction to solve disputes between unions, between employees, between employees affiliated to the same union, or between employees and members of the union. Public opinion tends to sympathise with employees and courts are required to interpret the labour laws in a way that is more favourable to employees.

The Ministry of Labour is the main government agency responsible for all labour issues, supervising the relationship between employers and employees, and verifying compliance

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2 Dominican Labour Code enacted through Law 16-92 dated 29 May 1992, as amended, Principle IV.

3 *id.*, at Principle V.

with the current labour regulation.⁴ This institution is in charge of creating all national labour policies. Within the Ministry of Labour, there are several departments with important roles, such as the National Salaries Committee, which sets the minimum wage,⁵ and the Agency for Industrial Safety and Hygiene, which is responsible for the approval of workplace hygiene and safety guidelines and the supervision of their enforcement.

Other relevant government authorities are the Institute for Professional Technical Training (INFOTEP), an autonomous not-for-profit agency in charge of overseeing the system for the training and qualification of employees, and the Treasury of Social Security, responsible for collecting, distributing and paying the monies of the social security system, and administering the central information system.

II YEAR IN REVIEW

The application of the Domestic Workers Convention (No. 189), ratified on 15 May 2015, continues to be a topic of discussion. There is still no up-to-date consensus on the extent of the obligations on the government to ratify the Convention, and the internal proceedings that should be carried out, if any, to render those obligations enforceable for the general population.

The average open unemployment rate for 2018 was 5.9 per cent, according to the results of the Continuous National Survey of the Workforce. The average open unemployment rate for the period from January to June 2019 was 6.3 per cent.⁶

III SIGNIFICANT CASES

On 3 December 2019, the Constitutional Court rendered a judgment confirming the constitutionality of Article 715 of the Labour Code, which governs the applicability of criminal penalties for the violation of labour laws, and the officials in charge of representing the state in criminal labour proceedings. The basis of the constitutional challenge was the lack of independence and impartiality of the officials representing the state; however, the Constitutional Court reasoned that the representation of the state relies on district attorneys and not on employees of the Ministry of Labour.⁷

On 15 August 2019, the Constitutional Court reaffirmed the criteria of the Supreme Court of Justice regarding the scope of Article 86 of the Labour Code, which provides that, in cases of termination without cause exercised by an employer, advance notice and severance must be paid to the employee within 10 days of the termination date, and if the employer fails to do so, it must pay compensation equal to one day's pay for each day of delay until the final payment is made. The Supreme Court of Justice stated that the employee cannot bring a claim for payment of severance prior to the expiry of the 10-day term established in Article 86, because it is untimely and renders the penalty of Article 86 inapplicable to that particular case; in such cases, the employee is only entitled to payment of severance and not to one day's pay for each day of delay.⁸

⁴ *id.*, at Articles 422, 423.

⁵ *id.*, at Articles 452 to 464.

⁶ Central Bank of the Dominican Republic, Continuous National Survey of the Workforce <<https://www.bancentral.gov.do/a/d/2541-encuesta-continua-encft>>.

⁷ Constitutional Court, judgment dated 3 December 2019.

⁸ Constitutional Court, judgment dated 15 August 2019.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

According to the Labour Code, a labour contract is formed when one party undertakes to provide personal services to another in exchange for compensation, under the supervision and immediate or delegated guidance of the latter. There is a presumption that a labour contract exists whenever a person renders a personal service to another, even if the terms of this relationship are not recorded in writing.⁹ An agreement must be in writing in three exceptional cases: apprenticeship contracts; contracts for a fixed term; and contracts with foreign employees.

When the agreement is in writing, the following terms must be included:

- a* the names, credentials and addresses of the employer and employee;
- b* the work to be performed by the employee, and the salary and benefits that the employee will receive for the work;
- c* the place and hours of work; and
- d* the term of employment if it is for a fixed term, or an indication that it is for an indefinite period.¹⁰

Some terms will apply by law even if not provided in the employment agreement, such as vacation leave, Christmas bonus and compensation for profit sharing.

The parties are free to agree to additional terms provided that they are not less favourable than the rights afforded by law. Under the principle of inalienability of rights established in the Labour Code, labour regulations are binding on the employer and employee even if the parties decide to amend the provisions. The employee may claim at all times the rights granted by the law, despite any attempted limitation, termination, loss or waiver, even by a judicial act. Any agreement or document that attempts to limit, or contains a waiver of, the employee's rights is void.

When an employment agreement is entered in writing, any amendment to its terms must also be in writing.¹¹

Employment agreements can be for a fixed term or an indefinite period. The latter is defined as a contract for the services provided by the employee on a permanent and uninterrupted basis (i.e., it goes towards satisfying the normal, constant and uniform needs of a company).

A fixed-term agreement is a contract in which the parties set a date for the expiry of their labour relationship. Only the complete execution of the work or providing services as promised will extinguish the contractual relationship; once the term is expired, the contract ceases to exist without any liability. The Labour Code establishes that this type of agreement can be entered into if (1) it is in accordance with the nature of the service to be provided, (2) its objective is to provisionally substitute an employee who is absent because of permitted leave, vacation, or another temporary impediment, and (3) it is agreed to be in the interests of the employee.

⁹ Labour Code, Article 15.

¹⁰ *id.*, at Article 24.

¹¹ *id.*, at Article 20.

Under Dominican law, an employment agreement is presumed to be for an indefinite period, until proven otherwise.¹²

Changes to an employment agreement can result as a consequence of the provisions in the Labour Code and subsequent labour laws, collective bargaining agreements or mutual consent. Also, the employer is allowed to enforce necessary changes to the employment agreement, as long as they do not imply an unreasonable exercise of this power, alter the essential conditions of the contract, or cause material or moral damage to the employee.¹³ The right awarded to the employer to enforce unilateral amendments to the employment agreement is known as *jus variandi*. This right is limited, and mutual agreement is sometimes required. Abusive use of *jus variandi* can be a just cause for the resignation of an employee.

ii Probationary periods

There is no express probationary period established in the Labour Code. However, according to Article 88(2) of the Labour Code, the employer may dismiss the employee with cause for 'performing the job in a manner that shows his incapacity and inefficiency. This cause ceases to have effect after the employee has provided services for 3 months'. The three months is considered a trial period during which the employer has the opportunity to decide whether the employee is capable of providing the services in the required manner.

Termination of a labour contract during the first three months is not subject to any severance or indemnity payment.

iii Establishing a presence

Every employer must register at the National Labour Registry of the Ministry of Labour or the competent local labour authority, if the employer is located outside the National District. Each employer is assigned a registration number that will be used as a reference for any filed documents or communications (i.e., dismissal letters and admonitions to employees).

Currently, an employer can file various records electronically through the Integrated System for Labour Registration.¹⁴ By acquiring an access code from the Ministry of Labour for 150 pesos for every 25 employees, the company can file all the registers regarding the salaries of permanent personnel,¹⁵ records of overtime hours, and changes to the salaries of permanent or temporary personnel, among others.

The employer is also subject to payment of a monthly quota to INFOTEP. This contribution is equivalent to 1 per cent of the total payroll and 0.5 per cent of the annual bonuses paid to the employees, if any.

In addition, every employer must register with the Treasury of Social Security and register its list of personnel. Employers and employees contribute to coverage for labour risk insurance, family health insurance, and old age, disability and survival insurance (pension funds). The three regimes are administered with separate funds and independent accounts. Specifically, employers contributes 70 per cent of the costs for financing family health insurance and old age, disability and survival insurance, and pays 100 per cent of the cost of labour risk insurance.

12 id., at Article 34.

13 id.

14 <www.ministeriodetrabajo.gob.do/index.php/servicios/servicio-no-1>.

15 This registration must be made each year within the first 15 days of January.

In terms of the amount apportioned each month to the social security system, the employee contributes 5.91 per cent of his or her quotable salary. The remainder is directly assumed by the employer and distributed between the different types of insurance, as follows:

Coverage	Proportion
Labour risk insurance	1.30%
Family health insurance	10.13%
Old age, disability and survival	9.97%
Total	21.40%
Employee	5.91%
Employer	15.49%

Family health insurance and administration of pension funds are provided by private institutions, which employees can choose at will.

Additionally, employers must file with the General Agency for Internal Revenues the monthly declaration and payment of the withholdings made to employees, since the employer acts as a withholding agent of individual income tax.¹⁶ The income tax rate for individuals is up to 25 per cent of his or her taxable income.

V RESTRICTIVE COVENANTS

The Labour Code does not contain a provision referring to the right of an employer to restrict future activities of employees. However, a non-compete clause included in the employment agreement can be enforceable as long as it is reasonable and expressly indicates the covered business area and time frame.

VI WAGES

i Working time

An employee's daily shift cannot exceed eight hours and the working week cannot be more than 44 hours.¹⁷ In companies with around-the-clock operations, the work period can be extended by an additional hour, but the weekly average may not exceed 50 hours, and any hours worked in excess of 44 hours per week must be compensated as overtime.¹⁸ In the event of the extension of the work period to face an extraordinary increase in work, the number of extra hours cannot exceed 80 hours every three weeks. Article 150 of the Labour Code provides for some exceptions to the work shift duration requirements when employees (1) serve as representatives of the employer, (2) serve in management or supervisory positions, or (3) are employed by small businesses, usually by family members.

These provisions apply in the same manner for night work. Article 149 of the Labour Code establishes that a daytime working day may run between 7am and 9pm and a nocturnal

¹⁶ Tax Code adopted through Law 11-92, as amended [Tax Code], Article 307.

¹⁷ Labour Code, Article 147.

¹⁸ *id.*, at Article 148.

working day between 9pm and 7am. A mixed working day includes both daytime and nocturnal working, if the night work is less than three hours. If the night work exceeds three hours, the entire working day will be deemed nocturnal.

Hours worked during a night shift must be compensated to employees at no less than a 15 per cent increase of the value of normal hours.¹⁹

ii Overtime

Overtime hours must be compensated in accordance with the amount of overtime work done by an employee in a given week. If the amount of overtime worked is less than 68 hours in a week, each extra hour must be paid at a rate of at least 35 per cent more than the normal hourly rate. However, if overtime exceeds 68 hours, each hour that exceeds this threshold must be paid at a rate of 100 per cent more than the normal hourly rate.²⁰ According to the Labour Code, overtime work cannot exceed 80 hours every three weeks.

VII FOREIGN WORKERS

The employment agreements of foreign workers have to be formalised in writing and registered with the Ministry of Labour. The Ministry must verify that the employee holds a valid work visa or is a legal resident allowed to work in the Dominican Republic. If the employer retains foreign employees who are not authorised to work in the Dominican Republic, the employer can be subject to a fine and the employee can be deported to his or her country of origin.

Foreign employees should be registered with the Social Security Treasury and the employer must pay all social security contributions for foreign employees. If an employee is still contributing to the social security scheme in his or her home country, then the employer does not need to pay contributions to the local entities for social security (according to the last paragraph of Article 5, Law No. 87-01, which creates the Dominican Social Security System).

In regard to the nationality of an employer's workers, the Labour Code establishes that at least 80 per cent of the workforce should be Dominican citizens. While there are no restrictions at the management level, the employees should preferably be Dominican.

VIII GLOBAL POLICIES

Employers can adopt internal labour regulations to organise the manner in which the service is provided.²¹ Once the regulations have been filed with the Ministry of Labour, they are mandatory for all employees.

The internal regulations may refer to general conditions of work, the rules under which the work must be done, work schedule, days and place of payment, and disciplinary action.²² These rules must be displayed in the most visible places within the establishment.²³ If the internal regulations are accessible through the company intranet, the employer must secure evidence that the employee has accessed the regulations and has knowledge of their content.

19 id., at Article 204.

20 id., at Article 203.

21 id., at Article 129.

22 id., at Article 131.

23 id., at Article 133.

The employer can modify or amend the internal labour regulations. However, in any case, the regulations cannot be contrary to the labour laws and provisions of any collective bargaining agreements.²⁴

IX PARENTAL LEAVE

Employers must grant a pregnant employee mandatory paid maternity leave of 14 weeks (seven weeks of prenatal leave and seven weeks postnatal leave).²⁵ When a pregnant employee does not use all her prenatal leave, the unused time is added to her postnatal leave. The statutory maternity protection applies regardless of the employee's length of service.

According to Article 239 of the Labour Code, maternity leave is paid with the ordinary salary earned by the employee.

Law 87-01, which created the Social Security System, provides that a female employee registered with the social security system has the right to a maternity benefit equal to 14 weeks of quotable salary. To receive the benefit, the employee must have been contributing to the social security system for at least eight of the 12 months prior to the date of birth or the beginning of maternity leave. Also, to receive the benefit, the employee must obtain a maternity report, completed by her doctor, which must certify the number of weeks of pregnancy to date, the expected date of birth, personal information about the patient, and the credentials of the doctor and medical centre. The report must also specify the beneficiary of the maternity benefit in the event of the death of the employee. This report must be handed to the employer, who files it with the Social Security Treasury as part of the process for requesting the payment.

The salary is paid by the employer directly to the employee. In turn, the employer receives the amount of the maternity benefit as a credit, which is put towards the next payment request from the Social Security Treasury.

There is a cap on maternity benefit equal to 10 minimum salaries (established and adjusted by the National Council for Social Security). If the ordinary salary of the employee exceeds this statutory limit, the employer is bound to pay the full amount to the employee as per Article 239 of the Labour Code, regardless of whether the credit to be received from the social security system is less.

When the employee requests authorisation to take vacation after maternity leave, the employer is bound to grant the request (provided the employee is entitled to vacation rights).²⁶

Also, when an employee is breastfeeding, she is entitled to three paid 20-minute breaks each day to breastfeed her baby. Further, during the baby's first year, the employee is entitled to one half-day each month to take the baby to any doctor's appointment.

Female employees who benefit from maternity protection can nevertheless be dismissed, provided the employer obtains authorisation from the Department of Labour or the local authority. An employer who dismisses a female employee without this authorisation must pay an indemnity equivalent to five months of ordinary salary, in addition to all other benefits and severance.²⁷

24 id., at Article 134.

25 id., at Article 236 (as amended after the entry into force of the Maternity Protection Convention 183 adopted by the International Labor Organization).

26 id., at Article 238.

27 id., at Article 233.

A dismissal without cause of employees during pregnancy and up to three months after giving birth is void.²⁸

A male employee is entitled to two days of paid leave following the birth of his wife's or partner's child.²⁹

X TRANSLATION

There is no express provision in the Labour Code regarding the language that should govern communications between employers and employees. However, the official language of the Dominican Republic is Spanish, and any document that is to be filed with the local authorities (e.g., employment agreements with foreign employees) must be in Spanish or duly translated by an authorised judicial interpreter. Documents to be filed include offer letters, employment contracts, agreements, compensation plans or bonus agreements and the policies of the enterprise.

There are no criminal penalties for the lack of translation, but it will be practically impossible to comply with the local rules regarding registration of documents if they are not submitted in Spanish to the Labour Department of the Ministry of Labour or the local authority, or there is a risk that an employee intends to disregard a certain policy or regulation in a foreign language, because of a lack of knowledge of the language, assuming it was not a requirement to apply for or be accepted for the job.

XI EMPLOYEE REPRESENTATION

Freedom to join a union is one of the basic rights of an employee. Employers are prohibited from using influence to restrict the right of employees to join a union, or firing them for belonging to or remaining in one.

The approval of the employer is not required to form an employees' union. The employees have to comply with the requirements set by law regarding formal documents, capacity and the number of members organising the union, and register before the Ministry of Labour. If the incorporation documents are not in compliance with the law, the Ministry of Labour can reject the registration or return the files for their correction. Once the union is registered with the Ministry of Labour, it has legal capacity as a juridical person.

A union representative's rights cease upon a violation of certain duties or by committing harmful conduct. The term for which he or she is elected depends on the statutes of the union, and his or her privileges are maintained up to eight months after he or she ceases to be a representative of the union. Any other specification as to the frequency of meetings and other tasks will be determined by the statute of the union.

28 id., at Articles 75(4) and 232.

29 id., at Article 54.

XII DATA PROTECTION

i Requirements for registration

Companies are allowed to maintain a data protection service for the control of the quality, goods and other information regarding the work being done by their employees. In accordance with Article 43 of the Labour Code, a company must always maintain this system of protection while not infringing the dignity of the employee, using these systems with discretion and subject to objective criteria. The implementation of the system, according to the provisions of Article 44 of the Labour Code, must be notified to the Ministry of Labour within 30 days of the start of the implementation of the system.

The creation of databases of personal information in the Dominican Republic is subject to compliance with the provisions contained in both the Constitution and Data Protection Law No. 172-13, regarding the conditions for the collection of data and the rights of the data subjects regarding the information kept on databases, as well as the handling of the data. However, Article 41 of Law No. 172-13 provides that ‘individuals that create files, records or databases of personal data that are not intended for their exclusive personal use should comply with the requirements established by this law’. Hence, if the creation of the database is for the exclusive use of the employer, there is no need to comply with registration requirements established by the law.

Article 27(4) of Law No. 172-13 includes as an exception to the requirement of consent of the data subject to access, process and transfer personal data, any information ‘arising from a business, employment or contractual, scientific, or professional relationship with the individual, and necessary for the development or performance of the relationship’.

The Supreme Court of Justice acknowledged that employers are entitled to search and revise all emails issued by members of its personnel subject to the fact that the email is sent from a company-owned email account (institutional email account) and kept on a server owned or controlled by the company. The Supreme Court of Justice established that the institutional email account is a tool provided by the employer to the employee for the performance of his or her work and, therefore, the property of the employer, which entitles the employer to have access to all emails issued regardless of the addressee.³⁰ The Constitutional Court reaffirmed the criteria set by the Supreme Court of Justice in this judgment, through a decision issued on 8 August 2019.

ii Cross-border data transfers

As previously established, if the use and handling of data is exclusively for private purposes, the provisions of Data Protection Law No. 172-13 do not apply. In any case, Article 28 of Law No. 172-13 provides that the transfer of personal data contained in any file, record or database shall be expressly consented to by at least one of the data subjects whose information is contained therein. However, according to the provisions of Article 27.1 of this Law, information from publicly available sources does not require the consent of the data subject for it being processed or transferred to third parties.

30 Supreme Court of Justice, Third Hall, Judgment No. 40 dated 18 December 2013.

iii Sensitive data

Maintaining databases of sensitive data is strictly prohibited. This type of data consists of, in general, political opinions, religious beliefs, philosophical or moral convictions, union work affiliation and medical information.

iv Background checks

Background checks are not expressly prohibited under Dominican law if they refer or are limited to publicly available information. Consent of the employee is required to access information from credit bureaus.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Employment may be terminated for dismissal with cause when the employer attributes to the employee one or more of the serious infractions listed in Article 88 of the Labour Code as cause of termination of the contract. It is the employer's right to terminate the employment agreement when an employee has committed a serious or inexcusable fault. The causes listed in Article 88 refer to contractual or legal faults that, because of their nature, make it impossible for the employment agreement to remain in effect.

It suffices that the fault committed by the employee must correspond with any of the causes listed in Article 88 of the Labour Code for the termination to occur; it is irrelevant and not required that the employer suffers any damage as a result of an employee's actions, except in the circumstances expressly provided by the law.

The employer has a limit of 15 days in which to proceed with the termination of an employment agreement for any cause, as indicated above. The term starts to accrue as of the date of the event that caused the breach of the contract, or as of the date on which the employer was informed or aware of the event taking place.

The employer obliged to communicate in writing to the employee its decision to unilaterally terminate the employment agreement within that term; otherwise the termination could be declared as time-barred. As of that moment, the employer has 48 hours to inform (in writing) the Labour Department of the Ministry of Labour, or the local authority acting as such, of the termination of the employment, with an express indication of the fault or faults committed by the employee.

The burden of proof of the just cause for termination lies with the employer. If the employer provides evidence of the legal cause, it is not required to pay any severance to the employee (except for the acquired rights, such as unused vacation time, Christmas bonus and profit share, which are due to the employee regardless of the cause or mode of termination of the employment agreement). However, when the employer fails to demonstrate just cause for unilateral termination, it is obliged to pay severance and compensation of up to six months of ordinary salary.

ii Redundancies

Redundancy as a cause for termination of a contract is not expressly provided in Dominican law. In that sense, therefore, employers can terminate an agreement without cause. If there is going to be a mass lay-off, two procedures may be followed:

- a* if it is not done by mutual agreement, then the procedure for dismissal without cause applies, and the employer must pay the employee severance; or
- b* if it is by mutual agreement, then the lay-offs can be agreed before a notary public.

Through this second procedure, the Labour Department must be notified after the enactment of the lay-offs and the corresponding employee benefits must be paid to each employee.

In the event of bankruptcy, a company's operations terminating completely, a lack of resources that impedes the company in operating a certain section of its business, unprofitability or another similar cause, the company must obtain approval from the Ministry of Labour to proceed with the lay-off of employees. In these circumstances, the reduction of personnel must be made in the following order: (1) unmarried foreign employees; (2) married foreign employees; (3) foreign employees married to Dominicans; (4) foreign employees with Dominican children; (5) unmarried Dominican employees; and (6) married Dominican employees.

XIV TRANSFER OF BUSINESS

A change in the ownership of a business, or the transfer of employees to any other company, passes on to the acquirer of the business all the prerogatives and obligations arising from the employment agreements corresponding to the transferring establishment, or relating to the transferred worker, including whatever may have been the cause of a suit, a pending sentence or execution of a decision. In any event, it does not terminate the rights acquired by the worker, without prejudice to the provisions of the third and fourth paragraphs of Article 69 of the Labour Code.

The new employer is jointly liable with the substituted employer for the obligations arising from the employment agreements or the law, before the date of the substitution, up to the statutory limit of any corresponding action.

XV OUTLOOK

Although labour laws tend to protect employees, they are not considered a barrier for investing or establishing a business in the Dominican Republic. The provisions are clear as to the rights to which employees are entitled, as well as the implications for employers who do not comply. Moreover, the Supreme Court of Justice has been consistent in the interpretation of the law, setting criteria commonly followed by the lower courts.

There are new demands from both employees and employers regarding labour conditions that are not expressly established under the law. Concepts such as availability and flexibility have evolved, and the international reach of work results in new conditions. This will require the active participation of the labour authorities in the discussion.

FRANCE

Véronique Child and Eric Guillemet¹

I INTRODUCTION

i Applicable rules

French employers are required to comply with various mandatory rules, such as the French Labour Code (interpreted by case law), national industry-wide collective bargaining agreements (CBA), company collective agreements, employment contracts and company customs.

In general, when more favourable, the provisions of a CBA prevail over those of the Labour Code. However, a CBA may not derogate from compulsory public policy provisions.

The reform enacted by Law No. 2017-1340 of 15 September 2017 has restructured the relationship between CBAs and company collective agreements. This Law gave precedence to company agreements over industry-wide CBAs in all aspects of labour law, with the exception of 13 points on which the CBA takes precedence over company agreements (in particular the issues of minimum wages, classification, measures relating to working hours, their distribution and adjustment, the term and renewal of fixed-term contracts).

On all other points, collective agreements entered into at company level may include provisions differing from those of the applicable CBA.

ii Employment law jurisdiction

In the event of a dispute between an employee or former employee and his or her employer, the court of first instance is the labour court, which is composed of both employer-elected and employee-elected non-professional judges. A judgment rendered by a labour court may be appealed to the court of appeal with territorial jurisdiction. Finally, subject to certain conditions, a final appeal may be made to the Court of Cassation (France's equivalent of a supreme court), which does not examine the substance of the matter referred, but only considers points of law.

iii Government agencies tasked with enforcing employment law

The French labour inspection system comprises:

- a* central agencies – the National Council of the Labour Inspectorate and the Directorate-General of Labour; and
- b* decentralised bodies – the regional directorates for companies, competition consumption, labour and employment (known as DIRECCTE), which include inspection units.

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The Labour Inspectorate is tasked with:

- a* ensuring the application of the legal provisions governing working conditions and the protection of workers in the exercise of their profession;
- b* providing technical information and advice to employers and workers concerning the most effective means of complying with legal provisions; and
- c* bringing deficiencies or abuses that are not specifically covered by existing legal provisions to the attention of the relevant authorities.

II YEAR IN REVIEW

One of the principal measures of the past year is the PACTE Law (Law No. 2019-486 of 22 May 2019 on the growth and transformation of companies). This Law aims to remove obstacles to the growth and transformation of companies in France and contains multiple provisions, some of which are of particular interest to labour and employment law, and specifically:

- a* a change in the method for calculating workforce thresholds: since companies nearing the thresholds were afraid of crossing them because of the obligations this would trigger and as a result did not wish to hire new employees, the legislative branch decided to pass more flexible provisions to limit this ‘threshold effect’;²
- b* measures to promote employee savings schemes: provisions concerning mandatory profit-sharing schemes, employee savings schemes and optional profit-sharing schemes; and
- c* other labour and employment law measures, such as provisions relating to night work and better employee representation in management bodies.

Another principal measure of the past year is the publication of an ordinance dated 20 February 2019 that transposes into French law Directive (EU) 2018/957 of 28 June 2018 concerning the posting of workers. The provisions of this ordinance will enter into force on 30 July 2020.

This reform provides that a set of core French statutory and collective bargaining provisions must apply to the posted employee to the same extent that they apply to local employees in that organisation or branch. Thus, it provides that the employer of an employee posted to France must guarantee him or her the same treatment as local employees. The core French rules will apply to ‘remuneration’ and no longer merely to minimum wages. Furthermore, a new point will be added to the list of core rules: the reimbursement of all professional expenses relating to a secondment (transport, accommodation and meals).

Moreover, as of 30 July 2020, after a period of posting exceeding 12 months (that could be extended to 18 months), in addition to the reinforced core French regulations, the full provisions of the French Labour Code will apply to posted employees, subject to some exceptions that are mainly related to conclusion, performance, transfer and termination of the employment contract, fixed-term employment contracts and specific employment contracts.

Another key measure is unemployment insurance reform. The new rules governing unemployment insurance are set out in two executive decrees (Decree Nos. 2019-796 and

2 There are many thresholds under French employment law (roughly 200). The most relevant here are in respect of the obligation to set up (1) staff representatives (mainly 11 employees or 50 employees) and (2) compulsory profit sharing (50 employees).

2019-797 of 26 July 2019). This reform is designed to meet several major objectives, in particular to fight against unjustified or excessive reliance on short-term contracts by introducing a bonus and penalty system for the unemployment insurance contributions paid by companies to encourage them to hire employees in long-term positions, but also to ensure that work pays more than inactivity by establishing new unemployment insurance compensation rules that incentivise inactive workers to return to work.

III SIGNIFICANT CASES

In a 5 April 2019 decision of the Full Court, the Court of Cassation reversed the case law concerning the harm caused by anxiety relating to asbestos.

In its decision, the Court of Cassation reversed its own case law limiting the possibility of suing for damages for anxiety resulting from exposure to asbestos solely to employees of those establishments recorded on Acaata³ lists.

Employees of unlisted establishments that can demonstrate such exposure, however, are also allowed to sue their (current or former) employer, provided an employee is able to prove that the employer was in violation of its safety obligation, and the reality and extent of the harm the employee suffered. Further, by eliminating any link between entitlement to the Acaata system and the harm of anxiety, the High Court removed the main obstacle to date to claims for reparations based on exposure to substances other than asbestos.⁴

The Court of Cassation also ruled this year on the ‘Macron’ scale, which imposes a statutory fixed scale of minimum and maximum damages that employees may be awarded in the event of unjustified dismissal depending on (1) their seniority at the company and (2) the size of the company. Following the refusal of certain French labour courts to apply the new scale introduced by the Macron Ordinances, the matter was referred to the Court of Cassation. In its opinion, the Court found that the scale complied with international and European labour conventions and treaties. Indeed, certain labour courts had refused to apply the scale on the grounds that it does not allow for adequate compensation as provided for by Article 10 of International Labour Organisation (ILO) Convention No. 158⁵ and Article 24 of the European Social Charter.⁶

The Court set aside Article 24 of the European Social Charter as it deemed Article 24 without direct effect, reasoning that it is insufficiently precise and unconditional to be considered self-sufficient. The Court found that Article 10 of ILO Convention No. 158 was to be of direct effect and may therefore be invoked. The Court of Cassation deemed that the terms ‘adequate’ and ‘appropriate’ employed in Article 10 of ILO Convention No. 158 leave a certain margin of evaluation to the state.

The Court thus considers the Macron scale to be compatible with Article 10 of ILO Convention No. 158.⁷

3 *Allocation de cessation anticipée d'activité des travailleurs de l'amiante* (asbestos workers' early activity cessation allowance).

4 Court of Cassation, Full Court, 5 April 2019, No. 18-17.442.

5 Under Article 10, '[the courts] shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate'.

6 Under Article 24, 'the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief'.

7 Court of Cassation, Full Court, 17 July 2019, Opinion No. 15013.

The Court of Cassation also rendered a decision relating to termination by mutual agreement and psychological harassment. On this matter, the Court ruled that acts of psychological harassment recognised by the courts do not automatically require the nullity of the termination agreement.

In other words, the existence of proven psychological harassment does not in itself suffice to invalidate a termination agreement entered into in such a context, as it does not automatically imply vitiated consent. Under French law, only vitiated consent can invalidate mutually agreed termination (fraud, error, violence).⁸ This decision is in keeping with the case law of the Court of Cassation, the aim of which is to stabilise the legal framework for termination by mutual agreement.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The formalisation of permanent employment contracts in writing is not required by law. Any non-written employment agreement is deemed to constitute a permanent contract of employment.

In practice, it is advisable to formalise the agreement in a written employment contract to ensure that the parties both know and accept the terms and conditions of employment and to enable the employer to add specific clauses, such as a probationary period and, if relevant, a non-competition clause.

While the content of a permanent employment contract remains fluid, a collective bargaining agreement applicable to a company's activity may contain provisions that must be included in the employment contract and be applied in the employment relationship.

Employees may also be hired under fixed-term contracts, but only in a limited number of specific cases (mainly for the replacement of absent employees or a temporary increase in activity).⁹ Notably, non-compliance with applicable rules can lead to the redesignation of a fixed-term contract as a permanent one.

A fixed-term employment contract must be set out in writing and must include specific mandatory provisions (notably specification of the grounds for recourse to a fixed-term contract; the name and status of the employee replaced if the contract is entered into for replacement purposes; the contract end date and any possibility of renewal; and the minimum term, where no definite term is specified). If some of these statutory provisions are not included, the contract may be designated as a permanent employment contract.

As a general rule, an employment contract may not be modified without the express written consent of the employee. Certain changes that qualify as simple modifications of the working conditions, however, do not require the employee's express consent (e.g., a change in the place of work if it is in the same geographical area, or changes to the employee's duties if they are still in accordance with his or her qualifications), and others qualify as amendments of essential elements of the employment contract (such as remuneration or status).¹⁰

8 Court of Cassation, Social Chamber, 23 January 2019, No. 17-21.550.

9 French Labour Code, Article L. 1242-2.

10 Court of Cassation, Social Chamber, 10 July 1996, No. 93-41.137.

ii Probationary periods

An employer may provide for a probationary period in an employment contract. Its duration may be freely fixed by the parties within certain limits provided for by the Labour Code and any applicable CBA. Standard probationary periods are two months for office and blue-collar workers, three months for supervisors and technicians and four months for executive employees.¹¹

The trial period may be renewed once by mutual agreement of the parties, provided this is allowed by a CBA.

iii Establishing a presence

A foreign company can have employees in France without creating a company or a branch in France. In this situation, the foreign company must register with the French social security authorities (URSSAF) and complete an E0 form, after which it becomes an employer without an establishment in France (known as an ESEF).

A system has been put in place to allow employers with no place of business in France to declare their company and their employees subject to the French social security.

Companies are required to declare their employees' status to the National Centre for non-French Companies (CNFE), an entity within the URSSAF collection office in the Alsace region. The CNFE will forward the information to the other relevant social security institutions. Then, when an employer wishes to hire an employee in France to perform a contract in France, the employment relationship is subject to French employment law.

An independent contractor cannot create a permanent establishment (PE) unless it is regarded as a legally or economically dependent agent who possesses and habitually exercises authority to conclude contracts on behalf of the foreign enterprise in France. Business profits attributed to the PE would become taxable in France with transfer pricing obligations.

Finally, since the entry into force of tax reforms in January 2019, employers are now required to deduct income tax directly from employees' wages. Essentially, this means that income tax is directly deducted by the employer from the income of each employee prior to the payment of wages.

V RESTRICTIVE COVENANTS

As a general principle, an employee has to comply with a non-compete obligation during the performance of an employment contract. When the contract has ended, the employee must remain loyal to his or her former employer but will not be bound by the non-compete obligation, unless otherwise stipulated in the employment contract.

To be valid, a non-compete clause must:

- a* be justified by the legitimate interests of the company;
- b* be limited in time and place; and
- c* provide for financial compensation.¹²

Some CBAs also have these requirements, including, for example, the level of any financial compensation and the duration of the clause. In these cases, employment contracts must comply with these rules.

11 French Labour Code, Article L. 1221-19.

12 Court of Cassation, Social Chamber, 10 July 2002, No. 00-45.135.

Should this clause be invalidated by a judge, the employee concerned is free to work for any competing company. The employee is also entitled to damages for any losses suffered.

The employer can include a provision allowing him or her to waive the non-compete clause within the framework of the termination of the employment contract within a certain period of time. The French Supreme Court requires that employers waive non-compete clauses within the period cited in the non-compete clause and at the latest on the date of the employee's effective departure, not on the date of termination of the employment contract. This means that if the employee is not required to complete his or her notice period, the employer must waive the non-compete clause before the last day of effective work.¹³ Otherwise, the employee is entitled to damages if he or she chooses to comply with this clause. The amount of damages is at the discretion of the judge.

VI WAGES

i Working time

Under the French Labour Code, the legal working time in France is 35 hours per week (equivalent to 151.67 hours per month).¹⁴

The 35-hour week includes effective working time, defined as the period during which the employee (1) must remain on company premises, (2) is under the supervision of his or her employer, and (3) may not go about his or her personal matters. Pursuant to French case law, breaks are not considered effective working time.

In the event that an employee works fewer than 35 hours per week, he or she is considered a part-time worker. Specific provisions must be included in employment contracts for part-time workers and specific rules are applicable.

There is also a specific working time arrangement that is both flexible and annualised, consisting of a fixed number of days to be worked per year (known as *forfait jours*). When an employee is subject to a *forfait jours* working time arrangement, his or her working time is calculated in days worked during the year rather than hours per week, and compensation represents a flat rate that does not vary in accordance with the number of hours worked per week.¹⁵ This system is especially appropriate for executives who enjoy greater autonomy in organising their work schedule and are not always in a position to abide by collective working hours. This type of arrangement has been extended to non-executives whose duties require autonomy in the performance of their work.

The conditions for implementing a *forfait jours* working time arrangement are relatively strict. The system must be provided for either by a collective agreement or by an applicable CBA, without which it is impossible to implement a *forfait jours* arrangement at the company, even with the employee's consent. The company agreement or the CBA providing for a *forfait jours* working time arrangement must stipulate certain terms, in particular a reference period for determining the number of days worked (calendar year or any other period of 12 consecutive months), and the fixed number of days to be worked during the reference period (up to a maximum of 218 days). Moreover, the employee's consent must be obtained by means of an individual annualised working time agreement, which must appear in a specific clause of the employment contract or in an amendment thereof.

13 Court of Cassation, Social Chamber, 13 March 2013, No. 11-21.150

14 French Labour Code, Article L. 3121-27.

15 id., at Article L. 3121-53.

Since the employee's working time is calculated in days rather than hours, the employer is required to implement a certain number of measures to ensure that the employee's workload remains reasonable (e.g., register the number of days worked, an annual meeting with the employee to discuss his or her work organisation and workload, a balance between his or her private and professional life, and his or her remuneration). These terms are customarily set out in the collective agreement providing for the *forfait jours*.

ii Overtime

The statutory working time for employees in France is 35 hours per week, meaning that any hours that employees are required to work in excess of this limit would normally be considered as overtime and paid at an increased rate. Overtime is calculated on the basis of actual hours of work (e.g., normal working time and performance of hours while on call).

The company must comply with the following working time limitations:

- a* maximum weekly working hours: average of 44 hours per week during 12 consecutive weeks with a maximum number of 48 hours per week;¹⁶
- b* maximum daily working hours: 10 hours;¹⁷ and
- c* maximum range of working hours: 13 hours (i.e., a minimum rest of 11 hours must be allowed to employees between two working days).

Overtime hours performed at the request of the employer also give rise to remuneration at an increased rate. Any CBA applicable to the company may provide for a specific increased overtime rate, which should be an increase of not less than 10 per cent.

Where no company collective agreement on overtime is in place, or where a CBA does not include any such provision, the following provisions of the Labour Code apply:

- a* hourly rate increased by 25 per cent for each of the first eight hours of overtime (from the 36th to the 43rd hour, inclusive); and
- b* hourly rate increased by 50 per cent for each hour after that.

Overtime hours may not exceed a certain annual overtime quota. Every overtime hour performed above this limit must be compensated in the form of mandatory compensatory rest.

The CBA may provide for a such a quota. Where there is no CBA or the CBA does not provide for any quota, the French Labour Code provides for a quota of 220 hours per year.¹⁸

It is possible to replace the payment of overtime hours by their equivalent in compensatory rest. Compensatory rest in lieu of pay may be implemented at the company either by a company or establishment collective agreement or, failing this, by an industry-wide convention or agreement; or by a decision made by the employer (usually for companies lacking union delegates), if neither the social and economic committee (or CSE)¹⁹ nor the works council nor, in the absence of these, the staff delegates (if any), are opposed.

In the absence of any staff representatives, compensatory rest in lieu of pay may be implemented at the employer's sole initiative.

¹⁶ *id.*, at Article L. 3121-20.

¹⁷ *id.*, at Article L. 3121-18.

¹⁸ *id.*, at Article D. 3121-24.

¹⁹ *Comité social et économique*.

VII FOREIGN WORKERS

Although employers in France are not required to keep a register of foreign workers, they must comply with other requirements, such as keeping valid work permits on file. There is no limit on the number of foreign workers a company may employ.

For foreign workers, immigration status is limited and depends on the obligations under labour law. In principle, a work permit or visa is always required, although there are some exceptions. Further, the company is liable for taxes and local benefits for each foreign worker.

Foreign employers that post their employees to France are subject to the same statutory, regulatory and collective bargaining provisions as those that apply to employees working for similar companies established in France, including laws and regulations regarding:

- a* individual and collective freedom in the employment relationship, exercising the right to strike;
- b* working hours, compensatory rest, public holidays, annual paid leave, working hours and night work for young workers;
- c* minimum wages (national minimum wage) or, where more favourable, the minimum wage under the relevant CBA) and the payment of wages, including overtime increases and ancillary wages set by law or by the CBA;
- d* health and safety rules;
- e* discrimination and professional equality between women and men; and
- f* maternity protections, maternity and paternity leave, adoption leave, family-related leave.

It is the employer's responsibility to inform employees of any national CBA applicable to them during their posting to France. The title of this CBA must appear on the employee's payslip.

In addition, posted employees are entitled to occupational health services, unless the employer, established in a Member State of either the European Union or the European Economic Area (EEA), demonstrates that those employees are subject to equivalent monitoring in their home country.

VIII GLOBAL POLICIES

Companies with 20 or more employees must establish internal regulations. This requirements remains optional in companies with fewer than 20 employees.²⁰

These internal regulations must consist of a written document, drawn up in French by the employer (and which may, if necessary, be accompanied by translations into other languages if the company employs staff who do not speak French), setting out the following rules:²¹

- a* measures for the application of health and safety regulations at the company, in particular instructions on the conditions of use of work equipment, means of protection, dangerous substances and preparations;
- b* the conditions under which employees may be required to participate, at the employer's request, in restoring working conditions that are protective of employees' health and safety, when these appear to have been compromised;

20 *id.*, at Article L. 1311-2.

21 *id.*, at Articles L. 1321-1, L. 1321-2.

- c general and permanent disciplinary rules, in particular the nature and scale of the sanctions the employer may impose;
- d provisions relating to the employees' right of defence during disciplinary proceedings; and
- e a reminder of the provisions of the Labour Code relating to psychological and sexual harassment and sexist acts.

The draft internal regulations must be submitted for the opinion of the CSE. This draft and the opinion of the CSE are then communicated to the local labour inspector, who examines the legality of the clauses therein.²² Finally, the internal regulations must be filed with the competent labour court.

The internal regulations must be brought to the attention, by any means, of all persons having access to the workplaces and premises where hiring is carried out (public posting, intranet, email, or delivery by hand delivery).

The internal regulations are binding on all employees of the company, even those who were hired prior to the date the regulations were implemented.

The internal regulations must be updated regularly.

IX PARENTAL LEAVE

Pregnant employees are entitled to maternity leave for a period starting six weeks prior to the expected due date and ending 10 weeks after this date.²³ At the employee's request, and subject to the approval of the healthcare professional monitoring the pregnancy, the period during which the contract of employment is suspended that starts prior to the expected due date may be reduced by up to a maximum of three weeks.²⁴ The period following the birth of the child is then extended by the same amount of time.

While on maternity leave, the employee receives substitute income in the form of daily benefits. The employer is legally required to prepare a certificate of wages and to forward it to the Primary Healthcare Insurance Fund (or CPAM)²⁵ so that the fund can determine the amount of the daily benefit.

Certain collective agreements or industry-wide CBAs provide that an employee's wages continue to be paid throughout the period of leave. In this case, the CPAM must pay the daily benefits directly to the employer by a process of subrogation. Daily benefits are paid every 14 days.²⁶

The right to health insurance benefits is subject to prior registration with the social security administration and performance of a minimum period of work.²⁷ In addition, the employee enjoys protection from dismissal throughout the entire term of her pregnancy, and in particular during her maternity leave, as well as for 10 weeks following the end of this leave.²⁸

²² *id.*, at Article L. 1321-4.

²³ *id.*, at Article L. 1225-29; Court of Cassation, Assemblée Plénière, 20 March 1992, No. 88-17-028.

²⁴ Court of Cassation, 2nd Civil Division, 25 April 2013, No. 12-17.769.

²⁵ *Caisse Primaire d'Assurance Maladie*.

²⁶ French Social Security Code, Article R. 331-5.

²⁷ *id.*, at Articles L. 313-1, R. 313-3 and R. 313-4.

²⁸ French Labour Code, Articles L. 1132-1 and L. 1225-4.

The child's father or, more generally, the mother's partner, is entitled to 11 consecutive days of paternity leave.²⁹ This leave must be taken within four months of the birth of the child. During his paternity leave, the employee may receive daily benefits from the CPAM. These daily benefits are calculated under conditions identical to those used in determining maternity leave benefits.³⁰

Finally, to extend the period available for welcoming the child, parents may choose to take parental leave. This leave allows any employee with one year or more of service at the company to take leave or reduce his or her working time to take care of a child under three years of age, with the guarantee that, at the end of this leave, he or she may take up his or her previous position, or one similar to it.³¹ Parental leave comprises an initial phase of one year, which may be extended twice.³²

Parental leave is not compensated by the employer, and either the contract of employment is suspended throughout this period or working time is reduced.

X TRANSLATION

Contracts of employment must be drafted and drawn up in French.

When the employment contract concerns a position that can only be designated by a foreign term without any equivalent in French, the contract must contain a French explanation of the foreign term.

If the employee is not a French citizen and the contract is established in writing, a translation of the contract in the employee's native language is drafted at the employee's request. Both versions are equally legally valid. In the event of a discrepancy between the two versions, only the text drafted in the employee's native language may be invoked against him or her.

The employer may not invoke clauses of an employment contract entered into in violation of Article L. 1221-3 of the French Labour Code against an employee to which those clauses are prejudicial.

According to Article L. 1321-6 of the French Labour Code, other documents must be drafted in French, such as internal regulations and, more generally, any document that (1) imposes obligations on employees, or (2) contains provisions essential to the performance of the employees' work, or both.

If these requirements are not fulfilled, the document is not enforceable in court. However, this requirement is not applicable to:

- a* foreign employees: such documents may also be drafted in their native language; or
- b* documents received from abroad, provided that the employees understand their content perfectly.

29 *id.*, at Article L. 1225-35.

30 *id.*, at Articles L. 331-8, R. 331-1, R. 313-8, D. 331-3, D. 331-4.

31 *id.*, at Articles L. 1225-47 and seq.

32 *id.*, at Article L. 1225-48.

XI EMPLOYEE REPRESENTATION

Following the introduction of Ordinance 2017-1386 on the organisation of social dialogue and its ratification by the law of 29 March 2018, a reform of staff representative bodies has progressively eliminated staff delegates, works councils and workplace health and safety committees within French companies.

The election of a CSE is now mandatory for any company that has employed 11 or more people during the past 12 months.³³ The members of the staff delegation are elected for a term of four years (unless a collective agreement provides for a term of office of two or three years).³⁴

The purpose of the CSE is to present individual or collective demands to the employer relating to wages, the application of the Labour Code and other legal provisions, in particular those concerning social protections, as well as collective bargaining agreements and company agreements. The CSE contributes to promoting health, safety and the improvement of working conditions at the company and carries out investigations into occupational accidents and diseases.

The members of the CSE are provided with premises for meetings, credit hours, as well as an operational budget and a budget for social and cultural activities.

As previously with works councils, CSE elections are held in two rounds: the first is reserved for trade unions, which may field candidates, and the second for independent candidates.

By 1 January 2020 at the latest, the works council, staff delegates and workplace health and safety committee will all be replaced by a single CSE, which will take over most of their duties. The means and role of the CSE depend on the company's headcount.

i For companies with fewer than 50 employees

In companies with between 11 and 24 employees, the staff delegation is composed of one delegate and one substitute. In companies with 25 to 49 employees, it is composed of two delegates and two substitutes.³⁵ The provisions relating to the number of elected representatives may also be amended by agreement, as may the number of delegation hours they are granted. Meetings must be held at least once a month.

ii For companies with 50 or more employees

The number of delegates and substitutes varies depending on the number of employees and may be amended by agreement. The greater the workforce, the greater the number of representatives.

The annual number of CSE meetings (no fewer than six, of which at least four must focus on health, safety and working conditions) may also be set by collective agreement. In the absence of an agreement, the CSE must convene at least once every two months at companies with between 50 and 300 employees and once a month at companies with more than 300 employees.³⁶

33 id., at Article L. 2311-2.

34 id., at Article L. 2314-33.

35 id., at Article R. 2314-1.

36 id., at Article L. 2315-28.

A commission on health, safety and working conditions must be created within the CSE at companies with 300 employees or more but is optional for companies with fewer than 300 employees.

In addition, each representative trade union at companies or establishments with 50 employees or more may designate a trade union delegate. It is through this delegate that the trade union informs the employer of its complaints, demands or proposals and negotiates collective agreements. The delegate is provided with the means to carry out his or her assignment. His or her office may be held in conjunction with others.

Finally, Ordinance 2017-1386 on the organisation of social dialogue also created the company council, which is a body whose purpose is to group together the negotiating functions of the trade union delegates and the CSE. This council therefore has all the powers of the CSE, but also a role in negotiating, entering into and amending company collective agreements.³⁷ This new, optional tool is currently used very rarely in France, where only a handful of company councils have been set up.

Staff representatives, in particular CSE members and trade union delegates, enjoy special protection, which involves protection from dismissal without administrative authorisation for staff representatives. It also includes the right to reinstatement and special compensation in the event of non-compliance with this procedure or if the authorisation is cancelled.

Being informed and consulted by the employer are two of the central roles of the CSE. Certain consultations are recurring, whereby the employer is required to consult the CSE regularly concerning the company's:³⁸

- a* strategic orientation;
- b* economic and financial situation; and
- c* social policy, working conditions and employment.

All the necessary data for these consultations is stored in the company's economic and social database. The procedures for organising these three consultations may be defined in a company agreement³⁹ and the employer may thus define the dates for which these consultations will be scheduled.

The CSE must also be consulted as and when necessary, in particular concerning any new working practices, restructurings, redundancies, the introduction of new technology, significant adjustments that affect health and safety conditions or working conditions, and the like.⁴⁰

XII DATA PROTECTION

i Requirements for registration

From the perspective of the EU General Data Protection Regulation (GDPR) and French legal human resources (HR) data protection, no registration with the French data protection authority (or CNIL)⁴¹ or a government body is required for companies located in France processing HR data as an employer.

³⁷ *id.*, at Article L. 2321-1.

³⁸ *id.*, at Article L. 2312-17.

³⁹ *id.*, at Article L. 2312-19.

⁴⁰ *id.*, at Articles L. 2312-8, L. 2312-38, L. 2312-39, L. 2312-40, etc.

⁴¹ *Commission Nationale de l'Informatique et des Libertés.*

Article 30 of the GDPR⁴² requires that organisations, including companies located in France acting as an employer for the processing of HR data, must maintain records of processing operations.

When a company located in France acts as an employer and collects HR data, directly or indirectly, about its employees, the company's representatives must inform the employees about the purpose of the processing and the recipients or categories of recipients, and with other specific information (under Articles 13 and 14 of the GDPR).⁴³

Companies located in France acting as an employer are likely to need to consider consent when no other lawful basis⁴⁴ clearly applies, such as an employment agreement.

According to Article 32 of the GDPR,⁴⁵ organisations, including companies located in France acting as an employer, must limit access to personal data, including HR data, by implementing appropriate technical and organisational measures to ensure an appropriate level of confidentiality and security.

ii Cross-border data transfers

From the perspective of the GDPR and French legal HR data protection, under Chapter V of the GDPR, there are several types of cross-border data transfers, each with different considerations. Cross-border data transfers, including cross-border HR data transfers, may only take place if the transfer is made either within the EEA (including the European Union), or to an adequate jurisdiction agreed as such by the European Commission or the data exporter, including a company acting as an employer, that has implemented a lawful data transfer mechanism (or an exemption or derogation applies) as an adequate safeguard.

As an example, binding corporate rules are one of the ways in which adequate safeguards (under Article 47 of the GDPR)⁴⁶ may be demonstrated by a group of undertakings, or a group of enterprises engaged in a joint economic activity as an employer, for cross-border HR data transfers.

Employers in the EEA must comply with the GDPR's principles and local personal data protection rules and regulations, and ensure that employees located in EEA Member States are informed about cross-border data transfers and have access to their personal data, as required by local data protection law in their home countries, regardless of the location of the HR data processing and storage.

Beyond these individual rights, no notification to employees located in EEA Member States, or consent from employees located in EEA Member States, is required for cross-border HR data transfers from the EEA.

For the United States, the Privacy Shield requires that an organisation processing personal data, including HR data, in the United States will cooperate in providing access to the personal data concerned, including HR data about employees, either directly or through

42 1978 French law on information technology, data files and civil liberties, in its latest version in force, Article 30.

43 *id.*, at Article 48.

44 General Data Protection Regulation [GDPR], Article 6, corresponding to Article 5 of the 1978 French law on information technology, data files and civil liberties, in its latest version in force.

45 1978 French law on information technology, data files and civil liberties, in its latest version in force, Article 4.6.

46 There is no specific provision for this purpose under the French law on information technology, data files and civil liberties, in its latest version in force.

an employer located in the EEA. The accountability for onward transfers provides that a contract (such as, for example, a contract that reflects the requirements of the standard contractual clauses adopted by the European Commission) is required when personal data, including HR data, received under the Privacy Shield is transferred either to a third party acting as a controller or to a third party acting as an agent.⁴⁷

iii Sensitive data

From the perspective of the GDPR and French legal HR data protection, under Article 9 of the GDPR,⁴⁸ 'sensitive data' is defined as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a natural person's sex life or sexual orientation.

Medical information can only be obtained from an employee when the information is needed by the employer. This means employees have the right to keep their medical information private and confidential. But employers also have the right to know about their employees' illness or disability, and have the right to seek medical information to provide appropriate support or make special arrangements.

A person's social security number (SSN) benefits from specific protection. The use of SSNs for candidates or employees by organisations and employers is strictly regulated under French data protection rules and can be processed for specific HR purposes only.⁴⁹

The processing of sensitive personal data by organisations, including employers, is prohibited unless the data subject, including an employee, has given explicit prior consent, or, as the case may be, the processing is necessary in the context of employment law, or laws relating to social security and social protection, or falls within other exceptions as detailed under Article 9(2) of the GDPR.⁵⁰

iv Background checks

From the perspective of the GDPR and French legal HR data protection, an employer located in France may ask an applicant to provide information directly or through a third party to the extent that the information is necessary to assess the applicant's professional capacities that have a direct link with the position and the employee's skills (Article L. 1221-6 of the French Labour Code).

This means background checks in France are limited to verifications of a candidate's qualifications and experiences that are absolutely necessary, and to obtaining references.

Criminal background checks are limited to certain professions that entail security responsibilities or that involve working with children or sensitive information or materials. Credit background checks do not exist in France.

47 <https://www.privacyshield.gov/article?id=Onward-Transfer-Principle-FAQs>.

48 1978 French law regarding information technology, data files and civil liberties, in its latest version in force, Articles 6, 8-I-2°(c) and 44.

49 Application Decree No. 2019-341 dated 19 April 2019 about processing, including the social security number and its purposes.

50 GDPR, Article 9(2)(a) and 1978 French law regarding information technology, in its latest version in force, Articles 6, 8-I-2°(c) and 44.

XIII DISCONTINUING EMPLOYMENT

In France, employment contracts can be terminated by the employer on either ‘personal’ or economic grounds.

i Dismissal for personal reasons

Dismissal for personal reasons is dismissal on grounds inherent to the employee’s person, such as misconduct, serious misconduct or professional underperformance.

To be valid, the dismissal of an employee for personal reasons must be based on real and serious grounds.⁵¹ The employee may only be dismissed based on objective facts resulting from his or her personal actions. Consequently, the grounds for an employee’s dismissal must be justified, in the event of litigation, with reference to written documents. It is also necessary to be able to establish that these facts are such that the contractual relationship between the two parties cannot continue.

Dismissal for personal reasons requires a specific procedure with specific deadlines. In particular, this procedure involves holding a preliminary meeting with the employee, sending a letter of dismissal containing certain specific provisions, and respecting a notice period (except in the event of termination for serious or gross misconduct), the duration of which is set by the law or by the applicable industry-wide CBA.

As mentioned above, under French law, special protection from dismissal is principally reserved for staff representatives. For these employees, a specific procedure must be implemented in the event of dismissal, requiring, in particular, prior authorisation from the French administration.⁵²

Upon dismissal, the employer must pay the dismissed employee:

- a* severance compensation provided for by the Labour Code or the CBA (whichever is more favourable). Under French law, severance compensation is due only to employees with at least eight months of service.⁵³ As an exception, French law provides that no severance pay is due for employees dismissed for serious or gross misconduct;
- b* wages corresponding to the notice period, if the employer decides to release the employee from working during this period; and
- c* compensation for any untaken days of paid leave acquired as at the date of the employee’s departure.

Should an employee consider that his or her dismissal is not based on real and serious grounds, he or she may claim damages for unfair dismissal.

Since 23 September 2017, the Labour Code provides for a statutory fixed scale of minimum and maximum damages that employees may be awarded in the event of unjustified dismissal depending on (1) their seniority at the company and (2) the size of the company (whether it has fewer than 11 employees or more than 11) (known as the Macron Scale):⁵⁴

- a* The minimum amount ranges from 15 days’ salary (on completion of one full year of service) to three months’ salary.

⁵¹ French Labour Code, Article L. 1232-1 and seq.

⁵² *id.*, at Article L. 2411-8.

⁵³ *id.*, at Article R. 1234-2.

⁵⁴ *id.*, at Article L. 1235-3.

- b* The maximum amount ranges from one to 20 months' salary.
- c* The amount determined by the judge within the scope of this statutory fixed scale will depend on the loss suffered by the employee.

Should an employee consider that the employer has failed to comply with the legal requirements regarding the dismissal procedure, he or she may claim damages for unlawful dismissal (up to one month's salary).

French law provides that a judge may deem a dismissal null and void only in situations expressly provided for by law or when an employee's fundamental freedom has been infringed.⁵⁵ In particular, a dismissal may be found null and void if it is based on an employee becoming pregnant, his or her status as a staff representative, participation in a strike, or discrimination.

Should an employee's dismissal be deemed null and void, that employee may be reinstated. If the employee's reinstatement within the company proves impossible, or if the employee does not wish to be reinstated, he or she is entitled to a greater level of damages (i.e., at least six months' salary, irrespective of seniority and the size of the workforce).

In the event of a dispute regarding dismissal, a settlement agreement may be entered into between the parties, and will have the effect of resolving the dispute between the parties. The validity of a settlement agreement, however, is subject to certain conditions:

- a* it must be drawn up in writing;
- b* litigation or pre-litigation proceedings must be pending;
- c* public social policy, which provides that one can only settle rights that are actually available but not future or potential rights, must be respected;
- d* the parties' consent must be valid; and
- e* both parties must make mutual concessions.

Termination may also come about by mutual agreement between the parties.⁵⁶ If this is the case, no grounds for terminating the employment contract need to be specified but a specific procedure must be followed and, in particular, the labour administration's approval is required. The employee will be entitled, as a minimum, to the severance compensation provided for by law or by the CBA. No notice period will apply as the parties must agree on a departure date.

Whenever an employment contract is terminated, the employer must deliver an employment certificate, a completed form for the French unemployment insurance office, and a receipt for full and final payment to the employee.

ii Redundancies

Under French law, dismissal on economic grounds is dismissal for reasons unrelated to the conduct of the employee and resulting from the termination, transformation or substantial change in the employment contracts, resulting, in particular, from economic difficulties, technological transfers, the necessary reorganisation of the company to safeguard its competitiveness, or the definitive suspension of the company's activities.⁵⁷

⁵⁵ *id.*, at Article L. 1235-3-1.

⁵⁶ *id.*, at Article L. 1237-11 and seq.

⁵⁷ *id.*, at Article L. 1233-3.

If a company belongs to a group, any economic difficulties, technological transfers or a need to safeguard competitiveness must be assessed at the group level and across the business sector that is common to the companies within the group that are established on French territory.

It should be noted that the French courts are quite strict in their assessment of the grounds for redundancy and, consequently, it is quite common for redundant employees to sue their former employers. As a result, specific efforts must be made to justify the grounds for redundancy, which must be supported by written documents.

Redundancy involves a specific formal procedure, which is far more complicated than the procedure involved in cases of dismissal on personal grounds. This procedure varies depending on the number of redundant employees, the company's headcount and the existence of staff representatives.

Individual redundancy

Individual redundancies do not require, in themselves, consultation with the CSE, unless they concern a staff representative.

If the employee meets the required conditions, the employer must give him or her the opportunity to:

- a* enter into a professional safeguarding contract, if the employee works for a company or group employing fewer than 1,000 employees within the European Union; or
- b* take reclassification leave or mobility leave, if the employee works for a company or group employing 1,000 employees or more (with specific provisions for non-French groups regarding the location of the employees).

Once the redundancy has been decided, the employer must inform the administration the decision.

'Small' collective redundancy of fewer than 10 employees

The employer must consult the CSE. In the context of its economic functions, the CSE of companies with at least 50 employees must also be consulted in due time on the restructuring and workforce reduction project. Thus, two separate consultations must be carried out.⁵⁸

Once an employer has decided on the redundancy of between two and nine employees, it must inform the DIRECCTE of its decision within eight days of sending out the letters of dismissal.

Collective redundancy of 10 employees or more

Should the dismissals concern more than 10 employees during a period of 30 days, a specific, burdensome procedure must be implemented, involving the implementation of a job protection plan (or PSE).⁵⁹ A PSE is established either by a majority-ratified collective agreement validated by the DIRECCTE, or by a unilateral document drawn up by the employer and approved by the DIRECCTE.⁶⁰

⁵⁸ id., at Article L. 1233-8.

⁵⁹ *Plan de sauvegarde de l'emploi*.

⁶⁰ id., at Article L. 1233-24-1.

The PSE must contain certain provisions and in particular a reclassification plan aimed at facilitating the internal reclassification or national outplacement of employees, professional training or vocational retraining, and monitoring the effective implementation of this reclassification plan.⁶¹

In the event of redundancy, the statutory severance compensation is the same as that paid in the case of dismissal on personal grounds. The employer may also include certain specific support measures in the PSE. The redundant employee is given priority in the event of rehiring for a period of one year.⁶²

Finally, since 23 December 2017, a new form of collective termination has been put in place: mutually agreed collective termination.

This method of termination is negotiated by way of a collective agreement entered into at company level and sets out the targets in terms of job cuts while excluding any dismissals.⁶³ The DIRECCTE is informed without delay of the opening of negotiations and, once they are finished, the agreement is submitted to the DIRECCTE for validation.

Once it has been completed and validated by the administration, the employees wishing to leave under this agreement present their departure application, which is studied by a commission. The employer's acceptance of the employee's application in the context of the collective termination agreement results in the termination of the employment contract by mutual agreement of the parties.

XIV TRANSFER OF BUSINESS

The transfer of an enterprise or business in France, or a part of an enterprise or business, to another company is governed by European Council Directive 2001/23/EC (known as the Acquired Rights Directive), by Article L. 1224-1 of the French Labour Code, and by both national and European case law.

Article L. 1224-1 of the French Labour Code provides that where there is 'a modification of the legal situation of the employer, chiefly in case of succession, sale, merger, transformation of the business . . . all the employment contracts in effect at the time of the modification remain applicable between the new employer and the employees attached to the business'.

Therefore, Article L. 1224-1 of the Labour Code is applicable in the event of a change in an employer's legal status. These types of changes mainly occur in the event of succession, sale, merger, transformation of business or incorporation of a company (according to the wording of Article L. 1224-1).

The French Court of Cassation has defined the general notion of a transfer as 'a transfer of an autonomous economic entity that keeps its identity and whose business continues after the transfer'.⁶⁴ It should be noted that case law considers that Article L. 1224-1 of the Labour Code should also, under some circumstances, be applied to insourcing operations. French case law considers that these provisions apply when:

- a* the entity involved in the transfer may be considered an autonomous economic entity; and
- b* the entity concerned continues its activity within the company to which it is transferred.

61 *id.*, at Article L. 1233-24-2.

62 *id.*, at Article L. 1233-45.

63 *id.*, at Article L. 1237-19.

64 Court of Cassation, Social Chamber, 7 July 1998, No. 96-21.451.

According to French case law, any ‘combined and organised unit of staff and tangible and/or intangible assets enabling the entity to carry on an activity that pursues its own objectives’ may be considered an autonomous economic entity.

When Article L. 1224-1 of the Labour Code applies, contracts of employment fully or partly dedicated to the transferred business are necessarily and automatically transferred to the new employer under the same individual terms and conditions. The contracts remain valid, and under the same conditions as those prevailing prior to the transfer (e.g., length of service resumed, same salary).

Transferred employees are bound by the same obligations and are entitled to the same rights as those governing their contracts at the time of their transfer. More particularly, the employees retain their seniority entitlement, grade and salary.

Where CBAs are concerned (e.g., an in-house collective agreement or an industry-wide agreement), any agreements applied before the transfer will continue to apply after the transfer until a substitute agreement is entered into or, in the absence of such an agreement, for one year from the end of the notice period (i.e., three months) in accordance with Article L. 2261-14 of the Labour Code.

If no substitute agreement has been entered into after 15 months (three-month notice period plus 12 months), the employees are entitled to a compensation guarantee (preservation of their compensation prior to the transfer by virtue of the employment contract and the CBA).

XV OUTLOOK

The year 2020 will be marked by a new pension reform promised by the Macron government, which aims to create a universal pension system. The current French pension system is based on a system of professional statuses (42 different pension schemes, multiple rules and exceptions, and complex calculations).

The purpose of creating a universal pension system is to simplify and ensure equal treatment by developing rules based on clear, comprehensible and transparent principles.

GERMANY

*Thomas Winzer*¹

I INTRODUCTION

The relationship between employers and employees is extensively regulated in Germany by statutory law at the federal level. Employees enjoy a comparatively high level of protection. Generally, statutory rules are binding. Contractual modifications to the employee's disadvantage are usually not permitted if made by way of agreement with an individual employee. European law has an increasingly important role in German employment and labour law. Case law and legal precedent are also of major importance. Various aspects of employment relationships can be regulated by collective bargaining agreements (concluded between an employers' association or a single employer and a union) and works agreements (concluded between an employer and a works council). Finally, individual employment contracts can contain provisions that override statutory labour law, collective bargaining agreements or works agreements if they are more favourable to employees.

Labour and employment law-related disputes are subject to the jurisdiction of the labour courts.

A number of government agencies are competent for or connected with the enforcement of employment law, for example, authorities monitoring compliance with statutory law in the field of occupational health and safety (e.g., workplace safety, working time).

II YEAR IN REVIEW

i Trade Secrets Act

The Trade Secrets Act has applied since 26 April 2019. It implements Directive (EU) 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure into national German law with the aim of establishing homogenous protection of trade secrets.

The Act summarises the protection of trade secrets formerly contained in various laws and introduces some new content, notably a legal definition of the term 'trade secret'. It requires that the owner of a trade secret apply 'appropriate' measures to ensure non-disclosure, verifiable, *inter alia*, through measures such as comprehensive confidentiality agreements with employees and post contractual non-competition clauses. In addition, the Trade Secrets Act implements exemptions to protect whistle-blowers, journalists and employees.

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ii Tax Act relating to Brexit

The Tax Act relating to Brexit came into force on 29 March 2019. One legislative purpose of the Act is to make Germany more attractive as a business location for financial institutions in view of the expected withdrawal of the United Kingdom from the European Union. The aim is to minimise employment-related risks of significant institutions in the financial sector in relation to ‘risk takers’ (i.e., making it easier to terminate employment relationships of risk takers). Employees qualify as risk takers if they may have a material impact on the overall risk profile of the institution.

The Act includes provisions under which highly paid material risk takers (as defined in the Remuneration Ordinance for Institutions) will, for the purposes of protection against dismissal, be treated as equivalent to persons in senior positions who are authorised to hire and dismiss employees independently. As a consequence, these employees can be dismissed unilaterally, without any reasons being required, against the payment of severance (all other employees need to agree to a termination of contract against payment of severance); that is to say, the bargaining power of these risk takers has been limited. However, this will affect only material risk takers in major institutions whose annual fixed remuneration exceeds three times the income threshold in the general pension insurance scheme (i.e., in 2019, €241,200 (former West Germany) and €221,400 (former East Germany)).

For other employees in the financial sector, the rules on protection against dismissal remain unchanged.

III SIGNIFICANT CASES

i Fixed-term employment and prohibition of previous employment

According to Section 14(2), sentence 2 of the Act on Part-Time and Limited Term Employment, the limitation of fixed-term employment contracts will be null and void if the individual has been employed by the employer previously (‘prohibition of previous employment’). This means that the employer may not validly conclude a fixed term contract with an individual if that individual has been in its employ at any time in the past. This practice had been criticised over time and, as a consequence, has become the subject of case law. Following the Federal Constitutional Court’s ruling that the case law, which had allowed a fixed-term employment relationship with the same employer after a three-year break, was unconstitutional,² the Federal Labour Court was required to revise its decisions to comply with this ruling. According to the Federal Constitutional Court, in (rare and) extreme cases, fixed terms are valid despite previous employment to avoid unreasonable results (e.g., in the event that the earlier employment relationship was ‘very long ago, very different in nature or has been of a very short duration’). According to the recent decisions by the Federal Labour Court, neither is a time period of eight years a ‘very long’ period nor can previous employment of nine or six months qualify as ‘very short duration’.³ In its latest decision, the Federal Labour Court ruled that previous employment that was in place 22 years ago may qualify as ‘very long ago’.⁴ In this case, it was possible to conclude a new fixed-term contract despite the prohibition under Section 14(2), sentence 2 of the Act on Part-Time and Limited Term Employment.

2 Decisions of 6 June 2018, Case Nos. 1 BvL 7/14, 1 BvL 7/14, 1 BvR 1375/14.

3 Decisions of 23 January 2019, Case Nos. 7 AZR 733/16, 7 AZR 13/17.

4 Decision of 21 August 2019, Case No. 7 AZR 452/17.

ii Vacation

In the first four months of 2019, the Federal Labour Court made several decisions regarding vacation entitlement.

In one of these cases, on 19 February 2019, the Court decided that an annual vacation entitlement would normally lapse only if the employer had previously duly informed employees of their specific holiday entitlement and the relevant periods of expiry.⁵ How the notification of this individual information to each employee shall be implemented in practice is yet to be seen.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

There is no legal obligation to conclude an employment contract in writing. However, according to the Act on the Recording of Essential Employment Terms, an employer must lay down the essential agreed employment terms in writing, sign it and provide its employee with this record no later than one month after commencement of the employment.

In any case, it is recommended to conclude a written employment contract to avoid disputes about the applicable terms of employment. Employers do not weaken their position by concluding a written employment contract because employees enjoy the same protection if there is only an oral agreement.

If an employer and an employee conclude a fixed-term employment contract, the agreement on the fixed term needs to be in writing (i.e., a written agreement executed by both parties on the same copy of the contract) and must be concluded prior to the commencement of the work. Fixed-term employment contracts are permissible if the strict requirements stipulated in the Act on Part-Time and Fixed-Term Work are met. Without any specific reason being required, a fixed-term employment contract can be concluded for a maximum term of two years provided that the employee had not been employed by the same employer in the past. In addition, it is permissible to conclude fixed-term employment contracts where the fixed term is justified by objective reasons (e.g., the employee is engaged as a temporary substitute for an employee on parental leave).

Substantial changes to the employment contract or the terms of employment require either the employee to give consent or the employer to issue a notice of termination with the option of altered conditions of employment. The employer and the employee can mutually agree on an amendment or change to the employment contract or terms of employment at any time.

ii Probationary periods

The parties to an employment contract can agree on a maximum probationary period of six months. The statutory notice period during any agreed probationary period is two weeks. The employer and the employee can contractually agree on a longer notice period.

5 Decision of 19 February 2019, Case No. 9 AZR 541/15.

iii Establishing a presence

A foreign company does not need to establish a subsidiary to hire employees, but can hire employees by itself. However, such a presence can qualify as a branch and would have to be entered in the commercial register. Also, the competent authority (usually the trade office or similar authority) needs to be informed of the intended start of a business. There are certain types of businesses that require a permit from the competent authority (e.g., credit institutions, insurance companies, insurance brokers and financial investment brokers).

The foreign company or branch has to apply to the employment agency for a company number. This number is necessary with regard to forwarding social security contributions to the competent authorities.

People employed in Germany are generally subject to compulsory statutory social security schemes. These are health insurance, long-term care insurance, pension insurance and unemployment insurance. Generally, the contributions to the statutory social security schemes are evenly split between employer and employee and amount to approximately 40 per cent of the employee's gross monthly salary up to the social security contribution ceiling. The employer is liable for calculating the social security contributions, deducting the employee's portion thereof from his or her salary and forwarding it to the competent authority. Further, the employer has to calculate, withhold and pay wage tax for the account of the employee.

Foreign companies can engage independent contractors in Germany.

V RESTRICTIVE COVENANTS

During the course of an employment relationship, employees are bound by a statutory contractual non-compete obligation.

The employer and the employee can agree on a post-contractual non-compete covenant with a maximum term of two years following termination of the employment relationship, if justified by the legitimate interests of the employer. The employee must be granted compensation amounting to at least half of the remuneration package last received by the employee for each year of the non-compete obligation.

VI WAGES

i General principles

Wages and salaries are usually stipulated in the employment contract and collective bargaining agreement.

As of 1 January 2020, the statutory minimum wage is €9.35 gross per hour.⁶ The increase is based on a decision by the Minimum Wage Commission, which proposed an adjustment every two years. According to the case law of the Federal Labour Court, the remuneration of an employee must generally not be lower than two-thirds of the remuneration under collective bargaining agreements commonly applied in the respective industry and region, and in no case less than 50 per cent of the value of the work performed by the employee.

⁶ When introduced on 1 January 2015, the standard minimum wage was €8.50.

Thus, it might be necessary to actually pay a higher wage than €9.35 gross per hour. In addition, minimum wages apply to certain industries (e.g., cleaning services, security services, construction businesses).

ii Working time

Statutory limits regarding maximum working hours are stipulated in the Working Time Act. Generally, the maximum weekly working time is 48 hours on average over a period of six months. The maximum daily working time is 10 hours. The same principles apply to night work. Employees need to have an uninterrupted rest of at least 11 hours after finishing a day's work.

iii Overtime

Employees are allowed to work overtime up to the limits stipulated by the Working Time Act. The employment contract needs to include provision for working additional hours. There is no statutory provision requiring overtime to be compensated in the form of higher wages or salary: in many companies, overtime is compensated by time off. Many collective bargaining agreements provide for overtime premiums, which usually range from 25 per cent on regular working days to 100 per cent for work carried out on Sundays or public holidays. It is also generally permissible to compensate a certain amount of overtime with the regular salary if the employment contract provides for this. It is uncommon for managerial employees to receive compensation for overtime.

VII FOREIGN WORKERS

Citizens of Switzerland and all Member States of the European Union and the European Economic Area (i.e., Liechtenstein, Iceland and Norway) are free to take up employment in Germany.

Citizens of third countries need a residence and work permit to be allowed to work in Germany. Persons willing to take up work in Germany are generally required to apply for a residence and work permit before travelling to Germany. Citizens of certain countries (e.g., Australia, Canada, New Zealand and the United States) are allowed to apply for a residence and work permit after their arrival in Germany.

Whether a foreign worker is subject to German tax depends on whether he or she is a tax resident in Germany (i.e., if he or she has a residence or habitual abode located in Germany). An applicable double taxation treaty concluded between Germany and the country of residence of the foreign worker might restrict the right of Germany to tax remuneration.

Generally, all employees working in Germany, regardless of their nationality, are subject to the German social security system. Exceptions may apply if a foreign worker is only temporarily seconded to Germany or performs work in different states.

With regard to secondments within the European Union, the European Economic Area and Switzerland, the provisions of Regulation (EC) No. 883/2004 of 29 April 2004 on the coordination of social security systems apply. According to this, employees can remain subject to the social security system of their home state if they are seconded to another Member State. An agreement on the applicable social security system may be agreed with the authorities.

Germany has concluded bilateral social security treaties with certain states (e.g., Australia, Canada, Turkey and the United States), which also relate to employee secondments. These social security treaties do not necessarily cover all components of the statutory social security system.

As a general rule (which applies if an employee is seconded from a state with which Germany has not concluded a social security treaty or if any such treaty does not cover a specific component of the German social security system), an employee who is temporarily seconded to Germany under his or her employment contract with a foreign company is not subject to the German social security system ('inward radiation').

Whether a foreign worker is protected by German labour and employment law generally depends on the law applicable to the employment relationship. This law needs to be determined on the basis of conflict of laws rules (in Germany, Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I)). Under that Regulation, the parties to an employment contract can generally freely choose the law that shall govern the contract (subject to mandatory statutory provisions under the law that, in the absence of choice, would have been applicable). The Regulation also includes provisions determining by which law the employment contract is governed in the absence of a choice of law.

VIII GLOBAL POLICIES

German law does not require companies to set up any work rules. Often, internationally active groups (in particular, those whose parent company is subject to the Sarbanes-Oxley Act) wish to implement global policies applying to all companies of the group (e.g., global code of business conduct).

If there is a works council, the implementation of a company policy in Germany may trigger co-determination rights of the works council. The co-determination right does not necessarily have to relate to the whole policy but may – from a legal perspective – be restricted to certain provisions contained therein. If such a co-determination right exists, implementation of the respective provisions of the company policy requires the works council's consent.

If there is no works council, the company may implement the policy under the employer's right to instruct its employees if the policy specifies or pertains to obligations that are already (an implied) part of the employment relationship. An employer's instruction does not require a specific form; an email, note or letter would be sufficient. However, additional obligations or prohibitions going beyond implied obligations under the employment relationship would require employees' consent.

If a company implements a company policy by means of an employer's instruction, it is recommended – but not mandatory – to have the employees confirm receipt and acknowledge the company policy.

Alternatively, a company policy may be implemented based on employees' consent, namely, by agreement with the employees.

There is no legal obligation to have a company policy translated into German. However, breaches of a company policy can only be disciplined if the company can prove that the respective employee has sufficient command of the language in which the company policy is written. It is advisable to prepare a translation if not all employees have sufficient command of that language.

IX PARENTAL LEAVE

An employee is entitled to be granted parental leave (*Elternzeit*) by his or her employer until the child reaches the age of three. Of these three years, up to 24 months may be taken between the child's third birthday and the age of eight.

Parental leave enables an employee to take a break from work or to reduce working hours (part-time) to look after a child. An employee who takes parental leave is (partly) released from his or her work duties. The employee does not receive any pay from the employer. However, the employee can receive a parental allowance (*Elterngeld*) for 14 months (the full amount of monthly parental allowance) or for up to 28 months (half the amount of monthly parental allowance). Parental allowances are paid by the German state.

The parental allowance is a form of financial support for a family after the birth of a child. It amounts to 67 per cent of the net income in the last 12 months before the birth, but not less than €300 per month. The allowance is capped at €1,800 per month (for 14 months) or €900 (for 28 months).

X TRANSLATION

There is no legal obligation under German law to translate employment documents into German or an employee's native language. However, a German translation should be prepared at the very least if not all employees have sufficient command of the language in which the employment contract or company policy is written.

XI EMPLOYEE REPRESENTATION

i Works councils

Works councils can be elected in operations with at least five employees. There is no legal obligation to establish a works council. An employer cannot prevent employees from electing a works council.

The number of works council members depends on the number of employees employed in the operation. In operations with more than 200 employees, a certain number of works council members (depending on the number of employees who are regularly employed in the operation) are released from their normal work duties to perform work for the council only.

Works council elections take place every four years between 1 March and 31 May and council members are generally elected for the full term of four years. The next regular works council election is due to take place in 2022.

If a company has more than one operation, a joint works council must be established at the company level. The works councils each send delegates to the joint works council. The joint works council is competent for matters relating to the company. Further, the local works councils can delegate matters to the joint works council.

A group works council can be established at the level of the parent company of a group in Germany. It is competent for matters pertaining to the whole group.

An economic committee must be established in companies employing more than 100 people on a regular basis. The economic committee is responsible for discussing economic matters with the management of the company and informing the works council.

Managerial employees can elect their own representative body if there are at least 10 managerial employees in an operation.

The rights and powers of the works council are stipulated in the Works Council Constitution Act. They are far-reaching and can extend from information rights, consultation rights and negotiation rights to what are known as co-determination rights. Participation rights of the works council are of particular importance in the event of an operational change (e.g., downsizing).

Works council members, former works council members (whose term of office ended less than one year ago) and certain employees who participated in the election of the works council enjoy special protection against dismissal.

Works council members are entitled to their regular salary when performing work for the council. In addition, they are allowed to participate in any necessary (external) training. The employer has to bear the costs in this regard. In addition, it has to bear the costs resulting from the work of the works council (e.g., the costs for hiring a certain specialist as an adviser of the works council) and provide the works council with all necessary equipment to perform its work (e.g., office, computer, telephone).

ii Employee representatives on supervisory boards

If, in particular, a German limited liability company or stock corporation employs between 501 and 2,000 people in Germany on a regular basis, it is subject to the provisions of the One-Third Participation Act. As a result, one-third of the seats of the respective supervisory board have to be filled by employee representatives.

Under the Co-Determination Act, a co-determined supervisory board must be established, in particular, in all German limited liability companies and stock corporations that employs more than 2,000 people on a regular basis. As a result, 50 per cent of the seats of the supervisory board have to be filled by employee representatives. The Co-Determination Act provides for mandatory rights of the supervisory board (e.g., appointing and removing the members of the management board).

Certain companies that are listed or subject to co-determination (generally those employing more than 500 people on a regular basis) must establish targets for the female quota on certain management levels. Listed companies that are subject to co-determination must also implement a quota of at least 30 per cent men and 30 per cent women on their supervisory boards.

iii Unions

Employees can also get involved with unions. Employers are usually not entitled to ask employees whether they are union members. In addition, employers must not discriminate against employees on account of their union membership.

XII DATA PROTECTION

i Requirements for registration

Under the Federal Data Protection Act, the employer is permitted to collect and process an employee's personal data if he or she has given consent, or if a statutory provision or other legal provision (in particular, a works agreement) allows for such data processing. It is generally permissible to process data to the extent that is necessary for the purposes of the employment relationship. Beyond that, data processing is only permissible to a very limited extent, accompanied by a careful weighing of the legitimate interests of the employer and the employee.

ii Cross-border data transfers

Transfers of personal data to countries inside the European Union (EU) and the European Economic Area (EEA) are allowed under the same conditions as data transfers within Germany. They are not subject to the approval of the supervisory authorities.

Data transfers to countries outside the EU and EEA (third countries) are permitted only if the recipient of the data can ensure an adequate level of protection of the data.

The European Commission has determined with regard to a number of countries that they have an adequate level of protection. In other countries, an adequate level of protection can be ensured by individual agreements with the data recipient or permits issued by supervisory authorities. Data transfers to the United States have been particularly problematic. After the Court of Justice of the European Union declared the Safe Harbour Decision of the European Commission invalid on 6 October 2015,⁷ data transfers to the United States were only permissible on the basis of standard contractual clauses or individual permits. On 12 July 2016, the European Commission adopted the EU–US Privacy Shield, which now governs data transfers to the United States.

iii Sensitive data

Information about a person's racial or ethnic origin, political opinions, religious or philosophical convictions, union membership, health or sex life is considered to be sensitive data. Sensitive data may only be processed by the employer in rare cases where this is explicitly permitted or required by statutory provisions (e.g., notification duties towards the statutory healthcare fund, accident insurance and pension insurance).

iv Background checks

Background checks by an employer are allowed but must be limited to issues that are significant for the specific position. With regard to checks of criminal records, only prior convictions that relate to the work of the employee or applicant may be requested. When performing background checks, the employer may not access information from social networks such as Facebook. On the other hand, it may evaluate information about the employee or applicant from professional networks such as Xing or LinkedIn.

XIII DISCONTINUING EMPLOYMENT

i Termination

The possibilities for dismissing an employee are limited by the Dismissal Protection Act. This Act applies to employees who have completed at least six months' service with an employer and are employed in an operation that has more than 10 employees.

Under the Dismissal Protection Act, the termination of an employment relationship needs to be justified on objective grounds, which are:

- a* operational reasons (i.e., redundancy);
- b* conduct-related reasons (i.e., misconduct); or
- c* reasons relating to the person of the employee (e.g., an inability to perform the work required owing to long-term illness).

⁷ Case No. C-362/14, *Schrems*.

In particular with regard to terminations for operational reasons, there must not be any vacancies within the company on the same or lower hierarchy levels that could be filled by the affected employee.

A termination for good cause with immediate effect is possible under circumstances that make it unacceptable for the employer to employ the person until the expiry of the notice period (e.g., fraud against the employer).

Any works council must be heard prior to the issuance of each notice of termination. However, the works council cannot veto the termination.

The applicable notice period must be observed. It can be stipulated in an individual employment contract, collective bargaining agreement or statutory law. Statutory law provides for notice periods depending on an employee's years of service (ranging from four weeks during the first two years of service, to up to seven months after 20 years of service).

Employees continue to be employed by the company during the notice period, which means a unilateral payment in lieu of notice is not permissible. Employees may generally be released from the duty to work (i.e., gardening leave).

Any notice of termination must be in writing and it must be signed by a person authorised to legally represent the company.

Employees can challenge the validity of the termination by filing a termination protection suit with the competent labour court. There is no discovery or jury trial under German law.

If the labour court finds a termination to be unlawful, it can, from a legal perspective, only award reinstatement; in other words, generally, it cannot grant a severance payment. In addition, the employee would be entitled to back pay.

Although the legal consequence of an invalid termination is reinstatement, approximately 90 per cent of the termination protection suits are settled in court. The employer pays severance and the employee accepts the termination. The severance is usually paid in addition to the notice period.

The employer can always offer the employee the chance to conclude a mutual termination agreement. This type of agreement usually provides for the termination of the employment and the payment of severance.

There is no statutory formula for calculating severance payments, though the following is often applied: $\text{severance payment} = \text{factor} \times \text{gross monthly salary} \times \text{years of service}$. The factor usually ranges between 0.5 and 1.5.

ii Redundancies

The termination of employee contracts for operational reasons (i.e., redundancy) is generally permissible if a position (job) is eliminated. A redundancy does not automatically result in termination of the contract of the individual whose job ceases to exist. Instead, a social selection procedure is used to determine which employees must be dismissed. This means that from a group of comparable employees, the individual with the least need for social protection in terms of age, years of service, maintenance obligations and disability will be dismissed.

The works council has many more rights in the case of an operational change (e.g., mass redundancy). If a planned restructuring constitutes an operational change, the employer must negotiate a reconciliation of interests regarding the scope of the restructuring and its implementation (in particular, steps and timing), and a social plan with the works

council (usually providing for severance payments). Again, there is no statutory formula for calculating the severance payments. In practice, formulas similar to the one described in Section XII.i are commonly used in social plans.

The conclusion of the proceedings on a reconciliation of interests and a social plan does not implement the redundancies. The employer still has to implement the redundancies concerning individual employees by issuing notices of termination or concluding mutual termination agreements.

Under German law, if a substantial reduction in personnel constitutes a mass redundancy, the employer has to notify the employment agency. A mass redundancy occurs if an employer dismisses a certain number or proportion of employees who are employed in an operation within 30 calendar days. The employment agency does not review whether the mass redundancy is justified. The procedure is more of a formal requirement, which is, however, a precondition for validity of the termination.

XIV TRANSFER OF BUSINESS

The Acquired Rights Directive (Directive 2001/23/EC) has the primary intention of protecting the rights of workers during a transfer of business. In Germany, the Acquired Rights Directive has been implemented in Section 613a of the Civil Code.

A transfer of business occurs if an economic entity is transferred by way of legal transaction to a third party (transferee) that continues to operate the economic entity. As a consequence, all employment relationships that are allocated to the economic entity transfer with all rights and obligations to the transferee by operation of law.

To determine whether an economic entity has been transferred in the specific case, the following seven criteria need to be considered:

- a* type of business involved;
- b* transfer of tangible assets;
- c* transfer of intangible assets;
- d* assumption of personnel or part of the personnel by the transferee;
- e* transfer of customers;
- f* similarity between activities before and after the transfer; and
- g* duration of any suspension of activities.

It should be established whether an entity is an asset-intensive business (e.g., a production plant) or a labour-intensive business (e.g., a consulting firm). In the case of an asset-intensive business, a transfer of business can occur simply by taking over the relevant assets and continuing the business. With regard to labour-intensive businesses, a transfer of business occurs if the transferee assumes an essential part of the workforce in terms of numbers and knowledge or skills.

If a transfer of business occurs, all rights and obligations under the employment relationship transfer to the new employer by operation of law. Only the employment relationships of active employees transfer. The employment conditions remain unchanged.

The transferor and the transferee are obliged to notify the employees who are subject to a transfer of their employment relationship. The Federal Labour Court has interpreted this obligation very broadly.

Under German law, an employee affected by a transfer of business may generally object to the transfer of his or her employment relationship within a period of one month after

receiving a proper notification letter. If the employee has not been properly informed (i.e., if the notification letter does not meet the standards set by statutory law and case law), there is no statutory period during which the employee must declare his or her objection – essentially, there is no time limit on when he or she can object to the transfer. If the employee objects to the transfer, he or she remains an employee of the transferor (i.e., he or she does not automatically have to resign).

Termination of the employment relationship of an employee because of the transfer of business is ineffective. Termination for other reasons is permissible, subject to the general rules.

XV OUTLOOK

As a result of the decision of the European Court of Justice of 14 May 2019 (Case No. C-55/18), employers are required to keep records of their employees' working hours. This decision may have a significant effect on German labour law as, until now, it had only laid down minor requirements for the recording of working time, breaks and rest periods. At present, in Section 16(2), sentence 1 of the Working Time Act, German law provides that employers are obliged to record employees' working hours that exceed those of the working day. This only affects working hours exceeding eight hours per working day as well as Sundays and public holidays. An additional obligation to record working time currently exists under Section 17 of the Minimum Wage Act solely for specific minor occupations. It is open as to whether and how the German legislature will shape the duty to record working time for all employees in the future and how this is likely to affect the businesses of employers.

HONG KONG

*Jeremy Leifer*¹

I INTRODUCTION

Hong Kong's employment environment and its employment legislation are widely recognised as being generally employer-friendly. The legislation applying to employees in Hong Kong is a combination of statutory and common law. The common law origins of Hong Kong employment law include decisions of the courts of other common law jurisdictions, in particular the English courts.

The principal piece of employment legislation providing protection to employees is the Employment Ordinance (EO). Since its enactment a little over half a century ago, it has not seen any general overhaul of its underlying principles, but instead has been amended piecemeal to address particular issues as they have arisen. Certain local structural constraints have ensured that only modest reforms have tended to occur. The result is that while the EO provides an important basis for protection for employees, when compared with other jurisdictions that have more advanced labour laws, Hong Kong has fallen some way behind.

In addition to the EO, there is legislation relating to employment in respect of minimum wages, employee compensation, health and safety, discrimination and insolvency.

The EO applies to any employee with employment in Hong Kong. It prescribes the minimum rights and benefits to be enjoyed by any such employee. It also contains a no-contracting-out provision, which will render void any term of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred upon the employee by the EO.

The relevant courts and tribunals in which employment claims can be brought are:

- a* the Minor Employment Claims Adjudication Board – for claims of up to HK\$8,000;
- b* the Labour Tribunal – this specialist tribunal seeks to provide a quick, simple, cheap and informal forum for resolving disputes between employers and employees.² Legal representation is generally not permitted. The Tribunal's jurisdiction includes claims arising under employment legislation, principally the EO and the Minimum Wage Ordinance;
- c* the District Court – generally, claims falling outside the Labour Tribunal's jurisdiction will be heard in this court;
- d* the High Court – for appeals from the Labour Tribunal, and for claims falling outside the Labour Tribunal's jurisdiction exceeding HK\$1 million;

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² Legislative Council Brief for the Administration of Justice (Miscellaneous Provisions) Bill 2014 (22 April 2014).

- e* the Court of Appeal – for appeals from the District Court or the High Court; and
- f* the Court of Final Appeal – for appeals from the Court of Appeal.

II YEAR IN REVIEW

Discrimination legislation (miscellaneous amendments) bill

In our 2017 review, we referred to the response to the 2014 Discrimination Law Review conducted by the Equal Opportunities Commission (EOC) on Hong Kong's discrimination laws, which identified 27 areas of higher priority for legislative reforms or other actions. The government responded by introducing a bill in late 2018 to amend the four discrimination ordinances to take forward eight of the EOC's priority recommendations. These include new provisions to:

- a* introduce express provisions in the Sex Discrimination Ordinance prohibiting direct and indirect discrimination on the ground of breastfeeding;
- b* provide protection from direct and indirect racial discrimination and racial harassment by imputation in the Race Discrimination Ordinance; and
- c* expand the scope of protection from sexual, disability and racial harassment between persons working in a common workplace.

Significantly, these steps do not include the consolidation and rationalisation of the four existing anti-discrimination ordinances into a single unified ordinance, which would have simplified the overall legislative framework. The bill has been delayed passing through the committee stage, but is expected to emerge as two separate pieces of legislation, and somewhat stronger than the original bill.

III SIGNIFICANT CASES

Leung Chun Kwong v. Secretary for the Civil Service and the Commissioner of Inland Revenue (Court of Final Appeal)

In our 2018 review, we included this landmark case,³ which had then reached the Court of Appeal (CA), on the issue of the limited recognition of same-sex marriage in two separate contexts involving discrimination based on sexual orientation. In 2019, the case reached the Court of Final Appeal (CFA).

Hong Kong's statute law restricts recognition of marriage to heterosexual marriage. The applicant is a Hong Kong civil servant who had entered into a same-sex marriage in New Zealand. He then applied to the Civil Service Bureau to update his marital status to an officer's family to obtain benefits available under the Civil Service Regulations (CSR). He had also sought to apply to the Commissioner of Inland Revenue for joint tax assessment with his spouse. The CA upheld the decision of the Court of First Instance, which confirmed the Commissioner's decision against the applicant (the Tax Decision). The CA also upheld the original decision made under the CSR (the Benefits Decision), reversing the decision of the Court of First Instance. The CFA reversed the CA, basing its decisions on its 2018 ruling in *QT v. Director of Immigration*, which was also a discrimination claim arising out of a same-sex marriage in the context of an application for a dependant visa (as discussed

³ FACV No. 8 of 2018.

in our 2018 review). The CFA agreed that the protection of the institution of marriage in Hong Kong was a legitimate aim and that differential treatment directed to that aim could be justified. However, the real question was whether the differential treatment of the appellant was rationally connected to that legitimate aim of the protection of the marriage in the context of this case. The CFA concluded that there was no rational connection in either the Benefits Decision or the Tax Decision.

For the Tax Decision, it could not logically be argued that any person is encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse is denied those benefits or a joint assessment to taxation. As for the Benefits Decision, the CFA treated the suggested rational connection between the differential treatment and the legitimate aim as all the more illogical when taking into account the government's published policy as an equal opportunities employer. Additionally, there was no administrative difficulty posed by the appellant's case.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The normal principles for the formation of a contract under Hong Kong law apply to the creation of an employment contract. Although there is no requirement for a contract to be in writing, a written contract is always advisable for an employer as there are certain basic minimum compliance requirements for an employer under the employment protection legislation. An employer would be well advised to have clarity around these terms in all circumstances. An employee must also sign the employment contract, if it is in writing.

Fixed-term employment contracts are permissible under Hong Kong law, although these generally tend to be seen in the context of specific projects or for the most senior levels of management.

The key provisions recommended for inclusion in an employment contract are:

- a* term;
- b* job title;
- c* scope of job responsibilities and duties;
- d* probation period;
- e* salary;
- f* bonuses (contractual or discretionary);
- g* other benefits, such as medical insurance and housing;
- h* annual leave;
- i* sick leave;
- j* period of contractual notice and right to make a payment in lieu of notice;
- k* termination for breach or summary dismissal;
- l* confidential information;
- m* governing law and jurisdiction; and
- n* personal information collection statement (PICS).

An employment contract would usually be entered into before the term of the contract commences, but it should in any event be entered into no later than that time. The parties may amend or change an employment contract at any time after it has been entered into, and should do so in writing. Care should be taken by an employer to ensure that if an employee is giving up any rights, or accepting any new obligations, any change to the contract complies

with Hong Kong's contractual rules, requiring the presence of some fresh consideration to ensure the enforceability of the employee's amended obligations. If there is any doubt as to the presence of consideration, the amendment should be executed by the employee as a deed under seal. Care should also be taken to ensure that the contract is not changed by oral agreement. This could occur if the elements for a variation were present and satisfied, and, if so, an employer may be found to have inadvertently agreed to an amendment to the contract.

ii Probationary periods

Probation periods in employment contracts are permitted under Hong Kong law and it is customary to use them.

The EO provides that, regardless of whether a notice period is expressly provided in the contract, during the first month of employment, while an employee is on probation, the contract may be terminated by either party without notice or payment in lieu of notice. After expiry of the first month and during the remainder of the probation period, a minimum of seven days' notice must be given or, if longer, the agreed notice period.

iii Establishing a presence

If a company that is incorporated outside Hong Kong establishes a place of business in Hong Kong (i.e., a branch), it must apply to the Hong Kong Companies Registry for registration as a non-Hong Kong company within one month of the date of establishing a place of business. It must also register with the Hong Kong Inland Revenue Department (IRD). If a non-Hong Kong company without a place of business in Hong Kong hires an employee locally, the requirement to apply for registration may be triggered by the activities of that employee in Hong Kong if those activities amount to the carrying on of a business by the employing company in Hong Kong. Whether a business is being carried on is a factual question that will depend on the circumstances. This possible outcome could be avoided if the company were instead to engage an independent contractor to represent it in Hong Kong, which it would do by entering into a contract with that person clearly describing that person's status (e.g., as a local agent or consultant) and the scope of the services to be provided.

Before establishing a branch in Hong Kong, or appointing an agent in Hong Kong to act on its behalf, the non-Hong Kong company would need to consider whether profits sourced from those activities (whether directly or through an agent) would be subject to Hong Kong profits tax. Hong Kong's tax system is territorial and generally will only tax profits that have been generated locally. Profits tax is charged if (1) the person carries on a business in Hong Kong, (2) profits have been earned from that business in Hong Kong, and (3) those profits have arisen in or been derived from Hong Kong (i.e., they must have a Hong Kong source).

Given the nature of Hong Kong's tax system, questions relating to the creation of a permanent establishment have tended to have less prominence in the determination of any liability for profits tax.

A company that hires employees must provide the following statutory benefits: sickness allowance, annual leave, statutory holidays, rest days, contributions to employees' mandatory provident fund (MPF), and maternity and paternity leave.

Assessment for salaries tax on the remuneration and benefits paid to or received by the employee is made directly on, and therefore is the liability of, the employee, not the employer. The employer must file returns with the IRD reporting the commencement and termination of employment of an employee, as well as an annual return reporting aggregate

remuneration and benefits paid to that employee for the prior tax year. The employer does not have any tax-withholding responsibilities for the employee's salaries tax liability, except when the employer is aware that the employee intends to leave Hong Kong for more than one month, typically on termination of employment.

V RESTRICTIVE COVENANTS

Hong Kong law permits the inclusion in employment contracts of post-termination restrictions (restrictive covenants). The following restrictions are typically included:

- a* non-competition with the business of the ex-employer;
- b* non-solicitation of employees of the ex-employer;
- c* non-solicitation of customers of the ex-employer; and
- d* non-dealing with customers of the ex-employer.

The approach of the Hong Kong courts to these types of clauses is, at the outset, to treat them as unreasonable on the basis that they are in restraint of trade on the employee, and thus unenforceable. To reverse this presumption, the burden of proof is on the employer to demonstrate that the scope of the restriction is no wider than is strictly necessary to protect the legitimate business interests of the employer. In considering whether any such restriction is enforceable, the courts will generally have regard to the following three components:

- a* the scope of the restricted activities;
- b* the duration of the restriction; and
- c* the geographical scope of the restriction.

Given the small size of Hong Kong's territory, the courts tend to adopt a very restricted approach to the enforceability of these types of clauses. Consequently, the scope for employers to impose these types of restrictions on their employees can be quite limited. Great care needs to be taken in drafting the wording of the clause. It is also normal to include in a contract of employment express non-compete obligations that apply during the contract term.

Commonly, in the case of more senior employees, an employer will include an express garden leave provision in the contract, to be able to control the activities of the employee once he or she has given notice of resignation. The limitations on the duration of garden leave are not clear. In addition, any restrictive covenant period should interlock with the garden leave provision so that the duration of the covenant is reduced by any period actually spent on garden leave.

VI WAGES

i Working time

Currently there are no maximum working hours regulations in Hong Kong, nor are there any regulations as to the amount of night work that may be performed, and in neither case does the government have any concrete proposals for introducing any such regulations. Nevertheless, a person employed under a continuous contract is entitled to one rest day in every seven days and to all statutory holidays.

Under the Minimum Wage Ordinance, the current minimum wage, which was set on 1 May 2019, is HK\$37.50 per hour.

ii Overtime

Overtime work is not regulated by legislation. Consequently, the right of an employer to ask an employee to work overtime, the rate of overtime pay and the amount of overtime that the employee may be asked to work, will be determined in each case by the terms of the contract of employment between the employer and employee.

VII FOREIGN WORKERS

Any person seeking to work in Hong Kong who does not have the right of abode in Hong Kong (i.e., permanent residence) must first obtain a work visa from the Hong Kong Immigration Department.

There is no requirement for an employer to keep a register of employees holding work visas, and there is no upper limit on the number of such employees that an employer may have. When applying for a visa, the applicant must demonstrate that he or she is in a job that is relevant to his or her academic qualifications or work experience and that cannot readily be taken up by the local workforce. Typically, this would require the employer to demonstrate that efforts have been made to search for suitable candidates in the local labour market. Successful applicants will normally be permitted to extend their stay in Hong Kong on a two–two–three years pattern without other conditions of stay, after which they may be eligible for right of abode status.

An employee holding a work visa will be subject to tax on his or her remuneration and benefits on the same basis as a local employee. If that employee's employment is located in Hong Kong (i.e., generally he or she performs his or her work in Hong Kong), he or she will have the benefit of statutory protection provided under local employment laws. This is likely to be the case even if the contract of employment is governed by a different governing law. An employee holding a work visa may be able to claim an exemption from the MPF scheme if the employee is already a member of a provident or retirement scheme outside Hong Kong. The exemption will cease to apply if the employee acquires right of abode status.

VIII GLOBAL POLICIES

A company is not required by law to apply its global policies, and in particular its internal discipline rules, to employees working in Hong Kong. While this will be a matter of policy for the employer, the presence of and adherence to a mature set of disciplinary rules can provide an effective evidential trail to demonstrate due grounds for dismissal of an employee in breach of contract. There is no requirement that these rules be agreed or approved by a representative body (if any) of the employees, or that they be filed with, or approved by, any government authority. It is not essential for employees to have agreed to the rules, but it is recommended that they be incorporated into the employees' contracts of employment.

As mentioned in Section II, Hong Kong has four separate pieces of legislation dealing with discrimination. Under each of these, an employer can incur vicarious liability for acts of discrimination against an employee, regardless of whether the employer knew about the act or whether it was carried out with its approval. The employer will have a defence to a claim for discrimination if it can prove that it took such steps as were reasonably practicable to prevent an employee from carrying out that act, or from carrying out acts of that description in the course of the employee's employment. Given this, it will be important for the employer to include in its internal rules a robust anti-discrimination policy. This should be backed

by training for employees, particularly those in the human resources department, on the employer's anti-discrimination practices. A record should be kept of the application of these rules and the policy to be able to support the aforementioned defence. The EOC has published codes of practice for each of the areas of discrimination covered by the legislation and these should be used as reference points for the drafting of any internal rules on discrimination applicable to Hong Kong-based employees.

There is no requirement that an employer's rules must be written in any particular language. However, it is important that the employer be sensitive to cultural and linguistic differences between employees of different ethnic backgrounds to ensure that all employees are able to read and understand these rules in their first language.

At the time that the employee signs his or her employment contract, he or she should be asked to sign an acknowledgement that he or she has received a copy of the rules and has read and understood them. The rules would ordinarily be posted on the employer's intranet, but it is also good policy to distribute a hard copy of the rules to each employee.

IX PARENTAL LEAVE

Female and male employees are entitled to statutory maternity and paternity leave, respectively, and are entitled to receive maternity and paternity pay, paid by the employer, provided that she or he has been employed under a continuous contract for no fewer than 40 weeks before the start of the scheduled leave.

Maternity leave is for a continuous period of 10 weeks, and a further period of unpaid leave of up to four weeks for illness or disability occasioned by the pregnancy or birth. The rate of statutory maternity pay is four-fifths of the employee's average daily wage. Paternity leave is for five days, and paternity leave pay is payable at the rate of four-fifths of the employee's average daily wage.

It is both a civil and a criminal offence for an employer to terminate the contract of an employee who has given notice of her pregnancy until she is due to return to work on the expiry of her maternity leave. There is no equivalent protection for an employee taking paternity leave.

X TRANSLATION

As mentioned in Section VIII, there is no specific requirement that any employment documents must be translated into an employee's first language. However, it is recommended that where it is clear that the employee is not proficient in the language of the contract or the document in question, it should be translated into that employee's first language.

There are no particular formalities required for obtaining a translation, but any translation should be checked and verified by a senior member of staff who is able to do so. If an employee is provided with a contract or document in a language that he or she does not fully understand, there may be scope for misunderstanding, which could lead to or exacerbate a claim by that employee.

XI EMPLOYEE REPRESENTATION

While legislation permitting the formation of trade unions has existed in Hong Kong for many years, despite the number of unions in Hong Kong, levels of employee union participation continue to be low. There is no statutory provision for the recognition of collective bargaining agreements or for works councils of any kind, and there is no requirement for employers to consult employees in situations where such a requirement might typically be found in other jurisdictions, such as in the event of termination of employment or business sales or combinations. Instances of industrial action in Hong Kong are uncommon.

XII DATA PROTECTION

i Requirements for registration

The collection, processing, use, disclosure and transfer of personal data is governed by the Personal Data (Privacy) Ordinance (PDPO). It sets out six data protection principles (DPPs) drawn from the 1981 OECD Guidelines and the EU Directive at the time of its enactment in 1996, with some modifications. The employer as a data user will be required to comply with the DPPs and with the PDPO. Compliance with the PDPO is generally overseen by the Privacy Commissioner. Employers are not required to register with the Privacy Commissioner.

Personal data is defined in the PDPO as any data (1) relating directly or indirectly to a living individual (2) from which it is practicable for the identity of the individual to be directly or indirectly ascertained, and (3) in a form of which the access to or the processing of the data is practicable. Data that would typically fall within this definition would include the employee's name, address, telephone number, and passport and identity numbers.

Before an employer can collect any personal data from an employee, it must first provide the employee with a PICS, which would usually be attached to the employee's offer of employment. Its content should include explicit statements as to the purposes for which the data is to be used, the classes of persons to whom the data may be transferred and whether it is obligatory or voluntary for the individual to supply the data.

If it is later proposed that the data be used for a purpose not expressly included in the PICS, the employer must obtain separate consent from the employee for that use. An employee is entitled to request access to his or her data and to correct it if necessary.

The employer should only retain personal data for as long as is necessary to fulfil its purpose. It is also required to take 'all practicable steps' to ensure that personal data held is protected against unauthorised or accidental access, processing, erasure or other use.

ii Cross-border data transfers

Although the PDPO contains a provision for the regulation of transfers of personal data to a place outside Hong Kong, it has never been enacted.⁴ The DPPs, as described in Section XII.i, require that an employee be informed explicitly of the purpose for which the data is to be used (i.e., in a PICS), including a transfer out of the jurisdiction. If the purpose for this

⁴ In December 2014, the Privacy Commissioner published guidance on cross-border data transfers to help data users to prepare for the implementation of this statutory provision. While no date has been set for this, the Privacy Commissioner nonetheless encourages data users to adopt the recommended practices contained in the guidance.

transfer does not fall within the original purposes stated in the PICS, then the consent of the employee must be obtained. In this circumstance, there is no requirement for a data protection agreement to be entered into.

iii Sensitive data

No distinction is drawn between different types of personal data.

iv Background checks

Background checks are permitted in Hong Kong and are commonly carried out in respect of prospective employees. Criminal record checks made with the Hong Kong police are also permitted in limited situations, with the consent of the prospective employee. Hong Kong has legislation for the rehabilitation of offenders under which certain convicted offences will be treated as spent with the lapse of time, but they will remain on record.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

The usual events by which a contract of employment may be terminated include:

- a* termination by one party by giving contractual notice to the other;
- b* termination by one party making a payment in lieu of notice to the other; and
- c* termination by the employer by summary dismissal (i.e., for cause).

Termination by contractual notice from one party to another

The EO lays down minimum periods of notice that must be given to terminate a contract. Usually, the period of notice in a contract of employment will be longer than that prescribed by the legislation, in which case the longer period must be used. Subject to this, the minimum statutory notice period for a continuous contract (including in a redundancy situation) is seven days.

Hong Kong law does not recognise the concept of termination at will.

Termination by one party making a payment in lieu of notice to the other

The EO permits an employer to make a payment in lieu of notice to an employee (including in a case of redundancy), and likewise for the employee to make a payment in lieu of notice to the employer. The payment can be made either at the time that the notice is given or at any time during the period of notice. This is a mutual provision (but available only to the party who gave the notice), so the employee may also use it to bring his or her employment to an early end. A new employer might also 'buy out' the employee from the previous employer.

Assuming that the termination of the employment contract by a payment in lieu of notice is made in accordance with its terms, the employee will be entitled to receive contractual pay and benefits (with some exceptions) that he or she would have received had he or she instead served out the full period of notice of termination, and any other payments to which he or she may be entitled under the contract.

Termination by the employer by summary dismissal (i.e., for cause)

This type of termination permits an employer to dismiss an employee immediately and with no further entitlement to pay or benefits. In a well-drafted contract, the grounds of termination would be clearly laid out. In the absence of express grounds of termination, the EO provides for a number of grounds for summary dismissal, including any ground available at common law.

In the case of senior employees, it is not unusual for an employer and an employee to enter into a settlement agreement if, given the seniority of the employee, the employer may want to manage termination of the relationship in a more discreet way.

ii Redundancies

An employee whose contract is terminated, whether by notice or unlawfully, and who satisfies the eligibility requirements, may be entitled to receive either a statutory severance payment or long-service payment. Entitlement to one form of payment excludes entitlement to the other.

An employee will be entitled to a long-service payment in several situations, including if he or she is dismissed, has been in continuous employment with the employer for no fewer than five years and the employer is not liable to pay a severance payment. The amount of the payment is calculated on the same basis as the severance payment.

An employee will be entitled to a severance payment if he or she has been employed under a continuous contract for a minimum of 24 months and is dismissed by reason of redundancy or is laid off. There is no requirement to notify any government department other than the IRD, and no requirement to notify any trade union, unless the employer is bound by an agreement with the union to do so.

Except for the requirement that the employee must be given a statement of the calculation of the severance payment, termination of an employee's contract for redundancy would follow the same procedure for termination as in a non-redundancy situation.

The amount of a severance payment (or long-service payment) due to the employee is calculated by reference to the number of years of service (pro rata for any part year) and the last full month's wages. For each year of service, the employee will be entitled to receive either two-thirds of his or her last full month's wages or two-thirds of HK\$22,500, whichever is less. This sets a ceiling of HK\$15,000 on the monthly amount. This amount has not changed for several decades and, consequently, has fallen well behind overall wage levels as compared with those prevailing when it was set. After a statutory payment has been made to an employee, an employer is entitled to claw back the amount of that payment from its mandatory contributions to the employee's MPF account, thereby in all likelihood setting off in full (or very nearly) the statutory payment made to the employee (but see Section II.vi).

iii Notifications to government departments

An employer who wishes to cease to employ a person in Hong Kong must notify the IRD at least one month before the date of cessation. The IRD will accept a shorter notice period where reasonable, such as in the event of a summary dismissal.

Additionally, if an employee is due to leave Hong Kong for more than a month, the employer must notify the IRD at least one month before he or she actually leaves. This requirement does not apply to an employee whose job requires him or her to leave Hong Kong at frequent intervals.

An employer whose employment relationship with an employee holding a work visa has been terminated must inform the Immigration Department as soon as possible.

XIV TRANSFER OF BUSINESS

There is no provision under Hong Kong law for the automatic transfer of contracts of employment upon transfer of the ownership of a business. Consequently, it is necessary in that context for the selling employer to terminate the contracts of employment of all transferring employees, and for the buyer to make offers of re-engagement to those employees.

The EO provides a mechanism for a form of compliant transfer. This requires broadly that the offer of re-engagement must be on terms that are substantially equivalent to those under the existing contract of employment. Subject to the offer being made no fewer than seven days before the transfer of the business occurs, an employee who accepts the offer will be treated as having his or her continuity of employment and statutory protection rights preserved and transferred to the new employment with the buyer.

Conversely, an employee who rejects the offer unreasonably, and who would otherwise be eligible for a severance payment or long-service payment, will lose that statutory protection.

XV OUTLOOK

The main developments to watch in the coming year will be the proposed amendments to the discrimination ordinances and the enhancement of maternity leave. These are both welcome developments.

INDIA

*Debjani Aich*¹

I INTRODUCTION

The principal sources of law and regulations relating to employment relationships in India are the Constitution of India 1950, labour statutes, judicial precedents, and collective and individual agreements. The applicability of employment law in India is based on several factors, most of which relate to the function of the employee, the activity being performed by the employer and the number of persons employed in the organisation. Briefly, India's employment laws can be categorised as below:

- a* certain laws (such as the Factories Act 1948) apply only to a factory that is engaged in manufacturing;
- b* certain laws apply to an individual who is a 'workman',² regardless of the organisation in which he or she is working; and
- c* certain laws apply to all employees working in an establishment, without distinguishing between categories of employees.

Indian employment laws are highly protective of workmen and it can be a challenge for employers to comply with all applicable laws, some of which date from the 1940s. The labour laws require an employer to act in accordance with multiple regulations, which include obtaining registrations, filing periodic returns, maintaining various registers and displaying extracts of specific laws. Compliance with these regulations can be tedious and problematic, as the information is usually voluminous and an employer may have specific internal methods of maintaining it.

i Legal framework

India is a federation of states. The Constitution demarcates the areas where central (federal) and state governments can legislate. Most employment laws are federal. These include laws relating to employment disputes and social welfare benefits. States are generally empowered to pass amendments to these laws, with specific local applicability.

The Industrial Disputes Act 1947 (the ID Act) is the main central legislation dealing with workmen. A workman would generally be any employee engaged, *inter alia*, to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, but would not include an employee engaged in a managerial or administrative

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² The term 'workman' is not gender-specific.

capacity, or in a supervisory capacity and receiving wages of more than 10,000 rupees per month. Typically, all employees who are not in a managerial or supervisory role would be considered workmen.

The main piece of legislation that is usually enacted by a state is the Shops and Establishments Act (SEA), which deals with issues such as working hours, leave and overtime.

ii Court procedure in labour disputes

Complaints involving industrial disputes fall under the ID Act, which provides for various adjudicatory bodies, including jurisdictional conciliation officers, labour courts and industrial tribunals, to resolve disputes between workmen and management. An employer and workmen may also agree to refer an industrial dispute to arbitration under the ID Act. Further, the high courts of the states³ and the Supreme Court of India⁴ (the country's apex court) also have jurisdiction to hear certain labour disputes under constitutional law.

Litigation in India is often drawn out and the duration of an industrial dispute is difficult to predict with certainty – it may range from six months to more than two years.

The dispute process varies for employees who are non-workmen. In this case, the remedy would be mainly for breach of the employment agreement, where the parties have the option to approach the jurisdictional civil court (which includes the state high court) for relief or the appropriate authority under the SEA.

II YEAR IN REVIEW

After being in the pipeline for several years, as part of its objective to make it easier to do business in India, the government has begun the process of implementation of an amalgamation of key labour laws into comprehensive single codes. In July and August 2019, the Code on Wages 2019 was notified as a law, with the effective date of operation yet to be notified. This Code merges four federal Indian laws relating to wages, minimum wage rates, bonus payments and pay parity for employees. Three other labour codes are expected to be introduced by the government in relation to (1) employee health, safety and social security, (2) industrial relations and (3) social security.

One of India's main social security laws, the Employees State Insurance Act, also underwent amendment in relation to employer and employee contributions. This law provides for subsidised health insurance for employees who earn a monthly salary up to 21,000 rupees. With effect from 1 July 2019, the employee contribution rate as required by the Employees' State Insurance Corporation has been reduced to 0.75 per cent (from 1.75 per cent) and the employer contribution has been reduced to 3.25 per cent (from 4.75 per cent).

III SIGNIFICANT CASES

One of the key cases in Indian employment law in 2019 was a Supreme Court judgment under the Employees' Provident Fund and Miscellaneous Provision Act 1952. The case (*The Regional Provident Fund Commissioner (II) and Ors v. Vivekananda Vidyamandir and Ors*) was in relation to the computation of provident fund contributions under the

3 Each state has a high court with superintendence over all courts and tribunals in the state.

4 The Supreme Court of India exercises original and appellate jurisdiction in relation to employment laws.

Act. As per industry practice, employers frequently used a ‘special allowance’ carve-out to reduce the amount of an employee’s compensation that would be held as basic wages and subject to statutory contributions payable by the employer (and employee). The Supreme Court held that special allowances paid by an employer to its employees will fall under the definition of ‘basic wages’ and would be subject to provident fund contributions. This has a huge financial impact on companies in India, where an employee’s basic wages and special allowances have historically been treated as separate components for the purpose of provident fund contributions.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 is one of India’s newest laws and there have been several interesting cases in this area, especially with the second wave of the #MeToo movement continuing its momentum. Incidents of non-compliance by an employer are being treated stringently by courts and regulatory authorities. In a 2019 judgment of the High Court of Madhya Pradesh,⁵ the Court directed the employer to pay the petitioner significant compensation – 2.5 million rupees – for having faced sexual harassment in the workplace. The Court also imposed a statutory penalty of 50,000 rupees on the employer for its failure to set up an internal committee to handle sexual harassment complaints for its employees.

In April 2017, the government introduced amendments to the Maternity Benefit Act 1961. One of the key amendments was the recognition of surrogacy, whereby a woman employee providing her egg for surrogacy is entitled to paid leave of 12 weeks from the date the child is handed over to her. In the case of *Dr Mrs Pooja Jignesh Doshi v. State of Maharashtra and Another*, the High Court of Bombay held that even with the birth of a child by surrogacy, the parents who have lent the ova and sperm would be entitled to maternity leave and paternity leave, respectively. Interestingly, though the case related to matters prior to the 2017 amendments, the Court adopted the same principle of law in relation to maternity leave to be provided to a commissioning mother. The Court also held that a commissioning father is entitled to paternity leave, which is not yet legally required to be provided by private sector companies in India.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under the Employment Exchanges (Compulsory Notification of Vacancies) Act 1959, if notified by the concerned state government, a private sector employer with 25 or more employees is typically required to notify any vacancy to a local government employment exchange 15 days before the date on which applicants will be interviewed. In practice, this is often observed in the breach.

There is no central statute dealing with the issue of an appointment letter or employment contract. Certain state-specific statutes may require the employer to issue an appointment order in a specified format. In practice, most companies provide an appointment letter or an employment contract indicating the join date, position, compensation and general terms of employment. Typically, the compensation break-up is mentioned in an annexure, which can be modified as required. The compensation break-up is largely based on the taxation aspects of the different compensation components.

⁵ Global Health Private Limited and Ors v. Local Complaints Committee, District Indore and Ors.

Companies would also have an employee handbook or manual that includes details of company policies relating to discipline, leave, and the like. In addition, it is quite common for companies (especially in the information technology, and research and development sectors) to enter into confidentiality and non-disclosure agreements separately.

If an employer wishes to amend employment terms, he or she would need to check whether the employee is a workman. For workmen, the ID Act prescribes a specific process to be followed when changing specified working conditions (e.g., wages, working hours), including giving 21 days' notice. For a non-workman, it is recommended that the employer obtain the consent of the affected employee to effect the change, as any unilateral change to the employment agreement may be held as arbitrary and void.

ii Probation

There are no direct laws in India dealing with probation in general terms; however, this is a common practice. The (federal) Industrial Employment (Standing Orders) Act 1946 (the IESO Act) regulates working conditions for workmen and generally applies to industrial establishments employing 100 or more workmen.⁶ Under the IESO Act, a workman can be employed on a probationary basis to provisionally fill a permanent vacancy for up to a maximum of three months. Any such probationer is not entitled to notice of dismissal or payment in lieu during the probation period.

Certain states (such as Maharashtra) have built the concept indirectly into the SEA, by requiring an employer to provide notice of termination if an employee has worked for a specific duration (in Maharashtra, three months). No notice is required if the employee has worked for a shorter period.

Typically, a probation period lasts between three and six months, and should ideally not exceed 240 days, as several statutory social welfare laws apply to employees who have worked for this period and a probation period exceeding this limit may be construed as a way to avoid complying with the law. It is generally accepted that the services of probationary employees can be terminated at any time by either the employer or the employee as per the terms of the employment contract.

iii Establishing a presence

The hiring of employees requires the establishment of a legal entity to do business in India. There are various means of setting up a legal entity, such as establishing a company, a branch office, a liaison or representative office, or a limited liability partnership.

Until the legal hiring entity is set up, if a foreign company wishes to get people on board, it can examine options such as entering into an independent contractor agreement or using a manpower agency as a temporary measure. The use of an independent contractor, especially in relation to the duration of the contract term, would need to factor in possible adverse tax implications on the foreign company by way of having a permanent establishment in India.

⁶ There are state-specific modifications, such as those seen in Karnataka, where the IESO Act will apply to industrial establishments with 50 or more workmen. Further, states can exempt the applicability of the IESO Act to certain sectors. For example, in Karnataka, the information technology [IT] and IT enabled services sector is exempt from the IESO Act.

iv Contract labour

Multinational companies in India often do not hire direct or regular employees for ancillary services, such as security, housekeeping and catering. A company would usually hire a contractor to provide these types of support services and the provision of labour by such a contractor would be regulated by the Contract Labour (Regulation and Abolition) Act 1970 (CLRAA). The CLRAA envisages registration of the principal employer and licensing of a contractor. A principal employer is any person responsible for supervision and control of an establishment, namely the company hiring the contractor. It is the responsibility of the contractor to make timely payment of salaries and other emoluments to the contract personnel. A key aspect of the CLRAA relates to defaults in the statutory obligations of the contractor – in such a case, the principle employer may need to make good the defaults (which can include payments) to the contract personnel and subsequently recover the same from the contractor. A principle employer should ensure that the contractor undertakes and is liable to comply with all statutory obligations for its personnel.

V RESTRICTIVE COVENANTS

Restrictive covenants in the form of non-compete and non-solicitation clauses are frequently included in an employment agreement. Strictly speaking, a blanket non-compete clause following termination of employment would not be enforceable under Indian laws as it would be held as a ‘restraint of trade’, but is usually included for deterrent value.

Non-solicitation agreements following termination of an employment relationship may have limited enforcement between two employers but not against the employees *per se*. The law on non-solicitation agreements is not very well developed. It is possible to have employees sign an employee bond – if the employee is provided with substantial training at significant cost, the employer can require him or her to remain with the organisation for a reasonable period. If the employee leaves prior to the expiry of this period, he or she may be required to repay the actual or reasonable costs incurred by the employer for this training.

VI WAGES

The Minimum Wages Act 1948, the Payment of Wages Act 1936 and the SEA generally govern the payment of wages to employees.

The Minimum Wages Act stipulates the minimum rates of pay in certain employment. These rates differ from state to state and are periodically revised.

The Payment of Wages Act regulates the payment of wages, including method and period for disbursement to employees earning up to 24,000 rupees per month.

i Working hours, overtime and leave

The SEA usually provides for working hours, which average between eight and nine hours per day. The SEA in most states provides for a break of 30 to 60 minutes after four to five hours of work. Any work beyond this limit would warrant overtime payment, which is usually twice the average wage. The SEA may also provide for overtime caps, usually on a daily, weekly, monthly or annual basis. There are no exemptions from paying overtime. However, overtime provisions are often observed in the breach, as companies may not pay overtime when employees stay late of their own volition to complete work.

Ordinarily, companies need to adhere to government norms on opening and closing hours, and need to be closed for one day a week; as per standard business practice, this is usually Sunday. Exceptions have been made under the SEA for certain sectors, such as the information technology (IT) and IT enabled services (ITES) sector, for which specific permission is required from state labour authorities.

Female employees are generally not permitted to work at night (between 8pm and 6am) for safety reasons. Some state governments provide exceptions for sectors such as IT and ITES, for which specific approval has to be obtained from the labour authorities. Any such approval is subject to stringent security conditions.

The Factories Act is the main central law dealing with factories, distinct from 'regular' commercial establishments. The Factories Act provides for working hours for factory workers (a maximum of 48 hours a week or nine hours a day, or both), overtime (usually at twice the ordinary rate of pay), leave, and so on. Other relevant features of the Factories Act are detailed safeguards for the health of factory workers, safety, improvement of physical conditions of the workplace and welfare amenities.

Typically, the SEA provides for between 15 and 20 days of regular leave and about 10 national or public holidays. Some national holidays are compulsory, while others may be chosen from a longer list of holidays notified by the state government.

ii Employee benefits

An employer may be required to provide statutory social welfare benefits to its employees according to various pieces of central legislation. The main legislation includes the Employees' Provident Funds and Miscellaneous Provisions Act 1952 (the EPF Act), the Employees' State Insurance Act 1948 (the ESI Act), the Payment of Gratuity Act 1972 (the PG Act) and the Bonus Act.

The EPF Act automatically applies to establishments that, *inter alia*, employ more than 20 people and to employees who earn up to 15,000 rupees per month. The employer and employee are required to make contributions to various funds (provident, pension and deposit-linked insurance) for the benefit of the employee. As a matter of practice, companies often provide this benefit to all employees regardless of their monthly remuneration. If a company chooses to follow the EPF Act voluntarily, it would need to comply with all requirements thereunder, including in relation to contribution caps and filings.

Companies with foreign employees and companies sending Indian employees to work overseas would need to factor in the concept of international workers under the EPF Act, where a higher amount of the employer's contribution typically needs to be deposited in the provident and pension funds as compared with 'regular' Indian employees.

The ESI Act applies to factories, which are defined as establishments engaged in manufacture with the aid of power with 10 or more employees. In establishments engaged in manufacture without the aid of power, 20 or more employees are required for the ESI Act to apply. The central government may also notify other establishments to fall under the ambit of the ESI Act. According to the labour authorities, the ESI Act is applicable to all establishments. However, there is some ambiguity about this. As discussed in Section II, the ESI Act aims to provide proper medical facilities and insurance to a workman and to his or her immediate family through a contributory fund. All employees, whether employed directly, through a contractor or part-time, who receive a salary of up to 21,000 rupees per

month are entitled to be insured under the ESI Act. The employer and the employee are required to contribute a specified percentage of the salary, which is deposited by the employer in the Employees' State Insurance account.

Gratuity under the PG Act is a lump sum payment made to an employee on retirement, death or termination of employment because of disablement. Other than in the case of death or disablement, it is required to be paid to employees who have completed five years of continuous service. The requirement to pay gratuity applies, *inter alia*, only to an establishment in which 10 or more people are employed and applies to all employees regardless of monthly remuneration. Gratuity is determined at a rate of 15 days' salary for every year worked or part thereof in excess of six months, capped at 2 million rupees.

The Bonus Act applies to every establishment with 20 or more employees during an accounting year. An employee receiving a salary of 21,000 rupees per month or less is entitled to a bonus for every accounting year if he or she has worked for at least 30 working days in that year, *inter alia*, on the basis of profits, or on the basis of production or productivity. The minimum bonus is 8.33 per cent of the salary earned by an employee during an accounting year, or a sum of 100 rupees, whichever is higher. The Bonus Act also provides that the maximum bonus payable to an employee should not exceed 1,400 rupees (or minimum wages, whichever is higher).

VII FOREIGN WORKERS

As mentioned in Section VI, a significant difference between Indian and foreign employees is highlighted in the EPF Act. The threshold to qualify, the manner of deduction and the benefits differ for a foreign employee, and differ further depending on whether the country of origin has a social service agreement with India.

There are no other substantive distinctions between local and foreign employees.

Immigration issues in India are regulated broadly by federal laws, with input from the Ministry of Home Affairs and Ministry of External Affairs. While the tourist visa-on-arrival provision has been introduced for a limited number of countries (such as Singapore and Finland), applications for work-related visas typically need to be made well in advance.

To stay in India and work long-term with an Indian company, a foreign national requires an employment visa, unless he or she already holds a valid Overseas Citizen of India card, which is granted to certain foreign nationals of Indian origin. To be eligible for an employment visa, a foreign worker must earn a salary of more than US\$25,000 per year and should not be appointed to a job for which qualified Indians are available. A separate category of business visa exists that is issued only for short-term purposes, such as a visit to India to explore possible business ventures.

Foreign nationals are generally required to register with a jurisdictional Foreigners' Registration Officer or Foreigners' Regional Registration Officer, within 14 days of their arrival in India if they hold a visa for more than 180 days.

Given the fluidity of international relationships, it is recommended that before any foreign national travels to India, he or she should seek specific advice on the type of visa he or she needs to obtain.

VIII GLOBAL POLICIES

The IESO Act provides for the formation of standing orders defining the working conditions for workmen in applicable establishments. The orders need to be certified by the labour authorities and made available to all workmen. The types of matters covered in standing orders include:

- a* classification of workmen (permanent, temporary, probationer, etc.);
- b* working hours, holidays and wages;
- c* shift work;
- d* termination of employment and related matters, including suspension or dismissal for misconduct;
- e* sexual harassment matters; and
- f* retirement.

While most companies would have an employee handbook or manual dealing with issues under the IESO Act, it is advisable to check whether there are any state laws that require the company to actually adopt the format of the standing orders under the IESO Act.

IX PARENTAL LEAVE

The Maternity Benefit Act (the MB Act) provides for employer-provided maternity leave and other benefits (such as a maternity bonus) for female employees in relation to childbirth, medical termination of pregnancy, miscarriage, etc. This becomes applicable once a female employee has completed at least 80 days of work in the 12 months immediately preceding her expected delivery date.

A female employee is generally entitled to 26 weeks of paid maternity leave for up to two children and 12 weeks of paid leave for a third or more children. Paid maternity leave of 12 weeks is also provided for cases of adoption of a child up to three months old, which begins from the date the child is handed over to the adoptive mother. The law also recognises surrogacy: 12 weeks of paid maternity leave is provided to a 'commissioning mother', that is to say a biological mother who uses her egg to create an embryo implanted in any other woman. Any female employee who is a commissioning mother can avail of paid maternity leave, which is calculated from the date on which the child is handed over to her.

The MB Act provides for other types of leave, including (1) six weeks for miscarriage or medical termination of pregnancy, (2) two weeks for a tubectomy, and (3) up to one month for illness arising out of pregnancy, delivery, premature birth, medical termination of pregnancy, miscarriage or a tubectomy.

The MB Act prevents a female employee from having her employment terminated or her working conditions changed to her detriment while she is on statutory maternity leave.

Indian law does not provide for statutory paternity leave within the private sector; however, increasingly this is being provided by employers as a discretionary benefit for employees. Leave is usually granted for up to two weeks and would apply also in the case of adoption or surrogacy.

X TRANSLATION

State laws may require statutory employment-related documents to be maintained or displayed in the local language or the language understood by the majority of employees. An employment agreement would not need to be framed in this manner and is usually in English. What is important is that the employee should be able to understand all employment-related documents.

XI EMPLOYEE REPRESENTATION

i Works committee

Under the ID Act, if an industrial establishment employs 100 or more workmen, the government (state or central) may require the establishment to constitute a works committee with a maximum of 20 members. The aim of a works committee is to promote measures for security and good relations between the employer and workmen, and to mediate or facilitate any material difference of opinion between the parties. The committee would consist of an equal number of representatives nominated by the employer and the workmen.

ii Trade union

The legal right for collective bargaining exists in India through the means of a trade union. A trade union may be formed in accordance with the Trade Unions Act 1926 for regulating relations between an employer and employees. For the purpose of registration, seven or more members of a trade union can subscribe their names to the charter of the trade union and apply for registration of the trade union. A trade union is entitled to enter into binding contracts and settlements with an employer. In practice, white-collar employees are usually not represented by a trade union or any other collective bargaining unit. Further, trade unions are largely absent in services businesses, including, in particular, India's large IT and ITES sector, though there is some movement towards forming trade unions in the IT sector.

Certain states in India have laws dealing with trade unions, such as the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 and the Kerala Recognition of Trade Unions Act 2010.

iii Trade union of IT employees

In November 2017, the Labour Commissioner of Karnataka granted certification for the creation of the first trade union (Karnataka State IT/ITES Employees Union (KITU)) of IT employees under the Trade Unions Act 1926, and the Karnataka Trade Unions Regulations 1958. The main purposes of the formation of KITU were to organise employees working in the IT sector in Karnataka, to act as a platform for those employees to voice their grievances and to provide a medium for interaction with the employers. There has been considerable backlash from employers to this, mainly on the grounds that unionisation in the IT sector will hamper business operations and create an uncompetitive environment. The authorisation for the creation of KITU had a ripple effect across India. In January 2018, Maharashtra registered its first trade union for IT employees – the Forum for IT Employees – with chapters being opened in Karnataka, Tamil Nadu, Delhi NCR, Kerala, Hyderabad, West Bengal and Bhubhaneshwar.

XII DATA PROTECTION

i Requirements for registration

There is no requirement for an employer to register with a data protection agency or other government body.

ii Sensitive personal data or information

An employer has an obligation to ensure that any sensitive personal data or information (SPI) that it collects from an employee is kept secure and confidential. From an employer's perspective, employee SPI would include personal details such as financial information (bank account or credit card details), medical records and biometric information. The employer may either contractually provide for safety norms dealing with SPI or would need to follow the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 in relation to the same. Thus, companies are increasingly contracting out the safety and security measures applicable to an employee's SPI, which is held by the company in accordance with its data protection and privacy policy.

iii Background checks

Background checks are a common feature that employers in India generally follow before hiring anyone, and successful completion of these checks is a precondition to employment (and continuing employment) with the company. Often, employers retain the right to conduct background checks on existing employees in case it is required for business purposes.

There is no prohibition on conducting background checks on employees, including candidates, provided their consent for this has been obtained. Background checks could include verifications on education, criminal history, credit rating, etc. The most common background check is of academic credentials, which is typically outsourced by an employer.

Criminal verifications are becoming quite common in India, though it is not an easy process as criminal records are not digitised or consolidated centrally.

Under current Indian credit rating structures, an individual can obtain information on his or her credit rating. An employer can also access this information with the employee's permission and on providing necessary proof of identity. Access to credit rating information is more common in banks and financial institutions.

XIII DISCONTINUING EMPLOYMENT

The termination of employment, whether on a large scale or for a single employee for convenience (and not for cause, such as termination on disciplinary grounds), would be held to be either retrenchment or termination of services, depending on the category of the employee under applicable Indian law.

i Retrenchment of workmen

As mentioned in Section I.i, the ID Act applies to an employee who qualifies as a workman. Under the ID Act, retrenchment would mean termination of a workman's contract for any reason other than as a punishment by way of disciplinary action.

In an establishment (other than a factory, mine or plantation with a minimum of 100 workmen), an employer must follow certain conditions for retrenchment of workmen who have been in continuous service⁷ for a minimum of one year, namely:

- a* to provide the workman with one month's written notice indicating the reasons for the retrenchment or make payment in lieu thereof;
- b* to provide the workman with 15 days' pay for every year or part thereof in excess of six months of continuous service; and
- c* to serve notice to the appropriate government.

From a practical perspective, many companies do not provide this notice (especially if only a few employees are being retrenched) because they fear that this may lead to enquiries by the labour authorities. However, not providing the notice would be a violation of law.

For establishments employing at least 100 workmen, prior approval would need to be obtained by the employer from the appropriate government before effecting retrenchment. The notice period required to be given to the workmen would increase to three months. The government may enquire into the reason for the proposed retrenchment and give the involved parties an opportunity to be heard. Approval for the retrenchment would be given only after such a hearing.

Under the ID Act, the employer needs to follow the principle of 'last come, first go' in the event of retrenchment. An employer is statutorily required to retrench the workman who is the last to have been hired in the particular employment category in the establishment, unless:

- a* the requirement is contracted out by both parties; or
- b* the employer can provide valid reasons for deviating from the requirement.

An employer should have reliable and sufficient evidence to justify the deviation from the rule, preferably in the recorded employment history of the employees.

An employer is not required to provide any alternative employment to retrenched workmen. However, a retrenched workman has a right to priority in the event of any rehiring – an employer is required to offer employment first to those workmen who were retrenched by it and are citizens of India.

Notification of employee representatives is not required in cases of retrenchment unless there are recognised employee representatives or a trade union and the agreement with that body or union requires notification, especially for large-scale retrenchments. From a practical perspective, an employer would hold a meeting with the affected employees or workmen and explain the termination requirement to them, and thereafter commence the formal retrenchment process.

Notwithstanding the provisions of the ID Act in relation to retrenchment, if a workman's employment agreement has better termination provisions (such as a longer notice period or severance pay), the employer would be bound by the same.

⁷ 'Continuous service' generally means working in an establishment for 240 days in the immediately preceding 12 months.

ii Termination of non-workmen

The SEA may specify a notice period to be provided to all employees, including non-workmen. For example, under the SEA in Karnataka, an employer is required to provide one month's written notice or wages in lieu thereof for any employee who has been in continuous employment for six months. Further, the employment contract would need to be examined for termination of non-workmen and related severance conditions.

In practice, an employer may ask for the resignation of the employee rather than terminate his or her contract. Most employees are willing to resign as it is a face-saving way for them to leave the company. If this method is used, it should not be a reason to deny the employee any due compensation under the law or contract.

iii Termination for misconduct

The aforementioned rules may not apply to the termination of an employment agreement as a result of misconduct. For example, the SEA in certain states (including in Karnataka) mentions that the notice period requirement need not be followed if the employee is being dismissed for misconduct. Dismissal because of misconduct would occur in the event of a breach of the rules of the employer or objectionable conduct. An employer can provide detailed rules in the employee manual or appointment letter of what an employee can and cannot do in the workplace.

If the dismissal of an employee (in particular, a workman) is by way of disciplinary action, the employer would need to follow the principles of natural justice and the guidelines that have evolved from various court decisions, including proving the misconduct of the employee. Additionally, if there were any standing orders or service rules applicable to the dismissal, the same would need to be followed. Broadly, to prevent the possibility of an employee challenging his or her dismissal before a court of law on the grounds of *mala fide* intentions, victimisation, etc., it is recommended that an employer follow this procedure:

- a issue a charge sheet or a show-cause notice on the employee;
- b hold a domestic inquiry (a single individual may be appointed as an officer to conduct the inquiry). The inquiry officer should not be directly involved in the conduct in question and, preferably, should not be the immediate superior of the employee;
- c peruse the report of the inquiry officer; and
- d issue an order of dismissal.

An order of dismissal may be challenged in a labour court and, if it is found to be flawed, the court has the power to order reinstatement with continuity of service, back wages and consequential benefits.

iv Termination under employment contract

An employment contract would normally mention a notice period or payment in lieu thereof for termination of employment other than for misconduct. In the case of senior management this is likely to be three months, and in the case of other employees this would be one month. In practice, at the time of the termination, the employer would check whether the compensation payable under law is more than that prescribed under the contract.

XIV TRANSFER OF BUSINESS

Under the ID Act, where the ownership or management of an undertaking is transferred, whether by agreement or by law, from one employer to another, the new employer is required to ensure that:

- a* the service of the workmen is not interrupted by the transfer (i.e., continuity of service must be maintained, since this is relevant for the provision of certain statutory welfare benefits);
- b* the terms and conditions of service applicable to the workmen after the transfer cannot be less favourable than those applicable immediately before the transfer; and
- c* under the transfer terms or otherwise, in the event of future retrenchment, the new employer is legally liable to pay the workmen compensation on the basis that the service has been continuous and not interrupted by the transfer.

If the new employer does not comply with the above conditions, the workmen who have been in continuous service for one year immediately before the transfer are entitled to notice and compensation as if they were being retrenched.

Though not specifically provided under the ID Act, case law provides that the transfer of workmen is not automatic and the employer should obtain the consent of the workmen. If a workman refuses to be transferred, then the current employer has the option to terminate the contract by way of retrenchment.

XV OUTLOOK

Several of India's federal employment laws date back to the early 1900s, albeit with amendments from time to time to address current issues. Moves by the government to codify the major federal employment laws relating to wages, worker safety and employee relationships is a positive step towards streamlining the employer-employee relationship. Compliance with multiple laws continues to be an issue for employers, as it is practically impossible for any employer ever to be completely compliant. The codification should again assist with better compliance while ensuring that there are no arbitrary or *ad hoc* inspections of companies' day-to-day operations. Workplaces and the traditional employer-employee relationship are evolving rapidly in India, with increased digitisation, and the approach by the government to simplifying laws is a step in the right direction. The overall outlook is positive, with increased digitisation of processes, and transparency in compliance and government interventions.

IRELAND

Bryan Dunne and Colin Gannon¹

I INTRODUCTION

Employment in Ireland is regulated by an extensive statutory framework, much of which has its origins in European Community law. The Irish Constitution, the law of equity and common law remain relevant, particularly in relation to applications for injunctions to restrain dismissals and actions for breach of contract. The main legislation in the employment law area includes:

- a* the Industrial Relations Acts 1946–2015;
- b* the Redundancy Payments Acts 1967–2014;
- c* the Protection of Employment Act 1977–2014;
- d* the Minimum Notice and Terms of Employment Acts 1973–2005;
- e* the Unfair Dismissals Acts (UDA) 1977–2015;
- f* the Data Protection Act (DPA) 1988–2018;
- g* the Payment of Wages Act 1991;
- h* the Terms of Employment (Information) Acts 1994 and 2014;
- i* the Maternity Protection Acts 1994 and 2004;
- j* the Adoptive Leave Acts 1995–2005;
- k* the Organisation of Working Time Act 1997 (OWTA);
- l* the Employment Equality Acts 1998–2015;
- m* the Parental Leave Acts 1998–2019;
- n* the National Minimum Wage Act 2000–2015;
- o* the Protection of Employees (Part-Time Work) Act 2001;
- p* the Carer's Leave Act 2001 (as amended);
- q* the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003;
- r* the Protection of Employees (Fixed-Term Work) Act 2003;
- s* the Safety, Health and Welfare at Work Act 2005–2014;
- t* the Employees (Provision of Information and Consultation) Act 2006;
- u* the Employment Permits Acts 2003–2014;
- v* the Safety, Health and Welfare at Work (General Application) Regulations 2007;
- w* the Protection of Employees (Temporary Agency Work) Act 2012;
- x* the Protected Disclosures Act 2014;
- y* the Workplace Relations Act 2015;
- z* the Paternity Leave and Benefit Act 2016;
- aa* the Employment (Miscellaneous Provisions) Act 2018; and
- ab* the Parent's Leave and Benefit Act 2019.

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Employment rights under Irish law can be enforced under the specially allocated statutory forum (the Workplace Relations Commission), or by the civil courts in appropriate cases. The process of determining which body or court will have jurisdiction in a particular case mainly depends on whether the claim is being brought under either statute or common law.

In general, employers' liability (i.e., personal injury) claims and breach of contract claims are dealt with in the civil courts, as are applications for injunctive relief in relation to employment matters, whereas statutory claims (those made, for example, under the UDA or the OWTa) are heard by the Workplace Relations Commission or the Labour Court (on appeal).

i Civil courts

The civil judicial system in Ireland is tiered, based on the monetary value of particular claims. At the lowest level, the District Court deals with claims not exceeding €15,000; it rarely hears employment-related disputes. At the next level is the Circuit Court, where jurisdiction is generally limited to awards of up to €75,000 (except for personal injury actions when the jurisdiction is limited to €60,000), although when a case has been appealed to the Circuit Court from the Employment Appeals Tribunal (EAT) in relation to any remaining legacy cases under the old system (see Section I.ii), it has jurisdiction to exceed this limit and make awards up to the jurisdictional level of the EAT. There is no longer a right of appeal to the Circuit Court under the new Workplace Relations system for all cases issued on or after 1 October 2015. The Circuit Court also has potentially unlimited jurisdiction in relation to gender equality cases. When the sums involved in a contractual claim exceed €75,000, the action must be brought in the High Court, which has unlimited jurisdiction. Only the Circuit and High courts can hear applications for injunctive relief.

ii The Workplace Relations Commission

The Workplace Relations Commission (WRC) is an independent statutory body established on 1 October 2015 following the Workplace Relations Act 2015 (the 2015 Act). The WRC took over the functions of the National Employment Rights Authority (NERA), the Labour Relations Commission, the Equality Tribunal and the first instance (complaints and referrals) function of the EAT. The WRC is the sole body to which all industrial relation disputes and complaints in accordance with employment legislation will be presented. All claims issued prior to 1 October 2015 before any of the relevant bodies will be dealt with under the old system, until they have fully concluded. At the time of writing, there are a small number of cases to be dealt with in this manner.

Following the 2015 Act, the WRC provides conciliation, advisory, mediation and early resolution services, as well as an adjudication service. The latter (formerly the Rights Commissioner service) investigates disputes, grievances and claims made under the relevant employment legislation. A complaint may also be referred to mediation if deemed suitable; otherwise, it will go before an adjudicator. The WRC also has discretion to deal with complaints by written submission only, unless either party objects within 42 days of being informed.

A major difference compared to the old system is that all WRC hearings are held in private. The employer has 56 days from the date of the decision to implement it, and should the employer fail to do so, the employee may apply to the District Court for an order directing the employer to fulfil the order. If the decision relates to the UDA, and the decision was to reinstate or re-engage the employee, the District Court may substitute an order to pay compensation of up to 104 weeks' pay, in accordance with the UDA. In the context of

claims under the UDA, the WRC has powers to require witnesses to attend and give evidence at a WRC hearing or to produce any documentation in the person's possession, custody or control that relate to the case.

The WRC also has powers to carry out workplace inspections to ensure compliance with employment legislation.

iii Labour Court

Since 1 October 2015, the Labour Court is the single appeal body for all workplace relation disputes. The EAT will continue to hear all appeals submitted prior to the commencement of the 2015 Act and there remain a number of cases to be heard by the EAT (some hearings are scheduled for 2020). It is intended that the EAT will be wound up once all the legacy cases have been heard.

The Labour Court can choose to deal with a dispute by written submissions only, unless either party objects. Unlike the WRC, all hearings before the Labour Court are held in public, unless it decides, owing to special circumstances, that the matter should be heard in private. The Court has wide powers under the 2015 Act to require witnesses to attend and to take evidence on oath.

A Labour Court decision may be appealed on a point of law only to the High Court.

II YEAR IN REVIEW

The Irish economy is continuing to grow. The Economic and Social Research Institute has forecast economic growth of 3.1 per cent in 2020, though this is subject to the technical assumption that the United Kingdom does not leave the European Union in a 'hard Brexit'. The unemployment rate stabilised in 2019 and, according to the Central Statistics Office, the seasonally adjusted unemployment rate stood at 4.8 per cent in December 2019.

The Employment (Miscellaneous Provisions) Act 2018 came into operation in March 2019. It is significant in that it brought changes in a wide range of areas of Irish employment law, such as a requirement that employers provide a written statement of five core terms within five days of commencement of employment, a ban on zero-hour contracts in most circumstances (unless it is genuinely casual work, emergency cover or short-term relief work) and the introduction of the concept of banded contract hours. Additionally, minimum wage rates for employees who are 18 years old (or younger) or 19 years old have been simplified and reflect a percentage of the national minimum wage (currently €9.80 for employees over 20 years old). From 1 February 2020, the national minimum wage for employees over 20 years old increases to €10.10.

There have been some changes in the area of leave entitlements with the introduction of a new form of leave, known as parent's leave, and an increase in existing entitlements in relation to parental leave. These changes are outlined in more detail in Section IX.

Several notable changes to the Irish immigration system were made during 2019, by both the Irish Naturalisation and Immigration Service (INIS) and the Department of Business, Enterprise and Innovation (DBEI). Significant changes include the introduction of a pre-clearance process for partners to be recognised for the purposes of family reunification for certain employment permit holders and Irish nationals. INIS now also grants immediate access to the labour market upon arrival for the spouses and recognised partners of certain employment permit holders, whereas previously such dependants would need to arrive and apply for an employment permit before working.

III SIGNIFICANT CASES

i Investigations and fair procedures

*McKelvey v. Iarnród Éireann/Irish Rail*²

This case arose from a disciplinary process in which the employer alleged that the employee, Mr McKelvey, had committed theft by the misuse of fuel cards, causing financial loss to the employer. Mr McKelvey requested that he be allowed to be represented by a solicitor and counsel at the disciplinary hearing. The employer's disciplinary process provided that an employee could be represented by a colleague or trade union representative and Mr McKelvey's request was denied.

The High Court found that it would be contrary to the principles of fair procedures and natural justice to deny him the right to legal representation. However, this was overturned on appeal by the Court of Appeal and affirmed by the Supreme Court.

In doing so, the Supreme Court endorsed a previous Supreme Court decision in *Burns and another v. The Governor of Castlereagh Prison*.³ In *Burns*, the Supreme Court held that an employee may be entitled to legal representation in disciplinary hearings but that this right would only arise in 'exceptional' circumstances. However, some doubt was cast over *Burns* in 2017 by the High Court decision in *Lyons v. Longford Westmeath Education and Training Board*⁴ as it appeared to suggest that an employee is entitled to legal representation as part of fair procedures in all disciplinary processes. Whereas, the decision of the High Court in *Lyons* created a degree of uncertainty around disciplinary processes, the *McKelvey* Supreme Court decision upholding the decision of the Court of Appeal has provided welcome clarity for employers in that they can refuse a request for an employee to be legally represented at a disciplinary hearing unless there are exceptional circumstances, such that the employee would not receive a fair hearing without legal representation.

On the facts of *McKelvey*, Chief Justice Clarke considered various factors set out in the *Burns* decision but ultimately found that the allegation of misconduct against Mr McKelvey was a straightforward one and there were no exceptional circumstances that necessitated legal representation for Mr McKelvey during the disciplinary process.

ii Disability discrimination – duty of reasonable accommodation

*Nano Nagle School v. Daly*⁵

This was a long-running case concerning a claim by Ms Marie Daly, a special needs assistant (SNA), against Nano Nagle School, a special needs school, for failure to adequately consider or evaluate potential options of reasonable accommodation.

Ms Daly was involved in a road traffic accident in 2010, which left her paralysed and wheelchair-bound. She sought to return to work following a period of rehabilitation and the school carried out a number of occupational health, ergonomic and risk assessments. These determined that Ms Daly would be unable to perform nine of the 16 core duties associated with her role as an SNA. On that basis, the school concluded that she was medically unfit to return to her role and she was dismissed on incapacity grounds. The school did not discuss any alternative options to reasonably accommodate Ms Daly's return to work with either her or the other SNAs employed by the school.

² [2018] IECA 346.

³ [2009] 20 ELR 109.

⁴ [2017] IEHC 272.

⁵ [2019] IESC 63.

Ms Daly brought a claim under the Employment Equality Act 1998 (as amended) (the Act) claiming that the school failed to provide reasonable accommodation for her, as required by Section 16 of the Act, which would have enabled her to return to her employment. Section 16 provides that employers are obliged to take appropriate measures to enable an employee with a disability to undertake the essential duties of his or her position, subject to this not being a disproportionate burden. If these measures are taken and the employee is still not fully competent and capable of undertaking the role, then the employer is not obliged to continue the employment.

Ms Daly was initially unsuccessful in the Equality Tribunal (now the WRC) but this was overturned by the Labour Court, which awarded compensation of €40,000. This was affirmed by the High Court, which held that the school had breached Section 16 of the Act. The High Court decision was then overturned by the Court of Appeal.

In its decision, the Court of Appeal distinguished between core and non-core tasks and stated that an employer was not obliged to create a new role to accommodate an employee with a disability. The Court of Appeal determined that if an SNA was unable to perform 'essential duties', the school had not failed to reasonably accommodate them even though they had not sought to consult the employee before considering such accommodations.

In 2019, the Supreme Court reversed the decision of the Court of Appeal and confirmed that an employer may not distinguish between core and non-core tasks when considering reasonable accommodations for employees. An employer is instead required to take all 'appropriate measures' in facilitating a disabled employee. In essence, the Supreme Court has limited the potential burden on employers as they will not be forced to implement any measure that would constitute a 'disproportionate burden'. The Supreme Court stated that creating an entirely new role would amount to a disproportionate burden.

The Supreme Court also found that there was no mandatory duty on an employer to consult an employee when considering what adjustments could be put in place, but the Court heavily encouraged employers to actively engage with employees through this process as part of fair procedures.

While the decision is helpful in highlighting the applicable principles for employers to consider, the Supreme Court has made it clear that the extent of the burden of reasonable accommodation will depend on the specific facts of every case.

The Supreme Court also criticised the approach of the Labour Court for not considering all relevant evidence and providing reasons for its decision. The Supreme Court remitted the case to the Labour Court for a full rehearing.

iii Injunctions

*Kearney v. Byrne Wallace*⁶

This Court of Appeal case relates to the appropriate forum in which an employee can challenge a redundancy. While the UDA stipulates that the WRC is the appropriate body to bring such claims, this case was an appeal on the question of whether an employee could seek to challenge redundancy by securing injunctive relief before the High Court.

Mr Kearney had been with this employer from 2006 until 2017. During that time, he had taken extended periods of certified sick leave. In 2016, the employer referred Mr Kearney to an independent physician to assess his fitness to return to work. This physician, and

6 [2019] IECA 206.

Mr Kearney's own psychiatrist, concluded he was fit to return to work; however, his request to return to work was ignored. In 2017, Mr Kearney was informed that his previous role no longer existed and no other suitable role was available to him. Mr Kearney's employment was then terminated on the grounds of redundancy and he was given two months' notice in accordance with his contract of employment.

Mr Kearney argued that the letter purporting to terminate his employment was not a genuine redundancy and amounted to a sham. He sought an interlocutory injunction in the High Court to restrain his dismissal and require his employer to continue paying him as an employee. However, the primary matter in this case centred on whether Mr Kearney could bring the action before the High Court. In refusing to grant an interlocutory injunction, the High Court relied on the decision of *Nolan v. Elmo Oil Services Limited*,⁷ which distinguishes between cases in which a genuine redundancy exists but an employer fails to adhere to contractual notices, and cases in which there is a sham redundancy but the employer has observed all contractual notices and entitlements. The *Nolan* decision confirmed that in the latter case, where there is a statutory scheme available to a plaintiff (e.g., the WRC), the High Court has no role because injunctive relief can only be granted where there is a breach of contract.

Mr Kearney was also unsuccessful in his subsequent appeal to the Court of Appeal, which confirmed the *Nolan* case as being 'firmly embedded jurisprudence' in Ireland and therefore maintained the position that when an employer abides by all contractual obligations and fair procedures, it can avoid the granting of injunctive relief, although the prospect of an unfair dismissal claim remains.

iv Maternity leave and pregnancy discrimination

*G4S Secure Solutions Limited v. Kelly*⁸

The complainant, Ms Karen Kelly, had been employed by G4S Secure Solutions Limited (G4S) since 2014 and, before going on maternity leave in 2017, she was primarily based at a client's offices in Swords, County Dublin, in accordance with her contract of employment. Shortly before returning to work from maternity leave, Ms Kelly was informed by her employer that the client had requested that she did not return to the offices in Swords. Her employer offered her an alternative position of a three-month contract working in its head office, which was later extended to a six-month contract. This alternative office was significantly further away from her home and necessitated a four-hour round trip rather than a 30-minute commute. Her employer did not make any other offers of suitable alternative positions. In April 2018, the employer stopped paying Ms Kelly and Ms Kelly requested her P45 in June 2018 (but it was not supplied at the time).

Ms Kelly brought a claim to the WRC under Irish employment equality legislation and argued that, had she not gone on maternity leave, it was likely she would have continued to work at the initial office on a permanent contract. She argued that her employer had discriminated against her by not allowing her to return to the office stipulated in her contract of employment or providing a suitable alternative location. Ms Kelly had also initially worked on a permanent contract but was now only offered a fixed-term position.

⁷ [2009] IEHC 15.

⁸ EDA1919.

The WRC decided that G4S had discriminated against Ms Kelly and awarded her approximately €11,000. Both parties appealed the decision to the Labour Court: Ms Kelly on the basis that she was not satisfied with the amount awarded by the WRC and G4S on the basis that it was not satisfied with the WRC's findings.

In the Labour Court, G4S argued that, among other things, it had a clause in its contracts with third parties that stipulated that a third party could dictate who could be assigned to the site and that this was superior to the statutory rights of Ms Kelly.

The Labour Court considered the relevant legislation,⁹ but rejected the arguments put forward by G4S. In particular, the Labour Court noted that a clause in a contract with a third party could never be 'superior to any statutory right'. While noting that an employer may offer an alternative contract, this is only where the new contract is suitable and appropriate for the employee and the contract is under terms and conditions that are not less favourable than the original contract. The Labour Court found that the new contract was on less favourable terms, as it was for a fixed term and at an alternative location with a significantly increased commute for Ms Kelly.

Ultimately, the Labour Court was satisfied that this was a discrimination-based dismissal and awarded approximately €51,000 in compensation, which the Labour Court said was 'proportionate, effective and dissuasive', having regard to the effects of the discrimination on Ms Kelly. This was also the maximum amount that the Labour Court could award.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under the Terms of Employment (Information) Act 1994–2014 (the Terms of Employment Act), all employers are obliged, within two months of commencement of employment, to provide their employees with a written statement setting out certain fundamental terms of their employment:

- a* date of commencement of employment;
- b* full name and address of employer, and name of employee;
- c* the employee's place of work;
- d* the job title or a description of the nature of the work;
- e* if a temporary or fixed-term contract, the expiry date;
- f* pay, including overtime, commission and bonus, and methods of calculating these;
- g* whether pay is to be weekly, monthly or otherwise;
- h* the pay reference period;
- i* terms and conditions relating to hours of work and overtime;
- j* holiday or other paid leave entitlement;
- k* notice requirement;
- l* details of rest periods and breaks;
- m* details regarding sickness and sick pay;
- n* details of pensions and pension schemes; and
- o* reference to any applicable collective agreements.

⁹ Section 6 of the Employment Equality Acts 1998–2015 and Sections 26 and 27 of the Maternity Protection Act 1994.

The Employment (Miscellaneous Provisions) Act 2018 (the 2018 Act) requires an employer to notify an employee of five core terms of employment within five days (as distinct from five business days) from the commencement of employment. The five core terms are:

- a* the identity of the employer and of the employee;
- b* the address of the employer;
- c* in the case of a temporary employment contract, its expected duration, or if the contract is for a fixed term, the date on which the contract expires;
- d* the rate or method of pay calculation, the intervals at which the employee is paid, and the pay reference period; and
- e* hours of work that the employer 'reasonably expects' the employee to work (per normal working day and working week). Notably, the phrase 'reasonably expects' was not defined in the 2018 Act.

This provision supplements, rather than replaces, an employer's existing obligations under the Terms of Employment Act, including the obligation to provide certain information to employees who are required to work outside Ireland for a period greater than one month.

The written statement and the notice of core terms must be signed and dated by or on behalf of the employer. It must also be retained by the employer during the employment and for one year after the employee's employment has ceased. Any change to the statutory particulars must be notified to the employee, in writing, within one month.

If either the written statement or the notice of core terms is not provided as required within one month of the commencement of employment, the employer will be liable for a criminal offence, resulting in a fine of up to €5,000 or imprisonment not exceeding 12 months (or both).

More generally, it is recommended that employers consider what other terms might be necessary and appropriate, and prepare comprehensive contracts. Other relevant terms will depend on the seniority of the employee, and will range from intellectual property and exclusivity of service provisions, to post-termination restrictive covenants. Any changes or amendments to the employment contract of a material nature can only be implemented, generally, with the agreement of both parties.

Separately, fixed-term contracts are permissible in Ireland and they are governed by the Protection of Employees (Fixed-Term Work) Act 2003, which provides that when employees are employed on a series of fixed-term contracts, which exceed the aggregate period of four years, they may be entitled to a contract of indefinite duration.

ii Probationary periods

There is no Irish legislation that deals with probationary periods. Therefore, a probationary period will only be effective if expressly provided for. The terms of the probationary period, including duration, the length of notice and whether or not the employer has discretion to extend it, should be set out in the contract.

Although there is no statutory limit on how long an employee can be retained on probation, he or she will be covered by the UDA once 12 months' continuous service is accrued, which will include any period of notice of termination. Accordingly, the right to protection against unfair dismissal will apply once the 12-month service threshold has been reached, even if the employee is still on probation. Employers will therefore usually seek to conclude the probationary period before the employee completes 12 months' service.

iii Establishing a presence

An employer does not need to be registered as an entity or otherwise based in Ireland. In practice, and for varying tax and regulatory reasons, a large number of Irish employees across all sectors are employed by and report to foreign entities based outside Ireland. Similarly, it is also possible to hire employees through an agency without registering in Ireland.

However, foreign employer will be required to register for pay-as-you-earn (PAYE) income tax in Ireland when the income of its employees is within the scope of the Irish PAYE system. In addition to registration, the employer must deduct the amount of income tax due from its employees directly, and remit those amounts to the Revenue Commissioners. If, however, the foreign employer is engaging an independent contractor, the responsibility to pay the appropriate taxes lies with the independent contractor, not the foreign employer.

Income from non-Irish employment that is attributable to the performance in Ireland of the duties of that employment is also chargeable to Irish income tax and is within the scope of the PAYE system.

As regards mandatory benefits, as a minimum, an employer is required to provide its workforce with access to a Personal Retirement Savings Account within six months if it does not have a pension scheme available to its employees. There is also no obligation on the employer to make any contributions on an employee's behalf.

V RESTRICTIVE COVENANTS

The Competition Act 2002–2017 (as amended) prohibits agreements between undertakings that prevent, restrict or distort competition. As employees are considered to be part of an undertaking and are not undertakings themselves, the Competition and Consumer Protection Commission (CCPC) considers that employment agreements are not covered by the competition rules. However, once an employee leaves an employer and sets up his or her own business, he or she will then be regarded as an undertaking. The CCPC has set out guidelines as to what types of non-compete provisions, in particular, will be acceptable in such situations. Generally, they must be reasonable in subject matter, geographical scope and duration.

The common law is also of relevance to the issue of restrictive covenants. The basic position applied by the courts is that such covenants are, *prima facie*, unenforceable for being unduly in restraint of trade, unless the party seeking to rely on them can demonstrate that the restrictions in question are no more than what is strictly necessary to protect a legitimate business interest and are not otherwise contrary to the public interest.

VI WAGES

i Working time

The OMTA deals with maximum working hours and other matters related to working time. Under the OMTA, an employer may not permit any employee to work for more than an average of 48 hours per week, although this can generally be averaged over four months. Working time should only take account of time spent working (i.e., it should exclude rest and meal breaks). The average period for night workers is two months; for employees working in agriculture and tourism it is six months; and it can be up to 12 months for employees covered by an approved collective agreement.

Employees cannot opt out of the 48-hour average working week. However, the legislation does provide a particular exemption for senior or specialist employees, who can be said to determine their own working time, such that they are not subject to the restriction. The contracts of such employees should expressly provide that they are exempt from this part of the OMTA.

ii Overtime

Generally, there is no statutory entitlement to overtime under Irish law, or to payment for overtime. In certain cases, however, specific categories of workers may be entitled to overtime pay if covered by a sectoral employment order (SEO).

Those employees not covered by an SEO will only be entitled to paid overtime if such an entitlement is contained in their employment contract or has been established by custom and practice in the employment concerned. Section 14 of the OMTA provides that employers who require employees to work on Sundays are required to compensate them in accordance with Section 14, unless the employment contract specifies that the fact that the employee may be required to work on a Sunday is already taken into account in determining the salary.

VII FOREIGN WORKERS

European Economic Area (EEA) nationals and Swiss nationals do not require employment permits to work in Ireland. For non-EEA nationals, different types of employment permits are available depending on the circumstances. An employment permit will generally not be granted if the result in doing so means that more than 50 per cent of a company's employees are non-EEA nationals; however, there are some limited exceptions to this.

Intra-Company Transfer Employment Permits can be granted for senior management roles, key personnel or employees engaged in a training programme. Critical Skills Employment Permits (CSEPs) can be granted to individuals earning €60,000 (but this increases to €64,000 from 1 January 2020) or more, or if the role is listed on the Critical Skills Occupations List¹⁰ and the applicant has a relevant third-level degree, earning between €30,000 and €59,999 (but these increase to €32,000 and €63,999 from 1 January 2020). If an individual does not meet the criteria for either of the above permit types, a General Employment Permit is also available in certain circumstances, subject to a labour market needs test to ensure that there is no EEA or Swiss national available to fill the post.

Most employment permits can be granted for an initial period of up to two years, after which they can be renewed, if required. A CSEP can only be granted for a job offer for a minimum of two years, after which the holder may apply for a Stamp 4 permission to continue to work in the state without an employment permit.

There is no requirement to keep a register of foreign workers, but it is good practice to do so, in particular noting the expiry dates of employment permits or right to work documents to ensure that all employees have a valid permit or immigration permission in place. Once an employee is legally able to work in Ireland, he or she is entitled to the same statutory benefits and subject to tax as if he or she were originally from Ireland.

The Employment Permits Acts 2003–2014 apply significant penalties for employing non-EEA nationals without a valid employment permit. The maximum penalty for this offence is a fine of up to a €250,000 or up to 10 years' imprisonment (or both).

¹⁰ This is a list that is reviewed twice yearly by the Department of Business, Enterprise and Innovation, and lists occupations that have been identified as being in shortage in the local labour market in Ireland.

VIII GLOBAL POLICIES

The UDA requires employers to provide employees with a written disciplinary procedure, which can either form part of the contract of employment or be kept as a separate document. This information must be furnished to employees within 28 days of commencement of employment. While there is no specific form for this to take, it must at least adhere to the concept of natural justice and fair procedure as enshrined in the Irish Constitution. There is also a non-binding Code of Practice concerning grievance and disciplinary procedures in the workplace, which provides general guidelines in relation to the preparation and application of disciplinary procedures. While not obligatory, failure to apply the guidelines (in the absence of any other express procedure) could be held against an employer should an employee dispute his or her dismissal.

Employers are not required to obtain the approval of employees regarding the preparation or implementation of disciplinary procedures, although agreement in relation to these matters will often be obtained when collective bargaining takes place. A disciplinary policy must not discriminate against employees contrary to the Employment Equality Acts 1998–2015 (i.e., on one of the following nine grounds: gender, family status, age, disability, sexual orientation, race, religion, civil status or membership of the Traveller community), and must otherwise be fair and reasonable (i.e., provide that an employee is made aware of all the charges against him or her, is afforded a reasonable opportunity to rebut the charges and is afforded adequate representation throughout the process). Additionally, the level of sanctions should be staggered to reflect the seriousness of the offence. It will suffice for the disciplinary policy to be available on an employer's intranet, provided employees are made aware of this. If the employer does not have this facility, employees should be advised of where they can obtain a copy of the policy. The policy should generally, as a matter of best practice, be available in English and in any other language spoken by employees. Disciplinary procedures do not have to be filed with any state or government authority.

IX PARENTAL LEAVE

There are various forms of leave available to parents in Ireland, each affording particular rights and entitlements.

i Maternity leave

All female employees have a basic entitlement to take maternity leave of 26 consecutive weeks, regardless of their length of service. This basic entitlement may be extended if a baby is born prematurely.

There is no obligation on an employer to pay an employee on maternity leave, though many employers do offer to 'top up' maternity benefit to match an employee's normal remuneration. However, the employee may be entitled to social welfare payments, provided she has accrued sufficient pay-related social insurance contributions.

An employee is also entitled to 16 additional weeks of unpaid maternity leave. This additional leave carries no entitlement to social welfare payments.

An employee must give four weeks' notice in writing to the employer of her intention to take maternity leave. Employees are also entitled to paid time off during working hours for prenatal and postnatal medical appointments.

With the exception of the right to remuneration, all other employment rights are preserved during the course of the period of leave. This includes continuity of service and entitlements to other forms of leave, such as annual and sick leave.

Notice of termination of employment given during maternity leave is void. An employee has a right to return to the job held prior to going on maternity leave. If this is not reasonably practicable, the employer must provide suitable alternative work under a new contract of employment.

ii Adoptive leave

An adopting mother or sole adopting father is entitled to 24 weeks' adoptive leave. Employees availing of this leave may be entitled to receive social welfare payments, provided sufficient social insurance contributions have been paid. Employees are also entitled to additional unpaid adoptive leave for a further 16 weeks. No social welfare payments are payable in respect of that period.

Notice of termination of employment given during adoptive leave is void and, on return to work, the employee has a right to the job held prior to availing of adoptive leave, or to suitable alternative work if this is not reasonably practicable.

Adopting parents are entitled to paid time off work to attend preparation classes and pre-adoption meetings with social workers as required during the pre-adoption process.

iii Paternity leave

Employees who are fathers, or partners in same-sex relationships who have newly adopted a child, are entitled to take two consecutive weeks' paternity leave. This leave must be taken in a single block within 26 weeks of the date of birth of the child (or the date of placement in the case of adoption).

There is no obligation on an employer to pay an employee on paternity leave. However, the employee may be entitled to social welfare payments, provided sufficient pay-related social insurance contributions have been paid.

Notice of termination of employment given during paternity leave is void and, on return to work, the employee has a right to the job held prior to availing of paternity leave, or to suitable alternative work if this is not reasonably practicable.

iv Parental leave

Since 1 September 2019, parents are entitled to 22 weeks' parental leave in respect of a natural child, adopted child or child in respect of whom the employee acts *in loco parentis*. From 1 September 2020, this entitlement will increase to 26 weeks. This leave must be taken before the child reaches 12 years of age. This upper age limit can be extended in certain circumstances when an adopted child is involved. In the case of a child with a disability, leave may be taken up to the child reaching 16 years of age. There is no obligation on the employer to pay the employee during parental leave, nor is there any entitlement to social welfare payments during this time.

To qualify for parental leave, an employee must have completed one year of continuous service with the employer. However, if an employee has more than three months, but less than one year of continuous service, the employee may be entitled to parental leave for a period of one week for each month of continuous employment.

An employee is entitled to return to work at the end of a period of parental leave on the same terms and conditions held prior to availing of parental leave or, if this is not reasonably practicable, to suitable alternative employment. An employee has a right to request changes

to his or her working hours or patterns for a set period of time following the return from parental leave. The request must be made in writing no later than six weeks before the commencement of the proposed set period. An employer must consider the request but is not obliged to grant the requested changes.

In addition to the rights outlined above, a parent returning from parental leave has the right to request a change in working patterns. An employer is not obliged to accede to this request, though they must consider it.

Employees are protected from dismissal in the same manner as with all other forms of leave, as outlined above.

v Parent's leave

This is a new form of leave, introduced in 2019 and governed by the Parent's Leave and Benefit Act 2019. Under this legislation, employees who are a 'relevant parent' (i.e., a parent of a child, a cohabitant, civil partner or spouse of a parent, an adopting parent or a cohabitant, civil partner or spouse of an adopting parent) and whose child was born or adopted on or after 1 November 2019, will be entitled to two weeks' leave, which may be taken in one continuous block or as two separate blocks. Parent's leave must be taken within 52 weeks of the birth of the child or the date of placement in the case of adoption. A relevant parent must give his or her employer at least six weeks' notice before the intended commencement of the parent's leave.

An employee is not entitled to be paid by an employer during parent's leave; however, an employee may be entitled to apply for a parent's leave benefit provided he or she has accrued sufficient pay-related social insurance contributions. An employer may choose to top up the parent's benefit in the same manner as other forms of leave.

If an employer is satisfied that the taking of leave would have a substantial adverse effect on the operation of his or her business, profession or occupation, the leave may be delayed by up to 12 weeks. An employer who postpones this leave must give the employee at least four weeks' notice of the intention to do so.

Employees are protected from dismissal in the same manner as with all other forms of leave, as outlined above.

X TRANSLATION

There is no statutory requirement for employers to translate employment documents into other languages, and traditionally employers have provided these documents in English only. Best practice, however, and a decision of the Equality Tribunal (now the WRC) in 2008¹¹ suggests that it may be prudent to make these documents available in other languages, depending on the circumstances.

11 *58 Named Complainants v. Goode Concrete Limited* (DEC-E2008-020). It was held that employers should have in place clear procedures to ensure non-Irish employees are able to understand their employment documentation and are not treated less favourably than Irish employees. The Equality Officer also found that if an employer is not in a position to have these documents translated, it should arrange to have the contracts and other documentation explained to all employees by someone who speaks a language they understand, with the employee signing a form acknowledging that the contract has been explained to them and that they understand its contents.

Although there is no clear direction on exactly which documents are required to be translated or explained, the *Goode* decision, and common sense, would dictate that this should be done in respect of documents such as the contract of employment and any documentation ancillary to it.

The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 is an example of an employment code and guidelines building on the *Goode* decision. The Code of Practice outlines that employers should ensure that staff have access to equality policies, including by means of certain measures 'to provide, where necessary, for the translation of policies and procedures into languages other than English as appropriate with provision of interpreters'.

If documents are not translated or explained to an employee, the employer faces the risk of discrimination claims, under which the employee can be awarded up to two years' gross remuneration.

XI EMPLOYEE REPRESENTATION

The concept of employee representation under Irish law relates to both unionised and non-unionised employees, and is derived from a number of sources (statutory and otherwise).

i Trade union representation

Any employee has the right to join a trade union, although trade unions may not legally compel employers to recognise and negotiate with them. The degree to which trade unions may embark upon industrial action (either to try to gain recognition from employers, or for any other reason) is regulated principally by the Industrial Relations Act 1990. The method of appointing employee representatives is done by way of secret ballot.

ii Information and consultation representation

In addition to any local representation arrangements that may exist (whether with trade unions or otherwise), employees may also be entitled to representation in certain circumstances as a matter of statute. This form of representation can arise in a transfer of undertakings, collective redundancy situations or when the employees are covered by a local or European-level works council.

The Transnational Information and Consultation of Employees Act 1996 (as amended) (which implemented Council Directive 94/45/EC on the establishment of a European works council) (the 1996 Act) requires multinational employers of a certain size to set up European works councils to inform and consult their employees on a range of management issues relating to transnational developments within the organisation. The 1996 Act applies to undertakings with at least 1,000 employees in the European Union and 150 or more employees in each of at least two Member States. A special negotiating body (SNB) is established in accordance with the 1996 Act to negotiate with the employer. The duration and functions of the SNB will be subject to the terms and purpose of the works council agreement put in place. The Employees (Provision of Information and Consultation) Act 2006 obliges employers with at least 50 employees to enter into a written agreement with employees or their elected representatives, setting down formal procedures for informing and consulting them. The legislation will only apply if a prescribed minimum number of employees request it. The legislation is silent on how employee representatives are elected,

and it will be up to the employees to determine how this is conducted, but usually it is done by way of secret ballot. The purpose of their role and how they conduct themselves will be subject to their own agreement.

The Employment Equality Acts provide that no employee should be discriminated against for being a trade union member. Further, all the above legislation specifically provides that no employee representative should be penalised for carrying out his or her function as an employee representative.

XII DATA PROTECTION

i General principles

Issues regarding the keeping and disclosing of personal data relating to employees are governed by the General Data Protection Regulation (GDPR) and the DPA 2018. Under the GDPR, an employer established in Ireland that gathers, stores and processes any data about employees in any computerised or structured manual filing system is deemed to be a controller of that data.

Controllers must follow eight fundamental data protection rules:

- a* obtain and process information lawfully, fairly and in a transparent manner;
- b* only keep the information for one or more specified, explicit and legitimate purposes;
- c* process the information only in ways compatible with these purposes;
- d* ensure the information is processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing, and against accidental loss, destruction or damage, using appropriate technical and organisational measures;
- e* keep the information accurate, complete and up to date;
- f* ensure that the information is adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed;
- g* retain the information for no longer than is necessary; and
- h* be responsible for and demonstrate compliance with the above principles.

When collecting personal data from an employee, the controller is required to provide certain information to the employee, including:

- a* the identity and contact details of the controller;
- b* the contact details of the data protection officer (if applicable);
- c* the purposes of the processing and the legal basis for the processing;
- d* the recipients or categories of recipient to which personal data has been disclosed;
- e* the safeguards provided by the employer if it transfers personal data to a third country or international organisation;
- f* the period for which personal data will be stored;
- g* the existence of the various data subject rights;
- h* the employee's right to request rectification, erasure or restriction, or to object to this processing;
- i* the right to lodge a complaint with the Data Protection Commission (DPC);
- j* the existence of automated decision-making, including profiling (if applicable); and
- k* information about the source of the data, if not obtained directly from the employee.

In practice, some of this information may be provided in the employer's privacy notice.

Employees have a number of rights under the GDPR, including the right (subject to certain exceptions) to obtain a copy of any personal data relating to them that is kept on the employer's computer system or in a structured manual filing system by any person in the organisation.

The GDPR does not specify how to make a valid request, so it may be done verbally or in writing, and employers must respond to the request within one calendar month of receipt of the request. The right to access personal data does not apply if that access would adversely affect the rights and freedoms of others.

Under the GDPR, all public bodies and authorities (other than courts acting in their judicial capacity) are mandated to have a data protection officer (DPO), as well as any employer whose core activities consist of:

- a* data processing operations that, by virtue of their nature, scope and purposes, require regular and systematic monitoring of employees on a large scale; or
- b* data processing on a large scale of the special categories of data and data relating to criminal convictions.

Where appointment of a DPO is not mandatory but one is appointed through choice, the organisation will be subject to the same provisions set out in the GDPR as though the appointment was mandatory. A DPO may be a member of staff at an appropriate level, part-time or full-time, a person external to the organisation or one shared by a group of organisations, provided that the person has the required expertise and that any other role that may be held in the organisation does not give rise to a conflict of interest with the DPO role.

Details of DPOs must be registered with the DPC and published to relevant individuals (including employees and other data subjects).

ii Cross-border data transfers

Ireland, like other EU Member States, restricts the transfer of personal data from Ireland to jurisdictions outside the EEA that do not 'ensure an adequate level of protection', unless the transfer meets one of a number of conditions, including, but not limited to, the following:

- a* the transfer is pursuant to the standard contractual clauses that have been specifically adopted by the European Commission for international transfers of data;
- b* the transfer is to an entity that is subject to the US–EU Privacy Shield Program operated by the US Department of Commerce; or
- c* the transfer is pursuant to binding corporate rules put in place within the employer's group and approved by the DPC (or another relevant lead supervisory authority).

iii Special categories of personal data

The GDPR defines special categories of personal data to include data concerning racial or ethnic origin, political opinion, religious or philosophical beliefs, or trade union membership, and genetic data, biometric data for the purpose of uniquely identifying an individual, or data concerning health, or sexual life or sexual orientation. Special categories of personal data may not be processed by an employer except in very limited circumstances (e.g., when the processing of health data is required to assess the working capacity of an employee). The processing of data relating to criminal convictions and offences may only be carried out under the control of official authority and subject to other conditions set out in the DPA 2018.

iv Background checks

Employers can carry out a number of background checks on applicants for employment. These can include reference checks, credit-history checks, education verification, verification of entitlement to work in Ireland and a pre-employment medical assessment. Before carrying out any background checks, the resulting data must be relevant to the individual's role and the employer will need to have established a lawful basis under the GDPR to obtain and process the data. In respect of any method used to verify a prospective employee's background, it should be ensured that the method is applied consistently to all applicants, and is not discriminating on any one of the nine grounds protected by the Employment Equality Acts (see Section VIII). The ability to process criminal data is greatly restricted by the GDPR and the DPA 2018. As noted in Section XII.iii, the processing of data relating to criminal convictions and offences may only be carried out under the control of official authority and subject to other conditions set out in the DPA 2018.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

An employer can, at common law, terminate the employment contract without cause, provided this is done in accordance with its terms. If a term of the contract is breached, however, this can give rise to a claim for damages at common law, or even to a claim for injunctive relief in certain circumstances. Notwithstanding any express contractual right to terminate, employees are afforded statutory protection against unfair or discriminatory dismissal. Under the UDA, an employer cannot lawfully dismiss an employee unless substantial grounds exist to justify termination. Also, it is essential for an employer to be able to establish that fair procedures have been followed before making a decision to dismiss. Subject to certain exceptions, employees must have accrued at least 12 months' continuous service to qualify for protection under the UDA.

To justify a dismissal, an employer must generally be able to show that it resulted wholly or mainly from one or more of the following grounds:

- a* the capability, competence or qualifications of the employee for the work concerned;
- b* the conduct of the employee;
- c* the redundancy of the employee; or
- d* the employee being prohibited by law from working or continuing to work (e.g., not holding a valid work permit where one is required).

If the dismissal is not because of any of the grounds listed above, there must be some other substantial grounds to justify it. If an employee believes that he or she has been unfairly dismissed, he or she may bring a claim to the WRC. An adjudicator can award redress in the form of compensation (subject to a maximum of two years' remuneration), reinstatement or re-engagement.

A dismissal is automatically deemed unfair under the UDA if an employee can show that his or her dismissal was wholly or mainly attributable to one of the following:

- a* membership or proposed membership of a trade union or engaging in trade union activities;
- b* religious or political opinions;
- c* legal proceedings against an employer in which an employee is a party or a witness;
- d* race, colour, sexual orientation, age or membership of the Traveller community;

- e pregnancy, giving birth, breastfeeding or any other matters connected with pregnancy or birth;
- f making a protected disclosure under the Protected Disclosures Act 2014; or
- g the exercise or proposed exercise by the employee of the right to parental leave, *force majeure* leave, carer's leave, maternity leave, adoptive leave, paternity leave or parent's leave.

If an employee alleges that he or she has been dismissed in a discriminatory manner (i.e., on one of the nine grounds upon which discrimination is prohibited by the Employment Equality Acts; see Section VIII), he or she may bring a claim before the WRC, and subsequently before the Labour Court on appeal. Either of these bodies may award compensation (subject to a maximum of two years' gross remuneration, depending on the claim) or reinstatement. In gender discrimination cases, a claim may be made directly to the Circuit Court, which can, in theory, award unlimited compensation. There is no minimum service threshold for an employee to be covered by this legislation.

Once in continuous employment for at least 13 weeks, an employee is entitled to a minimum period of statutory notice of termination. The minimum length of the notice period will depend on the employee's length of service (although greater periods of notice can be provided for by contract):

- a between 13 weeks and two years' service: one week's notice;
- b between two years' and five years' service: two weeks' notice;
- c between five years' and 10 years' service: four weeks' notice;
- d between 10 years' and 15 years' service: six weeks' notice; and
- e 15 years' or more service: eight weeks' notice.

An employee may waive the right to notice and accept payment in lieu of notice. Alternatively, the contract can stipulate a right to pay in lieu of notice. An employer may dismiss an employee without notice or payment in lieu of notice if the employee has fundamentally breached the employment contract amounting to a repudiation of the employment contract, or if they are guilty of gross misconduct.

To settle a dispute, including a redundancy situation, compromise or claim, the parties can enter into a settlement agreement. For the settlement agreement to be enforced, as a matter of contract law, the employee must receive something over and above what they might otherwise be entitled to. The employee should also be advised in writing and given the opportunity to obtain independent legal advice in relation to the terms of the agreement.

ii Redundancies

The Protection of Employment Act 1977 must be complied with when an employer intends to implement collective redundancies. Collective redundancy occurs when, within a period of 30 days, the number of such dismissals is:

- a at least five in an establishment employing more than 20, but fewer than 50 employees;
- b at least 10 in an establishment employing at least 50, but fewer than 100 employees;
- c at least 10 per cent of the number of employees at an establishment employing at least 100, but fewer than 300 employees; and
- d at least 30 in an establishment employing 300 or more employees.

When collective redundancies are proposed, the employer must first enter into consultation with employee representatives, a trade union or a works council, with a view to reaching an agreement in relation to matters such as the possibility of avoiding or reducing the numbers to be made redundant and the criteria to be used in selecting employees for redundancy. The consultation must commence at least 30 days before notice of the first redundancy is issued. The Minister for Employment Affairs and Social Protection must also be notified at least 30 days in advance of the first notice of termination by reason of redundancy being confirmed.

The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 established a redundancy panel to which employees or employers may refer certain proposed collective redundancies for an opinion and possible Labour Court hearing in circumstances where it is alleged that the dismissed employees will be replaced by new employees on lesser terms and conditions of employment. Should such a finding be made and the employer proceeds with the redundancies nonetheless, it will be exposed to significantly increased liabilities, *inter alia*, if claims are brought by the dismissed employees under the UDA.

Although there is no express statutory form of consultation required for individual redundancies, it is best practice to do so. In this regard, it is also recommended that employers make at least some effort to locate an alternative position for the employee, if possible. As with any other form of dismissal (other than in cases of gross misconduct), notice of termination by reason of redundancy or payment in lieu thereof must be given.

It is also possible, when concluding the redundancy process, to enter into a compromise agreement with the employee, whereby he or she would be paid an *ex gratia* payment in return for him or her waiving his or her rights and entitlement to bringing any claim against the employer.

Any employee who is on protected leave (e.g., maternity or paternity leave) cannot be made redundant, and the employer will have to wait until he or she returns before engaging with him or her on the issue.

XIV TRANSFER OF BUSINESS

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the Regulations) apply in circumstances where there is any transfer of an undertaking, business or part of an undertaking or business from one employer to another employer as a result of a legal transfer or merger. The Regulations include an assignment or forfeiture of a lease. Outsourcing of a service has also constituted a transfer within the meaning of the Regulations. The Regulations apply to any transfer within the European Union, although the UK case *Holis Metal Industries Limited v. GMB & Newell Limited*¹² suggests that they might also apply to transfers outside the European Union or EEA, in respect at least of the obligations of the party to the transfer located within the European Union. This extraterritorial aspect of the Regulations is particularly relevant in the context of outsourcing. The importance of the Regulations and the need to assess carefully whether they apply in any given situation cannot be underestimated.

Transfer is defined as 'the transfer of an economic entity which retains its identity'. When a transfer within the meaning of the Regulations occurs, the acquiring party will be obliged to employ the employees of the disposing party on terms and conditions no less

12 [2008] ICR 464.

favourable than those previously enjoyed by them, and with their prior service intact. A lapse in time between the transferor ceasing business and the transferee resuming the business does not necessarily prevent there being a transfer of the business for the purposes of the Regulations. In assessing whether or not the Regulations apply, consideration must be given to the type of business concerned, whether there has been a transfer of assets, whether any employees have been transferred, whether customers have transferred and to what extent the activity carried on before and after the transfer is similar.

When a transfer is taking place, it is important that the transferor and transferee take steps to ensure that the employees are informed in advance. In practice, employee representatives must be informed of the reasons for the transfer and the legal, economic and social implications of the transfer for the employees, and also of any measures that are envisaged in relation to the employees. This information must be communicated at least 30 days in advance of the transfer, where possible, to enable the representatives to be consulted in relation to any measures concerning the employees. The obligation to consult only occurs where there are measures envisaged in relation to the employees.

The Regulations do make provisions for transfer-related dismissals when the dismissals are because of economic, technical or organisational reasons that result in changes in the workforce. However, this defence is generally only available to the transferee. This makes it difficult for employers to implement changes before the sale of their business to make the business more attractive to prospective purchasers.

With regard to breaches of the Regulations, employees may bring complaints to the WRC, with a right of appeal to the Labour Court.

XV OUTLOOK

It is expected that the Irish economy will continue to perform strongly in 2020, with unemployment levels reaching record lows. It also expected that the high level of foreign direct investment into Ireland will continue in 2020. However, all the commentary is indicating that Brexit will have a significant impact on the Irish economy.

We expect to see the WRC increasing its focus on more targeted, industry-specific workplace inspections during the course of 2020. However, the general aim of the WRC in carrying out inspections is to promote a culture of compliance and to educate employers on their legislative obligations rather than to prosecute employers.

With effect from 1 September 2020, parental leave will increase from 22 weeks to 26 weeks unpaid leave per child (once certain additional conditions are satisfied). This is part of a series of family-friendly initiatives in recent years, which is expected to continue.

We expect the draft gender pay gap reporting legislation, the Gender Pay Gap Information Bill, to continue working its way through the Irish legislative process. Although the bill is still at a relatively early stage in the legislative process and is likely to be subject to further amendments, many employers have already started to prepare for its introduction.

The legislative scheme underpinning the Central Bank's proposed Senior Executive Accountability Regime (SEAR), and the broader Individual Accountability Regime, is expected to be published in the near future, following which the Central Bank will engage in a public consultation on the new regime. Once introduced, SEAR is likely to have a significant impact on the hiring of employees and management in the financial services sector.

While all the above legislative proposals will technically fall away as a result of a planned election in February 2020, it is expected that the incoming government will take over these legislative proposals, which will lead to further amendments.

ISRAEL

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I INTRODUCTION

The employment law framework in Israel is derived from the following sources:

- a* Legislation: statutes and regulations provide employees with certain minimal rights. Israel lacks a constitution and has basic laws instead, which are superior to regular laws, including the Human Dignity and Liberty and Freedom of Occupation Law.
- b* Collective bargaining agreements: either specific or general. The latter may be extended by an order of the Minister of Economy to additional groups of employers and employees, or to all employers in the economy.
- c* Employment contracts: provisions of employment contracts will not be enforceable if they are inferior to those prescribed by law. If several legal sources apply to an employee, the one that is most beneficial governs.

The primary means for resolving employment disputes are the labour courts, parity committees (mostly established by collective bargaining agreements), internal courts that exist in several fields, arbitration and mediation.

The enforcement of employment laws may be conducted by several organisations and mechanisms, such as the Enforcement Unit of the Ministry of Economy, specific legislative authorities, state authorities and the courts.

II YEAR IN REVIEW

i Amendment to the Hours of Work and Rest Law 5711–1951

Working on weekly rest days

In the past, the right to refuse to work on the weekly rest day was afforded only to employees who could not work because of their religious beliefs. However, as of 1 January 2019, employees may refuse to work on the weekly rest day or religious holidays for any reason.

Therefore, employees who do not wish to work on the weekly rest days are no longer required to provide an affidavit regarding their religion or declare that they observe the Jewish religion. Employees can inform their employer, no later than three days from the date on which they are required to work on a weekly rest day, that they do not agree to do so.

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In general, employers are forbidden from turning away candidates for the sole reason that they informed the employer, when accepted for work, that they would refuse to work on the weekly rest days. Equally, an employer cannot require a candidate to commit to working on the weekly rest days as a condition of accepting a position.

The amendment does not apply to certain workplaces, such as safety organisations, the electricity, health and hotel industries, etc. Note that, in any case, requiring an employee to work on the weekly rest days is subject to obtaining a permit from the Ministry of Labour, Welfare and Social Services.

ii Amendment to the Employment of Women Law, 5714-1954

Absences resulting from fertility treatment

Previously, employees were entitled to be absent from work to receive fertility treatment, in accordance with their entitlement to sick leave. Since sick leave is paid only from the second day of absence, and even then the payment is partial until the fourth day of absence, the legislator wanted to bring the situation regarding absences for fertility treatment in line with that for absences for pregnancy examinations, for which there is a fixed entitlement to time off without deduction of pay, separate from the entitlement to sick leave. As such, from 31 December 2018, both male and female employees are entitled to up to 40 hours of absence per year for fertility treatment. Partial days are also taken into account for this purpose and employees are entitled to sick pay in this regard from the first hour of absence.

III SIGNIFICANT CASES

i Employer's responsibility to examine alternative positions prior to termination

The question of the extent to which an employer is required to conduct due diligence and find an alternative position for employees who can no longer fulfil their previous position was addressed in the recent case of *Shmuel Vagman*.² In this case, an employee was transferred from his managerial position. The court determined that the company's decision to do this was reasonable and for relevant considerations, and did not amount to age discrimination. However, it found that under the circumstances, there was a 'duty to make an effort' to locate a relevant alternative role, and that the degree of effort required could vary from case to case. In this respect, according to a new and developing trend in recent labour court rulings, employers have a duty to make an effort to find alternative positions for certain groups of employees (such as disabled employees and those close to retirement), before proceeding with the termination of contracts.

In this respect, the court found that the duty derived from the obligation to act in good faith in the context of labour relations, which had both substantive and procedural aspects. The substantive aspect required the employer to examine whether there was a relevant alternative position, considering a wide range of matters, including the organisation's needs, the availability of vacant roles, the employee's suitability for the position relative to his or her qualifications and abilities, and the effects of staffing the position on labour relations, whether in the workplace as a whole or in the specific department, and more. From a procedural

² Labour Appeal 67949-09-16, *Shmuel Vagman v. Galil Engineering Ltd.*

perspective, the court considered that employers must follow a proper and serious procedure to locate alternative positions, including the employee in the process and giving them the opportunity to suggest alternative positions that they may find interesting.

Under the circumstances, owing to the heightened duty of good faith that applies in employment relations, the employee's length of service (he was on the threshold of retirement) and the reason for his removal from the position, the employer was required to search diligently for an alternative position. This expectation was reasonable, in view of the duty to make an effort. Since the employer failed to do so, it was ordered to pay compensation of 100,000 shekels.

ii Disability discrimination

Who is disabled?

In connection with reductions in the workforce, the National Labour Court recently examined the question of who is a 'person with disabilities' and how an employer is required to know of the disability. In this context, the National Labour Court in *Tircovot Brom*³ determined that the definition of a 'person with disabilities' – as in the Equal Rights of Disabled People Law 5758-1998 (the Disabled People Law)⁴ – must be interpreted broadly and flexibly. This means that there is no obligation that people be defined as having 'severe' disabilities, and the determination of any 'percentage disability' by the National Insurance Institution is not relevant. Furthermore, there is no requirement to present a medical certificate explicitly stating that the individual has a disability; it is sufficient that the disability affects one main area of life, which does not have to be employment.

In addition, limitations that are apparent are not the only limitations that may be considered severe, as even those with a 'slight' degree of disability can experience harm occasioned by societal norms. However, it was also held that the definition as determined by the legislator cannot be completely ignored, and that not every health problem seriously interferes with an individual's routine functioning.

In this case, the Labour Court added that it was justifiable to apply the provisions of the law only to those who indeed fulfilled the conditions of the definition, thus preventing abuse or artificial use of the law. The law was intended to protect a person whose disability may have caused him or her, without the protection of the law, difficulty in integrating, working or making a living and progressing, or would otherwise harm the individual's realisation of his or her potential or full and equal participation in various areas of life. A critical mass of physical, sensory, mental, cognitive, intellectual or social dysfunction, including stigmas and prejudices, is required to conclude that a person's functioning is indeed substantially limited.

How is the employer to know?

As a rule, and except where circumstances justify a different conclusion, an employee who wishes to receive the protective provisions of the law is required to notify his or her employer (especially if the disability is not apparent). Generally, if the employee wishes to

3 Labour Appeal 34784-10-16, *Tircovot Brom (ICL Israel Chemicals Ltd) v. Yehudit Borochov* (published in *Nevo* on 15 October 2018).

4 A 'disabled person' is defined in the Disabled People Law as a person with a permanent or temporary physical, mental or intellectual (including cognitive) impairment, due to which his or her functions are substantially restricted in one or more main spheres of life.

have adjustments made or benefit from affirmative action (or other protection) under law, he or she should inform the employer that he or she is a 'disabled person' and provide the facts reasonably required for implementing the adjustments, and so on.

The National Labour Court emphasised that an employer should not be required to examine historical medical documents that may be in its possession (such as sick leave or periodic examinations) or attempt to identify a medical problem that the employee may have, even theoretically, to determine whether the person has 'disabilities' according to the law.

We note that at the end of the ruling, the National Labour Court incidentally commented on a link between the employer's obligation in respect of the fair representation of employees with disabilities, and its duty to find an alternative position for an employee when downsizing. The court noted that it may be argued that the duty to find an alternative position applies as long as the employer cannot prove that the workplace already has full and adequate representation of persons with disabilities, even after the downsizing. However, this remains an open issue.

iii New 'hearing procedure' rules

There is a requirement in Israel to arrange a hearing with employees when considering the termination of their employment, prior to making a final decision in their regard. The purpose of the hearing is to hear the employees' thoughts on the matter, and wholeheartedly take them into account before reaching a final decision. This requirement has recently been broadened by case law, to include candidates for employment.

In the *Nir Ephraim* case,⁵ a candidate was accepted for a temporary position at the Ministry of Health to provide cover for an employee who was due to go on maternity leave. The candidate, who was not otherwise employed at the time, was willing to wait until the employee began her maternity leave, between two and three months later. A mere three days after completing the screening process, the candidate was informed that there was a headcount problem, and therefore they could not hire him after all.

The plaintiff filed a claim against the Ministry of Health, claiming that he had been employed by the Ministry and unlawfully dismissed without an opportunity to share his thoughts on the decision, in violation of the agreement between the parties.

The Ministry claimed that he had not been employed at the time, and therefore his employment had not been terminated; there was no breach of contract; he did not suffer any damages; and had no entitlement to severance pay. It further claimed that because of the circumstances, there was no requirement to hold a hearing, and in any case, the outcome of such a hearing would have been known, in view of the headcount issue. Finally, the Ministry claimed that in any case, its mistake was made in good faith and did not cause any damage to the plaintiff, who should have continued his search for work because of the temporary nature of the position and the delay in its commencement.

The court ruled that, under the circumstances, and since the parties had entered into a binding contract, the plaintiff should be viewed as having been hired and fired, and that, therefore, the hearing rules applied to him, even if his employment had not yet begun. The court based this on, among other things, the notion that employees should be provided with a genuine opportunity to demonstrate their skills and abilities before employers make

5 Labour Dispute 67436-06-16, *Nir Ephraim v. State of Israel – Ministry of Health*.

definitive decisions in their regard. The plaintiff was therefore awarded 25,000 shekels as compensation for the Ministry failing to conduct a hearing with him, which was deemed unacceptable conduct in bad faith.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Generally, Israeli law does not require a written employment contract, though there are some exceptions.

However, employers are required to provide new employees (and existing employees upon their request) with a written notification form regarding certain employment terms and to update them in writing regarding any changes to those terms, as detailed in the Notice to Employee and Job Candidate Law (Employment Conditions and Candidate Screening and Selection) 5762-2002 and the relevant regulations.

An employer is not obliged to provide this type of notification if the employee is provided with a written employment agreement that includes all the required details.

Employment contracts may be for a fixed term or an indefinite term, at the parties' discretion. The termination of a fixed-term contract prior to its expiry by one party (the employer) may entitle the other party (the employee) to damages in the amount of the salary for the remaining term.

ii Probationary periods

Probationary periods are permitted by Israeli law, but during such a period, an employee would still be considered a regular employee for all intents and purposes. The minimum statutory written prior notice for a monthly employee⁶ is one day for each month during the first six months of employment, and two-and-a-half days for every additional month. A monthly employee who has worked for a year or more is entitled to one month's notice.

According to a Labour Court ruling, during a probationary period, the reasons for termination of an employment agreement may be examined in a more lenient manner.⁷

iii Establishing a presence

In general, a foreign company can hire employees directly in Israel without being required to officially register a subsidiary company or have a registered branch in Israel. However, it will be required to be registered with the tax authorities as an employer.

A foreign company can also engage individuals as independent contractors or as service providers through manpower companies or service contractors. In principle, a foreign employer who employs employees directly is required to comply with local employment legislation. In addition, the foreign company has withholding obligations to the tax authorities as the employment income is subject to income tax, social security contributions and health tax.

6 Under the Prior Notice of Termination Law 5761-2001, a monthly employee is an employee whose remuneration for work is mainly paid once a month.

7 See, for example, ASK 56412-01-17, *Kobi Shimoni v. Israel Railways Ltd* (6 September 2017).

Generally, the engagement of individuals by a foreign company (whether as independent contractors or as employees) may expose that company to the risk of being regarded as a permanent establishment in Israel. The main outcome of this would be that general income attributed to an Israeli permanent establishment will be subject to Israeli corporate tax.

V RESTRICTIVE COVENANTS

Non-compete restrictions during and after a employment relationship are a common feature of employment agreements.

During the employment period, limitations imposed by an employer on an employee's freedom of work are likely to be enforced, if the employee is in a full-time position.

However, post-termination non-compete restrictions are rarely enforced. An employee would be prohibited from competing with a former employer only if it may harm a legitimate interest of the employer.⁸ According to case law, non-compete covenants will not be enforced except in the following circumstances:

- a* the former employer owns a trade secret that is unlawfully used by the employee;
- b* the former employer has invested unique and valuable resources in the employee's training;
- c* on termination of the employment, the employee has received special consideration in return for his or her non-compete undertaking; or
- d* when balancing the employee's conduct and good faith in taking the new position and his or her obligation of fidelity towards the former employer, the non-compete covenant can be justified.⁹

Even if the court decides to enforce a non-compete covenant, the enforcement would only be with respect to an obligation that can be considered reasonable given the scope of the employee's position, the period of the restriction, the field in which the employer operates, and the relevant geographical limitation. Accordingly, the court can redraft the non-compete obligation to make it reasonable.¹⁰

VI WAGES

i Working time

The issue of working hours and overtime is governed by the Hours of Work and Rest Law and additional legislative sources, such as extension orders.

The Hours of Work and Rest Law was amended in April 2018, the effect of which was to shorten the working day, which now consists of 8.6 hours per day on four weekdays and 7.6 hours a day on one working day of the employer's choice (which should take into account the employee's request), amounting to 42 hours per week and 182 hours per month.

According to this Law, night work is defined as a minimum of two hours' work between 10pm and 6am. Night work must not exceed seven hours per day (not including overtime) and an employee must not carry out night work for more than one week in every two.

8 LA 164/99, *Frumer v. Radguard Ltd* PDA 34, 294 (1999); CA 6601/96, *AES Sys Inc v. Saar* PDI 54 (3), 85 (2000).

9 LA 164/99, *Frumer v. Radguard Ltd* PDA 34, 294 (1999).

10 CA 6601/96, *AES Sys Inc v. Saar* PDI 54 (3), 85 (2000).

ii Overtime

There are limits to the amount of overtime that may be performed in a given period, other than for employees who are excluded from the Hours of Work and Rest Law (under exceptional circumstances).

Overtime compensation must be paid after working 8.6 hours per day (or 7.6 hours on the relevant shortened day) or 42 hours per week. For the first two hours of overtime, an additional 25 per cent is paid per hour, and for the third hour of overtime and thereafter, an additional 50 per cent per hour.

When a business operates a six-day working week, employees may work up to 12 hours' overtime per week, and when a business operates a five-day working week, employees may work up to 16 hours' overtime per week.

VII FOREIGN WORKERS

An Israeli employer may employ a foreign employee in Israel provided that:

- a* the employee has an unrestricted visa allowing him or her to work in Israel regardless of the employer's identity; or
- b* the employer has a permit to employ a foreign employee who has a visa based on this permit.

The permit is usually issued for 12 months and can be extended, subject to the discretion of the relevant authorities, for additional 12-month periods, up to a maximum of five years and three months. Permits can also be issued for periods of up to 45 days, three months or two years.

In general, permits are granted in five sectors: construction, agriculture, nursing, services and industry. A common type of B-1 permit is a permit to employ 'foreign experts' in which:

- a* the foreign expert must demonstrate a high degree of expertise or unique and essential knowledge to the service provided by the employer, which is absent in Israel; and
- b* his or her monthly salary shall not be less than twice the average salary in Israel (for 2020, 20,856 shekels).¹¹

An employer may employ an unrestricted number of foreign employees who do not require a permit. There is no limit on the number of permits that can be applied for by an employer. However, the authorities will take into consideration the number of foreign employees employed by an employer as compared with the total number of its employees.

Employment of foreign employees in Israel is subject to local labour legislation, including collective agreements (when applicable) and extension orders.

The duties of enterprises employing foreign workers include providing medical insurance and, in some cases, accommodation. In addition, the employment can be subject to a special tax in which the employer should pay up to 20 per cent tax in addition to the taxes that apply to any employee, except in certain situations, such as when the employee earns more than twice the average salary in Israel.

¹¹ This amount is updated annually.

VIII GLOBAL POLICIES

There is no mandatory requirement for applying disciplinary rules. However, these types of rules are quite common in unionised workplaces (as part of a collective agreement with the employee representative committee) and in companies that are subject to global policies in light of being part of a group of companies. Disciplinary rules are regarded as part of an employee's terms of employment.

There are mandatory rules and policies that an employer is required to adopt, such as the model rules for the prevention of sexual harassment according to the Prevention of Sexual Harassment Regulations 5758-1998.

In general, disciplinary rules are not required to be filed with or approved by any government authorities, but they should comply with applicable law and general legal principles.

Generally, for disciplinary rules to be applicable to them, employees should consent to the rules, either explicitly or implicitly. It is recommended that the employer's rules be accessible to the employees (such as on a bulletin board or intranet site) to reduce claims that the employees were not aware of them (or any amendment to them).

Disciplinary rules are not required to be written in the local language. However, they should be in a language that the employees understand.

IX PARENTAL LEAVE

The Employment of Women Law 5714-1954 and its regulations sets out the rights of women and their partners in the workplace, including during fertility treatment, pregnancy and after giving birth.

Employees are entitled to statutory maternity leave (now known as birth and parenting leave (BPL)), which may be taken by the mother or shared between both parents.

In general, payment is for 15 weeks of BPL, made by the National Insurance Institute (NII), subject to certain entitlement criteria, as determined by the National Insurance Law [consolidated version], 1995. The rest of the BPL (i.e., 11 weeks) is unpaid.

An employee is entitled to 26 weeks of BPL if she has worked for the same employer or at the same workplace for at least 12 months (otherwise, the entitlement is 15 weeks). The BPL may be extended in certain circumstances, such as hospitalisation of the employee or the child, or a multiple birth.

According to law, an employee whose partner has given birth is entitled to BPL, to be paid by the NII, as of the end of the first six weeks following the delivery, so long as certain conditions are met. These include that he has provided a written waiver from his partner, waiving her entitlement to the remainder of her BPL, and that she returns to work for the remainder of this time. In certain cases, usually when the employee has sole custody of the child or is the sole carer (e.g., because of the mother's medical condition), he will be entitled to the entire BPL.

An employee, or in certain circumstances, her partner may be entitled to statutory unpaid leave after the completion of BPL, which may equate to a quarter of the employee's length of service (less the period of the maternity leave exceeding 15 weeks that was actually taken by the employee), though in no case longer than a year following the birth.

There are a number of other employee entitlements in this area, such as time off for antenatal appointments, the right to work one hour less per day (without reduction in pay) for a limited period after returning from BPL, and time off for fathers around the time of birth, all of which are subject to requirements and conditions.

Pregnant employees, those undergoing fertility treatment, and employees on BPL, statutory unpaid leave and for a certain period thereafter, are all protected from dismissal (subject to conditions). Note that specific ministerial approval may be obtained to allow such a termination in certain circumstances if the employer can show that the termination is not occasioned by the special circumstances of the employee (for example, the employee being pregnant). See also Section XIII.i.

X TRANSLATION

There is no requirement that employment contracts be written in any specific language, as long as the employee understands the language (except with regard to foreign employees, for whom the Foreign Employees Law 5751-1991 expressly provides that the employment contract should be written in a language the employee can understand). In this respect, it is common for global companies to provide employment-related documents (including employment contracts and confidentiality agreements) in English, mainly for them to be understood by the company's management abroad.

There is no clear recommendation as to whether to provide employment documents in Hebrew, and the decision usually depends on the employees in the company and the extent of their knowledge of the foreign language.

Providing employees with employment-related documents in a language they do not understand may result in employees claiming that they are not subject to their terms (as they did not understand them), and may affect the employer's ability to enforce them.

XI EMPLOYEE REPRESENTATION

Employees are permitted, but not required, to establish a union if none exists. The right of unionisation is regarded as a fundamental right of employees.

For the purpose of defining the representative organisation in the workplace, the general rule is that, in a specific workplace, there should be one 'bargaining unit', meaning that at least one-third of the total employees are members of the union. Splitting the natural bargaining unit can be done consensually by the bargaining parties – namely, the union and the employer.

The election procedures for representatives are set out in the articles of association of each union or employee committee. The length of the term of the representative committee may change from one committee to another, in accordance with its articles of association.

Employees have a general right to enrol as members of a trade union and to authorise the union to act on their behalf. The law defends this right by prohibiting the employer from preventing any trade union representative from entering the workplace to organise the employees and advance their interests, and revoking or reducing any employee rights, including terminating employment, on the ground of an employee's membership or activity within a trade union or on the grounds of his or her activity in establishing a representative body in the workplace.

The National Labour Court has also ruled that, during initial unionisation, the presumption is that the expression of the employer's opinion could exert pressure that may constitute an unjustified influence on the employees. Therefore, an employer is not allowed to publicly express its views against the organisation of its employees, let alone take any action in an attempt to avert it.¹² In recent years, the regional labour courts have imposed significant compensation on employers that have acted to thwart initial unionisations by various means (such as putting pressure on employees to abolish their union membership, giving legitimacy to actions against the unionisation, discriminating against unionised employee; and acute expressions of opinion against the unionisation made by senior managers).¹³ In this regard, the National Labour Court has pointed out that attempts by employers to harm initial unionisation has become a 'common phenomenon', justifying increasing compensation in the future.¹⁴ However, the Regional Labour Court in Tel Aviv ruled in the *McDonald's* case,¹⁵ that if, during the unionisation process, representatives of the workers union deliver deceptive or misleading information that gives rise to false allegations, the employer will have a right to respond to those allegations in good faith.¹⁶

The law stipulates that an employer has an obligation to negotiate with the union in the initial stages of its formation in the workplace, with respect to any of the following: hiring and firing; termination of employment; employment terms and conditions; and the rights and obligations of the trade union. However, the law emphasises that this requirement does not require the employer to sign a collective bargaining agreement with the trade union, but rather only requires the employer to negotiate with the union.

In workplaces in which collective relations are already established, the employer is obliged to negotiate with the representative trade union with respect to various specific employment matters, including engagement, termination and terms of employment. To the extent that the employer does not respond to the employees' demands and refuses to sign a collective bargaining agreement, the trade union can potentially declare a work dispute and initiate a strike.

XII DATA PROTECTION

i Requirements for registration

The Privacy Law 5741-1981 regulates the matter of databases and their registration. The Privacy Law defines 'database' as 'a collection of data, maintained by magnetic or optical means and intended for computer processing'.

12 *Pelephone* decision: *New General Workers' Union v. Pelephone Communications Ltd* (2 January 2013) 25476-09-12. A motion to the High Court of Justice was rejected.

13 SK 49105-08-16, *New General Workers' Union v. The Medical Rehabilitation Centre 'Ba'it Balev' Bat-Yam*; ASK 61532-12-16, *The Medical Rehabilitation Centre 'Ba'it Balev' Bat-Yam v. New General Workers' Union*; SK 29252-04-18, *New General Workers' Union v. Neto Melinda Trade Ltd*; SK 52024-03-16, *New General Workers' Union v. S. Shlomo Insurance Company Ltd*.

14 ASK 11460-10-14, *Hot Mobile Ltd v. The New General Workers' Union*.

15 *McDonald's* decision; *New General Workers' Union and other v. Alonyal Ltd and other* – 31826-10-14 – 6 May 2015.

16 An appeal on the *McDonald's* decision served by the workers union was removed without prejudice, and without the National Labour Court expressing its opinion on the Regional Labour Court's decision (ASK 40548-05-15, *New General Workers' Organization v. Alonyal Ltd* (24 November 2015).

'Data' is defined under the Privacy Law as 'information about an individual's personality, personal status, intimate affairs, health condition, financial condition, professional qualifications, opinions or beliefs'.

Under the Privacy Law, it is necessary to register a database (in the databases' registry maintained by the Israeli Registrar of Databases) if, inter alia, it:

- a* contains data about more than 10,000 individuals;
- b* contains sensitive data (see Section XII.iii);
- c* contains data about persons that was not provided by them, on their behalf or with their consent; or
- d* is used for direct mailing services. 'Direct mailing' is defined under the Privacy Law as 'approaching a specific person based on his/her belonging to a group of the population that is determined by one or more characteristics of persons whose names are included in a database', and 'direct mailing services' is defined under the Privacy Law as 'providing services of direct mailing to others by way of transferring lists, labels, or data by any means'.

Human resource databases in workplaces are generally considered to include sensitive data and, consequently, should be registered according to the Privacy Law. In addition, no person may use the data included in a registered database except for the purposes for which it was established.

ii Data security

Under the Privacy Law, the owner of a database, the holder of a database and the manager of a database are each individually responsible for the protection of the data in the database. The Privacy Law defines 'data protection' as 'protection of the integrity of the data, or protection of the data against exposure, use or copying, all when done without due permission'. It is customary to limit access to a database to individuals who have reasonable needs to use the information included in the database.

The Protection of Privacy Regulations (Data Security) 5777-2017 establish a broad and comprehensive arrangement regarding the physical and logical protection of databases and their management.

iii Notice and consent

Section 11 of the Privacy Law provides that any request for data made to a person, with the intention of keeping and using it in a database, shall be accompanied by a notice indicating (1) whether that person is under a legal obligation to deliver that data or whether its delivery depends on his or her decision and consent, (2) the purpose for which the data is requested, and (3) the person or entity to whom the data will be delivered and for what purpose. Based on case law, employees are required to provide their explicit consent to such a notice.

iv Cross-border data transfers

The export of data outside Israel from a database subject to the Privacy Law is regulated by the Protection of Privacy Regulations (Transfer of Data to a Database Outside the State Borders) 5761-2001. These Regulations prohibit the transfer of data from an Israeli database to a database located abroad, unless the receiving country ensures a level of protection of data that is not lower than the protection provided for under Israeli law.

In addition, the Regulations lay down conditions that enable the transfer of data from an Israeli database to a database abroad, even when the overseas law provides a level of protection that falls below that provided under Israeli law. These conditions include, for example, obtaining the individual's consent to the transfer of the data, and the data being transferred to someone who has agreed to fulfil the conditions laid down in Israel.

In addition to the fulfilment of any of the above-mentioned conditions, the Regulations state that the owner of the database must ensure (by way of written obligation), that the recipient takes steps to ensure the privacy of data subjects, and that the data shall not be transferred to any other person, whether that person be in the same country or not. Accordingly, onward transfer of data to a third party located outside Israel is not permitted, unless the owner of the database entered into a direct agreement with that third party, which includes, *inter alia*, the above requirements.

v Data subject rights

According to Section 13 of the Privacy Law, every person is entitled to inspect, either by himself or herself or through a representative authorised by him or her in writing or by his or her guardian, any data about him or her that is kept in a database. In addition, under Section 14 of the Privacy Law, when a person who, on inspecting any data about himself or herself, finds that it is incorrect, incomplete, not clear or not up to date, he or she may request that the owner of the database or, if the owner is a non-resident, the holder of the database, amend or delete the data.

vi Sensitive data

Under the Privacy Law, 'sensitive data' is defined as 'data on a person's personality, intimate (i.e., private) affairs, state of health, financial conditions, opinions and beliefs'. Sensitive data is interpreted very broadly by the Israeli courts and the Israeli Protection of Privacy Authority, as encompassing types of personal information that are not specifically mentioned in the definition of sensitive data, all depending on the specific circumstances of the matter.

As stated above, if a company maintains sensitive data by electronic means for processing, it is required to register a database.

vii Outsourcing

Any owner of a database who outsources services that involve the processing of personal data by a third party service provider, must enter into a written agreement with the third party service provider, which will determine certain security measures and safeguards, such as, for example, the purpose of the processing, the return or destruction of data upon termination of the services, supervision rights on the service provider's activities and a binding security document.

viii Background checks

Background checks on candidates must respect the individual's right to privacy, and be reasonable, relevant, proportionate and carried out in good faith.

In respect of publicly available information, there is no specific requirement to obtain an individual's consent. As regards non-public information, the need for prior written notice and informed consent depends on the circumstances.

Requesting information with respect to protected criteria under the Employment Equal Opportunities Law 5848-1988 (e.g., regarding race, gender, age, religion) will usually shift the burden of proof to the company in the event of a discrimination claim, to show that it did not unlawfully take into account any such protected criteria in making the employment decision.

Criminal background checks are generally not permitted. Even requesting a candidate to provide a declaration about his or her criminal history is regarded as unlawfully circumventing the legislation, unless the employer specifies the types of offences or investigations about which it requires information, and demonstrates that this is relevant for the position in the circumstances.

In April 2019, a new Credit Data Law (which had been enacted in 2016) came into force (the New Credit Law), which replaced the previous law on the matter from 2002. The New Credit Law completely prohibits an employer from requesting or obtaining information regarding an individual's credit data and credit rating for the purposes of employment, including through a questionnaire or declaration from the candidate (with an exception regarding credit data published in public databases according to law). The New Credit Law also provides that the courts have the power to oblige a person who has requested or received credit data information in violation of the provisions, to pay the candidate compensation without proof of damage.

It is forbidden to request information regarding military and genetic profiles.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

As a general rule, employers must exercise their right to terminate an employee's employment in good faith, for valid reasons¹⁷ and in compliance with applicable laws, any written employment contracts, workplace customs and collective bargaining agreements or extension orders, if applicable.

In addition, according to court decisions, all employers are required to hold a hearing prior to making a decision regarding a termination of employment. The purpose of the hearing is to inform the employee of the employer's reason and give him or her the opportunity to respond. A hearing is required in all circumstances, regardless of whether the dismissal is based on redundancy, poor performance or misconduct.

In certain circumstances, terminating employment may be prohibited or subject to obtaining ministerial approval.¹⁸ Israeli law prohibits the termination of employment for certain groups of employees, such as pregnant women, employees expecting to adopt, become

17 Valid reasons for dismissal may include poor performance, redundancy and disciplinary action.

18 Ministerial approvals for the termination may be obtained in certain circumstances if the employer demonstrates that the termination is not the result of the special circumstances of the employee (such as the employee being pregnant).

foster parents or become parents with the assistance of surrogacy, employees undergoing fertility treatment, employees on maternity or paternity leave and for 60 days thereafter,¹⁹ employees on army reserve duty²⁰ and employees on sick leave.²¹

In workplaces where collective relationship exist, or a collective bargaining agreement or extension order applies, the process of termination, which is often included therein, usually involves the participation of employee representatives.

In general, employees are not entitled by law to a social plan or the right to be rehired.

According to some court decisions, in certain circumstances, prior to making a decision regarding termination of employment, employers are required to consider whether they can offer the employee an alternative position within the workplace.

Under Prior Notice Before Termination Law 5761-2001, employers must provide the employee with prior written notice when ending the employment relationship. An employer may choose to pay the employee in lieu of notice. Payment in lieu is equal to the salary the employee would have received had the employee continued to work throughout the notice period.

Under the Severance Pay Law 5723-1963, an employee who is dismissed after completing at least one year's service is entitled to statutory severance pay. This is calculated based on the employee's monthly base salary multiplied by the number of years of service.

In general, employees can compromise contractual payments or benefits only if these entitlements are over and above statutory entitlements.

Furthermore, it is common for employers to ask employees to sign a letter of receipt of their final payments and a release of claims against the employer. According to case law, a release does not constitute a formal bar to future claims by employees. However, it may be enforced if certain conditions are met, such as:

- a* the employee was aware of the rights that he or she waived;
- b* the employee was presented with a clear and comprehensible account of the sums he or she received before signing the release;
- c* the release is clear and unambiguous; and
- d* the employee signed the release of his or her own free will and not as a result of coercion by the employer.

ii Redundancies

As a general rule, Israeli case law requires an employer to inform and consult employees with respect to redundancies. However, the law does not specify the form, timetable or content of these obligations. If a collective bargaining agreement, or any other binding legal document, applies to the affected employees, it may set out specific procedures for redundancies, including the bodies the employer must consult.

In the absence of specific provisions, there is a general duty to carry out consultation in good faith before any final decisions are made. In general, the employees should be provided

19 Employment of Women Law 5714-1954; ministerial approval is required for all the aforementioned groups.

20 The Discharged Soldiers (Reinstatement in Employment) Law 5709-1949. In general, unless a ministerial permit is granted in advance, the termination of an employee's employment during military reserve service is prohibited, as is termination within 30 days of reserve service lasting longer than two days.

21 Under Sick Pay Law 5736-1976, employers are prohibited from terminating the employment of an employee who is absent from work owing to an illness during the period in which the employee is using his or her accumulated sick leave.

with relevant information regarding the anticipated dismissals, such as general information regarding the financial situation of the employer when the redundancies need to take place owing to lack of profit.

In practice, the obligation to inform and consult employees is only practical when an employee representative body exists and can therefore be consulted.

The obligation to inform and consult employees does not detract from an employer's general obligations with respect to the termination of employment, including holding personal hearings with each employee (see Section XIII.i). Thus, employees whose contracts are terminated by reason of redundancy have the same personal rights as any other employee whose employment is terminated.

XIV TRANSFER OF BUSINESS

There are no regulations in Israel in the style of the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as TUPE). In principle, an employee cannot be transferred to another employer without his or her consent. Therefore, if an employee does not consent to the transfer, the seller would either continue the employment of the employee or terminate the employee's employment.

In practice, there are two methods of transferring employees, for example, on the sale of a business:

- a* 'fire and rehire', in which the original employer terminates the employees' employment and the new employer rehires them; and
- b* 'continuity of rights', in which the buyer 'steps into' the seller's position as employer for all intents and purposes. In these circumstances, subject to the employees' consent to the transfer, the buyer assumes all the seller's obligations towards the employees while maintaining their rights and entitlements.

When there is an active union or works council at the workplace, employers need to inform employees about the forthcoming change, and consult and negotiate with regard to their employment terms after such change.

The National Labour Court issued an important ruling in 2015, stating that the original employer is required to provide its employees with prior notice of termination (or pay in lieu of notice), even if the new employer is willing to hire the employees and continue their employment immediately following the termination.²²

XV OUTLOOK

Sexual harassment and other forms of bullying and abuse in the workplace

It is clear that employers no longer only consider the purely financial employment entitlements of employees (minimum wage, annual leave, pension, severance, etc.), but have a greater interest in creating a more holistic and accommodating working environment. This may be driven by increasing legal obligations, but also reflects our digital age, the 'war on talent'

22 LA 28597-03-11 *Dabush v. Yardeni Locks Holdings (2005) Ltd* (11 February 2015).

and the demands of a new generation of employees. In this context, we note that case law is increasingly involved with such 'environmental' issues as the prevention of sexual harassment and workplace abuse and the protection of employee privacy.

The prevention of sexual harassment was already well developed in Israel prior to the rise of the #MeToo movement, with extensive and detailed obligations applying to employers in this regard. However, the issue has received greater public attention since the creation of the movement, and there has been an increase in the number of claims (as well as awareness) in this area. We note that the courts may now be moving in the direction of highlighting the perspective and rights of those accused and their entitlement to due process.

Equally, the passing years have highlighted a growing trend to prevent general abuse in the workplace (as distinct from abuse relating to sexual harassment or to whistle-blowers, which was already lawfully recognised).

The legislature has raised several bills that aim to regulate the matter and ensure the prevention of workplace abuse, and is currently considering the adoption of the Law for the Prevention of Abuse in the Workplace. The pending law, which does not seem to be progressing in the enactment process, defines abuse in the workplace very widely, as 'recurring behaviour towards a person, on several different occasions, which creates a hostile work environment for such person'. According to the pending law, employers are obliged to take reasonable action to prevent abuse in the workplace, such as defining an effective way to submit complaints and effective treatments for such cases.

Despite the apparent halt in the enactment process, the labour courts (in a series of rulings) have found a way to adopt the principles of the pending law, and implement them, mainly on the basis of general principles, such as an employer's obligation to act in good faith and an employee's fundamental right to dignity.

It seems that the labour courts are trying to find the necessary legal framework to rule in such claims, regardless of the official adoption of the law. For example, a regional labour court has ruled in favour of a plaintiff, granting material compensation to an employee, on account of grief caused by an offensive work environment. The court stated that an employer is obliged to provide a suitable work environment for its employees. The court described a pressurised, disciplinary and generally violent work environment, in which the employees were often reprimanded and insulted, and ruled that this type of environment establishes the grounds for a claim of abuse in the workplace, despite the fact that the law has yet to be enacted. Additional aspects that contributed to this specific work environment becoming abusive were the fact that the employees did not have clear working hours and there was a high turnover of employees (owing to their inability to handle the work conditions).

ITALY

*Raffaella Betti Berutto*¹

I INTRODUCTION

In addition to international and EU sources, employment in Italy is governed by a number of provisions contained in the Italian Constitution (e.g., Article 36 on fair and reasonable remuneration and Article 40 on the right to strike); the Italian Civil Code (ICC); state laws, among which the most important is Law No. 300/70 – the Workers’ Statute; collective agreements operating at sector level, at territorial level and at company level; individual employment agreements; and, subject to certain requirements, common practices.

Collective agreements at any level have an essential role. Subject to some exceptions, they are legally applicable to the employment relationship only if an employee and employer are members of the contracting trade union and employers’ organisation or if they have otherwise agreed to be bound by them. However, labour courts tend to refer to the applicable collective agreement when determining employees’ rights, regardless of membership.

Sector-level agreements usually contain provisions covering almost every aspect of the employment relationship in the specific sector, such as the rights of the employee with regard to:

- a* minimum content of the hiring letter;
- b* duration of probationary periods;
- c* holidays, working time and overtime;
- d* sick and maternity leave;
- e* disciplinary matters;
- f* minimum salary and other employment-related benefits;
- g* termination and notice period;
- h* severance payments; and
- i* industrial relations.

They also indicate which specific aspects can be further negotiated at territorial level and at company level.

Special collective agreements regulate employment relationships with executives.

Collective provisions supplement the law and, subject to certain conditions, can derogate from the law. Terms and conditions of employment agreed in individual employment contracts cannot be less favourable than those set out in applicable collective agreements.

The Italian judicial system consists of a number of different courts. In general terms, criminal justice is administered by criminal courts, while civil courts hear civil cases.

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Employment disputes are heard by special sections of the civil courts, known as employment tribunals. These have jurisdiction over any dispute relating to private and public workers, independent contractors and agents.

Ordinary labour proceedings start with the filing of a complaint by the applicant. The defendant must file a defensive brief no fewer than 10 days before the hearing. At the first hearing, the judge will attempt to settle the claim by making a formal settlement proposal to the parties. The parties must personally attend the hearing to discuss this settlement proposal and be cross-examined by the judge. If the parties do not accept the proposal, the process continues to the discovery procedure, which usually takes up to four hearings depending on the complexity of the case. The entire process may take between one and two years.

The employment section of the court of appeal hears appeals of employment tribunal decisions and the Supreme Court of Cassation hears further appeals on grounds of questions of jurisdiction, nullity of the previous decisions or nullity of the entire proceedings, lack of motivation of the previous decisions or breach of statutory provisions. In the case of a suspected breach of constitutional provisions, the parties can bring a claim before the Constitutional Court. Questions on the interpretation of laws giving effect to law deriving from the European Union may be referred to the European Court of Justice by any tribunal or court.

The enforcement of employment laws and regulations also lies with a number of government agencies and authorities. In particular, the National Social Security Agency is responsible for the correct payment of social security contributions by employers, and the National Insurance Agency monitors the correct payment of the contributions due by employers. Besides these two national agencies, a number of other authorities (including provincial labour offices and local sanitary offices) are responsible for compliance, such as with health and safety legislation, night work and overtime limits.

II YEAR IN REVIEW

The year 2019 has been one of adjustment following a period of reforms that have had a significant effect on, among others, the regulations applicable to the dismissal of employees with open-ended contracts and requirements for the lawful recourse to temporary work.

Furthermore, a new regulation was introduced in 2019 in relation to continuative collaborations organised by the client and carried out with the individual's personal work, which prevails over the use of entrepreneurial means. Reference is made to the relationships of platform workers (e.g., the riders) who, effective as of 2 November 2020, are entitled to certain rights that are typical of the employee status, such as the economic treatment (which cannot be determined on the basis of the number of deliveries accomplished but rather by making reference to minimum economic standards set forth by the collective agreements at national level) and mandatory insurance.

III SIGNIFICANT CASES

The following notable cases appeared before the courts during 2019.

In Decision No. 22809 rendered on 12 September 2019, the Court of Cassation clarified that it is lawful to agree upon a trial period clause with an employee who has already been contracted by the same employer and for the performance of the same duties and subject matter of a previous employment agreement, upon occurrence of the actual need of

the employer to further verify the employee's competence, owing to, by way of example, the period of time that has elapsed between the former and the present employment agreement, or the short length of the former employment agreement, or the peculiar nature of the duties to be carried out.

In Decision No. 359 rendered on 25 October 2019, the Tribunal of Busto Arsizio clarified that the conduct of an employer (in this case, a low-cost airline company), by preferring a specific trade union association in all its internal negotiation processes and relations, and by favouring the establishment of a union-monopoly regime of that association, must be classified as anti-union. The Tribunal ruled that, notwithstanding that the employer is not obliged to negotiate with each trade union association, the employer's refusal to interact with a trade union association amounts to anti-union conduct insofar as the association is the signatory party to the national collective bargaining agreement of the relevant business sector in which the employer operates, had a significant number of affiliates within the employing entity and repeatedly asked to meet the company.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

In principle, the parties are free to enter into an employment contract orally. In a dispute, however, the employer has the burden of proving the content of the employment contract; therefore, employment contracts are usually written. Given the extensive use of collective agreements, employment contracts usually consist of a simple hiring letter that refers to and incorporates the applicable collective agreements. In Italy, open-ended employment contracts are the most common type of employment contract.

Employers are required by law to provide employees with certain basic information before the job starts, including the names of the parties, place of work, hiring date, level of employment and duties assigned, duration of the probationary period, if any, working time and notice period. Generally, the employer will add this information to the hiring letter and give the employee a copy. It is common for executives to negotiate and include in the employment contract additional and more specific rights, benefits and obligations, such as restrictive covenants, confidentiality obligations and parachute obligations.

Subject to certain exceptions, changes or amendments to the employment agreement must be mutually agreed between the parties. Certain terms of the agreement, such as probationary periods and non-compete undertakings, must be in writing.

Under certain circumstances, an employer is entitled unilaterally to modify the employment terms and conditions originally agreed with their employees, pursuant to Article 2,103 of the ICC as recently amended by Legislative Decree No. 23 of 4 March 2015 in the framework of the Jobs Act Reform (see below). In very general terms, the employer is now entitled to modify its employees' duties without implying a change of employment level and category as set forth by the collective bargaining agreement. Moreover, if a corporate reorganisation affects the employment status of an employee, the employer is now entitled to assign the employee to one level lower, without a change in salary.

Starting from 2010, a very long and important process was commenced, as regards the recourse to fixed-term contracts. In addition to a number of laws, the process culminated in Legislative Decree No. 81 of 15 June 2015, within the framework of the Jobs Act Reform.

However, progress was halted with the enactment of Decree Law No. 87 of 12 July 2018, as subsequently amended by Law No. 96 of 9 August 2018, which implemented significant changes to the Jobs Act Reform.

Following the 2018 Reform, an employer is not required to provide specific reasons to hire on a fixed-term basis, provided that the overall length of the agreement is no longer than 12 months. However, specific reasons are required in the following cases: fixed-term employment agreements longer than 12 months (up to a maximum of 24 months); extensions of fixed-term employment agreements (up to a maximum of four months over a period of 24 months) that exceed the aforementioned 12-month threshold; and renewals of fixed-term employment agreements.

Under the 2018 Reform, the reasons for executing a fixed-term agreement have to be related to one of the following: temporary and objective needs, unrelated to ordinary activities, or a temporary need to replace employees; or requirements connected to temporary and significant increases in ordinary activities, which could not be planned in advance.

The number of employees hired on fixed-term contracts must not exceed the threshold of 20 per cent of the number of employees with open-ended contracts, which applies as of 1 January of the relevant year of hiring, unless otherwise provided for by the applicable collective bargaining agreements. The threshold of 20 per cent does not apply with respect to, *inter alia*, the hiring of employees:

- a* for a start-up activity for the duration established by a national collective bargaining agreement; and
- b* for replacement or seasonal needs, including the seasonal activities set forth in Presidential Decree No. 1525/1963.

An employee can challenge the validity of a fixed-term contract by means of a written communication sent within 180 days of the due date of the contract's expiry, and must file the claim with the competent employment tribunal within 180 days of submitting the challenge.

If a fixed-term contract is converted into an open-ended contract, the employer is required to pay damages on top of the reinstatement equal to an overall indemnity ranging from two-and-a-half to 12 monthly salaries. If the employer exceeds the maximum number of fixed-term employees, the following administrative sanctions apply: 20 per cent of salary for each month of work, which is increased to 50 per cent of salary if the number of workers hired in violation of the statutory threshold is more than one.

ii Probationary periods

Probationary periods are allowed in Italy. The length varies depending on the level of the employee and the applicable collective agreement. During the probationary period, each party can withdraw from the contract without notice.

iii Establishing a presence

A foreign company is free to hire employees and engage consultants directly without setting up a subsidiary or branch in Italy. However, if the activities carried out in Italy amount to a permanent establishment for tax purposes, the setting up of a branch or a subsidiary is required. This usually happens when the services provided in Italy relate to the core business of the foreign company and are not merely preparatory or when the employees, consultants

or agents are empowered to execute contracts that directly bind the company. In the latter situation, the foreign company will also be liable for failure to fulfil the relevant obligations under the Italian tax laws and be subject to tax penalties.

A foreign company engaging employees without establishing a local entity must appoint an Italian company representative through a power of attorney, which is usually a payroll adviser.

The setting up of an Italian payroll is required as the foreign company must deduct social security contributions at source and pay these to the Italian social security authorities, whereas the employee is liable to pay income tax to the Italian tax authorities. In addition, notarised and legalised (by apostille) copies of the company's articles of incorporation, along with a certificate of good standing attesting that it is registered with the local register of enterprises, if any, must be provided. These documents must be translated into Italian.

Even if the parties agree to subject the employment agreements to non-Italian law, mandatory Italian laws apply. These include rules relating to, *inter alia*, the minimum wage, working time, termination of the employment relationship and related compensation, health and safety in the workplace, 13th-month and 14th-month allowances, and holidays.

V RESTRICTIVE COVENANTS

Article 2,105 of the ICC imposes on the employee a duty of loyalty and fidelity during the employment relationship, which includes a non-compete obligation. Non-compete covenants agreed after the termination of an employment relationship are regulated by Article 2,125 of the ICC. This provision requires the parties to enter into a written agreement, which can be made either at the time of the hire or afterwards.

Under Article 2,125 of the ICC, the non-compete covenant:

- a* must be for a term not exceeding three years for employees and not exceeding five years for executives;
- b* must indicate the territory in which the covenant applies – this cannot cover an area so wide as to deprive the employee of the opportunity to carry out any further working activity; and
- c* must provide for consideration.

The employer is free to choose whether to pay consideration during or at the end of the employment relationship. If paid during employment, the consideration usually amounts to between 15 per cent and 25 per cent of the monthly salary; it is paid in addition to the monthly salary and is subject to social security contributions. If paid after employment, the consideration usually amounts to between 30 per cent and 40 per cent of the last annual salary multiplied by the years of non-competition and is not subject to social security deductions. Opting in after the termination of the employment relationship contained in the covenant is usually deemed null by the courts.

VI WAGES

i Working time

Italian law provides for a standard 40-hour working week. Sector-wide collective agreements may modify the standard working time and also provide for a working time limit to be calculated as an average for a period not exceeding one year. This allows employers to exceed

the standard working time at certain times of year and to reduce it through an offset at other times, without the excess being considered overtime. In any case, the average working time cannot exceed 48 hours (including overtime) for each seven-day period and a daily rest period of at least 11 consecutive hours must be guaranteed to the employee.

Night work cannot exceed eight hours every 24 hours. Sector-wide collective agreements are free to extend the reference period of 24 hours provided that the average time worked does not exceed one-third of the total time during the extended reference period.

ii Overtime

Any work performed in excess of 40 hours per week constitutes overtime. In the case of multiple shifts, any work that exceeds the planned daily working time is overtime.

Overtime is usually compensated by an increased rate of pay, ranging from 15 per cent to 50 per cent depending upon the collective agreement and when the overtime takes place (e.g., day or night). However, collective agreements are free to compensate overtime with additional leave.

When overtime is regulated by sector-wide collective agreements, working time and overtime cannot exceed 48 hours per week. In the absence of collective regulation, the law provides for a limit of 250 hours per year and requires the consent of the employee to work overtime. Unless otherwise provided for by collective provisions, overtime is not subject to limits in the case of exceptional technical production needs, force majeure and particular events to be previously notified. Overtime regulations do not apply to executives, employees performing managerial duties, family workers, employees performing sporadic duties (e.g., doormen or concierges), homeworkers and teleworkers.

VII FOREIGN WORKERS

Employers in Italy may directly recruit employees, including foreign nationals, provided that the recruiting procedures followed are not discriminatory against potential employees. EU nationals with a valid passport, or other equivalent document, may enter Italy without a visa and stay for up to 90 days. These nationals do not need a work permit to perform work in Italy and can be recruited directly by the employer.

A number of additional requirements apply if the prospective employee is a non-EU national. The employer must apply to the Immigration Office at the Prefecture (the Immigration Office) for a work permit. With the exception of managers and highly specialised workers, the issue of a work permit is conditional upon the Immigration Office being satisfied that the vacancy cannot be properly filled by any other EU or non-EU nationals already residing in Italy and enrolled with the Labour Office, and that the hiring does not exceed the immigration threshold set every year by the Ministry. Once the work permit is obtained, it is forwarded to the Italian consulate abroad for the employee to apply for a work visa. Within eight days of his or her entry into Italy, the employee must sign the residence contract and apply to obtain a residence permit. The permit has a duration of two years in the case of open-ended employment relationships and can be renewed if the employment contract is still pending at the expiry date of the residence permit.

The employer is free to apply either Italian law or a foreign law to regulate the employment relationship. If, however, the employer chooses the foreign law, mandatory

Italian law will still apply (see Section IV). Also, the employer must deduct taxes and social security contributions at source and pay the same to the Italian tax and social security authorities.

In addition to direct recruitment, foreign workers may also work temporarily for an Italian employer under a secondment agreement. EU nationals are not required to comply with any visa requirements. Non-EU nationals must obtain a visa, which is not subject to the immigration threshold. The seconding company is liable to deduct taxes and social security contributions at source and pay the same to the Italian tax and social security authorities, unless otherwise provided by international, EU or bilateral agreements.

Also, by means of Legislative Decree No. 108 of 28 June 2012 implementing Directive 2009/50/CE, non-EU nationals who are highly qualified may obtain a visa that is not subject to the immigration threshold (the EU Blue Card).

Finally, European regulations (Directive 2014/67/EC concerning the secondment of employees in the European Union) have been enacted to ensure more control and better protection for posted employees. In Italy, the Directive has been implemented by Legislative Decree No. 136 of 17 July 2016 providing for new obligations in terms of advance communication, and imposes material sanctions in the event of breach, and new measures aimed at preventing unlawful secondment of employees. The Decree applies to any Member State's company seconding one or more employees to another company – even belonging to the same group – or to another business unit, as well as to temporary agency workers hired by temporary work agencies established in a Member State and seconding their employees to a user company with its registered office or a business unit in Italy.

Directive (EU) 2018/957 on transnational secondment has not yet been implemented in Italy.

VIII GLOBAL POLICIES

Article 2,104 of the ICC permits employers to implement internal discipline rules. Implementation requires no prior consultation with, or approval from, trade unions, works councils, employees' representatives or any government authority (it may, however, be advisable where a works council exists to discuss the envisaged implementation of the code of conduct so as not to harm working relations). There is no need to obtain the employees' signatures to evidence their acceptance of the code.

The employer's power to unilaterally impose rules of conduct is subject to a number of limitations provided by the Constitution (such as the principle of equality and non-discrimination and the right of defence), laws and collective agreements.

If there is a breach of the code of conduct, the employer may apply disciplinary sanctions provided that they comply with Article 7 of the Workers' Statute. To lawfully discipline an employee, an employer must take the following steps. First, the employer must give adequate notice of the disciplinary rules by displaying them in a place accessible to all employees. Second, the grounds for the disciplinary action must be clearly stated; any sanction that is more serious than a verbal reprimand can only be made at least five working days after a written warning has been given to the employee. Third, disciplinary sanctions (suspension with or without pay, dismissal, etc.) must be proportionate.

As such, a code of conduct, as well as any global policies, should be posted within the employer's premises, and an Italian translation should be provided so that employees are aware of the code and understand it. Since the Workers' Statute expressly requires the display

of the code of conduct, any other form of distribution of the document (such as via the company intranet) may be deemed insufficient by an employment tribunal if the employee challenges the sanctions.

IX PARENTAL LEAVE

Mandatory protections are granted to working mothers and fathers as a consequence of their parental status. In particular, according to Legislative Decree No. 151 of 26 March 2001, pregnant employees are prohibited from working during the two months preceding the expected date of birth, and during the three months following the birth of the child (mandatory maternity leave). The employee can opt to postpone the mandatory maternity leave by one month, if there is no health risk for her or the baby in doing so. Broader mandatory abstention applies in case of risks to the health of the mother or the child (or both).

Individual and collective dismissals of female employees during pregnancy and for one year after the birth of the child are null and void, irrespective of whether the employer was aware of the employee's pregnancy. The only exceptions to this general ban are: just cause of dismissal, closing down of the employer's activities or of the business unit where the working mother works, termination of a fixed-term contract, and failure to successfully complete a probationary period. The same protection against dismissal is afforded to the father, in the event of the mother's death or disability, or if he has been assigned the relevant custody.

The prohibition against dismissal commences on the date on which the employee becomes or is deemed to be pregnant. A woman is deemed to have become pregnant 300 days prior to the expected date of birth as specified on a doctor's certificate.

In addition to mandatory maternity leave, during the first 12 years of a child's life, working mothers are entitled to take a further period of leave, for each child, up to a maximum of 10 months, depending on the number of months of absence requested by the father. The parents may abstain from work for consecutive periods or even on a hourly basis, subject to compliance with certain procedural rules. Moreover, an employees can ask her or his employer for a full-time employment agreement to be changed to a part-time one in lieu of parental leave. The employer is under a duty to allow such a change within 15 days of the request.

During the mandatory leave period, the parents are entitled to an indemnity, to be paid by the national social security institute (the INPS) (80 per cent of the average daily salary for mandatory absence and 30 per cent for optional absence). Usually, this indemnity is anticipated by the employer and then offset by future payments to the INPS.

X TRANSLATION

There is no legal obligation to translate employment documents into Italian or the employee's native language. However, it is recommended that employers should require employees to sign employment documents in both Italian and their native language. It is also advisable to include in these documents a clause indicating which language shall prevail in the event of any discrepancies in interpretation.

In general terms, it is advisable to provide a translation of all employment documents that mention specific obligations for employees or employers (e.g., employment contracts, stock options and incentive plans, restrictive covenants, general policies). Exceptions should

be evaluated case by case, when the employer is satisfied that the employee is able to fully understand the terms and conditions of employment even though they are provided in a foreign language (e.g., bilingual employees, top executives).

Failing to translate employment documents into an employee's native language may result in it being impossible to enforce the provisions contained therein. It may also expose the employer to possible claims for damages (especially when incentive and bonus plans are concerned), unless the employer satisfies the court that the employee was fully aware of the terms and conditions regulating his or her employment relationship.

XI EMPLOYEE REPRESENTATION

The establishment of works councils is regulated by certain provisions of the Constitution, the Workers' Statute and the Interconfederal Agreements dated 23 July and 20 December 1993 (the Interconfederal Agreements). As a result of this system, it is now possible to have two main forms of workers' representation in a workplace: business union representation (RSA) and unitary union representation (RSU).

According to Article 19 of the Workers' Statute, an RSA may be appointed in industrial and commercial businesses that have more than 15 employees in the same unit or in the same municipality. Before Decision No. 231 of the Constitutional Court (3 to 23 July 2013), only the unions that executed a collective agreement applicable in the workplace were entitled to be qualified as an RSA. After this judgment, the entitlement was extended to RSAs that, despite failing to sign up to the collective agreement applied by the employer, actively participated in the negotiations of the same agreement.

The Interconfederal Agreements regulate the establishment of an RSU. The election of an RSU is not mandatory. Where there are more than 15 employees in the same workplace, the employees may elect an RSU to represent their interests. The initiative for the election must be taken by the main trade unions (CGIL, CISL and UIL), the trade unions that signed the applicable collective agreement or other trade unions meeting certain requirements.

All employees (excluding executives) who are employed on the day of the election and who have successfully completed their probationary period are entitled to vote. The election is valid if votes are cast by a majority of the employees who are entitled to vote. The number of members of an RSU varies depending upon the size of the business.

One-third of the members of an RSU are appointed from among the candidates presented by the trade unions that signed the applicable collective agreement, while two-thirds are elected from among the candidates presented by the other trade unions. RSU representatives may hold office for three-year terms and may be re-elected.

Italian law does not provide for periodical meetings to be held with the works council. However, the Workers' Statute provides for a number of duties with which the employer has to comply. Among others, the Workers' Statute prohibits an employer from discriminating against any employee for reason of trade union membership and trade union activities; it also provides that the transfer of internal trade union representatives is subject to the prior consent of the relevant national trade unions they belong to and that the representatives have a right to paid and unpaid time off to carry out trade union activities.

The law and collective agreements also give works councils the right to be informed and to be consulted on certain events regarding the business organisation (such as mass lay-offs,

or resorting to the special public wage guarantee fund). Following the implementation of Directive 2002/14/EC,² collective agreements also provide for the ongoing obligation of the employer to inform and consult with works councils on specific matters.

XII DATA PROTECTION

i Requirements for registration

Employers must comply with the obligations on data processing included in the Privacy Code (Legislative Decree No. 196/2003), as amended by Legislative Decree No. 101/2018 on the harmonisation of Italian data protection provisions with the new obligations and changes introduced, from 25 May 2018, by Regulation (EU) No. 679/2016 (the General Data Protection Regulation (GDPR)). One of the duties of a data controller is to appoint a data protection officer (DPO). The data controller is required to appoint a DPO only in certain cases, outlined in the GDPR, in which the processing is carried out for specific purposes or for specific categories of data. For example, the processing may be carried out by a public authority or body (except for courts acting in their judicial capacity); the core activities of the controller may consist of processing operations that require regular and systematic monitoring of data subjects on a large scale; or the core activities of the controller may consist of large-scale processing of special categories of data, or personal data relating to criminal convictions and offences. The DPO can be a staff member of the data controller, or fulfil the tasks on the basis of a service contract. While the appointment of a DPO is required only in some cases, the delivery – orally or in writing (note that if it is in writing, the controller must retain evidence of its delivery) – of the information notice to the data subject (applicant, employee, etc.) is always necessary. When the personal data are collected directly from the data subject (e.g., when the employment relationship is established), the notice must include:

- a* the identity and contact details of the data controller and, for controllers established outside the European Union, of the controller's representative;
- b* the contact details of the DPO, where applicable;
- c* the purposes for processing the data and the legal basis for processing, including the legitimate interests pursued by the data controller or by a third party;
- d* the recipients or categories of recipients of the personal data, if any;
- e* where applicable, the transfer of personal data to a non-EU country or international organisation and the existence or absence of an adequacy decision by the European Commission, or reference to the appropriate or suitable safeguards adopted by the controller to carry out the transfer lawfully and the means by which to obtain a copy of them or where they have been made available;
- f* the period for which the data will be stored, or if that is not possible, the criteria used to determine that period;
- g* the data subject's rights;
- h* where the processing is based on consent, the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
- i* the right to lodge a complaint with a supervisory authority;

2 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – OJ L 080/29.

- j* 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 data subject is obliged to provide the personal data and of the possible consequences of failure to provide the data; and
- k* the existence of automated decision-making, including profiling, and meaningful information about the logic involved, as well as the significance and the envisaged consequences, of data processing for the data subject.

In addition, the processing of personal data may require the consent of the data subject. The consent is valid only if it is given freely and specifically, and is provable. In this respect, however, the EU authorities do not recommend that employers ask directly for employees' consent, as employees are considered 'vulnerable subjects'. Consent is not required when the data is necessary for, *inter alia*, (1) the performance of a contract to which the data subject is a party, (2) compliance with a legal obligation to which the controller is subject, or (3) the purposes of the legitimate interests pursued by the data controller or by a third party.

ii Cross-border data transfers

The transfer of data to third countries is always allowed if the data controller has implemented the measures provided by the GDPR (e.g., standard contractual clauses approved by the European Commission or binding corporate rules) or if there is an applicable EU decision (e.g., Swiss and Canadian authorisations, American companies adhering to the Privacy Shield principles). In such cases, no further action to seek consent (with the exception of the information notice) is required.

iii Sensitive data

Sensitive data, defined in the GDPR as 'particular categories of data', may be processed with the written consent of the data subject or if, for example, the data is necessary for the purposes of carrying out the obligations and exercising specific rights of the data controller or of the data subject in the field of employment and social security and social protection law, insofar as it is authorised by the European Union or national law, or a collective agreement pursuant to national law.

The GDPR grants to the employee the right to access his or her personal data. This must be easy to do and free of charge. The employer is required to adopt 'adequate security measures', namely security measures that, based on technical progress, prove to be adequate to avoid any risk of destruction, loss or unauthorised access of the data, taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing.

- Transfers to non-EU countries are subject to a number of conditions, including:
- a* the consent of the data subject (provided that, if there is no adequacy decision or appropriate safeguards, he or she is aware of the possible risks of the transfer);
 - b* the necessity of the transfer for the execution of an agreement to which the data subject is a party or the implementation of pre-contractual measures taken at the data subject's request; and
 - c* the necessity of the transfer to establish, exercise or defend legal claims.

iv Background checks

There are also restrictions on background checks. From both a privacy and a labour standpoint, background checks may only be carried out when:

- a* the purposes of the investigation have already been identified and are legitimate;
- b* the relevant information is not excessive in relation to its purpose; and
- c* the data to be collected is strictly related to the functions and responsibilities connected to the employment relationship.

The investigations must be preceded by an adequate information notice to the applicant or employee illustrating some details of the data processing and in some cases requesting express consent. Judicial data (e.g., criminal records) may be collected only if the processing of the data is authorised by laws or regulations.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Subject to limited exceptions, employees may only be dismissed with cause, which may consist of either a just cause or justified reasons.

Just cause arises if serious misconduct occurs, affecting the feasibility of the continuation of the employment relationship. When dismissed for just cause, the employee is not entitled to any notice period but retains the right to obtain other termination indemnities (i.e., compensation, which is payable upon termination regardless of the reason for the termination; the pro rata amounts of the 13th-month and 14th-month allowance; unused holiday and leave).

Justified reason arises if there is a serious breach by the employee of his or her contractual obligations (subjective justified reason), such as failure to comply with the employer's instructions, repeated unjustified absence from work or, in the event of reorganisation (objective justified reason), abolition of a job position arising out of a reorganisation (Article 2118, ICC). When dismissed for a justified reason, an employee is entitled to notice as provided for in the applicable collective agreements or a payment in lieu in addition to the other termination indemnities. The employer must also consider redeployment before dismissal for a justified reason is implemented.

The Jobs Act Reform introduced a complex system in terms of legal consequences arising from unfair dismissal. This system has been modified following the implementation of the 2018 Reform. In particular, the consequences for the employer are different, depending on whether there are more than 15 employees per production unit (or more than 60 employees as a whole) and whether the dismissed employee was hired before, on or after 7 March 2015.

Dismissal for discriminatory reasons or in breach of other mandatory provisions

Regardless of the hiring date and the number of employees, if a dismissal is based on a discriminatory reason, or is carried out in violation of certain mandatory provisions of law (e.g., the rules on parenthood), or is not implemented in writing, the employer shall be required to reinstate the employee and pay damages equal to the salary accrued between the date of dismissal and reinstatement (a minimum of five months' salary).

Disciplinary dismissal

Regardless of the hiring date and provided that the employer has more than 15 employees, if the court ascertains that a disciplinary dismissal was based on conduct that did not actually occur, the employer shall be obliged to reinstate the employee and pay damages of up to 12 months' salary. With regard to employees hired before 7 March 2015, the aforesaid reinstatement protection also applies if the same conduct should have been sanctioned with a less serious penalty under an applicable collective agreement.

In any other cases where disciplinary dismissals are deemed unlawful (e.g., a judge determines that the employee's misconduct did not justify his or her dismissal), the employee is entitled to compensatory protection and no reinstatement is applicable. Compensatory damages vary depending on the hiring date.

As mentioned in Section IV.i, under the Jobs Act Reform, with particular regard to employees hired on or after 7 March 2015, damages were linked to the employee's length of service – namely, two months' salary for each year of service (a minimum of four months' up to a maximum of 24 months' salary). However, under the 2018 Reform, the indemnity for unlawful dismissal ranges from a minimum of six months' salary to a maximum of 36 months' salary. Following Decision No. 194, rendered on 25 September 2018 by the Constitutional Court, in a case of unfair dismissal, the indemnity shall be determined by equity, taking into account, in addition to the employee's length of service, the size of the company and the general behaviour and conditions of the parties. For employees hired before 7 March 2015, the compensatory damages range between 12 and 24 months' salary, and are assessed on the basis of judges' discretionary criteria.

Economic dismissal

If a dismissal is based on an economic reason, and provided that the employer has more than 15 employees, should the alleged economic reason be declared as clearly non-existent and if the employee was hired before 7 March 2015, the employer can be required to reinstate the dismissed employee and pay damages of up to 12 months' salary. Otherwise, in the event that the court does not intend to apply the aforesaid sanctions, or an organisational or business reason for dismissal is not straightforward, the employee will be entitled to damages only, of between 12 and 24 months' salary.

With respect to employees hired on or after 7 March 2015, no reinstatement protection applies and the employer can be required to pay compensation in compliance with the criteria set forth by the 2018 Reform (see 'Disciplinary dismissal', above).

If the employer has 15 or fewer employees, the dismissed employee (for economic or disciplinary reasons) is not entitled to reinstatement, but is entitled to the payment of damages of between three and six months' salary.

In any case, employees cannot be dismissed while pregnant or for one year after giving birth. The same protection is afforded to the father in the event of the mother's death or disability or if he has been granted legal custody of the child. This protection is not afforded if the company is wound up.

A employee must challenge his or her dismissal within 60 days of the date of receipt of the written communication of termination and to file a claim with the competent employment tribunal within the following 180 days. For individual dismissals, an employer need not notify unions, nor is the submission of a social plan required.

Special rules apply to executives. Although they are not entitled to reinstatement if dismissed without cause, they are entitled to claim damages in addition to the notice period and termination indemnities, which varies depending on the length of service and the grounds for dismissal.

ii Redundancies

Pursuant to Law No. 223/1991, if a dismissal plan concerns (1) at least five redundancies within 120 days, or (2) companies staffed with more than 15 employees, the employer must give prior notice to all relevant trade unions indicating the reasons for the proposed redundancies, the number of and description of the employees to be affected, and the date on which the envisaged dismissals will be effected. The unions may call for consultation with the employer within seven days of receipt of the notice to request a detailed explanation of the need for redundancies and to discuss possible alternative solutions.

If no agreement with the unions is reached within 45 days of receipt of the notice, the local, regional or central labour office, as the case may be, will mediate for a further period of up to 30 days. These negotiations will consider:

- a* the positions to be made redundant;
- b* the possible relocation of employees to other business units;
- c* the possible redeployment of employees;
- d* the possibility of entering into a government-funded job saving scheme;
- e* the provision of an enhanced severance payment to mitigate the effect; and
- f* an application for other redundancy funds ('social shock absorbers').

Often, the enhanced severance payment referred to in point (e) is offered in exchange for the execution of a settlement agreement providing for the employees' waiver of any claims.

Law No. 223/1991 provides for mandatory selection criteria to be followed in choosing the employees to be made redundant (upon completion of the unions consultation procedure). Pursuant to Law No. 223/1991, the employer must consider, *inter alia*, the length of service (in the same company) of the concerned employees, their family responsibilities, and any other technical, production and organisational needs.

After the enactment of Law No. 161 of 30 October 2014, the rules provided for by Law No. 223/1991 also apply to executives whose contracts are terminated as part of a collective dismissal process, who therefore must be selected in accordance with the aforesaid social selection criteria. Also, it follows that the executives to be dismissed must be included within the threshold of five redundancies.

XIV TRANSFER OF BUSINESS

Article 2112 of the ICC provides that in the case of a transfer of business, the employment relationship continues with the transferee and the employees maintain the same terms of employment by operation of law. The transferor and the transferee are jointly and severally liable with respect to the employees' vested rights at the time of the transfer, unless the transferor has been discharged by the concerned employees in accordance with a special waiver procedure. The transfer of business does not in itself represent a justified reason for dismissal. Employees who have suffered a material change as a result of a transfer may resign for cause within three months of the date of transfer and are entitled to payment of an indemnity equal to the amount they would have received in the event of a dismissal without notice.

This protection applies in any case in which a transfer of business entails a change of employer, including the transfer of a going concern and merger. Special rules apply in the event of a bankruptcy, insolvency or winding up of the company transferring the business.

Subject to certain requirements, the transfer of business is conditional on the transferor and transferee having complied with the requirements for an information and consultation procedure with the relevant trade unions. The employee must challenge the validity of the transfer within 60 days of the date of the transfer and file a claim with the competent employment tribunal within the following 180 days.

XV OUTLOOK

The Italian political situation in 2019 has been characterised by strong instability, which led to the appointment of a second government led by Giuseppe Conte, known as ‘Conte-bis’, within the context of the eighteenth legislature effective as of 23 March 2018. The outlook for 2020 is uncertain, since this government is not supported by a majority party, but is the result of an alliance of different political thoughts, including in respect of its views on employment matters.

JAPAN

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I INTRODUCTION

The laws in Japan governing collective labour relationships are the Labour Union Act (LUA) and the Labour Relations Adjustment Act. Regarding individual labour relationships, there are laws protecting minimum working conditions, such as the Labour Standards Act (LSA), the Minimum Wages Act, the Industrial Safety and Health Act (ISHA) and the Industrial Accident Compensation Insurance Act. These laws are traditional Japanese labour laws established after World War II and based on the Constitution of Japan.

The Labour Contract Act (LCA), enacted in 2007, sets out basic regulations on employment agreements. The revision of the LCA (effective from April 2013) includes important amendments for fixed-term employment. The Equal Employment Opportunity Act (EEOA)² entered into effect in 1986 and has been revised several times. Since 2007, the EEOA has broadened protections for employees so that both male and female employees will not suffer any disadvantages based on their gender. Employees' rights are also expanded by other laws, such as the Child Care and Family Care Leave Act³ and the Part-time Employment Act (PEA).⁴ In addition, the Worker Dispatch Act (WDA), enacted in 1985 and amended in 1999, extended the scope of occupations that were covered by the worker dispatching system. As a result, the worker dispatching system was considered a social problem, so the WDA was further amended in 2012 and in September 2015.

Each labour law has a different supervision and conflict resolution system, so the system as a whole is complicated. The LUA stipulates a system of labour relations commissions, whereby a local labour relations commission (established in each prefecture) and its supervising agency, the Central Labour Relations Commission, conduct mediation, conciliation and arbitration to settle collective labour disputes.

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2 In full, the Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment.

3 In full, the Act on the Welfare of Workers Who Take Care of Children or Other Family Members, including Child Care and Family Care Leave.

4 In full, the Act on Improvement, etc. of Employment Management for Part-Time Workers and Fixed-Term Workers.

In contrast, ordinary courts settle individual labour disputes. Additionally, since the inception of the labour tribunal system in 2006, labour tribunals have also been competent to settle these types of disputes. Local labour departments (government agencies) also conduct mediations to settle these disputes.

The Labour Standards Inspection Office (LSIO) is the supervisory agency with regard to the LSA, the Minimum Wages Act, the ISHA and the Industrial Accident Compensation Insurance Act.

Local labour bureaus are the supervisory agencies with regard to the EEOA, the PEA and the WDA.

II YEAR IN REVIEW

As part of the process of work-style reforms in Japan, the LSA and some other acts have been amended, and new measures for the ‘correction of working long hours, including an upper limit for overtime work of the “36 agreement” with penalties’ were enacted on 1 April 2019 (with respect to small and medium-sized enterprises, they will be enforced from 1 April 2020).

Regarding the ‘36 agreement’ (a labour management agreement stipulated in Article 36 of the LSA), which regulates limits for overtime and holiday working hours, a measure of stipulating the upper limit for overtime work with penalty was introduced under the aforementioned measure. Under the new stipulation, overtime is capped at 45 hours per month and 360 hours per year in principle. Even when a ‘special clause’ applies, which can be used up to six times (i.e., six months) a year, applies, the maximum limits on overtime and holiday working hours are 100 hours per month and an average of 80 hours per month over two to six months; furthermore, overtime working hours must be fewer than 720 hours per year. However, the actual effect of the measure to limit overtime work is doubtful so far.

Even in leading enterprises, cases of mental disorder and even death attributed to long working hours or stress in the workplace have been reported. At one electronics manufacturer, a senior employee who was putting pressure on a junior employee said to the employee: ‘You should die.’ The junior employee later committed suicide. This case was sent to the prosecutor’s office as a criminal offence (i.e., solicitation of suicide).

It was determined that the use of this kind of language and behaviour by people in superior positions in the workplace that is beyond the necessary level for work purposes or is socially unreasonable will be defined as ‘power harassment’ in the Labour Policy General Promotion Act amended in June 2019 (the amended Act will be enforced on 1 June 2020). With this amendment, companies will be required to take measures to prevent any such power harassment from impairing the working environment for employees.

Companies have already been obliged to take measures to prevent sexual harassment and maternity harassment. With the inclusion of the prevention of power harassment as of June 2019, it has been confirmed that the prevention of harassment in the workplace is a significant issue for companies.

III SIGNIFICANT CASES

The classifications of ‘employee’ and ‘independent contractor’ are currently at issue in Japan. The following decision by the Central Labour Relations Commission (CLRC) is worthy of note in this respect.

Seven-Eleven Japan (6 February 2019)

The CLRC judged that members of a convenience store (franchise) are not categorised as employees of the franchisor under the LUA, and the fact that the franchisor did not hold a collective bargaining with the members of franchise is not regarded as an unfair labour practice under the LUA. The outline of the case is as follows:

- a* A member (Member A) of a convenience store (the store in which Member A operates, hereinafter, the franchise) entered into a franchise contract with Seven-Eleven Japan, the company that operates that chain of convenience stores.
- b* Member A is responsible for the management of the franchise, including:
 - the procurement and management of funds;
 - the recruitment of employees;
 - determining working conditions; and
 - determining the methods for the purchase and sale of goods.

Member A is also responsible for the entire operation of the franchise, such as managing and supervising customer service and sales operations, organising and creating documents, entering work shifts, ordering products, displaying, selling, servicing, cleaning stores, managing and supervising employees.

- c* Seven-Eleven Japan sends a field counsellor to Member A about twice a week, and provides guidance and advice on the overall management of the franchise.
- d* Member A joined a labour union. The union requested Seven-Eleven Japan to enter into a collective bargaining agreement, which Seven-Eleven Japan rejected. The union therefore filed a case with the local labour relations commission. On 13 March 2014, the labour relations commission held that Member A is categorised as an employee under the LUA, and that the refusal of Seven-Eleven Japan for collective bargaining is regarded as an unfair labour practice under the LUA. Seven-Eleven Japan appealed for review to the CLRC.
- e* The CLRC rescinded the dispositions of the local labour relations commission and dismissed the case filed by the union, holding that ‘Member A cannot be regarded as an employee under the LUA in relation to Seven-Eleven Japan’. The reasons stated are as follows:
 - Member A raises funds and bears the costs of the franchise’s business operation. In addition, the loss and profit of the franchise belongs to Member A. Member A utilises the labour force by employing employees. Personnel management at the franchise is at the discretion of Member A, as manager of the franchise. Therefore, although there are certain restrictions on the franchise’s business, such as the management of funds, the purchase of goods, and the business days and business hours, Member A is regarded as an independent contractor (entrepreneur) with considerable discretion.
 - It cannot be said that Member A performs labour for Seven-Eleven Japan by receiving the order of working time and workplace from Seven-Eleven Japan. While Member A has received the advice and guidance of manuals from Seven-Eleven Japan, it cannot be said that this has binding power, except in the case of a breach of contract. Thus, Member A does not supply labour under the command and supervision of Seven-Eleven Japan.

- The disparity between Member A's and Seven-Eleven Japan's bargaining power should not be considered as the bargaining ability gap between employers and employees, but rather that the disparity is the bargaining ability gap between business operators. This gap should be solved under the Fair Trade Law.
- In total consideration of these matters, Member A cannot be regarded as an employee under the LUA who is incorporated into the business organisation of Seven-Eleven Japan.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employment contract is established when an employer and a job applicant agree that (1) the job applicant shall work for the employer and (2) the employer shall pay a salary to the job applicant as consideration. If the employer has in place working rules that stipulate reasonable working conditions and has informed its employees of those rules, the contents of an employment contract shall be based on the working conditions provided by the working rules without the requirement of consent from the job applicant. A job applicant and an employer may enter into or change, by agreement, an employment contract that includes working conditions that differ from those under the working rules. However, any parts of an employment contract that stipulate working conditions that do not meet the standards established by the working rules shall be invalid. In this case, the invalid portions shall be governed by the standards established by the working rules.

There is no statutory requirement concerning the form of an employment contract, so an employer and a job applicant may orally enter into an employment contract. However, to allow the job applicant to understand his or her rights and duties under the contract, the employer must notify him or her in writing of certain employment conditions⁵ before or upon entering into the employment contract.⁶ The employer can fulfil this requirement by giving the applicant a written employment contract or by providing a copy of its working rules.

Fixed-term employment is lawful, but the term of the agreement cannot be longer than three years, except in limited circumstances.

ii Probationary periods

Although there is no regulation concerning probationary periods, an employer may set a limited probationary period based on case law in Japan. Many employers use probationary periods to train and to evaluate their employees to determine whether they should be retained as fully fledged employees.

An employer generally sets forth probationary periods in its working rules. Generally, probationary periods range from one to six months and are typically three months. Extremely long probationary periods will be void because of a violation of public policy.

It is generally understood that the usual probationary period is designed to reserve the employer's right of cancellation. The employer may dismiss an employee on probation less strictly than a regular employee; however, even during the probationary period, 'reasonable and socially acceptable' grounds are required to dismiss an employee. This means that

5 Such as wages, working hours, term of contract, workplace and the nature of the work.

6 Labour Standards Act [LSA], Article 15, Paragraph 1.

an employer is required to show a lack of fitness of an employee based on facts (e.g., low job performance ratings and unsatisfactory attitudes) to properly exercise its reserved cancellation rights.

iii Establishing a presence

Whether a foreign company is required to register will depend on its intended business in Japan. If it intends only to conduct preparatory or supplemental tasks (e.g., market surveys and collecting information), it may establish its representative office in Japan without any registration. However, if it intends to operate its business continuously in Japan, it must register with the relevant legal affairs bureau. In this case, while the foreign company does not have to establish a branch office in Japan, it must at least register its representative or its branch office (if any) in Japan.

Unless a foreign company intends to operate its business continuously in Japan, it may engage an independent contractor in Japan that does not require registration. An independent contractor will constitute a permanent establishment (PE) of the foreign company under certain conditions, such as the contractor being authorised to conclude contracts on behalf of the foreign company in Japan. While there are exemptions for independent contractors under Japanese taxation laws, if a foreign company has its PE in Japan, its Japanese-sourced income will be subject to corporate tax.

There are four types of insurance that a company is obliged to have: workers' accident compensation insurance, employment insurance, health insurance and nursing care insurance, and employees' pension insurance.

Salary income is subject to withholding tax under the Income Tax Act. Under the withholding tax system, a payer of salary income in Japan must calculate the amount of income tax payable, withhold the amount of income tax from the income payment and pay it to the government.

V RESTRICTIVE COVENANTS

Given the personal, continuous character of an employment contract, a relationship of trust between the parties is required. In more concrete terms, each party is required to act in good faith in consideration of the other's interest. Therefore, during the term of employment, an employee shall undertake obligations to keep trade secrets, to refrain from competitive activities and not to damage the employer's reputation or confidence even if there is no provision about the obligations under any employment contract or working rules.

By contrast, an employee has the right to change his or her job, which means that if the employer wants its employees to undertake post-termination non-compete obligations, it must enter into such an agreement with the employees or have corresponding working rules, both of which should set forth the obligations. Non-compete obligations are direct restrictions on a former employee's freedom to choose his or her occupation, so courts will decide their enforceability based on a variety of factors, such as whether the duration and scope of the obligations are clearly stated in an agreement or working rules, and whether additional and sufficient financial compensation is provided to the former employee.

VI WAGES

i Working time

Statutory working hours

The LSA stipulates overly rigid regulations on working hours. In principle, an employer must not require or approve of employees working more than eight hours a day or 40 hours a week (excluding rest periods) without a labour management agreement.⁷ These are generally known as statutory working hours. If an employer violates this regulation, it will bear criminal liability.⁸

If an employer wants to require employees to work more than the statutory working hours, it must enter into a labour management agreement either with a labour union (if any) or, if a union does not exist, an employee who represents the majority of employees in the workplace, and then notify the relevant government agency of the agreement.⁹

The Work Style Reform Act took effect on 1 April 2019. According to this Act, even if a labour management agreement is executed, overtime will, in principle, be capped at 45 hours per month and 360 hours per year. It will be possible for employers to require employees to work more hours when special circumstances exist based on the labour management agreement. However, even under these special circumstances, the maximum limits for overtime must be less than 100 hours (including hours for legal holiday work) per month, an average of 80 hours (including hours for legal holiday work) per month over two to six months, and 720 hours per year.

The maximum limits on overtime working hours can be summarised as follows:

In principal	45 hour/month and 360 hours/year
In an extraordinary special circumstance	720 hour or less/year (overtime only)
	Less than 100 hour/month (both overtime and holiday work)
	Average of 2 to 6 months 80 hours or less/month (both overtime and holiday work)
	Month with more than 45 hours of overtime work should be limited to 6 times/year.

Exemptions to statutory working hours

The LSA stipulates certain modified systems of working hours, such as flexitime and annual, monthly or weekly modified systems. Under these systems, an employer may require its employees to work beyond the statutory working hours to the extent permitted by law.

Exemption for managers

Certain employees, such as those in management, are exempted from the regulations on statutory working hours.¹⁰ This means that an employer may require the exempted employees to work in excess of the statutory working hours without entering into a labour management agreement.

7 id., at Article 32.

8 id., at Article 119, Paragraph 1.

9 id., at Article 36.

10 id., at Article 41.

ii Overtime

The LSA does not require an employer to pay its employees a salary based on working hours. However, it is understood that, in practice, wages and working hours are associated when it comes to overtime pay. Under certain conditions, an employer may let its employees work overtime, with the LSA requiring the following minimum salary premiums for all employees, except those who are exempted from the regulations on statutory working hours.

Work in excess of statutory working hours	25%
Work in excess of statutory working hours exceeding 60 hours in a month	50%
Work on statutory days off	35%
Work performed late at night (between 10pm and 5am)	25%
Work performed late at night in excess of statutory working hours	50%
Work performed late at night in excess of statutory working hours exceeding 60 hours in a month	75%
Work performed late at night on statutory days off	60%

Employees who are exempted from the regulations on statutory working hours (e.g., employees in management roles) are entitled to a minimum premium of 25 per cent for work performed late at night (between 10pm and 5am). However, these employees are not entitled to receive any other premiums.

iii Prohibition of unreasonable treatment (employment terms, working hours, etc.)

Currently, Article 20 of the LCA provides that working conditions for fixed-term employees should be balanced with those for open-term employees under the same employer to improve working conditions for irregular workers.

However, on 1 April 2020, Article 20 of the LCA will be abolished, and the Act on Improvement, etc. of Employment Management for Part-Time Workers will be amended to cover managing the employment for fixed-term employees. (The name of the Act will be changed to the Act on Improvement, etc. of Employment Management for Part-Time Workers and Fixed-Term Workers.) As this result, working conditions for part-time employees and fixed-term employees should be balanced with those for open-term employees under the same employer. In addition, under certain special circumstances, working conditions for part-time employees and fixed-term employees should be equal to those for open-term employees under the same employer. With regard to Article 20 of the LCA, the Supreme Court issued two important decisions on 1 June 2018, and many other decisions have been issued in district courts and appeal courts. These decisions will become case law when interpreting relevant Articles under the Act on Improvement, etc. of Employment Management for Part-Time Workers and Fixed-Term Workers.

The WDA has also been amended to improve the working conditions for dispatched workers. Under new regulations, working conditions for dispatched workers should be in line with those for employees at a company that accepts a dispatched workers, unless a labour management agreement exists between a staffing company and the representative of its dispatched workers. These regulations will become effective from 1 April 2020.

VII FOREIGN WORKERS

There is no limit on the number of foreign workers that an employer can employ. Japanese employment laws are applicable to foreign workers who are employed and work in Japan regardless of whether their employer is a foreign company or a domestic company.

Additionally, an employer must not use the nationality of any employee as a basis for engaging in discriminatory treatment concerning certain working conditions, such as wages and working hours.¹¹

When an employer enters into an employment contract with a foreign person, other than a special permanent resident, it must notify the relevant job placement office of key information about the person, such as name, residency status and date of birth. The employer is also required to give notice to a relevant job placement office of the person's retirement.

Any foreign national who enters Japan to work must obtain a working visa at a Japanese diplomatic mission abroad. Also, any foreign national must generally receive landing permission when he or she arrives at a port of entry, a time when his or her residency status and period of stay in Japan will be determined. The foreign national can conduct activities within its residency status. The foreign national can only reside in Japan for the agreed period of stay. A foreign national who wishes to continue conducting the same activities in Japan within his or her current residency status beyond the period of stay must apply for an extension no later than the last day of the period.

There are four types of insurance that are obligatory for employers in Japan, as mentioned in Section IV.iii, all of which also apply to foreign workers.

All individuals, regardless of nationality, are classified as either residents or non-residents under Japanese tax laws. In general, residents have an obligation to pay income tax on their worldwide income (including salary). By contrast, non-residents are obliged to pay income tax on any income from domestic sources (including salary for employment in Japan).

VIII GLOBAL POLICIES

The adoption of working rules is mandatory for any employer who hires 10 or more employees on a continuing basis. The employer must submit its working rules to the relevant local LSIO.¹² When establishing its working rules, an employer must seek the opinion of either a labour union (if applicable) or, if there is no union in the workplace, an employee that represents the majority of the employees in the workplace. When submitting its working rules to the relevant local LSIO, the employer must attach a document stating the opinion of the labour union or employee representative.¹³

The working rules must include the following information:¹⁴

- a* working hours (including holiday, leave, shift changes, breaks, and the start and end of the working day);
- b* wages (including the methods for determination, calculation and payment of wages, and the dates for closing accounts for wages and for payment of wages); and
- c* termination (including grounds for dismissal).

11 *id.*, at Article 3.

12 *id.*, at Article 89.

13 *id.*, at Article 90.

14 *id.*, at Article 89, Items 1 to 3.

Working rules must also cover the following if the employer has a policy relating to any or all of these matters:

- a* termination allowances (including the scope of covered employees, methods for determination, calculation and payment of termination allowances, and the dates for payment of such allowances);
- b* special and minimum wages;
- c* the cost to be borne by employees for food, supplies or other expenses;
- d* safety and health;
- e* vocational training;
- f* accident compensation and support for an injury or illness that does not arise during the course of employment;
- g* commendations and sanctions; and
- h* other matters applicable to all employees at the workplace.

The working rules must not infringe any laws and regulations or any collective agreement applicable to the workplace in question.¹⁵

To amend working rules, the employer must request an opinion on its amendment from either a union or, if there is no union in the workplace, an employee who represents the majority of the employees in the workplace. The employer and the employees may, by agreement, amend the working rules. However, if (1) the employer informs its employees of changes to working rules, and (2) the changed working rules set forth reasonable working conditions in light of relevant circumstances (such as disadvantages to be incurred by the employees, the need for the change, the contents of the changed working rules and the status of negotiations with a labour union or a representative employee), the employer may amend its working rules without the employees' consent.

IX PARENTAL LEAVE

i Maternity leave

If a woman requests to take pre-childbirth leave when she is due to give birth within six weeks (or within 14 weeks in the case of a multiple birth), the employer is not permitted to require the employee to work during this time. Further, an employer cannot require a woman to work for eight weeks after childbirth (post-childbirth leave). However, this does not prevent an employer from permitting a woman to return to work sooner, when she has requested to do so, when certain requirements are met. In this case, the mother may return to work six weeks after childbirth.

ii Parental leave

An employee can request parental or childcare leave to care for a child less than one year old (or, in certain situations, less than one and half or two years old).

The employer may not refuse a request for childcare leave by any employee except those who (1) are employed for a specified term who meet certain conditions, (2) are employed on a *per diem* basis, and (3) belong to certain categories as specified in a labour management agreement made with a union or an employee representing a majority of the employees.

¹⁵ id., at Article 92.

X TRANSLATION

When employing foreign workers, an employer is not required to provide the worker with relevant documents (e.g., working rules and an employment agreement) in a language that he or she understands. However, to avoid conflicts, it is appropriate to explain key working conditions in a language comprehensible to foreign workers so that they can understand the terms and conditions of their employment contracts. Furthermore, an employer should display warning letters and health and safety rules in the workplace, both written in languages employees understand. If an industrial accident happens under a situation where there is no such display at a workplace, the situation will be regarded as evidence that an employer has not complied with its duties of safety and of safety education.

XI EMPLOYEE REPRESENTATION

There is no definition of ‘employee representation’ under Japanese law. However, in certain situations, the LSA requires that an employer hear an opinion of or enter into a labour management agreement with either a labour union organised by a majority of the employees at a workplace (where such a union exists) or a person representing the majority of the employees at a workplace (where a union does not exist). While, in practice, the union or representative is referred to as an employee representative, this is very different from the works councils established and regulated in many European countries. When the employees at a workplace select a person to represent them, the person must be selected through a democratic process. Further, the employees cannot select a person in management as their representative. The employee representative is an *ad hoc* representative, so, in general, there is no term for the representative.

On the other hand, where an employer enters into a collective agreement concerning working conditions, a labour union will be party to that agreement. The Constitution of Japan guarantees workers’ right to organise, and to bargain and act collectively, so a labour union must remain independent from an employer. In contrast to the United States and Europe, corporate unions are more popular than industry unions in Japan. Once a collective agreement is executed, any employment agreement that does not meet working conditions under the collective agreement will be void and replaced with the collective agreement. In a case of collective bargaining, an employer must negotiate in good faith with a labour union.

XII DATA PROTECTION

i Requirements for registration

Data protection in Japan is governed by the Act on the Protection of Personal Information (APPI), which was amended on 3 September 2015. The amendment included clarification on the definition of ‘personal information’, the establishment of the Personal Information Protection Commission and the introduction of provisions relating to sensitive data. There is no required registration in relation to data protection under Japanese laws.

When handling personal information, a company shall, as far as possible, specify the purpose for its use of personal information (the purpose).¹⁶ In principle, no company can handle personal information beyond the scope necessary to achieve the purpose without obtaining the prior consent of the data subject.¹⁷

When acquiring personal information, a company must promptly notify the person of, or publicly announce, the purpose, unless the company has already publicly announced it.¹⁸ In addition, when a company directly acquires personal information from a person in writing, the company must expressly show its purpose to the person in advance.¹⁹

A company must not, in principle, provide any personal data to any third parties without obtaining the prior consent of the person.²⁰

A company must keep personal data accurate and up to date within the scope necessary for the achievement of the purpose. Once the purpose is achieved, a company must delete personal data without delay.²¹ Also, a company must take necessary and proper measures for the prevention of leaks, loss or damage, and for other security control of the personal data.²² A company must exercise necessary and appropriate supervision over its employees to ensure the security control of the personal data.²³

ii Cross-border data transfers

A company must, in principle, obtain the prior consent of the person (the data subject) when it provides the data subject's personal data to any third party.²⁴ The same shall apply for cross-border transfers of personal data.²⁵

A company does not have to obtain the prior consent of the data subject in cases that are not regarded as the transfer of personal information to a third party.²⁶ The same shall apply for the cross-border transfer of personal data if a company provides personal data to (1) any third party in a foreign country that has regulations for personal information protection at the same level as Japanese regulations, or (2) any third party in a foreign country who puts into place a system compliant with the standards prescribed by rules of the Personal Information Protection Commission as is necessary to continuously take measures corresponding with measures that business operators handling personal information ought to carry out pursuant to certain provisions under the APPI with regard to the handling of personal data.²⁷

iii Sensitive data

The amendment of the APPI defines sensitive data as personal information that contains descriptions that have been specified by Cabinet Order to require special consideration in handling so as to avoid any unfair discrimination, prejudice or other disadvantage to an

16 Act on the Protection of Personal Information [APPI], Article 15, Paragraph 1.

17 APPI, Article 16, Paragraph 1.

18 *id.*, at Article 18, Paragraph 1.

19 *id.*, at Article 18, Paragraph 2.

20 *id.*, at Article 23, Paragraph 1.

21 *id.*, at Article 19.

22 *id.*, at Article 20.

23 *id.*, at Article 21.

24 *id.*, at Article 23, Paragraph 1.

25 *id.*, at Article 24.

26 The cases are stipulated in APPI, at Article 23, Paragraph 5.

27 APPI, Article 24.

individual based on his or her race, creed, social status, medical history, criminal records or the fact that a person has incurred damages through an offence, etc.²⁸ A company must not acquire sensitive personal information without obtaining the data subject's consent to do so, except in certain circumstances.²⁹

Certain guidelines also set forth additional rules concerning sensitive personal information, such as information relating to race, ethnic group, social status, family origin, income and medical records. Further, if a company abusively uses such sensitive information, this may be regarded as a violation of privacy or an invasion of personal rights, in which case the company may be held liable for damages arising from the violation or invasion.

iv Background checks

As an employer has the freedom to employ persons of its choosing, it may collect personal information about applicants (such as information relating to their credit records), to a reasonable extent, as part of a background check. However, when collecting sensitive data, such as criminal records, an employer must obtain the applicant's consent to do so.

The collection of sensitive data needs to be carried out by commonly accepted proper methods and care must be taken to respect applicants' privacy.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

As a general rule, employment will only be terminated for cause by an employer in Japan. There is no concept of termination 'at will'.

Causes for dismissal include poor performance, repeated misconduct, serious misconduct, redundancy and medical incapacity. However, an employer's right to dismiss an employee is severely restricted. Article 16 of the LCA stipulates that a dismissal will, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of rights and be invalid.

It is considered that dismissal because of poor performance is one of the most difficult cases at trial. Employment law in Japan is very protective of employees and a heavy burden is placed on employers to prove reasonable cause in all cases of dismissal. Therefore, an employer must prepare and collect detailed facts and evidence showing the employee is actually underperforming. The evidence should be objective, such as written warning letters, a written performance improvement plan, and emails with detailed facts expressing that the employee is underperforming.

Other laws (such as the LSA) set forth certain restrictions on dismissals, such as during maternity leave or medical treatment for a work-related injury.

If an employer wishes to dismiss an employee, the employer must provide at least 30 days' advance notice. An employer who does not give the 30-day notice is required to pay the average wage for no fewer than 30 days, except under certain conditions.³⁰ An employer is not generally required to give notice to a works council or trade union when an employee is dismissed.

28 *id.*, at Article 2, Paragraph 3.

29 *id.*, at Article 17, Paragraph 2.

30 LSA, Article 20.

Based on its working rules, an employer may dismiss an employee because of a disciplinary action (punitive dismissal). In the case of a punitive dismissal, the courts will judge the validity of the dismissal pursuant to Articles 15 and 16 of the LCA.³¹

ii Redundancies

As with any dismissal, as discussed in Section XIII.i, the validity of a redundancy is judged by whether there are objectively reasonable grounds and whether it is considered appropriate in general societal terms. However, in general, redundancy will not become a reasonable cause for termination under case law in Japan, except in special circumstances, such as when an employer has no option other than redundancy to avoid going bankrupt.

Under case law, for redundancies to be deemed reasonable and appropriate, the following criteria must be met:

- a* Necessity: the business circumstances of the employer are in a situation that renders redundancies unavoidable and necessary.
- b* Efforts to avoid redundancy: in short, redundancies should be the measure of last resort.
- c* Reasonable selection: the standards for selection of employees who are subject to redundancy were reasonable and the redundancies were carried out fairly.
- d* Reasonable process: the employer conducted sufficient consultations with its employees and labour unions.

XIV TRANSFER OF BUSINESS

i Merger

In a merger, employment contracts between a target company and its employees shall be automatically transferred to an acquiring company. Therefore, employees of the target company shall be employees of the acquiring company as of the effective date of the merger. Employees' working conditions remain the same at the acquiring company, so they are not materially disadvantaged. This is why there is no specific Japanese labour law to protect employees affected by a merger.

ii Asset transfer

In the event of a transfer of assets, each asset (including employment contracts) shall be transferred from a seller to a purchaser according to an asset purchase agreement. However, Japanese law requires employers to obtain consent from each employee to ensure the validity of the transfer of the employment contracts to the purchaser. The employees may decide whether they continue working for their current employer, so there is no specific Japanese labour law to protect employees affected by asset transfer.

31 Article 15 of the Labour Contract Act stipulates that 'in a case where an employer takes disciplinary action against its employee, if the disciplinary action lacks objectively reasonable grounds and is not found to be appropriate in general societal terms in light of the characteristics and mode of the act committed by the worker pertaining to the disciplinary action and any other circumstances, the disciplinary order will be treated as an abuse of right and be invalid'.

iii Company split

In the event of a company split, a part or all of the company's assets and liabilities (including employment contracts) constituting a particular business of a seller shall be transferred from a seller to an acquirer based on a company split plan or agreement. While the Companies Act sets forth general procedures for the company to follow, the Labour Contract Succession Law regulates the transfer of employment contracts in a company split because of the consequences of a split on employees.

XV OUTLOOK

With the labour shortage arising from the declining birth rate and an ageing population, and the increasing burden of social insurance premiums, the expansion of employment of older people has been discussed. Currently, the Act on Stabilisation of Employment of Elderly Persons prohibits retirement before the age of 60. As a result, companies are obliged to take measures to secure employment opportunities up to the age of 65. In fact, even though there are already many workers who are over the age of 65 because of pension shortages or other reasons, the government is considering expanding the employment opportunities for older people up to the age of 70 as a growth strategy. It is anticipated that various approaches will be necessary. When considering these approaches, the needs and motivations of older people for various types of work and their state of health should be reviewed.

From 1 April 2020, the Act on Improvement, etc. of Employment Management for Part-Time Workers and Fixed-Term Workers and the WDA will be amended and enforced to improve the treatment of employees who do not work full-time. These amendments require that there be no unreasonable difference in treatment between regular employees and part-time and fixed-term workers, but there are often large differences in the content of duties and the range of changes in job assignments between regular employees and part-time and fixed-term workers. Therefore, it is thought that the disparity in basic salaries, and other differences, are unlikely to be recognised as unreasonable treatment.

With respect to dispatched workers, it is expected that their treatment will be improved by securing wages that exceed the average wage for similar jobs in the local area under the labour management agreement. This will affect a trend in the dispatched workers' market.

In addition, as stated in Section II, the Labour Policy General Promotion Act has been amended to impose on employers the duty to take measures to prevent power harassment. Many companies have already stipulated a prohibition of power harassment in their working rules, and have introduced a system to deal with violators by disciplinary measures. Therefore, the effects of this amendment are less significant. However, it should be noted that the perception of harassment beyond the framework of companies is becoming pervasive. It will be necessary to deal appropriately with instances of harassment when carried out by employees of other companies (e.g., an employee of one company is harassed or victimised by a business client hired by another company) or directed at employees of other companies (e.g., when the harassment is by an employee of one company against a business client hired by another company). Further preventive and reactive measures will be required in the future.

LUXEMBOURG

Guy Castegnaro, Ariane Claverie and Christophe Domingos¹

I INTRODUCTION

i Employment law framework

The relevant statutes and regulations applicable in Luxembourg are:

- a* EU regulations;
- b* the Constitution;
- c* the Labour Code;
- d* grand-ducal regulations;
- e* agreements resulting from multi-industry social dialogue declared generally binding by grand-ducal regulations;
- f* collective bargaining agreements (industry or company-level agreements). Some collective agreements are declared generally binding by a grand-ducal regulation, others are not; and
- g* case law.

ii Courts and tribunals

The relevant courts and tribunals in Luxembourg are:

- a* the labour courts, competent to settle disputes concerning employment contracts and apprenticeship contracts;
- b* the Court of Appeal, competent to settle appeals against decisions from the labour courts; and
- c* the Court of Cassation, competent to review decisions from the Court of Appeal on the grounds of legal or procedural error.

iii Government agencies with competence for enforcement of employment law

The Inspectorate of Labour and Mines (ITM) is competent in terms of working conditions and protection of workers in the exercise of their professional activity. ITM's aim is to help develop a culture of prevention and cooperation concerning working conditions, including the health, safety and hygiene of the employee, with respect to all aspects of employment law.

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II YEAR IN REVIEW

i Time savings account for private sector employees

The Law of 12 April 2019² has introduced a time saving account (CET) for employees in the private sector. The purpose of introducing the CET is to allow greater flexibility in managing working time for both companies and employees, particularly with regard to finding a healthy work–life balance. In particular, an employee can set aside his or her overtime and days off and recover them at a later time.

ii Additional statutory leave and public holiday

The Law of 25 April 2019³ has increased the minimum statutory paid leave from 25 to 26 days per year and declared Europe Day, celebrated on 9 May, as a statutory public holiday. The law came into force retroactively as of 1 January 2019.

iii Increase in the social minimum wage

The Law of 12 July 2019,⁴ amending Article L. 222-9 of the Labour Code, increased the social minimum wage (SSM) by 0.1 per cent as of 1 January 2019. This increase to the SSM was in addition to the 1.1 per cent increase resulting from the law of 21 December 2018.

Currently, the mandatory minimum wage for a non-qualified employee is €2,141.995 (index 834.76) and the minimum wage for a qualified employee is €2,570.39 (index 834.76).

iv Professional training reform

The Law of 12 July 2019 incorporates provisions into the Labour Code relating to apprenticeship and internship contracts as stipulated by the 2008 Law reforming professional training, and adds certain clarifications and modifications. The main changes include:

- a* duration of the apprenticeship contract: the Labour Code explicitly specifies that the duration of the contract is the same as the actual duration of the apprenticeship;
- b* trial period in the apprenticeship contract: the Law now provides that the apprenticeship contract must include a non-renewable three-month trial period; and
- c* end of the apprenticeship contract: there are four new circumstances in which the apprenticeship contract can be ended, namely:
 - a mandatory career change for the apprentice;
 - if the apprentice is removed from the training;
 - in the event of the apprentice's absence without a valid reason for 20 consecutive working days; and
 - when the rights to sickness benefits granted to the apprentice have been exhausted in accordance with Article 9(1) of the Social Security Code.

2 Law of 12 April 2019 introducing a time savings account and modifying the Labour Code, the Civil Code and the modified law of 4 December 1967 on income tax (Mémorial A No. 262 of 24 April 2019).

3 Law of 25 April 2019 amending Articles L. 232-2 and L. 233-3 of the Labour Code, and Article 28-1 of the modified law of 16 April 1979 establishing the general status of civil servants (Mémorial A No. 271 of 26 April 2019).

4 Law of 12 July 2019 modifying the Labour Code, the modified law of 31 July 2006 introducing a Labour Code, and the modified law of 19 December 2008 reforming professional training (Mémorial A No. 497 of 12 July 2019).

v Creation of a new assistance activity

The Law of 1 August 2019⁵ has introduced an ‘assistance activity for inclusion in employment’ to regulate and promote the integration of employees with disabilities and an external reclassification in the employment market by offering assistance to suit their needs.

III SIGNIFICANT CASES

i Impact of trial period on right to bonuses

With regard to the purpose of a trial period, the objectives to be achieved and the terms of the payment of bonuses are to be set by the employer at the end of the trial period. Consequently, even if a contractual clause expressly provides for the payment of an annual bonus, according to the terms fixed each year, termination of an employment contract during the trial period does not give entitlement to a contractual bonus *pro rata temporis*.⁶

ii Maintenance of acquired rights during a transfer of business

The payment of a 13th-month salary has a presumption of liberality, which can be reversed by proof of a custom. If an employee proves that he had an acquired (non-contractual) right to the payment of a 13th-month salary before the transfer, the contractual clause concluded after the transfer and providing that the premiums are non-binding benefits for the employer is void.⁷

iii Employee’s right to disconnect when on leave

The Court of Appeal recognised a restaurant manager’s right to disconnect during his annual leave and ruled that he ‘had a right during his leave . . . to the disconnection and not be approached during the night by his superior in a threatening tone’). This is the first time that Luxembourg courts have recognised the existence of an employee’s right to disconnect.⁸

iv Usual absenteeism related to professional activity

When usual absenteeism of an employee for medical reasons is directly related to professional activity, the employer is not authorised to terminate the contract for that cause. In this particular case, the medical certificate attesting that the employee’s anxiety disorders are concomitant with professional difficulties is not sufficient, in the absence of other objective elements, to establish the link between the illness and the professional activity.⁹

5 Law of 1 August 2019 complementing the Labour Code by creating a new assistance activity designed to encourage the inclusion in employment of employees with disabilities or in external reclassification (Mémorial A No. 545 of 14 August 2019).

6 Court of Appeal, 28 March 2019, No. CAL-2018-00140.

7 Court of Appeal, 28 March 2019, No. CAL-2018-00558.

8 Court of Appeal, 2 May 2019, No. 45230.

9 Court of Appeal, 6 June 2019 No. CAL-2017-00041.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employment contract

Employment contracts must be evidenced in writing and signed, in principle, no later than on the first day of work. In the absence of a written employment contract, the existence of a contract may be proven by the employee via any other means of evidence, whereas the employer may only prove it via limited means of evidence.

Fixed-term employment contract

Fixed-term employment contracts are only permitted for the performance of specified time-limited tasks and shall only be used under strict conditions (e.g., execution of an occasional and punctual task defined and not falling within the framework of the current activity of the company, the performance of a specific and unsustainable task in the event of a temporary and exceptional increase in the activity of the business, or when starting or expanding the business).

Terms of the employment contract

All employment contracts must contain the following essential terms:

- a* identity of the parties;
- b* date of the beginning of the performance of the employment contract;
- c* place of employment (or if there are various places of employment, a statement that the employee will perform work in various places (including abroad), and the employer's headquarters or address, as the case may be);
- d* nature of employment (and, as the case may be, a description of the tasks assigned at the moment of hiring);
- e* daily or weekly standard working hours;
- f* standard working schedule;
- g* remuneration and any benefits;
- h* length of paid holiday or the method of determining it;
- i* length of notice period for termination or the method of determining it;
- j* length of the probationary period, if any;
- k* any complementary or derogatory provisions;
- l* any collective work agreement governing the employee's working conditions; and
- m* any supplementary pension scheme.

Specific terms should be added depending on the type of employment contract involved (e.g., a fixed-term, part-time or student employment contract). For example, fixed-term employment contracts must contain the following additional essential terms:

- a* reason for making the contract;
- b* termination date, or the minimum length of the employment contract if it has no defined length;
- c* name of the absent employee if the contract is concluded to replace an absent employee;
- d* length of the probationary period, if any; and
- e* renewal provision, if any.

In addition, certain provisions must be expressly provided in writing for them to be applicable (e.g., probationary period, non-compete provisions).

Modification of the employment contract

Any modification to an employment contract must be effected by the conclusion of an addendum to the employment contract. The employer may unilaterally impose a favourable change if it concerns a non-significant employment condition.

However, the employer may also unilaterally modify essential clauses of the employment contract (e.g., remuneration or working hours) to the detriment of the employee if it has real and serious reasons to do so. The procedure to be followed is similar to the one applicable to dismissal (with notice or with immediate effect). This involves notifying the employee, providing any notice period (as the case may be) and, if the employment contract is being modified with notice, giving reasons for the modifications if the employee requests them. The timeframe for changes to essential terms must also comply with the rules on dismissal. If this procedure is not followed, the modification will be void.

Under the rules, either:

- a* the employee does not challenge the modification or its reasons and accepts the change to his or her employment contract. If the employee does not resign and remains with the employer after the changes come into force, he or she is deemed to have accepted them; or
- b* the employee refuses to accept the changes. The employee must then resign before the end of the notice period, if applicable. This will be considered as a dismissal rather than a resignation. The employee must then start a procedure before the competent labour court to claim for damages. If the labour court determines the reasons for the modification are not sufficiently real and serious, or not provided to the employee with sufficient precision, it will declare the dismissal as wrongful and the employer will be required to pay compensation for material and moral harm to the employee.

ii Probationary periods

Conditions of the trial period

Probationary periods may, in principle, only be applied if a probationary clause is included in the employment contract at the time it is signed, or at the latest before the beginning of the work, or if the applicable collective work agreement provides that all new employees are subject to a probationary period.

In the absence of a written statement that the contract has been concluded on a trial basis, it is deemed to be concluded for an indefinite period, and proof to the contrary is not admissible.

Probationary periods may not be less than two weeks, with the normal maximum probationary period being three months. It is possible to extend a probationary period to six months for employees with a professional qualification (i.e., a certificate of technical and professional capacity) and to 12 months if the employee earns a monthly gross salary of at least €4,474.31 (index 834.76).¹⁰

¹⁰ Wage indexation is an automatic mechanism for the adjustment of salaries when the cost of living increases by at least 2.5 per cent. The current index of 834.76 is applicable as of 1 January 2020.

End of the trial period

Employment contracts cannot be terminated unilaterally during the first two weeks of a probationary period, except in cases of gross misconduct. Once this two-week period is completed, the contract may be terminated with notice and without justification by either party through a registered letter or a countersigned copy of the termination letter.

The length of the notice period depends on the length of the probationary period. If the probationary period is expressed in weeks, each week should give rise to one day's notice. If the probationary period is expressed in months, four days' notice should be granted for each month of the probationary period, with a minimum of two weeks and a maximum of one month.

The end of the employment contract (notice period included) should occur within the probationary period. Otherwise, the employment contract will be considered as an open-ended employment contract or a fixed-term employment contract (depending on the type of employment contract initially concluded).

iii Establishing a presence

Establishment permit

According to the Law of 2 September 2011, a natural or a legal person cannot exercise, as either a principal activity or an ancillary activity, an independent activity in the field of trade, craft industry, industry or a specific liberal and intellectual profession without an establishment permit.

However, an establishment permit is not required for companies duly established in a Member State of the European Union or the European Economic Area (EEA), or Switzerland, that provide services in Luxembourg on an occasional or temporary basis. This freedom of services does not apply to non-EU companies.

Thus, in principle, a foreign company wishing to carry on any activity in Luxembourg shall obtain an establishment permit before starting its activity in Luxembourg and hiring employees here. An establishment permit is required for a subsidiary as well as for a branch of a foreign company.

To obtain an establishment permit, the company shall demonstrate an effective activity in Luxembourg, notably through premises, administrative and technical equipment, and the regular presence of the business licence holder.

The permit establishment is granted by the Ministry of Economy, the Middle Class and Tourism after a formal application process. The Ministry verifies that the applicant (an individual setting up his or her own business or the legal representative of a company) complies with honourability conditions (e.g., has no criminal record in Luxembourg or abroad, and no record of bankruptcy or insolvency) and qualification conditions (such as diplomas or actual professional experience).

Tax

Employment income is mainly taxed by means of withholding payroll taxes, the amount of which depends on the yearly gross income and the personal situation of the employee.

At the beginning of the year, each employee must provide his or her employer with a tax card containing all the information needed by the employer to be able to withhold taxes.

V RESTRICTIVE COVENANTS

i Non-competition during employment contract

Employees' obligation of loyalty to their employer (which is implied in any employment contract) prohibits them from any competing activity during the employment relationship.

An employer also may include an exclusivity clause in an employment contract, according to which the employee commits to provide work only for the employer and the employee is expressly prohibited from providing services for any other organisation (whether a competing employer or not). However, exclusivity clauses are only applicable to contracts for full-time employees.

In the event of a dismissal with notice, if the employee is released from performing his or her duties during the notice period, the loyalty obligation still applies. However, according to case law, as the employee has been dismissed, he or she has the right to prepare for a new career during the notice period by working on a future project.

If an employee engages in competing activity during the employment contract, the employer may sanction the employee and bring a claim for damages before the competent labour court.

ii Non-competition after employment contract

Once an employment relationship has ended, the employee is free to perform any competing activity, provided he or she is not bound by a non-compete clause.

The parties may agree on a non-compete clause in the employment contract, preventing the employee from performing similar professional activities by running his or her own business as a sole enterprise after termination of the employment contract. These clauses are strictly regulated by Luxembourg labour law.¹¹

Non-compete clauses can only apply to employees who are at least 18 years old and whose annual gross salary, at the date of termination of the contract, is more than €56,906.17.

To be valid, a non-compete clause must also comply with the following conditions:

- a* it must be in writing in the employment contract;
- b* it must refer to a specific professional sector and to similar professional activities to those performed by the employer;
- c* it must be limited to 12 months following the day the employment contract ends; and
- d* it must be geographically limited to a relevant area (i.e., locations in which the employee could effectively compete with the employer) and cannot extend beyond the national territory of Luxembourg.

Finally, according to the law, a non-compete clause only prevents a former employee from setting up his or her own undertaking but not from working as an employee for another organisation, which could be a competitor of the former employer.

However, the Court of Appeal¹² ruled on the validity of a non-compete clause preventing a former employee from working as an employee for a competitor. The clause in that case prevented the employee from performing similar activities as an employee of a competitor for 12 months within Luxembourg and France (i.e., more than 500 kilometres beyond the Luxembourg border), in exchange for a monthly allowance for 12 months of 25 per cent of

11 Labour Code, Article L. 125-8.

12 Court of Appeal, 13 November 2014, No. 39706.

the last gross salary (i.e., approximately €20,000). The Court validated the principle of this clause but found it ‘excessive’ owing to its broad geographical scope. The Court reduced its implementation to Luxembourg and the French border areas. It also ordered the employer to pay the employee the financial compensation stipulated.

There is nevertheless no legal certainty about these extended non-compete clauses since they are not provided for by law. There is a risk that, in a legal challenge, a court declares such a clause as unlawful and not binding for the parties.

VI WAGES

i Working time

Working hours regulations

Normal full-time working hours in Luxembourg are eight hours per day and 40 hours per week, or up to nine hours a day provided the weekly working time remains at 40 hours over a maximum of five days. Specific provisions apply in some sectors, such as transport, hotels, restaurants and bars.

The normal duration of work may be increased to a maximum of 10 hours a day and 48 hours per week, including overtime. It is not permitted to work beyond these limits, except in specific circumstances, such as *force majeure*, and in some sectors, such as transport.

Overtime pay may be incorporated in a work organisation plan or a flexitime regulation. This will apply over a reference period determined by the employer. The maximum reference period is four months, except if a collective bargaining agreement (CBA) provides for a longer period (of up to 12 months).

- a* Work organisation plan: This allows the employer to plan the working hours over a reference period. If the reference period is longer than one month, the employee is entitled to supplementary annual leave (up to 3.5 days) and to specific overtime pay (if the CBA does not provide other rules). A work organisation plan may be implemented only after consulting employee representatives or the affected employees; for some issues, their consent is required.
- b* Flexitime regulation: This allows employees to organise their working time as they see fit, while observing the core work time imposed by the employer, if any, during the reference period. A flexitime regulation may be implemented only with the mutual consent of the employer and the employee representatives, if any, or if none, the affected employees themselves.

In both cases, hours worked over eight hours per day and 40 hours per week are not considered overtime if the average weekly hours of work during the reference period do not exceed either 40 or the maximum weekly working hours set by agreement. In other words, at the end of the reference period, the working hours performed with the agreement of the employer that exceed an average of 40 hours of work per week during the reference period are considered overtime.

Exceptionally, in specific sectors and for a period not exceeding six consecutive weeks, a CBA may provide for 12-hour days and 48-hour weeks.

For young employees (i.e., under 18) the duration of work must not exceed eight hours a day and 40 hours a week. This maximum includes hours spent at school.

Any work organisation plan applicable within an organisation should contain specific provisions for young employees. As part of a work organisation plan, a reference period of a

maximum of four weeks can be set for young employees and only in exceptional cases. The effective duration of work must not exceed nine hours a day, 44 hours a week or 10 per cent more than the normal duration of work within the organisation. The average duration of work for each reference period must not exceed eight hours a day and 40 hours a week.

Night workers

Specific rules apply to night workers. Employees are deemed night workers if they perform at least three hours of work a day between 10pm and 6am (i.e., the night period) as part of their normal schedule, or may perform hours of work during the night period of more than one quarter of their annual working hours. The working hours of these employees must not exceed an average of eight hours during a 24-hour period calculated over a period of seven days. Overtime is permitted, with the same limitations as for normal working time.

However, night workers whose work involves particular risks, or significant mental or physical stress factors, must not work more than eight hours within a 24-hour period. In some sectors, such as the hotel and restaurant businesses, the night period is between 11pm and 6am. Young employees (i.e., under 18) are prohibited from working between 8pm and 6am, or between 10pm and 6am in some sectors.

ii Overtime

Limits to the amount of overtime

Overtime hours are those worked beyond eight hours per day and 40 hours per week (or beyond the part-time hours set in the employment contract) at the request or with the consent of the employer. If a company operates a work organisation plan or a flexitime regulation, overtime is defined as each hour worked beyond the limits fixed by the plan or regulation, at the request or with the consent of the employer.

Overtime worked by full-time employees must not exceed two hours a day and eight hours a week. If an employee decides to work overtime, he or she should ask for the employer's approval so as to be entitled to an overtime payment. Employees may be required to work overtime within the limits and under the conditions provided for by law.

Overtime is, in principle, limited to specific circumstances, namely:

- a* to prevent the loss of perishable goods or to avoid compromising the results of work;
- b* to allow for special work, such as inventories or balance sheets, timelines, liquidations and statements of account; and
- c* exceptional cases in the public interest and events of national danger.

It is generally prohibited for adolescents (aged 15 to 17 years) to work overtime, except in very specific circumstances and under conditions strictly regulated by law. Under part-time work contracts, overtime hours may be worked only by mutual agreement between the employer and employee.

Overtime compensation

Overtime is generally compensated by paid leave of one hour and 30 minutes for every hour of overtime. An employer may choose to compensate overtime financially.

If an employer decides to provide financial compensation instead of paid leave, or if an employee leaves the organisation without taking his or her leave, overtime will be paid at the rate of 140 per cent per hour or the normal hourly rate. Some CBAs provide for specific conditions and a higher rate (e.g., 150 per cent in the banking sector).

Specific rules and pay apply to overtime under a work organisation plan (where a CBA does not provide other rules). This should provide that:

- a* monthly working hours exceeding the statutory monthly working hours by more than 12.5 per cent are treated as overtime, when the reference period is more than one month and less than three months. The rate is 10 per cent when the reference period is between three and four months;
- b* work performed at the request of the employer beyond the limits set in the initial planning for the day, week or during an entire work organisation plan, is deemed to be overtime if the employer gives the employees less than three days' notice; and
- c* if the employer changes a work plan with less than three days' notice and this does not result in an increase in the hours scheduled, but is simply a change of schedule, the hours of work exceeding the initial work plan by more than two hours should be paid at a rate of 1.2 times the hourly rate for the first two hours.

Overtime for young employees, when exceptionally permitted, is compensated by a 100 per cent increase in the normal hourly rate paid for the hours performed.

CBAs may provide for a different form of compensation or higher rates.

The aforementioned overtime rules do not apply to top executives.

VII FOREIGN WORKERS

i Register of foreign workers

The hiring of foreign employees directly by a Luxembourg company does not entail a specific obligation for an employer to keep a register of foreign employees. However, the employer shall keep a copy of the employee's residence authorisation in case the ITM carries out an inspection.

Moreover, employees seconded to Luxembourg must be declared to the ITM before starting to work in Luxembourg. This declaration is made through an e-platform and several documents must be uploaded (such as a medical statement, social security certificate and employment contract).

There is no limit on the number of foreign employees that a workplace or company may have.

ii Length of assignment

As regards the secondment of employees to Luxembourg by a foreign company, the length of an assignment shall remain temporary. Although the Luxembourg Labour Code does not provide for a specific time limit, the length of a secondment is limited by the validity of the residence authorisation and by social security rules.

iii Work permit

Citizens of an EU or EEA Member State and Switzerland are exempt from the obligation to obtain authorisation to work in Luxembourg. They only need a valid passport or national identity card. However, if EU nationals intend to stay in the territory of Luxembourg for more

than three months, they must make a declaration of arrival registration with the municipality within eight days of their arrival, and fill in a registration certificate for EU nationals no later than three months after their arrival.

Third-country nationals wishing to work in Luxembourg must obtain a residence authorisation. However, and depending on the purpose of their stay in Luxembourg, third-country nationals can rely on an exemption of residence authorisation for work if the stay does not exceed three months. A residence permit is valid for a certain period and may be renewed if the legal requirements are satisfied.

Nationals from certain non-EU countries who wish to visit, travel through or work in Luxembourg must, before their departure, have a valid travel document with a visa issued by a consular authority from one of the countries in the Schengen area.

iv Application of legal provisions

Foreign workers who are authorised to work in Luxembourg benefit from the same protection as Luxembourg nationals under the legal provisions.

Moreover, legal, regulatory and administrative provisions, and provisions resulting from a CBA declared to be generally binding, apply to all employees working in Luxembourg (including on secondment or a short-term posting), as regards the following matters:

- a* minimum wage and its automatic adjustment to the cost of living;¹³
- b* working time, daily breaks, 11 hours of daily rest, 44 hours of weekly rest;
- c* annual leave;
- d* public holiday;
- e* interim work and loan of workforce;
- f* protection of young workers, pregnant and breastfeeding workers;
- g* non-discrimination;
- h* unemployment resulting from weather disruptions;
- i* temporary lay-off;
- j* prohibition of illegal work; and
- k* health and security at work.

VIII GLOBAL POLICIES

Internal rules are not required by law in Luxembourg. If internal rules are established, the content may be freely determined by the employer and the staff delegation, if any, provided that it does not breach Luxembourg labour legislation.

However, it is mandatory for employers to set up a specific written procedure to manage problems of harassment on the basis of an internal assessment and subsequent reassessments of harassment within the enterprise.

If internal rules are established, the organisation must inform and consult the staff delegation before implementing, amending or withdrawing any internal rules. In organisations with at least 150 employees, the establishment or amendment of internal rules must be by mutual agreement between the employer and the staff delegation.

13 See footnote 10.

Internal rules are not subject to registration with government authorities or any other legal body. Moreover, the law does not impose the use of a specific language in the drafting of internal rules. Nevertheless, the rules shall be written in a language that can be understood by all employees.

For an internal rule to be considered as binding upon an employee, the employer shall be able to prove that this employee has acknowledged the internal regulations. As a result, internal regulations shall be either signed by the employee at the time of recruitment, or attached to the employee's employment contract provided that a mention is inserted into the employment contract stating that the employee has received a copy of the internal regulations and has acknowledged their contents. Internal regulations may also be placed on a company's intranet but simply posting regulations online would not be sufficient to demonstrate that the employee has acknowledged them.

IX PARENTAL LEAVE

i Maternity leave

Maternity leave is divided into two periods: eight weeks' prenatal leave and 12 weeks' postnatal leave. While on maternity leave, the employee is paid by the National Health Fund and receives an indemnity equal to the employee's remuneration, but limited to five times the monthly minimum social salary for unqualified employees as in force on a particular date (€10,709.95 as of 1 January 2020). Payment of maternity leave is subject to membership of the Luxembourg social security scheme for at least six months during the 12 months before the commencement of maternity leave. However, the EU regulation providing for the aggregation of insurance periods applies.

Employees are protected against dismissal during maternity leave. However, for gross misconduct, an employer may suspend an employee and apply to the courts for permission to dismiss without notice.

ii Adoption leave

If a child under the age of 12 is adopted by a couple, an adoptive parent who is employed through an employment contract is entitled to 12 weeks' leave upon presentation of a certificate from the court stating that the adoption application has been filed. If both parents are employed, or if one parent is in a non-salaried position, the adoption leave can only be granted to one of them. If an employee is adopting as a single parent, he or she can benefit from adoption leave, except if the adopted child already lives with the employee, or is the child of the spouse or partner of the employee. Most of the provisions that apply to maternity leave apply equally to adoption leave, including the requirements for being entitled to leave, entitlements and protection against dismissal.

iii Paternity leave

Paternity leave can be taken as an 'extraordinary leave for personal reasons'. Since 2018, a father is entitled to 10 paid days off work (it was previously two days).

Paternity leave can be split, but must be taken within two months of:

- a* the birth of the child; or
- b* in the case of adoption, the arrival of the child under the age of 16. However, this leave is not available if the parent had the benefit of leave for the adoption of a child under the age of 12 (see Section IX.ii).

An employer may refuse to allow paternity leave to be split if it is contrary to the needs of the business. If an employer and an employee disagree on a possible split of paternity leave, it must be taken in one block, immediately after the birth or arrival of the child.

In practical terms, the employee must inform the employer in writing, with two months' notice, of the expected dates on which he would like to take his paternity leave. If this notice is not given, the employer may reduce the leave to two days.

There are no specific conditions for entitlement to paternity leave except the birth of the child.

Only the first two days of paternity leave are paid by the employer; the government pays from the third day onwards. The employer must submit its request for a refund for salaries paid to the Minister responsible for employment within five months of the birth or arrival of the child, failing which the request will not be considered. The salary taken into consideration for this refund is limited to five times the minimum social wage for unqualified employees (i.e., €10,709.95 as of 1 January 2020).

There is no protection against dismissal during paternity leave.

iv Parental leave

Parental leave is offered to parents following the birth of one or several children until they are six years old, or the adoption of one or several children under 12 years old. The parent can request:

- a* first parental leave, which must be taken immediately after maternity or adoption leave; or
- b* second parental leave, which must be taken before the child's sixth birthday or, in the case of adoption, within six years of the adoption leave, or (if no adoption leave was taken) from the date of the adoption order but before the child's 12th birthday.

Leave can be taken full-time, part-time or split (under certain conditions provided by law), whether it is for the first or second parental leave, provided that the employee has completed at least one year of service with the same employer.

The leave may be granted if the parent:

- a* has been affiliated to the Luxembourg social security scheme at the time the child is born or adopted, and for at least 12 continuous months prior to the parental leave, via one or more employment contracts totalling at least 10 hours of work as an employee per week;
- b* is engaged as an employee via one or more employment contracts during the full period of the parental leave;
- c* ceases any professional activity during the course of the leave (in the case of full-time parental leave) or reduces his or her working hours (in the case of part-time parental leave); or
- d* during parental leave, raises the child in his or her home and mainly uses the time to take care of the education of the child.

The parent must submit his or her request to the employer by registered mail (with acknowledgement of receipt) at least two months before the start of maternity leave or adoption leave (for first parental leave) or at the latest four months before the start of second parental leave.

The employer is obliged by law to accept parental leave on a full-time basis, except if the request was not made in the manner and within the timescale required.

While on parental leave, the employee is directly paid by the Fund for the Future of Children and receives an allowance calculated on the basis of his or her normal monthly income. The allowance must not be lower than the monthly minimum social wage for unqualified employees (i.e., €2,141.99 as of 1 January 2020) nor higher than the monthly minimum social wage for unqualified employees increased by two-thirds (i.e., €3,569.99 as of 1 January 2020).

The employee is protected against dismissal starting from the last day of the notice period for requesting the leave, and during the parental leave. Any attempted dismissal during this period is null and void but the employee is not protected against immediate termination for gross misconduct.

X TRANSLATION

There are three official languages in Luxembourg: French, German and Luxembourgish.

Luxembourg law does not impose the use of any specific language in the drafting of employment contracts. However, the use of a language understood by both parties is recommended to avoid any discussion regarding lack of consent.

In the event of litigation, a court could request translation into one of the three official languages, but particularly French or German. If a contract is written in more than one language and there is doubt about its meaning, the version with the meaning that is more favourable to the employee will prevail.

XI EMPLOYEE REPRESENTATION

i Obligation to set up a staff delegation

Undertakings with at least 15 employees during the 12 months prior to the announcement of social elections must set up a staff delegation.

The staff delegation members are elected by and from the eligible employees through a secret vote.

The renewal of the staff delegation takes place every five years within a statutory timeframe on a date set by the Ministry of Labour. Thus, the term of a staff delegate is five years. If the threshold is staggered between two statutory timeframes, a staff delegation must be set up as well.

ii Number of staff delegates

The size of the staff delegation varies according to the number of employees represented:

Composition of the staff delegation	
Represented employees	Number of delegates
Between 15 and 25	1
Between 26 and 50	2
Between 51 and 75	3
Between 76 and 100	4
Between 101 and 200	5

Composition of the staff delegation	
Represented employees	Number of delegates
Between 201 and 300	6
Between 301 and 400	7
Between 401 and 500	8
Between 501 and 600	9
Between 601 and 700	10
Between 701 and 800	11
Between 801 and 900	12
Between 901 and 1,000	13
Between 1,001 and 1,100	14
Between 1,101 and 1,500	15
Between 1,501 and 1,900	16
Between 1,901 and 2,300	17
Between 2,301 and 2,700	18
Between 2,701 and 3,100	19
Between 3,101 and 3,500	20
Between 3,501 and 3,900	21
Between 3,901 and 4,300	22
Between 4,301 and 4,700	23
Between 4,701 and 5,100	24
Between 5,501 and 5,500	25
More than 5,500	+1 for each 500

For each effective member, a substitute shall be elected so that a deputy is available should an effective member no longer be able to exercise his or her duties.

iii Attributions of staff delegations

The Law of 23 July 2015 on the reform of social dialogue abolished the works council. All the rights and attributions previously granted to works councils were transferred to staff delegations in undertaking with at least 150 employees.

A staff delegation's general duty is to safeguard and defend employees' interests with respect to working conditions, job security and social welfare. More precisely, a staff delegation is expected to:

- a* prevent or solve individual or collective disputes arising (or likely to arise) between the employer and the employees;
- b* submit employees' individual or collective claims to the employer; and
- c* in the event of unsuccessful negotiations, submit a claim to the Labour Inspectorate regarding the legal or contractual rights of the employees.

A staff delegation is also expected to ensure compliance with the principles governing equal treatment, access to employment, vocational training, promotion, working conditions and remuneration.

To enable a staff delegation to carry out its mission, the employer is required to provide information and data regarding the functioning of the organisation, including the evolution of its activities and its economic situation. It is also required to provide information regarding health, safety and absenteeism.

A staff delegation must be informed and consulted in certain matters, especially:

- a* on the situation, structure and likely evolution of employment within the company as well as possible anticipatory measures envisaged, in particular threats to employment;
- b* on decisions likely to lead to substantial changes within the organisation, in particular redundancies and transfers of undertakings;
- c* before implementing, amending or withdrawing a supplementary pension plan and before publishing or amending internal rules; and
- d* on any issue relating to working time or apprenticeships.

Moreover, in organisations with at least 150 employees, certain decisions must be made jointly by the employer and the staff delegation (e.g., the introduction or application of technology to monitor or control employees' behaviour and performance, or the introduction or modification of measures concerning the health and safety of employees and the prevention of occupational diseases).

iv Rights of staff delegations

A staff delegation is allocated a credit of hours in proportion to the number of employees represented, namely 40 hours per week for 500 employees (in an undertaking with fewer than 150 employees) or 250 employees (in an undertaking with between 150 and 259 employees).

Members of the staff delegation have the right to participate in training sessions, even during working hours and without loss of wages, organised by trade unions or a specialist institution, such as professional chambers, with the purpose of improving their knowledge in economics, their social and technical skills, as far as this is in relation to their role as employee representatives. The duration of time taken for training depends on the number of employees in the undertaking:

- a* fewer than 50 employees: one working week over the full term of the member's term of office (i.e., five years);
- b* between 50 and 150 employees: two working weeks over the full term of the member's term of office; or
- c* more than 151 employees: one working week per year.

v Meetings

A staff delegation may meet once a month during working hours. Notice of five working days shall be given to the employer, unless both parties agree on a shorter notice period. These meetings are paid as working time.

A staff delegation is compelled to meet at least six times per year during working hours, and three of those six meetings must be attended by the employer.

Finally, the employer is required to convene the staff delegation whenever at least one-third of the regular members so request.

vi Protection against dismissal and unilateral modification of employment contracts

The members of a staff delegation are protected against dismissal during their term of service and for six months after the end of that term. Any dismissal of a staff representative may be declared null and void. However, in a case of gross misconduct, the employer may suspend a staff representative with immediate effect and ask the labour court to terminate the employment contract. Similarly, the employer cannot introduce any modifications to a staff representative's employment contract.

XII DATA PROTECTION

i Requirements for registration

The Law of 1 August 2018 on the organisation of the National Data Protection Commission and the general data protection framework does not require the data controller to register with the Luxembourg Data Protection Authority (CNPD). The obligation to notify each instance of personal data processing provided for by the Law of 2 August 2002 on the protection of persons with regard to the processing of personal data no longer exists as of the Law of 1 August 2018.

However, the data controller and, where applicable, the data controller's representative must, in principle, maintain a record of processing activities as part of their responsibilities. Moreover, the data controller or the processor must communicate the details of the undertaking's data protection officer to the CNPD.

ii Cross-border data transfers

Personal data can circulate freely from Luxembourg within the EEA, as long as the general principles of the EU General Data Protection Regulation GDPR are respected.

Any data controller who wishes to export personal data outside the EEA must first establish that there is an adequate level of protection in the recipient country. Indeed, when the third country is considered to offer an adequate level of protection, the transfer can be carried out as if it were a transfer within the EEA. However, the general principles of the GDPR must be respected.

If a country that is not a member of the EEA, or an international organisation to which the data is to be transferred has not been recognised as adequate by the European Commission, the transfer must be subject to appropriate safeguards or be based on one of the legally recognised derogations. Among the appropriate safeguards that may be put in place for a transfer of personal data to a country without an adequate level of protection, the data exporter and the data importer may sign standard data protection clauses adopted by the European Commission (contractual clauses), or may rely on binding corporate rules, codes of conduct, certification mechanisms, or guarantees specific for transfers between public authorities or bodies.

For transfers of personal data to the United States, the data exporter and the data importer may also have recourse to the EU-US Privacy Shield. The Privacy Shield (which replaced Safe Harbour) has its own requirements, under which entities established in the United States can certify their processing of personal data to facilitate the transfer of personal data. Although its lawfulness is currently being challenged, the Privacy Shield can still be used to transfer personal data to the United States.

An employer must inform the employee in question (the data subject) that his or her personal data can be transferred to a third country. In limited cases, the data subject's consent can be required.

iii Sensitive data

The processing of personal data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation, are prohibited as the aforementioned are regarded as sensitive data.

This prohibition does not apply when the data subject has given explicit consent to the processing (it is usually not recommended to rely on an employee's explicit consent as the sole legitimate ground in the context of employment) or when the processing operations are necessary to comply with specific rights and liabilities in relation to the employment legislation to which the data controller (the employer) is subject, provided that there is a legal requirement (e.g., requirements regarding safety and security in the workplace).

Social security numbers are not regarded as sensitive data under Luxembourg data protection laws.

iv Background checks

The legislation does not specifically rule, restrict or prohibit background checks on applicants. However, background checks must comply with the general principles resulting from legislation on privacy, protection of personal data and discrimination.

Hence, an employer may conduct background checks only if applicants are informed of the process used, its purposes and the rights relating to the processing of their personal data (e.g., the right to access, rectify, request or erase). Furthermore, the processing operations shall be legitimate, operated loyally and in proportion to the objective sought (i.e., limited to the data directly linked to and necessary for filling the vacant position). The processing of sensitive data such as religious beliefs, political opinions, sexual orientation or ethnicity is subject to very restrictive rules.

The processing of criminal data (i.e., convictions or judicial proceedings) shall be prescribed by law, otherwise it is strictly forbidden. Following the reform of the legislation on criminal records – in force as of 1 February 2017 – an employer may request a job applicant's criminal record under the condition that the request is specified in the job advertisement and is justified by the specific needs of the position. The criminal records of an applicant cannot be kept longer than one month following the conclusion of the employment contract; the criminal records of unsuccessful applicants must be destroyed immediately.

During employment, restrictive rules apply (except where specifically prescribed by law) as the employer cannot request new criminal records unless the employee is assigned to new functions. Specific rules apply for jobs involving regular contact with minors.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Dismissal with notice and dismissal with immediate effect

An employer can only dismiss an employee with notice or with immediate effect in the following circumstances:

- a* Dismissal with notice: related to an employee's aptitude or conduct, or reasons relating to the operational needs of the organisation, establishment or department (i.e., economic grounds).
- b* Dismissal with immediate effect: in the event of gross misconduct (i.e., conduct that is considered immediately and definitively to make it impossible for the working relationship to continue).

According to labour law, an employer with 150 or more employees must invite any employee affected by a potential dismissal (with or without notice) to a meeting prior to giving notice of the dismissal. A copy of this invitation must be sent to the staff delegation, if any.

If an employee disagrees with the grounds for dismissal, he or she is entitled to bring a claim against the former employer.

Notice period

In cases of dismissal with notice, notification must be sent by registered letter or by a letter for which the employee must sign to acknowledge receipt. The notice period that must be given by the employer depends on the length of service of the dismissed employee:

- a* less than five years: two months;
- b* five to nine years: four months; or
- c* 10 years or more: six months.

Employment contracts or applicable collective agreements may provide for specific notice periods. However, these must not be, in principle, less than the minimum length of notice period provided for by law (as above).

The notice period may be extended in lieu of the payment of a departure allowance provided the employer has fewer than 20 employees and depending on the employee's length of service.

Luxembourg labour law does not provide for a lump sum payment, that is, a payment in lieu of notice. However, an organisation may discharge an employee from the obligation to work for the entire notice period or a part of it. The release date must be included in the letter of termination or in a subsequent letter.

Hiring priority

If an employment contract has been terminated for reasons unrelated to an employee's conduct at work, the employee may request in writing a hiring priority during the 12 months following the date on which he or she left the undertaking. If the employee exercises this hiring priority, the employer is obliged to inform the employee of any vacancy corresponding to that employee's qualifications and to rehire him or her if he or she applies for the position.

Protection against dismissal

Some categories of employees are protected against dismissal and their dismissal may therefore be declared void. For example:

- a* dismissal of a pregnant woman, or dismissal during maternity leave and parental leave (see Section IX);
- b* dismissal of a victim or a witness of sexual harassment;
- c* dismissal based on the marriage of a female employee;
- d* dismissal during a period of sickness (under specific conditions); and
- e* dismissal during the protection period for an employee declared disabled in his or her last position who has been internally professionally redeployed by the Joint Committee.

Dismissal indemnities

At the end of an employment contract, the employee is entitled to:

- a* payment for any remaining untaken annual leave calculated up to the end of the notice period, even if the employee has been released from the obligation to perform active work during the notice period;
- b* the prorated amount of a contractual 13th-month payment or a bonus, provided that the bonus can be considered as being part of the remuneration (i.e., not a discretionary bonus); and
- c* a legal departure allowance (i.e., severance pay) if the employee has at least five years' service within the organisation (excluding dismissal for reasons of gross misconduct).

Settlement agreement

Once a notice of termination has been served on an employee, both the employee and the employer may conclude a settlement agreement under Luxembourg civil law. This agreement settles any existing or potential disputes about the termination.

Settlement agreements are valid only when both parties make reciprocal concessions (e.g., the employer accepts to pay an out-of-court indemnity and in return the employee undertakes to waive his or her right to bring an action against the employer in court). Thus, to be enforceable, the settlement agreement must:

- a* be drawn up in writing, in as many copies as there are parties;
- b* contain reciprocal concessions; and
- c* initiated and drawn up with the full consent of the parties.

ii Redundancies

In the case of individual redundancies on the grounds of a restructuring or staff reduction, the employer must observe the above-mentioned rules for a dismissal. However, specific procedures apply to collective dismissals.

Social plan

For collective dismissals, a social plan must be prepared and negotiated. This procedure applies when an employer with at least 15 employees is contemplating dismissing at least seven employees within 30 days, or at least 15 employees within 90 days, for a reason unrelated to the employees' conduct or behaviour at work, that is, for an economic reason, or in relation to a reorganisation or restructuring.

The collective dismissal rules apply if at least four dismissals are contemplated during the relevant period for reasons unrelated to conduct at work. The employer must then include in the calculation of the threshold for collective redundancies any termination of employment (other than a dismissal) based on economic reasons that it offers as an incentive, such as redundancy for economic reasons by mutual consent and employees retiring for economic reasons before the usual retirement date.

Content of the social plan

The negotiation of the social plan must cover ways of avoiding or reducing collective dismissals and of mitigating the consequences by using social measures for redeploying or retraining employees who are made redundant.

Further, the social plan may, and usually does, contain provisions on outplacement or training measures.

Information and consultation

The employer must inform and consult the staff delegation about any decisions likely to lead to substantial changes in work organisation or contractual relations, including those relating to collective dismissals. In undertakings with at least 150 employees, the staff delegation must be informed and consulted before any decision of an economic or financial nature that might have a determining effect on the structure of the organisation or on the number of employees, such as a restructuring.

After completing the information and consultation process and before entering into negotiations with social partners, or at the beginning of the negotiations of the social plan at the latest, the employer must notify the employee representatives of its intentions to proceed with a collective dismissal.

The employer should provide the following information:

- a* the reasons for the proposed (collective) redundancies;
- b* the number and categories of employees affected by redundancy;
- c* the number and categories of employees working regularly for the organisation;
- d* the period during which the proposed redundancies will take place;
- e* the selection criteria for employees to be made redundant (with the input of the staff delegation); and
- f* the method of calculation of any compensation above the minimum provided for by law, or CBA, if any, or the reason for not awarding any additional compensation.

Notification to the National Employment Agency

At the beginning of the negotiations at the latest, the employer must notify the National Employment Agency in writing of any proposed collective redundancies. The National Employment Agency must then forward this information to the Inspectorate of Labour and Mines.

The employer must also send a copy of the information given to the employee representatives to the National Employment Agency, which will forward the information to the ITM. The employee representatives may notify the National Employment Agency of any observations in relation to the information provided by the employer. These observations will also be forwarded to the ITM.

Protection against dismissal

In addition to the protections against dismissal mentioned in Section XIII.i, during the period of negotiation of a social plan, dismissal for a reason unrelated to the employees' conduct or behaviour at work is void. During the period of negotiation, the employer can notify a dismissal with notice or with immediate effect for reasons related to the aptitude or conduct of an employee.

Payments due in collective dismissals

There are no legal requirements for additional payments in the context of collective dismissals. However, in addition to statutory severance pay, the employer will have to respect any payment commitments made under the social plan (e.g., moving allowance, training allowance, or other financial assistance).

XIV TRANSFER OF BUSINESS

A transfer of undertaking is defined as a transfer of an economic entity that retains its identity and constitutes an organised grouping of resources (notably human and material) with the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

i Employee's rights and protection

In a transfer of undertaking, employment contracts and employment conditions are automatically transferred from the transferor to the transferee. If the transferred employees benefited from the application of a CBA with the transferor, the transferee is required to maintain all the conditions that result from the CBA until the termination date or the expiry date of the CBA, or until the entry into force or the application of a new CBA.

There is no requirement for a transfer to be personally approved by employees.

A transfer of undertaking leads to a restriction on the employer's rights to dismiss employees and to amend a substantial provision of employment contracts to the detriment of the employees.

Neither the transferor nor the transferee can dismiss employees on the grounds of the transfer of undertaking itself. Moreover, the transferor and the transferee cannot justify a modification of a substantial provision of the employment contract that is detrimental to the employee on the transfer itself.

ii Informing and consulting staff representatives

During the transfer of an undertaking, the staff delegation of both the transferor and the transferee must be informed both before and after the decision to transfer is made. If there is no staff delegation, the employees are informed directly.

After the decision to transfer is made, but before the transfer is effective, the transferor and the transferee must disclose the following information to the staff delegation (or directly to the employees):

- a* the fixed or proposed date for the transfer;
- b* the reasons for the transfer;
- c* the legal, economic and social consequences of the transfer for the employees; and
- d* the envisaged measures towards the employees.

When the transferor and the transferee contemplate implementing measures in respect of their respective employees, they must consult their respective staff delegations about these measures in a timely manner.

XV OUTLOOK

i Bill modifying right to leave for family reasons

Bill No. 7489 modifying Articles L. 234-51, L. 234-52, L. 551-2 and L. 552-1 of the Labour Code in respect of leave for family reasons and professional redeployment was submitted to the Chamber of Deputies on 10 October 2019.

The aim of the Bill is to add an exception to the condition relating to hospitalisation if a child, from the age of 13:

- a* receives a special supplementary allowance in accordance with Article 274 of the Social Security Code; or
- b* is suffering from an exceptionally serious illness or impairment, as defined by the Grand Ducal regulation specified in Article L. 234-52 of the Labour Code, confirmed by the child's doctor.

In these two situations, the parent who is an employee would be able to claim their leave entitlement for family reasons, even if their child was not hospitalised.

In addition, the Bill allows both parents to take leave for family reasons at the same time in both the cases described above.

ii Extension of beneficiaries of the right to leave for family reasons

Bill No. 7436 provides for the extension of the circle of beneficiaries of leave for family reasons to grandparents, and amending the Labour Code accordingly.

iii Transposition of EU Directive on posting of workers

Bill No. 7516 on (1) transposition of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of a provision of services and (2) modification of the Labour Code, was tabled in the Chamber of Deputies on 23 January 2020.

The purpose of the Bill is to codify Directive (EU) 2018/957 modifying Directive 96/71/EC on the posting of workers within the framework of the provision of services into national law and to modify the provisions of the Labour Code relating to posting workers.

According to the government press release, the main purpose of the Bill is 'to consolidate respect for the rights of employees when they are posted in Luxembourg, while also guaranteeing fair competition for businesses'.

MALAYSIA

*Jack Yow*¹

I INTRODUCTION

There are three broad categories of employment relationships in Malaysia.

The most common category is employment relationships in the private sector between an employer and an employee. Given that this is a contractual relationship, the terms of the employment contract determine the rights and duties of the employer and the employee thereunder. Malaysian case law also recognises employees' implied rights and duties, including the implied term of mutual trust and confidence, and the implied duty of fidelity. Private sector employment relationships are also regulated by statutory law, which regulates many terms of employment, such as working hours, overtime, minimum wages, termination benefits, holidays, retirement age, statutory pension and social security insurance benefits. Employees have a right to register a trade union, which, upon recognition by the employer, may commence collective bargaining on behalf of the employees. A registered trade union may also take industrial action, such as engaging in strikes and picketing. However, strikes are rare as there are many statutory restrictions to these actions.

The second category is employment relationships within the public sector, namely those who hold public offices such as members of the armed forces, the judicial and legal service, the general public service of Malaysia, the police force, the joint federal and state public services, and the education service and public service in each state. Employees who are in this type of employment relationship are provided special protection under Article 135 of the Federal Constitution. The aforementioned public officers are protected from dismissal or reduction in rank without being given a reasonable opportunity to be heard under Article 135(2) of the Federal Constitution.

The third category of employment relationships is a hybrid of the first two categories. This applies to employees of statutory authorities, such as those under a statutory body corporate or a local council. They are not employees as provided in the definition of public service under Article 132 of the Federal Constitution and as such cannot be regarded as public servants under the Federal Constitution. They are not regarded as private sector employees either, as they are employed by statutory bodies or authorities and perform 'public' functions. See Section III.i, which highlights the rights of such an employee in applying for *certiorari* to challenge a dismissal from employment.²

1 Jack Yow is a partner at Rahmat Lim & Partners.

2 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan* (Federal Court Civil Appeal No.02(f)-29-05/2018(P)).

Jurisdiction to determine employment disputes

The civil courts of first instance consist of magistrates' courts, the sessions courts and the high courts. If a claim is for monetary compensation for breach of an employment contract, these civil courts have the jurisdiction to hear the case. For example, if the claim is for salary in lieu of notice for termination on short notice or resignation given, respectively, by an employer or employee, the civil courts can hear the case and award damages.

Apart from the civil courts, under the Employment Act 1955 (EA), the Director General of Labour (DGL) can hear employment disputes relating to the terms of a contract of employment or disputes relating to a breach of a provision of the EA or Wages Council Act 1947.³ These disputes are brought before the Labour Court, presided over by the DGL; however, note that the DGL can only hear cases for employees earning 5,000 ringgit or less.

The civil courts and the Labour Court cannot order specific performance of an employment contract, which is prohibited under Section 20(1)(b) of the Specific Relief Act 1950.

The courts that may order specific performance of an employment contract are the industrial courts, established under the Industrial Relations Act 1967 (IRA). The industrial courts have the power to order reinstatement,⁴ grant back wages and grant compensation in lieu of reinstatement.

Public servants and employees of a statutory authority cannot file claims for reinstatement in an industrial court.⁵ The only available remedy for a public servant or employees of a statutory authority is to apply for a judicial review and to challenge the dismissal in a high court. The usual remedy is a *certiorari*⁶ to quash the decision for dismissal.

The high courts also exercise a supervisory function over the industrial courts and an appellate function over the Labour Court. Thus, the high courts have the power to hear judicial review applications to quash decisions by the industrial courts. They also have the power to hear applications concerning questions of law from the industrial courts.⁷ The high courts can also hear appeals of decisions by the Labour Court.⁸

II YEAR IN REVIEW

The year 2019 was significant in respect of the legislation that is in the process of being amended. There was a variety of proposed amendments to the IRA, the EA and the Trade Unions Act 1959 (TUA), which were and still are in the process of being tabled in Parliament. See Section XV for a more detailed explanation of these proposed amendments.

Parliament is increasingly passing legislation that gives greater scope to the protection of an employee's rights. This trend started at the beginning of 2019 when the minimum wage for all employees in the private sector, except domestic servants, was increased from 1,050 ringgit per month to 1,100 ringgit per month with effect from 1 January 2019.⁹

³ Employment Act 1955 [EA], Section 69.

⁴ Industrial Relations Act 1967, Section 20(1).

⁵ *id.*, at Section 52.

⁶ Order 53 of the Rules of Court 2012 read with the Schedule to the Courts Judicature Act 1964.

⁷ Industrial Court 1967, Section 33A.

⁸ EA, Section 77(1).

⁹ Minimum Wages Order (Amendment) 2018 [P.U.(A) 305/2018]. See also Section XV.

To ensure greater protection for foreign workers, the Employment Injury Scheme under the Employees' Social Security Act 1969, with effect from 1 January 2019, was extended to all newly hired foreign workers. As such, all employers who hire foreign workers must register with the Social Security Organization (SOCSO) and pay the due contributions. Previously, SOCSO was only payable for local employees.

To ensure greater employment protection for children and young people, the Children and Young Persons (Employment) Act 1966 (CAYPEA) was amended on 1 February 2019. The key amendments include, *inter alia*, stricter conditions imposed on the light work that may be performed by a child or young person (and who must be at least 13 years of age), a list of the work and hazardous work that may not be engaged in by a child or young person, and enhanced penalties or fines for contravention of any of the provisions under the CAYPEA.

III SIGNIFICANT CASES

i The Mohd Sabri case¹⁰

Under contract law, specific performance is not available to an employee as it is prohibited under Section 20(1)(b) of the Specific Relief Act 1950. In an old Federal Court decision – *Mohd bin Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor*¹¹ (*Jempol*) – it was held that there are only two exceptions to this principle: one relates to claims for reinstatement under the IRA, which are only available to employees in the private sector, and the other relates to claims for *certiorari* in a high court, which are available to holders of public office under Article 132 of the Federal Constitution. In *Jempol*, the Court found that an employee of a local council is not a holder of public office under Article 132 of the Federal Constitution and, as such, cannot make a claim for reinstatement in a high court.

The Court also held that here is no third exception to the principle that specific performance is not available to a contract of personal service. However, the Federal Court in *Mohd Sabri* revisited the question as to whether there is such a third exception.

In *Mohd Sabri*, the respondent was an engineer employed by the second appellant, a local authority of Seberang Perai established under the Local Government Act 1976 (the LGA 1976). After the respondent was dismissed from his service, he filed an application for judicial review in the high court to quash the decision to dismiss him for breach of natural justice. The Federal Court found for the respondent and held that an employee of a local council is governed under Section 16(4) of the LGA 1976. Such an employee, the Court explained, has a right to a 'reasonable opportunity to be heard' before dismissal, just like holders of public office under Article 132 of the Federal Constitution. Therefore, the dismissal of employees regulated by statute is governed by public law and amenable to public law remedies. *Mohd Sabri* has thus impliedly recognised a third exception to the rule that specific performance is not a remedy available for a breach of contract of personal service. Thus, an employee whose contract is regulated by statute has the right to apply for judicial review to challenge a dismissal.

10 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan* (Federal Court Civil Appeal No.02(F)-29-05/2018(P)).

11 [1997] 3 CLJ 135.

ii Alliance Bank Malaysia Berhad v. Menteri Sumber Manusia & anor¹²

The Court of Appeal considered the ambit of a minister's duty to give reasons for a decision in a judicial review of a minister's exercise of discretion. In this case, a bank had promoted its clerical and special grade clerks to the position of customer service executive (CSE). As a result of promotion to the CSE positions, they were regarded as being employed in a managerial, executive, confidential or security capacity. This gave rise to the question as to whether a CSE can remain a member of the National Union of Bank Employees (NUBE), which represents clerical staff, or whether they should be represented by the Association of Bank Officers, Peninsular Malaysia (ABOM), which represents the non-clerical staff of banks.

The investigation conducted by the Director General of Industrial Relations (DGIR) confirmed that the CSEs were not employed in a managerial, executive, confidential or security capacity and this was affirmed by the Minister of Human Resources. The bank challenged the Minister's decision on the basis that he had failed both to disclose the DGIR's report and to consult the Director General of Trade Union (DGTU).

The Court of Appeal reaffirmed the principle that the Minister of Human Resources was under no obligation to give reasons or divulge the DGIR's report. The Court referred to another Court of Appeal decision in *Bank Muamalat Malaysia Bhd v. Menteri Sumber Manusia & Ors*,¹³ which was decided in the same year and supported the same proposition. In this case, the Court of Appeal also decided that there was no need for the Minister to explain why he did not consult the DGTU, as this was not a dispute between ABOM and NUBE. This case highlights the difficulty in challenging a minister's decision by way of judicial review especially when the minister does not need to provide reasons for his or her decision.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

A contract of employment may be made in writing or orally. However, for employment positions governed under the EA, a contract must be in writing if it is for a service for a specified period exceeding one month or for the performance of a specified piece of work where the time reasonably required for completion of the work exceeds one month.¹⁴ A written contract must include a clause setting out the manner in which the contract may be terminated by either party.¹⁵ It must be signed by both parties and may be altered only by mutual consent.

Not all terms of employment are found in an employment contract. Some may be found in an employment handbook, which is usually incorporated by reference in the employment contract.

An employment contract can be for a fixed term, and a genuine fixed-term contract is recognised in Malaysia. However, a court will look at the substance rather than the form of the fixed-term arrangement. A fixed-term contract that has been repeatedly renewed may be regarded as a sham arrangement and may be treated as a permanent contract of employment.

Under the Minimum Retirement Age Act 2012 (MRAA), a fixed-term contract that exceeds the period stipulated in the Schedule to the MRAA can only end when the

¹² [2019] 9 CLJ 52.

¹³ [2019] 6 CLJ 281.

¹⁴ EA, Section 10(1).

¹⁵ *id.*, at Section 10(2).

employee reaches retirement age.¹⁶ Therefore, a fixed-term contract loses its efficacy if it is for a fixed term (inclusive of any extension) that is longer than the period permitted under Paragraphs 1(h) or 1(ha) of the Schedule (Section 2) to the MRAA. In these circumstances, the fixed-term contract in substance becomes a permanent contract, whereby it will only end upon the employee reaching retirement age (which is 60 years).

ii Probationary periods

The law in Malaysia recognises probationary periods. There is no statutory minimum notice of termination for a probationer, and as such, termination is a matter of contractual right. Nevertheless, for employees governed under the EA, when the reason for termination falls within certain categories, such as redundancy or closure of business, there are minimum periods of notice that must be given to the employee.¹⁷ A probationer has a right to lodge a complaint for unfair dismissal under the IRA.

iii Establishing a presence

There is no prohibition against a foreign company hiring employees without being officially registered to conduct business in Malaysia. However, the foreign company itself must not conduct business in Malaysia.¹⁸ Merely hiring an employee may not by itself be regarded as conducting business in Malaysia. If, however, these employees are actively soliciting business in Malaysia, and concluding contracts in Malaysia, there is a risk that the foreign company may be regarded as conducting business in Malaysia.

There is also no prohibition against a foreign company engaging an independent contractor without registering in Malaysia. However, the foreign company must consider whether engaging an independent contractor or an employee may give rise to the foreign company having a permanent establishment (PE) in Malaysia. A foreign company is regarded as having a PE in Malaysia if the independent contractor or employee:

- a* continues supervisory activities in Malaysia in connection with a building or work site or a construction, an installation or an assembly project;
- b* acts on behalf of the foreign company in Malaysia and has the authority to conclude contracts on its behalf and habitually does so, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification; or
- c* maintains a stock of goods in a place in Malaysia from which the independent contractor or employee delivers goods, or regularly fills orders on the company's behalf.

The consequence of having a PE in Malaysia is that income generated by the business will be subject to Malaysian income tax.

If a company hires employees in Malaysia, the employer is obliged to pay benefits due under the following:

- a* an employee provident fund;
- b* SOCSO (social security protection); and
- c* an employment insurance system (EIS).

16 *Wong Mei Yoke v. Tien Wah Press (Malaya) Sdn Bhd* [2018] 1 ILR 20.

17 EA, Section 12(3), Paragraphs (a) to (f) read with Section 12(2), Paragraphs (a) to (c).

18 Companies Act 2016, Section 561.

Income tax will be deducted at source as a monthly tax deduction. In practice, it would be difficult for a foreign company to comply with the above requirements without a locally registered company. Typically, payroll companies will be employed by foreign companies to perform payments of the above statutory contributions and deductions.

V RESTRICTIVE COVENANTS

Under Malaysian law, an agreement in restraint of trade is void and unenforceable pursuant to Section 28 of the Malaysian Contracts Act 1950 (CA). Unlike other common law jurisdictions where an agreement in restraint of trade may be valid depending on the 'reasonableness'¹⁹ of the restraint, in Malaysia, once a clause is found to be an agreement in restraint of trade, it is automatically void regardless of the reasonableness of the restraint.²⁰

The non-enforceability of an agreement in restraint of trade applies only to post-contractual restraint. Therefore, a non-compete restraint that is imposed on an employee during the life of the contract for employment is not a covenant in restraint of trade and is not rendered void under Section 28 of the CA.

While post-termination non-compete clauses are clearly void by reason of Section 28 of the CA, a non-solicitation clause may be upheld if it is regarded as reasonable.²¹

VI WAGES

i Working time

There is no regulated or fixed number of working hours except for employees who are governed by the EA. Under Section 60A of the EA, employees must not be required to work for more than five consecutive hours without a period of leisure of not less than 30 minutes, or for more than eight hours in one day, or spread over a period of more than 10 hours in one day, and for no more than 48 hours in one week. Also no employer is allowed to require any female employee to work in any industrial undertaking between 10pm and 5am, nor work for a day without having had a period of 11 consecutive hours free from such work.²² The DGL has the power to provide a written exemption to any female employee, or classes of female employees, from any restriction in Section 34 of the EA. In practice, these exemptions have been given.²³ There is also a blanket exemption given for all employers provided that certain conditions are met.²⁴

19 Usually, the reasonableness of the restraint will depend on the geographical location of the restraint and the length of the restraint.

20 *Polygram Records Sdn Bhd v. The Search* [1994] 3 MLJ 127 and *Nagadevan Mahalingam v. Millennium Medicare Services* [2011] 4 MLJ 739.

21 *Tint-Shop (M) Sdn Bhd v. Yu Yeing Yin* [2009] 1 LNS 187.

22 EA, Section 34.

23 Employment (Employment of Women) (Shift Workers) Regulations 1958 (revised 1983).

24 Maimunah Aminuddin, *Employment Law Manual for Practitioners*, 2013 CLJ Publications, at pp. 48 and 49.

ii Overtime

An employee is entitled to a minimum overtime rate of one and a half times the hourly rate of pay for work beyond the employee's normal hours of work per day.²⁵ For work carried out in excess of the normal hours of work on a rest day, the employee is entitled to two times the hourly rate of pay.²⁶ For work carried out in excess of the normal hours of work on a public holiday, an EA employee is entitled to three times the hourly rate of pay.²⁷ Employee cannot work more than 104 hours of overtime in one month.²⁸

VII FOREIGN WORKERS

The Immigration Department, as a matter of practice, draws a distinction between 'foreign workers', who are blue-collar workers in manufacturing, construction, plantation, agriculture and services, and 'expatriates', who are white-collar workers. To hire expatriates, an employer must apply for passes, such as an employment pass and a professional visit pass via the Expatriate Services Division website.

As regards the hiring of foreign workers, the employer must apply in advance for Immigration Security Clearance (ISC) at ISC centres in the source countries and for Visa with Reference from the Immigration Department. An employer who employs a foreign worker must furnish the DGL with the particulars of the foreign worker, within 14 days of employment, by forwarding the particulars to the nearest office of the DGL.²⁹ In respect of registration, the employer must prepare and keep one or more registers containing information regarding each foreign worker it employed. There is currently no express limitation on the number of foreign workers that a company may employ but a maximum quota of foreign workers must be obtained by employers and companies from the Ministry of Home Affairs.³⁰

Employers must apply to the Immigration Department for the necessary visa and visit passes for foreign workers. New foreign workers starting work in Malaysia on or after 1 January 2019 will have to be registered directly with SOCSO under the Employment Injury Scheme by their employers. The employer or company is also required to make EIS contributions to the relevant employment insurance fund. This EIS fund provides for a number of benefits, such as re-employment allowance, reduced income allowance, training allowance and job-hunting assistance.

Generally, employers do not have to contribute to an employee provident fund unless the foreign worker elects to contribute. In such a case, the employer's share of the contribution is five ringgit per month. Foreign workers who leave Malaysia permanently may withdraw their contributions when leaving.

Foreign workers are protected under the local employment law. Workers whose wages do not exceed 2,000 ringgit or whose nature of work falls under the First Schedule of the EA are protected by the EA. The EA prescribes certain minimum benefits and rights of an employee. A foreign worker is also protected from unfair dismissal.³¹

25 EA, Section 60A(3)(a).

26 *id.*, at Section 60(3)(c).

27 *id.*, at Section 60D(3)(aa).

28 Employment (Limitation of Overtime Work) Regulations 1980.

29 *id.*, at Section 60K(1).

30 See <https://www.imi.gov.my/index.php/en/foreign-worker.html>.

31 Industrial Relations Act 1967, Section 20(1).

An employer will not be permitted to obtain an employee's bank account information as it is protected by banking secrecy laws.³² Written consent for the disclosure of this type of information is required from the employee for the bank to disclose the information.

See also Section XII regarding data protection and background checks.

VIII GLOBAL POLICIES

There is no express legal requirement for a company to have internal disciplinary rules. Nevertheless, it is good practice to maintain such policies and procedures. An employer has the management prerogative to set down guidelines for the discipline and protection of its employees and to meet its legitimate business interests.³³ Therefore, there is no need for an employer to obtain approval from the employees or representative body for its rules.

An employer is required to investigate a claim by an employee that he or she has been sexually harassed and must inform the complainant within 30 days. If the employer chooses not to investigate, it must provide reasons for that decision. An employer may refuse to investigate if the claim has been previously investigated or if the claim is frivolous or not made in good faith. If the employer is satisfied that a case for sexual harassment has been proven, the employer must take disciplinary action against the accused employee, which may include dismissal, demotion or any other lesser punishment as the employer deems just and fit. If a suspension without wages is imposed, it must not exceed two weeks.

Further, a complainant who is dissatisfied with the refusal of his or her employer to investigate a complaint of sexual harassment may refer the matter to the DGL. The DGL may direct the employer to conduct an inquiry if the DGL thinks the matter warrants it.

Although it is not mandatory for a company to have rules relating to the prevention of corruption, it is highly advisable to do so. Section 17A of the Malaysian Anti-Corruption Commission Act 2009 (the MACC Act), which is due to come into force on 1 June 2020, imposes liability on a commercial organisation if a person associated³⁴ with that commercial organisation is involved in corrupt activities. In this regard, Section 17A(1) of the MACC Act provides that it is a defence for the commercial organisation to prove that it had 'adequate procedures' in place to prevent persons associated with the commercial organisation from undertaking any corrupt activity.

There is no requirement for the rules in this respect to be written in the local language. It is also not a requirement for the rules to be signed by employees; it is sufficient that the rules are brought to the attention of employees.³⁵ In this regard, it is sufficient if the rules are posted on the company's intranet and reference to this is incorporated in the employment contract.³⁶

It is common in Malaysia for disciplinary rules to be set out in full in an employment handbook and incorporated by reference in employment contracts.

32 Financial Services Act 2013, Section 133.

33 *Hamdan bin Ahmad v. U Mobile Sdn Bhd* [2014] 4 ILJ 386.

34 Under Section 17A(6) of the Malaysian Anti-Corruption Commission Act 2009, a person is associated with a commercial organisation if he or she is a director, a partner or an employee of the commercial organisation, or a person who performs services for or on behalf of the commercial organisation (e.g., an independent contractor or an agent).

35 *Zulkifli Abdul Latif v. Sistem Penerbangan Malaysia Berhad* [2006] 3 ILR 1923; *Tan Siang Pin v. IBM Malaysia Sdn Bhd* [2019] 2 ILR 593.

36 *Tan Siang Pin v. IBM Malaysia Sdn Bhd* [2019] 2 ILR 593.

IX PARENTAL LEAVE

A female employee is entitled to 60 days of maternity leave for each and every time she gives birth. A female employee is also entitled to a maternity allowance (which is paid maternity leave) if she fulfils two conditions: (1) she must have no more than five surviving children at the time she gives birth; and (2) she must have worked with the employer for at least 90 days during the nine months before she gives birth and at least one day in the four months before she gives birth.

Save and except for termination on the ground of closure of business, an employer is prohibited from dismissing a female employee during the period she is entitled to maternity leave.³⁷ If an employee remains absent from work after the expiry of her maternity leave because of an illness arising out of her pregnancy and confinement that results in her being unable to work, an employer can only terminate her services if she remains absent for more than 90 days after the expiry of her maternity leave.³⁸

X TRANSLATION

For an employer with employees who are governed by the EA, there is an obligation to maintain one or more registers containing information regarding each of those employees.³⁹ The details must include, among other things, the name, gender and age of the employee, and the terms and conditions of employment, such as rates of pay, allowances, overtime rates, agreed hours of work, annual leave, sick leave, holidays and other benefits.⁴⁰

Employees must have the right to examine the register, which must be maintained and kept in a place where every employee can have access to it. The register must be in the national language (i.e., Malay).⁴¹ Failure to translate any documents as necessary will render the employer subject to a fine.

While there is no express statutory provision stating that a contract of employment must be in Malay, some labour officers take the view that because the register that contains the terms and conditions of employment must be in Malay, it follows that the contract of employment must also be in Malay. Therefore, for employees governed by the EA, it is preferable that their employment contracts are translated into Malay.

XI EMPLOYEE REPRESENTATION

Employees in Malaysia have an unfettered right to join a trade union and this right cannot be restricted by contract.⁴² Before a trade union can represent its employees, however, it must satisfy two requirements: (1) it must be registered under the TUA; and (2) it must be recognised by the employer under the IRA.

Once a trade union is duly registered, it may serve on an employer a claim for recognition. The employer can refuse to recognise the trade union; if it so refuses, the matter will be referred to the DGIR. The DGIR will make enquiries as to the competency of the

37 EA, Section 37(4).

38 *id.*, at Section 42.

39 *id.*, at Section 61(1).

40 Employment Regulations 1957, Regulation 5.

41 *id.*, at Regulation 7.

42 Industrial Relations Act 1967, Section 5.

trade union and to conduct a membership verification. A secret ballot will be carried out to ascertain whether the trade union commands the requisite majority to represent the employees in the establishment. The matter will be referred to the Minister of Human Resources for the Minister to either bestow or not bestow recognition.

When a trade union has been accorded recognition in respect of any worker or class of worker, whether or not by a decision of the Minister of Human Resources, no other trade union shall make any claim for recognition in respect of the same workers or class of workers unless three years have elapsed since the initial recognition, or the original trade union no longer exists.

A trade union representative cannot be dismissed or discriminated against by reason of his or her position as an officer of the trade union.⁴³

XII DATA PROTECTION

The Personal Data Protection Act 2010 (PDPA) seeks to regulate the processing of any information that relates directly or indirectly to an identifiable individual (the data subject), in commercial transactions (personal data) by any party who processes any personal data, or has control over or authorises the processing of any personal data (the data user). An employer would be the data user and an employee would be the data subject.

The PDPA applies to a person's personal data if the person is established in Malaysia and the personal data is processed in Malaysia. The PDPA does not apply to any personal data processed outside Malaysia unless that personal data is intended to be further processed in Malaysia.

i Requirements for registration

The PDPA requires the registration of certain classes of data users, which are described in the Personal Data Protection (Class of Data Users) Order 2013. A data user who belongs to two or more classes of data users must make a separate application for registration for each class to which the data user belongs.

ii Cross-border data transfers

Data users cannot transfer personal data outside Malaysia unless the transfer is to a location specified by the Communications and Multimedia Minister. The Communications and Multimedia Minister has issued a public consultation paper on the Personal Data Protection (Transfer of Personal Data to Places Outside Malaysia) Order 2017, though the Order has yet to be finalised and published in the Official Gazette. Notwithstanding the foregoing, data users may transfer any personal data to a place outside Malaysia under certain conditions, for instance, if an employee has consented to the transfer, the transfer is necessary to conclude a contract between an employee and an employer, or the transfer is for the purpose of any legal proceedings.

⁴³ id., at Section 5, Paragraphs (c) and (d).

iii Sensitive personal data

Sensitive personal data means any personal data consisting of information as to the physical or mental health or condition of a data subject, his or her political opinions, religious beliefs or other beliefs of a similar nature, or the commission or alleged commission of any offence. An example of sensitive personal data is an employee's medical information.

iv Background checks

There is no express prohibition against background checks. In respect of credit checks, the employer may carry out checks on an employee through a licensed credit reporting agency in Malaysia. Nevertheless, credit reporting agencies usually require the consent of employees before divulging any information.

Criminal checks are more difficult to procure, as the cooperation and assistance of the police is required. However, for offences under the MACC Act, an employer or future employer may carry out an initial filter or check on a prospective employee by searching the records of corruption offenders on the MACC website.⁴⁴

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Any termination of employment in Malaysia must be for 'just cause or excuse'.⁴⁵ The following are the commonly recognised categories of just cause or excuse for termination of a contract of employment:

- a* misconduct;
- b* retrenchment;
- c* poor performance;
- d* retirement;
- e* expiry of a genuine fixed-term contract;
- f* resignation; and
- g* by mutual agreement.

In an unfair dismissal case, the burden is on the company to prove that the contract of employment is terminated with just cause or excuse. An employee who believes that he or she has been dismissed without just cause or excuse can make representations in writing to the DGIR to be reinstated to his or her former employment.⁴⁶ These representations may then, if the Minister of Human Resources thinks it appropriate, be referred to an industrial court.⁴⁷

There is no notification requirement for termination of employment in Malaysia. However, for termination by reason of retrenchment or under a voluntary separation scheme, the employer will need to file the requisite PK Forms I to IV at least 30 days before the date

⁴⁴ See www.sprm.gov.my.

⁴⁵ Employment law in Malaysia does not recognise an employer's right to exercise a termination simpliciter, that is to terminate an employment contract by merely giving sufficient notice pursuant to the employment contract.

⁴⁶ Industrial Relations Act 1967, Section 20(1).

⁴⁷ *id.*, at Section 20(3).

of cessation of employment.⁴⁸ Thereafter, the employer will also need to file PK Forms V and VI. There is no duty to notify the trade union of any termination of employment unless it is expressly provided for in the collective agreement.

For termination by reason of misconduct, no notice is required as an employee may be summarily dismissed. However, it is generally accepted practice that this step of summary dismissal is only taken after having conducted an inquiry for the employee to be given a chance to defend himself or herself. The requirement for due inquiry is even more important in terms of EA employees by reason of Section 14(1) of the EA.

If the ground for termination is redundancy or poor performance, the employer should comply with the notice requirement provided for in the contract. The notice may be waived by either party, or the employer may decide to pay salary in lieu of notice.

ii Redundancies

Retrenchment is a term to describe instances where a business entity terminates the services of employees who it considers as surplus and redundant to its business requirement. It is the right and privilege of an employer to reorganise his or her business in any manner he or she sees fit, so long as the procedure is bona fide and does not have any collateral purpose.⁴⁹

Note, however, that an ill-planned retrenchment exercise may be challenged by the employees by way of unfair dismissal representations to the DGIR, which may subsequently be referred for adjudication at an industrial court. In the event that the legality of the retrenchment exercise is challenged, the onus is on the company or employer to show that there was a real redundancy situation and the retrenchment is justified to safeguard its interest.⁵⁰ The relevant questions for consideration are as follows: (1) Is there a real redundancy situation leading to the retrenchment exercise; and, if so (2) was the consequential retrenchment exercise made in compliance or in conformity with accepted standards of procedure?

There is no legal difference between multiple redundancies, collective dismissal or reduction in force. However, practically, if there are multiple redundancies, or there is a collective dismissal or reduction in force, it would be more difficult for an employee to contend that he or she was negatively affected as the retrenchment is affecting a number of employees within the organisation, not just one employee.

A company should try to comply with the Code of Conduct for Industrial Harmony (the Code), which is relevant in a redundancy situations.⁵¹ Although the Code does not have the force of law, the industrial courts frequently use it as a reference guide when deciding whether or not an employee has been properly retrenched using fair procedures. The Code sets out the steps that should be taken by an employer in circumstances where redundancy is likely to occur, such as to limit recruitment, to restrict overtime work, to restrict work on

48 EA, Section 63(1) read with Regulation 4 of the Employment Retrenchment Notification Regulations 2004 and First Schedule thereof. Failure to comply with this requirement is an offence punishable under EA, Section 99A and shall be liable to a fine not exceeding 10,000 ringgit.

49 *Harris Solid State (M) Sdn Bhd v. Bruno Gentil Pereira* [1996] 4 CLJ 747, CA. The usual justifications for retrenchment include business loss, closure of department or business, reduced turnover, adverse business conditions and escalating expenditures.

50 *Gold Coin Feedmills (Malaysia) Sdn Bhd v. En Ibrahim bin Mohd Shah & 2 Ors* (Award 657 of 2001).

51 The Code of Conduct for Industrial Harmony [the Code] is a collaboration between the Ministry of Human Resources, the Malaysian Council of Employer's Organisations and the Malaysian Trades Union Congress, with the aim of providing principles and guidelines to employers and workers on the practice of industrial relations to achieve greater industrial harmony.

the weekly day of rest, to restrict the number of shifts or days worked per week, to restrict the number of hours of work and to retrain or transfer employees to other departments or types of work.⁵²

A company is required to give sufficient notice of termination to its employees as provided for in the employment contract. For employees governed by the EA, however, an employer is obliged to give a minimum notice of termination (as set forth in the EA)⁵³ to employees before the date of retrenchment. Either party may waive the right to the requisite notice. If notice is not given, however, the employer would be liable to pay employees an indemnity for the lack of notice equivalent to the notice period.

There is also a requirement to pay retrenchment benefits for employees governed by the EA provided they have worked for a continuous period of 12 months or more.⁵⁴

For unionised employees, an employer must consider the terms of the collective agreement and determine whether there are clauses dealing with retrenchment or termination benefits. If so, the employer should pay in accordance with the terms of the collective agreement.

The employer should also consider the terms of the contract of employment and the employment handbook and determine whether retrenchment or termination benefits are provided under the contract or handbook. If so, the employer should pay in accordance with the terms of the contract or the handbook if the terms are more favourable than the statutory termination benefits.

Although a genuine retrenchment is recognised by the industrial courts as a valid ground for termination of employment, some companies prefer to offer a voluntary separation scheme (VSS) to reduce the number of employees. By its nature, a VSS is on a voluntary basis, offered at the discretion of the employer to the employees, who may choose to accept or reject the VSS. It is common for companies to offer a VSS before a retrenchment exercise.

Occasionally, instead of conducting a VSS, a company might decide to enter into a one-to-one negotiation with each employee to agree to a mutual separation agreement. This is also an acceptable manner to end a contract of employment. However, the company must be cautious so as not to be accused of coercing or forcing the employee to sign the mutual separation agreement.

XIV TRANSFER OF BUSINESS

While statutory termination benefits are normally payable to employees governed by the EA by reason of redundancy, this is not necessarily the case if the termination of employment is by reason of a change of business ownership. Termination benefits are not payable if, within seven days of the change of ownership, the transferee offers to continue to employ the employee on terms and conditions of employment that are no less favourable than those under which the employee has been employed before the change occurs, and the employee unreasonably refuses that offer.⁵⁵

52 The Code, Article 20.

53 EA, Section 12(2) read with Section 12(3).

54 Employment (Termination and Lay-Off Benefits) Regulations 1980, Regulation 6.

55 *id.*, at Regulation 8.

XV OUTLOOK

With effect from 1 February 2020, the minimum wage has been increased to 1,200 ringgit per month for employees who work in 40 city or municipal council areas specified in the First Schedule to the Minimum Wages Order 2020 PU(A) 5/2020.

Employers in Malaysia will need to prepare for the implementation of the amendments to the EA. The proposed amendments are, among other things, to expressly prohibit employers from discriminating against jobseekers or current employees on the grounds of gender, religion, race, disability, language, marital status or pregnancy, reducing working hours, and to require employers to have a written code of prevention of sexual harassment at the place of employment. Employers must not engage in discriminatory conduct.

With regard to the TUA, one of the proposed amendments is to revoke the DGTU's discretion to refuse the registration of a trade union unless there are compelling reasons to do so. Trade unions are no longer restricted to representing members of a particular trade, establishment, occupation or industry.

There are also significant amendments to the IRA. If these are passed, the DGIR will be required to refer complaints of unfair dismissal to an industrial court for an award in the event that parties are unable to reach a settlement and the referral does not involve any exercise of discretion on the part of the DGIR. This means that all cases that cannot be resolved at a conciliation stage will automatically be referred to an industrial court for adjudication. This may lead to a flood of cases being referred to the industrial courts, including frivolous claims.

Another significant proposed amendment to the IRA is with regard to the industrial courts' powers to continue with legal proceedings notwithstanding the death of a worker. Currently, a claim for unfair dismissal under the IRA is regarded as a personal claim and the cause of action abates upon the death of the employee. Thus, the deceased employee's claim under the IRA comes to an end and the personal representative or next of kin of the employee cannot continue with the action on behalf of the deceased employee's estate. Once the IRA has been amended, the industrial court will have the power to order for proceedings to continue and even award compensation to a deceased employee's next of kin.

The proposed amendments to the IRA include a right of appeal against an industrial court decision to a high court. With this amendment, any party has 14 days from the date of receipt of the award to appeal to a high court. The procedure for the appeal will follow the Rules of Court 2012 and will be treated as an appeal from a sessions court to a high court, with necessary modifications. This may render it no longer necessary for litigants to resort to the cumbersome method of judicial review as a primary form of challenge to an industrial court award.

MEXICO

Jorge Mondragón and Luis Enrique Cervantes¹

I INTRODUCTION

i Legal framework

Employment relationships in Mexico are governed primarily by the Mexican Constitution, in which the guidelines for employment are established. The Constitution was enacted in 1917 and has been amended several times. In labour matters, the Constitution provides a response to workers' demands for better terms and conditions of employment – given the abuse they were subjected to by employers before the enactment of the Constitution – and thus seeks to balance production and capital forces with regard to the rights and conditions of the working class by setting forth minimum statutory benefits and conditions within employment relationships. Article 123 of the Constitution governs everything relating to employment relationships in Mexico and is divided into two main sections: Section A, for private employment relationships (between private employers and their employees), and Section B, for relationships between government entities and their employees.

The Mexican Federal Labour Law (FLL) regulates the labour and employment principles set forth by the Constitution, covering in detail all aspects relating to individual and collective employment relationships within the whole territory of Mexico: from definitions of basic concepts of labour and employment, types of contracts, statutory benefits and compensation, health and safety, and training and instruction regulations, and profit-sharing obligations, to procedural and judicial matters, such as labour claims, strikes and all types of labour and employment proceedings (judicial and administrative).

Since its inception, labour legislation has undergone two major amendments and some other minor reforms. As a result of amendments to the FLL, the trends in labour and employment law have resulted in new methods of handling and managing employment and industrial relationships between employers, employees and labour authorities. These amendments are the most substantial changes that have been made to the statute since it was integrally amended in 1970, and they came more than a year after a fundamental reform was made to the Constitution with regard to the protection of human rights.

Both the Constitution and the FLL divide labour matters into two jurisdictions – federal and local – depending on the industry and activities in which the employer participates. The federal government, through its conflict resolution bodies (federal conciliation and

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arbitration boards) and through its administrative labour authority (the Ministry of Labour and Social Welfare), is in charge of resolving controversies relating to the following industry sectors or activities:

- a* textiles;
- b* electricals;
- c* film industry;
- d* rubber;
- e* sugar;
- f* mining;
- g* metallurgical and iron and steel, covering the exploitation of basic minerals, the benefit and smelting of these, and extraction of metallic iron and steel, in all their forms, and lamination;
- h* hydrocarbons;
- i* petrochemicals;
- j* cement industry;
- k* lime industry;
- l* automotive, including mechanical or electrical parts;
- m* chemical, including pharmaceutical and medicines;
- n* cellulose and paper;
- o* oil and vegetable fats;
- p* food-producing industry, covering exclusively the manufacture of packed, canned or bottled food;
- q* manufacture of canned or bottled beverages;
- r* rail industry;
- s* basic lumber industry, covering manufacturing in sawmills or of plywood;
- t* glass industry, exclusively the manufacture of flat, plain and cut glass, glass containers;
- u* tobacco industry, covering the benefits of the manufacture of tobacco products; and
- v* banking.

Application of the law with regard to any other industry branch or activity not listed above shall be the responsibility of local (state) governments and administrations through their own labour and employment judicial and administrative bodies. Nonetheless, these bodies must also abide by the FLL in matters involving labour and employment.

In addition, the Social Security Law governs social security, nursery, medical and retirement mandatory benefits granted by the social security system to all employees. Employers are obliged to register themselves and their personnel with the Mexican Social Security Institute, and both parties are obliged to make the applicable social security contributions for employees' protection (employees' contributions are withheld from their salary and paid by the employer on their behalf to the Mexican Social Security Institute). The Law also outlines the rights and access of employees and employers to social security benefits, which encompass the following insurance or cover in favour of employees: occupational risk; health and maternity; disability and life; retirement pensions; and day care.

The Law for the National Fund for the Housing of Employees, the Law of the Institute of the National Fund for Worker's Expenditures and the Law for the Retirement Savings System are other pieces of social security legislation governing different and more specific aspects of additional social security and welfare benefits in Mexico, such as loans granted to employees for buying consumer goods and services, and loans for the acquisition, remodelling or extension of real estate property.

ii Judicial and administrative authorities

The authorities in charge of solving any employment-related conflicts are the labour boards; however, in accordance with the amendments made to the FLL on 1 May 2019, which were published in the Official Gazette of the Federation, the labour boards will cease to exist and will be replaced by labour courts, which will be dependent on the judicial system.² Moreover, according to the fifth and sixth transitory articles of the reforms to the FLL, local and federal labour courts shall start operations within the next three and four years, respectively, following the entry into force of the decree.

Currently, there are both federal and local labour boards, depending on the industry sector, covering the activities of the companies involved in trials. These boards are tripartite, being composed of one representative of the employers, one representative of the employees and one representative of the government, to ensure there is balance in every employment relationship, as mentioned in Section I.i, and they depend directly on the local or federal government, respectively. Any constitutional remedy proceeding (*amparo*) filed by the parties on trial against any resolution issued by a local or federal labour board will be resolved by the federal courts or by the Supreme Court of Justice (if the case fulfils the proper requirements), which depend directly on the federal judicial power.

In addition to the labour boards, the Ministry of Labour and Social Welfare, at a federal level, and the local ministries of labour, are the authorities in charge of the enforcement of employment regulations within their respective jurisdictions.

II YEAR IN REVIEW

As mentioned in Section I, throughout its history, labour legislation has undergone major amendments and reforms to adapt to the constant evolutions in employment relationships. Some interesting new interpretations and concepts have recently come to light. The following is a summary of the main topics regarding Mexican labour and employment law.

i Reform to the FLL

One of the major amendments to labour legislation occurred on 1 May 2019, as result of the 2017 amendments to Article 123 of the Constitution; the main aspects of these reforms are the following:

- a* The creation of labour courts to replace the conciliation and arbitration boards, delegating the administration of labour justice to federal and local court systems, thereby making the switch from the executive branch to the judicial branch.
- b* The creation of ‘conciliation centres’ in federal and local jurisdictions, which entails a mandatory stage of the judicial procedure for employers and employees that occurs before the formal initiation of the employment litigation.
- c* Collective bargaining agreements (CBAs), internal labour regulations and the procedures for their execution, filing, registration, conciliation and litigation will be concentrated in a newly created decentralised government body, which will depend on the executive branch and will be in charge of the aforementioned collective matters, as well as the conciliation centres.

² The labour boards will remain as such until May 2022 with respect to local conciliation and arbitration boards and until May 2023 in relation to federal conciliation and arbitration boards.

- d* For requesting the execution of a CBA along with a call to strike, the union must evidence that it represents and has affiliated at least 30 per cent of the employees working at the company in union-type positions (e.g., blue-collar workers) and to whom the CBA will apply.
- e* The obligation of the employer to implement, in agreement with the workers, a protocol to prevent discrimination based on gender and attention to violence and harassment or sexual harassment cases, and to eradicate forced and child labour.

ii Mexican Official Standard on Occupational Health and Safety

The Mexican Official Standard NOM-035-STPS-2018 (NOM-035) on psychosocial risk factors in the workplace – identification, analysis and prevention – entered into force on 23 October 2019. NOM-035 aims to identify, analyse and prevent psychosocial risk factors in the workplace that can cause anxiety disorders, severe stress disorders or adjustment disorders, arising from the nature of the work that employees carry out, among other matters. The risk factors set forth by NOM-035, which must be identified and analysed by companies, are: conditions within the work environment; workload; lack of control over work; work shifts and rotation of shifts; interference with work – family relationships; negative leadership and relationships; and violence in the workplace. NOM-035 entails the following obligations for companies with 16 or more employees: identify and analyse the risk factors; carry out a psychological evaluation and medical examination of an employee who presents symptoms of any alteration to his or her health; and create a programme to prevent and control risk factors, which may include a written prevention policy that promotes awareness and social support, and a means for employees to file complaints. For the aforementioned purposes, employers have to prepare and implement the corresponding surveys and other related documents to identify and mitigate said psychosocial risk factors.

iii Amendments to the FLL in relation to outsourcing employment structures

Currently there are several amendment bill proposals relating to the FLL in discussion in Congress, which aim to establish more rigorous conditions for valid outsourcing structures. The reason behind such amendment bills seeks that all companies comply with all their corresponding employment and social security obligations, including the mandatory payment of employees' profit sharing (i.e., PTU).

The amendment bills will aim to strengthen the fact that outsourcing employment structures shall only be valid if the contracting party agrees the provision of specialised services with the contractor, which do not constitute activities pertaining to the contracting party's corporate purposes; otherwise, outsourcing structures might be challenged and may ultimately be considered to be illegal and, therefore, economic penalties and potential criminal actions might be imposed on the parties.

In that regard, Congress has invoked an open parliament to perform a more rigorous discussion between the business sector and unions, which is likely to take place within the first months of 2020.

III SIGNIFICANT CASES

On 2 July 2019, a Decree amending the Social Security Law was published in the Official Gazette of the Federation. The amendments set forth the obligation for employers to enrol domestic workers with the Mexican Social Security Institute. Furthermore, the reforms to

the FLL emphasise the obligation on employers to grant domestic workers all applicable employment benefits, such as vacation, rest days, a Christmas bonus, social security and other related benefits.

On 12 July 2019, the Supreme Court of Justice issued a judgment that establishes the obligation on Mexican courts to take account of relevant criteria relating to a person's gender, which implies that if in a labour trial an employer argues that a woman employee terminated her employment relationship by tendering her resignation, but the employee demonstrates that the termination occurred while she was on pregnancy leave, the employer shall be required to prove that the resignation was tendered freely and spontaneously, and with the corresponding elements of conviction.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

According to the FLL, entering into an employment contract is mandatory, particularly because it allows both parties to set in writing the terms and conditions of the employment relationship. However, the FLL provides that rendering personal and subordinated services in favour of another person or corporate entity without entering into an employment contract has the same effect as if the parties had executed a contract, and that the omission in the execution of an employment contract is the direct responsibility of the employer.

Under the current amended labour statute, there are four types of contracts for hiring personnel. A standard contract is entered into for an indefinite term (which is the general rule), based on the principle of employment stability that prohibits employers from laying off their workforce without sufficient grounds (based on the causes for termination set forth in the FLL).

Contracts for a fixed term or for a specific task may be entered into when the needs of the employer are in accordance with such an engagement. To enter into such an agreement validly, the employer must justify the reason for hiring an employee for a fixed term or for a certain undertaking, and hence the contract will terminate automatically at the end of its term (fixed-term employment) or at the completion of the undertaking (employment for a specific task). If the work or activities under which the employee was originally hired for a fixed term or specific task continue after the end of the contract, then the employment relationship will be automatically extended and consequently deemed to be for an indefinite term.

Article 25 of the FLL provides the statutory content required for every employment contract, namely:

- a* name, nationality, age, gender, marital status, personal identity number, taxpayer registration number, and addresses of both the employee and the employer;
- b* whether the employment relationship is seasonal, or for a specific task, for a fixed term, for initial training or for an indefinite term, and whether the contract is subject to a trial period;
- c* the service or services to be provided, which shall be stated in as detailed a manner as possible;
- d* the place or places where the work shall be rendered;
- e* the duration of the work shift;
- f* the form and amount of the salary;
- g* the day and place of salary payment;

- b* indication that the employee will be trained or instructed in terms of the plans and programmes established by the company, pursuant to provisions of the FLL;
- i* any other term and work condition, such as days of rest, holiday and any additional agreement reached between employee and employer; and
- j* the designation of beneficiaries for the payment of accrued and uncollected salaries and benefits upon the death of the employee or those generated by his or her death, or disappearance arising from a criminal act.

In addition, although they are not mandatory, it is advisable to detail any benefit paid to employees as part of a compensation package, a work-for-hire provision and a provision regarding information privacy and personal data protection, as well as confidentiality of the information provided to or generated by employees.

Execution of the employment contract shall be on the starting date; however, if parties are not in a position to enter into the contract on this date, it is possible to do so later, but the contract would have to include the starting date considered for the purposes of seniority.

Employers are not entitled to change the terms of employment unilaterally. If parties wish to amend or change the employment contract or its terms, it would be necessary to execute an amendment to the contract. However, the FLL prohibits employees from waiving any of their acquired rights, thus a provision stating lower employment conditions or benefits than those they were receiving prior to the amendment will be considered null and void as a matter of law. Therefore, amendments or changes to the employment contract would only be valid if better terms and conditions for employees are foreseen or if benefits above the minimum required by the FLL are first liquidated (paid) with the written consent of the employee through the payment of the corresponding severance.

In all employment relationships, and regardless of whether the employer is a Mexican national or entity, minimum statutory benefits set forth in the FLL must be granted and paid to employees, such as paid vacations, a vacation bonus and a Christmas bonus. The law foresees minimum standard benefits that cannot be waived, and employers cannot grant anything below those minimum standards.

Vacations are granted according to employees' seniority: for the first year of service, employees are entitled to a minimum of six days' vacation; for the second year of service, they are entitled to eight days; for the third year, they are entitled to 10 days; and for the fourth year, they are entitled to 12 days. From the fifth year onwards, two days are added every five years. In addition to this, employees are entitled to a minimum of 25 per cent of the salary earned during their holidays as a vacation bonus.

Employees are also entitled to a Christmas bonus equivalent to at least 15 days' salary, which must be paid no later than 20 December each year. The purpose of this bonus is to cover all expenses required for all the year-end festivities.

In respect of taxes, employers are bound to withhold and deliver to the tax authority any and all applicable taxes over salaries and benefits granted to their employees. Also, employers are bound to calculate and pay the corresponding social security contributions.

ii Probationary periods

Two types of probationary periods are provided for in the FLL:

- a* Initial training period: allows employers to train their employees for three months (six months for high-level executives). At the end of the training period, if the employer considers that the employee has not demonstrated sufficient competence to carry

out the job for which he or she was hired, the contract shall terminate naturally without any liability for the employer other than paying the corresponding salaries and benefits accrued during the training period. For the aforementioned purposes, at the end of the training period, the employer must verify that the employee did not demonstrate sufficient competence for a permanent engagement and that it heeded the recommendation of the company's training commission.

- b* Trial period: this addition to temporary (provided the contract is for a term of at least 180 days) and permanent contracts of employment allows companies to assess their new personnel for 30 days (or up to 180 days for employees in high-level executive, managerial and supervisory positions, and for employees with a bachelor's or technical degree), which cannot be extended. If at the end of the trial period, the company determines that the employee does not meet the necessary requirements and knowledge to perform the job, the contract may be terminated without any liability for the employer, except for the payment of the corresponding salaries and benefits accrued during the trial period. Further, if the employer wishes to terminate the employment relationship without incurring any liability, it must first take into consideration the opinion issued by the company's training commission. In this regard, employers must include objective elements in a contract to assess the abilities of the employee.

The FLL specifically provides that employers cannot execute subsequent training or trial period contracts with the same employee; they are valid once only. When the term of the trial or training period has ended, the contract and the employment relationship will continue and be considered as indefinite, as a matter of law, unless the employer deems that the employee does not meet the requirements for the position, in which case the employment relationship may be terminated.

iii Establishing a presence

Foreign companies can hire Mexican employees without being incorporated under Mexican laws but, as with every other employer, they have to comply with all the obligations relating to employment, such as labour, social security and taxes, which makes it necessary for foreign employers to register with the tax and social security authorities and to obtain the corresponding tax identity number. The foregoing implies a practical problem for foreign employers, as to obtain the aforementioned registrations, they need to set up a Mexican branch or incorporate a subsidiary. However, foreign employers who hire Mexican employees from abroad could fall under the permanent establishment concept for fiscal purposes, which means that the activities performed by the hired employee in Mexico could be deemed to be part of a permanent establishment of the foreign employer and, as such, all income or revenue generated by the employee would be subject to corporate tax in Mexico.

However, foreign companies exploring the possibility of doing business in Mexico without having to incorporate, enrol with the social security system as an employer and obtain a tax identity number, can resort to an outsourcing agency or a payroll company through the execution of a services agreement in exchange for an agreed fee or consideration with the corresponding vendor. This has become a common business practice in Mexico and provides companies with the possibility of transferring employment and social security obligations to a third party, with the obligation of paying the cost of the employment plus the corresponding fee for the services provided by the agency.

Nevertheless, and as outlined above, the FLL now provides certain limitations and requirements for outsourcing engagements, specifically for beneficiaries of the outsourced services not qualifying as employers and, as such, having to fulfil all employer obligations towards the outsourced employees assigned to them. In this regard, it is of paramount importance to structure each outsourcing engagement in terms that comply with the applicable provisions set forth in the FLL as well as to negotiate the outsourcing agreements in such terms that the outsourcing agencies assume the liabilities that were imposed on the beneficiaries under the amendments, since this could be material and, in principle, should be obligations that would have to be borne by the vendors or personnel providers as part of their services and in consideration of the fees paid to them by the clients.

In connection with independent contractors, a foreign company doing business in Mexico without being registered or incorporated under Mexican law can engage an independent contractor by entering into a services agreement with the contractor, in which it is specified that the contractor would act as an independent contractor not subordinated to the foreign entity. As such, the contractor would have to invoice the foreign entity for the services rendered.

V RESTRICTIVE COVENANTS

Article 5 of the Constitution states that no individual shall be kept from engaging in any profession, industry, commerce or job that best suits him or her, as long as it is lawful. Therefore, from a strict labour law perspective, non-compete and non-solicitation clauses and agreements are generally not enforceable in Mexico, as the authorities cannot restrict individuals in exercising the aforementioned right. However, if such clauses and agreements are executed or established to be in force for the duration of an employment relationship, then the non-compete and non-solicitation clause or agreement would be enforceable in Mexico.

Notwithstanding the foregoing, some employers have adopted the practice of executing agreements (of a civil nature) with their employees under which the employees assume covenants (i.e., non-compete, non-solicitation or non-disparagement) tied or linked to a liquidated damages provision that would have to be paid by the employee in the event of a breach of the covenant, in which case the employee is not restrained from performing the restricted activity but, in the event of a breach, could be held liable for the payment of the established amount. The foregoing could be a deterrent, dissuading employees from competing or soliciting against their former employers; however, these clauses could also be held null and void if related directly to the employment, or if submitted to and resolved by a labour board or labour federal court. Another approach is paying the former employee an agreed amount for not competing, which must be paid at the end of the non-compete period, since it is the best way to encourage the former employee not to engage in competitive activities during the agreed period.

Note that non-compete provisions are governed and interpreted through the judgments issued by Mexican courts and not by the laws. Furthermore, these provisions will be valid as long as they refer to a specific period, a specific geographical zone (within the Mexican territory) and an amount to be paid for the compliance of the provisions.

VI WAGES

i Working time

The FLL states that for every six days worked, employees shall be entitled to one day of rest. There are three types of work shifts, as follows:

- a* eight hours a day for daytime work (48 hours a week);
- b* seven hours for night-time work (42 hours a week); and
- c* seven-and-a-half hours for a mixed work shift (45 hours a week).

The FLL also provides that employees are entitled to at least 30 minutes of rest or to have a meal during their shift, and this time shall be considered as part of their working day. It will also be considered as part of the employees' working day if they are not allowed to leave the workplace during this time. However, there is new case law stating that the rest or meal period must be at least 60 minutes, which cannot be considered part of the continuous work shift. While the FLL has not yet been updated to reflect this change, employers must comply with the new requirements. This means modifying work shifts or running the risk of operating work shifts that surpass the limits established by law, as a 30-minute extension per day would now be considered working time.

Even though the statutory daily work shift is a maximum of eight working hours for a daytime shift, the law permits both parties to distribute the maximum of 48 hours in such a manner that allows employees to enjoy an extra day of rest. Thus, employees would be able to work for more than eight hours per day as long as they do not exceed the statutory maximum of 48 hours in a week.

Any time worked in excess of the mandatory 48 weekly hours will be deemed overtime and, as such, employers shall pay for any overtime worked.

The FLL foresees seven working hours for employees hired for night work. Nevertheless, there is the possibility of both contracting parties agreeing on the distribution of shifts to allow the employees to have an extra day of rest. In this case, the maximum weekly working hours for the night shift is 42, and any time worked in excess of that will be deemed overtime.

The FLL also states the working hours for the three work shifts:

- a* daytime shift: between 6am and 8pm;
- b* night shift: between 8pm and 6am the next day; and
- c* mixed work shift: covers periods of both day and night shifts, as long as the night-time period is less than three-and-a-half hours. If an employee working a mixed shift works more than these three-and-a-half hours of night work, the shift shall be deemed a night shift and subject to the statutory maximum of 42 working hours a week.

ii Overtime

Pursuant to the FLL, all employees are entitled to overtime pay if they have worked for more than the statutory hours of the work shift for which they were hired. It also provides that an employee may not work more than three extra hours daily and for no more than three days per week (a total of nine legal extra hours per week). The employer must pay the employee double salary for the hours of legal overtime worked and for any extra time worked in excess of nine hours during one week, the employee will receive triple salary, despite the fact that employers could be sanctioned by the administrative labour authorities for having their employees work for more than nine overtime hours per week or more than three times per week.

Even though, as a matter of law, all employees are entitled to overtime pay, it has become customary for employees holding managerial positions not to claim any overtime pay, because it is implied that their salary already includes and covers the extra time they need to work in view of the activities their job entails. Nevertheless, this should not be understood to mean they are not entitled to overtime pay, because it is possible under the FLL to claim overtime pay with the labour boards. However, material or manufacturing (blue-collar) workers commonly receive overtime pay whenever they work overtime, up to the maximum overtime allowed by the FLL and the corresponding salary for the extra hours worked.

Overtime compensation is paid with the salary and any other benefits to which the employee is entitled for the particular period. Employers have to be vigilant about paying overtime in a timely manner; otherwise, employees are entitled to claim for outstanding pay before the labour boards.

VII FOREIGN WORKERS

Pursuant to the FLL, a company's workforce should include at least 90 per cent Mexican workers but the remaining 10 per cent of positions can be filled by foreign workers. Technical and professional workers must be Mexican, except in those cases where the activities to be performed are so specialised that no Mexican workers with the required skills are available. This requirement does not apply to directors and general managers. Another exception to the rule is that physicians, railway employees, employees on any Mexican vessel and civil aviation crews must be Mexican nationals.

Foreign employees have the same labour, social security and tax rights and obligations as Mexican employees. Employers have to register foreign employees with the Social Security Institute and deduct from their salaries the corresponding amounts for social security contributions and taxes in the same terms as Mexican employees. Foreign employees must also file their tax returns according to the applicable laws.

For a foreign national to work in Mexico, the corresponding working visa must be obtained from the National Immigration Institute. For these purposes, the employer must be registered as an employer with the Institute.

Pursuant to the FLL, foreign employees shall earn the same salary and benefits as Mexican nationals who perform the same activities in the same position and work shift, and under the same efficiency conditions. Finally, Mexican nationals must be favoured over foreign employees when applying for a promotion under equal circumstances.

VIII GLOBAL POLICIES

The FLL requires that any disciplinary measure has to be set forth in the company's internal work regulations, which have to be drafted and signed by a joint commission, comprising an equal number of representatives of both the employees and the employer. For the regulations to be enforceable, the law requires that they be submitted to the labour boards for approval and registration. If employers enforce any disciplinary measures foreseen in the regulations without them being registered with the labour board, these disciplinary measures will be deemed illegal and the employees may be entitled to file a claim with the labour boards against the measures.

The regulations have to be written in Spanish and must contain the requirements provided by the FLL and the disciplinary measures, which cannot exceed those foreseen in the

statute. A reference to compliance with the regulations must be included in the employment contract to make employees aware of the regulations. As mandated by law, employers have to make sure employees know and are fully aware of the content of the regulations by making them as visible as possible, either on a bulletin board or intranet, or posting them in a visible place in the workplace or by giving a copy to each employee.

In addition to the aforementioned, it has become a common practice in Mexico for foreign companies to set up their own handbooks and global policies. It is not required to register these documents with the labour boards. In this regard they would not be deemed enforceable over the internal work regulations and their validity would be contingent on not contravening the FLL and the internal work regulations. It is advisable that, for a company to be able to enforce the global policies, the internal work regulations should incorporate them, by reference, as part of the regulations and guidelines that must be observed by employees.

IX PARENTAL LEAVE

The FLL establishes that employers are obliged to grant working men paternity leave of five working days with pay, following the birth of a child or the adoption of an infant. Mexican labour legislation also sets forth that, in the case of adoption, woman employees are entitled to six weeks of paid leave, which shall be enjoyed immediately after they receive the infant.

Further, the FLL provides that woman employees shall enjoy six weeks of rest before their confinement and six weeks of rest after delivery. At the express request of the woman employee, and prior written authorisation from the doctor of the corresponding social security institution or, where appropriate, the health service granted by the employer, taking into account the opinion of the employer and the nature of the work performed, a woman employee may transfer up to four of the six weeks of rest before the birth after it. In the event that a child is born with any type of disability or requires hospital medical attention, the rest period may be extended up to eight weeks after delivery, upon presentation of the corresponding medical certificate.

X TRANSLATION

The FLL does not state that employment documents have to be translated into any particular language. However, given that Spanish is the official language in Mexico, it is always advisable to have the documents drawn up in Spanish. Nevertheless, if a company requires a document to be written in an employee's native language it can be done, but it is advisable to have another copy of the contract or document in Spanish.

The sole exception to this is the requirement to accompany any document written in a foreign language that must be submitted in a labour trial with its translation in Spanish. If the party that submitted the document in the trial does not provide the corresponding translation, the labour board may reject the admission of the document.

XI EMPLOYEE REPRESENTATION

The FLL does not foresee the formation of works councils. Nevertheless, it imposes the obligation on both employers and employees to form different commissions to deal with particular issues in the workplace, such as training, health and safety, drafting the internal work regulations and profit-sharing payments.

In addition to this, the Constitution and the FLL guarantee the right of employees to form or join a union for representing and defending their interests before the employers and to have the union execute a CBA with the employer for the purpose of setting up the terms and conditions of the employment of unionised employees. CBAs are to be negotiated and restated each year with regard to the salaries of unionised employees, and every two years in connection with the employment terms and conditions for these employees. The most important right, and leverage, for unions forcing employers to negotiate the CBAs, and to comply with their terms, is the right to call for a strike and to stop activities until their demands are resolved.

XII DATA PROTECTION

On 5 July 2010, the federal government published the Federal Law on Protection of Personal Data Held by Private Parties (DPL) in the Official Gazette of the Federation, which has been in force since 6 July 2010 and is intended to protect personal data held by private parties – either companies or individuals – to regulate the lawful, informed and controlled treatment of personal data, with the objective of ensuring the right to privacy, and the right of informational self-determination.

To clarify the content of the DPL, on 21 December 2011, the federal government published in the Official Gazette of the Federation the Regulations of the DPL (the Regulations), which have been in force since 22 December 2011. Among other issues, the Regulations establish in detail the conditions for the compliance and enforcement of certain provisions of the DPL, providing legal certainty to its regulated subjects.

The DPL and the Regulations protect personal data that is processed by private parties at a national level; per the DPL, ‘processing’ entails the obtention, access, administration, use, disposition, disclosure and storage of personal data through any means available, as well as the national and cross-border transfer thereof. Both regulatory instruments directly affect employees (data subjects), either by strengthening their right to privacy and data protection in relation to their employer and its subcontractors, or by establishing duties with which they must comply to preserve the protection of the personal data that is processed in the course of their activities.

Furthermore, employers need to fulfil diverse obligations to comply with the provisions of the DPL and its Regulations. First and foremost, when processing personal data, employers must abide by the principles of lawfulness, fidelity, fairness, consent, notice, quality, proportionality, purpose and accountability, and with the duties of confidentiality and security.

In Mexico, consent is the only lawful basis for the processing of personal data by private parties, with certain exceptions set forth by law. This means that, for the collection and processing of personal data, the general rule is that the data subject must (1) be informed by means of a privacy notice³ about the personal data to be processed, the purposes for the processing, the personal data transfers and the means to exercise their access, rectification, cancellation and opposition rights, among other specific information established in the DPL

3 On 17 January 2013, the Ministry of Economy published in the Official Gazette of the Federation, with the collaboration of the National Institute for Transparency, Access to Information and Personal Data Protection, the Privacy Notice Guidelines, which provide guidelines in connection with the content and scope of privacy notices, establishing in detail the elements that a privacy notice must include, the forms of privacy notices and the ways to inform them to data subjects, among other things.

and its Regulations, and (2) consent to the privacy notice. Data subjects can provide their consent explicitly (i.e., verbally, in writing, electronically or through any other technological means available) or tacitly, if a data subject has 'access' to a privacy notice and expresses no opposition to it. To process financial personal data or any other data relating to patrimony, controllers require a data subject's explicit consent; and when processing sensitive personal data, controllers require the explicit and written consent of the data subject, through handwritten, digital signature or other identification procedure. All other personal data may be processed with the data subject's tacit consent.

In line with the exceptions set forth in the DPL, the data subject's consent is not required for the processing of personal data if it is necessary to comply with obligations derived from a legal relationship, such as a labour contract, entered into by the data subject (employee) and the data controller (employer). Candidates for employment do not fall within this exception as they do not have any legal relationship with the employer, so their consent is required if their personal data is to be transferred to a third party.

Under Article 48 of the Regulations, the employer is compelled to implement at least the following measures to comply with the accountability principle:

- a* developing binding and enforceable privacy policies and programmes within the organisation;
- b* implementing a training, update and awareness programme for staff in respect of the personal data protection obligations;
- c* establishing a system for internal supervision and monitoring, verification or external audits to verify compliance with privacy policies;
- d* allocating resources for the implementation of privacy programmes and policies;
- e* establishing a procedure to deal with the risks to personal data protection when implementing new products, services, technologies and business models, and to mitigate them;
- f* reviewing the security policies and programmes periodically to determine whether any modifications required;
- g* establishing procedures to receive and respond to queries and complaints from the data subjects;
- h* providing mechanisms for the enforcement of privacy policies and programmes, as well as for sanctioning lack of compliance;
- i* establishing measures for the protection of personal data, that is to say, a set of technical and administrative actions that guarantee the controller's compliance with the principles and obligations set forth by the DPL and its Regulations; and
- j* establishing measures for the traceability of personal data, that is to say, actions, measures and technical procedures that allow for the tracking of personal data while it is being processed.

In line with these measures, privacy regulations should be considered in a company's internal labour regulations, so as to enforce sanctions for infringement.

Article 19 of the DPL and Chapter III of the Regulations also provide that controllers must implement and maintain administrative, technical and physical security measures to protect personal data against damage, loss, alteration, destruction, use, access or unauthorised use. Employers, as controllers, must consider the following actions, among others, when implementing and maintaining security measures: (1) create an inventory of the processed personal data, which, according to non-binding recommendations by the Mexican data

protection agency, should identify the nature of the personal data and its 'flow'; (2) identify the functions and obligations of the employees who process personal data; (3) carry out a risk analysis and a gap analysis; and (4) establish and implement any missing security measures.

i Requirements for registration

Under the terms of the DPL and its Regulations, there is no obligation to register an employer, in its role as data controller, with the Mexican data protection agency (the National Institute for Transparency, Access to Information and Personal Data Protection (INAI)) or any other government body.

ii Cross-border data transfers

Under the terms of the DPL and its Regulations, employers, as controllers, are not compelled to register their data transfers with the INAI or any other government agency and, as a general rule, data transfers are subject to the consent of the employees as data subjects, as explained hereinabove, and other formalisation requirements. However, Article 37 of the DPL establishes a few exceptions in which the employee's consent is not required for a data transfer, which include whether the transfer is:

- a* necessary for preventive treatment or medical diagnosis, the delivery of healthcare, medical treatment or the management of health services;
- b* to a controlling company, subsidiary or affiliate under the common control of the controller, or to a parent company or a company of the same corporate group as the controller, operating under the same internal processes and policies;
- c* necessary under a contract that has been concluded, or a contract to be concluded by the employer and a third party, in the interests of the employee; or
- d* necessary for the maintenance or fulfilment of a legal relationship between the company and the employee.

Neither the DPL nor the Regulations require safe harbour registration for data transfers or for carrying out an onward transfer.

iii Sensitive and financial personal data

Under the terms of Section VI of Article 3 of the DPL, sensitive personal data is defined as that which pertains to the data subject's most intimate sphere, or personal data that, if misused, could lead to discrimination or cause a serious risk to the data subject. In particular, personal data is considered to be sensitive if it relates to racial or ethnic origin, current or future health status, genetic information, religious, philosophical and moral beliefs, union membership, political opinions and sexual preference.

Financial and economic data is not considered to be sensitive personal data; however, as explained hereinabove, the processing of this type of data requires the express consent of the data subject, except as provided by law.

The processing of sensitive data is more stringent than for non-sensitive data. Pursuant to Article 16 of the DPL, when sensitive personal data is collected, the privacy notice must address explicitly that the controller collects and processes this type of data. Furthermore, Article 9 of the DPL states that no databases that contain sensitive data should be created without justifying their creation for legitimate purposes, concrete and consistent actions, or explicit purposes pursued by the controller.

If infringements to the DPL are committed when sensitive data is being processed, fines can be increased to twice the established amounts, under the terms of Section IV of Article 64 of the DPL.

iv Background checks

Under the DPL and its Regulations, background checks, credit checks and criminal record checks are allowed if the candidate for employment has granted his or her express and written consent, as such records should be considered as sensitive data.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

It is not easy to terminate an employment relationship in Mexico owing to the principle of ‘employment stability’ governing employment relationships. This principle shall be understood to mean that no employment relationship can be terminated at an employer’s will unless it is for one of the causes for termination foreseen in Article 47 of the FLL. Regardless of these causes, the contracts of employees with more than 20 years of seniority can only be terminated when the causes are particularly serious (although the FLL does not provide what can be classed as serious), or when they have repeatedly violated their obligations or committed different violations.

There is also cause for termination in respect of trusted employees,⁴ particularly when the employee commits any act that leads to the employer losing confidence or trust in him or her. Notwithstanding the foregoing, it is typically that employers link a loss of trust with any other cause or causes in the terms of Article 47 of the FLL.

Before the amendments to the FLL published on 1 May 2019, when lawfully terminating an employee’s contract under a statutory cause, the employer would provide him or her with a written notice stating the cause, or causes, for termination and the dates on which the actions took place, or file it with the corresponding labour boards within five days of the termination date for said authority to deliver it to the employee. In this case, the employer has the burden of proof regarding the causes for termination stated in the corresponding notice; however, with the amendments to the law, the obligation to provide written notice will no longer be applicable, since it will be sufficient that the employer proves before the labour authorities that it terminated the employment relationship for a statutory cause, under the terms of the FLL.

When terminating an employee’s contract with sufficient cause, the employer has to pay only the accrued salaries, benefits and seniority premium.⁵ If the employer fails to prove the causes for termination or the delivery of the termination notice to the employee, the termination shall be deemed unjustified as a matter of law regardless of the cause, and the employer must reinstate the employee in his or her role or tender severance pay, which shall consist of: three months of daily integrated salary,⁶ 20 days of daily integrated salary for each

4 A trusted employee is any individual who performs activities of management, oversight and inspection within the workplace.

5 Equivalent to 12 days of salary per year of service or proportional part thereof, with a cap of twice the daily minimum wage applicable in the geographical zone where the services were rendered.

6 According to the Federal Labour Law, an integrated salary comprises any and all entitlements or payments in cash or in kind granted to the employee for the previous 12 months.

complete year of service, a seniority premium, and accrued salaries and benefits owed to the employee, such as vacations, vacation premium, Christmas bonus, among others (such as a saving fund, food allowance, gas allowance, punctuality bonus, attendance bonus).

As proving the causes for termination and the delivery of the termination notice is difficult, it has become common practice for employers to negotiate settlements with their employees, which can be documented by either:

- a* having the employee address a unilateral communication to the employer advising of his or her voluntary separation from the job (i.e., a resignation letter) and a signed document that evidences the breakdown of the benefits paid to and received by the employee (i.e., release receipt); or
- b* executing an employment termination agreement; this document can be ratified by the parties with the corresponding labour board; however, it is not mandatory.

The option under point (b) provides the parties with added legal security since the document issued as a result of ratifying the termination agreement with the relevant authority has the effect of an official ruling.

ii Redundancies

Whenever an employer wishes to make an employee redundant, it has to follow the same process of dismissal or termination without cause as described in Section XIII.i. There is no need to notify the government or the employee's union about the redundancy (unless otherwise provided in the CBA), and no social plan, offers of alternative employment or notifications to the employees are required. When a case of redundancy arises, the common practice is to offer the employee full statutory severance pay in exchange for the execution by the employee of the corresponding termination documents (termination agreement or resignation letter and release receipt).

For collective redundancies, based on the principle of employment stability governing all employment relations in Mexico, the FLL foresees this kind of redundancy in the following situations:

- a* force majeure or act of God not attributable to the employer or, if the employer is an individual, his or her physical or mental disability, producing the necessary, immediate and direct termination of the employment relationship;
- b* unaffordability of the business;
- c* exhaustion of the subject matter of the extraction industry;
- d* causes foreseen in Article 38 of the FLL (mining-related causes); and
- e* a legally declared bankruptcy of the employer, if the authorities or creditors resolve the definitive closure of the company or a definitive reduction of the company's activities.

Carrying forward any collective redundancy would have to be performed through the corresponding special proceeding provided by the FLL and the severance payment would be limited to three months' integrated salary, omitting the payment 20 days of integrated salary per year of service. However, it is important to take into consideration that any collective redundancy can be carried forward outside the special proceeding provided by the FLL, in which case a full severance payment must be paid, including the three months' integrated salary, 20 days' integrated salary per year of service and a seniority premium.

When redundancies are the result of the implementation of new production processes involving new automated technologies or the installation of new machinery in the workplace, employees are entitled to four months' integrated salary plus 20 days' integrated salary per year of service, and the salaries and benefits accrued.

XIV TRANSFER OF BUSINESS

Mexico does not have business transfer laws that protect employees affected by a merger, acquisition or outsourcing transaction as in other jurisdictions. However, the FLL contains a provision that regulates the transfer of employees from one employer to another as a result of a corporate buyout or restructuring of the business. This transfer must take place on a date agreed by the parties (employers) and it has been held recently that the transfer of employees shall take place whenever the whole or the main part of the business is also transferred. This transfer is known as an 'employer substitution', which is a legal proceeding whereby an employer assumes any and all obligations of the former employer of an individual or group of individuals without terminating, suspending or modifying the terms of the original labour relationship.

Under an employer substitution, the existing employment relationships, and the terms and conditions attached to them (salaries, benefits, work shift, etc.) cannot be reduced or changed unilaterally by the new employer. If they are somehow affected, employees are legally entitled to claim via the labour boards the granting or observance of their corresponding salaries, seniority, benefits and conditions, or even to terminate the labour relationship with cause and with responsibility being on the former and the current employer.

Employment substitutions do not require the employee's or, if applicable, the union's consent to be effective and do not trigger any severance payments (unless there is any change in control agreements executed with some employees). The law requires employers to deliver a substitution notice to the employees, and to the Mexican Social Security Institute. (Note that the Institute will automatically advise the National Fund for Workers' Housing of the substitution.)

The FLL and the Social Security Law provide that the former (substituted) employer is jointly liable with the new employer (substitute) for six months for any employment and social security obligation existing before the effective date of the substitution.

Finally, the FLL contains a provision that forbids the transfer of employees in a deliberate manner with the purpose of reducing their labour rights. In such a case, the employer would be subject to relevant fines and potential labour claims against it.

XV OUTLOOK

There has been considerable progress in labour matters during the past year, specifically relating to new outsourcing and tax regulations, the constitutional reform of labour legislation, and the changes to the labour boards as a consequence of this reform, providing more flexibility to employers in the context of a historically overprotective law. Hot topics for 2020 are likely to be the following: the transition process from the current administration of justice model to the new model as a result of the reform to the labour legislation; more stringent requirements for valid outsourcing structures; and the commencement of operations by the Federal Conciliation and Labour Registration Centre.

NETHERLANDS

Dirk Jan Rutgers, Inge de Laat, Stephanie Dekker, Annemarth Hiebendaal and Annemeijne Zwager¹

I INTRODUCTION

i Sources of employment law

Employment is regulated in the Netherlands by three main sources: legislation, collective bargaining agreements (CBAs) and individual employment contracts.

The most important employment law regulations are set forth in Book 7 of the Dutch Civil Code. Various aspects of Dutch employment law are also governed in a number of specific acts, such as the Works Council Act and the Collective Dismissal Act.

International law, in particular European Community law, is a significant influence on Dutch employment law. Under Article 153 of the Treaty on the Functioning of the European Union, the European Union issues Directives that impose minimum requirements concerning terms of employment, working conditions, and informing and consulting employees, which are generally incorporated into the local statutes. If they so wish, EU Member States may offer better protection to the employees than the Directives require.

A CBA is an agreement between one or more employers or employers' organisations and one or more employees' organisations that mainly or exclusively regulates terms of employment that must be observed in employment contracts. It regulates many different aspects of the employment relationship between an employer and its employees. As a general rule, in the event of inconsistencies between the provisions of an applicable CBA and the provisions of an employment contract, the CBA will prevail.

Generally, an individual contract between an employee and an employer cannot deviate from statutory employment law and CBAs to the detriment of the employee. Thus, the freedom of contract is limited. An employment contract may also regulate aspects of the employment relationship that are governed by other sources of law, provided that the agreed clauses are more favourable for the employee.

ii Relevant courts and government authorities

There are three distinct courts in the Netherlands for civil and commercial matters: district courts, including the sub-district courts, courts of appeal and the Supreme Court. In the public sector, individual labour disputes are regarded as administrative disputes and are consequently handled by a single judge in the administrative law sector of the court. In cases involving civil servants and social security issues, appeals are taken to a special appeals tribunal, the Central Appeals Tribunal.

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The Employee Insurance Agency (UWV)² is the government authority responsible for administering employee benefits (such as social security and welfare) and helping unemployed people to find work. In addition, the UWV determines eligibility for work permits and processes requests for permission to terminate employment contracts on economic grounds or on the grounds of long-term disability (more than 104 weeks).

The Data Protection Authority³ oversees compliance with laws relating to the protection of personal data.

The Netherlands Institute for Human Rights⁴ explains, monitors and protects human rights; promotes respect for human rights (including equal treatment) in practice, policy and legislation; and increases the awareness of human rights in the Netherlands.

II YEAR IN REVIEW

Most of 2019 was characterised by the introduction of the Balanced Labour Market Act and the Civil Servants Normalisation of Legal Status Act, which both have entered into force as of 1 January 2020.

The Balanced Labour Market Act introduced measures that have significantly changed Dutch employment laws, the most important of which are as follows:

- a* A request to terminate an employment contract submitted to the competent court must be based on a specific dismissal ground, which must be fully substantiated. A ‘cumulative dismissal ground’ has been introduced by the Act, which can be used for dismissal in cases where the facts and circumstances are not sufficient to fully substantiate one of the specific dismissal grounds. If the court rescinds the employment contract on the basis of the cumulative dismissal ground, it may award the employee an additional compensation of up to half the transition payment on top of the regular statutory transition payment.
- b* The calculation of the statutory transition payment has been amended.
- c* Legislation on consecutive fixed-term employment contracts has been extended. In the new situation, employers cannot offer their employees more than three consecutive fixed-term employment contracts over a period of three years, without the most recent contract being converted into an open-ended contract, unless that three-year period has been interrupted for six months or longer. This means that consecutive fixed-term employment contracts can be agreed with employees for up to three years rather than two years (as was the case before the introduction of the Balanced Labour Markets Act) before they are converted into open-ended employment contracts.

Under the Civil Servants Normalisation of Legal Status Act, the legal status of civil servants is made largely equivalent to that of private sector employees. Certain groups of civil servants are excluded, namely political officials, the judiciary, military officials (including civilian personnel), notaries, bailiffs and police officers. The Central and Local Government Personnel Act will continue to apply to this group of civil servants. One consequence of this change and the new Civil Servants Normalisation of Legal Status Act is that the majority of civil servants are now subject to civil law instead of the rules of administrative law.

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4 Studie- en Informatiecentrum Mensenrechten.

III SIGNIFICANT CASES

On 8 November 2019, the Supreme Court provided (more) clarity on the admissibility of dormant employment contracts after a request for a preliminary ruling in that regard was made. Under previous lower case law, keeping employees on a dormant status did not constitute a breach of law. This resulted in a tendency for employers not to terminate the dormant employment contracts for employees with a long-term disability. However, the Supreme Court ruled that employers are, in principle, obliged, based on good employment practices, to terminate dormant employment by mutual consent and by granting a statutory transition payment at the employee's request. This could be different when an employer has a reasonable interest in not terminating the dormant employment (e.g., when it is reasonably expected that the employee is able to reintegrate in the near future). The Supreme Court also pointed out that, following the introduction of the Compensatory Scheme Act, financial grounds to not agree with a termination at the employee's request to prevent having to pay a statutory transition payment are no longer deemed valid to keep an employment relationship dormant.

On 25 January 2019, the Supreme Court issued a ruling that will affect cases in which a lower court has wrongfully terminated an employment contract, which has then been ordered to reinstate it by a court of appeal. The Supreme Court ruled that as a court of appeal cannot reverse or annul a lower court's termination of an employment contract, the statutory transition payment granted to the employee by the lower court remains due by the employer. This means that if a court of appeal finds that an employee should repay the statutory transition payment, it must issue a specific ruling in that regard. Furthermore, when an employment contract has been already discontinued for more than six months, the court of appeal is able to determine that the total length of the previous, wrongfully terminated employment contract should be taken into account in relation to the employee's seniority for the calculation of a potential future statutory transition payment if the employment contract is terminated a second time. Finally, the Supreme Court argued that reinstatement of the employment contract may take place by a court decision without any further action required by the employer.

On 18 January 2019, the Supreme Court rendered an important judgment regarding the question of when an employer has to reassign an employee to another suitable position. According to the Supreme Court, the conclusive factor is whether reassignment can reasonably be required from the employer in the given circumstances. This means that an individual test of reasonableness applies, contrary to an obligation to achieve the employee's reassignment as such. The Supreme Court ruled that if there is no alternative suitable position within an enterprise or group of enterprises, this may be a valid ground for dismissal (h-ground). This ruling means that for the question as to whether reassignment of an employee can reasonably be required from an employer, the employer has a certain degree of discretion. In addition, employees said to be 'on the bench' (i.e., those whose temporary assignment has ended, without there being another position available) could be dismissed based on the h-ground.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The law does not prescribe that employment contracts take a specific form; they may be either written or oral and can be agreed for a fixed term or an indeterminate period of time. This means that parties can, in principle, start an employment relationship without signing an

employment contract. However, within one month of commencement of the employment, the employer is obliged to provide the employee with a written or electronic statement listing the following employment details:

- a* the names and addresses of the parties;
- b* the place where the work will be performed;
- c* the position of the employee or the nature of the work;
- d* the date of commencement of employment;
- e* if the contract is concluded for a fixed term, the duration of the contract;
- f* the holiday entitlement or the manner in which holiday entitlement is calculated;
- g* remuneration and the periodic frequency of payment;
- h* the usual number of hours to be worked daily or weekly;
- i* whether the employee will join a pension plan;
- j* any applicable CBA or scheme made by or on behalf of a competent authority;
- k* whether the employment contract is a secondment contract as defined in Section 690 of Book 7 of the Dutch Civil Code; and
- l* if the employee will work outside the Netherlands for a period in excess of one month, more information is required.

A non-compete clause, a probationary period and a unilateral amendment clause must be formalised in writing in order to be valid.

The employment contract or terms of employment can be amended with the employee's consent. The employer may unilaterally amend the contract only in certain circumstances. If the employment contract contains a unilateral amendment clause, this could facilitate a unilateral amendment, although to be able to implement an amendment, it must outweigh the employee's interest in keeping the terms of employment unchanged. If the parties have not agreed on a unilateral amendment clause, an amendment could be based on the obligation to be a good employer or employee, or on the principle of reasonableness and fairness.

ii Probationary periods

Probationary periods are only allowed in employment contracts with a duration of more than six months; thus, probationary periods in employment contracts with a term of six months or less are null and void. For the remainder, employers and employees are free to agree on a probationary period, as long as it is agreed in writing. The permissible duration of a probationary period depends on the duration of the employment contract. For example, the probationary period in employment contracts with a duration of less than two years may not be more than one month; the probationary period for employment contracts for two years or more may be two months at most.

If a probationary period is agreed in violation of the rules, it will be null and void. During the probationary period, either party may terminate the employment contract with immediate effect without notice and without stating the reasons for termination.

iii Establishing a presence

Foreign companies can hire employees in the Netherlands without being officially registered in the country, although they may be required to register with the Dutch tax authorities if Dutch social security contributions are due.

Under certain circumstances, a foreign company may be required to register with the Dutch tax authorities, or may do so voluntarily, as a withholding agent. Registration is

mandatory if a foreign company has a permanent establishment (PE) in the Netherlands. A PE is defined as a fixed place of business in the Netherlands through which the business of an enterprise is wholly or partly carried on. In principle, if a Dutch employee of a foreign company acts on behalf of that company, is authorised to conclude contracts in the Netherlands in the name of the foreign company and habitually exercises that right, then the foreign company is deemed to have a PE with respect to any activities undertaken by that person (permanent representative). Furthermore, a PE is deemed to exist if the foreign company makes employees available on the Dutch labour market or if the employee works on or above the Dutch part of the continental shelf for a consecutive period of at least 30 days.

If employees are hired through an agency or another third party, no registration will be required, provided that the agency or third party qualifies as an employer or a withholding agent.

A foreign company can engage an independent contractor without being officially registered, although it should be carefully checked whether the tax authorities consider that relationship to be a *de facto* employment relationship. If an employment relationship is deemed to exist, that will result in a withholding obligation for the foreign company (see above). A company is required to determine itself whether it has a withholding obligation for wage tax and social security contributions in relation to independent contractors. However, the Dutch tax authorities will enforce the current policy regarding the use of independent contractors, in principle only in cases involving deliberate fraud or deception, or after having provided directions to the relevant parties that have not been observed.

Companies must pay their employees a statutory minimum wage. The amount of the minimum wage depends on the employee's age.

All employees are entitled to a statutory minimum amount of holiday, which is calculated by multiplying by four the number of hours they work per week. For people in full-time employment, this equates to 20 days, which is in addition to public holidays. Furthermore, employers must pay all employees a statutory holiday allowance of 8 per cent of the employee's gross annual salary, which may be included in an employee's salary provided that it is agreed in writing and the employee concerned earns more than three times the minimum wage.

V RESTRICTIVE COVENANTS

A non-compete clause can, in principle, only be agreed to in writing in an open-ended employment contract and if the contract is concluded with adult employees. An exception to this rule is made for fixed-term employment contracts if it appears from a written statement included in the contract that the non-compete clause has been included by reason of substantial business interests. This necessity must exist not only when the employment contract is concluded, but also if and when the employer enforces the non-compete clause. A court may decide whether a non-compete clause is legally valid and should remain in force in its original form. It is ultimately up to the court to limit, or even wholly or partially annul, a non-compete clause if the employee's interest in having a free choice of work prevails over the interests that the employer has sought to protect by the clause.

A generally accepted term for a non-compete clause is one year. The parties can agree that a penalty will be forfeited if the obligations arising from a non-compete clause are not fulfilled. An employer cannot rely on a non-compete clause in the case of serious imputable acts or omissions on the part of the employer.

If the employer terminates an open-ended employment contract during the probationary period, a non-compete clause can only be enforced if the employer substantiates its major business interests in writing to the employee.

VI WAGES

i Working time

Under the Working Hours Act, employees are permitted to work a maximum of 12 hours per day or 60 hours per week, although any given working week may not exceed an average of 48 hours over a 16-week period, or an average of 55 hours over a four-week period. However, it is possible to deviate from the latter requirement in a CBA. Generally, employees must have 11 hours of rest each day, which may be brought back to no fewer than eight hours, and 36 consecutive hours of rest once every week or 72 hours every two weeks.

Night work is permitted subject to a maximum of 10 hours per shift, which may be extended by two hours for a maximum of five times per fortnight and 22 times per year. After an extended night shift, employees should get a minimum of 12 hours rest. In each period of 16 weeks, an employee can work a maximum of 36 night shifts that end after 2am. If a shift ends after 2am, employees may not, in principle, work for the next 14 hours. In the case of 16 night shifts in 16 consecutive weeks, employees may not more than 40 hours a week.

ii Overtime

Overtime pay is not regulated. The question of whether pay is due for overtime or if a threshold applies depends on the contractual arrangements between the parties, or in the CBA if one is in place. In most cases, the applicable CBA will contain rules stating when overtime must be paid, for example by means of extra salary payments.

Similarly, there are no statutory rates for overtime pay. The maximum working hours mentioned in Section VI.i also govern the maximum amount of overtime.

VII FOREIGN WORKERS

Employers are not required to keep records of foreign workers. However, they are obliged to verify the authenticity of their workers' identification documents and must keep copies on file for each employee. Copies of these documents must be kept for a minimum of five years after the calendar year the employment was terminated. The law does not limit the number of foreign workers in a workplace or company.

Under the Employment of Foreigners Act, both a work permit and a residence permit are required for workers from outside the European Union, the European Economic Area (EEA) or Switzerland. These permits are issued by the Immigration and Naturalisation Service, in some cases based on advice obtained from the UWV. Employers must apply for these permits. As a rule, an employer will be granted a permit only if he or she proves that no European Union, EEA or Swiss workers are available for the job. Workers from outside the European Union, EEA or Switzerland who have legally worked in the Netherlands for at least five years no longer need a work permit.

When a work permit and residence permit has been approved, the foreign worker must obtain a temporary residence permit (MVV) before travelling to the Netherlands. Citizens of a number of countries (Australia, Canada, Japan, Monaco, New Zealand, South Korea, the

United States and Vatican City) are exempt from this MVV requirement. After the foreign worker has travelled to the Netherlands with an MVV, the work permit and residence permit are granted automatically.

A work permit and a residence permit are required for a stay of more than 90 days in the Netherlands. Shorter work assignments can be covered by a work permit, combined with a Schengen visa (unless the applicant is from a visa waiver country). Generally, the holder of a residence permit is under the same obligations as Dutch nationals (i.e., social security contributions and customs duties). If a foreign worker is subject to Dutch taxes or social security contributions, the employer will generally be obliged to withhold taxes and contributions and pay these amounts to the tax authorities. Since 1 January 2019, there is a distinction between Dutch workers and foreign workers regarding tax credits. Only a foreign worker from the European Union, EEA, Switzerland, or from special municipalities Bonaire, St Eustatius and Saba, who is taxed for at least 90 per cent in the Netherlands, is entitled to the same tax credits as a Dutch worker.

If a citizen of another country comes to work in the Netherlands, he or she may be liable for extra costs, known as extraterritorial costs. The employer may grant the employee a free (untaxed) reimbursement of the extraterritorial costs that the employee incurs. The employer may also provide the employee with 30 per cent of his or her wage, including reimbursement, tax free; this is known as the 30 per cent facility. For this, it is not necessary to prove that expenses have been incurred. To make use of this facility, permission is needed from the tax and customs administration and the employer and employee should submit an application. The employee is eligible for this allowance if a number of conditions are met, but – since 1 January 2019 – only for a maximum of five years.

Residence permits are issued for the period of the work permit. Foreign workers become eligible for a permanent residence permit if the Netherlands has been their principal country of residence for five years, if they work regularly and if they earn sufficient income. Since 1 January 2010, all foreign workers are required to pass an integration test to be eligible for a permanent residence permit.

The most common permit for highly skilled workers is the knowledge migrant ruling permit (KMR), which is a combined work and residence permit. The only requirement to obtain a KMR permit is that the employee must earn a salary of at least €4,500 gross per month, exclusive of 8 per cent statutory holiday allowance or, if the employee is not yet 30 years old, at least €3,299 gross per month.⁵ Furthermore, the employer must have obtained recognised sponsor status from the Immigration and Naturalisation Service.

Since 2016, foreign workers who are transferred to the Netherlands as intra-corporate transferees and who fall under the scope of the Intra-corporate Transferees Directive (Directive 2014/66/EU), must apply for an Intra-corporate Transferees (ICT) permit. The Directive applies to employees who:

- a* are not a national of Switzerland, Turkey or a country within the European Union or the EEA;
- b* perform work as a manager, specialist or trainee;
- c* have an employment contract with an undertaking established outside the European Union;
- d* are transferred to a group member within the Netherlands; and
- e* live outside the Netherlands at the time of submitting the application.

⁵ The quoted monthly salaries are those applicable for 2019.

The requirements for an ICT permit are largely the same as for a KMR permit, although the salary thresholds are applied slightly less strictly. An ICT permit is valid for a maximum of three years (for trainees a maximum of one year), after which it can be converted into a KMR permit, regardless of whether the contract is transferred to the host entity. However, the salary thresholds will be applied strictly.

VIII GLOBAL POLICIES

An employer may choose to adopt a global policy or code of conduct, but is generally not required to do so. Notwithstanding the lack of a formal requirement, many companies, in both the public and private sectors, have opted to issue codes of ethics or conduct that identify the principles by which employees are expected to conduct themselves. Doing so is not only a way of attempting to ensure that their employees will act in an honest and ethical matter, but can also help to defend against an action for improper conduct. If the company can point to the existence of, and internal adherence to, a well-drafted code of conduct, it may assist the company in demonstrating that unethical conduct ran counter to the company's directives and operating culture. Although difficult to generalise because the sector or industry in which the company operates will influence the substance of its code of conduct, the following topics are often included:

- a* compliance with laws and regulations;
- b* preventing conflicts of interests;
- c* attention to people and the environment;
- d* fairness in financial reporting;
- e* protecting the company's assets; and
- f* commitments relating to human rights, freedom of association, elimination of forced or child labour, and elimination of discrimination and harassment.

Some companies have extended the application of a code of conduct to their interaction with suppliers.

Codes of conduct do not have to be written in Dutch and employees do not have to confirm their acceptance and compliance with the code. The only requirement is that companies must ensure that the employees who are bound by the code understand its contents. However, the company's position will improve if its employees acknowledge in writing that they have received and will comply with the code of conduct. Most companies will include such acknowledgements in employment agreements with their employees. Some companies require their employees to acknowledge receipt and understanding of the code, including its updates, each year.

IX PARENTAL LEAVE

The Work and Care Act provides that all employees (male and female and regardless of the number of working hours per week) may take unpaid parental leave for up to 26 times their working hours per week when they have or care for a child under eight years of age. A multiple birth or adoption of more than one child at the same time, gives the right to full parental leave in relation to each of the children. At the end of the period of parental leave, the employee should return to his or her original number of working hours. Except when the employer has a substantial ground to refuse, the employee is entitled to determine the

specifics of his or her parental leave (one day per week, one day per month, a continuous period, etc.). A request to take parental leave must be made in writing at least two months in advance.

Within four weeks of childbirth, an employee who is the partner of a woman who has given birth is entitled to paid leave equivalent to the number of working hours in the partner's standard working week. With effect from July 2020, additional birth leave will be introduced, based on which an employee has the option to take additional leave of up to five weeks within the six months following childbirth. During this leave, the employee will receive up to 70 per cent of the maximum daily wage set by the UWV.

X TRANSLATION

The law does not contain any statutory provisions that prescribe the language in which employment-related documents, such as job offers, employment contracts, confidentiality agreements and restrictive covenants, must be drafted. However, the employee must be able to understand the contents of these documents and employers should cooperate with an employee's request to have the documents translated. It is advisable that employers translate the employment documents for a non-skilled employee into that employee's native language. Documents not drafted in Dutch are often drafted in English.

XI EMPLOYEE REPRESENTATION

Workers have freedom of association and representation, based on the European Social Charter and the Dutch Constitution. Under the Dutch Works Council Act, workers can furthermore be represented by a works council or an employee representative body. Moreover, employees may be represented by trade unions, of which membership is voluntary. A worker must submit an application to a trade union to become a member.

i Works council

A company that employs 50 or more employees must establish a works council, which represents the employees of the company in relation to the company's management. If a company does not fulfil the obligation to create a works council where required, any interested party can ask the court to order the company to establish one.

To represent a company's employees as well as possible, a works council has various rights and obligations, including the right:

- a* to be consulted on important decisions by the company on financial, economic and organisational matters;
- b* to approve regulations concerning the social policy pursued by the company; and
- c* to be consulted about the appointment and dismissal of members of the company's managing board.

If management violates these rights, the works council may seek redress in court.

Works councils consist of between five and 25 members, depending on the number of persons employed. The election procedure is established in the Works Council Act. The membership term is three years, unless the works council itself determines that the term will be two or four years. Members of the works council are protected against dismissal and discrimination.

Companies must give the members of their works council a specified number of hours to meet and discuss works council matters during working hours, for which they will receive full pay.

Companies that employ between 10 and 50 employees may be under an obligation to establish an employee representative body, rather than a works council.

ii Trade unions

A trade union represents the interests of individual employees and groups of employees and of other members. In practice, this means that the work of trade unions predominantly involves representing the collective interests of employees in a particular industry or sector. This includes:

- a* assisting in the negotiations about the collective terms of employment in connection with the formation of CBAs;
- b* drafting redundancy or social plans; and
- c* providing guidance in the event of forced redundancy in organisations.

CBAs dominate at industry level. Negotiations normally take place between the trade union and a company (if a CBA is in place) or the trade union and the employers' association (if a single industry-wide CBA is in place). The main purpose of CBAs is to set fixed wages. They also cover issues such as working hours, holiday entitlement, pensions and social matters. At the company level, the employer's representatives negotiate directly with the workers' representatives.

XII DATA PROTECTION

i Requirements for registration

The General Data Protection Regulation⁶ (GDPR) applies to the processing of personal data. The GDPR is accompanied by the General Data Protection Regulation (Implementation) Act.

When employers process personal data in an employment context, they will – as a main rule – act as a controller within the meaning of the GDPR. A controller is the party that determines the purposes and means of the processing activity.

The controller needs to comply with certain principles when processing personal data. Personal data shall be:

- a* processed lawfully, fairly and in a transparent manner;
- b* collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes;
- c* accurate and kept up to date;
- d* not be stored for any longer than is necessary to achieve the purposes for which the data are collected and subsequently used; and
- e* processed in a manner that secures the appropriate security of the personal data.

Personal data may be processed only if the processing is necessary in connection with the performance of the employment contract with the employee, or the controller can rely on

⁶ Regulation (EU) 2016/679.

another lawful basis for processing set out in the GDPR. As a general rule, employers cannot process the personal data of job applicants or employees on the basis of their implied consent because of their dependency on the employer.

Under the GDPR, a controller shall maintain a record of processing. This internal documentation obligation does not apply to companies or organisations employing fewer than 250 persons, unless 'the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data . . . or personal data relating to criminal convictions and offences'. Employers will regularly process employees' personal data in the context of their human resources and payroll administration, and the management of their daily business operations. The above-mentioned derogation does not apply to these non-occasional processing activities.

Small and medium-sized enterprises will need to maintain a record of these processing activities. The record must include:

- a* the name and contact details of the controller and (where applicable) the name and contact details of any joint controller, the controller's representative and the controller's data protection officer;
- b* a list of the purposes of the processing;
- c* the categories of data subjects and the various types of categories of personal data that are processed;
- d* the categories of recipients to whom personal data will be disclosed;
- e* whether the personal data will be sent to countries outside the European Union; and
- f* where possible, the retention periods that apply and the security measures that have been taken.

The controller needs to make the record available to the supervisory authority on request.

The GDPR requires controllers to implement appropriate data protection policies when this is proportionate in relation to their processing activities. Even when the implementation of these policies is not strictly required by the GDPR, an employer will usually implement them as part of its data protection compliance programme and its efforts to document and demonstrate GDPR compliance.

As set out above, the controller must implement appropriate technical and organisational measures to protect personal data against loss and any form of unlawful processing. These measures shall guarantee an appropriate level of security, taking into account the risks associated with the processing and the nature of the personal data to be protected. The measures must also aim to prevent any unnecessary collection or further processing of personal data.

In the event of a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data, the controller shall notify the supervisory authority about the breach within 72 hours of becoming aware of it, unless the breach is unlikely to result in a risk to the rights and freedom of natural persons. However, if the breach is likely to result in a high risk to the rights and freedom of natural persons, the controller shall also notify the breach to the data subject without undue delay.

The controller shall provide data subjects, such as job applicants and employees, with information in clear and plain language, about the processing of their personal data. This information must include, among other things, the identity and contact details of the controller, the contact details of the data protection officer (if applicable), the purposes of the processing of the personal data, the recipients of the personal data, the applicable retention periods and the data subjects' rights.

In principle, the data subjects have a right of access to their personal data. Consequently, data subjects may ask, at reasonable intervals, whether personal data relating to them is processed and, if so, the controller shall provide a copy of their personal data and information about the processing. Furthermore, data subjects can, under certain circumstances, request an employer to rectify, supplement or erase personal data, to restrict the processing of their personal data or can object to certain processing of personal data. In specific cases, data subjects also have a right to data portability. The data subject rights set out above are not absolute and restrictions may apply, for example where this is necessary to protect the rights and freedom of others. The data subject also has the right to lodge a complaint with a supervisory authority.

The Dutch Data Protection Authority supervises compliance with legislation on the use of personal data.

ii Cross-border data transfers

Personal data may not be transferred to countries outside the European Union, unless the receiving country guarantees an adequate level of protection. This also applies to transfers of personal data within a group of companies. The European Commission (EC) has decided that the following countries provide an adequate level of protection: Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland and Uruguay. The countries belonging to the EEA also are deemed to guarantee an adequate level of protection.

On 12 July 2016, the EC adopted the EU–US Privacy Shield adequacy decision, which became operational on 1 August 2016. Therefore personal data may be transferred to organisations in the United States that are certified under the Privacy Shield as having an appropriate level of protection (for the duration of the certification).

In the absence of an adequacy decision, personal data may also be transferred to third countries if appropriate safeguards are implemented, such as approved binding corporate rules or approved standard contractual clauses, or if one of the exceptions of Article 49 of the GDPR applies.

iii Sensitive data

The processing of special category personal data (such as data regarding race or ethnic origin, political opinions, religion or philosophical beliefs, membership of a union, genetic or biometric identification data (for identification purposes), health or sexual preferences) is, in principle, prohibited. The same applies to personal data relating to criminal convictions or offences. The GDPR provides for certain circumstances based on which the processing of sensitive personal data is allowed, for example if the data subject has given his or her explicit consent or if the data subject has manifestly made the data public himself or herself. The Data Protection Regulation (Implementation) Act also provides specific derogations to these prohibitions. An employer may, for example, process health data where this is necessary for the reintegration of employees in a case of incapacity for work.

iv Background checks

It is not uncommon for a company in the Netherlands to perform a background check when it intends to hire a new employee. This could be done by asking the job applicant for extra background information or by checking references. From a privacy law perspective, it is important to tailor screening activities to the position and qualifications needed. In

this respect, the interest of the future employer should be weighed against the applicant's privacy interest. Furthermore, discrimination on the grounds of age, race, gender, religion, belief, political conviction, nationality, sexual orientation, marital status, disability or chronic disease is prohibited.

Employers may only request information about credit records through the applicant or employee, through a public source or with the applicant's or employee's permission. Applicants or employees are not obliged to answer questions about their credit records, unless this is relevant for the performance of the job. Whether processing of this type of data is permitted will depend on the position. Information about an applicant's or an employee's criminal record qualifies as sensitive personal data. Processing this type of data is prohibited unless a statutory exception applies. However, if a person's criminal record is relevant for the performance of a job, an applicant or an employee must duly inform the employer (e.g., an accountant who has been convicted of fraud or a primary school teacher who has been convicted of child abuse). The employer may ask an applicant or employee to provide a certificate of conduct issued by the Judicial Agency for Testing, Integrity and Screening of the Dutch Ministry of Security and Justice if such a certificate is relevant for the position.

Besides the aforementioned, it is important for employers to realise that it is generally prohibited to request medical tests, ask questions about the use of illegal narcotics (in spare time) and to process health data. In the Netherlands, drug or alcohol tests are regarded as medical tests and the related data as health data.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Employees may be dismissed only if the employer has a reasonable ground for dismissal. Depending on the grounds for dismissal, an employment contract can be terminated by proper notice, with prior permission from the UWV, or if it is rescinded by the sub-district court. In addition, the parties may terminate an employment contract by mutual consent and record their terms in a settlement agreement.

Termination by mutual consent

Settlement agreements are only valid if they are concluded in writing. Employees have the option to terminate settlement agreements within 14 days, either by withdrawing their consent (without giving reasons) or by rescinding the settlement agreement out of court. Employers are obliged to point out this option to employees; failure to do so extends the 14-day time limit to three weeks.

Notice after permission from the UWV

Employers have to request permission from the UWV to terminate an employment contract on economic grounds or on the grounds of the employee's long-term illness (i.e., more than 104 weeks).

If permission is granted, the employer may deduct the time the UWV or the collective dismissal committee needed to process the application from the applicable notice period to a minimum of one month. In employment contracts, the parties often refer to the statutory notice period, which is one month for the employee. The employer's statutory notice period depends on the length of the employment: one month for employment contracts with a duration of less than five years; two months for contracts with a duration of between five

and 10 years; three months for contracts with a duration of 10 to 15 years; and four months for contracts with a duration of more than 15 years. The parties can also agree on a different notice period, to a maximum of six months for the employee, but in that case the employer's notice period must be twice as long as that of the employee. Payment in lieu of notice is not permitted.

If an employer acts in violation of the rules for giving notice of termination, the employee may seek annulment of the notice of termination, or ask for fair compensation. If the UWV or the collective dismissal committee has given the employer permission to terminate the employment contract and the employer has done so, the employee may also request the sub-district court to restore the employment contract or to award fair compensation. These proceedings are initiated by submitting an application.

Even if a dismissal permit has been granted, a dismissal will be prohibited if it occurs during the first two years of illness, concerns an employee who is pregnant or on maternity leave or ill as a result of pregnancy or childbirth, is based on the employee's membership of a trade union, or the employee's attendance of meetings held by political organisations, or the employee exercising his or her right to parental leave, or involves any discrimination.

Requesting the sub-district court to rescind the employment contract

The sub-district court is designated to review the other grounds for dismissal in termination proceedings. In these cases, employers are not entitled to follow the UWV procedure. The requests concern termination on the grounds of, among other things, the employee repeatedly calling in sick, unsuitability, imputable acts, refusal to perform work and damaged working relationships. Furthermore, the sub-district court is the designated dismissal route in situations involving fixed-term employment contracts that do not include a clause on giving early notice of termination, or if the employment contract is terminated on economic or long-term illness grounds. Employers can also apply to the sub-district court if the UWV has refused to grant permission to give notice of termination.

The application on which a termination request is based must fully substantiate at least one of the reasonable grounds in order for the court to rescind the employment contract, which will be terminated on the date ordered by the court. Under the Balanced Labour Markets Act, employers may also combine two (or more) uncompleted grounds for dismissal (cumulative dismissal ground). When terminating the contract, the court will take the applicable notice period into account and deduct the time taken by the court proceedings. After these court proceedings, it is possible to file an appeal with the appeal court and subsequently with the Supreme Court.

Reassignment

Employers must substantiate that it is not possible to reassign the employee – even after training – to a suitable alternative position within the company or the group. If a suitable alternative position is available, the employer must offer it to the employee. In such a case, the employer does not have the right to terminate the employment contract.

Transition payment and fair compensation

Under the Balanced Labour Market Act, all employees whose employment contracts end are generally entitled to a transition payment from the first day of employment. This applies also to employees with fixed-term employment contracts that are not renewed. As a rule, employees are not entitled to a transition payment if their employment contracts are terminated by

mutual consent, but this will naturally be relevant when arrangements are made regarding the termination. In addition, employees are not entitled to a transition payment (1) if the employment contract is terminated at the employee's initiative (except in the event of serious imputable acts or omissions on the part of the employer), (2) if the employee has committed serious imputable acts or omissions, or (3) in the case of termination on or after the employee has reached state retirement age or a different retirement age.

The transition payment is not age-related and amounts to one-third of the monthly salary for each year of service (including extra days or months pro rata). Monthly salary means one month's gross salary plus monthly average variable pay and benefits during the 36 months before notice of dismissal. The payment is set at a maximum of €81,000 gross or one year's salary for employees who earn more than this amount. When entering into an employment contract, employers and employees may agree on a higher payment, but not a lower payment.

As stated in Section II, the court may grant an employee additional compensation of a maximum of half the transition payment if the termination is based on cumulative dismissal grounds. In the situation that the employment contract was terminated on the grounds of serious imputable acts or omissions on the part of the employer, the sub-district court may award additional compensation to the employee. This additional compensation is not capped. However, case law shows that courts seldom award additional compensation of more than a couple of times the value of the transition payment.

Instant dismissal

Both employers and employees are entitled to terminate the employment contract with immediate effect for urgent cause, without having to observe the statutory or contractual notice period and without having to seek a permit from the UWV. Employees who are instantly dismissed are not entitled to any unemployment benefits. Examples of urgent causes that may justify an instant dismissal include theft, fraud, embezzlement and physical abuse. In an adjudication to determine the existence of urgent cause for termination, all relevant circumstances of the situation, including the personal circumstances of the employee, must be considered. A court will ultimately determine whether the urgent cause has been shown.

Instant dismissal is an extreme measure and courts are conservative in adopting an urgent cause.

ii Redundancies

It is possible to make employees redundant for economic reasons. In such cases, employers must follow the UWV procedure or try to reach a settlement with the employee or employees in question. The rules described in Section XIII.i (e.g., notification period, severance payment, categories of employees protected against dismissal) also apply to cases of redundancy.

In the event of a mass lay-off, additional rules apply. A mass lay-off occurs when a company decides to dismiss 20 employees or more, within three months and within an area of activity of the UWV. Companies must notify both the UWV and the relevant trade unions of mass lay-offs, and state the following: the reasons for the lay-off; whether the works council was consulted; and the number of employees concerned, including details about the employees' functions, ages and years of service.

After it has notified the UWV accordingly, the employer can choose to follow the individual termination procedures with the UWV or try to settle with each individual employee concerned.

The UWV may not consider the request for a permit until one month after the date of notification, unless this statutory waiting period would hinder the re-employment possibilities for the employees who will be dismissed or the employment of other employees in the company. If a statement from the trade unions affirming that the employer consulted them on this matter is attached to the employer's notification to the UWV, the UWV will consider the request for a permit immediately, without observing the one-month waiting period.

If an employer does not give the required advance notification but ultimately requests permission from the UWV to dismiss 20 or more employees within three months, the statutory waiting period is increased to two months. The purpose of the statutory waiting period is to facilitate consultations between the employer and the trade unions.

If a company has a works council, the works council should be given the opportunity to advise on the intended decision to reorganise the organisation. The employer is obliged to submit its intended decision in written form (a request for an advice) to the works council at such a moment that the works council can still have a significant effect on the intended decision. A request for advice must, as a minimum, include a statement of the grounds for the intended decision, the consequences anticipated for the people who work for the company, and the proposed measures that will be taken in that respect. If and when requested by the works council, the employer is obliged to provide the works council with all information and data that it reasonably requires to perform its duties, in a timely fashion and in written form if so required. Generally speaking, the works council may decide what information is reasonably necessary for it to perform its duties.

Before it issues its advice, the works council and the employer will deliberate on the matter concerned at least once in a consultative meeting, which means that the employer is obliged to join the meeting and to provide the works council with the requested information. The employer has to give the works council a reasonable period of time to issue its advice. Although one month is considered to be a reasonable period, it is likely that the works council will request more time. Therefore, it is not uncommon for the whole consultation procedure to take six to eight weeks.

If the works council's advice is not followed, or not followed in its entirety, the employer must inform the works council of the reasons for not following the advice. This will delay the process and, as a consequence, the employer will have to suspend the implementation of its decision until one month after the date on which the works council was notified of the decision. If the decision is fully in line with the advice, the employer may implement the decision immediately.

When dismissals are the result of a reorganisation, the employer can provide for financial compensation in a social plan. Employers have no obligation to draw up or negotiate a social plan. However, in the event of a mass lay-off, the employer will benefit from setting a standard for the financial compensation in a social plan and the works council will require a social plan as part of the mandatory advice procedure. If trade unions are not involved in the matter, a social plan is sometimes agreed with the works council, or simply drafted unilaterally by the employer.

XIV TRANSFER OF AN UNDERTAKING

The Dutch Civil Code (Article 7:662 et seq.) applies when an undertaking is transferred in whole or in part from one employer (transferor) to another (transferee). The Code implements the Transfer of Undertakings (Protection of Employment) Regulations (generally

known as TUPE) regarding the safeguarding of employees' rights in the event of a complete or partial transfer of an undertaking. If a transfer qualifies as a transfer of undertaking under TUPE, the people employed by the transferor, including all their rights and obligations, are automatically transferred to the transferee. This means that the employment contracts, including the existing terms of employment, non-compete clauses and the provisions of CBAs, become the transferee's responsibility. Whether a transaction qualifies as a transfer of an undertaking depends on the facts and circumstances of the case. The transferor and transferee remain jointly and severally liable for obligations towards the employees for one year after the transfer date.

If employees object to the transfer and do not wish to continue the employment contract with the transferee, the employment contract with the transferor will end by operation of law on the transfer date. Neither the transferor nor the transferee has any obligations towards the employee in this termination.

The respective rules do not apply to the transfer of an undertaking by receivers in the event of the insolvency of the transferred business. Moreover, the transfer of an undertaking is not considered a valid reason for terminating an employment contract.

XV OUTLOOK

As of 1 April 2020, the Compensatory Scheme Act will enter into force. Under this Act, employers who meet the requirements can be compensated by the UWV for the statutory transition payment paid (with retroactive effect back to 1 July 2015) to the employee to terminate a dormant employment contract with an employee who has a long-term disability. Owing to long-term illness, the employee concerned is no longer able to perform his or her work and, generally after two years, the employer is allowed to stop paying wages; however, the employee is nevertheless kept on the payroll to prevent the employer having to pay the statutory transition payment to the employee.

With regard to independent contractors, the Dutch government has announced a new act to replace the existing Deregulation of Assessment of Independent Contractor Status Act. The aim of the new act, which is scheduled to be enforced by 1 January 2021, is to provide independent contractors and their clients with more certainty on the qualification of their contractual relationship and to prevent pseudo self-employment. In that regard, the government proposes minimum hourly fees (€16 for all independent contractors and an independent contractor's statement for independent contractors with a higher hourly fee of at least €75).

NEW ZEALAND

Charlotte Parkhill and James Warren¹

I INTRODUCTION

i Jurisdictional framework

Employment relationships in New Zealand are defined and governed by legislation, common law and the terms of employment agreements, which can be either individual or collective agreements. Legislation has substantially modified and regulated the employment relationship, and should be considered the principal source of employment law in New Zealand.

The Employment Relations Act 2000 (ERA) sets out the core statutory framework for employment relationships including, imposing a mutual duty of good faith, requiring written employment agreements, confirming the rights of unions and governing industrial relations. It also establishes statutory bodies that have exclusive powers over employment matters.

There are a number of other statutes that contribute to the landscape of employment law, among which are the Minimum Wage Act 1983, the Human Rights Act 1993 (containing laws against discrimination on a range of protected characteristics), the Holidays Act 2003 and the Health and Safety at Work Act 2015.

New Zealand's common law system originated in England but has been developed separately by the New Zealand courts. The common law provides a body of principles, duties and implied terms that form part of the employment relationship.

New Zealand was a founding member of the International Labour Organization (ILO) and has ratified a significant number of ILO Conventions. The objects of the ERA include the promotion of observance of the principles underlying ILO Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively. However, these Conventions do not have direct application in New Zealand.

ii Relevant institutions

New Zealand has three dedicated institutions for the resolution of employment law problems. The Mediation Service (operated as part of the Ministry of Business, Innovation and Employment (MBIE)), the Employment Relations Authority (the Authority) and the Employment Court.

The preferred and generally mandatory initial problem-solving tool is mediation between the parties, with the MBIE providing a free mediation service. If the matter cannot be resolved through the use of mediation it can then be examined by the Authority. The Authority is

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an investigative (rather than adversarial) body that has the power to resolve employment relationship issues. It is intended to be guided by equity and good conscience and not to be dominated by technicalities.

Decisions given by the Authority can be appealed to the Employment Court. The latter adopts an adversarial approach and more formal procedures than the Authority. Most appeals to the Employment Court are heard *de novo*. Decisions from the Employment Court can be appealed to New Zealand's Court of Appeal, and from the Court of Appeal to the Supreme Court, if the appeal is based on an important point of law.²

II YEAR IN REVIEW

The employment landscape in New Zealand continued to evolve in 2019. The government implemented a number of changes to employment legislation, including:

- a* a renewed focus on reinstatement as the primary remedy for employees who have been unjustifiably dismissed;
- b* the reinstatement of set meal and rest breaks, with a return to more regulation of the timing, frequency and duration of breaks;
- c* an increase in the statutory minimum adult hourly wage to NZ\$17.70; a further increase, to NZ\$18.90, takes effect from 1 April 2020;
- d* the use of 90-day trial periods (during which employers can dismiss employees with a much reduced risk of a legal claim) has been restricted to businesses with fewer than 20 employees;
- e* victims of family violence have been given additional protections and entitlements to leave and flexibility regarding working arrangements; and
- f* union rights and collective bargaining requirements have been strengthened.

Proposals for fair pay agreements are currently the subject of consultation, setting out a potential new framework for the negotiation and setting of minimum terms and conditions across entire sectors.

The potential exploitation of dependent contractors and the misuse of independent contractor agreements to avoid the protections and rights given to employees has received significant attention in 2019. The government has released a discussion paper calling for submissions on better protections for contractors and deterrence against the misclassification of workers as contractors.

There has also been a focus on holding individual directors and managers personally liable for employment law breaches. The MBIE took 19 cases to the Authority or the Employment Court, resulting in awards totalling more than NZ\$250,000 in wage and holiday pay arrears and orders for penalties totalling NZ\$475,000 to be paid.

Statistics demonstrate a continuing upward trend in the value of hurt and humiliation awards to employees in connection with personal grievance claims they have brought in the

2 Employment Relations Act 2000 [ERA], Sections 214 and 214A.

Authority and the Employment Court.³ Combined with the strengthened individual and collective rights enjoyed by employees, the general picture is of increasing compliance risk and costs for employers.

III SIGNIFICANT CASES

i Jacks Hardware and Timber Limited v. First Union Incorporated⁴

This case followed a protracted bargaining process between a major union and an employer, which had not resulted in a collective agreement. The union applied to the Authority to fix the remaining terms of the collective agreement, and the Authority allowed the application after concluding that the parties had exhausted all other reasonable alternative means of reaching agreement.

The employer appealed to the Employment Court, which found that the grounds for the union's application had been met and it was appropriate for the Authority to fix those provisions that the parties had been unable to agree between themselves.

This case is significant as it is the first instance of the Court endorsing the Authority's power to fix remuneration in a collective agreement, overriding the parties' ability to independently negotiate and settle an agreement through collective bargaining.

ii Morgan v. Transit Coachlines Wairarapa Limited⁵

This case involved a claim by a bus driver, who had been employed under a series of fixed-term employment agreements over a period of 18 years. The employee argued that the real nature of his employment was permanent on the basis that the reason for the fixed term was not a genuine reason based on reasonable grounds (a requirement for fixed-term employment under the ERA) and that he was entitled to back pay for entitlements that he had accrued as a permanent employee.

The employer claimed that the reason for the fixed term was the uncertainty regarding annual contract-based funding the employer received from a third party, and that this funding uncertainty meant it could not guarantee the employee's employment in the long term.

The Employment Court disagreed with the employer, finding that the risk of loss of funding was speculative and that the employer did not have genuine reasons based on reasonable grounds for the fixed-term employment agreement. The Court said that financial uncertainty is a normal business risk and not a sufficient reason to offer fixed-term employment.

iii Advanced Personnel Services Ltd v. Pitman⁶

This case focused on the effect of an indemnity clause in an employee's individual employment agreement and whether it was an unlawful attempt to contract out of the ERA.

The employer brought an action against a former employee alleging that he had breached his employment agreement by working for a competing business and using his

3 See Ministry of Business, Innovation and Employment website for reports on Levels of compensation awarded to employees by the Employment Relations Authority and Employment Court for January to June 2018 and January to June 2019 < <https://www.employment.govt.nz/about/employment-law/compensation-and-cost-award-tables/> >.

4 [2019] NZEmpC 20.

5 [2019] NZEmpC 66.

6 [2019] NZEmpC 83.

former employer's confidential information and intellectual property for the benefit of his new employer. The Authority found in favour of the employer in relation to the breaches and awarded the employer special and general damages.

The Authority considered the indemnity clause and held that it was valid and enforceable and awarded the employer an additional NZ\$46,000 in indemnity costs in accordance with the clause. This decision was appealed on the basis that the indemnity provision was an attempt to contract out of the ERA, but the original decision was upheld.

This case is significant, having regard to the potential scope to recover indemnity costs rather than the standard very modest costs typically awarded in the employment jurisdiction.

Two other cases of note are *Chambers v. Peladon*,⁷ in which it was held that compliance orders against employers can be extended to holding companies and individual directors (of relevance to international groups), and *Postal Workers Union of Aotearoa Inc v. New Zealand Post Ltd*,⁸ in which an employer's right to impose compulsory overtime on waged employees was held to be unenforceable unless separate consideration, in addition to the actual rate being paid, is provided to compensate for the employee having to be generally available.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employment relationships are primarily governed by the ERA, which imposes a statutory duty of good faith, and parties are unable to contract out of the general rights and obligations it sets out. The ERA requires that the employer should provide the employee with a written employment agreement, of which a signed copy must be retained by the employer.

Employment agreements can be entered into between an employer and individual employees, or agreed collectively. Collective agreements are between an employer and a registered union.

Employment agreements must contain, as a minimum, the names of the parties, the hours of work expected, a description of the role of the employee, a description of where the work is to be performed, the wages or salary payable to the employee, and a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the 90-day limit for raising a personal grievance.⁹

Parties may agree to vary individual employment agreements. It is best practice for any variation to an individual employment agreement to be agreed in writing by the parties. For a collective agreement, any variation must be ratified in accordance with the ERA.

Employment agreements can take many forms, including full-time, permanent, part-time, fixed-term or casual. Fixed-term employment agreements are permissible provided that the employer has genuine business reasons based on reasonable grounds for the fixed term and that those reasons are communicated to the employee.¹⁰ If these requirements are not met, the employer will not be able to rely upon the fixed-term provision to terminate the employee's employment.

7 [2019] NZEmpC 45.

8 [2019] NZEmpC 47.

9 ERA, Section 65.

10 *id.*, at Section 66.

Casual employment engagements can come to an end without formality and with less risk of claims of unjustified dismissal, but must be genuinely casual, meaning that the employee has no guaranteed hours of work, no regular pattern of work and no continuing expectation of employment.

ii Probationary periods and trial periods

Employment law in New Zealand provides for both statutory trial periods and probationary periods.

Trial periods allow an employer to dismiss an employee within the first 90 days of employment for any business or performance-related reason. The employee subject to a valid trial period will be prevented from raising a personal grievance (legal claim) in relation to the termination of employment. Trial periods are only available to employers with fewer than 20 employees and must be agreed in writing prior to the employee commencing employment.¹¹

Probationary periods may be used by employers of any size and provide the framework for an employer to respond to performance concerns in respect of new employees or employees in a new role. Unlike with 90-day trial periods, if employment is terminated within a probationary period, the employee remains entitled to bring a personal grievance in relation to the termination.

iii Establishing a presence

There is no general bar against foreign entities employing staff in New Zealand. However, foreign employers are required to be registered on the Companies Office Overseas Register if they are carrying out business in New Zealand and intend to hire employees to carry out that business. The use of intermediary employment businesses is also permitted but may not avoid the need for registration, or individual employees having direct rights against their ultimate employer.

Additionally, there is no restriction on foreign entities engaging independent contractors in New Zealand under a contract for services. Independent contractors will be responsible for their own tax obligations and not entitled to the protections provided by employment law.

Foreign companies need to be aware that activities in New Zealand could lead to their classification as a permanent establishment (PE). Having a PE in New Zealand requires the employer to meet business tax obligations relating to the income-earning activity.

Minimum entitlements are set by law in New Zealand for employees, which include:

- a* a minimum wage of NZ\$17.70 per hour (NZ\$18.90 as of April 2020);
- b* a minimum of four weeks of paid holiday per year;
- c* 11 public holidays, each being a day off on full pay;
- d* five days of paid sick leave per year;
- e* on completion of six months of continuous employment, entitlement to bereavement leave and 10 days of family violence leave per year;
- f* paid parental leave; and
- g* certain procedural requirements that govern the employment relationship and its termination.

Employers must deduct income tax (pay as you earn) from employee source income and are responsible for reporting to New Zealand's Inland Revenue.

¹¹ id., at Section 67A.

V RESTRICTIVE COVENANTS

Restrictive covenants are *prima facie* unlawful and employers must prove that a restrictive covenant is reasonably necessary to protect the employer's legitimate proprietary interests for it to be potentially enforceable. Confidential and commercially sensitive information, client relationships, and contacts and supplier relationships are examples of proprietary interests capable of protection.

A restraint of trade must only protect the employer's interests as far as reasonably necessary. This will involve consideration of the length of the restraint and the geographical area it covers. The reasonableness of a restraint will be assessed at the time the employment relationship was entered into and must be met with some form of consideration (employment can itself be consideration). There is no requirement for consideration to be offered or paid after termination of employment.

Any finding of the clause not being reasonably necessary to protect the legitimate proprietary interests of the employer will lead to a finding that the clause is unenforceable. However, where a restraint is found to be unreasonable, the Authority or Employment Court has a specific statutory power and discretion to reduce the scope of the clause to what it considers is reasonable.

An employment agreement may also contain provisions that protect the employer's interests in other ways. These commonly include confidentiality and intellectual property clauses that survive the termination of employment.

VI WAGES

Wages are governed primarily by the Minimum Wage Act 1983 and the Wages Protection Act 1983. The minimum wage is increasing on 1 April 2020 to NZ\$18.90 per hour, from NZ\$17.70. The minimum wage rate for starters and trainees is NZ\$15.12 per hour (remaining at 80 per cent of the adult minimum wage).

The Wages Protection Act provides for limited circumstances in which deductions can be made, how payments must be made and situations in which consent is needed to deduct wages.

i Working time

There is no maximum cap for hours worked by employees in New Zealand. However, some limitations are prescribed for particular industries (such as commercial drivers). Further, the health and safety laws recognise fatigue as a hazard, which means that excessive hours worked must be monitored to mitigate the risk of fatigue.

Hours worked by an employee, whether greater or less than 40 hours a week, must be included in the employment agreement between the parties.

ii Overtime

There is no specific stand-alone requirement for an employer to pay compensation for overtime. Parties may agree to payment for overtime in the employment agreement, or it may be prescribed in company policy.

When waged employees are required to be available for overtime beyond their guaranteed hours of work, they must receive reasonable compensation for being available

as well as receiving payment for any additional hours worked. For salaried employees, there can be an express provision in the employment agreement to provide that the salary includes reasonable compensation for availability as well as for payment of additional hours of work.¹²

VII FOREIGN WORKERS

Employees who are not citizens or residents need a valid visa that allows them to work in New Zealand. It is the employer's responsibility to ensure that all its employees are legally entitled to work in New Zealand. A worker's visa may specify a number of requirements, including the type of work undertaken by the worker, who the worker's employer is and the length of time the worker is entitled to work in New Zealand.

There is no requirement for an employer to keep a register of foreign workers or to limit the number of foreign workers it hires, assuming that they all have a valid work visa. Foreign workers are generally subject to the same employment laws and tax laws as domestic workers.

VIII GLOBAL POLICIES

It is not compulsory for New Zealand businesses to have employment-related company policies. However, policies serve important purposes and are a useful tool for managing employment relationships and expectations. International companies may be able to apply certain global employment policies within New Zealand, but legal requirements can affect their interpretation and application locally. Others may need modification or supplements to be workable in the New Zealand context.

There is no requirement in New Zealand for policies to be filed with or approved by government authorities.

Although there are a number of relevant laws regarding anti-discrimination, health and safety requirements in relation to bullying and harassment, and minimum procedural requirements with respect to employment relationships, these are not required to be reflected through the implementation of a policy. However, it is useful to set expectations in policies as opposed to within employment agreements for matters such as disciplinary processes, drug and alcohol testing, whistle-blowing, health and safety, and bonus practices, as this enables an employer to amend and update policies without requiring changes to individual employment agreements or agreements with unions.

To comply with the statutory duty of good faith, employers should consult the affected employees or unions when new policies are introduced by the employer or when current policies are changed. Depending on the nature of the business, a range of policies may be appropriate. It is important that employees are aware of and understand all policies that apply to them and how to access them if they wish. It is best practice for employment agreements to contain a provision ensuring employees' compliance with any applicable company policies, while also expressly acknowledging that the policies are not contractual and may be changed at any time by the employer.

¹² *id.*, at Section 67D. Note that employers must ensure that any additional hours worked do not result in the employer breaching the minimum wage requirements for low-salaried employees.

IX PARENTAL LEAVE

The Parental Leave and Employment Protection Act 1987 sets out the paid leave, unpaid leave and extra protections provided to employees who become parents.

Leave entitlements are separated into primary carer leave and secondary carer leave. An employee's entitlement to parental leave is not necessarily determined by gender or biological relationship. For example, any parent can be the primary carer if he or she is taking permanent primary responsibility of a child under the age of six years.

The amount of leave provided to employees is determined by the length of employment with their current employer. There are two service thresholds of more than six months or more than 12 months of service (with minimum hours per week). Employees on parental leave may also be entitled to government-funded payments.

Employment protection

Dismissal on the basis of pregnancy or parental leave is prohibited. There is a presumption that an employee's job will be kept open for the employee to return to after a period of parental leave. This presumption can be rebutted if the position is a 'key' position (having regard to the size of the business, the nature of the role, whether any training is required and other considerations), or a redundancy situation arises.

If an employer is unable to keep a role open because the employee in question is a key employee, or the employer is having to make positions redundant, the employee enters a 26-week period of preference at the end of the parental leave. This means that if the employer has a job opening that is substantially similar to the role the employee performed previously, the employee must be offered this job before it is offered to anyone else.

X TRANSLATION

Employment documents may be in any language, and do not need to be translated into the employee's native language. However, an employee needs to be aware of the terms of employment and if it is clear that this is not the case, it may give rise to a claim of unfair bargaining or may pose difficulties should the employer seek to rely upon a term of an agreement to disadvantage the employee if it is clear that the employee did not understand that term. Translators may be used by the Authority or the Employment Court to assist with understanding or engagement.

XI EMPLOYEE REPRESENTATION

Employees may form and join trade unions. A trade union is an organisation that supports collective rights for employees in the workplace as a collective advocate for those employees by consent. The union will represent and negotiate with employers the collective interests of its members. A union must have a minimum of 15 members to become incorporated and must register with the Registrar of Unions.

The ERA recognises the inherent power imbalance in the employment relationship and therefore actively promotes union activity and collective bargaining processes with employers.

Unions and their representatives are permitted to enter the workplace for purposes related to union members' employment, union business, or health and safety purposes for non-union members where that person (or persons) has requested the assistance of the

union.¹³ It is only when there is no active collective agreement in place or no collective bargaining that the union must first seek consent to enter the employer's premises, and then the employer must not unreasonably withhold consent.¹⁴

Union members are entitled to attend a minimum of two union meetings per year, which, if during normal working hours, they are entitled to attend without deduction of pay from the employer.

The ERA requires that, when a new employee is hired by an employer that is a party to a collective agreement and the role is covered by that agreement, the employee's terms and conditions for the first 30 days of employment must be those of the collective agreement that would bind the employee if he or she were a union member, and the employer must provide information about the union to the employee. The employer and employee may agree additional terms, but those terms must be no less favourable to the employee than those in the collective agreement.¹⁵ It is only following the first 30 days that the employer and the employee can enter into an individual employment agreement.

XII DATA PROTECTION

i Requirements for registration

The main piece of legislation in New Zealand regulating personal information is the Privacy Act 1993, which governs the collection, storage and use of personal information. The Privacy Act is intended to protect individual privacy by providing protection for personal information which, under the Act, is defined as 'information about an identifiable individual'.

At the core of the Privacy Act are a number of information privacy principles (IPPs) that set out the restrictions and rules governing how personal information may be collected, stored and used. All employers are required to comply with the IPPs.

The IPPs require that information about employees can only be collected for a lawful purpose connected with a function or activity of the entity collecting the information, and the collection of the information must be necessary for that purpose. As a general principle, when an employer collects personal information about its employees, it must collect the information directly from the individual concerned. Further, when collecting that information, an employer must take such steps as are reasonable to ensure that the individual concerned is aware that, among other things, the information has been collected and why it has been collected.

An employer must ensure that employee data is protected by such security safeguards as are reasonable in the circumstances and that the information is not kept for longer than is necessary.

Employers are required to retain personal records of former employees for no longer than is reasonably necessary after the employment relationship has ended. However, there are specific employee records that must be kept for a statutory period (six years for employee wages and time records, and six years for holiday and leave records, from the date on which those records are created).

13 ERA, Section 20.

14 *id.*, at Section 20A.

15 *id.*, at Section 62.

ii Cross-border data transfers

In light of the restrictions contained in the IPPs (set out in Section XII.i), it follows that an employer can only share employee data with a related entity based overseas if it has been communicated to employees that the information was collected for that purpose or the employees otherwise consent to the disclosure at the relevant time.

Arguably, it is implicit that a company with global operations or networks will share employee information with other entities within those operations or networks. However, this has not been confirmed by the courts. Good practice would generally be regarded as requiring employers to be explicit about the fact that employee data will be shared with related entities or third parties based overseas, articulate the reason for doing so and obtain express authorisation from employees to use employee data in the manner proposed.

While there is no requirement for an employer to register with a data protection authority or enter into a joint-user agreement for the purposes of transferring employee information outside New Zealand to another state, New Zealand's Privacy Commissioner may prohibit transfers of employee information if satisfied that the information is likely to be transferred to a third state where privacy safeguards are less stringent than in New Zealand and if the transfer is likely to contravene the Organisation for Economic Co-operation and Development's Privacy Guidelines.

iii Sensitive data

There is no separate category of sensitive personal information in New Zealand law. However, some categories of information, such as medical and health records, are inherently more sensitive personal information, and the application of the IPPs to those categories will require particular care.

iv Background checks

The IPPs apply to background checks without modification or additional restriction. An employer is entitled to conduct tests and checks both before and during employment. Typically any offer of employment to prospective employees will be on the condition that the employer is satisfied with the outcome of the background check. An employer should obtain an employee's consent before undertaking a background check. Information obtained as part of a background check may include:

- a* credit history: employers may carry out credit checks if relevant to the employee's role (for example, the role carries with it significant financial responsibilities, such as dealing with accounts and financial administration);
- b* drug and alcohol testing: an employer may ask employees to agree to alcohol and drug tests if this is relevant to their role or workplace (for example, operating heavy machinery in safety sensitive areas);
- c* criminal history: employers can file a request with the Ministry of Justice for an employee's criminal history if the individual agrees in writing (although note that a 'clean slate' scheme applies to remove, and allow individuals not to disclose, certain old convictions); and
- d* references obtained regarding an employee's suitability to perform a job.

An employer cannot ask an employee to provide certain information (for example, any previous names the individual may have held) if this is not for a lawful purpose (for example, if the motive is to determine whether the individual is transgender, which would be discriminatory).

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Employment cannot be terminated at will. Employers need to have a lawful reason to dismiss an employee and they must follow a fair and reasonable process in reaching the decision to dismiss.

If required to justify a termination of employment, the employer must be able to establish that its actions were those of a fair and reasonable employer taking into account all the circumstances at the time the dismissal or action occurred.¹⁶ This will typically require an employer to investigate any concerns it has, raise these with the employee involved, providing them with the opportunity to respond and genuinely considering their response prior to making any decision.

An employer must grant an employee the contractual notice period, unless the reason for the termination is serious misconduct, which can result in summary dismissal. Payment in lieu of notice, or not being required to attend work for the duration of a notice period, is acceptable, provided these terms have been agreed between the parties.

There is no requirement to notify any government agency, work council or trade union (unless it is part of a collective agreement) of the termination of employment. There is similarly no requirement for a social plan.

If the situation arises that an employee believes he or she has been unjustifiably dismissed, the employee may seek damages or the remedy of reinstatement by raising a personal grievance with his or her employer, and ultimately the Authority or the Employment Court.

ii Redundancies

To terminate employment for redundancy, there must be a genuine business reason for the restructuring that gives rise to the redundancy, and the employer must follow a full and fair process.

A fair process for a redundancy requires the employer to consult the affected employees regarding a proposed restructuring (including the business rationale), provide them with all relevant information and provide them with an opportunity to provide feedback on the proposal. An employer is required to genuinely consider any feedback prior to confirming any restructuring. An employer also has a positive obligation to consider redeployment opportunities for any affected employees prior to making them redundant.

There is no statutory requirement for redundancy compensation to be paid; however, there may be a contractual obligation or employers may adopt a policy that provides for redundancy compensation.

¹⁶ id., at Section 103A.

XIV TRANSFER OF BUSINESS

The ERA contains provisions that provide employees with protection when a business is being sold or transferred.

Under the ERA, all collective and individual employment agreements must contain an employee protection provision, setting out the process the employer will follow when the business is sold or transferred. There are minimum requirements for this provision, including information regarding how the employer will negotiate with the new employer about the transfer, what will be negotiated (including whether the employees will transfer on the same terms and conditions), and the process to be followed in determining what entitlements, if any, employees will receive if they do not transfer to the new employer. However, there is generally no requirement for the acquirer to offer employment (or otherwise accept the transfer of staff), whether on particular terms and conditions or at all.

There are specified categories of employees (referred to as vulnerable workers), in broad terms being those employees who carry out cleaning, catering, laundry and caretaking duties, who have additional protections. Under the ERA, vulnerable workers have an automatic right to transfer on existing terms and conditions to a new employer when the business is sold or transferred.

XV OUTLOOK

The outlook for employment law is subject to the outcome of the general election scheduled in 2020. The current Labour-led coalition has driven a number of reforms that have sought to increase the power of unions and protection of employees, including the removal of trial periods for larger companies, increased obligations to provide rest and meal breaks, and increasing the minimum wage. A number of other proposed reforms are still on the current government's agenda, including fair pay agreements (which appear similar to the Australian award regime), and are likely to become law if the current government is appointed for another term.

A National-led coalition would be likely to seek to undo some of those recent reforms in favour of more employer-friendly amendments; however, a substantial overhaul of the ERA is very unlikely.

Irrespective of the outcome of the general election, it is very likely that the Holidays Act 2003 will be amended or replaced. The Act covers leave entitlements and how to calculate those entitlements. The complex requirements of the Act have led to inadvertent but substantial non-compliance by the majority of employers in New Zealand, which has resulted in substantial financial liability. Part of the aim of a current review is to provide clarity and transparency of the obligations and calculations required by the Holidays Act to prevent non-compliance in future.

NIGERIA

*Folabi Kuti and Chisom Obiokoye*¹

I INTRODUCTION

Employment law in Nigeria was not founded on the provisions of a single statute. Rather, it is dispersed in different legislation that provides the framework and is greatly influenced by case law. While there is an unsettled discussion as to whether the Labour Act extends beyond unskilled and manual workers, it nonetheless remains the governing law for labour matters.

Nigerian law allows freedom of contract in upholding and binding employers and employees to their agreements.

Section 1 of the National Industrial Court Act² establishes a specialised court, the National Industrial Court of Nigeria (NICN), with exclusive responsibility for handling employment-related disputes. The Constitution of the Federal Republic of Nigeria 1999, as amended (CFRN),³ further endorses the NICN's authority and jurisdiction. The Industrial Arbitration Panel (IAP), which was established by the Trade Dispute Act, is responsible for settling any dispute referred to it by the Minister of Labour and Productivity. Any objection to an IAP award is taken before the NICN. The courts of appeal hear appeals from the NICN regarding questions of fundamental rights contained in Chapter IV of the CFRN, in relation to matters under its jurisdiction.⁴ However, if an appeal from the NICN relates to other employment matters, it must be with leave of the competent court of appeal.⁵

II YEAR IN REVIEW

According to data from the International Labour Organization, ILOSTAT database and World Bank population estimates (September 2019), as at the third quarter of 2019, Nigeria had a labour force of 62,447,234 people.⁶

A number of issues arose in 2019, such as the intrusive forces of technology in the workplace and evolving world of work. With the worrying rise in redundancy and downsizing

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2 This used to be Section 20 of the Trade Dispute Act, Cap T8, LFN 2004.

3 Section 254C(2). The establishment of the NICN by Section 1 of the National Industrial Court Act, and its further empowerment by the amendment to the 1999 Constitution to the Federal Republic of Nigeria has changed the resolution of employment disputes significantly, also expanding the outdated provisions of the Nigerian Labour Act. In many cases, the NICN has taken into consideration international labour practices and international best practices in reaching decisions, case by case and with an air of finality.

4 Constitution of the Federal Republic of Nigeria 1999, as amended [CFRN], Section 243(2).

5 *Skye Bank Plc v. Victor Anaemem Iwu* (2017) LPELR-42595(SC).

6 See <https://data.worldbank.org/indicator/SL.TLF.TOTL.IN?locations=NG>.

that has taken place in the country, especially in the finance sector and the oil and gas industry, regulators were forced to take steps to review the reasons and modes of mass termination. For example, the Department of Petroleum Resources issued Guidelines and Procedures for the Release of Staff in the Nigerian Oil and Gas Industry 2019. The purpose of the Guidelines was to establish the procedure for obtaining authorisation prior to the disengagement of workers employed in the oil and gas industry.

In the light of the evolving world of work, ‘outsourcing’ has emerged as a growing, cost-cutting business tool that many organisations now key into. However, outsourcing arrangements and contract staffing remain a major issue, and many of these types of relationships have resulted in lawsuits regarding the protection of workers’ rights and employment entitlements. The emerging trend now recognises that contracts of employment are, in the true sense, drafted by the employer, with little or no input by the employee, who has a lesser bargaining power. As such, the National Industrial Court does not hesitate to disregard any contract that is unfair, or that does not represent the actual relationship between the parties.

Other trending issues in employment law include the scope, validity and enforceability of non-compete clauses, technology and social media policies, sexual harassment and discrimination in the workplace, among others. Additionally, the federal government of Nigeria approved an upward review in 2019 of the national minimum wage.

III SIGNIFICANT CASES

In 2019, the underlying jurisprudence of the employment court (the National Industrial Court of Nigeria (NICN)) on workplace issues has been restless. Although some principles have been clarified and strengthened, a few other areas clamour for unanimity in the mind of the labour court.

To be sure, there are signposts that the NICN has continued to contribute to the development of a progressively evolving labour law jurisprudence. The most significant strides have been recorded in the areas of workers’ protection and job security, workers’ participation in respect of the influence of labour on decision-making by management, and fortifying the courts’ resistance to interference with parties’ freedom of contract; excepting in deserving cases to protect a weaker party (more often than not, the vulnerable worker) in accordance with the letters of the courts’ enabling law. Some of the courts’ decisions have also advanced increasing engagement with employees as a pivotal factor of production. Some of the more noteworthy decisions of the past year are examined below.

The case against a high compensatory regime of damages for a wrongfully dismissed worker in the labour court (at the NICN), which some recent appeal court decisions appear to have championed, may not, in all cases, hold to deny a successful litigant an appropriate award of damages with the lucid clarification in *Emana I Edet v. Fidelity Bank Plc.*⁷ Here the NICN, still placing reliance on a 2019 decision of the court of appeal in *Promasidor (Nig) Ltd v. Asikhia*,⁸ recognised the distinction between the somewhat limited scope of award of

7 Unreported Suit No. NICN/LA/276/2014, judgment delivered on 17 December 2019, per Hon Justice B B Kanyip (PhD).

8 [2019] LPELR-46443(CA).

damages for a wrong arising from the termination of employment (often the failure to give the requisite notice) and an award of (general) damages for alleged unproven malpractice, holding that, in deserving cases, both can be awarded.

In a landmark decision around unfair labour practice, the NICN, in *Ekeoma Ajah v. Fidelity Bank*,⁹ resolved that, in the main, a recondite legal issue on the effect of a new policy on a party who had attained the exit point in an organisation. The question was whether an employee after attaining 14 years and 11 months in service, and serving notice indicating her option to retire and take the benefit of a certain policy extant at the time of serving the notice, should, to her detriment, be subject to the employer's sudden policy, making those entitlements only due upon completion of 15 years in service. The Court examined the details of this case thoroughly and thoughtfully, calling in aid-availing equities in (1) pronouncing against the employee being subjected to a retroactive policy, (2) holding the employer estopped from avoiding contractual obligations, and that in any event, (3) the principle of arithmetical approximation would nonetheless avail the claimant in deeming that she had served the 15 years on the date the new policy was issued.

Chucks Ajukwu v. Blueche Lomado & Logistics Limited,¹⁰ *Gbite Adegoke v. Ecobank Nig Ltd*,¹¹ *Toluwase v. MID Atlantic Sea Foods Company Limited*,¹² *Oyama Friday v. PW Nig Ltd*,¹³ *Onifade Oluwatoyin v. IBDC Plc*¹⁴ and *Friday Godwin v. Anthony Rocks Limited*¹⁵ all considered workplace injuries and accidents in ascertaining the ambit of the duty of care owed to sustain a claim for damages in negligence. Mr Ajukwu failed to establish that the negligent conduct of the defendants led to the collapse of a vessel crane cutting off his thumb. Mr Adegoke, a bank manager, was attacked by armed robbers during a road trip to Lagos on an official assignment and sustained a spinal cord injury from the gunshots received during the attack. The court held, *inter alia*, that the bank did not owe him a duty to provide police protection on that trip, similar to what was normally provided by the defendant when moving significant sums of cash from one branch to another.

Some of the aforementioned cases brought to the fore the seeming uncertainty around compensable damages. Mr Toluwase was awarded the sum of 3 million naira as compensation for the eye injury he sustained in the course of his employment with the defendants. For workplace injury causing total loss of vision in his right eye, Oyama Friday was awarded the sum of 5 million naira. Mr Oluwatoyin succeeded in establishing negligence on the part of his employer for injury (electric shock) sustained in the course of work which, in turn, led to the amputation of his arms.

Much less straightforward, with respect, is the rationale for the denial of an appreciable amount of the sum which Mr Oluwatoyin claimed, on the premise that the court had not yet been confronted with such a situation and consequent award of such a sum as that claimed.¹⁶ With respect, the resignation of the court in this regard suggests the fettering of judicial

9 Unreported Suit No. NICN/LA/588/2017, judgment delivered on 14 May 2019, *per* Ogbuanya J.

10 Unreported Suit No. NICN/LA/510/2017, judgment delivered on 4 February 2019, *per* Oji J.

11 Unreported Suit No. NICN/LA/407/2016, judgment delivered on 4 April 2019, *per* Peters J.

12 Unreported Suit No. NICN/LA/283/2014, judgment delivered on 11 June 2019, *per* Amadi J.

13 Unreported Suit No. NICN/ABJ/235/2014, judgment delivered on 8 October 2019, *per* Anuwe J.

14 Unreported Suit No. NICN/AB/08/2015, judgment delivered on 19 March 2019, *per* Peters J.

15 Unreported Suit No. NICN/AK/46/2014, judgment delivered on 4 April 2019, *per* Oyewumi J.

16 The injunction is apt in the circumstance: 'If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.' Lord Denning, *Packer v. Packer* [1954] p. 15.

discretion.¹⁷ Litigants and counsel are entitled to the expectation that a case can be decided on its peculiar fact pattern, which may be completely unique. The facts in *Oluwatoyin* evoke deep emotion and, oddly enough, those facts were perhaps given their most compelling expression by the court, which nevertheless significantly whittled down his claim for a compensatory sum of 850 million naira. In describing the condition of the claimant on account of his workplace injury, the court summed it up pitifully, thus:

I watched the Claimant while testifying in chief. He has no hands and no arms. He joined the services of the Defendants as a complete human being but got disengaged as an incomplete being. For all intents and practical purposes, the Claimant will forever be dependent on somebody virtually 24 hours a day and seven days a week. He needs a person to bath, feed, dress him. He needs assistance to use the toilet. He needs assistance to even scratch his body in event of an insect bite. Should he find himself in a place of public disturbance or riot, the Claimant is right on his own and all alone to fend for his dear life. The appearance of the Claimant at trial was one of a sorry state. One cannot but think aloud as to how much could be awarded in damages to be able to put the Claimant back in his position before the accident leading to the amputation of his both arms.

The claimant was nonetheless awarded the sum of 150 million naira for the permanent injury he suffered as a result of the negligence of the defendants, against the 850 million sought.

Friday Godwin, in turn, was awarded the sum of 10 million naira of the 100 million naira sought as general damages for permanent injury sustained from an industrial crusher while in the employ of the defendant. The court recorded his plight thus:

I observed that the claimant throughout the trial had his right hand static, he could not move it, which might be due to the wasting of the right shoulder and upper limb, inability to flex and extend the right shoulder and elbow as stated in UBTH medical report as well as the other two from Fate Medical Center and Millennium Hospitals. I equally observed that his right ear lobe was chopped off. It is better imagined than to experience the pain and trauma he must be going through as a result of the injury he sustained, which permanently led to the loss of his right ear lobe/external ear and paralysis of his entire right hand from his shoulder down to his fingertips as stated supra. The import of which is that he can no longer use his right hand. His injuries are such that cannot be quantified in monetary term. The paralysis of his right hand has taken life and means of his livelihood from him.

In the light of inflationary trends that can now be safely said to characterise the Nigerian economy with no signs of abating, the damages awarded in the preceding case were sadly but undeniably inadequate. Perhaps on a related note, one is not unmindful of decisions

17 *per* Oseji, JCA in *Enabore Properties Ltd v. Peace-Cover Nig. Ltd & Ors* (2014) LPELR-22585 (CA): 'The awesome power of a Judge in the exercise of judicial discretion should not be under-estimated provided such exercise of discretion is done judicially and judiciously.' In *Union Bank of Nigeria plc v. Astra Builders* (2010) 41 NSCOR 1016, at 1038 to 1039, the Supreme Court *per* Adekeye JSC held that: 'An exercise of discretion is an act or deed based on one's personal judgment in accordance with one's conscience, free and unfettered by any external influence or suggestions. A judicial discretion means the power exercised in an official capacity in a manner which appears to be just and proper under a given situation. It must not flow from or be bound by previous decision of another Court in which a discretion was exercised. It is in short, an antithesis to the doctrine of stare decisis. There is no hard and fast rule as to the exercise of a judicial discretion by a Court for if it happens, discretion becomes fettered.' (pp. 46 to 47, Para. G).

of the appellate court that have sought to whittle down the stable gains made by the NICN in applying appropriate sanctions to erring employers by way of significant compensatory damages. The courts of appeal have often reduced compensatory damages awarded by the NICN and, in other cases, outright deprecated the lower court for making such – in the appellate court's views – exorbitant awards. It would be moot to speculate as to whether these influences of the courts of appeal have had the effect of tempering the disposition of the court as seen in *Oluwatoyin*, *Friday Godwin* and a slew of similar matters decided in the year under review. However, it suffices to say that the NICN remains the court that is most favourably placed to ensure that damages awarded in deserving cases truly reflect the justice of the case in terms of the socio-economic realities faced by litigants who appear before it.

The Supreme Court had an opportunity to make clarifications on a vexed legal issue arising out of the Public Officers Protection Act in *National Revenue Mobilization Allocation and Fiscal Commission v. Ajibola Johnson*.¹⁸ The Court made plain that the limitation provision in the Act,¹⁹ mandating that an action can only be instituted against public officers within three months of the accrual of the cause of action, will not apply to contracts of service. This laudable exposition came to the rescue of the otherwise stale claims in *Hon Emeka Mbonu v. Etche Local Government Council*,²⁰ *Mr Ibiwari Lovde Jack v. Niger-Delta Development Commission (NDDC)*,²¹ *Alukwe Okpara v. AG, Rivers State*²² and *Agu v. Federal Civil Service Commission*.²³ This, even as the NICN, faced with a similar objection as to limitation of action, reached a diametrically opposed view in *Bari v. Ministry of Local Government, Kano*.²⁴

Drawing a balance between its normative role and evolving dynamics in the world of work, the NICN, in *Samson Systems & Investment Ltd v. Nabih Chamchoum*,²⁵ held a business covenant that restricted the defendant from visiting Nigeria for a minimum of five years for employment or business after his resignation from the claimant, as unreasonable in terms of time and length. Perhaps underscoring the importance of submitting proper issues for adjudication in adversarial, and not inquisitorial, court settings, an almost identical instance of restraint of trade fact emerged in *Captain Chergui v. Dana Airlines Ltd*,²⁶ in which the Court held the claimant strictly bound to the terms of his contract with the defendant.

It is also instructive to look at the paradigm shift from a customarily settled position of law. This shift is as represented by the radically altering decision in *Bello Ibrahim v. Ecobank Plc*.²⁷ In a very influential passage,²⁸ perhaps in anticipation of the critique to follow, the Court 'demystified' the common law rule that reinstatement cannot avail as a possible

18 [2019] 2 NWLR (Pt 1656) 247, at 270 to 271.

19 Cap P41, Laws of the Federation of Nigeria (LFN) 2004.

20 Unreported Suit No. NICN/ABJ/365/2014, ruling delivered on 5 March 2019, *per* Danjidda J.

21 Unreported Suit No. NICN/PH/87/2017, judgment delivered on 19 September 2019, *per* Kola-Olale J. The suit was nonetheless held to be statute-barred on account of the wider provisions of the Niger-Delta Development Commission (NDDC) Act, CAP N86, LFN, 2004.

22 Unreported Suit No. NICN/PH/87/2017, judgment delivered on 14 October 2019, *per* Kola-Olale J. The suit was nonetheless held to be statute-barred on the applicability of the six-year timescale prescribed by Section 16 of the Limitation Law of Rivers State.

23 Unreported Suit No. NICN/ABJ/355/2014, judgment delivered on 17 October 2019, *per* Anuwe J.

24 Unreported Suit No. NICN/LA/574/2017, judgment delivered on 10 December 2019, *per* Isele J.

25 Unreported Suit No. NICN/LA/87/2015, judgment delivered on 13 March 2019, *per* Obaseki-Osaghae J.

26 Unreported Suit No. NICN/LA/129/2015, judgment delivered on 25 February 2019, *per* Obaseki-Osaghae J.

27 Unreported Suit No. NICN/LA/87/2015, judgment delivered on 17 December 2019, *per* Sanusi Kado J.

28 Paragraph 69 of the Judgment.

remedy in the breach of master and servant contractual relationship. The holding of the Court unswervingly points in one direction – a probable reversal of the decision if submitted to the higher court for review.

The unfettered right of an employee to resign, even in the face of express stipulations to the contrary in an employer's handbook, was reiterated in *Adigwe v. FBN Mortgages Limited*.²⁹ Relying on citation of cases expounding on the principle, the Court cast its decision in the light of international best labour practices and the applicable International Labour Organization Convention; lest such a practice be deemed to amount to forced labour. Curiously, *Fajuyitan v Guinea Insurance Plc*³⁰ reached a divergent position with regard to an employee tendering a letter of resignation when facing a disciplinary hearing and the employee handbook stipulating otherwise.

Consistent with the thrust of the Court's previous decisions in matters with similar fact patterns, *ASP Kiriben v. Nigeria Police Force*³¹ hinted at how gratuity is ascertained with exactitude and particularised in a claim. *Yunus Adewale Adefowope v. MTN Nigeria Communications Ltd*³² and *Kayode Tijani v. FRA Williams (Jr)*³³ gave an approval that payment in lieu of notice period must be made contemporaneously with the termination, otherwise the termination, in that circumstance, would be wrongful. *Okonyia v. UBA*,³⁴ *inter alia*, emphasised the distinction between termination or dismissal that is wrongful and termination or dismissal that is unlawful or illegal and ensuing court orders attending upon each incident. *Jonathan Pigden v. Tolu Ogunkoya*³⁵ affirmed that remuneration alone may not suffice as establishing a contract of employment as to confer jurisdiction on disputes arising from a contract of employment or service over which the NICN has jurisdiction.

In the realm of trade unionism and trade disputes, *Joachim v. Union Registrars Limited*³⁶ fortifies the constitutional protection of employees' freedom of association and, more importantly, the protection of the employee from persecution or termination of employment on account of trade union activities. *National Union of Hotels and Personal Services Workers*³⁷ stresses the need to exhaust the first-course grievance remedial processes of Part I of the Trade Disputes Act 2004 (in intra-union and inter-union trade disputes) before the appellate jurisdiction of the NICN can be invoked, whereas the court in *First Bank of Nigeria Plc v. Nnaemeka Eminiike*,³⁸ *inter alia*, recognised that a dispute arising from terminal benefits would

29 Unreported Suit No. NICN/LA/526/2016, judgment delivered on 9 July 2019, *per* Kanyip J (as he then was, now President, NICN).

30 Unreported Suit No. NICN/LA/209/2012, judgment delivered on 21 March 2019, *per* Obaseki-Osaghae J.

31 Unreported Suit No. NICN/LA/209/2012, judgment delivered on 3 December, 2019, *per* Hon Justice B B Kanyip (PhD) (President, NICN).

32 Unreported Suit No. NICN/LA/526/2016, judgment delivered on 15 May 2019, *per* Kanyip J (as he then was, now President, NICN).

33 Unreported Suit No. NICN/LA/130/2015, judgment delivered on 9 July 2019, *per* Kanyip J (as he then was, now President, NICN).

34 Unreported Suit No. NICN/AWK/09/2014, judgment delivered on 9 July, 2019, *per* Targema (PhD) J.

35 Unreported Suit No. NICN/LA/303/2018, judgment delivered on 20 March, 2019, *per* Oji (PhD) J.

36 Unreported Suit No. NICN/LA/139/2014, judgment delivered on 17 December, 2019, *per* Hon Justice B B Kanyip (PhD) (President, NICN).

37 Unreported Suit No. NICN/ABJ/207/2018, judgment delivered on 4 July 2019, *per* Kanyip J (as he then was, now President, NICN).

38 Unreported Suit No. NICN/ABJ/195/2018, judgment delivered on 12 April 2019; panel consisting of Hon Justice B B Kanyip, PhD (now, President, NICN), Hon Justice R B Haastrup and Hon Justice Sanusi Kado.

qualify as a trade dispute eminently qualified to be referred to the Industrial Arbitration Panel under the applicable laws. The Court took time to clarify labour rights inuring at three levels: pre-employment rights (i.e., those that arise prior to the start of employment, such as rights inuring to job applicants); employment rights (i.e., rights arising during the pendency of an employment); and post-employment rights (i.e., rights inuring at the end of the employment, such as pension rights).

In all, the labour courts have had an eventful year adjudicating on varied issues that often characterise the disputes in the world of work, while also stimulating insights into the shape of things to come (such as the legal impact of new technologies in the workplace).

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employer is required to provide an employee with a written employment contract within three months of the employee commencing work. The contract must contain:

- a* the name of the employer, or group of employers;
- b* the worker's name, address, position and date of engagement;
- c* the nature of the employment;
- d* the date of expiry, if a fixed-term contract;
- e* the notice period for termination;
- f* wages, frequency of payment and method of calculation;
- g* hours of work, holiday pay and conditions for incapacity owing to sickness and injury; and
- h* special conditions of the contract.³⁹

Generally, the contract must be signed to make it legally binding, as the employee's signature conveys acceptance of terms. The NICN may ignore express contractual terms if they are inconsistent with the reality of the relationship between the parties.⁴⁰

Fixed-term contracts are permissible and must specify the above-mentioned terms. If the contract is terminated before the agreed term has expired, the employer must pay the employee the full salary he or she would have earned for the period of the fixed term.⁴¹

The Labour Act allows parties to change or amend terms after execution, requiring the employer to inform the worker of the nature of the change by a written statement not more than one month after it is made.⁴² If a copy of the statement is not left in the worker's possession, he or she must be given reasonable access to it during the course of his or her employment.

³⁹ Labour Act, Section 7(1), Paras. (a) to (f).

⁴⁰ *Oladapo Olatunji & Anor (Representing themselves and other Uber and Taxi Drivers in Nigeria in a Class Action) v. Uber Technologies System Nigeria Limited & 2 Ors.* Suit No. NICN/LA/546/2017, judgment delivered on 4 December 2018, *per* Kanyip J.

⁴¹ *Nigerian Society of Engineers v. Ozah* (2016) 64 NLLR (Part 225) 1 CA.

⁴² Labour Act, Section 7(2), Paras. (a) and (b).

ii Probationary periods

Probationary periods in employment contracts are permissible, and the duration and length of notice to terminate during the period is subject to agreement between the parties. The notice requirement may also be waived.⁴³ Industry practice is usually for probation to last for three months. Failure to confirm or terminate the employment after probation could be deemed 'confirmation by conduct', where the employer continues to utilise the services of the employee at the end of the probationary period.⁴⁴

iii Establishing a presence

For a foreign company to hire employees to carry on business in Nigeria, it must establish its presence⁴⁵ by incorporation under the Companies and Allied Matters Act (CAMA).⁴⁶ It cannot own a place of business before incorporation, except for receiving correspondence, notices and other documents preliminary to incorporation. The CAMA⁴⁷ empowers the National Council of Ministers, on application by a foreign company, to grant exemption from incorporation in limited circumstances.⁴⁸

The Minister of Labour and Productivity may permit 'fit and proper persons' to recruit citizens in Nigeria for employment outside Nigeria (for 12 months from the date of issue).⁴⁹ An unincorporated company may engage an independent contractor strictly to carry out a specific task or contract and not to carry on any business in its favour. A joint venture agreement between a foreign company and an indigenous company would allow for employment of persons, with the local company (having legal status) hiring the employees.

The Personal Income Tax Act (PITA), as amended, obliges the employer to ensure monthly remittance of employees' taxes. The Pension Reform Act 2014⁵⁰ requires the employer to make monthly deductions of a minimum of 8 per cent from its employees' salaries, plus a minimum contribution of its own of an additional 10 per cent, and remit the same to the employees' retirement savings accounts (RSA). The employer must also maintain a group life insurance policy for each employee for a minimum of three times the annual total salary of the employee and the premium must be paid not later than the date of commencement of the cover.

43 id., at Section 11(6).

44 *Momoh Faruk Ikhuemeso v. Daar Communication Plc* <http://nicn.gov.ng/judgment/pdf.php?case_id=879>.

45 Companies and Allied Matters Act [CAMA], Sections 54 and 55.

46 Chapter C20 LFN 2004.

47 Section 56.

48 A foreign company may apply to the National Council of Ministers for exemption from incorporation if it belongs to one of the following categories: (1) foreign companies (other than those specified in paragraph (d) of Section 56(1)) invited to Nigeria by or with the approval of the Federal Military Government to execute any specified individual project; (2) foreign companies that are in Nigeria for the execution of a specific individual loan project on behalf of a donor country or international organisation; (3) foreign government-owned companies engaged solely in export promotion activities; and (4) engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Military Government.

49 Labour Act, Section 25(1).

50 The Pension Reform Act 2014 was signed into Law on 1 July 2014, repealing the Pension Reform Act 2004.

V RESTRICTIVE COVENANTS

Generally, all covenants in restraint of trade are unenforceable, unless they are reasonable with respect to the interests of the parties concerned and of the public. The courts apply a reasonableness test to determine whether or not to enforce such clauses. The burden of proof for 'reasonableness' lies with the enforcing party.

There is no express prohibition in Nigeria's laws on entering into restrictive covenants, which may have retrospective effect. An employer needs to be mindful of what proprietary interest it seeks to protect, as judicial trends lean in favour of the employee, who is often considered the party with the weaker bargaining power. While employers may have legitimate reasons for imposing restrictive covenants, they are often considered to inhibit competition and may be struck down by the courts if held unreasonable.

VI WAGES

The government responded to calls for an increase in the national minimum wage by establishing, through the Federal Executive Council, a National Minimum Wage Committee. The minimum wage was subsequently increased and has been approved at 30,000 naira. There are plans to commence the implementation of the minimum wage as soon as practicable.

Furthermore, under the Labour Act, it is unlawful for an employer to determine or direct the place or manner in which an employee must spend his or her wages.⁵¹

i Working time

Pursuant to the Labour Act, normal working hours under any employment contract shall be fixed by agreement, by any collective bargaining process within the organisation or industry, or by an industrial wages board (where there is no mechanism for collective bargaining). The Act is silent on the duration of the working day, which in practice is regulated by company policy. The statutory minimum for rest periods and leave⁵² must be considered when determining working hours.

With the exception of the Labour Act's provisions prohibiting employment of women for night work in a public or private industrial undertaking or any agricultural undertaking, and young persons below the age of 16 (and over 16, with exceptions), there are no other restrictions on working time. The prohibition on employment of women for night work⁵³ does not extend to women employed as nurses or holding management positions, or those who are not ordinarily engaged in manual labour.

51 Labour Act, Sections 1 and 2.

52 The Labour Act provides that if an employee is at work for six hours or more a day, his or her work shall be interrupted (to the extent that is necessary, having regard to its character and duration and to the working conditions in general) by allowing one or more suitably spaced rest intervals (the rest intervals being not less than one hour in aggregate). Furthermore, an employee is entitled to one day of rest, which shall not be less than 24 consecutive hours, every seven days.

53 The word 'night' is defined to mean: (1) with respect to industrial undertakings, a period of at least 11 consecutive hours, including the interval between 10pm and 5am; and (2) with respect to agricultural undertakings, a period of at least nine consecutive hours, including the interval between 9pm and 4am.

ii Overtime

Overtime is defined under the Labour Act as the hours an employee is required to work in excess of the normal fixed hours. While the Act does not categorise overtime work, it recognises work done in excess of agreed hours and contains time off (rest periods) or payment in lieu for worked hours. In practice, overtime wages are calculated on an hourly basis on a par with the normal hourly rate of the worker and may differ depending on the staff category.

While the Act is silent on a threshold for the number of overtime hours an employee can undertake per month, the total number of working hours undertaken should fall within the permissive periods of leave and rest. The quantum of overtime wages falls within the purview of the contract; in practice, the rate is determined by the employer's internal policies.

VII FOREIGN WORKERS

Foreigners working in Nigeria are subject to immigration approvals, controls, permissions and permits.

A bill repealing all previous Immigration Acts was enacted into law in May 2015, revising the rules with respect to issuance of work permits and expatriate quotas,⁵⁴ and imposing strict penalties on companies and foreign employees for non-compliance. The Immigration Act prohibits companies from employing a foreign national without the permission of the Director General of Immigration, unless the Minister of the Interior grants a waiver or exemption by notice.⁵⁵ Persons entering Nigeria for business purposes must obtain the Minister's consent.⁵⁶

There is no mandatory requirement for an employer to maintain a register of foreign workers. However, according to the Immigration Act (Control of Aliens) Regulations, all foreigners (having undergone legal formalities for residency) are to register their presence with the immigration offices closest to their place of residence within 21 days of arrival. Companies seeking to employ expatriates are to obtain a permit from the Nigerian Investment Promotion Commission. The expatriate quota (temporary or permanent until review), issued for two years and renewable thereafter, determines the number of foreign workers the employer may have. Further requirements include a disclosure of the provision made for repatriation of the expatriate and his or her dependants (if any).

The visa to be applied for is determined by the intended duration of employment. Experts invited for specialised employment for a short period ordinarily apply for a temporary work permit. Those wishing to reside in Nigeria permanently require a 'subject to regularisation' visa and, subsequently, a combined expatriate residence permit and aliens card.

54 Following an announcement from the Nigerian Immigrations Services, with effect from 6 April 2015, a re-entry visa ceased to be a requirement for the purpose of re-admitting any foreigner who is legally resident in Nigeria. The possession of a valid Combined Expatriate Residence Permit and Aliens Card, in addition to other travel documents, now suffices for re-entry into Nigeria.

55 Sections 34 and 18(1).

56 Sections 8(1) and 14(1).

The legislation regulating tax matters for individuals is the PITA.⁵⁷ A company must remit tax on behalf of its foreign employees if the employer is in Nigeria or has a fixed base in Nigeria, or if the duties of the employment are wholly or partly performed in Nigeria, unless:

- a* the duties are performed on behalf of an employer in a country other than Nigeria and the remuneration of the employee is not borne by a fixed base of the employer in Nigeria;
- b* the employee is not in Nigeria for a period or periods amounting to an aggregate of 183 days (inclusive of annual leave or temporary periods of absence) or more in any 12-month period; and
- c* the remuneration of the employee is liable to tax in the other country under the provisions of the avoidance of a double taxation treaty with that country.

Tax remissions may be available depending on the existence of a double taxation treaty between Nigeria and the employee's home country.

Nigerian employment legislation does not discriminate between foreign and local workers. In practice, the employee's contractual terms may elect for the home country pension arrangement to remain, or a subsequent transfer of his or her RSA content to his or her home country on retirement or exit.

VIII GLOBAL POLICIES

Employer-employee relationships in the private sector are formalised by parties entering an employment contract. It is common for organisations to have a handbook containing additional details on matters pertaining to the relationship. Although internal disciplinary rules are common, they are not mandated by law. In practice, they are found in the handbook and, in some cases, completed by the contract or a collective bargaining agreement (CBA). Public sector workers may be bound by rules specific to their establishments or industry.

It is common practice for a handbook to be provided to an employee at the commencement of employment or shortly thereafter, or to be included as part of the contract. Its terms do not have to be agreed through a representative body, or approved or filed with a government authority; however, in some instances, they may be reviewed by representative bodies (e.g., when the employees are unionised). Acceptance of the employment offer is usually predicated on acceptance of internal rules. However, employees must be notified of the existence of internal rules and any subsequent changes to them. While there is no prescribed format for where the rules are to be posted, organisations tend to provide employees with a hard copy and make them easily available (electronically or otherwise).

Nigerian laws address discrimination, sexual harassment, corruption and related matters. The CFRN enshrines the right to freedom from discrimination,⁵⁸ which is forbidden in the workplace.⁵⁹ Section 17(3) requires the state to direct its policy towards ensuring that 'there is equal pay for equal work without discrimination on account of sex, or any other

57 See Section IV.iii, above.

58 CFRN, Section 42; other laws, such as the Discrimination Against Persons with Disabilities (Prohibition) Act 2018 and the HIV and AIDS (Anti-Discrimination) Act 2014, reflect this.

59 *id.*, at Section 17. As regards corruption, there are a number of Nigerian laws in this respect.

ground'.⁶⁰ The Trade Union Act (TUA), as amended, stipulates that 'if any person is refused admission into a union on discriminatory grounds, the union and all its officials shall be guilty of an offence'.⁶¹ The Labour Act also states that contracts that cause the dismissal of or prejudice a worker on the grounds of union membership or participation in union activities, is in contravention of the Act and shall be illegal.

IX PARENTAL LEAVE

The right of women in private and public organisations to maternity leave is guaranteed by the Labour Act.⁶² However, the Labour Act is silent on paternity leave. Thus, entitlement thereto is subject to the contract of employment, company policy or handbook, or collective bargaining agreement between the employer and employees.

Under the Labour Act, pregnant women have the right to leave their work if they produce a medical certificate given by a registered medical practitioner and stating that their confinement will probably take place within six weeks. Women shall also not be permitted or compelled to work during the six weeks after childbirth. Accordingly, maternity leave is 12 weeks (i.e., six weeks before and six weeks after childbirth). The 12 weeks of maternity leave guaranteed by Labour Act can be increased by contract; however, it cannot be reduced by an employer.

After the maternity leave has ended, a nursing mother is entitled to half an hour twice a day during her working hours, to nurse her child. The Labour Act also provides that a woman who has been continuously employed by her employer for six months or more prior to her maternity leave will be entitled to not less than 50 per cent of her salary. This may be increased by contract, however, which may comprise either full pay or a mixture of full and partial pay. Since paternity leave is not governed by any Nigerian law, the entitlements accruing to the same are governed by contract.

No employer is liable, or can be compelled, under the Labour Act to pay any medical expenses incurred by a woman during, or on account of, her pregnancy or confinement, unless such an entitlement is contained in the employment contract.

With regard to dismissal, the Labour Act provides that when a woman is absent from her work through being on maternity leave, or remains absent from her work for a longer period as a result of an illness certified by a registered medical practitioner to have arisen out of her pregnancy or confinement and to render her unfit for work, then, until her absence has exceeded a period (if any) as may be prescribed by the medical practitioner, her employer is prohibited from giving her a notice of dismissal during her absence or a notice of dismissal expiring during her absence. The terms of dismissal of a person on paternity leave are subject to the terms of the employment contract.

60 While admirable in its intent, transgressions of Chapter II, Section 17 of the CFRN are not justiciable. Thus, unless a law is passed embodying the provision, it is not possible to rely on it as a basis for challenging any discriminatory practice in a court of law.

61 Section 12(2).

62 Section 54.

X TRANSLATION

Ordinarily, Nigerian law presumes that a person is of full age and capacity, and that the person fully understands the meaning of any document that he or she signs, with the exceptions of fraud, illegality, duress or coercion.

There is no statute or regulation requiring employment documents to be translated into the local language or an employee's native language. In Nigeria, the official language is English and therefore employment contracts and relevant documents are usually in English, provided that they are interpreted for the employee and the employee has a clear understanding of the document before signing it. The interpreter is also required to sign the document and certify that it was duly interpreted and understood by the employee.⁶³ The nature of the document and contract terms will determine whether they must be signed by the employee or whether a simple notification would suffice. However, the Labour Act requires the employee to have access to the contract and to be notified of any changes thereto.

XI EMPLOYEE REPRESENTATION

The CFRN grants all persons the fundamental right to peacefully assemble and associate. The Labour Act and TUA permit employees to form and belong to a union. The membership of a union or representative body must be voluntary and no employee is to be forced to join or to be victimised for refusing to join or remain a member.

The ratio of representatives to employees differs per institution and is not the subject of statute. In accordance with the TUA, an application for the registration of a union must be supported by at least 50 members for a union of workers and two for a union of employers.

The election procedure, terms of office of representatives and the frequency of meetings are regulated by the union's constitution or guiding document. The TUA requires registered unions to create an electoral college to elect members to represent them in negotiations.

The rights and protection of employees' representatives are guaranteed by the CFRN. The Labour Act prohibits contracts from making union membership (or lack thereof) a condition of employment, and prohibits employers from dismissing or being prejudiced against an employee:

- a* by reason of union membership;
- b* because of union activities outside working hours or, with the consent of the employer, within working hours; or
- c* by reason of the fact that he or she has lost or been deprived of membership of a union or has refused, or been unable to become, or for any other reason is not, a member of a union.

Employers are required to recognise any registered union branch within its organisation once notified by employees that they are members of the branch. The employer must deduct labour dues from members' wages for remission to the union's registered office within a reasonable period or a period prescribed by the Registrar of Trade Unions.

63 The Labour Act defines 'foreign contracts' as contracts for the employment of citizens outside Nigeria. Section 38 provides requirements specific to these contracts, including that they are read in or translated into a language understood by such persons.

XII DATA PROTECTION

Nigeria does not currently have a strict data protection statute. The usual recourse is the CFRN, which guarantees ‘privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications’, and English common law.

Other relevant laws include the Nigeria Data Protection Regulation 2019 (NDPR) issued by the National Information Technology Development Agency, the Cybercrimes (Prohibition, Prevention, etc.) Act 2015 (promoting cybersecurity and protecting computer systems, programs, e-communications, intellectual property, privacy rights and system data) and the Freedom of Information Act 2011 (applicable only to personal information in the custody of public agencies and institutions in Nigeria).⁶⁴ The Personal Information and Data Protection Bill is pending before the National Assembly.⁶⁵ In practice, employers provide for data protection in their handbooks or employee contracts.

i Requirements for registration

There is currently no data protection agency requiring registration.⁶⁶ When data is used in the course of a company’s usual line of business, consent or notification to an employee may, arguably, not be necessary. Where it is assumed that an employee’s consent was obtained when executing the employment contract, a clause to this effect should be included in the handbook or contract. Under the NDPR,⁶⁷ the processing of personal data is considered lawful if, among other things, it is necessary for the performance of a contract to which the individual is a party, it is in compliance with a legal obligation, or consent has been given to the processing for one or more specific purposes.

In practice, companies tend to limit access to information about employees and company data by contractual terms. The need to ensure adequate data protection is commercially prudent. Also, the NDPR places a duty of care on any person entrusted with personal data and makes him or her accountable for acts or omissions arising from processing the data. The NDPR also requires any person or organisation involved in data processing or control of data to develop security measures to protect the data.⁶⁸

ii Cross-border data transfers

Any transfer of personal data undergoing processing, or intended for processing after transfer to a foreign country or to an international organisation, shall take place subject to the NDPR and under the supervision of the Honourable Attorney General of the Federation. The NDPR permits the transfer of data to a foreign country where, among other things, the consent of

⁶⁴ One of the 46 bills passed by the 7th National Assembly (in 2015) was the Electronic Transactions Bill, which is used to ‘eliminate legal barriers to the effective use of electronic communications to the transaction’. It covers electronic transactions carried out in both public and private sectors, and although yet to be assented to by the President, seeks to promote the harmonisation of legal rules on electronic transactions across national boundaries. It also promotes business and community confidence in electronic transactions and provides a legal framework for e-commerce in Nigeria, protecting consumer and third party rights.

⁶⁵ The Bill, if passed, will provide a legal framework for privacy and data protection, which will further support the Nigeria Data Protection Regulation currently in force.

⁶⁶ The Cybercrimes Act does, however, require cybercafé operators to register as a business concern with the Computer Professionals Registration Council and as a business name with the Corporate Affairs Commission.

⁶⁷ Section 22.

⁶⁸ Sections 2.1(2) and (3), and 2.6.

the individual has been obtained, the transfer is necessary for the performance of a contract, or the transfer is necessary for the conclusion or performance of a contract concluded in the interests of an employee between the employer and another entity. It is advisable for data being transferred to be used solely for the company business. The use of a joint-use agreement or safe harbour registration is discretionary.⁶⁹

iii Sensitive data

The NDPR defines sensitive personal data to mean data relating to religious or other beliefs, sexual orientation, health, race, ethnicity, political views, trade union membership, criminal records or any other sensitive personal information; and requires measures to be put in place to protect it.⁷⁰ Nigeria does not operate a social security system; however, medical information, client–solicitor communications and bank–customer communications do enjoy conditional protection by law.⁷¹

iv Background checks

Background checks are not the subject of statutory regulation; however, evidence suggests that many employers conduct checks as a matter of prudence. The employee's approval may be required for certain checks. Credit and criminal records checks are allowed. There is no centralised credit registry in Nigeria, which means an individual's financial records are left in the custody of his or her bank, accessible only with clear authorisation and consent. Undertaking criminal checks, by discrete application to the Nigerian police, is a fairly common practice.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

In the past, Nigerian law generally permitted parties to an employment contract to terminate for cause or for no reason, provided that the terminating party complied with the contract terms. However, this position has been substantially altered by the decisions of the NICN. The NICN departed from the applicable principle of law in a master and servant relationship, which the common law developed and the decisions from other courts (up to the Supreme Court) had followed. By the NICN decision in the leading case of *Aloysius v. Diamond Bank*,⁷²

69 NDPR, Sections 2.11 and 2.12.

70 id., at Section 1.3(xxv). Such measures include protecting systems from hackers; setting up firewalls; storing data securely with access given to specific, authorised individuals; employing data encryption technologies; developing an organisational policy for handling personal data (and other sensitive or confidential data); protection of email systems; and continuously building capacity for staff.

71 The President of Nigeria, by the provisions of the Cybercrimes Act, is empowered to designate computer systems and networks as constituting Critical National Information Infrastructure systems, preventing the destruction of such information, which is viewed as a threat to national security.

72 (2015) 58 NLLR (Pt 199) 92; the NICN stated: 'The Court can now move away from the harsh and rigid common law posture of allowing an employer to terminate its employee for a bad or no reason at all' . . . *"it is now contrary to international labour standards and international best practice and, therefore, unfair for an employer to terminate the employment of its employee without any reason or justifiable reason that is connected with the performance of the employee's work"*. I further hold that the reason given by the defendant for determining the claimant's employment in the instant case, which is that his "service was no longer required" is not a valid

in certain circumstances, an employee cannot be dismissed without a reason. The employer is required to not only give a reason, but that the reason be justified and connected with the performance of the employee's work.

The law distinguishes between termination and dismissal, with dismissal being a severe sanction available only to the employer and connoting some grave infraction by the employee, such as theft, fraud or gross insubordination. It is often exercised without notice or pay. An employee should only be dismissed for a stated cause. Before a decision is reached on account of an infraction, the law requires the employer to afford the employee an opportunity to defend such allegations. Failure to do so may lead a court to declare the dismissal wrongful, entitling the employee to damages.

Notification to the authorities of the dismissal is generally not required. However, certain industries require prior notification to the appropriate industry regulator.⁷³ Except where expressly stated in any CBA, notification to a works council or union is not required. The closest thing to a social plan for dismissed employees is the RSA contributory scheme.

The employer's obligations should be up to date as at the time of dismissal. An employee has no legal right of rehire, although employers are not prohibited from extending this privilege. Either an employer or an employee may terminate the employment relationship. The Labour Act (and most contracts) state the required termination notice period. It is widespread practice for contracts to contain a clause permitting payment in lieu of notice.

The Labour Act protects a woman who is absent from work for a long period owing to a certified illness arising out of pregnancy from receiving a notice of dismissal during her absence, or one expiring during her absence. Additionally, an employer cannot cause the dismissal of or prejudice a worker by reason of a union membership and related reasons.⁷⁴

Severance pay in a dismissal is dictated by the employment contract. Employers may also make (discretionary) *ex gratia* payments. However, the parties may enter into a settlement agreement.

ii Redundancies

The law does not recognise multiple redundancies nor require government notification for individual or collective redundancies. Employers are to inform the union or workers' representative of the reasons for and extent of the anticipated redundancy. In certain industries, this requirement may extend to the regulator.⁷⁵

There is no statutory redundancy notice period, but the applicable contract, handbook or CBA may stipulate a period.⁷⁶ The employer must fulfil its severance, statutory and

one connected with the capacity or conduct of the claimant's duties in the defendant bank. In addition, I hold that it is no longer conventional in this twenty-first century labour law practice and in industrial relations for an employer to terminate the employment of its employee without any reason even in private employment.' [emphasis added].

73 In the oil and gas industry, for instance, a notification of a termination or dismissal must be submitted to the Department of Petroleum Resources.

74 See Labour Act, Section 9(6).

75 In the oil and gas industry, for instance, employers are required to notify the Department of Petroleum Resources.

76 In practice, although this is not a legal requirement, notice periods are generally between three and six months.

contractual obligations. Nigerian legislation does not confer rehire rights; it does, however, require that the principle of 'last in, first out' is adopted in executing a redundancy. Offers of suitable alternative employment may be exercised.

XIV TRANSFER OF BUSINESS

Nigerian law imposes no obligation on employers to protect employees in a successor company in the event of a business transfer. An employee's position before and after transfer is a matter of contract between the employee and the transferor. The transferee assumes no obligation to existing employees, except as intended at the contracting stage.

The Labour Act places a notification obligation on an employer when its intention is to transfer an employee's contract. The transfer is subject to the employee's consent and authorisation of the transfer by an authorised labour officer.⁷⁷ Redundancy provisions and policies of the company may be relevant (depending on the base structure of the transfer).

The Labour Act is limited in the security it provides. The existence of a CBA may afford a degree of protection to the extent of organised labour's ability to influence policy direction. The relevant business transfer laws are the Investment and Securities Act 2007, the Federal Competition and Consumer Protection Act (FCCPA), the CAMA and the Company Regulations of 2012.⁷⁸

Companies proposing a large merger or acquisition shall, in compliance with the FCCPA, file with the Federal Competition and Consumer Protection Commission a pre-merger notice and a formal application for approval of the proposed merger. Companies must comply with post-approval requirements. The obligatory filings with the Corporate Affairs Commission and associated costs are controlled by the CAMA and accompanying regulations.

XV OUTLOOK

The courts are now increasingly disposed towards applying international best practices in determining employment disputes, depending on the facts of each case. Additionally, the courts now determine the nature of an employment relationship based on the facts and the principle of primacy of facts. This is especially in view of the unique employment arrangements today in the face of the evolving world of work. The courts have also come to recognise co-employer status or triangular relationships, particularly where the arrangement purports to conceal the real employer. In essence, if the court is of the view that the written terms of a contract do not reflect the reality of the relationship, or the arrangement appears to be ambiguous or purporting to conceal the true employer, it may, in appropriate circumstances, disregard the written contract and determine the relationship of the parties based on the facts and evidence before it.

Sexual harassment and discrimination in the workplace are steadily becoming a major issue for deliberation in the courts.

⁷⁷ Labour Act, Section 10(1).

⁷⁸ Pursuant to CAMA, Sections 16, 585 and 609.

NORWAY

Magnus Lütken and Fredrik Øie Brekke¹

I INTRODUCTION

Norwegian employment law is governed by legislation, statutory regulations and collective bargaining agreements (CBAs), in addition to non-statutory sources of law such as case law and industry practice.

The Norwegian Working Environment Act of 2005 (WEA) is the principal Act within Norwegian employment law. The WEA applies mandatorily to all undertakings that have employees and may not be departed from to the detriment of the employee, unless otherwise explicitly provided by the Act.

Other relevant legislation within Norwegian employment law is, in particular, the Civil Servants Act of 2017, the Ship Labour Act of 2013, the Holidays Act of 1988, the National Insurance Act of 1997, the Act on Mandatory Collective Pension Schemes of 2005, and the Equality and Anti-Discrimination Act of 2017.

Employment disputes are generally heard by the local district courts first. Decisions from the district court may be appealed to the Court of Appeal, which in turn may be appealed to the Supreme Court. Judgments by the Supreme Court are final.

The Labour Court is a special court with limited jurisdiction in certain matters regarding the interpretation, existence, validity and breach of CBAs.

The Labour Inspection Authority is authorised to supervise all employers to secure compliance with the WEA and other relevant legislation.

II YEAR IN REVIEW

i Seniority in dismissals with notice owing to workforce reductions

The importance of seniority in connection with the selection of redundant employees in workforce reductions was a hot topic in 2019, as it had been in 2018. The Supreme Court pronounced two judgments, among others, on the topic – the *Skanska* case and the *Telenor* case (see Section III). The 2019 *Telenor* case from the Supreme Court is the same as the judgment pronounced by the Court of Appeal in the winter of 2018.

In these cases, the principle of seniority has been relevant in respect of both the selection criteria and the selection pool. The selection criteria are those used to select employees for redundancy. It is undisputed that seniority is a relevant criterion, but the question is how

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much weight it should carry. The selection pool is the group or groups of employees from which those who are at risk of dismissal are selected. The main rule here is that the entire legal entity is the selection pool, but that it may be narrowed down if done on a justifiable basis.

There has been a particular focus on the interpretation and understanding of the clause regarding seniority in dismissals with notice owing to workforce reductions – the principle of seniority – in the nationwide CBA between the Norwegian Confederation of Trade Unions (LO) and the Confederation of Norwegian Enterprise (NHO), the largest trade union and employers' organisation in Norway, respectively.

There has also been a dispute between the LO and NHO about whether seniority shall be the main selection criterion in connection with the selection of redundant employees, or whether the selection shall be based on an overall assessment of relevant criteria – seniority being just one. The dispute has been settled with the *Skanska* case at the Supreme Court (see Section III.i).

ii Amendments to the regulations on whistle-blowing

In March 2018, an expert group delivered a report on the whistle-blowing regulations and suggested amendments in the applicable legislation to strengthen protections under Norwegian law for employees who are whistle-blowers. Changes to the whistle-blower regulation were subsequently enacted by the Norwegian parliament and are effective from 1 January 2020. The changes include that the terms 'censurable conditions' and 'retribution' are defined in Chapter 2A of the WEA. The new regulation also includes guidelines for the correct procedure regarding whistle-blowing, as well as a clearer regulation of employers' obligations in whistle-blowing cases.

III SIGNIFICANT CASES

i Correct application of seniority

In the *Skanska* case,² the main question before the Supreme Court was whether the selection of redundant employees in a redundancy process was objectively justified, and more specifically whether the principle of seniority in the CBA between the LO and NHO had been correctly applied in the process. In its judgment, the Supreme Court pronounced that the CBA requires that seniority and length of service shall be the starting point for the selection of redundant employees, but the principle of seniority could not be considered as the main rule. Instead, seniority should be one factor in a holistic assessment, and the weight is relative, differing from case to case.

ii The seniority principle and selection pool

In the *Skanska* case, the Supreme Court assessed the principle of seniority as a factor in the selection criteria assessment. In the *Telenor* case,³ on the other hand, the Court assessed the selection pool. In this case as well, the principle of seniority was founded in the CBA between the LO and NHO. The Court concluded that the selection pool cannot be so narrow that the principle of seniority loses most of its effect.

2 Supreme Court, No. HR-2019-424-A, 28 February 2019, *Skanska*.

3 Supreme Court, No. HR-2019-1986-A, 29 October 2019, *Telenor*.

iii Variation dismissal

On 15 May 2019, the Supreme Court pronounced a judgment in the *Hurtigruten* case regarding variation dismissal (see also Section IV.i regarding variation dismissal).⁴ The verdict is the first in which the Supreme Court has concluded that the threshold for a variation dismissal is lower than for regular dismissal. The Court concluded that the consequences of the dismissal are somewhat mitigated by offering the employee new employment on revised terms.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The WEA requires that a written employment contract is entered into between all employers and employees. In all employment relationships with a total duration of more than one month, a written employment contract shall be entered into as early as possible and no more than one month following commencement of the employment. In employment relationships of a shorter duration than one month or in connection with the hiring out of labour, a written employment contract shall be entered into immediately. It is the duty of the employer to draft the employment contract.

There are certain minimum requirements regarding the content of an employment agreement. According to Section 14-6 of the WEA, an employment contract must state factors of major significance for the employment relationship, including the identity of the parties, the place of work, a description of the work or the employee's title, post or category of work, the commencement date, provisions relating to a probationary period (if relevant), the employee's right to holiday and holiday allowance, the notice period, salary, duration and disposition of the daily and weekly working hours, the length of breaks, information regarding applicable collective bargaining agreements, and, if the employment is of a temporary nature, the expected duration of the employment relationship and the basis for the appointment.

According to Section 14-8 of the WEA, changes in the employment relationship shall, as a main rule, be included in the employment agreement as early as possible and not later than one month after the change has entered into force.

Even though a written employment contract, as well as certain minimum requirements to the content of the contract, are required by law, a verbal contract will be binding for both the employer and the employee. However, the exact content of the contract can be difficult to prove, and any uncertainty would be interpreted to the detriment of the employer as the party having failed to secure a written contract.

The employer may make unilateral changes to the employment relationship subject to the management prerogative; however, this prerogative is not unlimited. According to case law, the scope of the employer's management prerogative will depend on a holistic assessment of, among other things, the employment agreement, the employee's job description, the circumstances surrounding the appointment, customs within the industry and practice in the employment relationship in question, in addition to any limitations under applicable legislation, regulations or CBAs. The management prerogative is also limited by principles of objectivity, as well as procedure.

⁴ HR-2019-928-A.

If changes are considered to be outside the scope of the management prerogative, they may be implemented either based on consent or by giving a 'variation dismissal' (a formal dismissal with notice according to the WEA, combined with a new offer of employment on revised terms). As a variation dismissal formally is an ordinary dismissal, all the procedural rules and formal requirements for dismissal in Chapter 15 of the WEA must be followed.

An employee shall, as a main rule, be hired on a permanent basis. However, a fixed-term contract may be agreed in certain circumstances, mainly when the work is of a temporary nature or for work as a temporary replacement for another person or persons.

There is also a general option to employ workers temporarily for a maximum of 12 months, with no requirement as to a specific basis for the temporary employment. A maximum of 15 per cent of the employees of the undertaking may be temporarily employed under this provision. If, on expiry of the agreement period, an employee who is temporarily appointed pursuant to this provision is not offered continued employment, the employer shall be subject to quarantine for 12 months, whereby the employer may not make new appointments subject to this provision. However, the quarantine only applies to work tasks of the same kind as those performed by the former employee.

Maximum periods of temporary employments are three or four years, depending on the basis for the temporary employment.

There are alternative provisions that may be made applicable only for the chief executive of an undertaking. A chief executive may always be appointed for a fixed term. Furthermore, a chief executive may relinquish the protection against unfair dismissal in exchange for severance pay on termination of employment.

ii Probationary periods

The employer and the employee may agree on a probationary period of a maximum of six months from the commencement of the employment relationship. The probationary period may be extended, however, by a period corresponding to an employee's absence from work during the probationary period, subject to certain criteria.

During the probationary period, the employee may be dismissed with notice on the grounds of lack of suitability for the work, or lack of proficiency or reliability.

The notice period during a probationary period is 14 days and commences on the first day after notice is given, unless otherwise agreed in writing or in applicable CBAs. The notice period during a probationary period is substantially shorter than the ordinary notice period (see Section XIII).

iii Establishing a presence

All foreign companies that have employees in Norway are required to register with the State Register of Employers and Employees (the AA Register).

Foreign employers with assignments in Norway are further required to report to the AA Register through the 'a-melding' scheme. The Norwegian authorities, including the Norwegian Tax Administration and the Labour and Welfare Service, have access to the a-melding. The a-melding is submitted monthly online⁵ and shall, among other things, contain information regarding employment, salary, tax withholding and the employer's national insurance contributions.

5 www.altinn.no.

Assignments in Norway carried out by a foreign company must also be reported to the Central Tax Office – Foreign Tax Affairs (SFU). The SFU makes an individual assessment of whether the activity is of such a character that it creates a permanent establishment. In the event that the company is to be regarded as a permanent establishment, this will, as a main rule, trigger tax liability for the company to Norway.

To comply with the aforementioned obligations, foreign companies have a right to register with the Central Coordinating Register for Legal Entities to obtain a Norwegian organisation number. Foreign companies that are carrying out business operations in Norway are also obliged to register with the Register of Business Enterprises. All foreign enterprises that are required to have a Norwegian organisation number will be registered as a Norwegian-registered foreign business.

Foreign companies may engage independent contractors in Norway, and hire employees through an agency or another third party. As a main rule, there are no registration requirements, nor will it be necessary for the foreign company to submit the a-melding. However, as stated above, the company is required to register with the Register of Business Enterprises if it is conducting business operations in Norway, and to report assignments in Norway to the SFU. Employees hired from agencies are entitled to the same pay and working conditions as if they had been employed directly to perform the same work.

There is a risk that a consultant or hired employee may claim employment with a foreign company operating in Norway. If the foreign company is to be regarded as an employer, it will be subject to the reporting liabilities and registration obligations for an employer as described above.

Employees working in Norway are covered by the Norwegian working environment legislation and regulations. Thus, foreign companies with employees in Norway must comply with these regulations.

V RESTRICTIVE COVENANTS

Traditionally, three types of restrictive covenants have been used in Norwegian employment agreements: non-competition, non-solicitation of customers and non-solicitation of employees. New and stricter regulations regarding non-competition and non-solicitation of customers came into full effect in January 2017. These regulations are provided in Chapter 14A of the WEA.

The regulations set out specific requirements in relation to restrictive covenants upon termination of employment. The requirements imply, *inter alia*, a maximum duration of restrictive covenants of 12 months from cessation of employment, a duty to provide a written statement and a duty to pay compensation to the employee when invoking a non-competition clause. Further, a non-competition clause may only be invoked as far as is necessary to safeguard the employer's particular need for protection against competition.

Non-solicitation of employee clauses may be censored or deemed invalid under contract law.

VI WAGES

i Minimum wage requirements

There is no minimum wage by law in Norway. However, in some industry sectors, collective agreements have been given general applicability, which means that they apply to all employers and employees in that sector, even if they are not party to the relevant CBAs. These generally applicable collective agreements may include minimum wage regulations.

The industry sectors in which CBAs have been given general applicability are usually those in which social dumping is an issue, for instance for construction workers and cleaners.

ii Working time

Provisions on working hours are provided in Chapter 10 of the WEA. These provisions apply to all employees, with the exception of those who have 'leading' or 'particularly independent' positions. Industry-specific rules, such as for offshore work, also apply according to separate regulations. According to the WEA, normal working hours must not exceed nine hours per 24 hours or 40 hours per seven days. However, the WEA allows for the employer and the employee to agree in writing to a calculation of average working hours, within certain limits.

Working between 9pm and 6am is generally prohibited, unless the nature of the work necessitates it.

iii Overtime

Work in excess of the agreed working hours must not take place unless there is an exceptional and time-limited need for it.

If the working hours exceed the limits for normal working hours according to the WEA, the work is considered as overtime, and the employee shall receive an overtime supplement of at least 40 per cent of the salary in addition to the salary received for corresponding work during normal working hours.

As a main rule, overtime work must not exceed 10 hours in seven days, 25 hours in four consecutive weeks or 200 hours in 52 weeks. These limits may be expanded through written agreements with employee representatives in companies that have CBAs.

VII FOREIGN WORKERS

There are no limits on the number of foreign employees a workplace or a company may employ, and the employer does not have to keep a register of its foreign employees. Further, there are no restrictions on the duration of a foreign employee's assignment.

Employees from countries inside the European Union or the European Economic Area (EEA) do not need a residence permit to work in Norway, but they have to register with the police no later than three months after arriving in Norway. Swedish, Danish, Icelandic and Finnish citizens can work in Norway without registering with the police, but they have to report a move to the National Registry.

People from countries outside the European Union or the EEA who wish to work in Norway need a residence permit for work, and cannot start working before a residence permit has been granted. The permit will have an expiry date, but most are renewable. Employers who employ foreign employees who do not have the right type of residence permit may be subject to fines or imprisonment.

Notwithstanding the foregoing, business travellers may be allowed to work in Norway for up to three months without a residence permit.

Foreign employees are, as a main rule, protected under the Norwegian employment laws and have the same rights as Norwegian employees, including under any generally applicable collective agreements.

Employers are obliged to report wages to the Norwegian tax authorities, and to withhold and pay tax on behalf of their employees. This also applies to foreign employees, unless exceptions are made pursuant to social security agreements between Norway and other countries. Foreign employees must visit the tax office in person to get a tax deduction card. It is a condition for receiving a tax deduction card that the Norwegian Tax Administration has checked the employee's identity and that the employee has been given a Norwegian identification number.

VIII GLOBAL POLICIES

Industrial and commercial undertakings, and undertakings with office activities, that employ more than 10 people are required under the WEA to have staff rules. Otherwise, there is no general requirement for employers to have particular policies in place. However, it is normal and considered best practice for larger employers to have certain policies in place, including ethical guidelines, anti-corruption rules and IT policies.

IX PARENTAL LEAVE

The provisions in the WEA regarding parental leave are closely linked to the Norwegian National Insurance Act. In Chapter 12 of the WEA, it is stated that an employee is entitled to leave of absence for at least 12 months, but at least as long as parental benefits are paid by the National Insurance Scheme. The period for which parental benefits are paid by the National Insurance Scheme is a much-debated topic in politics, and the length of the period is subject to frequent change: it is currently up to 59 weeks in total for both parents.

The same rules apply for adoption, although the maximum period is three weeks shorter. For births or adoptions of multiple children, the period extends up to 56 weeks.

In addition to the parental leave with benefits from the National Insurance Scheme, a parent is entitled to up to 12 months unpaid leave for each birth.

An employee has a duty to provide notification to her or his employer within given deadlines, but there are no other requirements for parental leave entitlement.

As an employee is entitled to parental benefits from the National Insurance Scheme, the employer is not obliged to pay any salary to the employee during parental leave. However, because the parental benefits are capped at a particular sum, some employers voluntarily take on the obligation to pay the difference between the employee's regular salary and the parental benefit. Until May 2020, the benefits are capped at approximately 600,000 kroner.

An employee cannot be dismissed on the basis of being pregnant or on parental leave, according to Section 15-9 of the WEA, and the onus is on the employer to prove that dismissals at these times are not in violation of this provision. Beyond that, there is not any particular protection against dismissal of employees on parental leave. However, if an employee is dismissed while on parental leave, the notice period will not commence until the employee returns from parental leave.

X TRANSLATION

It is not required to translate any employment documents into Norwegian, nor into the employee's native language. Nevertheless, the employer should ensure that the employment documents are written in a language the employee understands.

XI EMPLOYEE REPRESENTATION

In undertakings that regularly employ at least 50 employees, the employer is obliged to provide information concerning issues of importance for the employees' working conditions and consult employee representatives about these issues. The WEA also includes several provisions on information and consultation with employee representatives irrespective of the size of the undertaking, including with respect to potential workforce reductions involving 10 or more employees and transfers of business.

The aforementioned undertakings are also obliged to have a working environment committee, with the aim of establishing a fully satisfactory working environment.

In addition, the Private Limited Liability Companies Act and the Public Limited Liability Companies Act provide rules on employee representation on boards of directors. Employees' right to be represented on a board of directors depends on the number of employees in the company, starting with companies with at least 30 employees.

The Public Limited Liability Companies Act also contains rules on gender representation.

XII DATA PROTECTION

i Requirements for registration

The EU General Data Protection Regulation is implemented in Norway through the Personal Data Act of 2018. The new rules strengthen the rights of persons that have personal data registered.

The processing of personal data concerning employees must comply with the Personal Data Act. An employer is not required to register with the data protection authority or any other government body, but it must identify the information being processed concerning employees, and keep an overview of personal data on employees. Employees must be informed of what personal data the employer is processing. An employer is not allowed to process personal data on employees that is not necessary to achieve a legitimate purpose. Further, an employer must take all necessary measures to protect employees' personal data against unauthorised access and ensure that employees are sufficiently aware of the relevant data protection obligations.

Consent is highly unlikely to be a legal basis for processing employees' personal data, unless employees can refuse without adverse consequence. Employers will have to rely on another legal basis, such as legitimate interest.

Any transfer of employees' personal data from an employer (controller) to a third party (processor) must be regulated by a data processing agreement. No data processor may process personal data in any other way than is agreed in writing with the data controller.

ii Cross-border data transfers

Any international transfer of personal data concerning employees shall take place only where an adequate level of protection is ensured, such as in countries within the European Union or the EEA.

Transfers of personal data concerning employees to third countries or an international organisation may take place provided the European Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question, ensures an adequate level of protection. A transfer does not then require any specific authorisation. Transfers of personal data to other countries or international organisations is only allowed if the employer or the processor has provided appropriate safeguards, and on the condition that enforceable data subject rights and effective legal remedies for data subjects are available. A data processing agreement must be in place.

Employee notification is necessary.

iii Sensitive data

Sensitive data is defined as information relating to a person's racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, sex life or sexual orientation, health, or genetic or biometric data. Social security numbers are not regarded as sensitive data.

There are strict limits on the processing of sensitive data about employees. It is only allowed when the processing is necessary for the purpose of carrying out the obligations, or exercising specific rights, of the controller or of the data subject in the field of employment, social security and social protection law, in so far as it is authorised by Norwegian law or a collective agreement.

iv Background checks

An employer may only perform background checks (e.g., credit checks and criminal record checks) if it is objectively justified. This will depend on the employee's position and the employer's business.

During recruitment of staff, an employer can only review information about a candidate on social media if this is necessary for the job, and the candidate is correctly informed. The candidate may be informed by an appropriate statement in the job advertisement.

In several sectors, prospective employees may be required by law to provide a certificate of good conduct from the police, such as the legal sector and education.

XIII DISCONTINUING EMPLOYMENT

Dismissal and redundancies

Section 15-7 of the WEA provides that a dismissal with notice from the employer must be objectively justified owing to circumstances relating to the undertaking, the employer or the employee.

Necessary workforce reductions resulting from the company's financial or operational situation will usually be objectively justified. An employer is required first to consider less drastic measures than redundancy, such as temporary lay-offs. When selecting redundant employees, the selection pool and selection criteria must also be objectively justified, and must be applied in a just manner. Furthermore, there is a duty to consider whether suitable

alternative work for an employee is available within the company, in addition to carrying out a weighing of the respective interests of the employer and the employee. Many CBAs have provisions applicable to redundancy processes, including on the principles of selection.

The WEA distinguishes between collective redundancies and dismissals with notice involving individuals or only a few employees, and establishes specific procedures for collective redundancies. Redundancies are collective when notice of dismissal is given to at least 10 employees within 30 days without being warranted by reasons relating to the individual employees. In the event of collective redundancies, an employer must inform and consult the employee representatives regarding specific topics that must be covered before a final decision on redundancies is made. In addition, an employer must notify the Norwegian Tax Administration and the Labour and Welfare Service of the impending redundancy. Applicable CBAs or Chapter 8 of the WEA may require that consultations with employee representatives shall take place in the event of redundancies on a smaller scale as well.

A termination based on circumstances relating to an employee will in general be objectively justified if there is a breach of duty or if the employee has neglected the obligations stated in the employment agreement. However, breach of the employment agreement or the employee's duties will not necessarily constitute sufficient grounds for dismissal, as the threshold for dismissal is generally high. If an employee has been given a formal warning, the threshold for dismissal may be lowered if there are further breaches of the employment agreement.

Pursuant to Section 15-14 of the WEA, an employer may summarily dismiss an employee who is guilty of a gross breach of duty or other serious breach of the employment contract. Summary dismissal implies that the employment relationship is terminated with immediate effect. The employer is obliged to consult the relevant employee before deciding whether to give notice of dismissal or a summary dismissal. The employee is entitled to have an adviser at that consultation meeting.

A decision regarding termination of employment shall be made only after a consultation meeting with the employee. Requirements as to the form, content and delivery of the notice of dismissal or summary dismissal also apply.

The WEA sets out requirements as to the length of the notice period if an employment contract is to be terminated. The notice period will be a minimum of one month, calculated from and including the first day of the month following that in which notice was given. A longer notice period may apply, however, depending on an employee's age and seniority in the company, or according to the employment contract. The employee is both entitled and required to work during the notice period. Pay in lieu of notice is not allowed, unless both parties agree.

Employees are not entitled to severance pay or other termination indemnities. However, clauses in this respect may be included in settlement agreements, which may be entered into as an alternative to a dismissal with notice.

Employees who have been employed for a total of at least 12 months during the previous two years and who are being dismissed with notice because of workforce reductions have a preferential right to new employment with the same company for one year after expiry of the notice period, unless the employee is considered not to be suited for the vacant position.

The chief executive of an undertaking may waive employment protection in return for severance pay, in which case the material and procedural requirements outlined above do not apply.

XIV TRANSFER OF BUSINESS

The rules on transfers of business are derived from two EU Council Directives (77/187/EEC and 98/50/EC), which Norway, as a member of the EEA, has implemented in Chapter 16 of the WEA. Section 16-1 of the WEA states that Chapter 16 applies to a 'transfer of an undertaking or part of an undertaking to another employer'. The same Section defines a transfer as a 'transfer of an autonomous unit that retains its identity after the transfer'. The transfer of business rules do not apply to share sales.

Pursuant to Section 16-2 of the WEA, if the transaction constitutes a transfer of business, the rights and obligations of the former employer ensuing from the contract of employment or the employment relationship in force on the date of transfer will be transferred to the new employer. This implies that, as a general rule, the new employer must maintain the transferred employees' salary and other contractual working conditions that ensue from the employment relationship with the former employer. Exceptions apply with respect to pension obligations and CBAs.

Pursuant to Section 16-5 of the WEA, the former and the new employer must inform and consult the employees' representatives regarding the prospective transfer and certain specific topics. The consultation and information obligations have to be carried out as early as possible.

In addition, according to Section 16-6 of the WEA, both the new and former employer are obliged to inform the employees affected by the transfer of business as early as possible.

XV OUTLOOK

With the implementation of a new and clearer regulation on whistle-blowing from 1 January 2020, one can expect discussions and, in time, cases before the courts, regarding the application of the rules. The new regulation has placed specific duties on employers, which will make it easier for an employee to take legal action if an employer is negligent.

Further, several cases regarding bonuses have been heard by the city courts and the Court of Appeal in 2019, and one of the latter, the *Semco* case, has been admitted to the Supreme Court. It is likely that several of these cases will be appealed and heard in 2020. Different questions regarding bonuses are being tried, for instance the company's degree of discretion regarding the size of the bonus, and non-discrimination of agency workers in bonus schemes.

The Supreme Court has also admitted another case regarding the principle of seniority and the selection pool, again with Telenor as the employer. Because the Supreme Court pronounced a judgment on 29 October 2019 based on similar facts, the latest *Telenor* case has the potential to be a topic for debate in 2020 as well.

PANAMA

Vivian Holness¹

I INTRODUCTION

Employment relationships are mainly regulated by the Constitution of the Republic of Panama and the Labour Code. The Constitution provides for the core inalienable rights relating to employment relationships, while the Labour Code regulates in detail such relationships. The Labour Code was enacted through Cabinet Decree No. 252 of 30 December 1972, and since then has undergone only one major reform in 1995.

Depending on the nature of a labour dispute, it may be resolved before the conciliation boards of the Ministry of Labour, in the case of unjustified dismissals or claims for up to US\$1,500; or before the sectional labour courts, in the case of claims relating to vested rights. Cases brought before the conciliation boards of the Ministry of Labour may be appealed before the superior labour courts; cases brought before the sectional labour courts may also be appealed before the superior labour courts and, after that, an extraordinary action may be brought before the Third Chamber of the Supreme Court.

Other employment matters, such as authorisation for mass dismissals, are handled by the General Directorate of Employment of the Ministry of Labour.

II YEAR IN REVIEW

Labour regulations in Panama are not prone to changes. As mentioned in Section I, there has been only one major reform in 40 years, which took place in 1995. As a general rule, employment relationships may only be terminated based on a justified cause, explicitly established in the Labour Code. However, since 1995, employers have been able to terminate employees without cause, but only during the first two years of employment.

Since 1995, minor changes have been introduced with the aim of protecting employees in certain lines of business. For example, as of 2010, private security companies are obliged to provide free and complete uniforms to their employees, and life and accident insurance coverage of a minimum of US\$25,000 per employee.

Other minor changes were introduced between 2017 and 2018, namely the approval of three days of paid paternity leave, and employers' obligation to have an internal procedure to attend complaints that are filed as a result of discriminatory actions in the workplace.

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III SIGNIFICANT CASES

Even though labour claims are filed daily before the courts, there is not any recent case law dealing with relevant topics, such as restrictive covenants or payment in kind. This may be the result of negotiated terminations. In Panama, most relevant or contentious matters are never discussed before the courts because of the common tendency to settle all disputes. Both parties benefit from the settlement of a dispute. For example, while the employee achieves acknowledgement of his or her rights and consequently receives payment in a short period of time, employers incur fewer costs by not having to pay court expenses.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under Panamanian law, an employment relationship is formed by the rendering of services by one person to another, provided that the former is subordinated to or economically dependent on the latter. An employment relationship may exist, therefore, regardless of whether there is a written agreement.

Subordination consists of the authority to command exercised, or susceptible to being exercised, by the employer or its representatives with regard to execution of the work.

A state of economic dependence will be deemed to exist when the amount received by the individual who performs the service or executes the work constitutes his or her only or main source of income.

In the absence of a written contract, facts and circumstances alleged by the employee and that should appear in a written contract will be presumed to be true. These presumptions may be rebutted by evidence that proves otherwise beyond a reasonable doubt.

Employment contracts must be executed in writing and must contain at least the following information:

- a* personal information about the employee;
- b* the names of the employee's dependants;
- c* the work to be performed and the method of performing it;
- d* the place of work;
- e* the term of the agreement;
- f* the duration of the working day;
- g* wages; and
- h* the place and date of signing.

The parties to the contract shall sign three copies, one of which shall be kept by the employer, one delivered to the employee and one submitted for registration with the Ministry of Labour.

Employment contracts may be executed for an indefinite period, for a specified period or for a specified piece of work.

Contracts for a specified period may not be used for the purpose of temporarily filling a job that is permanent in nature, excluding certain exceptions contained in the Labour Code. The duration of an employment contract for a specified period shall not be more than one year. In the case of services that require special technical skills, the duration of the contract may be stipulated up to a maximum of three years.

ii Probationary periods

In cases where the services to be rendered require certain special skills or dexterity, it shall be valid to stipulate in writing a clause whereby the employment relationship will be subject to a probationary period of up to three months. During this period, any of the parties can put an end to the labour relationship without liability and without the need to give notice.

iii Establishing a presence

For a foreign company to be able to hire employees, it must officially register to carry out business in Panama, either as a branch or through a local subsidiary. Foreign companies that do not wish to officially register in Panama usually use agencies or payroll service providers to engage employees locally.

Depending on the nature of the services, foreign companies not officially registered in Panama may acquire the services of independent contractors. In such a case, it is important to verify that the services are not provided under conditions of subordination or economic dependency to avoid the relationship being considered as an employment relationship.

If the contractor is in fact an independent entity acting in the ordinary course of its business, then a permanent establishment would not be created for the foreign company. If that is not the case and the person is a dependent agent, a permanent establishment would be created if the person has the power to execute contracts on behalf of the foreign company and exercises that power habitually. In that case, a permanent establishment would be created with regard to the activities of such a contractor in Panama.

If a permanent establishment is created, the company will be subject to income tax as a regular Panamanian company on the taxable income attributable to the permanent establishment. The current corporate income tax rate in Panama is 25 per cent. If a permanent establishment is created, it is advisable to consider incorporating an entity in Panama or registering a branch of the foreign company to facilitate all compliance and reporting processes.

In an employment relationship, an employee is entitled to social security cover. The benefits offered by the social security system include the following: medical, dental and hospitalisation benefits; disability subsidy; maternity leave; retirement pension; death benefits; funeral subsidy; and occupational hazards (workmen's compensation). Both employers and employees must contribute a percentage of the employee's salary to this system. Currently, the employer's contribution is equivalent to 12.25 per cent of the employee's salary and the employee's contribution is equivalent to 9.75 per cent of the salary received.

Employers also pay a rate between 0.98 per cent and 5.6 per cent of the salaries paid, to cover workers' compensation. The rate will be determined by the Social Security Administration, depending on the activities carried out by the employer.

The law provides that the granting of benefits provided for under the social security system, by the system's administration, releases the employer from liability with regard to occupational illness or accident suffered by the employee, except in those cases where the occupational hazard has occurred owing to negligence or fault on the part of the employer, in which case additional tort liabilities may arise.

The disability of an employee because of an accident or occupational illness, provided it is not of an absolute and permanent nature, suspends the employment contract.

The employee's social security contribution, and the income tax generated, must be withheld, declared and paid monthly by the employer to the social security system.

V RESTRICTIVE COVENANTS

Even though restrictive covenants are not regulated by Panamanian law, and there is no jurisprudence discussing their enforceability, more and more international companies are proposing inclusion of these types of covenants in employment contracts. Given that there is uncertainty as to the enforceability of restrictive covenants, and some argue that they may violate the constitutional right to employment, they are included in separate private agreements, rather than the employment contract.

VI WAGES

i Working time

The day is divided into the following shifts or working periods:

- a* day work: from 6am to 6pm; and
- b* night work: from 6pm to 6am.

Hours of work within these working periods shall be classified as day shift (day work) and night shift (night work) respectively. A mixed shift is made up of hours in both periods of work, provided that the period of night work is less than three hours. A shift including more than three hours within the night working period will be considered a night shift.

The maximum daily hours of work shall be eight hours and the corresponding maximum working week will be 48 hours. The maximum night shift shall be seven hours and the corresponding working week will be a maximum of 42 hours. The maximum duration of a mixed shift is seven-and-a-half hours, and the corresponding working week is a maximum of 45 hours.

ii Overtime

Working time exceeding the limits set forth in Section VI.i, or exceeding the lower limits as provided by contract or special legally prescribed limits, constitutes overtime and is recognised by the following additional payments on top of the employee's hourly wage:

- a* 25 per cent of ordinary wages when work is performed during the daytime;
- b* 50 per cent of ordinary wages when work is performed during a night period or when mixed shifts, which had started in the daytime, are prolonged; and
- c* 75 per cent of ordinary wages when an overtime work shift is an extension of a night shift or of a mixed shift that had started during the night period.

In addition, the following limitations apply:

- a* overtime will not be permitted in work that, owing to its nature, is dangerous or unhealthy;
- b* persons under the age of 16 cannot work overtime;
- c* an employer is obliged to employ as many teams made up of different workers as may be necessary to carry out the work in shifts that do not exceed the ordinary limits described in this chapter; and
- d* a maximum of three hours' overtime is permitted in one day, and a maximum of nine hours in one week.

If for any reason an employee renders services in an overtime period in excess of the limits stated in point (d) above, the excess shall be paid with the addition of a further 75 per cent, apart from other penalties prescribed by law.

VII FOREIGN WORKERS

As a general rule, all employers must contract employees who are either Panamanian citizens or foreigners who are married to Panamanian citizens or who have resided for at least 10 years in the country, so as to make up at least 90 per cent of its ordinary workforce. They may also engage expert or technical foreign personnel, but not exceeding 15 per cent of the total number of workers. These are the general restrictions on the employment of foreign personnel. There are certain exceptions to these restrictions; for example, foreign employees who hold certain special immigration statuses are exempted from complying with these restrictions. Individuals regarded as having a special immigration status include residents under the Marrakech Treaty, foreign professionals who do not require licences to practise their profession, or citizens of certain countries considered friendly to Panama.

Employers who need to contract foreign personnel must obtain an authorisation issued by the Ministry of Labour. This authorisation, or work permit, is valid for renewable one-year periods, except for citizens of certain countries considered friendly to Panama who may obtain a permanent work permit. Employees under the Marrakech Treaty may only renew their resident permits and work permits for a maximum of six years.

The determination of the best employment option available depends on the case.

All foreign employees providing services in Panama are subject to local employment laws and their salaries are subject to income tax and social security withholdings, at the same rates as Panamanian employees. Executives of companies holding a multinational headquarters licence or who have a special temporary residency permit are exempted from the payment of income tax and social security contributions.

VIII GLOBAL POLICIES

The Labour Code provides that every company with 10 or more employees must have approved internal work regulations. These have to be previously approved by the Ministry of Labour and even though employees' consent is not required, they have 30 days to comment on any proposed internal work regulations.

The Ministry of Labour has provided certain guidelines on the minimum provisions that must be included in internal work regulations. These include employment applications and contracts; work schedules; wages; work by women and minors; safety and hygiene measures; employees' obligations and prohibitions; employers' obligations and prohibitions; disciplinary measures; and company committees. The employees' and employers' obligations and prohibitions include provisions relating to discrimination and sexual harassment.

The internal work regulations must be drafted in Spanish and posted for the employees' general knowledge, either on the company's intranet or in a place with unrestricted access. In addition to employment contracts, internal work regulations regulate the particularities of employment relationships in every workplace.

IX PARENTAL LEAVE

Labour regulations provide for both maternity and paternity leave.

Maternity leave starts six weeks before the expected date of delivery and ends eight weeks after delivery, for a total of 14 weeks. Wages due during maternity leave will be paid by the social security system provided that the employee has accrued a total of nine monthly social security quotas before the seventh month of pregnancy. If the employee has not accrued the minimum number of quotas required, then wages due during maternity leave shall be paid by the employer.

Paternity leave was introduced in 2017 and grants three working days of paid leave to employees starting on the date of birth of the child. Wages due during paternity leave are paid by the employer. To be entitled to paternity leave, the employee must have declared a spouse on the employment contract or personal data forms, and must have communicated to the employer the forthcoming birth of their child at least one week prior to the expected date of delivery. Paternal leave may be granted only once during each calendar year.

Under the Labour Code, the effects of the employment relationship are suspended during maternity or paternity leave; therefore, employees on maternity or paternity leave are protected from dismissal.

X TRANSLATION

As a general rule, all documents relating to employment relationships must be drafted in Spanish. Exceptionally, instructions regarding the performance of the work may be written in the language in which the employee has greatest proficiency.

What is usually recommended to international companies is that documents are drafted in a two-column style, showing Spanish and English versions of the document. This has been accepted by labour authorities.

XI EMPLOYEE REPRESENTATION

Both the Constitution and the Labour Code recognise the right of employees to form or join unions. To organise a union, the law requires a minimum of 40 members.

The Labour Code contemplates the following types of workers' unions:

- a* trade unions – comprised of persons of the same profession, occupation or speciality;
- b* company unions – comprised of persons of several professions, occupations or specialities who work for the same company;
- c* industrial unions – comprised of persons of several professions, occupations or specialities who work for two or more companies of the same kind; and
- d* mixed or multi-occupational unions – comprised of persons of diverse professions, occupations or specialities who work for diverse or unrelated companies. These unions may be established only when, in a specific city, district, province or region, there are fewer than 50 employees of the same trade.

The election and terms of union representatives and the frequency of their meetings are governed by the union's statutes. A union may establish ordinary and extraordinary contributions for its members. Employers are obliged to withhold the contributions established by the union from their employees' salaries, and to deliver those contributions to

the union. Employees who are not members of a union may nevertheless be required to make contributions in case they receive benefits from a collective agreement entered into between the union and the employer.

Any employer with employees who are members of a union is obliged to enter into a collective bargaining agreement with those employees if the union so requests. If an employer refuses to enter into a collective employment agreement, its employees may, after termination of conciliation proceedings, exercise the right to strike.

Workers have the right to strike to protect their working conditions or to improve them. Collective disputes may be submitted totally or partially to arbitration.

The Labour Code contains certain provisions aimed at protecting unions. Among them, it is important to mention the union immunity that is granted to certain employees in specific situations, namely:

- a* members of unions in formation;
- b* members of the directing council of unions, federations, confederations or workers' centres;
- c* substitute members of a directing council, even if they are not active; and
- d* union representatives.

Employees protected by union immunity cannot be dismissed without the prior authorisation of the labour court and must be based on a justified cause provided in the law.

In addition to unions, every workplace, company or establishment that employs 20 or more employees must establish a company committee made up of two representatives of the employer and two employees of the union. The union members shall be appointed annually by the union and the committee shall be established in such a way that its members may meet on equal terms. Where a union does not exist, the employees shall elect their representatives.

The employer or its representatives and the union or employees may place before the company committee questions relating to production, productivity and its improvement, the qualifications of employees and other matters.

The company committee, upon the request of an interested party, shall have the power of conciliation in controversies arising from breach by either an employee or an employer of their obligations.

XII DATA PROTECTION

i Requirements for registration

Panama does not have a government body that oversees data protection matters and, apart from medical and credit or financial information, there is little regulation on the subject. In particular, the Labour Code does not contain any provisions regulating the protection or privacy of employees' data. In fact, there has been a trend for payroll services that deal with the payment of employees' salary to be outsourced to third-party service providers. There are no restrictions imposed on this practice, and the employees' consent is not required.

Employees' information may be kept or transferred outside the workplace and on servers managed by third-party service providers.

ii Cross-border data transfers

Given that there is a lack of regulation on this subject, there are no restrictions on the transferability of employees' personal data outside Panama.

iii Sensitive data

Only medical information is considered sensitive and employees are not obliged to disclose this information to their employer, except – and only if authorised by the employee – for purposes of obtaining private medical or life insurance. This information must be treated as strictly confidential.

iv Background checks

As a general rule, background checks are allowed. It is customary for potential employers to independently verify the information provided by potential employees on application forms relating to former employment, personal references and academic background, for which the employees' consent is not required. Credit and criminal record checks are also allowed; however, the applicant's written authorisation is required for both these checks.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Employees who have served continuously for less than two years can be dismissed without cause. If this is the case, the employer must give the employee notice of the unjustified dismissal 30 days in advance or pay a sum equivalent to 30 days' salary and, in addition, pay the employee severance for unjust dismissal that is equivalent to 3.4 weeks of salary for each year of service, calculated pro rata. The salary for this purpose will be the average monthly salary during the last six months of employment.

Employees who have served continuously for more than two years can only be dismissed based on just cause as provided by law. If an employer decides to terminate the contract of an employee who has served for more than two years, without cause, he or she will normally try to negotiate a mutual termination agreement, in which compensation similar to that applicable to unjust termination will be offered to the employee.

There are three types of justified causes that empower an employer to terminate the employment relationship without severance.

First, the Labour Code sets forth 16 causes of a disciplinary nature, including the following:

- a* if the employee engages, while on duty, in acts of violence, threats or ill treatment against the employer, his or her family, or members of the management of the undertaking or his or her fellow workers, except in the case of self-defence;
- b* if the employee, without the authorisation of his or her employer, discloses technical, commercial or industrial secrets or other information of a confidential nature that may cause damage to the employer;
- c* if the employee, while on duty, performs serious dishonest or dishonourable actions or criminal actions against property to the detriment of the employer; and
- d* if the employee fails to arrive for work, without permission from the employer or without justified cause, on two Mondays during the course of a given month, six in a given year, or three consecutive days or alternate days in any one-month period.

The second group of just causes for termination of an employment relationship by an employer contemplates situations of a non-imputable nature, notably the following:

- a* a properly verified mental or physical disability of the employee that makes it impossible for him or her to perform the work;

- b* the expiry of one year, starting from the date of suspension of the contract, owing to the employee's illness or non-employment-related accident; and
- c* force majeure or acts of God that provoke the definitive stoppage of the employer's activities as a necessary, immediate and direct consequence.

The third group consists of causes of an economic nature, namely:

- a* the insolvency or bankruptcy of the employer;
- b* the closing of the enterprise or definite reduction of work because of the evident unprofitability of the enterprise;
- c* the definitive suppression of the work inherent to the worker's contract; and
- d* an evident reduction of the employers' activities owing, for instance, to a serious economic crisis, partial failure to meet operating costs because of a properly established decrease in production, innovations in the industrial process or revocation or lapse of an administrative concession, cancellation or decrease in sales orders, or any other similar cause duly verified by the competent authority.

Notice of termination must be always in writing and must specify the reasons for termination. In the event of termination for economic reasons, the employer must obtain authorisation from the Labour Ministry authorities and prove *prima facie* the valid economic reasons for termination. If upon the passing of 60 calendar days from the date when the authorisation is requested, the labour authorities have not ruled on the petition, the employer can proceed to execute the dismissals. In this instance, the employer shall nevertheless pay the dismissed employees severance as provided in the first paragraph of this subsection.

The employment relationship may also be terminated by (1) mutual consent, provided it is expressed in writing and does not involve the waiver of acquired rights, (2) expiry of the term of the contract, provided the employment relationship has been validly stipulated for a definite period, and (3) the resignation of the employee, provided that the same is in writing and has been ratified before an administrative labour authority.

Employees protected by union immunity, as described in Section XI, or maternity immunity cannot be dismissed without the prior authorisation of a labour court based on a justified cause provided in the law. Maternity immunity is granted to female employees during pregnancy and for one year from the date the employee returns from maternity leave.

ii Redundancies

Collective dismissals are regulated under the Labour Code and are considered justified based on economic reasons, as set out in Section XIII.i. For an employer to be able to dismiss its workforce collectively, it requires previous authorisation from the Ministry of Labour, as it must prove that the company is facing at least one of the economic situations described above. In the event of dismissals based on economic reasons, the following rules shall be applied:

- a* dismissals shall begin with employees of the lowest seniority within the various labour categories;
- b* after application of the previous provision, Panamanian employees shall be given preference in determining the retention of those who are not Panamanian, unionised employees over those who are not unionised and the most efficient over those who are less efficient;

- c* pregnant employees, even if they are not given preference under the previous provisions, shall be the last to be dismissed and only if their dismissal is absolutely necessary and after compliance with legal formalities; and
- d* after the previous provisions are applied, under equal circumstances, employees with union immunity shall have preference over others for retention of employment.

Even when the cause for the dismissal is justified under the Labour Code, given that the dismissal is not attributable to the employee, it must be compensated with a severance payment that is equivalent to 3.4 weeks' salary for each year of service, calculated pro rata. The salary for this purpose will be the average monthly salary of the last six months of employment.

Other than the notification to the Ministry of Labour, no other notifications are required, and there is no requirement to provide prior notice to the employees.

Mutual termination agreements may be used for collective dismissals; however, it is most likely that the employee will demand the payment of severance, three months' salary and a 25 per cent surcharge on the severance.

Individual redundancies are not regarded as justified under the Labour Code, but an employer may try to terminate an employment relationship by offering an employee a mutual termination agreement offering the payment of severance, unless the employee has completed fewer than two years of service, in which case the employee may be dismissed with the payment of severance and 30 days' prior notice or payment in lieu.

XIV TRANSFER OF BUSINESS

The Labour Code provides the rules that must be followed upon any change in the legal or economic structure of a company, or the substitution of an employer:

- a* The change or substitution shall not affect existing employment relationships in a manner that would prejudice the employees.
- b* Without prejudice to legal obligations between an employer and an employee under the civil law, the replaced employer shall always be jointly and severally liable with the new employer for obligations existing for one year under an agreement or imposed by law that arose before the date of the substitution, counting from the date of the notice in point (c). After the end of this period, the new employer will have sole liability for these obligations.
- c* Notice of the substitution of an employer shall be given in writing to employees, and their respective unions, no later than 15 days after the date of the substitution.
- d* Failure to give notice of substitution shall maintain the joint and several liability of the former employer and the new employer until notice is given.
- e* In no case shall the division of a company into units in which employees work or the making of contracts, commercial arrangements or combinations with the intent of diminishing or making other persons liable for the responsibilities of the employer affect the rights and claims of employees.

- f* When all or substantially all the assets of a company have been transferred to a third party pursuant to a judicial or other action that is later declared unlawful or unconstitutional, the transfer will not be effected and the transferee shall be the only person liable for the legal consequences arising from actions that occur, agreements that are entered into or laws that are adopted between the date on which the aforesaid assets were transferred and the date on which they were returned to their lawful owner, except in the event that the transferor benefited from a transfer of assets that was not genuine or that was fraudulent in a manner that benefited the transferor.
- g* The beneficiary of an action that is declared unlawful or unconstitutional shall be jointly and severally liable with its shareholders and directors, if any, for the payment of liabilities that arose during the period of its management of the assets that it acquired or produced.

Moreover, an employee who is owed money for work done may demand payment for that work from the transferee of the property of the establishment, business or company, if the transfer was not genuine or was made through fraudulent acts.

In addition, if agreements for the lease of an establishment or business are not genuine or are fraudulent, the lessor shall be jointly and severally liable with the lessee for all obligations in respect of labour arising during the term of the lease, without prejudice to the application of provisions respecting substitution of employer to the extent that they are more favourable to employees. Agreements for the lease of an establishment or business shall be deemed not to be genuine or to be fraudulent when they cause non-fulfilment of obligations in respect of compensation for labour.

XV OUTLOOK

Given that the current administration left office in July 2019, we do not foresee any changes to the Labour Code or any other labour-related regulations, other than the applicable minimum wage rates.

Minimum wage rates are revised every two years, and the current term ends on 31 December 2021. During the months prior to December 2021, the government will meet with both employees' and employers' representatives to discuss the new minimum wage rates that will apply for 2021–2022.

PHILIPPINES

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I INTRODUCTION

Philippine labour law is intertwined with the principle of social justice. The Civil Code declares that relationships between management and the workforce are not merely contractual but are imbued with public interest such that labour contracts must yield to the common good,² while the Constitution declares that '[t]he State affirms labour as a primary social economic force. It shall protect the rights of workers and promote their welfare'.³ Various statutes provide similar protections such that if there is any doubt, all labour legislation and all labour contracts shall be construed in favour of the safety and decent living of the worker.⁴ Philippine case law also provides: 'When the conflicting interest of labour and capital are weighed on the scales of social justice, the heavier influence of the latter must be counterbalanced by the sympathy and compassion the law must accord the underprivileged worker.'⁵

Nevertheless, the law also recognises the employer's right to exercise management prerogative in the conduct of its business. An employer has free rein and enjoys a wide latitude of discretion to regulate all aspects of employment, provided that policies, rules and regulations on work-related activities of the employees are always fair and reasonable.⁶ The Supreme Court has often declined to interfere in the legitimate business decisions of employers as long as its exercise is in good faith to advance its interests and not for the purpose of defeating or circumventing the rights of employees under the law or valid agreements.⁷

i Legal framework

The Labour Code primarily governs labour standards and labour relations. Subdivided into sections, it regulates (1) pre-employment, including the recruitment and placement of overseas workers, and the employment of non-resident aliens, (2) human resources development, including training for apprentices and learners, (3) labour standards, including hours of work, rest periods, wages and premium pay, (4) health and safety, and social welfare

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2 Civil Code, Article 1700.

3 Constitution, Section 18, Article II.

4 Philippine Labour Code, Article 4; Civil Code, Article 1702.

5 *Philippine Telegraph & Telephone Corporation v. National Labor Relations Commission*, 183 SCRA 451 (1990).

6 *Gemina v. Bankwise Inc*, 708 SCRA 403 (2013).

7 *Mariano v. Martinez Memorial Colleges, Inc*, 789 SCRA 344 (2016).

benefits, (5) labour relations, including regulations on the organisation and activities of unions, collective bargaining, and strikes and lockouts, and (6) post-employment, including termination of contracts and retirement.

There are also special laws regulating certain aspects of employment, including:

- a* laws that required mandatory employer contributions to a state fund, such as:
 - the Social Security Law (the SSS Law);⁸
 - the National Health Insurance Act;⁹ and
 - the Home Mutual Development Fund Act;¹⁰
- b* laws that grant certain benefits to specific groups of employees, such as:
 - maternity leave for pregnant women under the Expanded Maternity Leave Law;¹¹
 - paternity leave under the Paternity Leave Act;¹²
 - parental leave for single parents under the Solo Parents Welfare Act;¹³
 - special leave for women who have undergone surgery caused by gynaecological disorders under the Magna Carta of Women;¹⁴ and
 - special leave for victims of violence under the Anti-Violence Against Women and their Children Act (the VAWC Law);¹⁵ and
- c* laws that affect specific aspects of employment, such as:
 - the Occupational Safety and Health Standards Act,¹⁶ which strengthens the compliance requirements for safe workplaces;
 - the Safe Spaces Act,¹⁷ which defines and penalises sexual harassment in the workplace; and
 - the Telecommuting Act, which allows an employee to work from an alternative workplace with the use of telecommunications or computer technologies.¹⁸

The Department of Labour and Employment (DOLE) is the regulatory entity primarily charged with the administration and enforcement of the Labour Code and is empowered to issue rules and regulations on employment matters.

Case law, as decided by the Supreme Court, is the final component of the legal framework of employment law as it clarifies gaps left by statute.

ii Courts and tribunals

Proceedings on employment disputes are initiated by referral to a single-entry assistance desk officer for conciliation-mediation proceedings to aid parties in reaching an amicable settlement. Should these efforts fail, the matter is referred to the appropriate DOLE office or

8 Republic [Rep.] Act No. 8282 (1997).

9 Rep. Act No. 10606 (2013).

10 Rep. Act No. 9679 (2008).

11 Rep. Act No. 11210 (2019).

12 Rep. Act No. 8187 (1996).

13 Rep. Act No. 8972 (2000).

14 Rep. Act No. 9710 (2009).

15 Rep. Act No. 9262 (2004).

16 Rep. Act No. 11058 (2018).

17 Rep. Act No. 11313 (2019).

18 Rep. Act No. 11165 (2018).

agency. For disputes relating to termination of contract and cases of unfair labour practice, the office of the labour arbiters of the National Labour Relations Commission (NLRC) shall have exclusive original jurisdiction.

The NLRC is a quasi-judicial body created by the Labour Code as the primary tribunal having jurisdiction over employer–employee disputes.

Labour arbiters have the jurisdiction to receive evidence, and to hear and decide cases involving unfair labour practices; termination disputes, including claims for benefits; strike and lockout disputes; financial claims not arising from social security, national health insurance or employee compensation; and damages. Decisions made by the labour arbiter may be appealed to a division of the NLRC.

Parties seeking alternative means for dispute resolution may mutually agree to bring their employment disputes before a DOLE-accredited voluntary arbitrator. Voluntary arbitrators have exclusive jurisdiction to hear and decide cases arising from the interpretation or implementation of a collective bargaining agreement (CBA) or a company personnel policy.

Decisions of these quasi-judicial entities may be elevated to the Court of Appeals, and decisions by the Court of Appeals may be appealed to the Supreme Court.

iii Enforcement

The enforcement of Philippine labour law primarily rests with the DOLE. The DOLE monitors the enforcement of labour laws daily through its regional offices and attached agencies. The Secretary of Labour and Employment, or any of his or her duly authorised representatives, is granted visatorial and enforcement power to access any employer's premises and records, to conduct inspections to monitor compliance with the required labour standards, and to address any labour relations issues.

II YEAR IN REVIEW

In a controversial move, President Rodrigo R Duterte vetoed the Security of Tenure Bill¹⁹ on 26 July 2019. Key proposals under the Security of Tenure Bill included (1) changing the definition of prohibited labour-only contracting by empowering the Industry Tripartite Council and the Secretary of the DOLE to determine whether workers' activity is directly related to the main business operation of an entity, which would signify labour-only contracting, and (2) imposing additional requirements for the licensing of contractors. The veto was implemented despite President Duterte's previous act of certifying the bill as urgent in September 2018.²⁰

The passage of the Expanded Maternity Leave Law significantly increased the maternity leave benefits granted to all eligible female employees who have made the required contributions to the social security system (SSS), by increasing the number of standard paid days of maternity leave from 60 to 105 days and introducing various additional benefits available to eligible employees.

The Safe Spaces Act expanded the definition of sexual harassment under the Anti-Sexual Harassment Act, recognising that sexual harassment can happen in different settings,

19 Senate Bill No. 1826 (2019).

20 'Duterte certifies proposed law vs "endo" as urgent', *Rappler*, available at <https://www.rappler.com/nation/212775-duterte-certifies-security-tenure-bill-as-urgent-september-21-2018> (last accessed 1 December 2019).

spaces, and between parties who do not have a superior–subordinate relationship. It is now recognised that sexual harassment can occur between peers and has been expanded to cover the behaviour and actions of a subordinate towards a superior,²¹ and also by and among employees, subcontracted employees or persons under a secondment agreement.²²

Employers are required to form an investigative committee (headed by a woman and with at least half of its members being women), with adequate representation from management, the employees and the union.²³

III SIGNIFICANT CASES

In *Philippine Span Asia Carriers Corporation v. Pelayo*,²⁴ the Supreme Court clarified that while an employee may experience distress to the extent of suffering depression or a mental breakdown as a result of that employee's involvement in an employer's investigation into an alleged act of wrongdoing, mere involvement in an investigation does not constitute constructive dismissal. As explained by the Supreme Court, not every inconvenience, disruption, difficulty or disadvantage that an employee must endure sustains a finding of constructive dismissal. It is an employer's right to investigate acts of wrongdoing by employees, and employees involved in such investigations cannot *ipso facto* claim that employers are targeting them. Even if employees might be feeling under pressure, it does not necessarily mean that an employer is seeking a constructive dismissal.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under Philippine law, employment relationships are contractual in nature but imbued with public interest such that labour contracts must yield to the common good.²⁵ An employment contract may be perfected in oral or written form because, generally, no specific form of contract is required. Despite this, the best practice is to have a written employment contract signed at the beginning of the engagement.

One exception to the rule involves the contracts of employees hired by independent contractors as these must be executed in writing and must contain a specific description of the job, work or service to be performed by the employee, the place of work, the conditions of employment, and a statement of the applicable rate of pay.

The Labour Code classifies employees as regular, seasonal, project or casual. Regular employees are engaged to perform activities that are usually necessary or desirable in the usual business or trade of the employer and those who have rendered at least one year of service, whether continuous or broken, with respect to the activity in which they are employed. Seasonal employees are those who are engaged to work or perform services that are seasonal in nature, and the employment is only for the duration of the season. Project employees are those hired for a specific project or undertaking, the completion or termination of which

21 Rep. Act No. 11313 (2019), Section 16.

22 Rep. Act No. 11313 (2019), Section 3(b).

23 Rep. Act No. 11313 (2019), Section 17(c).

24 G.R. No. 212003, 28 February 2018.

25 Civil Code, Article 1700.

has been determined at the time of the engagement of the employee. Casual employees are those who are not regular, project or seasonal employees and perform work that is usually not necessary or desirable as part of the usual business or trade of the employer.

Additionally, Philippine jurisprudence recognises the validity of fixed-term employment contracts that meet the following criteria: (1) the fixed period of employment must be knowingly and voluntarily agreed upon by the parties without any force, duress or improper pressure upon the employee and absent any other circumstances vitiating his or her consent; or (2) it satisfactorily appears that the employer and the employee dealt with each other on more or less equal terms and neither exercised moral dominance.²⁶

ii Probationary periods

An employee may be required to complete a probationary period, provided that at the start of employment, the employee is (1) informed of his or her status as a probationary employee, and (2) informed of the reasonable standards that must be met to qualify as a regular employee.²⁷ Failure to satisfy these requirements means that the employee is hired as a regular employee from the start of their employment.

The probationary period must not exceed six months from the date the employee starts working. An employee who is allowed to work after the probationary period shall be considered a regular employee.

iii Establishing a presence

A foreign company may directly hire employees to carry on its business in the Philippines without being officially registered in the country. In such cases, the foreign company is considered as a foreign corporation doing business in the Philippines without a licence and is subject to the following significant risks: it is not allowed to bring suit or to defend itself in any litigation before any Philippine court or tribunal;²⁸ and its directors, trustees and officers are at risk of being penalised with a fine of not less than 10,000 Philippine pesos but not more than 1 million Philippine pesos.²⁹ Notably, the direct hiring of Filipinos for work to be performed outside the Philippines must be carried out through licensed recruitment agencies.

An employee is entitled to the following minimum statutory benefits:

- a* the minimum wage (as determined by the regional tripartite wages and productivity in the region where the company operates);
- b* overtime pay for work rendered beyond eight hours a day;
- c* one 24-hour rest day for every six consecutive days of work;
- d* premium pay for work performed at night, on rest days and on holidays;
- e* 13th-month pay equivalent to one-twelfth of an employee's annual pay;
- f* paid leave days for eligible employees, namely: (1) five days of service incentive leave after rendering one year of service; (2) seven days of paternity leave and up to 120 days of maternity leave; (3) seven days of single parent leave; (4) two months of leave for a gynaecological disorder; and (5) up to 10 days of leave for victims recognised under the VAWC Law;

26 *Convoy Marketing Corp v. Albia*, 772 SCRA 162 (2015), citing *Brent School, Inc v. Zamora*, 181 SCRA 702 (1990).

27 Labour Code, Article 291.

28 Revised Corporation Code, Section 150.

29 *id.*, at Section 170.

- g* mandatory employer's share in the social security system, Philippine Health Insurance Corporation and Home Mutual Development funds; and
- h* retirement pay of at least half-a-month's pay for every year of service, when the employee reaches the age of 65.

Employers are also required to withhold the appropriate amount of the employee's income taxes, and to report and remit the same to the Philippine tax authority (the Bureau of Internal Revenue).

An offshore foreign company may validly hire an independent contractor to perform a specific job or work in the Philippines. A valid contracting arrangement shall not establish an employer–employee relationship between the offshore foreign company and the independent contractor's employees. Similarly, for the purposes of seeking tax treaty relief, hiring an independent contractor will generally not create a permanent establishment in the Philippines, provided that the contract does not exceed the maximum periods under the applicable tax treaties.³⁰

V RESTRICTIVE COVENANTS

Restrictive covenants such as non-compete clauses, non-disclosure agreements, non-solicitation contracts and confidentiality clauses are valid and may be included in employment contracts so long as they are fair, reasonable and not contrary to law, morals, good customs, public order or public policy. The determination of the reasonableness of such provisions is evaluated based on the particular facts and circumstances of each case.

The Supreme Court has used the following factors in determining the reasonableness of non-compete clauses: whether the covenant protects the legitimate business interests of the employer; whether the covenant creates an undue burden on the employee; whether the covenant is injurious to public welfare; whether the time and territorial limitations contained in the covenant are reasonable; and whether the restraint is reasonable from the standpoint of public policy.³¹ The courts have also tested the validity of non-compete clauses based on the reasonableness of the limitations imposed in respect of time, trade and place.

Notably, apart from case law finding that confidentiality and non-compete clauses must be clear and unambiguous,³² there is currently no case law specifically dealing with other restrictive covenants, such as non-disclosure agreements, non-solicitation contracts and confidentiality clauses.

VI WAGES

i Working time

An employee's normal hours of work must not exceed eight hours per day. In addition, a one-hour break for regular meals, not counted as compensable working time, must be provided. DOLE regulations also require periodic short compensable breaks for employees

³⁰ ITAD BIR Ruling No. 241-12.

³¹ *Rivera v. Solidbank Inc*, 487 SCRA 512 (2006).

³² *Century Properties, Inc v. Babiano*, 795 SCRA 671 (2016).

who, owing to the nature of their work, either have to stand³³ or have to spend long hours sitting.³⁴ Employees are also entitled to a rest period of not less than 24 consecutive hours after every six consecutive normal work days.

Employees who work from 10pm to 6am are entitled to receive a 'night shift differential' of not less than 10 per cent of his or her regular wage for each hour of work.

DOLE regulations³⁵ allow employers and employees to agree to flexible work arrangements, including: compressed work weeks in which the normal work day is increased to more than eight hours but not more than 12 hours, and the week is reduced to fewer than six days; gliding or flexitime schedules whereby employees are required to complete core hours in the designated workplace but are free to determine their arrival or departure time; and flexi-holiday schedules whereby employees agree to take holiday on alternative days, such as during the public holiday of the foreign country which the employee serves, as opposed to the Philippine holiday.

Under the Telecommuting Act, the employer and employee may also agree to an arrangement to allow an employee to work from an alternative workplace with the use of telecommunications or computer technologies.³⁶ The employer is required to ensure that telecommuting employees are given the same treatment as comparable employees working at the employer's premises.³⁷

ii Overtime

An employee who works more than eight hours a day is entitled to receive overtime pay at a rate of 25 per cent over his or her regular rate. For the purpose of determining entitlement to overtime pay, all time during which an employee is required to be on duty, to be at the employer's premises or to be at a prescribed workplace, and all time during which an employee is suffered or permitted to work are considered as hours worked, while the one-hour regular meal break is not. An employee may render overtime only if he or she is obliged or permitted by the employer to do so.³⁸ The Labour Code and relevant labour regulations do not expressly provide for any limitations on the maximum number of hours of overtime that can be worked by an employee.

An employer may require an employee to perform overtime work in any of the specified cases detailed in Article 89 of the Labour Code.

VII FOREIGN WORKERS

An employer may hire foreign workers to perform work in the Philippines provided that they have secured the required permit from the DOLE and the appropriate visa from the Bureau of Immigration.

Under the Labour Code, an alien employment permit (AEP) may be issued to a non-resident alien or to the applicant employer after a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of application

33 Department of Labour and Employment [DOLE] Department Order [D.O.] No. 178-17 (2017).

34 DOLE D.O. No. 184-17 (2017).

35 DOLE Advisory No. 04-2010.

36 Rep. Act No. 11165, Section 3.

37 id., at Section 5.

38 *San Miguel Corporation v. Layoc*, 537 SCRA 77 (2007).

to perform the services for which the alien is desired. While there is no statutory limit to the number of foreign employees that an employer may hire, the number of foreign workers hired may be considered by the DOLE in determining whether the AEP should be granted. The AEP will be co-terminus with the foreign worker's employment so long as he or she is still engaged by the employer. Once issued, an AEP may be used as the basis for the foreign worker to apply for a Section 9(g) working visa from the Bureau of Immigration.

The foreign workers engaged and performing work in the Philippines are subject to Philippine tax regulations, and their employer has an obligation to withhold, report and remit the applicable taxes due. Local labour laws and regulations that provide benefits to, and protect the rights of, Filipino employees are also applicable to foreign workers.

VIII GLOBAL POLICIES

Philippine law recognises the right of an employer to expect from its workers not only good performance, adequate work and diligence, but also good conduct and loyalty.³⁹ Generally, an employer is free to craft and adopt its own disciplinary rules and policies as an exercise of its management prerogative. Disciplinary rules do not have to be filed with any government authority.

Changes to an employer's disciplinary policy may affect an employee's rights, benefits and welfare,⁴⁰ requiring the employer to consult with the employees regarding the proposed changes before they can be implemented.⁴¹ The consultation process may be effected through the following means:

- a* by having the representative of a labour management council or a similar body (see Section XI) consult employees regarding the change in the policy prior to the issuance of a memorandum declaring the change;
- b* by informing the employees by email of a proposed change in policy, giving them a reasonable period to register their comments or objections, prior to sending out a memorandum informing them that the policy has taken effect; or
- c* by discussing the proposed changes through a general meeting, to allow the employees to register their comments or objections, prior to sending out a memorandum informing them that the change in policy has taken effect.

Certain statutes, such as those involving sexual harassment in the workplace or drug testing, impose specific standards that must be complied with by the employer in crafting its internal policies.

IX PARENTAL LEAVE

i Maternity leave

In every instance of pregnancy, any female worker who has (1) made at least three monthly contributions to the SSS in the 12 months immediately preceding the semester of childbirth, miscarriage or emergency termination of pregnancy, and (2) duly notified her employer of

39 *Sugue v. Triumph International (Philippines), Inc.*, 577 SCRA 323 (2009).

40 Philippine Labour Code, Article 267.

41 *id.*

her pregnancy and the expected date of birth, in accordance with the regulations of the SSS, shall be entitled to the paid maternity leave benefit.⁴² The paid maternity leave benefit shall consist of:

- a* 105 days of paid leave for a live birth, regardless of the method of delivery; or
- b* 60 days of paid leave for a miscarriage or emergency termination of pregnancy.⁴³

In the case of a live birth, the mother has the option of extending her maternity leave for an additional 30 days without pay by giving the employer notice of the extension within 45 days of the end of her maternity leave.⁴⁴

Eligible female workers availing of the paid maternity leave benefit are entitled to receive their full pay, as advanced by the employer, within 30 days of filing a maternity leave application.⁴⁵ The SSS shall immediately reimburse the employer to the extent of 100 per cent of the employee's average daily salary credit for the applicable period of paid maternity leave.⁴⁶

A female worker entitled to maternity leave benefits may, by providing written notice to the employers of both the female worker and the intended carer, allocate seven days of benefits to the child's father or, in the event of the father's death, absence or incapacity, to an alternate carer who may be a relative within the fourth degree of consanguinity or the current partner of the female worker sharing the same household.⁴⁷

ii Paternity leave

Under the Paternity Leave Act, any married male employee is entitled to paternity leave of seven days with full pay for the first four deliveries of the legitimate spouse with whom he is cohabiting by notifying his employer of the pregnancy of his spouse within a reasonable period of time from the expected date of delivery of the pregnant spouse, or within such period that may be provided in the company's rules and regulations.⁴⁸ The paternity leave benefit is paid for by the employer.

iii Single parent leave

Under the Solo Parents Welfare Act, a single parent who has completed at least one year of service, whether continuous or broken, shall be entitled to seven working days of parental leave for each year, provided that he or she has notified his or her employer within a reasonable period prior to availing of the leave, and has presented his or her single parent identification card to his or her employer.⁴⁹

Further, in addition to the paid maternity leave benefits provided under the Expanded Maternity Leave Law, pregnant employees who qualify as single parents under the Solo Parents Welfare Act are entitled to an additional 15 days paid leave when availing of their paid maternity leave benefit.⁵⁰

⁴² Rep. Act No. 11210 IRR, Rule VI, Section 1.

⁴³ *id.*, at Rule III, Section 2, Paragraph 2.

⁴⁴ *id.*, at Rule III, Section 2, Paragraph 3.

⁴⁵ *id.*, at Rule VI, Section 3.

⁴⁶ *id.*, at Rule VI, Section 4.

⁴⁷ Rep. Act No. 11210, Section 6.

⁴⁸ Rep. Act No. 8187 (1996), Section 2; Rep. Act No. 8187 IRR, Sections 3 and 4.

⁴⁹ Rep. Act No. 8972 (2000), Section 8; Rep. Act No. 8972 IRR, Sections 18 and 19.

⁵⁰ Rep. Act No. 11210 IRR, Rule III, Section 2, Paragraph 2.a.

X TRANSLATION

English and Filipino are considered the two official languages in the Philippines for communications and instruction.⁵¹ For this reason, employment documents, including offer letters, employment contracts, confidentiality agreements, restrictive covenant agreements, proprietary information and assignment agreements, bonus or other incentive compensation plans, employee handbooks or other policies may be given in English. However, should an employee who is having difficulty understanding a document request a translation of the same, it is advisable to provide a translation in a local language understood by the employee.

For documents that take the form of a release, waiver or quitclaim, it is advisable that its stipulations be in English and Filipino or in the language best known to the employee.⁵²

XI EMPLOYEE REPRESENTATION

Employees and employers are encouraged by the Labour Code to form labour management councils for the purpose of facilitating the exercise of the employees' right to participate in the company's policy and decision-making processes. Employee representatives to labour management are elected by at least the majority of all employees in the establishment.⁵³

Employees also have a constitutionally protected right to self-organisation. Rank-and-file and supervisory employees are free to form, join or assist unions of their own choosing for the purposes of collective bargaining.

In the Philippines, unions are 'locally' formed within a company through specific bargaining units and are open only to employees within that company. To exercise the rights granted by law to unions, a union must be duly registered with the DOLE and must generally consist of at least 20 per cent of all the employees in the bargaining unit where it seeks to operate.⁵⁴ A bargaining unit is a group of employees sharing mutual interests within a given employer unit comprised of all or a portion of the entire body of employees in the employer unit, or any specific occupational or geographical grouping within that employer unit.⁵⁵

A union selected as the sole exclusive bargaining representative shall retain this status (1) for one year from the last certification election, (2) during the course of negotiations for a CBA, (3) during a bargaining deadlock and (4) during the five-year validity of a CBA, except within the last 60 days prior to its expiry. Once selected, the bargaining representative and the employer have a duty to bargain collectively.

XII DATA PROTECTION

i Requirements for registration

The collection and processing of personal information, including employee data, is governed by the Data Privacy Act of 2012. Data privacy regulations are implemented by the National Privacy Commission (NPC).

51 See *W Land Holding, Inc v. Starwood Hotels and Resorts Worldwide, Inc*, G.R. No. 222366, 4 December 2017; see also 1987 Constitution, Article 14, Section 7.

52 *EDI-Staffbuilders International, Inc v. National Labor Relations Commission*, 537 SCRA 409 (2007).

53 Philippine Labour Code, Article 266.

54 *id.*, at Article 240.

55 Omnibus Rules Implementing the Philippine Labour Code, Book V, Rule I, Section 1(q).

An employer is a personal information controller under the Data Privacy Act when it is involved in controlling the collection, holding, processing and use of information about its employees. It is required to implement 'reasonable and appropriate organisational, physical, and technical security measures for the protection of personal data'.⁵⁶ Employers must register with the NPC if any of the following conditions are met: it employs at least 250 employees; the processing includes sensitive personal information (as defined in Section XII.iii) of at least 1,000 individuals; the processing is likely to pose a risk to the rights and freedom of data subjects; or the processing is not occasional.

As a general rule, a current or prospective employee's consent must be secured prior to the collection of any personal information.⁵⁷ However, provided that sensitive personal information is not involved, an employee's personal data may be processed even without their consent when it is necessary or desirable in the context of an employer–employee relationship.⁵⁸

ii Cross-border data transfers

Cross-border data transfers are allowed under Philippine law, and are considered data sharing under the Data Privacy Act. The employee's consent is required even when the data is to be shared with an affiliate or mother company, or similar such relationship.⁵⁹ In addition, the employer should execute a data sharing agreement that establishes adequate safeguards for data privacy and security, and upholds the data privacy rights of its employees. The data sharing agreement is subject to review by the NPC on its own initiative or following a complaint by an employee.

There is no specific requirement to register a cross-border data transfer with the NPC.

iii Sensitive data

The implementing rules and regulations of the Data Privacy Act define sensitive personal information as personal information:

- a* about an individual's race, ethnic origin, marital status, age, colour, and religious, philosophical or political affiliations;
- b* about an individual's health, education, genetics or sexual life, or to any proceeding for any offence committed or alleged to have been committed by the individual, the disposal of such proceedings or the sentence of any court in such proceedings;
- c* issued by government agencies peculiar to an individual, which includes, but is not limited to, social security numbers, previous or current health records, licences or their denials, suspension or revocation, and tax returns; and
- d* that is specifically established by an executive order or an act of Congress to be kept classified.⁶⁰

Generally, the processing of sensitive personal information is prohibited unless the employee has given prior consent to the processing thereof for a declared, specified and legitimate

56 Implementing Rules and Regulations of the Data Privacy Act, Section 25.

57 *id.*, at Section 21(a).

58 *id.*, at Section 34(b)(2).

59 *id.*, at Section 20(b)(1).

60 *id.*, at Section 1(t).

purpose, or under the specific circumstances provided by the Implementing Rules and Regulations of the Data Privacy Act.⁶¹ Higher criminal penalties are also imposed for the unlawful processing of, or data breaches relating to, sensitive personal information.

iv Background checks

Background checks are legally permissible in the Philippines and may be required by an employer prior to hiring an employee as a valid exercise of its management prerogative.⁶² Employers commonly conduct background checks to determine a potential employee's prior criminal record and credit history. The processing of information gathered through background checks may be considered as necessary or desirable in the context of an employer–employee relationship.⁶³ However, processing the employee's information may require the employee's express prior consent if it involves the processing of sensitive personal information.

If an employee who has attained the status of a regular employee fails a background check, he or she may be disciplined by the employer only upon complete compliance with the employee's rights to substantive and procedural due process.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

An employee may only be dismissed if there is a just or authorised cause for the dismissal. This policy is anchored on the principle of the security of tenure of employees, which is not only statutorily provided but is constitutionally enshrined.

Under the Labour Code, the just causes for termination are:

- a* serious misconduct or wilful disobedience;
- b* gross and habitual neglect of duties;
- c* fraud or wilful breach of trust;
- d* loss of confidence;
- e* commission of a crime or offence by the employee against his or her employer, the employer's immediate family or his or her duly authorised representatives; and
- f* other causes analogous to the foregoing.⁶⁴

The authorised causes for termination of contract are:

- a* installation of labour-saving devices;
- b* redundancy;
- c* retrenchment to prevent losses;
- d* closure or cessation of business;⁶⁵ and
- e* a disease not curable within six months as certified by a competent public authority, and when the continued employment of the employee is prejudicial to his or her health or to the health of his or her colleagues.⁶⁶

61 id., at Section 22.

62 *Pili v. National Labor Relations Commission*, 217 SCRA 338 (1993).

63 Implementing Rules and Regulations of the Data Privacy Act, Section 34(b)(2).

64 Philippine Labour Code, Article 297.

65 id., at Article 298.

66 id., at Article 299.

The cause of dismissal determines which procedure must be followed prior to the dismissal. For just causes, an employer must:

- a* serve the employee with a written notice containing the specific causes or grounds of termination against him or her, and giving him or her an opportunity to provide an explanation, within at least five calendar days of receiving notice to clarify his or her defence;
- b* conduct a hearing or conference to allow the employee to explain his or her defences, present evidence and rebut the evidence presented against him or her; and
- c* serve the employee with a written notice of termination indicating that all circumstances involving the charge against him or her have been considered as well as the grounds to justify the severance of his or her employment.⁶⁷

Severance pay is not required for just cause dismissals but may be granted in exceptional circumstances.

For authorised causes, the employer must send written notices to the employee and to the DOLE regional office at least one month before the intended date of termination of the employment contract. The employee must also be granted severance pay at the rate prescribed by the Labour Code or by the CBA.

Failure to comply with the procedural requirements shall not invalidate a dismissal where just or authorised causes exist. However, an erring employer may be held liable for nominal damages of up to 30,000 Philippine pesos for just causes or up to 50,000 Philippine pesos for authorised causes.

There is no legal requirement for notifying a union prior to a termination, but such a requirement may be provided in the CBA. Further, no employee class may be exempt from termination, subject to regulations on the termination of employment contracts for authorised causes as may be prescribed in a CBA.

An employee may question his or her dismissal by claiming that it was not for a just or authorised cause and filing a case before the NLRC. The parties may freely enter into a settlement agreement while the dispute is pending.

ii Redundancies

An employer may validly dismiss an employee or a group of employees for authorised causes by sending written notices to the employee and to the appropriate DOLE regional office at least one month before the intended date of termination. The employee must also be granted the appropriate amount of severance pay as provided by law or the CBA.

An employer may implement termination of contract by redundancy when the following elements are present:

- a* there must be superfluous positions or services of employees;
- b* the positions or services are in excess of what is reasonably demanded by the actual requirements of the enterprise to operate in an economical and efficient manner;
- c* there must be good faith in abolishing the positions now deemed redundant;
- d* there must be fair and reasonable criteria in selecting the employees whose contracts are to be terminated; and
- e* there must be an adequate proof of redundancy, such as feasibility studies or proposals.⁶⁸

⁶⁷ *Unilever Philippines, Inc v. Rivera*, 697 SCRA 136 (2013).

⁶⁸ DOLE D.O. No. 147-15, Section 5.4(b).

An employer may also implement termination through a retrenchment programme that complies with the following requirements:

- a* the retrenchment must be reasonably necessary and likely to prevent business losses;
- b* the losses, if already incurred, are substantial, serious, actual and real or, if only expected, are reasonably imminent;
- c* the expected or actual losses must be proved by sufficient and convincing evidence;
- d* the retrenchment must be in good faith and not to defeat or circumvent the employees' right to security of tenure; and
- e* there must be fair and reasonable criteria in ascertaining the retention and dismissal of employees, such as status, efficiency, seniority, physical fitness, age and financial hardship for certain workers.⁶⁹

Mass termination as a result of the closure of business may also be implemented when the following elements are present:

- a* there must be a decision by the management to close the enterprise or cease operations;
- b* the decision was made in good faith; and
- c* there is no other option available to the employer except to close or cease operations.⁷⁰

Further, termination as a result of the installation of labour-saving devices is allowed when the following requirements are met:

- a* there is a need to introduce machinery, equipment or other devices;
- b* the introduction must be done in good faith;
- c* the purpose of the introduction must be valid, such as to save on costs, enhance efficiency or other justifiable economic reasons;
- d* the introduction of machinery, equipment or devices and the consequent termination of employment of those affected is the only option available to the employer; and
- e* the criteria for selecting employees whose contracts are to be terminated are fair and valid.⁷¹

An employee whose contract has been terminated as a result of the above causes is entitled to a severance payment of at least one month's salary or half-a-month's salary for every year of service. However, when closure of an enterprise is the result of serious business losses or financial reverses, no severance payment is required.

An employee may question the dismissal and allege illegal dismissal by filing a case before the NLRC. Failure by the employer to prove the existence of each of the elements of a valid dismissal may lead to a finding that there was an illegal dismissal. The parties may freely enter into a settlement agreement while the dispute is pending.

⁶⁹ id., at Section 5.4(c).

⁷⁰ id., at Section 5.4(d).

⁷¹ id., at Section 5.4(a).

XIV TRANSFER OF BUSINESS

While there is no specific statute that regulates the employment aspect of legitimate transfers of business through mergers, acquisitions or outsourcing transactions, case law provides clarification.

In the event of a full merger in which there is no express stipulation in the articles of the merger concerning the employees of the entity that does not survive, the employment contracts of the non-surviving entity are automatically assumed by the surviving corporation.⁷² Thus, the absorbed employees become regular employees of the surviving corporation on the day the Securities and Exchange Commission approves of the merger.⁷³ In this regard, the surviving company may have a valid good faith basis to establish redundancy for positions for which the functions of certain employees will be duplicated.

In transactions involving the acquisition of assets of a going concern, provided that the sale is in good faith, the transferee or buyer has no legal duty to take on the employees of the seller.⁷⁴ An innocent transferee that acquires a business in good faith has no liability with regard to the employees of the transferor and does not have to continue employing them. However, in exercising its prerogative to select and hire employees to fill the vacancies in its facilities, the transferee may give preference to separated employees who are suitably qualified.⁷⁵

XV OUTLOOK

Based on bills recently filed with Congress, employers can anticipate more comprehensive regulatory monitoring of alternative working arrangements and appurtenant employment benefits, in line with current regulations promoting telecommuting as a general policy.⁷⁶

Likewise, there is currently a push for removal of restrictions on the employment of foreign professionals in the country. House Bill No. 300 seeks to exclude from the coverage of the Foreign Investments Act of 1991 the ‘practice of professions’, which would effectively exclude professionals from the Foreign Investment Negative List and allow foreign professionals to practise in the Philippines.⁷⁷

72 *Bank of the Philippine Islands v. BPI Employees Union-Davao Chapter-Federation of Unions in BPI Unibank*, 658 SCRA 828 (2011).

73 *id.*

74 *Barayoga v. Asset Privatization Trust*, 473 SCRA 690 (2005).

75 *id.*

76 See also Senate of the Philippines, 18th Congress, press release, ‘Villanueva: Bill recognizing flexi-time, compressed work week passes on third and final reading at tail-end of 17th Congress, available at www.senate.gov.ph/press_release/2019/0520_villanueva2.asp (last accessed 2 December 2019).

77 House Bill No. 300, Section 2.

POLAND

Agnieszka Fedor¹

I INTRODUCTION

Polish employment law is primarily regulated by the Labour Code of 26 June 1974, which has been substantially amended. There are also numerous laws and regulations that address employment law.

Polish law states that certain internal acts issued by a particular employer constitute sources of labour law. This includes collective bargaining agreements and other collective arrangements, regulations and policies. The provisions of these internal policies may not be less favourable to employees than the provisions of the Labour Code or other statutory laws.

Labour courts are included in the framework of the common courts in Poland, constituting specialised divisions of those courts.

The State Labour Inspectorate (SLI) is the competent authority to enforce employment law. The primary tasks of the SLI include: supervision and inspection of compliance with labour law; taking legal action in cases relating to the establishment of labour relations (reclassification); and prosecuting infringements of employees' rights and other infringements relating to the performance of work and the legality of employment.

II YEAR IN REVIEW

i Act on Employee Capital Plans

The Act on Employee Capital Plans (PPK) was introduced in 2018 and came into effect on 1 January 2019. Its aim is to introduce an additional pension-saving vehicle. Under the Act on PPK, savings are to be systematically accumulated and paid to participants, in principle after they reach the age of 60. The PPK system is intended to be universal – all entities hiring workers (including employees as defined in the Labour Code, specific types of civil law contractors and supervisory board members who are remunerated for their duties) are required to establish an employee capital plan, with a few exceptions. Entities employing at least 250 persons (as at 31 December 2018) were obliged to apply the Act on PPK from 1 July 2019; all other entities are obliged to apply the Act, accordingly, from 1 January 2020, 1 July 2020 or 1 January 2021.

Employers are required to (1) enter into agreements with a financial institution pertaining to the management and maintenance of a PPK for each entitled individual, and

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(2) pay contributions for each individual, part of which is financed by the employer and the remainder by the individual. The employer's contribution is 1.5 per cent of the gross income of the given individual (with the possibility of an additional voluntary contribution of up to 2.5 per cent). The state also contributes to the PPK.

ii Amendments to the Act on Trade Unions

An amendment to the Act on Trade Unions was introduced in 2018 and took effect as of 1 January 2019. It grants non-employees, including civil contractors, the right to establish and to join trade unions. The Act also extends the scope of information that trade unions may demand from employers – in particular, they can request information about business operations and the employer's economic situation, as well as the structure and expected changes in employment.

iii Amendments to the Labour Code

The Labour Code was amended several times during 2019. An amendment relating to medical examinations for employees entered into force on 4 May. The new regulations specify certain new entitlements and employers' obligations in the scope of medical examinations for employees. This amendment was also introduced to ensure compliance with the EU General Data Protection Regulation. In respect of personal data, an employer may, for example, no longer demand from a candidate any data concerning his or her parents' names and place of residence.

Further amendments came into force on 7 September 2019, pertaining to:

- a* equal treatment of employees (a change in the definition of discrimination resulting in the introduction of an open catalogue of possible causes of discrimination);
- b* protection of persons exercising parental rights (equating the situation of an employee who is a member of the immediate family other than the parent, and who benefits from maternity leave or parental leave with the situation of an employee-father raising a child);
- c* workplace bullying (the employee may also seek damages if he or she has not terminated his or her employment contract as a result of bullying)
- d* issuance of work certificates (including an extended deadline for an employee to request an employer to rectify a work certificate and to submit a request for rectification of a work certificate to a labour court from seven to 14 days);
- e* clarification that an untimely issuance of a work certificate is subject to a fine (the previous provisions generally indicated 'non-certification'); and
- f* rules concerning consideration of an allegation of limitation of claims under an employment relationship (limitation of claims under an employment relationship is taken into account only if a person against whom the claim is sought made the charge, and not *ex officio*).

iv New regulations on maintaining personnel records

A new Regulation of the Minister of Family, Labour and Social Policy concerning personnel records took effect as of 1 January 2019. It introduces a number of modifications to the maintenance of personnel files. Among other things, a new Section D is added to personnel files, which should contain documents concerning liability for breach of order and discipline. Since the statute underpinning this Regulation permits storing personnel records either on

paper or in electronic form, the Regulation also covers matters concerning the maintenance of records in the relevant form (e.g., technical requirements, file format and transfers between computer systems).

The new regulations generally apply to the personnel records of employees who were hired on or after 1 January 2019. In practice, this means that employers will store personnel files on different terms for different groups of employees, depending on the date on which they were hired.

III SIGNIFICANT CASES

In a ruling of 4 December 2018,² the Supreme Court held that a sobriety test can fully serve as evidence only if it is conducted by a state or municipal police officer. The testing of an employee's sobriety by an employer (provided the employee consents) can only serve as a reason for the employer to contact an appropriate law enforcement authority, should the employer's suspicions as to the employee's sobriety be confirmed, so that a formal test may be carried out. Employer-ordered employee sobriety testing with the use of sobriety tests available at the employer's premises may be effectively challenged by the employee under the current legislation as being conducted without legal grounds.

By virtue of a resolution adopted by the Supreme Court on 4 April 2019,³ if an employer incorrectly terminates an employment contract with notice and then terminates it without notice in violation of the provisions, the employee is entitled to claim damages both for defective termination with notice and for the defective termination of the contract without notice.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employment relationship is, in principle, established on the basis of an employment agreement. There are additional bases for the establishment of an employment relationship, in particular appointment or nomination, but they are relatively insignificant.

Polish law defines the employment relationship as an obligation of the employee to perform a certain type of work under the supervision of the employer at a location and time defined by the employer for remuneration paid by the employer. Regardless of the type of contract the parties have executed, performance of work according to the aforementioned terms and conditions is always considered employment; in particular, a civil law contract may not be concluded instead of an employment agreement.

The Labour Code defines two major types of employment agreements:

- a* for an unspecified period (open-ended); and
- b* for a specified period (fixed-term).

Open-ended agreements are offered to employees with whom the employer wishes to have a long-term relationship and are strongly preferred by employees.

2 I PK 194/17.

3 III PZP 2/19.

A fixed-term employment agreement is also commonly used. This type of agreement provides for a specific duration and termination date (upon which it terminates automatically).

Employment agreements should contain provisions on:

- a* conditions of employment and remuneration, such as type of work, place of performance of work and remuneration;
- b* working time (full-time or part-time); and
- c* date of commencement of work.

It is advisable that additional issues be regulated in the agreement, such as intellectual property and confidentiality. A written employment contract must be executed and signed by both parties.

The terms and conditions of employment may be changed by the parties upon a mutual alteration agreement or by unilateral notice on the alteration of terms and conditions of employment served by the employer. If the employee is not willing to accept the alteration notice, he or she may appeal to the courts or decide to terminate the employment.

ii Probationary periods

Polish law provides for the possibility to execute a separate probationary period agreement, which may precede both open-ended and fixed-term employment agreements. The maximum permissible probationary period is three months. The employer has no obligation to continue the employment after the probationary period has elapsed.

The probationary period employment agreement may be terminated by either party with notice before the probationary period expires. The notice period depends on the duration of the probationary period and ranges from three days to two weeks.

iii Establishing a presence

A foreign company may employ workers without being registered to carry on business in Poland. It may also use temporary workers provided by an agency or engage individual contractors.

Most of the double tax treaties (DTTs) to which Poland is a signatory are based on the Organisation for Economic Co-operation and Development's Model Tax Convention and set forth regulations allowing a contractor to be considered a permanent establishment (PE) of the company. A contractor is considered a PE when it acts on behalf of the company and habitually exercises, in a given country, the authority to conclude contracts in the name of the company. In such cases, the company is deemed to have a PE in that country in respect of any activities of the contractor, unless they are limited to those listed in the DTT that, if exercised through a fixed place of business, would not make the contractor a PE unless it acts merely as an 'independent agent' under the DTT.

The commencement of activity by the foreign company in the form of a PE is treated as the start of business activity in Poland. Therefore, the company would be subject to corporate income tax (in relation to profits derived from activities performed in Poland) and any business activity by the company performed through a PE would be subject to value added tax in Poland. However, in principle, Polish law requires a foreign entrepreneur conducting business activity in Poland to establish either a branch or a representative office in Poland.

A Polish branch or a representative office of a foreign company becoming an employer is obliged to deduct and pay to the tax authorities income tax advances for each employee who is a Polish tax resident. In principle, it is also necessary to deduct social security dues from the gross amount of the employee's remuneration. Anyone who is employed directly by

a foreign company is responsible themselves for payment of the income tax advances during the year. In certain instances (in particular when someone is employed by a company from the European Union), deduction of social security dues remains the responsibility of the foreign employer. An EU-based foreign employer and an employee may execute an agreement regarding payment of social security dues on the basis of which the employee undertakes to pay his or her social security dues.

V RESTRICTIVE COVENANTS

An employer may conclude non-compete agreements with its employees. If the non-compete restriction covers the period of employment, compensation does not have to be provided to an employee.

When a given employee has access to particularly important information, the disclosure of which may expose the employer to damage, the employer may execute a non-compete agreement for the period following termination of employment with that employee. The non-compete restriction for a period following termination of employment should include compensation for the employee of at least 25 per cent of his or her previous earnings during the corresponding period immediately preceding the termination of employment.

VI WAGES

i Working time

The basic working time system allows for a maximum of eight hours' work per day and an average of 40 hours a week based on a reference period, which cannot exceed four months, although extensions of up to 12 months are permitted in certain circumstances. Weekly working time (including overtime) cannot exceed an average of 48 hours per week (balanced over the entire period of reference). The minimum daily rest period is 11 hours and the minimum weekly rest period is 35 hours.

According to Polish law, night work encompasses eight hours of work (chosen by the employer) between 9pm and 7am. An employee whose schedule of working time includes at least three hours of night work every day, or where at least a quarter of whose working time in the reference period falls during night-time, is deemed a night worker. The working time of a night worker may not exceed eight hours if the employee performs particularly dangerous work or work requiring a lot of physical or mental effort.

ii Overtime

For every hour of overtime, an employee is entitled to an additional 50 per cent of his or her remuneration. This is increased to 100 per cent in certain instances, such as if overtime work is performed during night-time, at weekends or on a public holiday, which is not a usual working day of the employee. Persons in managerial positions are entitled to overtime benefits to a limited extent.

Upon a written request, the employer may grant an employee a release from work for a period corresponding to the duration of overtime worked (instead of the aforementioned overtime compensation). The employer may also grant the employee time off without the employee's request; however, this is at the ratio of 1.5 hours of time off for each hour of overtime worked. The statutory overtime limit is 150 hours in a calendar year. It is possible to increase this within certain limits.

VII FOREIGN WORKERS

Employers are not subject to a legal obligation to keep a special register of foreign workers, although, for practical reasons, this information should be easily accessible (e.g., in the event of an SLI inspection). There is no legal limit on the number of foreign workers a company can employ.

A foreign national may perform work in Poland if, *inter alia*, he or she:

- a* has a work permit and relevant residence title in the territory of Poland (e.g., a visa) or a (joint) residence and work permit;
- b* has been granted refugee status, temporary protection, subsidiary protection, a permanent residence permit, a residence permit on humanitarian grounds, a permit for tolerated stay or a long-term EU residency permit;
- c* is a citizen of (1) an EU Member State, (2) a Member State of the European Economic Area (EEA), (3) a state that is not a member of the EEA, but who may enjoy freedom of movement on the basis of a treaty executed between that state and the European Union and its Member States, or is a family member of a foreigner in one of the categories listed here (subject to additional criteria); or
- d* has a residence permit granted for a specified period to practise a profession requiring high qualifications.

In principle, a work permit may be issued for a period not exceeding three years, although it may be extended. In certain specific situations, a work permit may be issued for five years. Following receipt of a work permit, the foreigner is obliged to apply for an employment visa or a residence permit. Instead of applying for two documents referring separately to work and residence legalisation, application may be made for a joint residence and work permit. The period for which such a permit may be issued may not exceed three years. The permit may be subsequently renewed.

A foreigner employed in Poland is covered by the minimum requirements of Polish labour law, in particular those relating to working time and overtime payments, minimum remuneration, length of holiday leave, health and safety at work, non-discrimination and the rights of employees relating to parenthood. The employer is obliged to pay taxes and social security dues for the foreign worker, subject to DTTs and any similar international treaties relating to social security and to the provisions of the pertinent EU regulations.

VIII GLOBAL POLICIES

Global policies are enforceable only to the extent to which they are compliant with Polish law and only if they are properly introduced. It is legally required that these policies are in Polish. Depending on the content of a policy, it may be recommended to obtain the employees' consent (familiarisation forms).

Disciplinary procedures are provided for by Polish law and are very formalised in relation to:

- a* types of disciplinary offences (breach of order at work, health and safety regulations, fire prevention regulations or the method of confirming presence at work and excusing absence from work);
- b* procedural requirements (which are very formal and include the right to appeal to court); and
- c* penalties.

All disciplinary procedures should be addressed in the employment regulations (a specific document, as described below) and not in global policies or employment contracts.

In principle, once an employer has 50 employees, it is obliged to introduce internal labour regulations, namely employment regulations and remuneration regulations (unless there is a collective bargaining agreement in force). The employer is also obliged to establish a social fund and issue social fund regulations, unless it has been agreed with the employees' representatives or trade unions that no fund is to be established. The employer is obliged to ensure that every individual employee is acquainted with the regulations and policies. The regulations and policies may be made available to the employees in the manner customary to a given employer, including posting on the intranet.

The employer is obliged to agree on the employment regulations and remuneration regulations with trade unions active at the employer's business (if any). Furthermore, some specific provisions of the employment regulations and remuneration regulations need to be agreed with the trade unions or the employees' representatives for their validity (e.g., extension of the reference period up to 12 months). In other cases, these regulations are not subject to the consent of the employees, unless they worsen the terms and conditions of employment.

Polish law prohibits discrimination, sexual harassment and corruption. These matters can be more specifically regulated in company policies. Neither global policies nor internal regulations issued by Polish companies have to be filed with or approved by any government authority; however, it is required that a copy of the agreement on extension of reference periods to 12 months is submitted to a labour inspector and the inspector is notified of specific working-time systems if they are introduced at the employer's business.

IX PARENTAL LEAVE

Polish Law provides for several forms of parental leave – maternity, parental, paternity and childcare.

A female employee is entitled to maternity leave of between 20 weeks and 37 weeks, depending on the number of children born at one birth. After completing her maternity leave, or the maternity allowance for the period corresponding to the maternity leave, the employee is entitled to 32 weeks of parental leave (or 34 weeks in the case of a multiple birth). A father-employee or other close family member is entitled to a part of the maternity leave or paternal leave under special circumstances.

A male employee raising his child has the right to two weeks of paternity leave, which must be taken before the child reaches the age of 24 months (or up to 24 months from the moment the adoption of a child becomes final), and in any case before the child reaches the age of seven years, or if there has been a decision to postpone the child's schooling, before the child reaches the age of 10.

A maternity allowance is due during maternity leave, leave granted on the terms of maternity leave, parental leave and paternity leave. The allowance during maternity leave amounts to 100 per cent of the average remuneration paid during the full 12 months preceding maternity leave (this is the 'basis' of the remuneration). Maternity allowance for paternity leave and leave on the terms of maternity leave is calculated in the same way. In the case of parental leave, the maternity allowance amounts either to 100 per cent of the aforementioned basis or 60 per cent or 80 per cent thereof, depending on the particular case, as provided by law. All leave taken that relates to parenthood is financed by the state from the Social Insurance Fund.

An employee who has been employed for at least six months is entitled to take childcare leave to provide personal care for a child. The length of childcare leave cannot exceed 36 months and is granted for a period not longer than until the end of a calendar year in which the child reaches the age of six. Childcare leave is unpaid.

Generally, an employer is not entitled to dismiss an employee who is on maternity leave, parental leave, paternity leave or childcare leave. However, Polish law provides exceptions to this rule, for example, in the case of insolvency of the employer.

X TRANSLATION

Employment documents must have a Polish version if the following conditions are jointly met: the employee is a Polish resident when concluding the employment agreement and the work is to be performed in Poland.

Certified translation or notarisation is not required; however, with respect to agreements, regulations, etc., the Polish versions need to be the official versions in the sense that they are executed (signed). Unofficial translations of documents executed in a foreign language are not sufficient.

A parallel foreign language version is admissible, but the Polish version prevails if the employee is a Polish citizen.

However, as an exception from the foregoing rule, if an employee is not a Polish citizen, has been instructed on his or her right to receive an employment agreement or other employment-related document in Polish and requests that the document is prepared in another language (with which he or she is familiar), then the Polish version is not required.

The Polish language requirement is applicable to all employment documents and in particular to employment contracts, confidentiality agreements, restrictive covenant agreements, proprietary information and assignment agreements, internal regulations, bonus or other incentive compensation plans, employee handbooks or other policies, among others.

Documents without the required Polish versions are, in principle, still enforceable (as long as the employee comprehends the foreign language version), but the person responsible for their implementation is subject to a fine.

XI EMPLOYEE REPRESENTATION

The two basic forms of employee representation are works councils and trade unions, which are governed by different rules. A works council and a trade union organisation may exist at one employer independently from others. In this case, certain issues would need to be separately discussed with the unions and the council (e.g., collective redundancies). Polish law also provides for various *ad hoc* employee representatives elected for specific purposes in the absence of trade unions.

i Works councils

A works council is a body representing the employees of a given employer that has at least 50 employees. The number of employees is established based on the average headcount during the six preceding months. The employer is obliged to inform the works council of:

- a* the activities and economic situation of the employer and contemplated developments in this regard;

- b* the situation, structure and contemplated development of employment, as well as actions aimed at retaining the level of employment; and
- c* actions that are likely to lead to substantial changes in the work organisation or in contractual relations.

Under certain circumstances, the employer may refuse to make some information available to the works council.

The matters specified in points (b) and (c) above should also be subject to consultation with the works council. The council does not have any approval or co-determination rights.

The procedure for information and consultation should be agreed between the works council and the employer. There are no formal rules as to the frequency of works council meetings; however, the employer is bound to inform the works council in the case of any contemplated actions that are statutorily covered by the information procedure, of which the employer has agreed to inform the works council and at the written request of the works council. Any action subject to information or consultation should only be taken following the completion of the process.

The members of a works council are elected by the employees. Should the average headcount reach 50 employees (calculated in a specific way), a group of at least 10 per cent of the employees may ask the employer, in writing, to organise the election of a works council. The election procedure is established by the employer but should be fair and democratic.

The term of office of works council members is four years from the day of the election.

The number of members of a works council depends on the number of employees, as follows:

- a* between 50 and 250 employees: three members;
- b* between 251 and 500 employees: five members; and
- c* more than 500 employees: seven members.

There are certain advantages for employees connected with their membership of a works council; in particular, an employer is not allowed to unilaterally terminate an employment agreement while an employee is a member of a works council without the council's consent.

ii Trade unions

Trade unions are established by virtue of a resolution adopted by eligible persons – employees as well as non-employees (the law amendments of 2019 granted non-employees, including civil contractors, the right to establish and to join trade unions). A trade union acquires legal standing upon registration by the court. Usually, the organisers of a company trade union join an existing nationwide union, which allows them to save on time and formalities, and take advantage of the expertise of experienced union activists. Trade unions have powers that are much broader than those of works councils. Generally, as well as the right to be informed and consulted, trade unions have co-determination rights in certain areas.

The fundamental obligations of an employer towards a trade union include:

- a* to agree certain internal regulations with the trade union;
- b* to consult the trade union regarding any collective redundancies;
- c* to inform and in some cases to consult the trade union regarding the issues relating to a transfer of undertaking;

- d* to obtain the consent of the trade union to termination of the employment agreement with that trade union's officers (as a primary rule, their exact number is dependent on the number of members of the trade union organisation), or to a change of the terms of their employment;
- e* to obtain the consent of the trade union for termination without notice of employment agreements of employees enjoying special protection (e.g., pregnant employees and employees on maternity leave); and
- f* to consult the trade union before terminating an employment agreement for an unspecified period or changing the terms of employment of employees employed for an unspecified period (no union approval is needed).

In individual matters, a company trade union organisation has the right and obligation to represent individual employees who are members of the organisation or non-members who give their consent to being represented by the organisation. When taking a position regarding the employer in matters concerning collective rights and interests, the company trade union organisation represents all entitled persons regardless of their trade union affiliation.

XII DATA PROTECTION

The basic rules concerning processing of personal data are set forth in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the General Data Protection Regulation (GDPR)) and in the Act on Personal Data Protection of 10 May 2018, which transposes some provisions of the GDPR to the Polish legal system. There are also specific regulations on processing the personal data of employees and candidates in the Labour Code of 26 June 1974. The Labour Code was amended in 2019 to ensure compliance with the GDPR. Amendments concerned, among other things, the scope of personal data that the employer may gather from a candidate or an employee (for example, an employer may no longer demand from a person seeking to be employed any data concerning his or her parents' names and place of residence).

i Requirements for processing personal data

An employee's consent for an employer to process personal data is not necessary if the personal data is processed in relation to the employment agreement (with regard to personal data as indicated in Article 22¹ of the Labour Code).

The processing of employees' personal data can be based on other legal grounds, such as a necessity for the performance of employment contracts (Article 6.1.b, GDPR), necessity for compliance with a legal obligation to which the employer is subject (Article 6.1.c, GDPR) or legitimate interests of the employer (Article 6.1.f, GDPR). The employer is required to notify employees on the processing of their personal data and to provide them with the information required under Article 13 of the GDPR (relating to, for example, the purposes and legal grounds for the data processing, data recipients and employee rights under the GDPR).

Under the GDPR, employers are obliged to maintain records of data processing activities, to implement appropriate technical and organisational measures to ensure a level of security of personal data appropriate to the risk, and to ensure that an individual who has

access to employees' personal data (acting under the authority of the employer) processes it according to instructions from the employer. However, there is no obligation imposed on employers to register the processing of employees' personal data with the data protection authority (DPA).

ii Cross-border data transfers

With respect to cross-border transfers of employees' personal data, registration of the transfers with the DPA is not required. However, it is necessary to obtain the DPA's consent for the transfer of personal data if the destination country does not ensure an adequate level of personal data protection in its territory and if none of the conditions allowing for transfers to such countries, as indicated in the GDPR, are met (e.g., explicit consent of the data subject, the necessity to perform a contract between the data subject and the controller, or the implementation of pre-contractual measures to be taken at the data subject's request). The consent of the DPA is not required for transfers of personal data to third countries based on EU Model Clauses or to US entities that obtain certification of the EU-US Privacy Shield Framework. Transfers of personal data can also take place on the basis of the Binding Corporate Rules approved pursuant to procedures established in the GDPR.

As stated above, the consent of the employee may potentially be one of the instances in which a transfer may be effected without the DPA's consent; however, as it may be questioned whether consent was freely given by an employee based on the nature of the employment relationship, obtaining the DPA's consent to a transfer of an employee's personal data or the implementation of EU Model Clauses and Binding Corporate Rules is considered a safe approach.

iii Special categories of personal data

The processing of special categories of personal data is allowed only in cases explicitly indicated in the GDPR. Employers are allowed, and indeed obliged, to process particular health information that relates to occupational health. The GDPR introduces the definition of special categories of personal data, which covers data revealing racial or ethnic origins, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data processed for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation. Under the GDPR, the processing of these special categories of personal data is generally prohibited and allowed only in certain circumstances, for instance if it is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security, and social protection law insofar as it is authorised by EU or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject. Processing based on data subject consent is also allowed and it does not require that consent to be in writing.

Processing of personal data relating to criminal convictions and offences or related security measures can be carried out only under the control of an official authority or when the processing is authorised by EU or Member State law that provides for appropriate safeguards for the rights and freedom of data subjects.

iv Background checks

As a principle, unless specific types of jobs are involved, Polish law does not allow background checks on employees, including criminal records and credit checks. The Labour Code specifically lists information that an employer may request from a candidate or an employee.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

There are three general methods by which employment agreements may be terminated in accordance with the Labour Code: by mutual agreement, with notice and without notice.

Each type of employment agreement may be terminated at any time by mutual consent of the employee and the employer. In general, these terminations are not subject to the requirement to specify the cause for the termination or to consult with a trade union regarding the termination.

Statutory notice periods are the same for the employee and the employer. Payments in lieu of notice are not allowed (except in certain specific instances, when the notice period may be shortened). It is admissible to release an employee unilaterally from the obligation to perform work with the right to remuneration retained, but only during the notice period.

Termination of an employment agreement for an unspecified period with notice from the employer requires just cause, which is defined by the courts as a reason that is true, real, specific and important enough to discontinue the employment relationship.

The reasons for termination may occur because of the employee (e.g., underperformance) or the employer (e.g., liquidation or restructuring). The employer has no duty to specify a reason when terminating fixed-term agreements.

If there is a trade union operating at the place of work, an employer must seek the trade union's opinion regarding the intention to terminate an employment agreement for an unspecified period for an employee represented by that union. Regardless of the trade union's opinion, however, the employer is free to make the final decision to terminate the employment agreement.

The employee who has been dismissed has the right to appeal to a labour court. If the labour court finds the appeal well grounded it may, in principle, reinstate the employee in his or her former job (which also involves payment of some compensation) or award the employee damages in an amount not exceeding three months' remuneration for that employee.

Polish labour law provides for the special protection of employment for a variety of groups of employees. In practice, the most important of them are trade union activists, employees in their pre-retirement period, pregnant women, employees on parental or childcare leave, and employees on sick leave.

In cases of termination of employment for reasons not relating to the employee, an employer employing at least 20 employees is obliged to pay statutory severance pay on the same terms and conditions as in a collective redundancy (see below).

The Labour Code allows employers to terminate employment agreements immediately without notice in specifically defined situations, such as a serious violation of basic employee duties.

Apart from social security registration issues, individual dismissals are not subject to notification to any government authorities. In respect of individual dismissals, there are no rehire rights. Obligatory offers of suitable alternative employment are only applicable to selected groups of employees. Social plans are not required.

ii Redundancies

Polish law provides for specific rules applicable to termination of employment for reasons not concerning employees, in particular collective redundancies. The provisions of Polish labour law regarding collective redundancy apply if an employer of at least 20 employees intends to terminate – for reasons not attributable to employees – within a period of 30 consecutive days, employment relationships with:

- a* at least 10 employees, if it has fewer than 100 employees;
- b* at least 10 per cent of employees, if it has at least 100 but fewer than 300 employees; or
- c* at least 30 employees, if it has at least 300 employees.

If the above limits are not met, redundancies should take the form of individual dismissals.

In the course of collective redundancies, trade unions should be notified in writing of the contemplated dismissals. Further, a company is obliged to consult unions regarding any intended collective redundancies. The consultation should be carried out with a view to reaching an agreement. The agreement should be concluded within 20 days and should set out the rules of handling the matters concerning the employees to be laid off (including severance and outplacement packages). If no agreement has been reached, the company should issue a regulation dealing with the matters that were to be regulated in the agreement (the collective redundancies regulation).

If no trade unions operate within an employer's business, the information should be delivered to, and the consultations should be carried out with, employee representatives elected for this purpose.

A contemplated redundancy is subject to an information and consultation procedure with works councils. The relevant regulations do not impose any formal requirements for this procedure.

A company is also obliged to provide two notifications to the local employment office on any contemplated collective dismissal measures. The first is to be made simultaneously with the notification to trade unions or employee representatives. The second notification should be made after the consultation process has been completed.

If a company intends to terminate employment relationships with at least 50 employees within a period of three months, it is obliged to agree with the local employment office on the scope and forms of assistance (outplacement) to employees who are to be made redundant.

In addition, in the case of collective redundancies, the termination of employment needs to be effected individually with respect to each employee – either a notice must be provided or a termination agreement signed with the employee. Payments in lieu of notice are required if the notice is served and the employer shortens the notice period (applicable in cases where the employee is entitled to a three-month notice period, which may be shortened to no less than one month). In the case of signing a termination agreement, payments in lieu of notice are allowed (understood as the amount equal to the salary an employee does not earn because of agreeing an immediate or a short-term employment expiry date). The employer is obliged to provide statutory severance pay to all employees affected by collective redundancies. The amount of statutory severance is fixed in relation to a given employee's aggregate employment record with the employer and ranges from one to three months' remuneration for the employee. The maximum amount of the severance pay is capped – in 2020, the cap is 39,000 zlotys gross.

Although it is not required under the provisions of the law, employers often grant additional compensation to employees whose employment is terminated. The categories of

protected employees are slightly narrower than in the case of individual dismissals. In respect of collective redundancies, there are certain limited rehire rights. Obligatory offers of suitable alternative employment are only applicable to selected groups of employees.

XIV TRANSFER OF BUSINESS

Poland has implemented the EU Council Directive 2001/23/EC.⁴ Under Polish law, the relevant ramifications pertain, in particular, to the sale of an enterprise, a part thereof or selected assets as well as to the lease of an enterprise or premises. The case law of the Polish Supreme Court has specifically confirmed that the transfer of a business may also take place even when no assets are transferred, provided that the business is labour-intensive rather than capital-intensive. This might have a material effect on outsourcing projects, since the transfer of an undertaking could also occur in the event of hiring and changing an external provider or the insourcing of previously outsourced tasks.

If a transfer covers an entire business (all employees of a given employer), the transferee becomes liable with regard to the employees for all employment-related obligations that arose before the transfer and the transferor is no longer liable for those obligations. If the transfer pertains only to some of the employees, both the transferee and the transferor are jointly and severally liable in relation to the transferred employees for the obligations that arose prior to the transfer. Obviously, both employers can and often do agree between themselves on indemnity regulations; however, this does not affect the principles of third-party liability (with regard to the employees).

If there are trade unions operating at the transferor or transferee, they should be notified in writing at least 30 days before the anticipated date of transfer of:

- a* the contemplated date of the transfer;
- b* the reasons for the transfer;
- c* the legal, economic and social implications of the transfer for the employees; and
- d* any measures envisaged in relation to the terms and conditions of employment, including working conditions, remuneration and retraining.

If there are no trade unions operating at either of the employers, a notification of these details should be made in writing to each individual employee of both employers.

Trade union consultation is required if there are any measures envisaged in relation to changing the terms and conditions of employment. A works council should also be consulted about a contemplated transfer (prior to any binding decision being made in this respect), if such a council is established at either the transferor or transferee.

Within two months of the transfer, transferred employees may terminate their employment with seven days' notice. For the employee, termination of employment in accordance with this procedure shall have the same consequences as those envisaged under labour law for termination of an employment relationship upon notice by the employer.

⁴ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 082/16.

XV OUTLOOK

A minimum wage per hour for persons rendering work or services to entrepreneurs under mandate or service agreements has been increased from 14.7 zlotys to 17 zlotys gross as of 1 January 2020. A minimum monthly wage for persons rendering work under employment contracts has also been increased from 2,250 zlotys to 2,600 zlotys gross. According to the government's announcements, the minimum remuneration is to increase rapidly in the next few years – to 3,000 zlotys gross in 2021 and to 4,000 zlotys gross in 2023.

PORTUGAL

Tiago Piló¹

I INTRODUCTION

The Portuguese employment law framework is generally known for its high degree of employment protection, mainly because dismissal at will is forbidden by the Portuguese Constitution and the general understanding of an employment relationship is that it is long-term. However, in practice, employees face labour market segmentation because employers, despite accepting a certain degree of risk, tend to use alternative forms of employment to provide for their staffing needs, such as fixed-term contracts, temporary agency work, independent contractors and outsourcing of services.

Most of the relevant regulations are consolidated in the Labour Code (LC) (Law 7/2009 of 12 February). In addition to the LC, several other laws regulate important issues, such as those relating to parenthood protection (Decree-Law 91/2009 of 9 April), occupational accidents and sickness (Law 98/2009 of 4 September), and occupational health and safety (Law 102/2009 of 10 September). Civil servant or public employment relationships are governed by special regulations.

Judicial litigation and the application of administrative fines are handled by labour courts, which are part of the system of ordinary courts, as courts with a specialised competence. This specialisation led to the creation of specific labour divisions within the higher courts: the social divisions of the appeal courts and the social division of the Supreme Court of Justice.

The main authority responsible for inspecting and enforcing the labour legislation is the Working Conditions Authority (ACT), which undertakes the duties of the Labour Inspectorate. Social security matters are handled by the Social Security Institute under the supervision of the Ministry of Employment and Social Solidarity. Another relevant public agency is the Commission for Equality in Labour and Employment (CITE), which focuses on matters relating to equality and non-discrimination between women and men, and the protection of parental rights.

II YEAR IN REVIEW

The year 2019 was marked by three major amendments to the labour framework. At the beginning of the year, a law was approved to introduce a system of employment quotas for people with disabilities, with a degree of disability of 60 per cent or more. In February,

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new measures came into force to promote equal pay for women and men for equal work or to promote equal pay for men and women. One of the most iconic measures was a report published in June 2019 that identified an overall gender pay gap of 14 per cent.

In the latter part of the year, a major overhaul of the Labour Code was enacted – the 15th since the Labour Code was introduced in 2009. These amendments resulted from a government initiative, backed by the left-wing majority in parliament, undoubtedly with a view to repealing some of the austerity measures introduced during the Troika years.

Apart from the aforementioned, 2019 was marked by a continuing stability in labour developments. The significant effects of the economic downturn during the past few years (including downsizing, closures, redundancy programmes and employee cost reductions) are now a thing of the past. As proof of this progress, the unemployment rate in the third quarter of 2019 was 6.5 per cent, which is below the average in the European Union but above the Eurozone average.²

Companies are increasingly investing in the Portuguese market and employers are making an effort to retain human capital and talent (reverting to alternative ways of managing employee costs, such as flexible working arrangements), as a result of the government's measures to support employment and business. Moreover, the rate of collective dismissals has dropped, which means that employment relationships are becoming more stable.

III SIGNIFICANT CASES

i Company cars qualify as salary

In March 2019, the Supreme Court of Justice ruled that company cars used for business and private purposes could qualify as salary and, as such, would benefit from the law's full protection, namely preventing companies from taking away the cars without providing the proper compensation.

ii Using CCTV tapes in disciplinary action against employees

In a landmark ruling in January 2019, the Oporto Court of Appeals confirmed that, under certain circumstances, CCTV recordings could be used in disciplinary action as a justifiable means of proof against an employee. According to this ruling, the integration of the employee into a business organisation entails restrictions on the freedom and exercise of fundamental rights, which may lead to a conflict between the employee's fundamental right to privacy and the employer's right to pursue its business objectives.

iii Appointment to board of directors does not terminate employment relationship

The Constitutional Court decided, for the third time, to confirm its previous judgments in which it ruled as unconstitutional the provision of the Commercial Companies Code, in the part that determines the termination of the employment contract of an employee of a public limited liability company who is appointed as a director within a year of being hired.

2 Information retrieved from Statistics Portugal: <https://www.inec.pt>.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Permanent employment contracts follow the general rule that applies to civil contracts: no written document is required, and the employment relationship may be proven by any means. The following types of contracts, however, must be in writing: fixed-term, part-time, home-based; and certain top management contracts.³

Although not mandatory, it is increasingly common for permanent contracts to be in writing, as this makes it easier to determine the agreed terms and conditions. Furthermore, the employer may take advantage in executing written contracts to comply simultaneously with mandatory information obligations and include clauses to facilitate the future management of the employment relationship.

Fixed-term contracts are limited to those situations where it is necessary to provide for temporary staffing needs or for reasons of state employment policies, such as to promote the hiring of certain categories of employees (individuals unemployed for more than 24 months) and the start-up of new enterprises or companies that employ fewer than 250 employees. These contracts may be renewed up to three times and their overall duration (including renewals, if any) is limited to two years.

Parties are entitled to amend or change the contract, unless it is expressly forbidden by law.⁴

Contracts for an unfixed term are more commonly used whenever the duration of the staffing need is uncertain (e.g., replacing a sick employee) and may not exceed four years.

The minimum duration for a contract of very short length is 35 days. This type of contract may be used in any industry, as long as there is an exceptional increase in activity to warrant it.

Contracts for temporary work are limited to a maximum of six renewals, except when they are executed to replace an employee who is absent because of illness or accident, or is on parental leave.

ii Probationary periods

Probationary periods in employment contracts are allowed for the following durations:

- a* for term contracts:
 - 15 days when the duration is less than six months; or
 - 30 days when the duration is six months or more.
- b* for permanent contracts:
 - 90 days for most employees;
 - 180 days for employees performing services of a highly complex technical nature, or requiring a high level of responsibility or a high degree of trust or for people looking for their first job or long-term unemployed (individuals unemployed for more than 24 months); or
 - 240 days for senior management and other senior staff; or
- c* for top management contracts: 180 days.

3 Failure to comply with the obligation to enter into a written contract, whenever it is mandatory, does not render the contract as invalid but may lead to it becoming a full-time permanent contract.

4 For instance, as a rule, an employer is not allowed to reduce an employee's salary unilaterally or to demote an employee, even with his or her consent.

The duration of the probationary period set by the law cannot be increased, but it may be reduced or eliminated, by either collective or individual agreement, in writing.⁵

The party that unilaterally terminates a contract during a probationary period is under no obligation to justify the decision or to pay any compensation. However, if the contract has lasted more than 60 days, the employer must comply with the requirement to provide seven days' notice; if the contract has lasted more than 120 days, the employer must comply with a 15-day notice period.

iii Establishing a presence

Any foreign company without any form of representation in Portugal or any permanent establishment (PE) within Portuguese territory aiming to enter into an employment contract to be executed in Portugal must be registered with the social security agency. For this purpose, it is necessary to have a Portuguese valued added tax number, which must be requested from the National Registry of Companies by means of the submission of a signed form accompanied by a certificate of legal standing and a statement confirming the reasons for the request. It is also necessary to have a designated representative for social security purposes, which can be one of the employees hired by the company.

For specific time-limited projects, a foreign company may also hire employees through a temporary agency or another third party without having to register in the Portuguese social security system.

The lack of the incorporation of a PE prevents the foreign company from withholding personal income tax. Therefore, employees hired by companies without a PE are subject to social security deductions only, and not any withholdings.

V RESTRICTIVE COVENANTS

There is a general prohibition on any clauses intended to limit a person's freedom to work, with the exception of the non-compete clause.

As a general rule, post-contractual non-compete covenants are not enforceable in Portugal. However, according to the LC, these covenants are enforceable provided all the following requirements are met:

- a* the maximum time for the limitation does not exceed two years after the termination of the employment agreement, or three years if the nature of the activity implies a special relationship of trust, or if the employee has access to particularly sensitive information relating to competition;
- b* the covenant is executed in writing (either in the employment contract or in the termination agreement);
- c* the activity that is being limited may in fact cause damage to the former employer; and
- d* the former employee is paid compensation for agreeing to the non-compete covenant, which means that gardening leave (whereby the employee is not paid any amount) cannot be enforced throughout the non-compete period.

⁵ Except in the case of top management contracts, when the probationary period must be expressly stipulated by the parties.

In terms of geography, there are no mandatory limitations, although restrictions may result either from the business requirements of the employer or from the scope of limitations agreed upon in the non-compete covenant.

There are no specific provisions to regulate the amount of compensation to be paid under non-compete covenants. In any case, the compensation must be fair and adequate in view of the restrictions to be complied with by the former employee. The compensation must be assessed case by case and may be lower than the employee's last monthly salary. Recent case law has held that non-compete covenants are enforceable provided that the compensation is agreed beforehand or, at the very least, both parties have agreed on the formula to be used to calculate the compensation.

VI WAGES

i Working time

The legal limit is a maximum of eight working hours a day up to a maximum of 40 hours per week. A collective bargaining agreement (CBA) may, nonetheless, establish different maximum hours of work per day as long as the legal maximum number of hours worked per week is not exceeded. Special flexible working schemes may also be established in certain circumstances and may allow an extension of the normal working times up to 12 hours a day and 60 hours a week. This is the case for the adaptability regime (in which the normal working period is stated as an average), the group bank of hours regime (in which the flexible working time arrangement has to be agreed by 65 per cent of the relevant employees) and the concentrated working period regime (in which the working period is concentrated into three or four days per week).

In any case, the average working time cannot exceed an average of 48 hours (including overtime) per week, and a daily rest of at least 11 consecutive hours between two consecutive working days must be guaranteed. By means of an agreement, the employee may opt out of working-time limits and choose to receive an extra salary instead. If the employee is in a management role, he or she has the option of waiving the right to receive extra salary.

The working day must include a rest period of at least one hour so as to avoid employees working for more than five consecutive hours, but it cannot exceed two hours.

As a rule, employees take two days off per week, although only one is mandatory according to the LC. The law also sets forth mandatory public holidays.

The LC defines night work as work performed between 10pm and 7am (although a CBA may amend these times), for which the employee is paid his or her normal salary plus 25 per cent. There are no specific limits for the number of night work hours as the general limits apply.

ii Overtime

All work performed outside normal working hours is considered overtime and may only be performed when there are specific reasons and within a certain limit, which is principally a maximum of 150 or 175 hours per year, depending on the company's size, and two hours per working day. A CBA may extend the annual limit to 200 hours per year.

The minimum additional salary due for overtime is, on a normal working day, 25 per cent for the first hour and 37.5 per cent any subsequent hours, and 50 per cent on public

holidays and weekly rest days. For overtime worked on a mandatory rest day, the employee is also entitled to a full day off. The mandatory rest day is established by the employer, and it is usually Sunday.

Employees under an exemption from the working time limits are not entitled to overtime payments, except for work on weekly rest days and public holidays.

VII FOREIGN WORKERS

A foreign employee authorised to work in Portugal has exactly the same rights and is subject to the same obligations as any Portuguese employee.

There are neither limits regarding the number of foreign workers a company may hire nor time limits for the duration of the respective employment contracts, and the company does not have to support any additional taxes or local benefits in relation to them.

Companies are under no obligation to keep a separate register of foreign workers. Nevertheless, these workers are identified separately in the company's annual social report and companies must ensure they are duly authorised to work in Portugal. In this regard, Law 23/2007 of 4 July requires foreign workers to apply for a visa. This requirement will not be necessary if the worker is an EU national or a citizen of a country with which the European Union has signed an agreement on the free movement of people.

The types of visas that allow an individual to work in Portugal are the following:

- a* a temporary stay visa, which allows entry for accomplishing a professional assignment either dependently or independently, and whose duration does not exceed, as a rule, one year; and
- b* a residence visa, which allows entry in order to apply for a residence permit. A residence visa is valid for two entries and enables its holder to remain for four months.

The hiring or termination of a contract with a foreign employee must be notified to the ACT electronically.

VIII GLOBAL POLICIES

Employers may implement internal regulations covering rules on organisation and discipline at work. These rules can include the conditions and terms of the fringe benefits granted to employees, as well as specific policies, for example regarding use of the company's assets, internet access, email system and mobile phones, and policies regarding discrimination, sexual harassment and corruption.

Internal regulations will not enter into force unless employees are notified via postings at the employer's headquarters and work locations, and the labour authority is notified. They represent the employer's exercise of its particular powers and, while they are not incorporated into employment contracts, employees must comply with them. If the internal regulations include some of the terms and contractual conditions the employer wishes to offer the employees, it will be necessary to obtain the employee's consent to those conditions. The employee must adhere to those clauses unless he or she objects in writing within 21 days of the date the contract starts, or when he or she is notified of the regulations if this occurs later.

IX PARENTAL LEAVE

Maternity and paternity are eminent social values; therefore employees have the right to receive the protection they are due from their employer and the state in respect of exercising parenthood.

Parental leave comprises the following arrangements:

- a* initial parental leave;
- b* initial parental leave exclusive to the mother;
- c* initial parental leave required to be taken by the father because of the mother's incapacity; and
- d* parental leave exclusive to the father.

Working mothers and fathers are entitled, by virtue of the birth of a child, to an initial parental leave of 120 or 150 consecutive days, which they may share after the birth.⁶

An expectant mother can take up to 30 days of leave before the birth, and it is mandatory for a mother to take six weeks of leave after her child's birth.

It is mandatory for a father to take leave for 20 working days, consecutive or at intervals, within the six weeks following the birth, five of which are to be taken consecutively and immediately after the child's birth.

If childbirth occurs up to 33 weeks' gestation, initial paternity leave is increased to 30 days, and if the mother requires hospitalisation, paternity leave is extended to cover the whole period of hospitalisation.

Initial paternity leave is also increased to 30 days if the child is hospitalised immediately after the recommended post-partum hospitalisation period.

Parents of children with disability, chronic illness or oncological disease benefit from childcare leave, which may be extended to apply for up to six years, subject to the necessary medical certificates.

The LC also sets forth several forms of parental leave of absence: assessment for adoption, appointments related to medically assisted procreation, prenatal appointments, and urgent and indispensable assistance in the event of illness or accident to a child under 12 or, regardless of the age, to a child with disability, chronic illness or oncological disease, up to 30 days a year.

Employees who are pregnant, have recently given birth or are breastfeeding have the right to be excused from working overtime or other flexible working time arrangements.

Furthermore, working parents with children under the age of 12 or, irrespective of their age, children who are disabled, chronically ill or have an oncological disease, have the right to a flexible work schedule.

Finally, all kinds of discrimination (such as wage discrimination, career progression) towards employees exercising their maternity and paternity rights is forbidden.

⁶ In the case of the adoption of a child under 15 years of age, the candidate has the right to the same amount of parental leave.

X TRANSLATION

Portugal does not have any legislation regulating the language that must be adopted for contracts and other related documents. The only requirement is that the language used shall be one that both parties understand. However, it is advisable for employers to make employees sign employment documents, including contracts, both in Portuguese and their native language, to avoid employees' claims based on a misunderstanding of the contents of employment documents.

Although there are no limitations in these situations, if any document not written in Portuguese has to be presented in court, a translation of its contents must be presented. In addition, all documents that have to be presented to the Portuguese authorities (in particular to the ACT) must be written in Portuguese or accompanied by a Portuguese translation.

XI EMPLOYEE REPRESENTATION

The right to form a works council in any company, regardless of its size, is guaranteed by the Constitution. The initiative to do so lies wholly with the employees, which means that employers are under no obligation to implement this form of representation.

The role of a works council is advisory, aimed at safeguarding employees' interests. Consequently, works councils are entitled to be informed and consulted on several matters regarding the company's overall organisation, activities and budget, working conditions and changes to the share capital, as well as to control the company's management and participate in any restructuring process.

The employer must allow the works council to meet on its premises, either outside or during working hours (in the latter instance, for up to 15 hours annually), provided the employee representatives give 48 hours' notice.

Works councils may be appointed for a maximum of four years. The members of the works council are elected from lists presented by the employees, by secret and direct vote, according to the principle of proportional representation.

The number of members of the works council depends on the company's size:

- a* up to 50 employees, two may be elected;
- b* between 51 and 200 employees, three may be elected;
- c* between 201 and 500 employees, three to five may be elected;
- d* between 501 and 1,000 employees, five to seven may be elected; and
- e* more than 1,000 employees, seven to 11 may be elected.

Employees are also entitled to be members of a union and to exercise their rights within the company. Unions have an important role, which includes the negotiation and execution of CBAs, the provision of economic and social services to their affiliates and participation in the labour legislation creation process, among other matters.

Union representatives may be elected for a maximum of four years. They have the right to hold meetings at the company, to present information directly to the employees on the company's premises and to request information regarding specific legally established situations.

All employee representatives have special protection in matters such as change of workplace, disciplinary proceedings and dismissals. Another important privilege for employee

representatives is the right to time off or 'hours credit', which is the right to interrupt the performance of their work for periods of varying duration, notwithstanding any other right or entitlement, including the right to receive the remuneration corresponding to the time off.

XII DATA PROTECTION

i Requirements for registration

The LC has several provisions concerning the processing of employees' personal data, but there are no specific provisions concerning the processing of employees' personal data within the employment relationship other than normal data processed by the company's human resources department.

This means that all instances of data processing shall comply with both the General Data Protection Regulation⁷ (GDPR) and the Portuguese Data Protection Law (Law 58/2019 of 8 August). In particular, the processing of data shall be lawful only if and to the extent that at least one of the lawfulness conditions set forth in the GDPR applies, namely:

- a* if the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- b* if the processing is necessary for the performance of a contract to which the data subject is party or to take steps at the request of the data subject prior to entering into a contract;
- c* if the processing is necessary for compliance with a legal obligation to which the controller (employer) is subject; or
- d* if the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (employer).

In the context of labour relations, the Portuguese Data Protection Law establishes that the employee's consent is not a lawful condition for the processing of his or her personal data if the processing results in a legal or economic advantage for the employee or if the processing is necessary for the performance of the contract. The Portuguese Data Protection Law further foresees that recorded images and other personal data of employees recorded through video systems or other technological means of remote surveillance may be used only in the context of criminal proceedings and for the purpose of establishing disciplinary liability (insofar as they are used in the context of criminal proceedings). The processing of the biometric data of employees is also limited, and may be legitimately processed only for two purposes: attendance control and access control to the employer's premises.

In addition to the lawfulness conditions for processing data, the employer must also comply with other rules contained in both the GDPR and the Portuguese Data Protection Law, including the need to provide employees with information on the terms of the processing of data, the obligation to ensure that data is adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed, and the obligation to implement adequate organisational and security measures to protect the data.

⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

In some situations, considering the type of data processing, the employer is required to carry out a Data Protection Impact Assessment before the processing of data takes place – in this context, the Portuguese Data Protection Authority may be consulted.

ii Cross-border data transfers

Any transfer of an employee's data from the employer to another entity shall be lawful only if and to the extent that at least one of the lawfulness conditions set forth in the GDPR applies.

As regards cross-border data transfers (i.e., data transfers to a non-EEA country), data transfer rules foreseen in the GDPR must be complied with. A transfer of personal data to a third country or an international organisation may take place if the European Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. The transfer shall not require any specific authorisation. In the absence of an adequacy decision by the Commission, a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available. In particular, entities must ensure that adequate safeguards are in place, including, but not limited to, the adoption of standard contractual clauses approved by the Commission, the adoption of binding corporate rules, or the adoption of an approved code of conduct or certification scheme.

iii Sensitive data

Both the GDPR and the Portuguese Data Protection Law consider information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation as special categories of data. The processing of these special categories of data is prohibited, except when one of the exemptions foreseen in the GDPR applies. This would be the case if the processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the employer or of the employee in the field of employment, and social security and social protection law, insofar as it is authorised by EU or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject.

In this situation, special safeguards and security measures must be implemented, taking account of the nature of the data at stake.

iv Background checks

The Constitution contains a general right to privacy regarding personal and family life, which is confirmed by the LC. An employer may not demand that an applicant or employee provide information relating to his or her private life, except when the information is strictly necessary and relevant to evaluate the person's aptitude for the performance of employment, and the respective motivation is provided in writing. However, no background checks are allowed unless the information is strictly necessary because of the nature of the job and is authorised by the candidate or the employee.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Although employment relationships in Portugal are still characterised by an almost permanent bond between the employer and the employee, the employer may, under certain circumstances, terminate the contract with just cause. The concept of just cause includes not only disciplinary dismissal but also other forms of dismissal, provided that they are justified according to the law. Currently, the LC regulates the following: dismissal based on unlawful conduct of the employee, redundancies or dismissals resulting from the elimination of jobs, and dismissal for failure to adapt.

Regarding dismissal based on unlawful conduct by the employee, the concept of just cause is of particular importance as it implies the impossibility, in practice, of continuing the employment relationship owing to the seriousness of the employee's misconduct. When dismissed with disciplinary cause, the employee is not entitled to any notice or compensation, but he or she will be entitled to standard credits that are payable upon termination regardless of the reason (prorated 13th and 14th monthly payments, unused annual leave, etc.).

Any kind of dismissal requires the previous implementation of a consultation proceeding extensively regulated by law. The works council should be involved in the procedure and has the right to give a written opinion, but this will not prevent the dismissal. As a rule, no form of dismissal requires authorisation from government authorities. If, however, it concerns a pregnant or breastfeeding employee, or an employee on parental leave, the CITE must be consulted and has the right to provide for a binding opinion.

The employee has the right to challenge the dismissal in court within 60 days of the dismissal, or six months in the case of collective dismissals. If the court rules the dismissal to be unlawful, the employee is entitled to receive compensation for salary and benefits lost while the lawsuit was pending. Additionally, the employee is entitled to be reinstated with all his or her former rights and guarantees or, instead, may choose to receive compensation to be set by the court depending on the specifics of the case (between 15 and 45 days' basic pay and seniority allowances for each year of service, with a minimum limit of three months' pay). The reinstatement can be avoided if the company employs fewer than 10 individuals or if the dismissed employee is a senior manager. In this case, provided the court agrees that the return of the employee would be disruptive to the company's business, the compensation shall be set by the court, according to the specifics of the case (between 30 and 60 days of basic pay and seniority allowances for each year of service, with a minimum limit of six months' pay).

Settlement agreements for termination of the employment contract are quite common and must be executed in writing. Termination agreements for which the employee's signature has not been duly notarised may be revoked by the employee by means of a written communication sent to the employer up to seven days after the execution of the agreement.

ii Redundancies

Termination of an employment contract by an employer for business reasons can be in the form of collective dismissal or individual redundancy. A dismissal will be considered collective whenever the employer terminates, either simultaneously or over three months, the employment contracts of at least two employees (in companies with up to 49 employees) or five employees (in companies with 50 or more employees). If the number of employees to be dismissed falls below these thresholds, it will be considered an individual redundancy.

In both cases, the dismissal must be justified by business-related reasons, namely closing down one or more departments of the company or by the elimination of jobs or work positions owing to economic, market, technological or structural reasons.

When collective dismissals are mandatory, the employer must first enter into consultations with the employees' representatives and the Ministry of Labour with a view to reaching an agreement in relation to matters such as the possibility of avoiding redundancies or reducing the number of employees to be made redundant.

Similarly, individual redundancy also requires the previous implementation of a consultation proceeding involving the employee to be dismissed and the employee's representatives (if any). The ACT will participate in the proceeding if the employee so requires.

In both situations, the dismissal shall require authorisation from the CITE if it involves a pregnant or breastfeeding employee, or an employee on parental leave.

An important factor for the evaluation of whether the dismissals are considered justified is the criteria used to select the employees to be made redundant. Within a collective dismissal, the employer is free to set the criteria provided they are non-discriminatory and relevant to the needs of the business. Conversely, with an individual redundancy, the criteria are preset by the law whenever there are two or more employees in a comparable situation in terms of job scope within the same team or department. These criteria are as follows:

- a* worst performance review;
- b* worst academic or professional qualifications;
- c* higher salary;
- d* shorter length of service in the current post; and
- e* shorter length of service for the company.

Again, in both cases, the employee is entitled to a notice period of between 15 and 75 days, depending on his or her seniority.

Employees dismissed within redundancy proceedings are entitled to statutory compensation. Portuguese regulations on compensation were extensively amended because of the agreements reached between the Portuguese government and the European Commission, the International Monetary Fund and the European Central Bank for its financial bailout. Under the new regulations, compensation for dismissal varies between 12 and 30 days of salary depending on the employee's start date and the length of service.

The parties also have the option of executing a termination agreement at any time, which eliminates the need to justify the dismissal. Only if the agreement is an alternative to redundancy is it necessary to notify the social security system of the reasons for termination for the purposes of unemployment benefit. Regarding the formal requirements, the agreement must be in writing, two copies must be made and signed by both parties. It must also include the date on which it is signed and the date the agreement will go into effect. The agreement can be revoked by the same terms mentioned above.

XIV TRANSFER OF BUSINESS

Regarding the transfer of business, the LC transposed the EU Acquired Rights Directive (Directive 2001/23/EC of 12 March).

A transfer of business is not a cause for termination. A dismissal based solely on the employer's transfer of business would be deemed unlawful. The underlying principle is that the

employment agreements are transferred by way of law to the transferor under the same terms and conditions. In these cases, employment contracts will be automatically transferred to the transferee with the exact terms and conditions in force at the moment the transfer occurs.

The transferor and transferee are jointly and severally liable for the payment of any credits due to the employees until the date of the transfer. The liability of the transferor is maintained for two years following the transfer. The transferee may not limit its responsibility. The transferee also assumes liability for payment of contributions and interest to the social security system at the time of completion of the transfer, and is responsible for the payment of any fines to the labour authorities for non-compliance with the labour rules. The transferee is obliged to observe a CBA that has been in force for a minimum of 12 months, unless a new CBA is applicable to the transferee's employment relationships.

Prior to the transfer, the transferor and the transferee must inform the employees' representatives or, should these not exist, the employees themselves of the transfer. This information must be made by means of a written document, including the date of, and reasons for, the transfer, its legal, economic and social consequences, and the measures regarding the employees that shall be adopted as a result of the transfer.

An extensive amendment to the Portuguese transfer regulations was enacted in mid 2018. The main amendments were that:

- a* the employee may object to the transfer whenever it may be seriously detrimental to his or her labour status;
- b* under the same circumstances, the employee may resign with cause and claim compensation from the transferor; and
- c* the relevant contract must be shared with the transferring employees and their representatives.

XV OUTLOOK

Although the Portuguese economy is still recovering from the financial crisis, there are optimistic signs that employment relationships and unemployment rates will improve, mainly because of increased investment and the government's measures to support employment and business.

The general election held in October 2019 resulted in a new socialist government without a parliamentary majority. Although no formal agreement was struck with the political parties that backed the previous government under the same prime minister, the consensus is that they will act as silent partners of the new government, and further introduce some amendments to repeal the recent austerity measures.

PUERTO RICO

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I INTRODUCTION

Puerto Rico is a jurisdiction that is highly protective of employees' rights, which are liberally interpreted in their favour. From rights established in the Constitution of Puerto Rico, such as the right to privacy, to more than a dozen statutory leaves of absence and numerous categories protected from discrimination, employers doing business in Puerto Rico encounter a jurisdiction rich in employment legislation.

As an unincorporated territory of the United States, Puerto Rico's dual legal system is characterised by coexisting US federal laws and local legal provisions. Thus, Puerto Rico enjoys US constitutional, legal and regulatory protections, many of which extend to the employment context. A similar duality applies to Puerto Rico courts of law – claimants have access to Puerto Rico state courts of general jurisdiction and the US District Court for the District of Puerto Rico, a federal court of limited jurisdiction. US District Court decisions are subject to appeal before the First Circuit Court of Appeals in Massachusetts and subsequently to the US Supreme Court.

The Puerto Rico Department of Labour and Human Resources (PRDLHR) is responsible for the administration of public policy relating to labour and employment legislation, occupational safety, unemployment insurance benefits, re-employment services and human resources training. The divisions of the PRDLHR, where employees commonly file administrative claims, include the Bureau of Employment Norms, the Office of Mediation and Adjudication and the Anti-Discrimination Unit. Under a work-sharing agreement, the latter is the US Equal Employment Opportunity Commission's (EEOC) state counterpart that handles discrimination complaints.

To further facilitate access to the judicial system, employees in Puerto Rico count on a special proceeding to file employment-related lawsuits in state courts pursuant to Act No. 2 of 17 October 1961, as amended. This statutory, summary proceeding provides for the expeditious handling of claims, and imposes strict requirements and severe consequences upon employers.

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II YEAR IN REVIEW

Labour and employment activity faced by Puerto Rico employers in 2019 ranged from US federal to state and local matters. At the federal level, activity was limited to agency regulatory developments. Challenges experienced in 2016 in respect of wage and hour law resurfaced with the issuance by the US Department of Labor (USDOL) on 24 September 2019 of a final overtime rule (the Final Rule), effective 1 January 2020. The Final Rule amended the regulation for overtime exemptions for white-collar employees. While the Final Rule increased the standard salary level from US\$455 to US\$684 per week for US workers, USDOL maintained the US\$455 minimum weekly salary requirement for Puerto Rico given its economic climate at the time. The Final Rule also increased the salary for highly compensated employees and allows employers to use non-discretionary bonuses and incentive payments to satisfy up to 10 per cent of the minimum salary level to the extent that those payments are made at least once a year. It may be interpreted that these two changes apply to Puerto Rico, although the Final Rule does not specify this.

The National Labor Relations Board (NLRB) has also issued proposed rules and key decisions on various topics, namely, employees' right of free choice regarding union representation, joint employer test under the US National Labor Relations Act of 1935, as amended (NLRA), work rules, non-employee access to property, right to use an employer's equipment, including email and other IT systems, for Section 7 purposes of mutual aid and protection, among others. US immigration policy and enforcement remained a priority of US President Trump's administration, including, among other initiatives, increased audits of the Employment Eligibility Verification Form (Form I-9) and visa denials.

On the local front, the PRDLHR has joined forces with the Puerto Rico Women's Advocate Office and the EEOC to increase policing and auditing to verify employers' compliance with US federal and local laws on equal pay.

Other significant developments include the following:

- a* Act No. 83 of 1 August 2019 provides an unpaid leave of absence for up to 15 working days per year, which are neither cumulative nor transferable to the next year, for employees facing situations of domestic or gender-based violence, child abuse, sexual harassment in the workplace, sexual assault, lewd behaviour or stalking. The Act imposes upon employers the obligation to grant leave of absence to qualifying employees, maintain confidentiality of all information provided for the purposes of using the leave, with certain exceptions, reserve the employee's job position and reinstate the employee once the leave of absence has been exhausted, and advise employees about their rights.
- b* Act No. 150 of 8 October 2019 (an Act to Protect Employee's Credit Information) (Act 150) prohibits employers from taking adverse employment actions, including refusing to hire, dismissing, or otherwise discriminating against employees or employment candidates based on their credit report or credit history. Employers are also prohibited from verifying or ordering such reports from a credit agency. The prohibition does not apply to certain positions, such as management employees or employees in positions with access to financial or personal information of other individuals, positions for which a credit report is required by law, and those who require access to trade secrets (as defined by local law), among others. When requesting a credit report or history for these positions, the employee or applicant must provide written consent. Each violation of the Act exposes the employer to fines of between US\$1,000 and US\$2,500.

- c The Secretary of the PRDLHR issued on 8 May 2019 the first edition of the Guidelines for the Interpretation of Puerto Rico's Labour Legislation. It is a compilation of historic and new interpretations of Puerto Rico's employment laws and regulations, with a focus on the Labour Transformation and Flexibility Act (LTFA) of 26 January 2017. Topics covered include religious accommodation, Christmas bonus, vacation time and sick leave, employment termination, discrimination, employment contracts, among others. While comprehensive in nature, the Guidelines do not create substantive or procedural rights. They may carry, however, important persuasive weight.

III SIGNIFICANT CASES

i Wrongful termination

In *González v. Baxter Healthcare of Puerto Rico*,² the Puerto Rico Supreme Court held that an indefinite suspension pending the criminal trial of an employee accused of committing several felonies did not have to be considered an unjust dismissal under Puerto Rico's Unjust Dismissal Law, Act No. 80 of 30 May 1976 (Act 80). It also determined that an employee can be dismissed with just cause if found guilty of the felonies and that the presumption of innocence does not apply in the employment law context.

ii Exempt status of graduate nurses with associate degrees

In *Unión General de Trabajadores v. Centro Médico del Turabo, Inc.*,³ the Puerto Rico Supreme Court held that graduate nurses with associate degrees were not entitled to overtime pay, concluding that graduate nurses are classified as 'professionals'. Thus, they are exempt from overtime pay under Act No. 379 of 15 May 1948 (Act 379), as amended, the US Fair Labor Standards Act (FLSA), and wage and hour regulations.

iii Counterclaims prohibition in employment claims filed under summary proceeding per Act No. 2

In *Bacardí Corporation v. Evaristo Torres Arroyo*,⁴ the Supreme Court of Puerto Rico ruled that the counterclaim prohibition under the summary proceeding for employment claims, pursuant to Act No. 2, does not preclude employers from claiming rights against the claimant employee through an independent lawsuit.

iv Arbitration clauses

In *José Méndez et al v. Carso Construction*,⁵ the Puerto Rico Supreme Court issued a judgment validating an arbitration clause covering a claim under Act 80. Although not precedential in nature, this holding means that an arbitrator can have original jurisdiction to hear an unjust dismissal claim, subject to a valid arbitration clause.

2 2019 TSPR 79.

3 2019 TSPR 126.

4 2019 TSPR 133.

5 2019 TSPR 19.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employment rights can stem from an employee handbooks, employment offer, collective bargaining agreement or employment contract. In general, executing an employment contract is not required to establish an employment relationship in Puerto Rico because employment agreements can be binding regardless of whether they are in writing. Under certain circumstances, it may be advisable and practical to execute a written employment agreement that establishes the terms and conditions of employment, such as base salary, benefits, responsibilities and job expectations, to name a few. While the LTFA increased flexibility, which reduced the need to have employment agreements in writing, there are still certain specific, employment-related obligations that can only be validly established through a written agreement. The following are some examples of agreements that still need to be executed in writing. Employers are advised to expressly reserve their right to interpret unclear clauses or language in any of their agreements.

- a* Agreements with non-exempt employees to reduce the statutory meal break, to fragment the use of vacation leave, to use non-working days as part of a vacation leave period, to partially liquidate and pay accumulated and unused annual leave in excess of 10 days, and to accumulate annual leave in excess of one year;
- b* non-competition agreements and some other restrictive covenants; and
- c* voluntary agreements with non-exempt employees to establish alternative, weekly work schedules to fulfil a 40-hour week in no more than 10 consecutive working hours per day, without incurring daily overtime liability.

ii Probationary periods

The law authorises the hiring of new, indefinite-term employees on a probationary basis. Employees properly classified as executives, professionals or administrators are subject to an automatic 12-month probationary period and all other employees are subject to a nine-month probationary period, unless a shorter period is agreed between the employee and the employer. Generally, during the probationary period, the employer may discharge, or terminate the contract of, an employee without cause and without responsibility for the severance payment established by Act 80. The termination cannot be for discriminatory reasons.

iii Establishing a presence

A foreign company may not hire employees in Puerto Rico without being officially registered with the Department of State of the Commonwealth of Puerto Rico. Companies engaged in trade or business in Puerto Rico must register with the Department of State and having an employee may qualify as conducting trade or business. However, a company may hire an independent contractor and, depending on the nature and extent of the duties performed by the contractor, the entity may not need to register with the Department of State.

The concept of a permanent establishment is not defined by the Puerto Rico Internal Revenue Code of 2011, as amended. Thus, tax presence in Puerto Rico is determined by whether a business is engaged in trade or business, or case by case in connection to fixed or determinable annual or periodic income. Accordingly, a corporation engaged in trade or business in Puerto Rico is subject to the normal tax on corporations pursuant to the Puerto Rico Internal Revenue Code.

Since 26 January 2017, with the enactment of the LTFA, the rights and responsibilities of an employee from another jurisdiction who (1) is assigned to work in Puerto Rico for the benefit of another employer, (2) maintains an employment relationship with the employer outside Puerto Rico and (3) is assigned to work in Puerto Rico for no more than three consecutive years, will be interpreted in accordance with the provisions of the employment contract. Notwithstanding contract provisions, the employee will be subject to Puerto Rico laws concerning income tax, employment discrimination and work-related accidents. If the parties do not stipulate the applicable law, they will be subject to Puerto Rico legal provisions.

Companies establishing a presence in Puerto Rico must also be aware that statutory benefits are vast and include those relating to wage and hours, as well as a statutory Christmas bonus, unemployment insurance, workers' accidents and non-occupational disability insurance compensation, and leaves of absence for maternity, adoption and breastfeeding, victims of domestic violence, child abuse, sexual harassment, assault, lewd behaviour or stalking, jury duty, renewal of a driving licence, participation in Olympic games and other world championships, appearance as a witness in criminal cases, military duty, occupational and non-occupational disability, family medical leave and car accidents, among others.

V RESTRICTIVE COVENANTS

Non-competition clauses in employment contracts are valid in Puerto Rico and must comply with requirements established by the Supreme Court of Puerto Rico (PRSC). There is no legislation controlling this type of agreement except that the LTFA expressly recognises employees' obligation not to compete with the employer's business activity unless it is otherwise provided by law or in an agreement with the employer. The requirements are as follows:

- a* Non-competition clauses must respond to the employer's legitimate interest, such as the protection of the business from the adverse effect of competition by a former employee. Restrictions on the employee's future functions must be limited to activities similar to those the employee performed during his or her employment.
- b* The prohibition shall not last for more than one year following the termination of employment.
- c* The object of the prohibition must be limited to activities similar to those performed for the employer.
- d* The non-competition agreement must specify the geographical boundaries within which the prohibition is to apply, limited to what is necessary to avoid competition. Alternatively, it should be limited to those customers the employee personally served for a reasonable period prior to the termination of employment or during a period immediately before the termination, and who were still customers of the employer when the employee's employment ended.
- e* The employee must receive adequate consideration in exchange for the prohibition.
- f* As required by the Puerto Rico Civil Code, the essential elements of consent, object and cause must also be present, and the employer may not coerce or exert undue pressure on the employee to accept the non-compete obligation, which must be in a written agreement.

VI WAGES

i Working time

Wage and hour coverage in Puerto Rico for non-exempt employees is governed by the FLSA as well as local laws. Non-exempt employees in Puerto Rico are entitled to more benefits than those provided by the FLSA. These benefits include payment for:

- a* hours worked in excess of eight hours or daily overtime;
- b* hours worked in excess of 40 hours or weekly overtime (also recognised under US federal law);
- c* hours worked during the meal break;
- d* hours worked during the seventh consecutive day or day of rest;
- e* hours worked in excess of the maximum number of working hours fixed in a collective bargaining agreement;
- f* statutory entitlement to vacation leave under Act 180; and
- g* statutory entitlement to sick leave under Act 180.

Act 379, as amended by the LTFA, coexists with the FLSA and regulates hours and days of work, overtime compensation and a mandatory meal break for non-exempt employees. Administrators, executives, professionals, computer programmers and outside sales persons, as these terms are defined by Regulation No. 13 of the PRDLHR or US Federal Regulation No. 541, are some of the occupational classifications excluded from the application of Act 379, as well as other wage and hour provisions.

On 4 April 2018, the PRDLHR issued a regulation for the application of Act 379. It establishes the requirements regarding working hours, alternative weekly work itineraries, changes in the working day, and employers' obligation to maintain employment and payroll records and compensatory time agreements. It also sets the norms applicable to meal break, agreements to reduce them and compensation for working during meal breaks.

Under Act 379, non-exempt employees are entitled to a one-hour unpaid meal break. The meal break can start after the second consecutive hour of work and, to avoid a meal-break work penalty, it must also be scheduled before the beginning of the sixth consecutive hour of work. If a non-exempt employee's working day consists of no more than six hours, the meal break may be waived. If the employee works for a period exceeding 10 hours per day, the employee is entitled to a second meal break. This second meal break may be waived when a working day does not exceed 12 hours, provided the first meal break was taken by the employee.

The meal break may be reduced to 30 minutes, and in some cases to 20 minutes, by means of a written stipulation. The agreement to reduce the meal break will be effective indefinitely and cannot be terminated unilaterally until one year after its effective date. In other words, before one year expires, both parties must consent to the termination, and after one year expires, either the employer or the employee can terminate the agreement unilaterally to reduce the meal break.

According to Act 379, eight hours is the length of the regular working day in Puerto Rico, while 40 hours is a regular working week. In addition, pursuant to Act No. 289 of 9 April 1946, as amended (Act 289), non-exempt employees are entitled to one day of rest for each period of six consecutive days of work. Under Act 289, one day of rest is considered to comprise 24 consecutive hours. The LTFA repealed Act No. 1 of 1 December 1989, as amended (also known as the Closing Law) and work performed on Sundays in retail establishments is no longer considered overtime work subject to premium pay.

ii Overtime

The minimum hourly rate is US\$7.25 per hour. Through company policy, employers may establish limits to the overtime work they will allow employees to perform. Any work employees perform for the benefit of the employer, however, generally requires compensation even when unauthorised.

The LTFA established a new uniform overtime rate of pay for non-exempt employees hired after 26 January 2017. The rate, which is equal to the rate established by the FLSA, consists of one-and-a-half times the regular rate of pay for hours worked in excess of eight hours during any calendar day (daily overtime), hours worked in excess of 40 hours in a week (weekly overtime) and hours worked during the meal break, the day of rest, when a commercial establishment is required to remain closed to the public, or when provided by a collective bargaining agreement.

Non-exempt employees hired prior to the enactment of the LTFA maintain superior benefits to which they were already entitled, which may include overtime compensation at double their regular rate of pay, when applicable and depending on a variety of circumstances and the industry in which they work.

iii Alternative weekly work schedules, compensatory time and modified working conditions

The LTFA now provides for three flexible-work arrangements for non-exempt employees. First, it permits voluntary, written agreements with non-exempt employees to establish alternative weekly work schedules to fulfil a 40-hour week in no more than 10 consecutive working hours per day, without incurring daily overtime liability. Work in excess of 10 hours per day will be considered overtime. Second, the LTFA recognises the concept of compensatory time agreements. That is, the employer may grant a non-exempt employee's request to make up hours not worked in a week because of absences for personal reasons. These compensatory hours will not be considered overtime when they are worked in the same week of the absence and do not exceed 12 hours in a day or 40 hours in the week. Third, the LTFA created an employee's right to request changes of schedule, working hours or work location. An employee is entitled to make the request if it is in writing, he or she works 30 hours or more per week, has worked for at least one year for the employer and has not made the same request in the six months since the employer's last response to such a request. There are other requirements applicable to the response the employer must provide. Employees are not automatically entitled to a change in work conditions just because they make the request. Priority must be given to employees who are head of a family who have legal or sole custody of their minor children.

VII FOREIGN WORKERS

US federal law governs Puerto Rico immigration matters. There are no statutory provisions requiring employers to keep a register of foreign workers. The Federal Immigration Reform Control Act of 1986 (IRCA), however, requires employers to complete Form I-9 to confirm that hired workers (citizens and non-citizens) are authorised to work in the United States. Through the verification process, hired workers must furnish, and their employer verify, documentation that confirms a worker's identity and authorisation for employment in the United States. Employers are required under the IRCA to retain Form I-9 for a designated

period and make it available for inspection by authorised government officials. Employers must ensure that all foreign workers hired are admitted in the United States as permanent residents or under work-related non-immigrant visa classifications.

While there are no limits on the number of foreign workers a company may have, there is a limited number of certain work visas issued by the US government each year. Non-immigrant workers hired for temporary employment in the United States under an employment-based visa category are restricted to the activity or reason for which their non-immigrant visa was issued. The length of stay in the United States will depend on the specific employment-based visa category under which the foreign worker was authorised for employment in the United States and whether the visa category permits extensions of stay.

An individual may seek an immigration classification that permits him or her to live temporarily in the United States. The employer, or potential employer, must file a petition for non-immigrant worker before the United States Citizenship and Immigration Services on behalf of the beneficiary worker under one of the employment-based visa categories. The most common non-immigrant visa categories are:

- a* H1B (workers in a speciality occupation);
- b* H2B (temporary non-agricultural workers);
- c* L1A (intra-company transferees in a managerial or executive position); and
- d* L1B (intra-company transferees in positions requiring specialist knowledge).

In general, Puerto Rico source income paid to a foreign worker will be subject to local income tax withholdings at source and taxes under the US Federal Insurance Contributions Act. Foreign workers are fully protected under local and federal employment laws, including discrimination based on citizenship or immigration status.

VIII GLOBAL POLICIES

The provisions of an employee handbook and other written norms, policies or benefits are considered part of the employment contract. Once these norms and policies are established, the employee and the employer are expected to honour them.

The rules of conduct and discipline must be reasonable and non-discriminatory as to their content and application. Depending on the circumstances, an employee's failure to comply with rules duly notified could constitute just cause for disciplinary action, including termination of employment. Consequently, employers usually include the rules of conduct in the employee handbook, and provide a copy of the rules to employees.

Although not required in general, best practice is for employers to have and distribute written basic rules of conduct, policies and procedures, as they are important tools for managing potential risks relating to employment practices and to ensure compliance with the many statutory requirements applicable in Puerto Rico.

Notwithstanding the above, local and US laws require employers to have in place and disseminate written sexual harassment and anti-discrimination policies, including prohibited conduct and a mechanism to report and investigate complaints. Similarly, under local law, employers are required to have a domestic violence protocol and policies specifically addressing gender identity and sexual orientation discrimination. Employers that perform drug testing are also required to establish a policy, rules of conduct and regulations compliant with Act

No. 59 of 8 August 1997 (Act 59). Also, under Puerto Rico law, employers who conduct electronic surveillance in the workplace are required to have and distribute an electronic surveillance policy.

It is not legally required, but is recommended, that these policies be in Spanish and that employers maintain evidence of their notification to and signed receipt by employees.

IX PARENTAL LEAVE

Puerto Rico Act No. 3 of 13 March 1942 (Act 3) provides for maternity leave. Under Act 3, pregnant and adopting mothers (and some experiencing a miscarriage) are generally entitled to eight weeks of maternity leave paid by the employer (four weeks before the birth and four weeks afterwards, but typically subject to change depending on the employee's ability to work and medical certifications). If a pregnant employee suffers *post partum* complications and is still unable to work after taking all the weeks of *post partum* rest, she is entitled to additional unpaid leave of up to 12 weeks, provided that before the expiry of the extended rest period, she provides the employer with a medical certificate confirming the facts. The employee is entitled to reinstatement at the conclusion of the original and the extended leaves of absence and double damages for violations of Act 3.

Act 3 prohibits discrimination in employment because of pregnancy, childbirth and related medical conditions. It makes it unlawful for an employer to dismiss, lay off, reduce the salary or affect other conditions of employment for the aforementioned reasons, or because of the diminished productivity or a decrease in the quality of work performed by an employee while pregnant. Puerto Rico Act No. 69 of 6 July 1985 also protects pregnant women from employment discrimination.

State law does not provide for paternity leave. However, the US Federal Family Medical Leave Act applies in Puerto Rico and entitles eligible employees (male and female) of covered employers to take 12 weeks of unpaid, job protected leave for specified family and medical reasons, including:

- a* the birth of a child and the care of a newborn child during the first year;
- b* the placement with an employee of a child for adoption or foster care and to care for the newly placed child for the first year of placement; and
- c* to care for a child with a serious health condition.

X TRANSLATION

As an unincorporated territory of the United States, the official languages of Puerto Rico are Spanish and English. Spanish is the native tongue of the vast majority of Puerto Ricans. Although English is taught as part of the academic curriculum in schools, according to estimates, a low percentage of residents in Puerto Rico are able to speak, read and write English fluently.

Notwithstanding this, there is no law that requires employers to maintain employment documents in Spanish or English. Nevertheless, many employers opt to prepare, distribute and maintain employment documents, such as employee handbooks, policies, procedures, contracts, admonishments and documents pertaining to employees' personnel records, in Spanish. This recommended practice reduces the risk of employees subsequently challenging

their obligations, employers' expectations, disciplinary measures, rules of conduct, duties pursuant to policies, etc., on grounds that they did not understand the contents of the documents.

In the employment context in general, translations do not require a notarial certification or the use of a certified translator. The Puerto Rico court system permits the filing of documents in Spanish or English. Documents filed in cases before the US District Court for the District of Puerto Rico must be in English or translated by a certified translator to be relied upon or by stipulation of the parties in lieu of the certified translation requirement.

XI EMPLOYEE REPRESENTATION

Employees have a constitutional right to organise and bargain collectively through representatives. These rights are regulated through local and US federal laws.

The principal law governing relations between unions and employers in the private sector is the NLRA. The NLRA created the NLRB as the statute's administering body. The NLRA guarantees the rights of employees to organise and to bargain collectively with their employers, and to engage in other protected concerted activities with or without a union, or to abstain from all such activity. The NLRB has jurisdiction over cases involving businesses engaged in activities affecting interstate commerce.

Act No. 130 of 8 May 1945, as amended (Puerto Rico's Labour Relations Act, Act 130), establishes collective bargaining as a public policy. It is inspired by the NLRA and was enacted to promote collective bargaining principles, reduce certain labour disputes and to enhance economic productivity.

Act 130 created the Puerto Rico Labour Relations Board (PRLRB), a quasi-judicial body of limited jurisdiction authorised to consider and adjudicate labour disputes. The scope of the PRLRB's authority includes determination and recognition of employees' representatives and appropriate units of workers for collective bargaining, investigation of controversies regarding representation, consideration of illicit labour practices and enforcement of mediation decisions.

There is no fixed ratio of representatives to employees.

Either the Puerto Rico Regional Office of the NLRB or the PRLRB oversees union representation elections. A labour organisation interested in becoming an exclusive representative of a group of employees must file a petition of investigation and representative certification before either body. After this petition is filed, the relevant Board initiates an investigation of the case and determines whether elections are warranted. Elections are only held for 'appropriate' bargaining units of employees. To form such a unit, employees must have common interests, that is, be subject to similar policies, and terms and conditions of employment and supervisors. Elections may be celebrated by consent of the parties, by order of the President of the Board, or by the Board via a decision and order.

Elections may be held by virtue of an agreement between the employer and the labour organisation. When the parties cannot agree on elections, the President of the Board may order a public hearing, or may order the parties to hold elections pending a public hearing. After the public hearing is held, the case is transferred to the Board so that it may resolve the issue between the parties.

When elections are to be held, the Board requires employers to post a notice of elections in visible places, both within and outside the employer's business. These notices must include the name of the employer, the time and place of the elections, and a detailed description of the categories of eligible and non-eligible voters of each unit.

When a labour organisation obtains the majority of votes in an election, it receives a representative certification and the union becomes the exclusive representative of the bargaining unit. As such, unionised employers must refrain from dealing directly with individual employees regarding terms and conditions of employment. The representative is given a status of immunity for 12 months following the elections. This means that no labour organisation may petition to represent the same group of employees for at least a year after elections are held.

After the union is certified, the employer and the union have an obligation to meet at reasonable times to bargain collectively in good faith with a genuine objective to reach agreements regarding mandatory subjects such as wages, hours, vacation time, insurance, and safety practices. The employer and the union may also bargain with respect to other non-mandatory subjects relating to the terms and conditions of employment. Employers are prohibited from engaging in a wide range of unfair labour practices, such as retaliation against employees for organising or supporting a union, surveillance of union activity, offering benefits to employees in exchange for opposing union activity and questioning employees about their feelings towards union activity.

In June 2018, the Supreme Court of the United States ruled that states and public-sector unions may no longer extract agency fees from non-consenting employees.⁶ The First Amendment is violated when money is taken from non-consenting employees for a public sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. This change has the same effect in Puerto Rico.

XII DATA PROTECTION

i Requirements for registration

Puerto Rico does not have a formal data protection agency or government body responsible for supervising the collection, use and dissemination of employees' personal information gathered by a public or private corporation. The right to privacy, nonetheless, is recognised under the Constitution. Additionally, local and federal laws recognise the confidential nature of certain information gathered by businesses. Depending on the nature of the information, a higher or lesser degree of confidentiality and reasonableness is applicable to employment records and employees' private data.

6 *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2459.

ii Cross-border data transfers

Companies do not need to register for the purposes of cross-border data transfer of an employee's personal information. To the extent records and information transferred include employees' private data, a company must take necessary steps to protect it from indiscriminate or public disclosure. The applicable standard should be that of a prudent business person.

iii Sensitive data

Various federal and local employment laws specify the confidential information that employers must protect from public disclosure.

The US federal Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act, as amended, and their local counterparts, protect employees' genetic, medical and health-related information, and data in the employment context, or relating to disabilities or requests for accommodation (or both). This information must be kept in separate records. Enforcement guidance issued by the EEOC under the ADA, and applicable in Puerto Rico, concerning disability-related enquiries and medical examinations of employees suggests that any medical information concerning employees' disabilities must be treated as confidential. Employers may share this type of information in limited circumstances with supervisors, safety personnel and government officials investigating compliance with the ADA.

Additionally, Act No. 207 of 27 September 2006 and its regulation prohibit employers from using an employee's social security number for identification purposes and requires safeguards to protect it from undue disclosure. An employer may only transfer social security numbers electronically when there are sufficient safeguards to protect their confidentiality.

Further, Puerto Rico's legislation prohibiting discrimination based on sexual orientation and gender identity requires employers to keep information of this nature confidential. A similar protection from disclosure is afforded to information gathered during an investigation to protect a domestic violence victim who is at risk in the workplace, or who is alleging discrimination. Employers must take reasonable measures to prevent disclosure of confidential information to persons who have no need to know the information.

Furthermore, Act No. 59 requires employers who carry out drug tests on job applicants and employees in the private sector to treat the test results and related data as confidential. Also, to the extent that Form I-9 for employment eligibility contains personal information about employees, the US Citizenship and Immigration Service recommends that employers provide adequate safeguards to protect it.

Finally, the privacy and security provisions of the Health Insurance Portability and Accountability Act of 1996 apply to employers who are covered entities in Puerto Rico.

iv Background checks

Employers can perform background checks on job applicants and current employees, subject to legal parameters in Section II of Act 150. Employment decisions that consider the results of background checks cannot have an adverse effect on a category protected from discrimination. The PRSC has held that not hiring an applicant based on his or her criminal record may constitute social-condition discrimination. In that regard, employers are required to assess different factors to make employment decisions involving an individual with a criminal record. Despite initiatives by the US government to promote removing from employment applications the check box or enquiries about applicants' criminal records (a campaign also known as 'ban the box'), Puerto Rico does not have such a prohibition.

To the extent allowed by Act 150, employers must also comply with the US federal Fair Credit Reporting Act of 1970 by notifying the applicant or employee of the possibility of using their background report for employment decisions, getting their written permission and certifying compliance to the reporting agency. If an employer takes an adverse employment action based on the background report, it shall provide a copy of the report to the job applicant or employee and a notice of rights with the contact information of the consumer reporting agency. Its Puerto Rico counterpart, the Credit Reporting Agencies Act, provides similar protections.

Subject to limited exceptions, areas outside the scope of review include genetic, medical and disability-related information about job applicants or current employees. Considering other categories revealed in background checks, such as filing for bankruptcy, military service or discharge records, may also expose employers to discrimination claims.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Act 80, known as the Unjust Dismissal Act, regulates employment termination of employees hired for an indefinite term. Puerto Rico is not an 'employment at will' jurisdiction. Thus, an indefinite-term employee discharged without just cause is entitled to receive a statutory discharge indemnity (or severance payment) based on the length of their employment and a statutory formula. The LTFA amended Act 80 to implement the equivalent of a nine-month salary cap to the statutory formula, applicable to employees hired on or after the enactment of the Act on 26 January 2017. Employees hired prior to the LTFA preserve their rights to receive a severance payment under the prior statutory formula.

Act 80, as amended by the LTFA, defines just cause for dismissal as:

- a* the employee's engagement in a pattern of improper or disorderly conduct;
- b* the employee's failure to work efficiently, working belatedly and negligently, or in violation of quality and security standards of the product handled by the establishment;
- c* the employee's lack of competence or inability to perform the reasonable requirements of the employer;
- d* the employee is the subject of complaints received from clients;
- e* the employee's repeated violations of reasonable written rules established for the operation of the business, provided a written copy of the rules had been given to the employee;
- f* full, temporary or partial closing of the establishment's operations. If the employer has more than one office, factory, plant or branch, the full, temporary or partial closing of the operations of any of the establishments where the employee works will constitute just cause for termination, subject to additional considerations established by the law;
- g* technological changes or reorganisations, as well as changes of style, design or the nature of the product made or handled by the establishment, and changes in the services rendered to the public; or
- h* reductions in employment made necessary owing to a drop in the volume of production, sales or profits, anticipated or prevalent at the time of the discharge or with the sole purpose to increase competitiveness or productiveness.

Unless the employee engages in gross misconduct (e.g., physical violence, fraud or stealing under certain circumstances), a first offence or reasons unrelated to the proper and normal

operation of the establishment shall not constitute just cause. Written progressive disciplinary or corrective actions are highly recommended and normally required. Generally, however, employers are not required to give written notice of a dismissal to the employee in question or the government.

Act 80 provides the exclusive remedy for indefinite-term employees whose employment is terminated without just cause but does not bar independent causes of action based upon torts, violation of constitutional rights or arising from other legislation prohibiting discriminatory employment and retaliation. In those circumstances, employees may be entitled to job reinstatement and other remedies for damages. Categories protected from discrimination in Puerto Rico include: disability; sex; age; race; colour; marital status; political affiliation or political ideas; religious beliefs; national or social origin; social condition; pregnancy; genetic information; union affiliation; being, or being perceived as, a victim of domestic violence; stalking or sexual aggression; sexual orientation or gender identity; and veteran status. Local and US federal laws also prohibit retaliation.

The LTFA expressly allows waivers of Act 80 rights and settlement of the severance payment once the termination of employment has occurred or the intention to terminate has been notified. The waiver must be made pursuant to a valid settlement transaction agreement that complies with legal requirements.

ii Redundancies

In essence, redundancies in Puerto Rico are regulated by Act 80 and local and federal anti-discrimination and anti-retaliation statutes. Redundancies have to respond to legitimate and non-discriminatory business reasons. The Age Discrimination in Employment Act has important provisions to protect employees over the age of 40 affected by different redundancy situations.

Employers must also comply with Act 80 when there are group lay-offs because of any of the following:

- a* a full, temporary or partial closing of operations;
- b* technological or reorganisation changes;
- c* changes to the style, design or nature of products;
- d* changes in the services being rendered to the public by the employer; and
- e* necessary employment reductions because of reduced production, sales or profits, or with the purpose of increasing competitiveness or productiveness.

Because the above circumstances are considered just causes to terminate employment, no compensation or offers of alternative employment are required.

Under a more flexible Act 80 after the enactment of the LTFA, if there is a group lay-off, an employer must determine who is to be discharged based on each worker's employment seniority within the affected occupational classification or their performance, efficiency or capacity. Certain rules apply to employers with multiple establishments. Act 80 also provides recall rights for six months following a group lay-off if the same or similar work is needed during that time.

Puerto Rico has no law setting notice requirements for group lay-offs. The US Worker Adjustment and Retraining Notification Act, however, requires most employers with 100 or more employees to give notification of 60 calendar days before a plant closure or mass lay-offs. Notice must be given to employees, employees' representatives, the local chief elected official and the state dislocated worker unit.

XIV TRANSFER OF BUSINESS

Act 80 specifies the protections granted to employees and the obligations of employers when a business is transferred. Under Act 80, a former employer and seller is responsible for the severance payment to employees who are not retained by the seller or hired by the buyer in the transfer of a business as a going concern. Act 80 mandates the buyer to retain from the purchase price an amount equivalent to the severance payments owed. If the seller does not pay severance, the buyer could then become liable towards discharged employees if deemed a 'successor employer'. A similar rule applies by virtue of case law to other employment-related liabilities towards discharged employees (e.g., unpaid wages).

If the buyer chooses to transfer and continue using the services of any employee of the seller, it can also be considered a successor employer. If a transferred employee is later dismissed without just cause, the successor employer is responsible for the severance payment, as provided by Act 80. The total years of service of the employee under the former and successor employer will be considered in calculating the payment.

Neither of the foregoing legal doctrines will apply when a business completely ceases operations and all its employees are terminated. Also, see *Roldan Flores v. M Cuebas*.⁷

XV OUTLOOK

Puerto Rico's employment law panorama has continued to evolve since the enactment of the LTFA in January 2017. Having overhauled Puerto Rico's employment statutory and regulatory scheme by amending or eliminating more than 12 labour statutes, the LTFA is dictating litigation strategies, motions practice, and compliance and preventive advice by employers' attorneys in an attempt to have a more employer-friendly application of the law. While some state courts and government agencies are embracing change, some others, influenced by years of employee-friendly interpretations, continue to have a hard time adopting the new legislative objectives of flexibility sought by the LTFA. We continue to see the dichotomy between the more lenient, legislative intent of the LTFA and new regulations and guidelines approved by the PRDLHR. This will continue to generate employment-related litigation that will affect and most likely transform employment law practice in the coming years.

Nothing has had a greater effect, however, than the changes to the workplace and litigation following Hurricanes Irma and Maria, which hit Puerto Rico in September 2017 within two weeks of each other, the effects of which will take a long time to heal. These devastating phenomena put justice and many lives on hold after destruction of the island's infrastructure forced employers and the entire government, including the courts, to shut down in a manner and for a length of time never seen before. In finding more creative solutions to workplace issues and confronting challenges posed by this new reality, new opportunities surfaced. While the dire circumstances brought about an exodus of Puerto Ricans by the hundreds of thousands, reduced litigation, operational closures, reductions in forces and job losses, opportunities also proliferated in various sectors, including construction, infrastructure recovery, insurance and claims adjusting, safety and security, business immigration and work-related visas, contracting with the US federal government, and personal investments and entrepreneurship.

7 199 DPR 664 (2018).

We have continued to adapt and transform legal services because of these major natural and legislative events. This transformation, resilience and swift adaptation to change must be long term as the country prepares for other significant events and situations, including:

- a* a historical movement that resulted in removing its governor in summer 2019;
- b* earthquakes rocking the south-west of Puerto Rico in 2020;
- c* an election year locally and in the United States;
- d* a struggling economy and a recovering infrastructure that will continue to benefit from a generous economic influx from the private and international sectors, as well as the US federal government, in an effort to renovate and reconstruct the island;
- e* continued and extreme policy changes implemented by the Trump administration that have had a direct impact on workplace law, most of which are beneficial for employers and corporate interests;
- f* a growing movement in favour of equality, women's rights and protection from sexual harassment and domestic violence; and
- g* the uncertainty of the legitimacy of the medical cannabis industry.

There is no doubt that preventive consulting, and revising and updating employee handbooks and workplace policies and practices will continue to be a priority, as will management training in this transformed era of labour law.

RUSSIA

*Irina Anyukhina*¹

I INTRODUCTION

The labour relationship between employees and employers of all types (including legal entities, individual entrepreneurs and natural persons) in Russia is governed by the Constitution, the Labour Code, federal laws and other statutory acts containing norms of labour law. The parties to a labour relationship cannot contract out of requirements imposed by Russian labour law.

The Labour Code is the main codified act that regulates labour relationships based on constitutional principles. Additionally, there are federal laws regulating various important aspects of labour relationships.

Cases relating to employment issues are presented before a court of general jurisdiction. Generally, the terms and procedures of trials on employment issues are specified in the Civil Procedure Code. The specific terms and procedures of trials on administrative issues are stipulated in the Administrative Procedure Code.

In addition to the judicial opportunity to protect labour rights, there are other options set forth in the Labour Code. An employee may pursue self-protection of labour rights, protection of labour rights and legitimate interests by labour unions, state authorities' supervision, and control of labour law observance. For instance, the employee may apply to a commission on labour disputes convened on a parity basis by representatives of the employer and employee and settle a labour dispute out of court, if the dispute is not exclusively subject to the consideration of the court of general jurisdiction.

Government agencies have competence in the following areas of employment law and employment relations:

- a* general issues relating to state supervision and control of labour are the responsibility of the Federal Service for Labour and Employment;
- b* migration is monitored and regulated by the General Directorate for Migration of the Ministry of Internal Affairs (on the basis of Presidential Decree of 5 April 2016, the functions of the abolished Federal Migration Service of Russia were transferred to the General Directorate for Migration of the Ministry of Internal Affairs);
- c* processing of personal data is the responsibility of the Federal Supervision Agency for Communication, Information Technology and Mass Communication; and
- d* sanitary and epidemiological control is covered by the Federal Supervision Agency for Customer Protection and Human Welfare.

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Authorities of the constituent states of Russia, municipal bodies and the Public Prosecutor's Office also oversee the observance of employment law.

II YEAR IN REVIEW

The following are the most significant amendments to the labour legislation and related areas introduced during 2019.

i New obligations for parties inviting foreign citizens to Russia

The Law introducing new types of obligations for 'inviting parties' of foreign nationals was adopted and came into force on 16 January 2019.

The Law introduces new obligations for inviting parties, aimed at preventing violation of Russian immigration laws by foreign citizens. The inviting party shall take measures to ensure the timely departure of an invited individual from Russia upon expiry of his or her stay (as per the issued visa). Moreover, according to the Law, the inviting party must also take measures to ensure that the invited person complies with the declared purpose of his or her entry into Russia.

The Law establishes new administrative liability of inviting parties for non-compliance with the aforementioned obligations in the form of a fine:

- a* for individuals: between 2,000 and 4,000 roubles;
- b* for officials of legal entities (e.g., a general director): between 45,000 and 50,000 roubles; and
- c* for legal entities: between 450,000 and 500,000 roubles.

ii Simplified rules for obtaining Russian citizenship

Starting from 29 March 2019, a new simplified procedure for obtaining Russian citizenship came into force for certain categories of foreign nationals.

According to the amendments, on humanitarian grounds the Russian President can determine categories of foreign nationals who may obtain citizenship status through the simplified procedure. The amendments also provide for a simplified procedure for foreigners who participate in the state programme for facilitating voluntary resettlement in the Russian Federation of ethnic Russians living abroad.

These persons have the right to apply for Russian citizenship under the simplified procedure; in particular, if they have a temporary residence permit or permanent residence permit, they are registered at the place of residence or at the place of stay in a Russian region included in the state programme.

iii Amendments to procedural legislation

Amendments to the procedure for handling labour disputes came into effect in 2019.

In accordance with the new rules, only lawyers and other persons with higher legal education, or a degree in law, can be representatives in court. However, the new requirements do not apply to representatives by virtue of the law (for example, to the general director of a company).

The changes establish new cassation appeal rules. A cassation appeal must be submitted to the cassation court of general jurisdiction, through the court of first instance (previously,

complaints could be submitted directly to the cassation court). The complaint must be filed within three months of the date of entry into force of the contested judicial act (previously, this period was six months).

The law also provides additional requirements for the content of the claim.

iv New retirement age

Starting from 1 January 2019, the retirement age will increase by one year during each year of a transition period until the retirement age reaches 65 years for men and 60 years for women (previously 60 years and 55 years, respectively).

The law also stipulates that men who have reached 60 years of age and have worked for 42 years, and women aged 55 who have worked for 37 years are entitled to retire earlier – 24 months prior to reaching the standard retirement age.

The law lists the categories of employees who are entitled to early retirement, such as:

- a* women aged 56 who have worked for at least 15 years, and have given birth to four children and raised them until they are eight years old; and
- b* women aged 57 who have worked for at least 15 years, and have given birth to three children and raised them until they are eight years old.

v New category of employees – persons of pre-retirement age

‘Pre-retirement-age’ employees are defined as individuals who will reach pension age within five years, making them eligible to the old age pension, including an early retirement pension. Specific dates of commencement and expiry of the pre-retirement age should be determined by the employer, taking into account the date, month and year of the employee’s birth.

The Criminal Code of the Russian Federation was supplemented by Article 144.1, which establishes criminal liability for unjustified refusal to hire or unjustified dismissal of a person of pre-retirement age. This liability may apply to a general director of a company or any other officer who is authorised to hire and dismiss employees. These officers may be subject to a fine of up to 200,000 roubles or an amount equivalent to the salary (or other income) of the convicted person for up to 18 months. However, the law does not provide for any criteria of ‘unjustified dismissal’.

As of 2019, companies must grant employees of pre-retirement age two working days once a year for a health check-up, with retention of salary and place of work for the period of absence.

vi Companies restricting employees’ right to choose bank for payroll accounting

As of 26 July 2019, an employer may be liable to an administrative fine of up to 50,000 roubles if it obstructs an employee in choosing a bank for payroll accounting. In the event of repeated violations, the fine can rise to 100,000 roubles.

The time limit for an employee to provide notice to an employer regarding changes to bank details has been extended to a maximum of 15 calendar days.

vii New forms of migration reports

On 9 September 2019, the Ministry of Internal Affairs approved new forms of notifications and applications to be applied in respect of the employment of foreign nationals. These forms must be used by companies engaging new foreign employees (resubmission is not required).

viii New insurance account notification document

The Pension Fund of the Russian Federation has approved a notification form to replace the individual insurance account number (SNILS), which was abolished in April 2019. The new document will include the employee's social insurance number and personal data and may be obtained at the local Pension Fund office or via the website.

III SIGNIFICANT CASES

The Supreme Court made the following significant decisions in 2019:

- a* Maternity and childcare leave, pregnancy and a current appeal by an employee to the State Labour Inspectorate may be recognised as justified reasons for failure to file a claim with the court on time.
- b* The State Labour Inspectorate is not authorised to impose an administrative fine on an employer for a violation of the procedure for imposing a disciplinary sanction.
- c* It is not possible to recover court fees from an employee, even if the court did not satisfy the employee's claim.
- d* The size of a 'golden parachute' may not be either arbitrarily large or violate the legal interests of the company.
- e* An employer cannot dismiss for absenteeism an employee who, with the informal consent of an employer, actually and permanently works remotely, even in the absence of an additional agreement on the transition to remote working.
- f* Companies must adhere to the selected salary indexation mechanism.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

A written employment contract setting forth the basic terms of the employment relationship and employment duties must be concluded with every employee working in Russia. The conclusion of the employment contract is the employer's obligation. If the employee starts working before the conclusion of a written contract, the employment contract with that employee is deemed concluded and the employee cannot be deprived of the rights provided for by law.

Employment contracts may be executed either for an indefinite period or for a fixed period, but not for more than five years (fixed-term employment contract).

A fixed-term employment contract can be concluded only on the grounds provided by law, and as such will apply only when a fixed term (1) is required or (2) can be decided between the parties. In all other cases, the contract should be for an indefinite period.

A fixed-term employment contract is required when an employee is hired, in particular, under the following circumstances:

- a* to perform the duties of an employee who is on a leave of absence but who retains his or her job;
- b* to perform temporary work or seasonal work (up to two months);
- c* to be sent to work abroad;
- d* to perform work that goes beyond the framework of an employer's ordinary activity;
- e* to work for organisations that are intentionally formed for a fixed period of time or for the purpose of completing a certain task;

- f* to carry out a defined task, the term of completion for which cannot be determined by a specific date; and
- g* in some other cases as provided by law.

Upon agreement by the parties, a fixed-term employment contract may be executed under, *inter alia*, the following circumstances:

- a* with persons hired by small businesses (including individual entrepreneurs) that have up to 35 employees, or 20 employees in the case of businesses (individual entrepreneurs) operating in retail or consumer service sectors;
- b* with pensioners (who obtain this status because of their retirement age);
- c* with persons who are only allowed to perform temporary work, pursuant to a properly issued medical certificate;
- d* for the purpose of carrying out emergency work aimed at preventing catastrophes, disasters, accidents, epidemics, epizootics and for the elimination of the aftermath of these and other emergencies;
- e* with creative employees of the mass media, cinematographic organisations, theatres, theatrical and concert organisations and circuses, etc.;
- f* with the heads, deputy heads and chief accountants of organisations; and
- g* in some other cases as provided by law.

In all other cases, an employment contract should be for an indefinite period. An employment contract concluded for a fixed term in the absence of sufficient reasons, as established by the court, is deemed to be concluded for an indefinite period. Moreover, in cases where several fixed-term employment contracts have been executed to perform the same type of work, the court may decide, taking into account the details of the case, that the employment contracts last for an indefinite period.

The employment contract should contain information about the parties to the contract, place and date of conclusion. It must specify the place of work, the commencement date, the position of the employee according to the staff schedule of the company, the rights and duties of the parties, remuneration, conditions of the working place (these are mandatory provisions of the contract) and other provisions. It is forbidden to stipulate directly or indirectly any limitations or privileges depending on the age, nationality, religion, gender or political views of an employee.

It is the employer's obligation to conclude the employment contract with the employee in writing no later than within three working days of the day the employee was admitted to work.

Substantial provisions of an employment contract can only be modified with the mutual consent of the parties thereto, for instance, by addenda or attachments to the contract. In the event of changes to the organisational or technological conditions of the company, the employment contract can be amended without the consent of the employee provided that his or her function will not be changed. These types of changes are subject to two months' prior notice.

ii Probationary periods

An employer has the right to establish a three-month probation period for a newly hired employee. As an exception to this rule, an employer may establish a six-month probation period for employees hired for certain top-level executive positions (e.g., head of a company, chief accountant, their deputies, or the head of a branch or representative office of an enterprise).

There are some categories of employees for whom the probation period should not be stated at all, such as pregnant women or women with children under one-and-a-half years old, or employees who are starting a job within one year of graduating from an educational institution.

The probation period should be specifically provided for by the employment contract. In the absence of this provision in the contract, no probation period is considered to be established for the employee. During the probation period, if the employer determines that the employee does not meet the criteria established for the job position for which he or she was hired, an employee can be dismissed by the employer without a severance payment by giving three days' written notice specifying the reasons for dismissal. An employee is entitled to resign during the probation period without any reason, giving three days' written notice to the employer.

iii Establishing a presence

Generally, a foreign company can hire employees without being officially registered to carry on business in Russia; however, if it employs (or intends to employ) an individual to work in Russia for more than 30 calendar days (continuously or cumulatively) in a year, it is obliged to obtain Russian tax registration.

A foreign company is not prohibited from hiring employees through a specialised agency or another third party, for example under an outsourcing agreement. As these employees conclude employment contracts with the specialised agency or another third party, a foreign company has no obligation to pay remuneration to them, or withhold or pay the corresponding taxes.

Under certain conditions, tax registration issues and permanent establishment (PE) risks may arise for a foreign company.

A foreign company may engage an independent contractor under a service agreement (i.e., a civil law contract) without tax registration in Russia. In this situation, under certain conditions, these relationships can lead to the creation of a PE of a foreign company in Russia. Pursuant to the Tax Code, a PE is a branch, representation, department, bureau, agency, or any other separate subdivision or other place of activity of the company or a 'dependent agent' through which this foreign company regularly conducts commercial activities in Russia.

A dependent agent of the foreign company for tax purposes is a Russian company (or individual or individual entrepreneur) who acts based on an intercompany agreement, exclusively represents this foreign company in Russia and conducts regular business activities (i.e., negotiates and concludes agreements) on behalf of this foreign company.

Therefore, if the activity of a foreign company through an independent contractor creates a PE in Russia, the foreign company may be subject to full taxation in Russia.

Among the statutory payments that are required to be paid to employees are salary, sick leave allowance, annual holiday pay and other additional payments stipulated for certain categories of employees. Foreign employees are entitled to some of these local benefits (e.g., payment for annual holiday).

Some statutory benefits are not subject to personal income tax. Income that is not taxable includes:

- a* state allowances, including maternity leave and unemployment benefits; and
- b* all types of compensation payable in accordance with effective laws within established limits (e.g., reimbursement of harm caused by injury or other damage to health, dismissal of employees, compensation for unused holiday and the expenses involved in the improvement of employees' professional skills).

The employer paying statutory benefits in favour of employees is obliged to declare them and withhold personal income tax at source.

V RESTRICTIVE COVENANTS

Pursuant to Russian law, non-compete clauses in employment contracts are not enforceable, as one of the main labour principles protected by law is that each employee has freedom of labour, including the right to work, and any person is free to choose his or her profession or type of activity.

Following these principles, the law does not allow a company to restrict an employee from working for another employer (a competitor). If a non-compete clause is included in an employment contract, it cannot be applied legally and will not be enforceable in Russian courts. The only statutory possibility allowing companies to restrict or control work for third parties relates to heads of companies: pursuant to the Labour Code, a general director (chief executive officer) can work for another employer only with the consent of the authorised body of his or her employer.

In addition, an employee of a state company or corporation should inform his or her employer of any potential conflicts of interest. Failure to report a conflict of interest could form grounds for dismissal of an employee.

VI WAGES

i Working time

Employers are required to keep a record of the working hours of every employee, including any overtime. The regular working week is 40 hours, or less for certain categories of employees and under certain working conditions.

An employee may be expressly engaged for night work according to the working conditions or production necessity with the obligatory consent of the employee. In these circumstances, the statutory requirements for payment shall be that each hour of work during the night shall be compensated at a higher amount than work during the normal working day. The rate of pay must be at least 20 per cent greater than the normal hourly payment for a day's work.

ii Overtime

Any time worked in excess of 40 hours per week is classified as overtime (unless an employee has an open-ended working day regime pursuant to his or her employment contract) and may only be required by employers with the employee's prior written consent. Without the employee's consent, overtime work may be required only in emergency situations (such as fire, accident or disaster).

Pursuant to the labour laws, overtime should be compensated as follows:

- a* for the first two hours of overtime, no less than one-and-a-half times the usual hourly rate; and
- b* for subsequent hours of overtime, no less than twice the usual hourly rate; or
- c* in accordance with an employee's wishes, overtime work may alternatively be compensated by the provision of additional rest periods or time off work. However, this period may not be for less time than the overtime actually worked.

An employee's overtime work cannot exceed four hours within two consecutive days or 120 hours per year.

Overtime work performed at the weekends or on public holidays and compensated as work performed on weekends or public holidays by increased payment or by provision of another day of rest shall not be compensated as overtime work.

VII FOREIGN WORKERS

Chapter 50.1 of the Labour Code specifies the general conditions and requirements of the employment of foreign nationals. The basic requirements are that:

- a* the employment contract must be concluded for an indefinite term (except on special grounds);
- b* the employment contract must contain details of the work permit (as well as work patent, residence permit or temporary residence permit) and a voluntary medical insurance policy;
- c* a foreign national must have a voluntary medical insurance policy that covers the whole period of employment in Russia;
- d* a foreign national must confirm his or her knowledge of the Russian language, history of Russia and basics of Russian legislation; and
- e* in the event of expiry of a work permit (or work patent, residence permit, temporary residence permit or voluntary medical insurance policy), the employer is obliged to suspend the foreign national from work until he or she obtains new documents.

The law does not stipulate a requirement for employers to keep a register of foreign employees. Generally, there is no limit on the number of foreign employees that may be engaged by Russian-registered corporations, with the exception of some economical areas that are specified by the government every year. Representative offices of foreign commercial organisations that are incorporated in one of the World Trade Organization Member States may initially hire up to five foreign employees. Despite the general rule, a company is not allowed to hire as many foreign employees as it wishes – in the year preceding the prospective employment of foreign workers, it must apply for a quota. The company must submit a special form, indicating how many employees it expects to employ in the following year, their professions, job titles and countries of origin. Filling in and submitting the form does not guarantee that the company will be allowed to hire foreign employees or employees from certain professions or with certain qualifications. The decision is made by state bodies based on the current economic situation and the company's legal record (i.e., any prior violation of the law by the company may negatively affect the decision). The quota requirement only applies to the less highly qualified foreign nationals coming into Russia with a visa.

The Ministry of Labour and Social Protection of Russia is entitled to adopt a list of those professions, positions and qualifications that are given a quota exemption in a given year. However, these professions, positions and qualifications may vary from year to year, or may not be adopted at all.

A simplified procedure for obtaining a work permit has been adopted for employees from France, South Korea and Mongolia. Currently, employers do not have to obtain a decision from the State Employment Centre regarding permission to employ foreign workers from these countries.

Companies, and representative offices of foreign companies, may also engage foreign nationals as highly qualified specialists. The main condition for engaging a foreign worker as a highly qualified specialist is that he or she has experience, skills and achievements in the sphere in which he or she is to be employed and that the company will pay him or her more than 167,000 roubles per month. Salary requirements differ depending on the type of highly qualified specialist, for example teachers and scientists invited by state-accredited institutions, and foreign nationals engaged in Project Skolkovo (Russia's technical innovation project). For these specialists, quotas for obtaining work permits are not applicable. Employers do not have to obtain a decision from the State Employment Centre in order to legally hire a foreign worker as a highly qualified specialist.

The period of employment of a foreign national in Russia is limited by the duration of his or her work permit. Generally, a work permit is issued for up to one year; a work permit for highly qualified specialists can be issued for up to three years. If an employee continues working when his or her work permit expires, both the company and the foreign employee will be subject to administrative fines (which are quite considerable for the company).

Foreign nationals who will be working in Russia, rather than travelling to Russia on business, need to have work permits and should be staying under a work visa (except in the case of visa-free entry).

Remuneration received by a foreign employee from a source in Russia is generally subject to Russian personal income tax. It may also be subject to social insurance contributions. An employer should also provide any highly qualified specialist and his or her accompanying family members with medical insurance.

A company paying remuneration to a foreign employee is deemed a tax agent and, therefore, must withhold personal income tax from the remuneration payable to employees and remit it to the tax authorities. If the personal income tax was not withheld by a tax agent, the employee should file a tax return and pay the tax independently.

The personal income tax rate is 13 per cent for Russian tax residents (individuals staying in Russia for more than 183 days during a period of 12 consecutive months and more than 183 days during a calendar year) and 30 per cent for non-Russian tax residents (individuals staying in Russia for fewer than 183 days during a period of 12 consecutive months).

For those foreign employees who have the status of highly qualified specialist (see above), the personal income tax rate is 13 per cent, irrespective of their tax residency status.

Employers (both Russian companies and Russian subdivisions of foreign companies) shall pay social insurance contributions with respect to those foreign employees who have a long-term or temporary residence permit in Russia. Employers are obliged to remit contributions to the Federal Tax Service of Russia from compensation paid to foreign citizens who are temporarily resident in Russia.

There is also obligatory accident insurance in Russia. All individuals (including foreign nationals) working under employment agreements are subject to this insurance irrespective

of their immigration status. The insurance covers incidents of temporary or permanent injury to the health of employees (including death) that occur while performing employment duties (as a result of a professional illness or a work-related accident).

The applicable rate of obligatory accident insurance depends on the degree of professional risk that an employer's activity entails and may vary from 0.2 per cent to 8.5 per cent. The base for calculating obligatory accident contributions is generally the same as the base for calculating social insurance contributions.

Foreign employees have the same rights and obligations as Russian employees and are granted the same level of protection under Russian law.

VIII GLOBAL POLICIES

The main disciplinary principles are contained in the Labour Code. Internal disciplinary rules can be adopted by the employer in the form of by-laws and regulations on discipline. As a general rule, however, these are incorporated into the rules of the internal labour regulations of the company.

Internal labour regulations are a local standard governing the hiring and dismissal of employees; the basic rights, obligations and accountability of the parties to an employment contract; the work regime; rest periods; incentives and punitive measures applicable to employees; and other regulations concerning labour relations, including disciplinary rules.

Internal labour regulations do not need to be filed with or approved by any government authorities.

The Labour Code establishes some mandatory rules prohibiting discrimination on various grounds. Everyone shall have equal opportunities to implement their labour rights under the labour laws.

Nobody may be subject to restrictions in labour rights and liberties or gain any advantages based on gender, race, skin colour, nationality, language, ethnic origin, property, family, social status, occupational position, age, place of residence, attitude to religion, political views, affiliation or failure to affiliate with public associations, or any other circumstances not pertaining to the employee's ability to perform his or her work.

Sanctions for sexual harassment are regulated by the Criminal Code.

A company's internal labour regulations have to be executed in Russian, as Russian is the official language and must be used by all companies regardless of their ownership structure for their employment contracts, by-laws and record management.

When an employee is hired (before a labour contract is signed), he or she should be provided with the internal labour regulations and other internal regulations relating to his or her work as a hard copy that he or she must sign. If the internal labour regulations are altered subsequently, the employee shall be provided with a revised copy.

The rules of the internal labour regulations shall be approved by an employer, taking into account the opinion of the representative body of the organisation's employees, if there is one within the company.

Generally, if there is a collective contract in the company, the rules of the internal labour regulations shall be supplementary to it.

The internal labour regulations shall be freely accessible. They should be available on the company's intranet, but in any case a hard copy should be held by the company.

The disciplinary rules can be incorporated into the employment contract by reference to them.

IX PARENTAL LEAVE

Pregnant employees are entitled to maternity leave of 70 calendar days before the expected date of birth and 70 calendar days after the birth. The pregnancy must be medically certified. In the event of a multiple birth, the prenatal part of the leave is increased to 84 calendar days and the postnatal part of the leave is increased to 110 calendar days. In the event of a complication relating to the birth of a child, the postnatal leave is increased to 86 calendar days.

During maternity leave, employees are not entitled to receive pay from their employer, but receive a state benefit from the Social Insurance Fund. The benefit is set at 100 per cent of the employee's previous average pay, up to a statutory ceiling. In 2020, the maximum total benefit for the full 140 days is 301,095.20 roubles.

The employer pays the benefit to the employee and reclaims the sums paid out from the Social Insurance Fund.

Female employees are entitled to take their annual leave entitlement immediately before or after maternity leave (even if they have less than six months' service with their employer).

If a pregnant employee's work is medically certified as representing a hazard to her health, and the employee so requests, her workload must be reduced or she must be transferred to another job (whichever is necessary to prevent the hazard) while retaining her former average pay. If the employee must be transferred to another job, and that type of post is not available, she must be given time off until such a job is available, and receive her former average pay from the employer.

Pregnant employees must not:

- a* be sent on business trips;
- b* work overtime; or
- c* work at night, at weekends or on public holidays.

If, on returning to work, an employee is unable to perform her previous job on health grounds, women who have recently given birth are entitled, at their request, to be transferred to another job until their child is 18 months old. They must be paid either the wage for the job being performed, or their former average pay, whichever is higher.

An employer must not dismiss an employee who is pregnant or on maternity leave, except when the employer's business is liquidated or wound up, or an individual entrepreneur's activities are terminated. Further, an employer must not discriminate in recruitment against women on any grounds relating to pregnancy or having children.

If an employee has a fixed-term employment contract, and the contract is due to expire during the term of her pregnancy or maternity leave, the employer must, at the employee's written request, extend the term of the contract until the end of her pregnancy or maternity leave.

Except when an employer's business is liquidated or wound up, or it is an individual entrepreneur whose activities are terminated, or on specified grounds of serious misconduct, the employer must not dismiss certain categories of employee, namely:

- a* female employees with children under the age of three;
- b* lone parents (of either gender) with children under the age of 14, or 18 in the case of a child with disabilities; and
- c* parents (or legal guardians) who are the only wage earner (that is, any other parent or guardian is unemployed) in a family where there is a child with disabilities under the age of 18 years, or in a family where there are at least three children under the age of 14 and one child under the age of three.

An employee who adopts a child is entitled to take leave from the date of the adoption for 70 calendar days (110 days if adopting two or more children). The leave may be taken by only one adoptive parent. During adoption leave, employees are not entitled to receive pay from their employer, but receive a state benefit, as for maternity leave.

Employees are also entitled to take parental (or childcare) leave to care for a child aged under three. The entitlement is granted per child and may be taken by the mother, the father, a grandparent, a guardian or any other relative who cares for the child. One of these people may take all the leave, or two or more of them may each take parts of the leave.

An employee taking parental leave is entitled to receive a state benefit from the Social Insurance Fund until the child is 18 months old, but not to be paid by the employer. The benefit is set at 40 per cent of average pay, calculated on the basis of pay for the previous two years, subject to a monthly maximum (set at 27,984.66 roubles in 2020).

An employee who adopts a child is entitled to take parental leave to care for the child until it reaches the age of three years, under the same conditions as natural parents. The leave may be taken by only one adoptive parent.

Employees who are entitled to take parental leave may, at their request, do so on a part-time basis, while working part-time, and retain their entitlement to state benefits.

Employees have a right to return to their former job after taking parental leave. The period spent on leave is counted as continuous service with their employer. An employer must not dismiss an employee who is on parental leave, except when the employee's business is liquidated or /wound up, or the employer is an individual entrepreneur whose activities are terminated.

Male employees are entitled to up to five calendar days of unpaid leave in the event of the birth of their child.

X TRANSLATION

Russian is the official language of Russia and must be used by all companies – regardless of their ownership structure – for all human resources documentation (including employment contracts) and record management. There are no formalities such as notarial certification of translation or use of certified translators.

In the republics and other constituent territories of Russia, employment contracts can be executed in two languages: Russian and the language of the republic, or any other language used by the population of the subject. The exact rules and obligations on the use of languages are established by the relevant Russian legislation.

As for foreign employees who know neither Russian nor the language of the constituent territory of Russia, Russian legislation contains no general requirement that the employment contract be presented in a language familiar to the individual. However, in practice, an employment contract with a foreign employee is usually signed both in Russian and in the language in which the foreign employee is fluent, to guarantee that he or she has a clear understanding of his or her rights and responsibilities under the agreement.

If the employment documents are not translated into a language that is familiar to the employee, he or she could challenge the implication of any disciplinary sanctions upon him or her for breach of the obligations stipulated in the document on the grounds that he or she did not understand the contents of the document.

XI EMPLOYEE REPRESENTATION

Employees are permitted to form representative bodies to protect their rights. As such, there are no works councils as a form of representation in Russia. Under the Labour Code, the representatives of employees shall be trade unions and other representatives. Russian law, however, does not define the 'other representatives' and the rules governing their activity. Therefore, all information regarding employee representation in this section concerns trade unions.

Once created at the company level, a trade union represents all workers engaged by the specific employer who have become members of the trade union, or who have authorised the trade union to represent their interests.

Trade unions shall have the right to exert control over the employers and the official persons observing the legislation on labour, including on the issues of the labour agreement (contract), working hours and rest periods, remuneration for labour, guarantees and compensations, privileges and advantages, and other social and labour issues in the organisations in which the members of the given trade union work. They shall also have the right to demand that the disclosed violations are eliminated. Employers and official persons shall be obliged, within a week of receiving a request to eliminate the exposed violations, and to inform the trade union about the results of its consideration and the measures effected.

For the trade unions to exert their control over the observation of the legislation on labour, they shall have the right to set up their own labour inspection service, which shall be vested with the powers stipulated by the legislative provisions and approved by the trade unions.

If the employees of a given employer are not united in any primary trade union organisation, or if fewer than half of the employees of the given employer are members of the existing primary trade union organisation, or if no existing trade union has the power to represent the interests of all the employees in a social partnership at the local level, another representative (or representative body) may be elected by secret ballot from the ranks of the employees at a general meeting (conference) of the employees for the purpose of exercising these powers.

The existence of this other representative shall not be deemed an obstacle to a primary trade union organisation exercising its powers.

Trade union organisations shall represent the interests of employees in collective negotiations, the conclusion or alteration of a collective contract, control over execution thereof, and in the implementation of the right to participate in the management of an organisation, and in considering labour disputes between employees and employers.

The trade unions shall independently formulate and approve their rules, which should define the length of a representative's term, how frequently representatives must meet, terms and procedures for setting up the trade union, the rules for becoming a member of the trade union and leaving it, the rights and the duties of the trade union members, the authority of the trade union bodies and the term of their powers. Trade unions also determine provisions relating to the structure of the union and shall hold meetings, conferences, congresses and other events.

The employer shall give the trade unions functioning in its organisation the equipment, premises, and means of transport and communications necessary for their activity in conformity with the collective agreement or other type of valid agreement.

XII DATA PROTECTION

i Requirements for registration

As a general rule, before processing personal data, an operator is obliged to notify the Federal Service for Supervision in the Sphere of Communications, Information Technologies and Mass Communications of its intention to process personal data. The notification should contain information required by the respective laws in Russia.

The operator is defined as a legal entity, individual, state authority or municipal authority that individually or collectively organises or carries out the processing of personal data, and determines the purpose and content of processing that personal data or the operations to be performed with that data.

Employers have the right to process the personal data of their employees without notifying the above-mentioned authorised state body. However, if the purposes of processing personal data fall beyond the scope of labour law and employment relations, the employer is obliged to notify authorised state authorities of its intention to carry out the processing of employees' personal data.

According to the general rule, it is required to obtain the consent of an employee prior to the processing of their personal data. If personal data may only be obtained from a third party, the employer is obliged to notify the employee in advance and obtain his or her written consent. The employer shall inform the employee of the purposes, probable sources and methods of obtaining the personal data, the nature of the personal data to be obtained and the consequences of an employee's refusal to provide written consent for the use of the data.

The general rule is that a subject of personal data shall make a decision to supply his or her personal data and give his or her consent, of his or her own free will, to the data being processed in his or her own interest. As mentioned above, the employer is entitled to request personal data that is necessary for the performance of the labour agreement with the employee. The consent of the employee will be required if the employer intends to transfer the personal data of its employee to third parties. However, consent may be withdrawn by the personal data subject at any time.

To ensure the rights and liberties of the employee, the employer and its representatives must permit only specially authorised persons to access employees' personal data. Moreover, these persons shall be permitted to obtain only the data that is necessary to fulfil particular functions. Employers shall adopt an internal policy covering the procedure of processing employees' personal data. This policy shall be adopted in Russian (or in a bilingual form) by order of the general director of the legal entity (or other authorised person) and all employees shall acknowledge familiarisation with their signatures.

The company is obliged to take the required organisational and technical measures in processing the personal data, including using ciphering facilities (where applicable), to protect personal data against any illegal or accidental access, destruction, alteration, blocking, copying and dissemination, and other illegal actions.

The Federal Law of 21 July 2014 introducing amendments to the Federal Law on Personal Data sets out the obligation on operators of personal data to ensure that certain types of processing of personal data belonging to Russian nationals is carried out by the use of databases located in the territory of Russia at the moment of collection of the personal data of Russian nationals, including collection via the internet. This localisation requirement entered into force on 1 September 2015.

The localisation requirement does not apply to all possible types of processing in Russia. Only the following types of processing must be performed by the use of databases located in Russia: collection, recording, systematisation, accumulation, storage, adaptation or alteration, retrieval and extraction (the 'target types of processing').

The localisation requirement does not prevent companies from transferring data abroad. However, in the context of localisation requirements, some peculiarities shall be taken into account; that is to say, personal data shall be placed initially in a 'primary database', which shall be located and maintained (to the extent that maintenance involves the target types of processing) in Russia. Personal data contained in a primary database may be transferred abroad and be placed in other databases (secondary databases) if the rules on cross-border data transfer are complied with.

Further, on 1 September 2015 a new enforcement mechanism in the sphere of personal data came into effect. It implies inclusion of information resources (domain names, references to pages on the internet, website addresses), where the data is processed in violation of the rights of personal data subjects, in a special registry of violators of data subject rights (the Registry). Under this mechanism, the Federal Service for Supervision in the Sphere of Communications, Information Technologies and Mass Communications is granted the power to restrict access to these types of information resources by users from Russia. The Federal Service for Supervision in the Sphere of Communications, Information Technologies and Mass Communications can apply these restrictions on the grounds of a court's decision.

ii Cross-border data transfers

Russian law does not require registration for the purposes of the cross-border transfer of personal data.

The general rule is that the employer should ensure that the receiving states are parties to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data or are deemed by the Federal Service for Supervision in the Sphere of Communications, Information Technologies and Mass Communications as states providing adequate protection of the rights of the subjects of the personal data despite their non-membership of the aforementioned Convention (the Member States are listed in the respective order issued by the Federal Service for Supervision in the Sphere of Communications, Information Technologies and Mass Communications). If the employer transfers personal data to states that do not ensure adequate protection of the rights of the subject of the personal data, the Russian company must obtain written consent from the subject of the personal data (i.e., the employee).

Taking into account that employers are obliged to gain the consent of their employees when intending to transfer their personal data to third parties (regardless of the location of the receiving third party) and to avoid any possible claims from the employees regarding the processing of personal data by the company without consent, it is recommended in all cases of cross-border transfers that the employer obtains the written consent of the subject of the personal data, stating the scope of the personal data to be transferred, the purpose of the processing and the recipients of the data. The employers should require the recipients of personal data to treat the data as confidential information. If the transfer is made on the ground of an agreement, the agreement should provide for an obligation of the recipient to treat the personal data as confidential information.

Additional transfers of personal data are allowed if the employee's consent covers any such transfers.

iii Sensitive data

Information relating to an employee concerning race or ethnic origin, political views, religious or philosophical convictions, state of health or private life is considered as sensitive data.

As a general rule, an employer may not request or process sensitive data. In cases directly associated with the issues of labour relations, an employer may obtain and process information relating to the private life of an employee only with his or her personal consent.

For a cross-border transfer of sensitive data, a Russian company must obtain the written consent of the employee.

iv Background checks

Russian law limits the amount and type of data that can be obtained about a candidate or an employee. The main principle is that the volume and character of personal data to be obtained about a candidate should be justified by a lawful reason. According to the Labour Code, these reasons are:

- a* to observe laws and regulations, for example if a certain check is prescribed by law, an employer can demand this information, or if a certain job is prohibited to a specific group of people (e.g., those under 18), an employer can also request the relevant personal data;
- b* to assist in employment, training and promotion (this may imply any information that is reasonably and lawfully required to hire, train and promote efficiently);
- c* to ensure the personal safety of employees (this may appear to allow a rather broad interpretation, but the general principle of non-excessiveness is to be observed);
- d* to control performance (the quality and volume of work carried out); and
- e* to ensure the safety of assets (again, the general principle of non-excessiveness is to be observed).

Russian law provides a full list of documents a job candidate must present to an employer, and prohibits the employer from requiring extra certifications. Thus, bank statements, credit repayment records, and the like cannot be demanded from the candidate. Moreover, even if the candidate voluntarily agrees to provide them, such requests can be interpreted as an invasion of privacy and discrimination on grounds of property. Additional documents can be required only when explicitly provided for in the legislation (e.g., public servants should present information about their income, property and material liabilities).

Criminal record checks may be required for certain jobs. For example, applicants for teaching positions may be subject to these checks as people with a criminal record are prohibited from working in educational roles. In other instances, enquiring about an applicant's criminal background can be considered excessive. However, there is no relevant court practice so far.

There is a statutory minimum amount of information an employer is entitled to know about a potential employee. Demanding further information or documents is illegal, and requesting them might be risky, as it may imply that the candidate was not hired for a protected reason or that there has been an invasion of privacy.

An employer should also avoid receiving any information about, for instance, the political, religious or other views of an applicant or an employee, or his or her membership of social organisations.

Obtaining information about an applicant's or an employee's private life is permitted only to the extent that is relevant to the job. For example, information about dependants is relevant to determining whether an applicant or employee is entitled to certain guarantees.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Pursuant to the law, employment may be terminated only on the grounds provided for by the law. The Labour Code sets out a list of the principal grounds for termination of employment, but it is not exhaustive; it can be extended by grounds stipulated in other federal laws.

As a general rule, the company does not have to notify the state bodies of a dismissal. Among the exceptions are dismissals resulting from a company being wound up, and redundancies (see below). If a company is dismissing a foreign employee, it must notify the General Directorate for Migration of the Ministry of Internal Affairs within three days of termination of the employment agreement.

Notification of the elected body of the trade union is to take place if an employer initiates dismissal of a trade union member on the grounds of staff reduction, insufficient qualification of the employee or numerous failures by the employee to fulfil his or her labour duties, provided that he or she has had a disciplinary punishment. The opinion of the trade union is not binding for the employer. The employer could dismiss an employee who is a member of the trade union-elected body for reasons of staff reduction or if he or she has insufficient qualifications, provided the elected body of the higher-level trade union gives its consent.

The dismissal can take place within one month of the trade union providing its reasoned opinion.

If an employer decides to reduce its staff numbers, it should submit a written notification to the elected body of the trade union organisation no later than two months before the planned action, and three months in advance if the staff reduction may lead to collective dismissal.

It is not common practice for employers to provide a social plan containing measures that are additional to those required by law or contained in industry or territorial agreements. However, measures aimed at reducing the number of employees subject to collective redundancy or providing re-employment may be contained in the company's collective bargaining agreement and may be implemented by the employer.

Offers of suitable alternative employment have to be made in the event of redundancy.

There are different notice periods depending on the type of dismissal. A notice of dismissal must be made in writing. Furthermore, it should be signed by the employee, proving that he or she received that notice. A notice period does not depend on the length of employment.

An employee who is not performing as expected during a probation period can be dismissed by giving three days' notice.

A fixed-term contract is terminated when it expires. An employer must notify an employee of the contract's termination three days beforehand.

In the case of redundancy or reduction of personnel, an employer has to notify employees two months before dismissal. Seasonal workers are to be given seven days' notice in such circumstances and three days' notice applies for temporary employees (working under an employment contract with a term of up to two months).

In all other cases of dismissal, the notification period is not defined in the law.

If a company is being wound up or there is a reduction of staff, an employer can, with the written consent of the employee, terminate the employment contract before expiry of the two months' notice period provided it pays additional compensation to the employee in the amount of the employee's average earnings calculated pro rata to the time remaining until the expiry of the notice period.

The general principle is that protection is granted to all employees. Special protection against dismissal at the initiative of the employer applies, inter alia, to the following groups:

- a* pregnant employees (can be dismissed at the employer's initiative only if a company is being wound up; a fixed-term labour contract should be extended until the end of the pregnancy);
- b* employees under 18 years old (can be dismissed at the employer's initiative only upon consent of the appropriate state labour inspectorate and commission for juvenile affairs and protection of their rights (unless the company is wound up)); or
- c* employees with two or more dependants.

A severance payment shall be paid to employees in the event of termination of employment as a result of the company being wound up, or in the case of redundancy (as described below). Severance pay equal to two weeks' average wages is paid to an employee in the following cases of dismissal:

- a* the employee's refusal to be transferred to another job as might be required according to a medical certificate² prohibiting the employee from remaining in his or her current job, or if the employer does not have an appropriate job to offer;
- b* the employee being called to military service (or alternative civil service);
- c* the reinstatement of an employee who previously occupied that position;
- d* the employee's refusal to be transferred to a job in another location;
- e* the employee is recognised as being fully incapable of working in accordance with a properly issued medical certificate; or
- f* the employee refuses to continue working following a change in the terms of the employment contract.

An employment contract or a collective contract may stipulate other cases of severance pay, as well as the amount of severance pay that is due.

If the employment is terminated at the mutual agreement of the parties, then a respective agreement specifying the terms of the termination shall be concluded.

ii Redundancies

If a company decides to make certain posts redundant, it should first select the employees that can be subject to redundancy, considering the protected categories.

Each employee must be individually notified in writing at least two months before the proposed dismissal, and each employee should confirm receipt of the notification in writing. Seasonal workers will be given seven days' notice in such circumstances and temporary employees (i.e., those with an employment contract of up to two months) are entitled to three days' notice.

2 A medical certificate must be issued according to the procedure established by federal laws and other normative legal acts of Russia.

The company further offers the employees all suitable vacancies within the company (including those requiring fewer qualifications or with a lower salary). Each offer should be made in writing and the employee's refusal or consent should also be in writing. If there are no vacancies within the company, the employee should be served the appropriate notices and confirm the receipt thereof.

Under Russian legislation, there is no difference between collective dismissal and reduction in the workforce. Mass lay-offs are not directly regulated. However, provisions in the Russian labour legislation relating to 'downtime' indirectly regulate lay-offs. Under these provisions, in the event of a temporary suspension of work owing to economic, technological, technical or organisational causes, an employee may be transferred without his or her consent for up to one month to a job with the same employer that is not stipulated by the employment contract. In this case, a transfer to a job that requires fewer qualifications is permitted only with the employee's written consent. If transferred, the employee is paid for the work he or she performs and at a rate not below the average earnings in his or her previous job.

A period of downtime attributed to fault by an employer shall be remunerated in the amount of not less than two-thirds of the employee's average salary. A period of downtime occasioned by reasons dependent neither on the employer nor on the employee shall be remunerated by no less than two-thirds of the tariff scale and salary, which are calculated pro rata for the duration of the downtime.

In a case of collective dismissal,³ an employer must provide notifications to the State Employment Agency of certain information in two stages. At the first stage (three months before the dismissals) the following information is required:

- a* details of the employer and employees;
- b* a list of all employees of the organisation as at the date of the notice;
- c* the reasons for the collective redundancy;
- d* the number of employees to be made redundant;
- e* the commencement date of the collective redundancy;
- f* the final date of the collective redundancy; and
- g* information about the employees to be made redundant (professions, number of persons, date of dismissal).

At the second stage (two months before the dismissals), the employer must again provide details about itself and each employee to be made redundant (full name, education, profession, qualifications and average salary).

The following categories of employees cannot be made redundant:

- a* pregnant women;
- b* women with children under three years old;
- c* single mothers with children under 14 years old (or disabled children under 18 years old);
- d* individuals bringing up a child under 14 years old (or a disabled child under 18 years old) without a mother; and
- e* a parent who is a sole breadwinner for a child under three years old in a large family bringing up minors in which another parent is not employed and takes care of their children.

3 Dismissal may be considered to be collective depending on the number of employees the company plans to dismiss. The exact thresholds for collective dismissal are provided in agreements relevant to a specific industry sector or territory.

Among other employees, protection should first be given to employees with higher qualifications and labour productivity. To evaluate labour productivity, a performance review can be used; however, there is no statutory procedure on how performances are evaluated.

Among employees with equal qualifications and productivity, the following categories should be given preference:

- a* employees with dependent family members;
- b* employees who have suffered from workplace injury or work-related disease while working for the company;
- c* employees doing professional training at the employer's instruction; and
- d* disabled veterans.

Protection may be given to additional categories by regional or industrial agreements, collective bargaining agreements, company policies, employment contracts, and the like.

Actual termination of the employment contract cannot take place while an employee is on holiday or on sick leave (unless in cases of termination of employment owing to the company winding up).

If the employment is terminated because a company is being wound up, or in the case of redundancy, a dismissed employee is to be paid severance pay equal to his or her average monthly wage. Further, an employee is entitled to payment of average monthly wages while searching for a new job. These payments are limited to a two-month period upon termination of employment (including the severance pay). If the employee obtains the agreement of the State Employment Service, he or she may be entitled to severance for the third month as well, provided he or she registered with an employment service within two weeks of the date of dismissal.

If the employment is terminated on the ground of mutual agreement of the parties, an agreement specifying the terms of the termination shall be concluded.

XIV TRANSFER OF BUSINESS

In the case of a sale of shares of an employer to another company, the employment contracts are not subject to termination as the employing company remains the same. Thus, any changes in the terms and conditions of employment can be made only in accordance with the general procedures prescribed by the Labour Code, which provides that the employer should notify the employee of any change to material terms and conditions of employment at least two months before it occurs. A change to material terms and conditions can take place only in the case of a change in organisational or technological conditions of employment and only with prior written notice to the employee.

According to the law, a change in the owner of the property (assets) of an organisation is not a ground for termination of employment contracts with employees except for its general director, deputies of the general director and chief accountant. The Supreme Court has clarified that this applies to cases of sales of all property (assets) of an organisation. It also commented that this rule applies, for example, to the privatisation of state-owned companies, enterprises or assets of state-owned companies or enterprises. This rule may also apply to the sale of an enterprise as a property complex (which is considered and registered as a real estate object). The new owner has the right to dismiss the general director, deputies of the general

director and chief accountant within three months of obtaining the ownership title to the property (assets). In this situation, these employees, if dismissed, are entitled to compensation in the amount of no less than three months' salary.

Reorganisation (whether a merger, accession, division, split-off or transformation) of a company is also not a ground to terminate employment and thus the transfer of employment agreements will be required. An employee may refuse to continue to work in connection with the change of the owner of the assets of an organisation or in connection with the reorganisation of the company. If that is the case, the employment will be terminated.

XV OUTLOOK

There are no particular trends or significant developments in employment law expected in 2020. However, employers need to remain aware of the following recent changes during the coming year.

i Introduction of tax for self-employed persons

A trial period of taxation of self-employed individuals (including people who are self-employed, who do not have an employer and do not attract employees under labour contracts) began on 1 January 2019; from 1 January 2020, this involves the following constituent entities of Russia: Moscow, St Petersburg, Moscow Kaluga, Volgograd, Voronezh, Leningrad, Nizhny Novgorod, Novosibirsk, Omsk, Rostov, Samara, Sakhalin, Sverdlovsk, Tyumen, Chelyabinsk regions, Krasnoyarsk and Perm territories, the Nenets autonomous area, the Khanty-Mansi autonomous area – Ugra, the Yamalo-Nenets autonomous area, the Republic of Bashkortostan and the Republic of Tatarstan.

The Federal Tax Service has already warned employers against rehiring former employees as self-employed individuals for the purpose of optimising taxes and social contributions. If the Federal Tax Service becomes aware of unlawful rehiring of individuals as self-employed persons, the company may face additional taxes or fees and may be held administratively liable.

ii Electronic work-record books

With effect from 1 January 2020, employers must record all information about labour activity in electronic form (i.e., an electronic work-record book). Nevertheless, a hardcopy work-record book will be maintained after 31 December 2020 for any employee who requests it. Employees shall be notified about amendments and the application requirement by 30 June 2020. However, even in the absence of the respective requests, employers shall continue to keep hardcopy work-record books for their employees. Employers are obliged to record all information about labour activity only in electronic form for those employees who refuse to keep a hardcopy book or who are being employed for the first time.

If there are any changes in labour activities, an employer must prepare a monthly report of the labour activity of all employees for submission to the Pension Fund of Russia no later than the 15th day of the month. However, this rule is applicable only until 1 January 2021. After that date, the employer will be obliged to report to the Pension Fund no later than on the next day after the change.

On termination of an employment relationship, for those employees about whom there are only electronic records, employers will be obliged to provide a certificate of work experience as at the termination date.

SINGAPORE

Ian Lim, Nicholas Ngo and Li Wanchun¹

I INTRODUCTION

The Employment Act serves as the central piece of employment legislation in Singapore, outlining salient terms and conditions for employment, and the rights and responsibilities of employers and employees under contracts of service. On 1 April 2019, significant amendments to the Employment Act were introduced, and the Act now affords essentially all private sector employees in Singapore coverage under its provisions, regardless of position or salary level. Prior to this, the Employment Act did not cover employees in managerial or executive positions (including professionals) earning more than S\$4,500 per month. What remains unchanged is that the Act continues to exclude Singapore government or statutory board employees, seafarers and domestic workers from its coverage.

Part IV of the Employment Act provides additional protection (such as mandatory rest days, overtime pay and maximum hours of work) to select groups of employees, namely workmen (essentially manual labourers) earning a maximum of S\$4,500 as a basic monthly salary, and those other than workmen and persons employed in managerial or executive positions (including professionals), earning a maximum of S\$2,600 as a basic monthly salary.

In addition to the Employment Act, other statutes govern specific aspects of employment, including the Retirement and Re-Employment Act, the Child Development Co-savings Act (concerning maternity and other parental leave), the Employment of Foreign Manpower Act, the Workplace Safety and Health Act, the Employment Claims Act 2016 and the Personal Data Protection Act 2012. Singapore's Tripartite Alliance for Fair Employment Practices (TAFEP) also issues guidelines and advisories. While some are non-binding in nature and provide best-practice guidance, there are other guidelines that employers, the relevant courts and tribunals are statutorily required to have regard to, a notable example being the Tripartite Guidelines on Wrongful Dismissal. In practice though, given how TAFEP and the Ministry of Manpower (MOM) of Singapore have been actively looking into complaints relating to non-compliance with Tripartite guidelines and advisories, employers would be best served to try to comply wherever possible.

In addition to the Personal Data Protection Act 2012, which is enforced by the Personal Data Protection Commission (PDPC), the other employment-related statutes are primarily enforced by the courts (including the Employment Claims Tribunals (ECT) and the Industrial Arbitration Court (IAC)) and the MOM. Certain types of employment-related claims may be heard at first instance before the ECT, a division of the state courts. The ECT was established under the Employment Claims Act 2016 to facilitate quick and affordable

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access to justice for employees who cannot afford legal representation. Employees may bring both salary-related and wrongful dismissal claims before the ECT, with each claim capped at S\$20,000, or S\$30,000 if the employee is assisted by a union. Before a claim can be made before the ECT, a request must be made for mediation before the Tripartite Alliance for Dispute Management (TADM).

II YEAR IN REVIEW

i Changes to employment law regime

The far-reaching changes to the Employment Act alongside the consequent expansion of the ECT's jurisdiction have resulted in seismic changes to Singapore's employment and labour law regime. Essentially all private sector employees are now able to submit employment-related disputes (in particular wrongful dismissal claims) to the TADM for mediation, and thereafter to commence employment-related claims before the ECT without needing to engage lawyers. As a result, employers in Singapore are now compelled to carefully scrutinise their employment practices and further ensure that all their employees are treated fairly. Particular caution must now be exercised when classifying an employee for the purposes of determining any entitlement to the further benefits under Part IV of the Employment Act, and when suspending or terminating an employee's employment. These matters are discussed further in Sections IV.i and XIII, respectively.

ii Retrenchment exercises

There was a number of high-profile mass retrenchment (or redundancy) exercises during 2019. Perhaps the most significant one took place in late September 2019, when Hong Kong-based travel retailer DFS (which operated duty free outlets at Changi Airport and other prominent locations across Singapore) asked about 60 workers to leave from one of its largest outlets with immediate effect.² DFS initially offered a severance package of one week's pay per year of service, capped at 13 weeks' pay.³ This drew widespread criticism from the media, the unions and TAFEP. Even the Minister for Manpower, Ms Josephine Teo, commented publicly that the DFS Group 'could have better handled' the exercise, referring also to the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment.⁴ Even when DFS increased its severance package to two weeks' pay per year of service, to be capped at 26 weeks' pay, the amount was described by a union representative as 'peanuts'.⁵ Around a month later and after extensive discussions with the relevant employee union, DFS revised the severance package to one month's salary per year of service, capped at 25 years.⁶

2 See <https://www.channelnewsasia.com/news/singapore/tafep-dfs-group-retrenchment-exercise-11952090> (accessed 28 January 2020).

3 See <https://www.straitstimes.com/business/dfs-retrenchments-severance-packages-not-substantial-enough-says-union> (accessed 28 January 2020).

4 See <https://www.straitstimes.com/singapore/manpower/dfs-could-have-better-handled-retrenchments-josephine-teo> (accessed 28 January 2020).

5 See footnote 3, above.

6 See <https://www.channelnewsasia.com/news/singapore/dfs-offers-retrenched-employees-better-severance-deal-following-12068822> (accessed 28 January 2020).

To allay concerns on the ground amid the retrenchments, the National Trades Union Congress has recently announced that it will be starting a job security taskforce aimed at protecting workers at the pre-retrenchment stage.⁷

With the increasing attention on retrenchment exercises and employee unions actively intervening in these exercises, employers in Singapore contemplating retrenchment exercises are encouraged to be guided by the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment when offering severance packages and further assistance to affected employees, notwithstanding that this is not strictly statutorily binding. More requirements on retrenchment are discussed further in Section XIII.vii.

iii Raising of retirement and re-employment ages

It was announced in August 2019 that the retirement and re-employment ages are to be increased.⁸ Last raised some 20 years ago, Singapore's current retirement age is 62. Employers are statutorily obliged to re-employ eligible employees who have reached 62 years of age until they reach the statutory re-employment age, which is presently 67 (some exceptions apply). If re-employment is not feasible, an employment assistance payment (EAP) must be provided.

By 1 July 2022, the retirement and re-employment ages will be raised to 63 and 68, respectively. Central Provident Fund (CPF, akin to a mutually funded social security scheme) contribution rates for older workers will also be increased as from 1 January 2021, as will the recommended EAP amount from 1 July 2022 onwards.⁹ The statutory retirement and re-employment ages will continue to be raised incrementally, up to 65 and 70, respectively, by 2030.

III SIGNIFICANT CASES

i Public Prosecutor v. Jurong Country Club and another appeal¹⁰

The Singapore High Court's decision in *Jurong Country Club* highlights both the importance and difficulty of properly distinguishing between independent contractors (under contracts for service) and employees (under contracts of service). In this case, the country club took the position that its gym instructor was an independent contractor and thus not entitled to employee CPF contributions, whereas the prosecution took the opposite view. On appeal, the Singapore High Court held that the gym instructor was indeed an independent contractor and therefore not entitled to employee CPF contributions.

Some observations made by the High Court are pertinent. First, the Court clarified that the expressed intentions of the contractual parties are not necessarily conclusive. Where the parties have either inadvertently or deliberately used a label that does not match the reality of the working relationship, the court should not hesitate to depart from the contractual wording in that respect. Here, the relative bargaining powers of the parties would also be

7 See <https://www.channelnewsasia.com/news/singapore/ntuc-conference-taskforce-retrenchment-membership-goals-12006366> (accessed 28 January 2020).

8 See <https://www.todayonline.com/singapore/govt-raise-retirement-age-65-and-re-employment-age-70-2030-cpf-contribution-rates-older> (accessed 28 January 2020).

9 See <https://www.mom.gov.sg/newsroom/press-releases/2019/0819-tripartite-workgroup-on-older-workers-releases-its-recommendations> (accessed 28 January 2020); also see 'Report of the Tripartite Workgroup on Older Workers: Strengthening Support for Older Workers' (1 August 2019).

10 [2019] SGHC 150.

taken into account. Second, the assessment of whether an employer-employee relationship exists would be done holistically, with due regard to all relevant circumstances. The Court held that it may not always be useful to look at the extent of control the ‘employer’ has over the worker (previously cited as an important factor in determining this question), especially if the worker has particular skills and expertise that make it difficult for an ‘employer’ to direct how work is to be done; just an element of control would therefore not necessarily be inconsistent with an independent contractor relationship.

ii a World Fuel Services (Singapore) Pte Ltd v. Xie Sheng Gu
b HT SRL v. Wee Shuo Woon

In the context of non-competition and restraint of trade clauses, the Singapore High Court in recent years has raised queries as to whether the principles set out in the seminal 2005 Court of Appeal decision in *Stratech Systems Ltd v. Nyam Chiu Shin (Stratech)*¹¹ should continue to apply. The key principle is essentially that every restrictive covenant must be shown to protect a specific legitimate proprietary interest; as such, when an employer’s relevant legitimate proprietary interests are already all protected by other restrictive covenants in the contract, the non-competition clause (which arguably seeks to protect all the proprietary interests at once) would not be enforceable. This principle was affirmed in the 2008 Court of Appeal decision of *Man Financial (S) Pte Ltd v. Wong Bark Chuan David (Man Financial)*¹² but has been doubted by at least two separate High Court judges in subsequent cases (see Section V.ii).

A couple of decisions by the High Court on the subject now appear to pull in different directions. In the March 2019 decision in *World Fuel Services (Singapore) Pte Ltd v. Xie Sheng Guo*,¹³ the Court said it saw no reason for the former employee to be honouring his duties of confidentiality but yet not honouring the non-competition clause. The Court also took the view that it was impossible to separate confidentiality from a detached discharge of the employee’s duties to the new employer. While one can see the logic of the Court’s reasoning, it also ran very much counter to the principle established in *Stratech*.

A month later though, the High Court reached the opposite conclusion in *HT SRL v. Wee Shuo Woon*¹⁴ in April 2019. On a straightforward application of the principle in *Stratech*, the Court held that a non-competition clause could not be relied on to protect an ex-employer’s interests in confidential information because of the presence of an existing clause imposing a duty of confidentiality. The Court also held that, in any event, the non-competition clause was unreasonable and therefore unenforceable.

Given these clearly conflicting High Court decisions, it would certainly be useful if an appropriate case could be brought before the Singapore Court of Appeal for a fresh decision on whether the *Stratech* principle remains relevant and should continue to apply. It is to be hoped that this may happen this year. In the meantime, employers should as a matter of prudence treat the *Stratech* principle as continuing to apply.

11 [2005] 2 SLR(R) 579.

12 [2008] 1 SLR(R) 663.

13 [2019] SGHC 54.

14 [2019] SGHC 96.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

At common law, contracts of employment or of service (as opposed to contracts for service, which are independent contractor relationships) can be formed in writing, orally or by conduct. An employee does not necessarily need to sign a written employment contract for the terms of employment to be enforceable, though evidentiary issues may arise when there is no written contract.

However, employers in Singapore are now statutorily required to set out certain key employment terms (KETs) in writing, and to issue a copy of these written KETs to all employees covered by the Employment Act (if the employee was hired on or after 1 April 2016) within 14 days of commencing employment. The KETs must include provisions relating to, among other things, payment of salary, allowances and other salary-related payments, such as bonuses and incentives, leave entitlement, and termination notice periods.

Employers should ensure that any onerous financial terms are set out expressly and unambiguously in employment contracts, and specifically brought to employees' attention where possible. This is important, as the courts have leaned in favour of the employee when construing onerous terms in employment agreements,¹⁵ and have also endorsed the concept of an implied duty of mutual trust and confidence between employers and employees.¹⁶

Fixed-term employment contracts are not uncommon and are enforceable, and may potentially be terminated prior to the expiry of the fixed term (depending on their provisions). In the absence of agreement, the notice period for termination of a fixed-term contract should be not less than the minimum notice periods prescribed by the Employment Act (see Section XIII.iv).¹⁷

The distinction between independent contractors and employees is as follows: the former include freelancers and gig workers, who are engaged through contracts for services and who are presently not entitled to any particular statutory rights or protection under Singapore law; and the latter are hired through contracts of service and entitled to statutory employee rights and protections. The distinction is not always clear, and as the High Court in *Jurong Country Club* held (see Section III.i), the assessment as to whether an employer-employee relationship exists would have to be done holistically, with due regard to all relevant factors. Be that as it may, the distinction is an important one. As the decision in *Jurong Country Club* shows, an entity may ultimately be liable or in breach of statutory requirements for failure to provide mandatory employee benefits to individuals misclassified as independent contractors. It may therefore serve employers to err on the side of caution in this respect.

Another important distinction must be made between employees who are covered by Part IV of the Employment Act (and who are therefore entitled to additional protections) and employees who are not (see Section I). Employers ought to exercise prudence in making

15 In *Corinna Chin Shi Hua v. Hewlett-Packard Singapore (Sales) Pte Ltd* [2015] SGHC 204, the High Court observed that where an employer had used a standard form (as opposed to specifically negotiated) contract containing provisions that were ambiguous and obviously unfair without bringing these to the employee's attention, the employer may risk subsequently being unable to enforce those terms against the employee (this part of the High Court's decision was not disturbed on appeal).

16 *Wee Kim San Lawrence Bernard v. Robinson & Co (Singapore) Pte Ltd* [2014] 1 SLR 1382; [2014] 4 SLR 357.

17 Employment Act, Section 10(3).

this determination, as wrongly classifying an employee may have significant consequences, as the High Court's 2018 decision of *Hasan Shofiqul v. China Civil (Singapore) Pte Ltd (Hasan Shofiqul)* shows.¹⁸

There, the High Court found that despite the employer's argument that the employee was not entitled to overtime pay under Part IV of the Employment Act because he was nominally a construction site supervisor (and therefore a manager or executive), the employee was not in fact employed in a managerial or executive position at law and was therefore entitled to statutory overtime pay. As a result, the employer was ordered to pay the employee all overtime accrued until his contract was terminated.

In coming to its decision, the Court reasoned that '[s]upervisory responsibility does not mean the person cannot be a workman' for the purposes of Part IV. It also observed that 'the fact that [the employee] is employed as a site supervisor is not sufficient by itself to lead to the conclusion that he is an executive'. Instead, '[m]uch must depend on the nature and level of supervisory powers that he has been given and all other circumstances'. In this regard, the Court noted that the employee did not have a diploma, did not possess any specialist skills or training, and was largely involved in hands-on supervision. The employee's supervisory functions were also not executive functions but 'regular on-site routine administrative work'. The employee also did not have authority to hire, dismiss or promote any of the workers whose work he was overseeing.

Hasan Shofiqul emphasises that an employer cannot simply rely on its own arbitrary classification of its employees to determine whether statutory rights (in particular, those under Part IV of the Employment Act, including as to overtime pay) would accrue, the practice of which has led to 'disguised PME's' (employees labelled as professionals, managers and executives (PMEs) through inflated job titles when they are actually not). Following this, the MOM warned in 2018 that it 'takes a serious view of attempts to misclassify employees in order to avoid employer obligations'.¹⁹ In light of this, employers should also err on the side of caution in classifying employees and determining which are covered by Part IV of the Employment Act and which are not.

ii Probationary periods

Probationary periods are allowed and are generally between one and three months. The contractual notice period for termination is also, in practice, shorter during probationary periods (e.g., one week, as opposed to one month post-probation). There are currently no statutory requirements in this respect.

iii Establishing a presence

A foreign company must be registered in Singapore to carry on business in Singapore. In this respect, the hiring of employees (local or foreign, through an agency or another third party) or agents to conduct the company's affairs and operations in Singapore would generally be considered as carrying on business in Singapore. On the other hand, registration is unlikely to be required when only an isolated transaction is contemplated.

18 [2018] 5 SLR 511.

19 See <https://www.straitstimes.com/singapore/mom-warns-bosses-not-to-mis-label-staff-as-execs-managers> (accessed 28 January 2020).

Carrying on business in Singapore or having a permanent establishment (PE) in Singapore is likely to attract corporate income tax liability as long as the income is accrued in or derived from Singapore, or received in Singapore from outside Singapore in respect of gains or profits. Singapore's Income Tax Act defines a PE as having a fixed place from where a business is wholly or partly conducted. A person is also deemed to have a PE in Singapore if that person has another person acting on that person's behalf in Singapore who has and habitually exercises authority to conclude contracts.

For employees, income tax is determined by the employee's residence status as well as the source of his or her income. Employers are obliged to report employee earnings to the Inland Revenue Authority of Singapore (IRAS) and withhold salary payments for tax purposes when the employment is terminated. For example, before a non-Singapore citizen employee ceases employment, the employer is generally required to withhold all moneys due to the employee until tax clearance with the IRAS is completed.

V RESTRICTIVE COVENANTS

Under Singapore law, restraints of trade are generally contrary to public policy and therefore unenforceable. The exception, as held by the Court of Appeal in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v. Wong Bark Chua David (Man Financial)*,²⁰ is where a restrictive covenant (1) seeks to protect a legitimate proprietary interest of the employer, and (2) satisfies the twin tests of reasonableness, namely, that the clause is reasonable between the parties concerned and with respect to the interests of the public as a whole (see further in Section V.i).

i Confidentiality, non-solicitation and non-poaching clauses

In *Man Financial*, the High Court recognised three legitimate proprietary interests in the employment context: trade secrets and confidential information; trade or business connections (clients and customers); and the maintenance of a stable, trained workforce (staff).

An employer's trade secrets and confidential information can be protected by an express confidentiality provision. While this interest could also be generally protected at common law, an express confidentiality clause helps to identify the precise trade secrets or confidential information that employees are precluded from using or disclosing during and after employment, and also aids in enforcement. However, care must be taken to distinguish between trade secrets and confidential information on the one hand, and the skill and knowledge belonging to an ex-employee on the other. As held in *Man Financial*, the courts will not sanction a covenant seeking to prevent an employee from exercising his or her own natural skill, talent and abilities, even if these were acquired or improved during the course of employment.

When an employee has personal knowledge and influence over an employer's customers or clients (i.e., the employer's trade or business connections), the employee can be restrained from taking advantage of this after employment. This is usually done through a non-solicitation of customers or clients clause, which must be reasonable in duration and geographical area of restraint. Non-solicitation provisions may extend to non-solicitation of suppliers as well. Periods of restraint of up to one year may be enforced. Although there is no

20 [2008] 1 SLR(R) 663.

clear prohibition against longer periods, and restraints of up to two years have been allowed in certain specialised industries (see *Tan Kok Yong Steve v. Itochu Singapore Pte Ltd*,²¹ discussed in Section V.iii), the prohibition period may affect the overall enforceability of the clause.

An employer can protect its workforce by a non-solicitation of employees clause (also known as a non-poaching clause). These clauses are subject to the requirement of reasonableness, taking into account the duration and the types of employees covered. The restraint should not be a blanket prohibition on the prospective solicitation of all employees of the ex-employer, but should be referable to the position, training or knowledge of the target ex-employee, and should be restricted to employees over whom the ex-employee had influence. Again, periods of restraint of up to one year may be enforced (with longer periods not impossible but potentially affecting enforceability of the clause).

ii Non-compete clauses and *Stratech Systems Ltd v. Nyam Chiu Shin*

Under Singapore law, non-compete clauses are difficult to uphold and enforce if the three recognised legitimate proprietary interests identified in Section V.i are already protected by other clauses. In its 2005 *Stratech* decision (briefly discussed in Section III.ii),²² the Court of Appeal found that the employer that sought to enforce a non-compete clause was unable to demonstrate any other legitimate proprietary interest that required protection, apart from the interests already protected by other restrictive covenants (in that case, a confidentiality clause). As such, the Court concluded that the main function of the non-compete clause was to inhibit competition and was therefore unenforceable. The Court of Appeal in *Man Financial* reaffirmed the principle in *Stratech* and took the view that it would apply equally in the context of other legitimate proprietary interests (i.e., not just confidentiality).²³

The correctness of the *Stratech* principle has since been doubted. In the High Court decision in *Centre for Creative Leadership (CCL) Pte Ltd v. Byrne Roger Peter and others (CCL)*,²⁴ the judge commented that though he was bound by *Stratech*, it did not seem logical that an employer which had both a non-compete covenant and a confidentiality clause in its contract had a lower chance of using the non-compete covenant to protect its confidential information than an employer which had only a non-compete covenant with no confidentiality provision.

Thereafter, a different High Court judge in *Lek Gwee Noi v. Humming Flowers & Gifts Pte Ltd (Humming Flowers)*²⁵ expressed similar views to the Court in *CCL* and opined that the legitimate proprietary interest of trade connections could potentially suffice to support both a non-compete and a non-solicitation clause.

The High Court in *Solomon Alliance Management Pte Ltd v. Pang (Solomon Alliance)* (which did not refer to *Stratech* at all)²⁶ also recognised in a novel fashion that there could be a legitimate proprietary interest in the exclusive marketing of an entity's products. This was held to justify the upholding of two non-competes against an independent contractor (one restraint operating during the term of the contract and the other both during the term and for one year after the term of the contract). This might have been the Court's way of avoiding the application of *Stratech*, but it also could be that this decision will eventually prove itself

21 [2018] SGHC 85.

22 [2005] 2 SLR(R) 579.

23 [2008] 1 SLR(R) 663.

24 [2013] 2 SLR 193.

25 [2014] 3 SLR 27.

26 [2018] SGHC 139.

as a reliable authority for a new legitimate proprietary interest of exclusive marketing. After all, the Court in *Man Financial* did state that ‘other legitimate proprietary interests may also exist and be protected by the courts . . . although they must obviously be legally justified’, but this remains to be seen. However, the *Solomon Alliance* decision concerned an independent contractor rather than an employee, and the courts have noted that restrictive covenants are scrutinised less strictly in non-employment contexts (i.e., the courts are more prepared to give precedence to freedom of contract).

In another 2018 decision in *Powerdrive Pte Ltd v. Loh Kin Yong Philip and others* (*Powerdrive*),²⁷ the High Court recognised that *Stratech* remains binding, though it also reiterated that concerns have been raised over that decision in *CCL* and *Humming Flowers*. The Court took the view, however, that, given the unreasonableness of the restraint, it was ‘not necessary to decide whether to rule against the enforceability of the [non-competition restraint] based on *Stratech*’.

As discussed in Section III.ii, the cases decided in 2019 relating to restrictive covenants appear to continue to pull in different directions. It would therefore be timely if an appropriate case is brought before the Singapore Court of Appeal for a fresh decision on whether the *Stratech* principle remains good law. Until then, employers should as a matter of prudence treat the *Stratech* principle as continuing to apply.

iii Non-compete clauses and the notion of reasonableness

Powerdrive also serves as an important reminder that when determining whether a restrictive covenant is reasonable, the court will also consider the types of employees sought to be restrained, over and above other common factors (i.e., the scope of activities restrained, the geographical scope of restraint and the period of restraint).

In *Powerdrive*, the High Court noted that the non-compete clause was used against ‘all its employees regardless of their seniority, nature of work or level of access to information’. Following past decisions, the Court further noted that ‘such an indiscriminate application would suggest that the true purpose of the provision was to restrain competition rather than to protect a legitimate interest of an employer’, which would make the non-compete unenforceable.²⁸ In this regard, the Court also suggested that even if an employer intends to enforce the non-compete against specific groups of employees, making the non-compete applicable to all employees will make it unreasonable and therefore unenforceable.²⁹ Considering the scope of activities restrained, the Court observed that each employee was prohibited from working for a rival ‘regardless of the scope of his work with his new employer’. The Court further noted that the two-year duration of the non-competition restriction appeared to be ‘arbitrarily selected’.³⁰

In light of this decision, employers should be vigilant when drafting non-competition restraints. Over and above stipulating an appropriate scope of work and geographical area, the employer would also need to carefully consider the types of employees to be restrained and, as *Powerdrive* suggests, would need to be able to provide some explanation and basis as to why the stipulated period of restraint is appropriate (although, in general, shorter periods of restraint would be relatively easier to justify).

27 [2018] SGHC 224.

28 *id.*, at [26].

29 *id.*, at [44].

30 *id.*, at [40] and [48].

That is not to say that long periods of restraint would always be unreasonable and unenforceable though. In the April 2018 decision of *Tan Kok Yong Steve v. Itochu Singapore Pte Ltd*,³¹ the High Court upheld a non-competition restraint that lasted for two years. This case concerned an employee who was in charge of his employer's cement products business (which the Court noted was a specialist industry) in various Asian countries, and who had taken about four years to build up customer connections on behalf of his employer. As such, it was reasonable that the employer would expect to need at least two years to rebuild the same contacts without any interference from the ex-employee.

iv Severance

If a restrictive covenant is directed at protecting a legitimate proprietary interest but it is too wide and unreasonable to be enforceable, the court may sever some portions of the relevant clause so that the remainder becomes reasonable and enforceable. This 'blue-pencil' test allows for severance by deletion but not addition or other amendment.

Significantly, in *Smile Inc Dental Surgeons Pte Ltd v. Lui Andrew Stewart (Smile Inc)*,³² the Court of Appeal indicated that it was not in favour of the 'notional' severance approach where a court applies the flexible 'reading down' test by modifying or adding to the clause as appropriate, as opposed to the blue-pencil test. The Court stated that employers should draft reasonable restrictive covenants from the outset, instead of drafting unreasonably long periods of restraint in trying to potentially obtain maximum protection, then subsequently relying on the courts to read down the provision to make it enforceable where necessary. As such, a restrictive covenant with an unreasonably long period of restraint (e.g., three years) cannot be notionally read down (e.g., to one year) and could therefore be struck out in its entirety as unreasonable. While the Court of Appeal in *Smile Inc* raised, without apparent disapproval, the use of cascading clauses, which consist of multiple overlapping periods and areas of restraint, to specifically allow the offending clauses to be blue-pencilled out, the subsequent High Court decision in *Humming Flowers* opined that cascading clauses offend against public policy: the Court reasoned that they increase rather than reduce uncertainty, particularly on the part of the employee, and should accordingly not be upheld. This is now the correct view unless and until the Court of Appeal holds otherwise.

v Deferred bonuses

A potential way to achieve a similar result to a non-compete clause may be to expressly incentivise employees not to compete, or disincentivise employees from competing, for a specific period after employment. However, the employer should take great care in doing so.

In *Mano Vikrant Singh v. Cargill TSF Asia Pte Ltd (Mano)*,³³ the Court of Appeal held that to financially disincentivise an employee from competing through a contractual clause that deprived the employee of a vested right effectively amounted to a restraint of trade, and it would then have to pass the test of reasonableness to be enforceable. The employer in *Mano* attempted to retain a declared and vested deferred bonus payment due to its ex-employee, but the Court held that the restriction was unreasonable because, among other things, it had no geographical limit and was twice as long as the one in the employment contract. This was

31 [2018] SGHC 85.

32 [2012] 4 SLR 308.

33 [2012] 4 SLR 371.

notwithstanding the fact that the clause in question did not actually prohibit competition by the ex-employee, as his competition with the company was not in breach of his employment contract *per se*, leaving the company with no recourse to damages or an injunction. In light of this decision, while a financial disincentive to compete may still be a viable alternative means to effectively stifle competition, employers should ensure that the benefits withheld cannot be construed as having been vested, or otherwise encourage expectations that employees are entitled to the benefits, if this is not the intention.

vi Springboard injunctions

Injunctive relief may also be granted to prevent a person who has obtained confidential information from using it as a springboard for activities detrimental to the person, including an entity, to whom the confidential communication belongs, or to gain an unfair advantage over, or a head start on, that person. Although similar in effect to an injunction based on express restrictive covenants, springboard injunctions originate from cases involving a breach of the duty of confidence, and do not exclusively arise in employer-employee situations. Accordingly, a springboard injunction may even be granted in the absence of any express restrictive covenants, although the presence of these would certainly be relevant.

In *Goh Seng Heng v. RSP Investments and others and another matter (Goh Seng Heng)*,³⁴ the High Court granted an interim springboard injunction as it was found that:

- a* there was misuse of confidential information, or the risk of misuse;
- b* the misuse of confidential information had given rise to an unfair competitive advantage for the party that the applicant sought to restrain;
- c* the unfair advantage was still being enjoyed by the party the applicant sought to restrain at the time the injunction was sought; and
- d* damages for the misuse would be inadequate.

The High Court found that the four requirements were satisfied as the ex-employees had, among other things, taken and misused confidential information and trade secrets. The Court found that the ex-employees' actions were intended to and did affect the company financially, and the breaches of confidentiality gave an unfair competitive advantage to the ex-employees' new company. There was a real likelihood that without a springboard injunction, the company would be ruined before the matter reached trial, and damages in lieu of an injunction would therefore be insufficient. As such, the springboard injunction was found to be necessary. The ex-employees appealed against the High Court's decision in this regard: the appeal was allowed by the Court of Appeal, which overturned the springboard injunction. However, no written grounds of decision were handed down, so it is unclear what view the Court of Appeal took of the High Court's reasoning above, and whether the injunction had been overturned on the facts, or as a result of the Court of Appeal's rejection of the legal principles applied by the High Court.

A clause prohibiting the misuse of confidential information for a stipulated period may be a relevant consideration for the court in deciding how long the springboard injunction should remain in place. In *PH Hydraulics & Engineering Pte Ltd v. Intrepid Offshore Construction Pte Ltd and another*,³⁵ the High Court stated that the springboard doctrine did not apply, as the two-year period in the relevant confidentiality clause had expired and

³⁴ [2017] 3 SLR 657.

³⁵ [2012] 4 SLR 36.

the information was no longer confidential. On the other hand, when a specific period is not expressly stipulated in a confidentiality clause (and the relevant clause does not indicate how long this obligation will last), the Court of Appeal in *Tang Siew Choy and others v. Certact Pte Ltd*³⁶ ruled that the time needed to restrain ex-employees from using confidential information would have to be gathered mainly from the complexity of the information protected, with the injunction to continue for the period for which the unfair advantage may reasonably be expected to continue.

VI WAGES

i Working time

Generally, employees covered by Part IV of the Employment Act (see Sections I and IV) cannot be required to work for more than eight hours a day (or nine hours a day in a working week that is five days or fewer) or 44 hours a week, or work for more than six consecutive hours without a leisure period. Under exceptional circumstances (e.g., urgent work, or work essential for defence or security), these employees may be permitted to exceed the aforementioned daily limit, provided they still do not work for more than 12 hours a day.

Employees covered under Part IV of the Employment Act are also allowed one whole day (or for shift workers, any continuous period of 30 hours) as a rest day each week without pay. The employer can determine which day of the week the rest day shall be, which is usually Sunday by default. However, these employees may elect to work on, and be remunerated for, the rest day.

No statutory restrictions as to working hours, days or periods presently apply to employees not covered by Part IV of the Employment Act (see Sections I and IV for a more detailed discussion of the distinction between employees covered by Part IV of the Act and those who are not), and any such restrictions would be a matter of contract between the employees and their employers. In late 2017, however, the Tripartite Standards on Flexible Work Arrangements were released, encouraging employers to implement variations from usual work arrangements in exchange for public recognition as a progressive employer.

ii Overtime

An employee covered by Part IV of the Employment Act (see Sections I and IV) must be paid for overtime at a rate of not less than one-and-a-half times the employee's basic hourly rate of pay, or twice the rate if the employee is requested by the employer to work on a rest day. Overtime payments must be made to the employee within 14 days of the last day of the employee's salary period.

In addition, an employee covered by the Employment Act, regardless of whether he or she is also covered by Part IV, who is required by his or her employer to work on any public holiday is entitled to an extra day's salary at the basic rate of pay. Alternatively, and provided that the employee is not covered by Part IV of the Employment Act, he or she may be given a day off or part of a day off in lieu of an extra day's salary.

An employee may work overtime at higher rates of pay for more than the aforementioned numbers of hours or on a rest day, provided that no employee works overtime for more than 72 hours in a month. In the 2013 High Court decision in *Monteverde Darwin Cynthia v. VGO*

36 [1993] 1 SLR(R) 835.

Corp Ltd,³⁷ it was held that any contractual term requiring an employee covered by Part IV of the Employment Act to work for more than 44 hours without overtime payment was illegal, and the employee would be entitled to overtime payment for the extra hours worked.

VII FOREIGN WORKERS

The principal statutes governing employment of foreign workers are the Employment Act and the Employment of Foreign Manpower Act (EFMA). Under the EFMA, no foreign employee may be employed or work without a valid work pass (with limited exceptions depending on the type of work being carried out). In addition, all employers are required to keep a register of foreign employees to whom they have issued work passes. The more common types of work passes include Work Permit, S Pass and Employment Pass. These are valid only for the employer, type, place or time of employment expressly specified, and each work pass is issued with mandatory conditions that the employer and foreign employee must follow.

Different eligibility criteria and restrictions apply depending on the specific work pass and the foreign employee concerned. A Miscellaneous Work Pass may be granted for foreigners who are directly involved in organising or conducting seminars, conferences, workshops or gatherings that relate to religion, race, a cause or politics; giving talks related to any religion; or journalists, reporters or accompanying crew members not supported or sponsored by any Singapore government agency to cover an event or write a story in Singapore. The Miscellaneous Work Pass allows foreigners take on assignments of up to 60 days in Singapore. There are no published quota limitations on such passes. Work Permits, S Passes or Employment Passes would be more suitable for longer-term assignments.

Generally, there is no minimum qualifying salary to obtain a Work Permit, which is usually applicable to manual or unskilled workers, or domestic helpers. It typically lasts two years, and there are limitations on quotas and maximum employment periods, depending on the industry sector, and an employee's skill level and nationality. In comparison, there are no maximum employment periods with respect to S Pass holders, which are usually issued to skilled workers such as technicians, though employers are bound by quota restrictions that are calculated by way of various prescribed ratios in each case. The minimum qualifying salary for a foreign employee to be issued an S Pass was S\$2,300 as of 1 January 2019, which was increased to S\$2,400 as of 1 January 2020. At the next level, foreign PME's earning at least S\$3,600 a month with acceptable qualifications could apply for an Employment Pass. There is no foreign worker quota for Employment Pass applications, nor is there a maximum employment period in this regard, though an Employment Pass (as with Work Permits and S Passes) is subject to renewal requirements.

Foreign workers are not entitled to benefits that only Singaporean citizens or permanent residents qualify for, such as CPF contributions. As for taxes, employers are not required to pay taxes for foreign employees, but are required to observe the tax reporting and tax clearance procedures as explained in Section IV.iii.

37 [2014] 2 SLR 1.

VIII GLOBAL POLICIES

Singapore has no specific laws mandating the implementation of internal disciplinary rules and procedures by employers, though the Tripartite Guidelines on Fair Employment Practices require that employers (1) set out their disciplinary procedures and policies for breaches of conduct, (2) set up mechanisms to deal with complaints of discrimination and (3) communicate the foregoing clearly to their employees. Other materials, such as a Tripartite Advisory on Managing Workplace Harassment and Tripartite Standards on Grievance Handling, have also been published, with a Grievance Handling Handbook on requirements and guidelines in managing grievances within the workplace. While these particular Tripartite advisories and guidelines are not legally binding *per se*, the MOM has warned that non-compliance may result in administrative actions, including the curtailment of an employer's work pass privileges.

In practice, many employers in Singapore, especially multinational companies, institute internal disciplinary rules and policies with respect to issues such as discrimination, corruption and sexual harassment. These policies are commonly made accessible to employees on a company's intranet or detailed in a company's human resources policies or employee handbook, and are usually expressly incorporated into employment contracts.

IX PARENTAL LEAVE

i Regimes under the Employment Act and Child Development Co-Savings Act

Parental leave is governed by the Employment Act and the Child Development Co-Savings Act (CDCA). Generally, to qualify for parental leave under the Employment Act, an employee must have worked for the employer for at least three months; however, to be eligible for parental leave under the CDCA, the employee's child must be a Singapore citizen, which is generally the case if at least one parent is a Singapore citizen, and the child is either born in Singapore or (if born outside Singapore) the child's birth is duly registered in Singapore within a year. The employee must also have worked for the employer for at least three months before the child's birth or adoption (as the case may be).

Parental leave entitlements are generally greater under the CDCA, and employers may seek partial or full reimbursement from the Singapore government (as the case maybe, as discussed further below) for payment of parental leave benefits of employees covered by the CDCA. Leave entitlements under the Employment Act are generally less favourable (see below), and no government reimbursements can be applied for to cover these benefits.

Once an employee is entitled to parental leave under the CDCA, the employee will no longer be entitled to parental leave under the Employment Act. There are elements that are common to both statutory regimes, as the CDCA provides that certain provisions of the Employment Act shall also apply to employees covered by the CDCA with the relevant modifications. For example, under both the Employment Act and the CDCA, it is not lawful for an employer to give a female employee notice of dismissal (or termination) while the female employee is on maternity leave or such that the notice period will expire while she is on maternity leave. While it is not entirely clear from the relevant statutes, this prohibition is also likely to apply to a dismissal issued with immediate effect by payment in lieu of notice (i.e., the notice period, if fully served, would have expired while the employee was on maternity leave).

Further, if an employer gives a female employee notice of dismissal (or termination) without sufficient cause (or on grounds of redundancy or reorganisation) while the female

employee is pregnant (as certified by a Singapore medical practitioner before the notice of dismissal is given) but prior to her maternity leave, the notice of dismissal cannot deprive the employee of any payments or entitlements that she would otherwise have received had she not been dismissed (provided the female employee is entitled to maternity leave under the Employment Act or the CDCA). This is the case even if the notice period would expire prior to the maternity leave. In other words, the employer would still have to pay the employee for her paid maternity leave.

A contract that purports to deprive a female employee of her statutory maternity benefits or reduce an employer's obligations in this respect will be null and void. It is also generally an offence to refuse to allow an employee to take parental leave. Over and above all this, an employee who takes the view that he or she has been dismissed for a wrongful reason (for example, because the employer was seeking to deprive the employee of his or her statutory entitlements) may commence a claim for wrongful dismissal against the employer (see Section XIII.v).

ii Maternity and adoption leave

An eligible female employee under the CDCA is entitled to 16 weeks of paid maternity leave (subject to a cap of S\$10,000 per four weeks or a total of S\$20,000 per child for a first or second child, and a cap of S\$10,000 per four weeks or a total of S\$40,000 per child for each subsequent child). The government will reimburse the employer for the ninth to 16th weeks of maternity leave for a female employee's first or second child, and for all 16 weeks of maternity leave for a female employee's third and any subsequent children. A female employee may absent herself from work up to four weeks immediately before and 12 weeks immediately after delivery (i.e., totalling 16 weeks). If there is a mutual agreement with her employer, an employee can take the last eight weeks (the ninth to 16th weeks) of her maternity leave flexibly during the 12 months after the child's birth.

Female employees who meet the eligibility criteria under the CDCA (as discussed above) are also entitled to 12 weeks of paid adoption leave (so long as the adopted child is below the age of 12 months at the time of taking the leave). A similar cap of S\$10,000 per four weeks applies, with a total cap of S\$30,000. Note that, the government will reimburse only up to S\$20,000 for adoption leave in respect of a first or second child, but up to the full S\$30,000 for a third and any subsequent children.

A female employee who is covered under the Employment Act but not under the CDCA (e.g., a foreign national) will be entitled to up to 12 weeks (instead of 16) of maternity leave, eight of which would be paid for by the employer, with the remaining four unpaid (unless she already has two or more living children born during more than one previous confinement, in which case the employee would no longer be entitled to any payment of maternity benefits). Presently, unlike the position under the CDCA, the amount of maternity leave benefits provided for under the Employment Act is not subject to any statutory caps. Notwithstanding this and as mentioned above, female employees who are entitled to maternity benefits under the CDCA will not be entitled to further maternity benefits provided for under the Employment Act.

Unlike the CDCA, the Employment Act does not provide for adoption leave.

iii Paternity and adoption leave, and shared parental leave scheme

Eligible male employees under the CDCA are entitled to two weeks of government-paid paternity leave (whether the employee is the natural or adoptive father of a child), to be taken within 16 weeks of the date of the child's birth (unless otherwise agreed between the employer and the employee). The payment to which the male employee is entitled cannot exceed S\$2,500 per week, or S\$5,000 in total. This will be reimbursed by the government.

There is also a Shared Parental Leave scheme under the CDCA, whereby a working father is entitled to share up to four of the 16 weeks of the working mother's maternity leave (to be taken within 12 months of the child's birth) if he meets the eligibility criteria and if a proper joint application is submitted. The female employee's maternity leave will then be reduced accordingly. A similar cap of S\$2,500 per week applies. This will likewise be reimbursed by the government.

Paternity leave, adoption leave and shared parental leave are not available to employees who are not covered by the CDCA and are only covered by the Employment Act.

iv Infant care, childcare and extended childcare leave

In addition to maternity and paternity leave, parents of children under the age of two are also entitled to six days of unpaid infant care leave per year under the CDCA, regardless of the number of children they have (or whether a child is adopted). Parents of children under the age of seven are further entitled to six days of paid childcare leave per year under the CDCA, regardless of the number of children. Finally, parents of children between seven and twelve years of age are entitled to two days of paid extended childcare leave per year. Parents are not allowed to take more than a combined total of six days of childcare leave and extended childcare leave in a year. Payment for each day of childcare leave is not capped for the first three days of childcare leave, but is capped at S\$500 per day for the next three days, whereas payment for every day of extended childcare leave is capped at S\$500 per day. The government will reimburse up to S\$500 per day of childcare leave, capped at S\$1,500 per year, and up to S\$500 per day for extended childcare leave, capped at S\$1,000 per year.

Employees covered under the Employment Act but not covered under the CDCA are not entitled to unpaid infant care leave or extended childcare leave. However, they are entitled to two days of paid childcare leave in respect of children below the age of seven years.

X TRANSLATION

Singaporean commercial contracts, including employment contracts, are generally in English, which is the language of business in Singapore. However, this does not mean that employment contracts that are not in English will not be upheld. In fact, employers are also encouraged to adopt the language that its employees can understand, especially with respect to KETs. There is also no legislation or guidelines requiring translation of employment-related documents (if in another language) into English, though this would be necessary before the documents may be received, filed or used in the Singaporean courts.

XI EMPLOYEE REPRESENTATION

The Trade Unions Act allows employees to form or join trade unions to regulate their relationships with their employers through collective agreements. Following amendments to the Industrial Relations Act in 2015, PME may also be collectively represented by

trade unions. That said, where the majority of a trade union's membership is made up of non-PMEs, it will not be able to collectively represent PMEs if there is a real or potential conflict of interest between the PMEs and the non-PMEs, or if management effectiveness may be undermined.

Once formed and registered with the Registrar of Trade Unions, a trade union may approach an employer for statutory recognition under the Industrial Relations (Recognition of a Trade Union of Employees) Regulations. Upon recognition, a trade union can invite the employer to negotiate a collective agreement for its relevant employees, pursuant to the Industrial Relations Act. This agreement would then govern the employment relationship between the employer and the unionised employees. The unions may also assist individual unionised employees in negotiating better bonuses, salary increments and other benefits. They could also facilitate collective negotiations and, as described in Section II.ii, unions have been seen to take quite an active role in negotiating retrenchment benefits. A fair number of the larger companies and multinationals in Singapore have granted statutory recognition to, and negotiated collective agreements with, trade unions.

It is difficult for an employer to refuse to recognise a trade union at law in the long run. If an employer continually refuses, the MOM Commissioner for Labour may call for a secret ballot among the employees entitled to vote, and if a majority of those employees are members of that trade union, the employer must give it recognition. If the majority is not met, then the union is precluded from seeking recognition again for six months. Because secret ballots are logistically challenging, cannot guarantee success and can create hostility, trade unions typically prefer to use a memorandum of understanding (MOU) with employers as an interim step. MOUs are contracts in which, for example, the union agrees not to seek recognition for a certain number of years, and the employer in return agrees to sponsor or subsidise its employees' union fees and dues, therefore effectively securing the success of any future secret ballot. If the employer refuses to negotiate a collective agreement, a statutory trade dispute will exist, which will have to be determined by the IAC, where legal representation is not allowed. Prior to that, the Commissioner for Labour from the MOM may intervene to facilitate reconciliation between the parties.

Technically, a registered trade union is also able to commence, promote, organise and finance a strike or industrial action, but it may only do so in very limited circumstances – the majority of affected members must consent to strike through a secret ballot, and under the Trade Disputes Act an industrial action is illegal if (1) it has any other object than the furtherance of a trade dispute, (2) it is in furtherance of a trade dispute of which the IAC has cognisance, or (3) it is designed or calculated to coerce the government either directly or by inflicting hardship on the community. Union-led strikes are very rare in Singapore. The last strike, in 2012, did not involve a union (it involved non-unionised foreign bus drivers taking unilateral action) and the previous strike was in 1986, which lasted a day.

XII DATA PROTECTION

The Personal Data Protection Act 2012 (PDPA) governs personal data protection and applies to all organisations except those in the public sector. It generally protects personal data, which is broadly defined as data about an individual who can be identified from that data, or in conjunction with other likely accessible information, through governing its collection, use and disclosure. The PDPA is administered and enforced by the PDPC, which has also released substantive Advisory Guidelines informing the content and application of the PDPA.

i Requirements for registration and protection of personal data

The PDPA does not contain any express requirement for an organisation to register with the PDPC. However, it requires that an organisation designate one or more individuals to be responsible for ensuring that the organisation complies with it (i.e., a data protection officer (DPO)). The business contact information of at least one of these individuals must be made available to the public, and DPOs are encouraged to register with the PDPC.

The PDPA generally requires that an individual's consent be obtained before an organisation can collect, use or disclose personal data. This applies to all forms of relationships with companies, including clients, customers, suppliers and employees. However, the PDPA dispenses with the requirement for the individual's consent in certain situations, four of which are pertinent in the employment context.

First, personal data produced for the purposes of an individual's employment, and personal data for the purposes of managing or terminating an employment relationship, may be collected, used and disclosed for those purposes, provided that notification of the purposes are given to the employee.

Second, an employee's personal data can also be collected, used and disclosed for evaluation purposes, without the need for the employee's consent and without the need to notify the employee. This includes determining suitability for employment, promotion or removal from employment by obtaining references from a former employer and maintaining an employee's performance records.

Third, an employee's personal data can be used by the employer or disclosed to a third party or prospective third party in a business asset transaction, provided the personal data relates to the part of the employer's organisation or business assets with which the transaction is concerned if the personal data is necessary for the third party to determine whether to proceed with the transaction, and the employer and the third party have entered into an agreement that requires the third party to use or disclose the personal data only for the purposes relating to the transaction. In such a case, the employer must notify the employees that the transaction has taken place and that their personal data has been disclosed to the third party. If the business asset transaction is ultimately not completed, the third party to the transaction must return or destroy the personal data obtained.

Fourth, an employee's personal data may be collected, used or disclosed without notification or consent if it is 'necessary for any investigation or proceedings'. Collection of the data may only take place if it is reasonable to expect that seeking the consent of the individual would compromise the availability or the accuracy of the personal data. While the term 'proceedings' relates to civil, criminal or administrative proceedings by or before a court, tribunal or regulatory authority, it is quite likely that the term 'investigations', as distinguished from proceedings, would also encompass investigations within an organisation. Organisations must also safeguard the personal data in their custody or control by making reasonable security arrangements to prevent unauthorised access, use, disclosure, copying, modification, disposal or other similar risks. They must destroy or anonymise personal data once the purpose for its collection has expired. Employers must also ensure that their employees understand and uphold the PDPA obligations regarding data privacy. Any conduct engaged in by an employee in the course of his or her employment is treated as also engaged in by the relevant employer, regardless of whether it was with the employer's knowledge or approval.

In 2019, the PDPC released a Guide to Managing Data Breaches addressing what organisations should do to prepare for and respond to data breaches. Among other things,

organisations are required to contain any data breach that may occur, assess the data breach within 30 days of when it first becomes aware of a potential breach, and notify the PDPC within 72 hours of establishing that the data breach is likely to result in significant harm or impact to the individuals involved, or is of a significant scale. Affected individuals and other parties are also to be notified as soon as possible. The organisation should then evaluate its systems, reviewing and learning from the data breach incident to improve its personal data handling practices and prevent the reoccurrence of similar data breaches. The PDPA has not yet been amended to reflect this, but the PDPC has indicated that organisations are expected to comply with these new provisions.

ii Cross-border data transfers

Under the PDPA, an organisation is not allowed to transfer any personal data to a country or territory outside Singapore except in accordance with requirements prescribed under the PDPA to ensure that organisations provide a standard of protection to personal data that is comparable to the protection under this Act. Insofar as the transfer may constitute disclosure of personal data to different organisations, consent would have to be obtained from the relevant individuals unless an exception applies. This is pertinent to multinational corporations as the personal data of employees is often transferred to offices outside Singapore.

The PDPC's Advisory Guidelines provide further guidance in this regard. Personal data may be transferred overseas provided that the PDPA's substantive data protection provisions are complied with. This may be done through ensuring that the recipient of personal data is bound by legally enforceable obligations to afford the personal data transferred a standard of protection that is comparable to that under the PDPA.

iii Sensitive data

The PDPA does not expressly differentiate between sensitive personal data and other personal data that is not sensitive. The general obligation is to obtain appropriate consent before collecting, using or disclosing personal data (whether sensitive or not).

The extent of personal data collected, used or disclosed would have to be reasonable, as the PDPA provides that an organisation may collect, use or disclose personal data about an individual only for purposes that a reasonable person would consider appropriate in the circumstances. An organisation is also prohibited from requiring an individual to consent to the collection, use or disclosure of personal data about the individual beyond what is reasonable to provide products or services to that individual.

Accordingly, the PDPC guidelines indicate that organisations are generally not allowed to collect, use or disclose national identifiers (national registration identification card numbers, birth certificate numbers, foreign identification numbers and work permit numbers) unless it is required by law, is an exception under the PDPA or is necessary. In the employment context, employers are required under Section 95 of the Employment Act to maintain detailed employment records of employees covered by the Act, which include employees' national identifiers and other relevant information.

Once collected, as with all kinds of personal data, an organisation is obliged to make reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks. As the PDPC recognises in its guidelines, there is no 'one size fits all' solution, and an organisation should, among other things, implement

robust policies and procedures for ensuring appropriate levels of security for personal data of varying levels of sensitivity. A higher level of security would therefore be warranted if the personal data concerned is more sensitive.

iv Background checks

Background checks are generally permissible. Though the general rule remains that an individual's consent must be provided before his or her personal data may be collected, used or disclosed, the PDPA provides certain exceptions. These include where the personal data is publicly available, where the personal data is collected by a credit bureau and where collection is necessary for evaluation or investigative purposes, as discussed in Section XII.i.

XIII DISCONTINUING EMPLOYMENT

Employees may generally be dismissed in one of two ways: termination with notice or with payment in lieu of notice (i.e., dismissal without cause); or summary termination without notice or payment in lieu (i.e., dismissal for cause).

i Summary dismissal

Sections 11(2) and 14(1) of the Employment Act prescribe that termination without notice or payment in lieu of notice is only permissible (1) in the event of any wilful breach by the other party of a condition of service or (2) on the grounds of misconduct inconsistent with the fulfilment of the conditions of service. The ECT and the courts hearing appeals from the ECT are statutorily required to have regard to the Tripartite Guidelines on Wrongful Dismissal (the Wrongful Dismissal Guidelines). It is as yet unclear whether courts hearing wrongful dismissal claims brought directly to the courts (and not as an ECT appeal) are required to apply, or even have regard to, the Wrongful Dismissal Guidelines. The Guidelines also expressly provide that misconduct is the only legitimate reason for dismissal without notice (although it appears that the Guidelines may have subsumed the ground of wilful breach under 'misconduct'). In this regard, the Guidelines define misconduct in a non-exhaustive fashion, which includes theft, dishonest or disorderly conduct at work, insubordination, and bringing the organisation into disrepute. The MOM also defines misconduct as a failure to fulfil the conditions of employment in the contract of service (including theft, dishonesty, disorderly or immoral conduct at work, and insubordination).

The Employment Act and Wrongful Dismissal Guidelines expressly require that an employer conduct a due inquiry process before dismissing an employee for misconduct. While the term 'due inquiry' is not defined under the Employment Act, the MOM stipulates that, as a general guide, (1) the employee should be told of his or her alleged misconduct, (2) the employee should have the opportunity to present his or her case, and (3) the person or persons hearing the inquiry should not be in a position that may suggest bias. Though not having the force of law, the High Court has in the past referred to these guidelines in determining whether a due inquiry was carried out.³⁸

For the purposes of conducting a due inquiry, an employer may suspend an employee from work for a period not exceeding one week, but the suspension cannot continue beyond a week unless the MOM approves a longer suspension. During the period of suspension, the

38 *Long Kim Wing v. LTX-Credence Singapore Pte Ltd* [2017] SGHC 151.

employee must also be paid at least half his or her salary, and if the inquiry does not disclose any misconduct, the employer must immediately restore to the employee the full amount of salary so withheld.

Employers should also bear in mind that if an employee brings a wrongful dismissal claim before the ECT, the employer would bear the burden of proving that there was misconduct sufficient to warrant a summary dismissal. It would therefore be prudent for employers contemplating a summary dismissal to document any alleged instance of misconduct, the surrounding circumstances, the due inquiry process, as well as its final decision to summarily dismiss the employee.

ii Dismissal with notice or salary in lieu of notice

According to the Wrongful Dismissal Guidelines, the legitimate reasons that may be given for dismissing an employee with notice include poor performance and redundancy. In these cases though, notice or salary in lieu of notice would still have to be provided. The employer would also need to substantiate the reason for dismissal, especially if poor performance is being relied on as a reason. In these cases and given that it is the employer's burden to prove before the ECT that there was poor performance, the employer should have documented proof thereof. Ideally, the employee's poor performance should have continued for a significant period, and especially if the employer has a performance improvement plan (PIP) policy, this should be followed prior to any dismissal for poor performance.

The Wrongful Dismissal Guidelines further define redundancy as occurring when the employer has excess manpower, the company is undergoing restructuring, a job no longer exists, or an employee's job scope has changed. Provided that the situation is one of genuine redundancy, an employee can be dismissed on this ground with notice or salary in lieu of notice. In these cases, employers should also have regard to the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment (discussed in Section II.ii and Section XIII.vii).

Employers are still at liberty to terminate an employee's employment with notice or salary in lieu of notice through a pure exercise of contractual rights. The Wrongful Dismissal Guidelines expressly state that this type of dismissal is presumed not to be wrongful. So for example, and using an illustration set out in the Wrongful Dismissal Guidelines, an employer who dismisses an employee with notice without giving any reasons (and continuing not to give any reasons even when asked) would not be considered wrongful if the employee is unable to point to any facts, incidents or situations that could suggest the employer's intention was anything other than termination in accordance with the contract.

However, the presumption that a dismissal is not wrongful may be displaced if an employee is able to substantiate a wrongful reason for dismissal, such as discrimination (including on the basis of age, race, gender, religion, marital status, family responsibilities or disability), being deprived of an employment benefit (e.g., an imminent mandatory payment), or if an employee is exercising his or her statutory rights (e.g., to parental leave). The last ground may also cover whistle-blowing in some circumstances (although Singapore has no overarching whistle-blowing legislation and the forms of protected whistle-blowing differ from statute to statute). The Wrongful Dismissal Guidelines also provide that when an employer has provided a reason for dismissal with notice, but the reason given is later proven to be false, the dismissal may then be wrongful.

iii Termination by mutual agreement

A contract of employment can be brought to an end by way of an agreement, such as a separation or settlement agreement, between the employer and employee, which would normally contain release and discharge provisions, whether unilateral or mutual. The validity of this type of agreement is subject to provisions of the Employment Act and general common law principles. Importantly, a contractual release and discharge alone cannot bar a subsequent ECT claim, although its presence may then be taken into account by the ECT. However, a valid and enforceable contractual release and discharge should operate to bar a claim directed to the court or arbitration.

iv Notice periods and other statutory requirements

If an employment contract is silent as to the relevant notice period, the Employment Act prescribes minimum notice periods according to the employee's length of service: (1) one day for employees employed for less than 26 weeks; (2) one week for employees employed for between 26 weeks and two years; (3) two weeks for employees employed for between two and five years; and (4) four weeks for employees employed for five years or more.

There are presently no statutory notification requirements for dismissing employees, unless there is a retrenchment exercise (see Section XIII.vii below). There is also no absolute statutory prohibition against dismissals, save for a few situations, including the following:

- a* employers cannot dismiss female employees during their statutory maternity leave;
- b* pursuant to the Retirement and Re-Employment Act, employers cannot dismiss elderly employees below the age of 62 solely on account of their age; and
- c* employers should not wrongfully or unfairly dismiss employees on pain of having to compensate or reinstate them.

v Employee recourse

Employees who feel that they have been dismissed without just cause or excuse (or who have other employment-related disputes) may submit the dispute for mediation before the TADM, where no legal representation is allowed. If mediation is unsuccessful, the employee may then commence proceedings before the ECT, where external legal representation is likewise not allowed. Commencing a claim before the ECT essentially involves little if no legal costs (though some filing fees and disbursements do apply), although organisations may use in-house legal counsel, and may be advised by external counsel behind the scenes (as has often been the case in practice).

Claims for wrongful dismissal must be submitted for mediation before the TADM not later than one month after the date of dismissal, and a claim before the ECT for wrongful dismissal must be lodged within four weeks of the date of issue of a claim referral certificate (which will be issued by the TADM if a dispute remains unresolved). Any party to the proceedings may, if it is dissatisfied with an ECT decision, also appeal against the decision to the High Court. However, appeals can only be made on the ground that the claim was outside the ECT's jurisdiction, or on any ground involving a question of law. Leave to appeal must also be granted by the District Court before an appeal can be brought to the High Court. The authors are not aware of a successful appeal having been brought to date.

Employers should also bear in mind that, from 1 April 2019, dismissal is statutorily defined as including 'the resignation of an employee if the employee can show, on a balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of any conduct or omission, or course of conduct or omissions, engaged in by the employer'.

This is a statutory recognition of the concept of constructive dismissal, and employees may accordingly be regarded as having dismissed or terminated even if it is the employee who had actually resigned.

The jurisdictional limit for claims brought before the ECT (and TADM) is S\$20,000 per claim (or S\$30,000 per claim if the employee is assisted by a union), and an employee may potentially bring both a salary-related claim and a wrongful dismissal claim before the ECT (effectively claiming S\$40,000, or S\$60,000 in cases where the employee is assisted by a union, in aggregate). The ECT may order the employer to reinstate the employee to his or her former employment or compensate the employee with his or her lost wages, or both.

The Employment Claims Regulations 2017 provide that where wrongful dismissal is made out, the amount of compensation to be awarded by the ECT is to consist of compensation for (1) the employee's loss of income, subject to a maximum of three months of the employee's gross rate of pay and (2) the harm caused to the employee by the ex-employer as a result of the wrongful dismissal. With regard to point (2), the amount of compensation for harm caused to the employee is to be computed using a base amount not exceeding two months of the employee's gross rate of pay, which may increase or decrease by 50 per cent of the base amount, depending on the aggravating or mitigating factors at play. As such, the total amount an employee may claim for wrongful dismissal at the ECT (not including any other claims that the employee may have) would effectively range from zero to six months of basic salary, subject to the overall jurisdictional claim limits under the ECT.

An employee is also at liberty to commence proceedings before the Singapore courts for damages. However, it remains to be seen whether the Singapore courts would award damages for wrongful dismissal *per se*. In this respect, prior to the introduction of the Wrongful Dismissal Guidelines, the Singapore courts had taken the position that employees who have been wrongfully dismissed are only entitled to salary in lieu of notice, as this is what an employee would be contractually entitled to had the employee been dismissed in accordance with the contract instead of being wrongfully dismissed (since the employee would have had no further recourse for wrongful dismissal). This is unless the wrongful dismissal also resulted in a loss of other benefits, such as deferred bonuses or vested share options, in which case the claim could include those other benefits.

The Wrongful Dismissal Guidelines and the Employment Claims Regulations 2017 make clear that the ECT and courts hearing appeals from the ECT may award compensation for wrongful dismissal *per se* over and above salary in lieu of notice in appropriate cases, but these are strictly speaking only binding on courts hearing these cases. If other Singapore courts applying common law are to award damages for wrongful dismissal *per se*, this would require a change to Singapore's common law and jurisprudence on the subject.

vi Severance payments

With the exception of employment assistance payments, which are payable under the Retirement and Re-Employment Act to eligible employees who have reached the statutory retirement age and are not re-employed (see Section II.iii), severance or redundancy payments are not statutorily required in Singapore. Any contractual right to, and calculation of, severance pay will have to be set out in the employment contract, or any applicable collective agreement in the case of unionised employees. Notwithstanding this, employers may still choose to pay severance even in the absence of contractual obligations to maintain morale, reputation, industry norms or consistency with group offices in other jurisdictions (and a number do – multinationals in particular).

Employers are generally obliged to re-employ employees who have reached the statutory retirement age (which is currently 62), provided certain criteria are fulfilled, which include the employee being assessed as having at least satisfactory work performance and being medically fit to continue working. If the employer is unable to find a suitable re-employment role for the employee (which should be for a period of at least a year), then an EAP is statutorily required. The employer's re-employment obligations last until the employee reaches the statutory re-employment age (which is currently 67).

The Tripartite Guidelines on the Re-employment of Older Workers (to which employers are statutorily obliged to have regard) clarify that the intent behind the EAP is to help eligible employees who are not re-employed while they look for another job. It further suggests, among other things, that an EAP should be equivalent to 3.5 months of salary (subject to a minimum of S\$5,500 and a maximum of S\$13,000). In light of the diminishing obligation to re-employ a worker until the statutory re-employment age, older employees (between the ages of 64.5 and 67) may be provided with an EAP equivalent to two months' salary (subject to a minimum of S\$3,500 and a maximum of S\$7,500).

With the changes to the retirement and re-employment ages (see Section II.iii), from 1 July 2022, the minimum and maximum EAP amounts for eligible employees between the ages of 63 and 65.5 are expected to increase to S\$6,250 and S\$14,750 respectively, and to S\$4,000 and S\$8,500, respectively, for eligible employees between the ages of 65.5 and 68.

vii Redundancies

Employers who employ at least 10 employees are required to notify the MOM if five or more employees are retrenched, or dismissed on the ground of redundancy or by reason of any reorganisation of the employer's profession, business, trade or work, within any rolling six-month period. This applies to both permanent employees and contract workers with full contract terms of at least six months.

The Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment (which are strictly speaking non-binding but may be considered by the ECT and the courts) also provide that retrenchment exercises should be carried out responsibly in consultation with the union (if the company is unionised) or with the affected employees (if not unionised). The selection of employees for retrenchment should also be fair and based on objective criteria, and employees with at least two years' service should be eligible for retrenchment benefits. The Advisory further suggests a scale of between two weeks' and one month's pay per year of service, with employees with less than two years' service granted at least an *ex gratia* payment. Employers are also urged to help affected employees look for alternative jobs.

Apart from this Tripartite Advisory, there are no other rules mandating the provision of retrenchment benefits. While Part IV of the Employment Act provides that an employee covered by Part IV is not entitled to retrenchment benefits unless the employee has been in continuous service with an employer for two years or more, it does not automatically entitle the employee to any retrenchment benefit or severance payment in the absence of an express contractual provision or collective agreement.

That being said (and as discussed in Section II.ii), given the high-profile retrenchment exercises that have taken place in 2019 and given how employee unions have played an active role in negotiating for retrenchment benefits (with negative publicity often following if the employer fails to abide by the Tripartite Advisory), employers in Singapore intending to

conduct a retrenchment exercise ought, as a matter of prudence, to adhere to the suggested retrenchment benefits and other guidelines set out in the Tripartite Advisory, and consult the unions as soon as is practicable.

XIV TRANSFER OF BUSINESS

Section 18A of the Employment Act generally provides that where an undertaking (defined as including any trade or business) or part thereof is transferred (defined as including ‘the disposition of a business as a going concern and a transfer effected by sale, amalgamation, merger, reconstruction or operation of law’) from one entity to another, the contracts of service of the affected employees covered under the Employment Act (which will essentially be all private sector PME’s given the changes effective as of April 2019) will have effect after the transfer as if originally made between the new employer and the employee. The transfer of the undertaking does not break the continuity of the period of employment, and the terms and conditions of the relevant contract of service remain the same (i.e., a statutory novation essentially takes place). When unionised employees are affected, the old employer would also have to notify the relevant unionised employees and their trade unions so that consultations may take place.

In practice, whether Section 18A applies to the relevant transaction is not always clear. The MOM has provided some guidance in this regard, stating that a Section 18A transfer could occur if the organisation is being restructured (which can involve a merger, takeover, sale of parts of a company or setting up a subsidiary company). The MOM has also clarified which transactions are not considered Section 18A transfers, namely transfers of assets only, transfers of shares, transfers of operations outside Singapore, outsourcing of supporting functions and a takeover of the provision of services through a competitive tendering. Nevertheless (and clarity as to what exactly constitutes a transfer of an undertaking would still be helpful), as in practice, a lot of employers simply effect contractual terminations and re-hires rather than deal with the uncertainty of whether a Section 18A transfer has taken place.

XV OUTLOOK

2019 was a significant turning point in Singapore’s employment law statutory and regulatory regime. It would perhaps be timely for the judiciary to opine on how these new laws and guidelines should be treated and interpreted, and on the extent to which they are binding or persuasive in courts other than the ECT, or courts hearing appeals from ECT decisions. While it was announced in 2019 that certain decisions of the ECT would be published and made publicly available, this has yet to happen. In particular, it would be most interesting to see how the ECT has interpreted the Wrongful Dismissal Guidelines and decided on the disputes brought before it (and the appropriate levels of compensation) as that would help provide some guidance and jurisprudence on the new regime, which is presently lacking. Guidance from the Court of Appeal on whether the *Stratech* principle in restrictive covenants (discussed in Sections III.ii and V.ii) continues to apply would also be very useful, not least given the conflicting cases emerging in 2019 from the High Court. It is hoped that clarity on all these points will emerge in 2020.

As the global economy also begins to slow, one can also expect there to be more retrenchment exercises. It should equally be anticipated that trade unions will become increasingly active in an effort to safeguard the interests of their employee members (especially in large-scale and high-profile retrenchments).

Measures specifically directed at concerns regarding protection and rights for gig economy workers and freelancers, an ever-expanding group of workers in Singapore who are not presently considered employees and have no specific statutory work rights, could also be on the horizon, possibly as soon as this year.

Finally, Singapore continues not to have overarching protections for whistle-blowers (currently spread across disparate statutes, such as the Workplace Safety and Health Act), and it would be timely for Singapore to consider introducing an omnibus whistle-blowing statute, or at least clarifying and confirming whether retaliation against whistle-blowers is a ground for employees to claim wrongful dismissal. It is likewise to be hoped that 2020 provides the needed clarity on this.

SLOVENIA

Petra Smolnikar, Romana Ulčar and Tjaša Marinček¹

I INTRODUCTION

Freedom of work is ensured under Article 49 of the Constitution of the Republic of Slovenia, and is a freedom and right bestowed on all individuals. Work may be performed on various legal bases, of which the most common is the employment contract. It is concluded between employer and employee and is basis of the employment relationship, ensuring adequate legal protection. Work may also be performed under a civil law contract, but not when the conditions for conclusion of an employment law contract are met. The umbrella act regulating employment relationships in Slovenia is the Employment Relationships Act (ERA-1).² In addition to regulating the most important mutual rights and obligations between the two parties, the purpose of ERA-1 is the effective inclusion of the employee in the working process of the employer, ensuring freedom of work, the employee's personal dignity and the prevention (or reduction) of unemployment. ERA-1 is applicable both for employers with their operations or address in Slovenia, and their workforce, as well as for foreign employers and employees, provided the employment contracts was concluded in the territory of Slovenia. ERA-1 applies to employers in both the private and public sectors.

The first Employment Relationships Act was adopted in 2003 and has been amended both in accordance with European and international legal order, and a result of various factors affecting employment relationships, such as globalisation, new technology and developments on the labour market for foreigners. More recent changes were introduced under the improved ERA-1 in 2013. Other industry-specific acts have been passed during this century, such as the Health and Safety at Work Act,³ Pension and Disability Insurance Act (PDIA-2),⁴ Labour Market Regulation Act,⁵ Labour and Social Security Registers Act,⁶ Personal Data Protection Act (PDPA-1).⁷ Certain standards in related fields have changed significantly in recent years.

While ERA-1 ensures employees a minimum level of rights, in every sector or at the employer level, further rights might be granted under collective agreements, employers' internal rules or employment contracts.

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2 Official Gazette of Republic of Slovenia, No. 21/13, with amendments (*Zakon o delovnih razmerjih*).

3 Official Gazette of Republic of Slovenia, No. 43/11 (*Zakon o varnosti in zdravju pri delu*).

4 Official Gazette of Republic of Slovenia, No. 96/12, with amendments (*Zakon o pokojninskem in invalidskem zavarovanju*).

5 Official Gazette of Republic of Slovenia, No. 80/10, with amendments (*Zakon o urejanju trga dela*).

6 Official Gazette of Republic of Slovenia, No. 40/06 (*Zakon o evidencah na področju dela in socialne varnosti*).

7 Official Gazette of Republic of Slovenia, No. 94/07 (*Zakon o varstvu osebnih podatkov*).

Individual or collective disputes are resolved under the specialist Labour and Social Court. The competencies, organisation and rules of procedure are set under the Labour and Social Courts Act. There are four courts of first instance, the Higher Labour and Social Court and the Supreme Court (the latter two are located in Ljubljana). The main objective in any employment dispute is to resolve the matter expeditiously, therefore once a case relating to the existence or termination of an employment relationship has been initiated, it will be prioritised. When the law or collective agreement prescribes that there is a mandatory preliminary procedure for achieving an amicable resolution of an employment dispute, a lawsuit is only permitted if that procedure has been followed, provided there has not already been a settlement.

The key organisation for supervising the proper execution of laws, collective agreements and other acts is the Labour Inspectorate, which acts both on its own initiative and on the basis of external reports. The Inspectorate often emphasises the level of effectiveness of certain employment law provisions. Annual reports by the Inspectorate draw attention to challenges in the field of labour and employment law. This inspires domestic lawmakers to reflect on necessary changes. The Institute of Employment also has an important role, being responsible for helping unemployed workers to return to the labour market and informs workers of their rights when they become unemployed.

II YEAR IN REVIEW

Despite an economic slowdown, the current level of unemployment is 4.8 per cent.⁸ The number of people who are active in the labour market is rising, with almost 95 per cent of active working people⁹ in an employment relationship based on an employment contract, 4 per cent students and 1 per cent of people performing work on another basis (e.g., under a work contract). A work contract is a contract of civil law, whereby the contractor undertakes to carry out a specific job and the client agrees to pay him or her for it. An employee may not perform work under a work contract (or any other contract under civil law) if elements of an employment relationship exist.

A burning issue in Slovenia is non-standard forms of work (self-employment, fixed-term and part-time employment contracts, and student work). These work arrangements do not follow the standard work model and, owing to their flexibility and higher financial benefit, are attractive to both employers and certain categories of employees, in particular the younger generations. These are more often part of modern and progressive work structures. Lawmakers are aware that non-traditional forms of work may cause economic insecurity and contribute to individual poverty, therefore the employer's tax burden in practice is being increased. Slovenia is slowly adapting to more flexible systems of work but is still a long way from emulating EU pioneers in the area of progressive work arrangements.

Most violations of workers' rights observed by inspectors pertain to incorrect payments for performed work (half of all violations). Of these, the most common are untimely payment for work and failure to pay for annual leave. There is also a high number of violations relating to mandated work breaks and rest periods, and inappropriate required management of records.

8 <https://www.stat.si/StatWeb/en/News/Index/8140>.

9 Meaning those who have, in a given period performed any work for remuneration (pecuniary or non-pecuniary), for profit or family well-being.

Given the Labour Inspectorate's lack of personnel, particularly in human resources, and the high number of reports made, its ability to provide effective supervision reports is hindered. The Inspectorate has suggested that employers tend to prevent adequate oversight by inspectors, for which they should be sanctioned (but are not).

A growing trend is the use of agency workers. The Labour Inspectorate reported in 2019 that employers that are not registered as agencies are also often failing to follow correct procedures in respect of employing agency workers. This situation is a cause of concern.

Slovenia is also concerned with prosecuting employers for criminal offences that occur during the employment relationship. Both the theory and practice behind these prosecutions are being developed. Although quite a number of criminal complaints arise, few cases result in convictions.

III SIGNIFICANT CASES

In 2018, the High Court took a step away from existing court practice with its decision that a worker was entitled to her wages regardless of the fact that she did not inform her employer of her absence or of the reasons for her absence. In its decision, the Supreme Court disagreed with the High Court's 2019 decision, stressing that the obligation to pay wages is not an automatic consequence of the existence of an employment relationship between the parties, but rather represents a counter right in lieu of the performed work. Only in exceptional instances, when the law so provides, may a worker be entitled to payment during the periods when he or she is not working.

The rise of non-traditional forms of work has been reflected in recent case law. Courts have frequently engaged in solving the question of whether an employment relationship exists or not. The Supreme Court has emphasised that, when the court is establishing the existence of an employment relationship, the will of the employer is irrelevant, as it is clear that the employer may be motivated to deny the establishment of an employment relationship by concluding a civil law contract.

A fixed-term employment contract is very attractive to employers because it provides flexibility, but may be concluded only in limited cases. The Supreme Court has emphasised that in the event of a dispute on the lawfulness of a concluded fixed-term contract, the employer must prove the existence of the exact reason that was given as the basis for the fixed-term contract, and not of any other reason (even if it were a lawful basis for conclusion).

Since April 2018, workers have brought claims under the Collective Actions Act (CAA)¹⁰ in the hope of ending unlawful actions and attaining damages awards. Shortly thereafter enactment of the CAA, the first claim was raised at the Labour Court, concerning a violation of the right to breaks during working hours. The Court rejected the case, since the claims were not all based on the same, similar or related circumstances. Given that the legislation is rather new and not firmly established in practice, there is still some reluctance to raise employment claims under the CAA.

10 Official Gazette of Republic of Slovenia, No. 55/17 (*Zakon o kolektivnih tožbah*).

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under Article 11 of ERA-1, the employment relationship shall be deemed concluded with the signing of the employment contract. The contract must be concluded in written form. From this point, the worker assumes the rights and obligations codified in relevant legislation, and is registered within the social security system. Under the Prevention of Undeclared Work and Employment Act, employers are prohibited from allowing an individual to work without having executed an employment contract. The contract also provides safeguards and assistance to employees, and ensures they are aware of their rights. A worker who is performing work without an employment contract may at any time request that the employer provides him or her with a valid employment contract. A worker may also file a complaint with the competent supervisory authority against the employer or file a lawsuit at court, on the basis of illegal employment and the failure to issue an appropriate employment contract.

The key elements of a valid employment relationship are integration into an organised work process, performing the job in person and continuously, subordination (i.e., working according to the instructions, and under the supervision of the employer) and remuneration. In this context, work may not be performed on the basis of a civil law contract, except as provided for by law. In the event of a dispute about the existence of an employment relationship between a worker and an employer, the court will assess whether the aforementioned elements are present. If neither the employer nor the individual who has been working illegally prove the duration of the employment, it shall be deemed that the worker was employed illegally for a period of three months and the employer is obliged to provide a written contract within three days of the supervisory authority determining that there has been illegal employment.

An employer must provide an employee with a written proposal of the employment contract at least three days prior to commencement of employment. Once it has been negotiated and prior to commencement of work, the employee must countersign the employment contract. For any specific points on the conclusions, validity, termination or other matters concerning the employment contract that are not explicitly regulated under ERA-1, the rules of the Civil Code¹¹ will apply. If the parties did not conclude the employment contract in writing, or if not all the components of the employment contract are expressed in writing, the existence and validity of the employment contract is not affected.

The usual procedure under Slovenian legislation is for employment contracts to be for an indefinite term, provided the required conditions exist for the contract to be concluded and adopted. The ERA-1 also encourages the use of indefinite term contracts by allowing employers not to pay social security contributions due for unemployment during the first two years of such a contract with an insured person (as referred to in the first, second, third and fourth paragraphs of Article 14 of PDIA-2) who has not reached the age of 26, and mothers who are caring for a child under the age of three. The employer is eligible for this benefit only if it is the employee's first employment for an indefinite period and provided that the employee remains employed for at least two years.

11 Official Gazette of Republic of Slovenia, No. 97/07 (*Obligacijski Zakonik*).

Fixed-term employment contracts may be concluded as an exception, subject to certain restrictions. Nevertheless, Article 54 of ERA-1 provides for numerous instances under which an employer may conclude a fixed-term employment contract with a worker:

- a* the performance of work that, by its nature, lasts only a limited amount of time;
- b* substitution of a temporarily absent worker;
- c* a temporary increase in workload;
- d* employment of a foreigner or stateless person, who has a single permit or a seasonal work permit;
- e* employment of a manager or a procurator;
- f* employment of an executive worker, as described in the first paragraph of Article 74 of ERA-1;
- g* performing seasonal work;
- h* employment for the purpose of preparation, training or education for work;
- i* employment during a period of adjustment on the basis of a final decision and a certificate from the competent authority, issued during the process of recognition of qualifications under a special law;¹²
- j* performing public works;
- k* preparation or execution of work that is organised as part of a project;
- l* work as required at the time of the introduction of new programmes, new technology or other technological improvements to the work process or for the training of workers;
- m* during a handover period;
- n* elected and appointed officials, or their employees, who are bound by the terms of an office of an authority, or an official in a local community, political party, trade union, chambers, association or its unions; and
- o* other cases as provided by the law or collective agreement at branch level, as defined by the Standard Classification of Activities.¹³

Employers may not conclude a fixed-term employment contract for the same work with the same worker for a continuous term of more than two years. In practice, it is common for employers to circumvent this rule by repeatedly employing workers for short periods (e.g., six months) until the two years have been reached. Employers will also reclassify a job after the two years, to obscure the fact that the work being performed is the same. If a worker continues doing the same work after the fixed term lapses, it shall be deemed that the worker has concluded an unlimited term employment contract (and thus a ‘transformation’ of the employment contract has occurred). Severance payments should be payable after the lapse of the fixed-term period, with some exceptions.

An employment contract must always include the following information about the contracting parties:

- a* the place of residence of the worker and the registered office of the employer;
- b* the date of commencement of work;

12 ERA-1 refers to the specific law regulating the acknowledgement of qualifications for the performance of regulated professions. This relates to citizens of the EU Member States or EEA Member States, who exercise their right to move freely within the European Union for the purpose of employment.

13 The Standard Classification of Activities is the obligatory national standard used for defining the main activity and for classifying business entities and their units for official and other administrative data collection (registers, records, databases, etc.) and for national and international statistics and analyses.

- c* the job title or the type of work, with a short description of the tasks the worker is obliged to perform;
- d* the place of work;
- e* the period for which the employment contract is concluded;
- f* the reason for the conclusion of a fixed-term employment contract;
- g* provisions on the manner of taking an annual leave;
- h* if a fixed-term employment contract is concluded, a statement as to whether it is a full-time or part-time employment contract;
- i* working time arrangements;
- j* a provision of the basic salary and other components of the salary;
- k* provision for annual leave;
- l* lengths of requisite notice periods;
- m* reference to any collective agreements that bind the employer; and
- n* other rights and obligations, as provided by ERA-1.

Either party to an employment contract may propose a change, at any time; however, both parties must agree to the changes. The employment contract is amended by signing an annex to the contract or by concluding a new employment contract; in certain instances, the latter is mandatory.

ii Probationary periods

As part of the employment contract, the employer and the worker may agree on a probationary period, which may last no longer than six months. If the employer determines during the probationary period that the worker did not perform sufficiently and therefore did not complete the probationary period successfully, the employer may lawfully terminate the worker's employment contract, subject to giving seven days' notice. The employer may also terminate the contract during the probationary period if it is determined, based on the work performed, that the probationary period will not be successful, subject to the employer providing valid and substantiated reasons for the termination. During a probationary period, an employer may, in principle, terminate a worker's employment contract if other reasons exist (such as breach of a contractual obligation or other employment obligation).

iii Establishing a presence

Pursuant to general rules of European law and Slovenian commercial and company law, the pursuit of economic activity in the territory of Slovenia may require the establishment of a subsidiary or a branch office. Under Article 57 of the Treaty on the Functioning of the European Union (TFEU), it is possible for a person to temporarily pursue its business in the Member State without having to establish a subsidiary or a branch office. The Court of the European Union held in the *Gebhard* case that a temporary exercise of business is to be established case by case based on the duration, frequency, regularity and continuity of the provision of service. Accordingly, if the exercise of business activities is deemed to have been temporary, the establishment of a subsidiary or a branch office would not be required. The freedom of provision of services is also established under the Slovenian Act on Services in the Internal Market.¹⁴ Under the Companies Act,¹⁵ commercial activities in the territory

14 Official Gazette of the Republic of Slovenia, No. 21/10 (*Zakon o storitvah na notranjem trgu*).

15 Official Gazette of the Republic of Slovenia, No. 65/09, with amendments (*Zakon o gospodarskih družbah*).

of Slovenia may be exercised either through an incorporated company (Articles 3 and 6) or through a registered branch office (Article 676). The establishment of a subsidiary or a branch office in Slovenia for business would, in principle, not be required if the business conduct could be deemed temporary. Slovenian legislation does not contain conclusive rules that would define exactly what constitutes a temporary provision of services. Therefore, each case must be assessed, considering the duration, frequency, regularity and continuity of the provision of service, to determine whether the establishment of a subsidiary or a branch office is required. Further, tax legislation provides specific rules and practices when a permanent establishment is deemed to exist.

A foreign employer may hire workers through an agency and a foreign employer may provide workers to the user, subject to local laws.

A foreign company that is not officially registered in Slovenia's jurisdiction may engage an independent contractor but, as mentioned above, if the elements of establishment have been met and the employment relationship exists, then the company must undertake the requisite procedures.

V RESTRICTIVE COVENANTS

The prohibition on competition is defined in Article 39 of ERA-1 as a legal prohibition of a competitive activity. While employed, a worker may not, without the written consent of the employer, perform business that is within the type of activity that is actually carried out by the employer, and which constitutes or could constitute competition in relation to the employer's activity. The employer may claim compensation damages within three months of the day it learned of the worker's behaviour or within three years of completion of the job.

Nevertheless, Slovenian legislation provides a competition clause to be included in the employment contract. This is a contractual prohibition, applicable after the cessation of the employment relationship, of any competitive activity, used in any instance, if the worker acquired technical, production or business knowledge and business connections while employed, and uses the skills or connections when he or she is no longer working for the employer. The parties must agree to the terms of the competition clause expressly and in writing. The competition clause cannot be binding for more than two years after the cessation of the employment contract and may be concluded only after termination of a employment contract for the following reasons:

- a* by agreement between the parties;
- b* lawful dismissal by the employer;
- c* lawful dismissal of the worker for a reason of culpability (i.e., breach of contractual obligation or other employment obligation); or
- d* termination of the employment contract by the employer for an exceptional reason.

The clause should not exclude the possibility of the worker engaging in suitable future employment. If compliance with the competition clause precludes the acquisition of earnings comparable to the worker's previous salary, the employer must pay at least one-third of the previous monthly compensation for the entire duration of the prohibition. The worker and the employer may agree by mutual agreement to terminate the competition clause.

VI WAGES

i Working time

Full-time employment should not exceed 40 hours per week. Overtime may not exceed eight hours per week, 20 hours per month or 170 hours per year. However, with the worker's consent, overtime may exceed the annual time limit, but must not be more than 230 hours per year). At any time the employer orders overtime work that exceeds the limit of 170 hours per year, the employer must obtain the worker's written consent. The working day can last up to 10 hours. The daily, weekly and monthly time limits may be considered as an average limit over a period, specified under the law or a collective agreement (normally six to 12 months). The worker is entitled, within a period of 24 hours, to a rest period, which lasts continuously for at least 12 hours. In addition to this right to daily rest, the worker is also entitled to a break of at least 24 continuous hours during a working period of seven consecutive days.

Night work is considered to be work carried out between 11pm and 6am the following day. If the working hours are determined as being during the night, eight hours of continuous work between 10pm and 7am the following day shall be considered night work. The working time of a night worker may not exceed an average of more than eight hours per day over a four-month period, and the working hours of a night worker who works in a place where there is a greater danger of injury or risk to health, as established by a risk assessment, shall not exceed eight hours per day.

ii Overtime

A worker is entitled to remuneration for work done both during regular hours and as overtime. Article 128 of ERA-1 states that workers are entitled to allowances for work in special working conditions, arising from the allocation of working time as overtime. It also states that the amount of the allowances shall be determined by a collective agreement at branch level, as defined by the Standard Classification of Activities. In recent rulings, the Supreme Court has firmly upheld the position of the European Committee on Social Rights in relation to Part II, Article 4 of the European Social Charter, asserting that overtime pay should always be higher than pay for regular work, since it has required more effort.¹⁶ However, another suitable compensation for hours worked as overtime is time off work, provided the employer also pays an appropriate additional allowance. The Supreme Court also ruled that workers are entitled to an overtime bonus for all additional overtime hours, even if the number of overtime hours worked is more than is permitted by the law.¹⁷

The limits to the amount of overtime that may normally be performed in a given period are stated in Section VI.i.

16 Supreme Court of the Republic of Slovenia, Labour and Social Department (2015), VSRS Judgment VIII Ips 80/2015 of 12 May 2015.

17 Supreme Court of the Republic of Slovenia, Labour and Social Department (2012), VSRS Judgment and Conclusion VIII Ips 111/2012 of 18 September 2012.

VII FOREIGN WORKERS

According to the Statistical Offices of Slovenia (SURS), foreigners made up 10 per cent of the working population in Slovenia in 2018. The number in 2019, according to SURS, was expected to increase by as much as 22 per cent.¹⁸ A majority of foreign workers come from the republics of the former Yugoslavia (mostly from Bosnia and Herzegovina, Croatia, Kosovo and Northern Macedonia). The growth of foreign workers is in part a result of Slovenia's economic growth but also of the Employment, Self-employment and Work of Foreigners Act,¹⁹ adopted in 2015. This Act provided workers with favourable solutions and simplified the process for obtaining work permits.

The motivation for adopting the aforementioned law were the inadequate regulation of foreign work permits, which had led to significant violations of workers' rights and the exploitation of workers, and the obligation to codify Directive 2011/98/EU of the European Parliament and of the Council²⁰ into national law. Slovenia has engaged in several bilateral agreements with the countries from which most foreigners workers originate (e.g., The Agreement between the Government of the Republic of Slovenia and the Council of Ministers of Bosnia and Herzegovina on the employment of the citizens of Bosnia and Herzegovina in the Republic of Slovenia, which was ratified by law in 2012), which brings additional legal security to the workers.

In accordance with the Employment, Self-employment and Work of Foreigners Act, a foreigner is a person who does not have citizenship in Slovenia. The law applies to all foreigners, with the exception of certain groups of persons (such as foreign journalists, priests, diplomats, lecturers and athletes). Slovenia, as an EU Member State, is also bound by the EU's legal rules and principles. One of the fundamental principles and values of the European Union is the free movement of workers (Article 45 of the TFEU), which, in relation to employment, remuneration and other working and employment conditions, prohibits distinction and discrimination on the grounds of the nationality of workers from EU Member States. Citizens of Norway, Liechtenstein, Iceland and Switzerland are also entitled to the free movement of workers owing to binding international agreements with Slovenia.

A single permit allows a foreigner to enter, reside and work in the country, and is issued by the administration units (which are set up to perform state administration tasks) for a period of one year, with a possibility of extension. Consent to the issuance must be given by the Employment Service of Slovenia. The permit gives the foreigner access to the labour market – on the basis of which the foreigner may perform work under civil law contracts, get a job with any employer, or several employers, or be self-employed. A single permit does not provide for a foreign worker to perform work as a posted worker for an employer that is established or resident outside Slovenia.

A single permit, issued on the basis of consent for employment being granted, is tied to the actual need of the employer. For this reason, the employer has to participate in the process of granting consent. One of the conditions for issuance is an employment contract, concluded with the employer, in accordance with ERA-1. A foreigner, who has concluded an employment contract in accordance with ERA-1, has the same rights and obligations

18 <https://www.stat.si/statweb>.

19 Official Gazette of the Republic of Slovenia, No. 47/15 (*Zakon o zaposlovanju, samozaposlovanju in delu tujcev*).

20 Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

as citizens of Slovenia. It is important to take this into account for provisions regarding salary, rest, working time and security and health at work, since the majority of violations and abuses that arise in these areas. Once a single permit has been issued, the foreigner may be employed only by an employer who has participated in the process of issuing the single permit, since it is the employer who is required, in accordance with the law, to meet the terms for the foreigner's employment.

In accordance with the Employment, Self-employment and Work of Foreigners Act, the employer is required to fulfil several conditions for a foreigner's employment, including, among other things, ensuring that there are no other suitable unemployed persons on the register of unemployed persons (the employer must obtain written notification from the Employment Service of Slovenia). The employer must also be operating an active business, must not be in a bankruptcy proceeding, or in liquidation. The employer is obliged to register the foreigner in the company schemes for compulsory pension and disability insurance, compulsory health insurance, parental care and unemployment insurance, so that, upon registration of the foreigner, he or she has the same rights as the citizens of Slovenia.

There is no limit on the number of employees or foreign workers an individual employer may employ. The number of foreigners in the labour market can be limited each year by the government with a quota of consents for issuing single permits, or with a quota of permits for seasonal work, taking into account the actual needs of the labour market. In addition to quotas, the government may restrict or prohibit the employment, work or self-employment of foreigners by region, occupation, activity or company. The government may, when it is justified by a public policy, public security, public health, general economic interest and foreseeable movements on the labour market, restrict or prohibit the arrival of new foreigners intending to seek employment or work in Slovenia as a whole or in certain regional areas.

Employers are required by the Labour and Social Security Registers Act to keep records of all workers, and they must, at the request of the competent authority, provide the necessary information.

VIII GLOBAL POLICIES

A worker's obligations relating to the performance of work are set forth in ERA-1 (such as performing work according to the instructions of the employer, compliance with the rules on safety and health at work, and the obligation to inform about any essential circumstances), and the worker and the employer regulate their relationship with an employment contract. The worker undertakes to perform the work in accordance with the instructions and under the supervision of the employer. For a more efficient, uniform and coherent operation (and consequently, uniform instructions and supervision of all workers), the employer can adopt internal regulations and rules relating to works processes, relationships with the employer, and help to clearly define the rights and obligations of both workers and employers. In an internal ruling, a worker's rights and obligations can only be regulated more favourably than foreseen by the law or a collective agreement, if any exists.

If a worker's behaviour or conduct is contrary to the general requirements of the employer or other regulations, he or she violates the obligations arising from the employment relationship. With the disciplinary responsibility of the worker so established, the employer may issue a warning note or other sanctions, as provided in a collective agreement at the branch level, as defined by the Standard Classification of Activities.

The employer must inform the worker of the alleged violations and allow him or her to make a statement within a reasonable time. However, ERA-1 stipulates that a disciplinary sanction may not permanently change a worker's position from the perspective of labour law. A trade union, the works council or workers' representative may participate in any disciplinary procedure (the latter being applicable, for example, if a worker is not a member of a trade union), but only with the worker's consent. The decision resulting from the disciplinary procedure has to be written, explained and delivered to the person to whom it applies. The employer must reach a decision within a relatively short time – the subjective deadline is one month from the day the employer found out about the violation and the objective deadline is three months from the day the violation occurred.

ERA-1 is the principle applicable law, supplemented by various regulations, from which the obligations of employers to adopt several different internal rules or regulations derive. The obligations and content of these depend mostly on the activity in which the employer and the size of the organisation.

IX PARENTAL LEAVE

In general, there are three types of leave to which parents, and other persons who are insured, are entitled under the Parental Protection and Family Benefits Act (PPFBA-1):²¹ maternity leave, paternity leave and parental leave. Employers are obliged to provide workers with leave from work in accordance with the law. The right to compensation is granted to those who have the right to take leave and who have been insured under the PPFBA-1 the day before the start of each type of leave. During maternity leave, an insured person is entitled to maternity allowance, during a period of paternity leave of 30 days to paternity allowance, and during parental leave the right to parental allowance. The leave benefit is paid by the state.

To be entitled to the relevant leave, the worker must inform the employer of the intention to take the leave 30 days in advance.

A mother is entitled to maternity leave of 105 days but is obliged to take 15 days of maternity leave. An expectant mother should start maternity leave 28 days prior to the scheduled date of delivery. If this maternity leave is not taken, it cannot be used after the birth of a child, unless the birth occurred before the scheduled date. A father is entitled to maternity leave if the mother (1) dies, (2) leaves the child or (3) is permanently or temporarily incapable, in the opinion of a specialist doctor, of the care of the child. A father is entitled to maternity leave to the same extent as the mother, reduced by the number of days that the mother has already taken, but for not less than 28 days.

A father is entitled to 30 days' paternity leave after the birth of a child or children. This right is non-transferable. A father shall take at least 15 days of this entitlement at one time, as either full or partial absence from work, between the date of birth of the child and one month after expiry of the period of parental leave being taken, or from the entitlement to parental allowance for that child.

Each parent is entitled to parental leave for 130 days. Of this, a mother can transfer 100 days of parental leave to the father; the other 30 days are non-transferable. A father may transfer all 130 days of his parental leave to the mother. One of the parents must use the

21 Official Gazette of Republic of Slovenia, No. 64/18 (*Zakon o starševskem varstvu in družinskih prejemkih*).

parental immediately after the maternity leave has expired. If no one is entitled to maternity leave for the child, the right to parental leave shall be recognised immediately after the child is 77 days old.

Workers on parental leave are protected from dismissal by Article 115 of ERA-1. The Article states that an employer may not terminate the employment contract of a worker during pregnancy or who is breastfeeding a child up to one year of age, or parents, at the time they take parental leave in a concise series in the form of full absence from work, and for one month after using this leave. In practice, the prohibition from dismissal applies also to workers on paternity leave, albeit the law uses the term 'parental leave'.

X TRANSLATION

According to the rules of the Act on the use of the Slovenian language, in the territory of the Slovenia, Slovenian must be used by all legal and physical entities that perform a registered activity in the country, in all communications with clients in Slovenia. This said, although employment contracts must be concluded in Slovenian, a bilingual format is permitted. It is the obligation of the employer to determine, for each working post, the adequate level of Slovenian that is required for that particular working post, given the nature and frequency of that working post when it comes to communication with clients, and to set the level of knowledge of Slovenian when posting job vacancies, if workers engaged for the post are required to interact with clients.

XI EMPLOYEE REPRESENTATION

Workers' participation in management is a constitutionally protected right in Slovenia, regulated under Article 75 of the Constitution. The Constitution further authorises the legislature to regulate in more detail the methods and conditions for exercising the right to co-decision. The Act that regulates these matters in more detail is the Worker Participation and Management Act (WPMA),²² adopted for the first time in 1993. The WPMA sets out the methods and conditions for employee participation in corporate governance (regardless of the form of property), sole proprietorships with at least 50 workers and cooperatives. This transposes the requirements of European law into national law. Unless otherwise provided in a special law, workers in public utilities, banks and insurance companies shall also have the right to participate in management.

The purpose of employees' participation is the identification and implementation of activities aimed at improving working conditions and, consequently, the successful operation of company business. Workers' participation in management is exercised by the right to initiative and the right to respond, the right to be informed, the right to give opinions and proposals, the possibility or obligation of joint consultations with the employer, the right to participate and the right to withhold employer decisions. An emphasis is also placed on the impact of the content and organisation of work, on activities aimed at improving the working environment and conditions, and humanising the company.

Employees may exercise the rights under this Act both individually and collectively – through a workers' council or a workers' representative, a workers' assembly or other

22 Official Gazette of Republic of Slovenia, No. 42/07 (*Zakon o sodelovanju delavcev pri upravljanju*).

representatives within the organisation. An individual employee may refuse to exercise the right to vote and cannot be forced to do so. These rights are supported by case law: for example, if a voter does not want to vote, it is their right not to.²³

The WPMA also mentions the possibility of a workers' council and an employer reaching an agreement regarding other ways in which workers may participate in the management of the company.

A workers' council may be formed if the company employs more than 20 employees with an active right to vote. In companies with fewer than 20 employees with an active right to vote, employees may instead exercise their rights through a workers' representative. The active voting right applies to all who have been employed by the employer for a continuous period of at least six months. Managers, procurators (leading employees) and family members of management staff are not entitled to vote.

The number of council members depends on the total number of employees in the company.

Every employee who has the right to vote and who has been employed by the company for at least 12 months continuously, has the right to be elected to the workers' council (passive voting right). The members of the council are elected by secret and direct ballot. Every employee holds one vote and can vote personally. The decision to call the elections must be published in a way that is accessible to all employees. The WPMA specifies the details of the election process and the initiation of newly elected members. Elections are valid if attended by more than half of the members with an active right to vote. If only half, or fewer than half, have participated, the elections shall be held again, but only after six months have passed.

The term of office of workers' council members is four years with the possibility of re-election. The council will usually meet during working hours, with due respect of working processes and needs. A company is obliged to provide members of its workers' council the right to five paid hours per month for participation at these sessions. Moreover, the employer has to cover necessary expenses for the work of the workers' council, the expenses of the premises required, the cost of material resources and administrative staff.

In companies with between 50 and 300 employees, some members of the workers' council may perform their function within part-time hours; in larger companies (with more than 300 employees), members can be appointed to perform the function professionally.

Employee participation in management within company bodies is realised through employee representatives within company management and control bodies. In a two-tier system of management, participation is exercised through employees' representatives on the company's supervisory board or the supervisory board of the cooperative, or through the workers' representative board of directors of the company or of the cooperative. In a one-tier management system, employee participation in management is exercised through employee representatives on the board of directors and on the committees of the board of directors, but also through a workers' representative within the executive directors of the company or cooperative.

Trade union freedom stems from the fundamental human right to associate. Article 76 of the Constitution stipulates that workers are free to form and operate trade unions and to be member thereof. That being said, it is possible to refer to organisational freedom, in respect of the rights of both employees and employers to establish and join their own organisations, with

23 Higher Labour and Social Court of the Republic of Slovenia (2011), VDSS Judgement Pdp 188/2011 of 24 February 2006.

a prohibition on conditionality. Another aspect is the freedom of action in rights regarding the functioning of organisations (such as adopting internal policies, collective bargaining, election of representatives). Protection of trade union freedom against interference by the state and other social partners is afforded by the Trade Union Representatives Act,²⁴ which determines matters regarding status. Important legal issues regarding the functioning of trade unions are already determined by ERA-1, including certain obligations of the employer towards trade unions, written notifications to trade unions, the position of trade union representatives, the protection of trade union representatives, and so on. Of particular importance is the provision of Article 6 of ERA-1 on the prohibition of discrimination, with reference to the prohibition of discrimination on grounds of union membership. In addition, the role of a trade union is important in the adoption of the general legal regulations of the employer, as the employer must send them to the trade unions for an opinion before adoption. A trade union may also be included in the procedure of a proposed lawful or exceptional termination of an individual employment contract or in the event of a mass lay-off.

Unlike a workers' council, which, in cooperation with employers, aims to improve the company's business performance by improving working conditions, the aim of the activities of a trade union is protecting the rights and interests of all workers with a given employer.

Workers' representative (including trade union representatives, members of workers' councils, workers' representatives or members of a supervisory board representing workers) are protected from termination of their employment contract. An employer cannot terminate an employment contract with a worker's representative without the consent of (1) the workers' council, (2) the workers who elected the representative or (3) the trade union, provided the representative complies with the law, the collective agreement and the employment contract. An employer may terminate the employment contract of an employee who is a workers' representative only for a business reason, that is to say, if the representative refuses an offer of suitable employment with the employer or if the employment contract is terminated during the process of winding up of the employer.

The aim of providing protection against dismissal is to achieve a higher quality of performance during the workers' representative's term of office and applies for the entire duration of the term of office and for a year after cessation of that term.

XII DATA PROTECTION

Data protection is regulated under PDPA-1, which was adopted in 2004. Since the enactment of the EU General Data Protection Regulation in May 2018, despite the efforts of lawmakers, Slovenia has not adopted a new and revised PDPA-2, which will harmonise its provisions with the EU Regulation. However, it is expected to be adopted in 2020.

According to PDPA-1, the processing of personal data represents any form of activity conducted in relation to personal data, in particular the collection, acquiring, entry, managing, saving, adapting, changing, recollection, insight into, use, disclosure with transfer, communication of, spreading, giving for disposal, classification, connecting, blocking, anonymising, deletion or destruction.

Personal data may be processed only if permitted by the law, or if the individual concerned has given personal consent. The purpose of processing must be determined in the law, or the individual must be informed of the purpose of the processing beforehand.

24 Official Gazette of Republic of Slovenia, No. 13/93 (*Zakon o reprezentativnosti sindikatov*).

Under PDPA-1, the term sensitive personal data covers data relating to racial, national or ethnic origin, political, religious or philosophical beliefs, trade union membership, health, sex life, entry or deletion from criminal records, and biometric features, subject to the condition that its use could identify the individual in connection with any of the aforementioned circumstances. Personal data may be processed, among other things, (1) if the individual has personally given explicit consent, which is normally in writing, or (2) if the processing is necessary for establishing compliance with the obligations and specific rights of the data controller of personal data in the field of employment in accordance with the law, which also provides adequate guarantees of individual rights. Sensitive data must be specifically designated as such and unauthorised persons should be restricted from being able to access it. During the transfer of sensitive personal data via telecommunications networks, the data is considered adequately protected if transmitted through the use of cryptographic methods and electronic signature to ensure illegibility or lack of recognition during transmission.

The employer may request from the candidate that he or she submits proof of fulfilling conditions for the performance of work. It is prohibited to request information regarding family status, marital status, pregnancy, planning of family, and other similar data, if the information is not directly necessary or in connection with the employment relationship.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Article 89 of ERA-1 states that an employer may terminate a worker's employment contract only if there is a valid reason that prevents the continuation of work under the conditions set under the employment contract. The law considers the following reasons as valid:

- a* there is no longer a need to perform a particular job under the terms of an employment contract, because of economic, organisational, technological, structural or similar reasons on the employer's side (business reason);
- b* failure to achieve the expected work results, because the worker does not perform the work on time, professionally and qualitatively, does not fulfil the conditions for performing the work, determined by the law and other regulations, issued on the grounds of the law, which results in the worker not fulfilling, or being unable to fulfil, contractual or other obligations in the work relationship (reason of incompetence);
- c* breach of a contractual obligation or other employment obligation;
- d* inability to perform work under the terms of the employment contract because of a disability, in accordance with the regulations governing the pension and disability insurance, or the regulations governing employment rehabilitation and employment of persons with disabilities; or
- e* not successfully completing probationary work.

The ERA-1 explicitly provides for unjustified reasons of termination, under Article 90. In a case of unlawful termination, the employee may request at the labour court an acknowledgement of the illegality of the termination of contract within 30 days of being served the termination, or from the day he or she learned of the violation of the respective rights.

If so requested by an employee, an employer must notify the trade union of which the worker is a member, of the intended lawful or exceptional termination of the employment

contract, when the procedure is initiated. If the worker is not a member of a union, at the request of the employee, the employer must inform thereon the work's council or the workers' representative.

If an employer terminates an employment contract for a business or incompetence reason, the employer may simultaneously offer the employee the conclusion of a new employment contract. If the employee accepts the employer's offer, he or she must conclude a new employment contract within 15 days of receiving the written offer. In the event that a new, suitable, permanent employment contract is offered to the employee, he or she is not entitled to severance pay. It is deemed that suitable employment is that which requires the same type and level of education as the worker needed to perform the work for which the previous employment contract was held, and for the same working hours as previously agreed. Further, the place of work must not be more than three hours' drive in either direction by public transport or by transport organised by the employer from the place of residence of the employee. If the employee does not accept the employer's offer to conclude a new employment contract for a suitable employment and for an indefinite period of time, he or she shall not be entitled to a severance pay. In the event that an employee accepts an unsuitable new post, he or she is entitled to a proportionate part of the severance pay as agreed with the employer.

In the event of termination of an employment contract during a probationary period by either the worker or the employer, owing to a failure to successfully complete the probationary work, the notice period is seven days.

The notice period for a lawful termination of an employment contract by the employer for a business or incapability reason depends on the length of service with the employer:

- a* up to one year of employment with the employer: 15 days;
- b* one to two years of employment with the employer: 30 days;
- c* more than two years of employment with the employer: 30 days. Thereafter, the notice period increases by two days for each completed year of employment with the employer, up to a maximum of 60 days; or
- d* more than 25 years of employment with the employer: 80 days, unless a collective agreement sets a different notice period, but not fewer than 60 days.

If an employment contract is terminated by the employer for breach of a contractual obligation or other employment obligation, the notice period is 15 days.

When an employer is undergoing bankruptcy proceedings, the insolvency administrator may, subject to a 15-day notice period, terminate the employment contracts of those whose work has become unnecessary as a result of the initiation of bankruptcy proceedings or forced liquidation with the employer. In the case of a court-approved compulsory settlement, the employer may terminate the employment contracts with workers, subject to giving 30 days' notice, if the terminations are provided for as a specific measure in the financial restructuring plan.

The employee and the employer may agree in writing on an appropriate cash benefit in lieu of part or all of the notice period.

There are specific legal protections against dismissal of certain categories of workers, namely workers' representatives, workers who are due to retire, parents, people with disabilities and those who are absent from work through illness.

Article 108 of ERA-1 states that an employer who terminates an employment contract for business or incompetence reasons is obliged to give the worker a severance payment.

The basis for calculating the severance payment is the average monthly wage received by the worker in the three months prior to termination of the contract, or would have received if he or she had worked during those three months.

If the reason for termination of the employment contract is the unsuccessful completion of probationary work, the employee is entitled to severance pay on the same basis as a lawful termination for business reasons.

If the termination of an employment contract is for an exceptional reason at the behest of the employer, the worker is entitled to severance pay, which is determined as for a lawful termination for a business reason, and to compensation of at least the amount of pay due for the length of the notice period.

A worker is entitled to severance pay if his or her fixed-term employment contract is terminated without notice at the end of the period for which the contract was concluded, or when the agreed work is completed, or if the reason for which the contract was concluded no longer applies. A worker is not entitled to severance pay in the event of termination of a fixed-term employment contract that is concluded for the following reasons: (1) replacement of a temporarily absent worker; (2) seasonal work lasting less than three months in a calendar year; (3) performance of a public service; or (4) for inclusion in active employment policy measures in accordance with the law.

If on terminating an employment contract for a business or incompetence reason an employer offers the worker a new, unsuitable employment contract, and the worker accepts, he or she is entitled to a proportionate part of the severance pay to the extent agreed with the employer.

Workers whose contract of employment is terminated during bankruptcy, compulsory winding-up proceedings or in the event of a compulsory settlement are entitled to severance pay.

Unless otherwise stipulated by a collective agreement at branch level, an employer is obliged to give a severance payment at the termination of the contract of employment to a worker who has been employed by the employer for at least five years and is retiring, at the rate of two average monthly salaries in Slovenia for the previous three months or at the rate of two average monthly salaries received by the worker in question during the previous three months, whichever is the more favourable to the worker.

The employment contract may be terminated by a written agreement between the contracting parties. In such an instance, the employer must explain in writing to the worker that if he or she signs the agreement as a way of terminating the employment contract, he or she will not be entitled to unemployment insurance benefits. No severance is prescribed by law.

ii Redundancies

When considering mass redundancies, an employer must create a proposal stating the criteria for determining the redundancies. In coordination with the union, the employer may, instead of the criteria in a collective agreement, formulate its own criteria. In any event, the following factors shall be taken into account: the professional training or qualifications needed for the work and any necessary additional knowledge and abilities; work experience; work performance; years of service; state of health; social status; and whether the employee is a parent of three or more minor children or the sole breadwinner of a family with minor children. In determining the workers whose work becomes unnecessary, those who have a disadvantaged social status shall be given priority over the same criteria to retain employment.

When a large number of workers are to have their contracts terminated for business reasons, the employer has an obligation to inform and consult the trade union, to inform the Employment Service and to formulate a programme for dismissing redundant workers. Those obligations apply when, for business reasons, work will become unnecessary during a period of 30 days for (1) at least 10 workers where between 20 and 100 workers are employed, (2) at least 10 per cent of workers where between 100 and 300 workers are employed, or (3) at least 30 workers where 300 or more workers are employed.

The notice period shall be 15 days for those who have been employed with the employer for up to one year and 30 days for those who have been employed with the employer for between one and two years. The worker and the employer can agree on an appropriate cash reimbursement instead of working part or all of the notice period; this agreement must be in writing.

The employer is not obliged to offer suitable alternative employment but the option to do so exists. If the employer terminates an employment contract for business or incapability reasons and at the same time offers the worker the option to conclude a new employment contract and the worker accepts the offer, the employer must conclude the new employment contract within 15 days of the offer being accepted.

XIV TRANSFER OF BUSINESS

Article 75 of ERA-1 states that if a legal transfer of a company, or part of a company, carried out according to a law, another regulation, a legal transaction or a final court decision, or as a result of a merger or division that results in a change of employer, the contractual and other rights and obligations arising from the employment relationships, to which the workers were entitled on the day of the transfer, are transferred from the transferor to the transferee. The transferee must guarantee any rights and obligations arising from a collective agreement, as agreed to by the transferor, for at least one year.

The transferee employer automatically enters into a contractual relationship with the employee, thus resulting in automatic transfer of employment.

If a worker refuses to transfer and perform the work for the transferee, the employment contract of the worker may be exceptionally terminated.

In many of their rulings, Slovenian courts refer to EU case law when ascertaining the criteria to be addressed to evaluate whether a legal transfer or transfer of an economic unit takes place:

- a* the type of business or undertaking (or its part) involved;
- b* whether tangible assets and (im)movable property are to be transferred or involved;
- c* the value of intangible assets;
- d* whether customers are transferred;
- e* the degree of similarity of business activities before and after the transfer;
- f* whether the business activities continue and are unaffected;
- g* whether the clients and potential clients are the same;
- h* the transfer of contracts;
- i* whether the orders are the same;
- j* whether stocks are taken over; and
- k* whether a majority of employees are transferred.

XV OUTLOOK

In the coming year, as the economy cools, the unemployment rate is set to rise and many interesting matters of employment law will be raised that concern both the courts and other entities involved.

At the beginning of 2021, we expect the adoption of PDPA-2, which will be in line with European data protection legislation.

We expect that issues relating to the rise of non-standard forms of work will continue to be topical. Nevertheless, we are optimistic that the legal culture of both employees and employers will also improve in this area.

SOUTH AFRICA

Stuart Harrison, Brian Patterson and Zahida Ebrahim¹

I INTRODUCTION

South Africa's Constitution² entrenches fundamental rights and contains several provisions that are relevant to employment and labour, which confer upon everyone the right to fair labour practices, provide for freedom of association for workers and employers, and the right to participate freely in the activities of a trade union or employers' organisation. Trade unions and employers' organisations have the right to form and join federations and to engage in collective bargaining. The Constitution provides for the enactment of national legislation to, *inter alia*, regulate collective bargaining, and the legislation so enacted is the Labour Relations Act No. 66 of 1995 (LRA).

The LRA also provides for resolution of labour disputes through, *inter alia*, the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA), industry bargaining councils, the labour courts and the Labour Appeal Court (LAC), which is, in principle at least, the final court of appeal for labour matters. However, when a dispute involves a constitutional issue, or the Constitutional Court (CC) is of the view that a matter raises an arguable point of law of general public importance that ought to be considered by that court, it is still possible to take the matter to the CC. Employees can also enforce contractual employment rights in the normal civil courts.

The LRA provides protection for employees against unfair dismissal and unfair labour practices, with further guidelines supplied in codes of good practice. The LRA extensively regulates dismissals on the basis of the operational requirements of the employer (retrenchments), and the rights of employees and the obligations of employers in the context of the transfer of a business (or part of a business) as a going concern.

Minimum conditions of employment are regulated by the Basic Conditions of Employment Act No. 75 of 1997 (BCEA). The BCEA applies to all employers and employees except 'soldiers and spies' and unpaid volunteers working for charity. The BCEA regulates working time, leave, particulars of employment and the keeping of records regarding remuneration, termination of employment (notice and severance pay), and the prohibition of child and forced labour. It provides for basic conditions to be varied in different ways. For example, a particular sector or industry can regulate its own terms via a bargaining council agreement, which then takes precedence over the BCEA (subject to some limited exceptions). A bargaining council comprises representative employers and unions in the industry

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2 The Constitution of the Republic of South Africa, 1996.

concerned. In addition, the Minister of Labour may make sectoral determinations setting basic conditions for a specific sector and area, a number of which have already been made. The National Minimum Wage Act No. 9 of 2018 (NMWA), which came into effect on 1 January 2019, sets a minimum wage for all workers in South Africa (except farmworkers, domestic workers and workers in the Expanded Public Works programme).

Discrimination and affirmative action issues are regulated by the Employment Equity Act No. 55 of 1998 (EEA). The Occupational Health and Safety Act No. 85 of 1993 (OHSA) imposes on all employers a general duty to provide and maintain a working environment that is safe and without risk to employees' health. In addition, there are a number of specific regulations published under the OHSA. Work-related injuries and illnesses are covered by the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993.

Unemployment benefits are regulated by the Unemployment Insurance Act No. 63 of 2001 and the Unemployment Insurance Contributions Act No. 4 of 2002.

Skills development in the workplace is regulated by the Skills Development Act No. 97 of 1998 and the Skills Development Levies Act No. 99 of 1999, which requires compulsory contributions by employers to a statutory fund with the opportunity for employers to obtain refunds against the contributions if they implement workplace skills development plans and the like.

Save for a section regulating the registration of private employment agencies, the provisions of Employment Services Act No. 4 of 2014 (ESA) came into effect on 9 August 2015. The purpose of the ESA is to increase productivity within South Africa, decrease levels of unemployment and provide for the training of unskilled workers. While the ESA has various mechanisms for improving employment levels in the country and training the workforce, it remains to be seen whether these mechanisms will fulfil their legislative objective. Retirement funding and provision for medical insurance in South Africa is private unless regulated under a bargaining council agreement.

The employment of foreign nationals who are not asylum seekers, refugees or permanent residents is governed by the Immigration Act No. 13 of 2002 (the Immigration Act) as amended and the Regulations published pursuant thereto on 26 May 2014, as well as various practice directives issued by the Department of Home Affairs that influence the execution and application of the law.

II YEAR IN REVIEW

This past year brought with it significant changes to the labour laws in South Africa, such as amendments to the LRA and the BCEA and the introduction of the NMWA. Regulations regarding picking rules and ballots in strikes have also been introduced, and a Code of Good Practice on Collective Bargaining, Industrial Action and Picketing. Besides changes to the labour laws, 2019 also saw the introduction of the proposed National Health Insurance Bill, which, if enacted, may affect employee benefits.

The NMWA sets a national minimum wage (NMW) of 20 rand per hour, payable by an employer for every worker ('worker' is defined in the NMWA as a person who works for another and receives payment or is entitled to receive payment for that work, whether in cash or kind), except farmworkers, domestic workers and workers in the Expanded Public Works programme who are exempt from the NMW. The latter are entitled to payment as follows: 18 rand per hour for farmworkers, 15 rand per hour for domestic workers, and 11 rand per hour for workers in the Expanded Public Works programme. These sectors are exempted

for two years, after which the NMW will also apply to workers in these sectors. A NMW commission will review the NMW annually and make recommendations to the Minister of Labour on any adjustments thereto.

To enforce the provisions of the NMWA, amendments were made to the BCEA to provide for the monitoring and enforcement of the NMW and the extension of the jurisdiction of the CCMA to include enforcement procedures for claims relating to the failure to pay any amount owing to an employee in terms of the BCEA (or a worker in terms of the NMWA) or in terms of a sectoral determination, a collective agreement or a contract of employment. Workers now have a choice to enforce the payment of amounts due to them – such as leave pay, or overtime pay, or payment of the NMW – either through the Department of Labour or through the CCMA. The amendments to the BCEA also introduce three new categories of leave to which employees are entitled: parental leave, adoption leave and commissioning parental leave.

The amendments to the LRA provide for the mandatory establishment of, *inter alia*, picketing rules, which must be agreed between the parties to a dispute before the commencement of a protected strike. If no picketing rules are agreed by the parties, they can be unilaterally determined by the CCMA. No strike or lockout may take place without picketing rules being established. The LRA also provides that trade unions must now have provision in their constitution for a ballot of their members (about whether to strike) before going out on strike. The ballot must be recorded and secret.

Finally, the introduction of the Code of Good Practice on Collective Bargaining, Industrial Action and Picketing is intended to provide practical guidance on collective bargaining, the resolution of disputes of mutual interest and the resort to industrial action, and to guide those who engage or want to engage in collective bargaining, or who seek to resolve disputes of mutual interest by way of mediation, conciliation, arbitration, or industrial action as a last resort.

III SIGNIFICANT CASES

i Legal Aid South Africa v. Mayisela and Others³

Mayisela was employed as the Justice Centre Executive managing the Kimberley Justice Centre. He reported to the Regional Operations Executive for the Western and Northern Cape, Ms C Robertson (Robertson). Pursuant to a negative performance assessment, Robertson attempted to schedule a meeting with Mayisela but was unsuccessful. During this time, Mayisela sent a string of emails to Robertson informing her that he would take up the issue of his performance assessment with the portfolio committee (among other bodies). He further alleged racism on Robertson's part and vilification of 'African managers'. Mayisela was subsequently charged with, among other things, an attack on the honour, dignity or good name of Robertson in making tacit accusations of racism. He was found guilty of 17 charges during his disciplinary hearing. Thereafter, he referred the matter to the CCMA. The Commissioner found that Mayisela was guilty of this particular charge. On review, the labour court was sympathetic to Mayisela. It took the view that Mayisela was entitled to raise the matter and even take it to the Parliamentary Portfolio Committee. His mere announcing

3 (CA9/17) [2019] ZALAC 1.

of the complaint, in its view, did not amount to misconduct. The matter was subsequently taken on appeal. The LAC took a dim view of Mayisela's allegations of racism and vilification, mainly of the manner in which Mayisela chose to raise the issues. The Court stated:

Although one naturally may be sympathetic to a colleague who has subjectively experienced a negative performance assessment as racial discrimination, unjustified allegations of racism against a superior in the workplace can have very serious and deleterious consequences.

Employees who allege tacit racism should do so only on the basis of persuasive objective information leading to a compelling and legitimate inference, and in accordance with grievance procedures established for that purpose. Unfounded allegations of racism against a superior by a subordinate subjected to disciplinary action or performance assessment, referred to colloquially as 'playing the race card', can illegitimately undermine the authority of the superior and damage harmonious relations in the workplace.

The LAC found that Mayisela was guilty of this charge and that the labour court erred in concluding that the Commissioner decided the issue unreasonably.

ii Stokwe v. Member of the Executive Council: Department of Education, Eastern Cape and Others⁴

In this case, the CC dealt with procedural unfairness caused by delays in a disciplinary process. The applicant had referred an unfair dismissal dispute to the Education Labour Relations Council in terms of which she alleged that her dismissal was substantively and procedurally unfair. The arbitrator for the Council found that the dismissal was substantively fair but did not make a finding in relation to procedural fairness. The applicant took the matter on review to the labour court, which dismissed the review application and denied leave to appeal. The LAC also denied leave to appeal. The applicant then approached the CC and applied for leave to appeal, which was granted.

First, the CC held that the requirement of speediness is applicable both to completion and to the institution of disciplinary action. Second, the Court noted that if an employee is kept in employment for a long period after the institution of disciplinary action, it may indicate that the employment relationship has not broken down. The Court further held that an appeal is a separate part of the disciplinary procedure and must be conducted with the same readiness as other disciplinary procedures for the standard of procedural fairness to be met.

The CC reiterated the principle that any delay in the resolution of labour disputes undermines the primary object of the LRA. The CC held that whether the delay would negatively affect the fairness of disciplinary proceedings would depend on the facts of each case. The Court also referred to factors used to determine what constitutes an unfair delay. These factors are:

- a* the unreasonableness of the delay (for example, the longer the delay, the more likely it is that it would be unreasonable);
- b* the explanation for the delay;
- c* the employee's conduct in asserting his or her right to a speedy process;
- d* whether the delay caused material prejudice to the employee; and
- e* the nature of the alleged offence.

⁴ (CCT33/18) [2019] ZACC 3; (2019) 40 ILJ 773 (CC).

According to the CC, the applicant's disciplinary process was not completed within the shortest possible time. This was especially true in circumstances where the excessive delay remained unexplained by the respondent. Consequently, the applicant's dismissal was held to be procedurally unfair in view of the extreme delay in instituting and concluding the proceedings.

The appeal was upheld with costs and the matter was remitted to the labour court for an appropriate remedy.

iii **Ramaila v. Minister of Justice and Correctional Services and Others**⁵

The applicant was appointed as a state law adviser from outside the public service against the backdrop of a provision in Resolution 1 of 2012 of the Public Service Co-ordinating Bargaining Council (PSCBC) (the Resolution), and other applicable policies. These prescripts entitled him, as a new employee in public service, to 'pay progression' only after a qualifying period of 24 months' employment. This was in contrast to two other newly appointed colleagues, who started in the same type of job at the same time, were appointed on exactly the same terms and conditions of employment, who received exactly the same performance rating as the applicant after one year of employment and who benefited from a pay progression after only one year of employment as a state law adviser. These two employees had been appointed from within the public service and had already completed 24 months of employment in public service. The result was that there was an obvious differentiation between the applicant and the other two employees in pay and that the basis for the differentiation was the applicant's status as a 'new employee in the public service'. The stated goal of the Resolution was to 'develop and professionalise the public service'. Elsewhere it was stated that the policy 'will enhance or ensure proper in-service training of new appointees'.

The applicant referred his matter to the labour court. He based his case on two causes of action, namely unfair discrimination and an administrative law review. In dealing with the unfair discrimination claim, the court applied Section 11(2) of the EEA requiring a finding on irrationality, discrimination and the unfairness or otherwise of the discrimination. The court started its analysis with an overview of the actual effect of the employer's conduct, namely the pay disparity, acceptance that the pay disparity will continue indefinitely and that, for the applicant, his 100 per cent performance rating counted for nothing. The court found that the conduct of the employer was irrational, constituted discrimination and also was unfair. The court relied on *Harksen v. Lane*⁶ and viewed rationality as requiring an 'appropriate and effective' measure. More important is the court's approach to the existence of discrimination which, of course, required recognition of 'being a new employee in the public service' as an unlisted, or arbitrary, ground of discrimination. The court accepted that 'being a new employee' is an 'attribute or characteristic' for the purposes of the existence of discrimination.

The court further accepted that this characteristic has the potential to, and in fact did, prejudice the employee 'in a comparably serious manner', thus focusing on the second part of the *Harksen* test.

The court reiterated the actual effect of the distinction between new and existing employees and also stated that the discrimination exists 'particularly if regard is had to the fact that the stated objective of the differentiation bears no rational connection to the differentiation which is used as a mechanism to achieve the stated object'.

5 (C479/2017) [2019] ZALCCT 4.

6 N.O. 1997 (11) BCLR 1489 (CC).

In effect, the court said that, because the employer's conduct was irrational, there must be discrimination and that one needs to recognise the distinguishing feature identified in the case as an arbitrary ground. Discrimination is and remains a special type of differentiation and only exists if a special type of ground is the reason for the differentiation. It is not the irrationality of the ground that makes it discrimination, it is its nature. And it is not the effect or the unfairness of the employer's conduct that constitutes discrimination to begin with. The court then proceeded to find the discrimination unfair to the applicant and other newly appointed employees.

iv Long v. South African Breweries (Pty) Ltd and Others⁷

Mr Long (the employee) was employed by South African Breweries (SAB) as a district manager. Among other things, the employee was responsible for ensuring that SAB complied with all legal requirements in his district, which included ensuring that SAB's fleet of delivery trucks was properly licensed and that all the vehicles were roadworthy. During late 2012, it was discovered that a number of the vehicles and trailers were unlicensed or not roadworthy. The employee issued instructions to certain subordinates to remedy the situation, but did not proactively involve himself in ensuring that this was done.

In May 2013, a fatal accident involving one of the unroadworthy vehicles occurred. The employee was placed on suspension pending an investigation into the issues relating to the fleet. Approximately three months later, the employee was subjected to a disciplinary hearing and dismissed. He referred disputes relating to his suspension and his dismissal to the Commission for Conciliation, Mediation and Arbitration (the CCMA). The CCMA found that the employee had been unfairly suspended on the basis that the suspension was 'unduly long' and because the employee was not provided with an opportunity to make representations before a decision to suspend was taken. SAB referred the matter to the labour court on review.

The labour court found that the CCMA had erred in finding that the employee's suspension was unfair and overturned the award. The court held that there is no requirement for an employee to be provided with the opportunity to make representations before being placed on precautionary suspension.

The employee applied to have the court decision reviewed but this was refused. The employee then took the matter on appeal to the CC, alleging that the finding by the labour court did not pass constitutional muster, and that the finding contradicts the principles established in the case law. The CC held that the finding of the labour court regarding the issue of an opportunity to make representations could not be faulted.

The CC aligned itself with the labour court's findings. Specifically, the labour court set out the important differences between the two possible types of suspensions – one being as a disciplinary sanction, and the other being as a 'holding operation' (or a precautionary suspension). A suspension as a disciplinary sanction can only follow a fairly conducted disciplinary proceeding, and is usually as an alternative to dismissal. This is distinguished from a precautionary suspension. The labour court found that this distinction is consistent with the case law on the subject.

The labour court held that the reason for the distinction between the two types of suspensions is that the standards of fairness differ between the two.

⁷ (CCT61/18) [2019] ZACC 7.

The labour court further held that in the case of a precautionary suspension, there is no requirement for an employee to be given an opportunity to make representations before the employer decides to place that employee on suspension. The court found that a precautionary suspension could still constitute an unfair labour practice if the employer does not have a fair reason for it, if it causes undue prejudice to the employee, or if the suspension is unduly long without a valid reason. In relation to the facts of this case, the court held that the Commissioner's reliance on the perceived right to make representations was misplaced, and the suspension was not unfair.

The labour court also held that it is not necessary for the employer, at the stage of implementing a precautionary suspension, to substantiate the allegations of misconduct. It is sufficient for the employer to hold a reasonable belief that the misconduct took place.

The CC confirmed that a suspension pending an investigation and possible disciplinary action is a precautionary measure and does not constitute disciplinary action, and, as such, the requirements in terms of the LRA relating to fair disciplinary action do not apply.

v Pailprint (Pty) Ltd v. Lyster NO and Others⁸

A number of employees were dismissed for misconduct during a protected strike. They had been seen carrying sticks, lengths of piping, a golf club and an axe while picketing. This contravened picketing rules agreed by their union, the National Union of Metalworkers of South Africa (Numsa) and their employer, which stated that picketers may not engage in unlawful or violent actions and that no weapons of any kind are to be carried or wielded by picketers; and that the employer may take disciplinary action if an employee's actions during a picket are in breach of the organisation's disciplinary code. In addition, the employer's strike policy unequivocally set out its zero tolerance of 'any violent acts, intimidation or vandalism' during strikes and stated that 'any employee caught behaving in a violent manner (which includes verbal abuse), vandalising property, preventing anyone from entering or participating in work or intimidating any other person in any form or manner, would be disciplined.

During July 2014, the striking employees in question each carried a stick while picketing outside the employer's premises. One employee carried a PVC pipe and another, in addition to a stick, carried a sjambok. Another of the striking employees had a golf club and another had an axe. The employees were charged by the employer with 'brandishing or wielding of dangerous weapons during [the] strike' and, following disciplinary hearings, they were dismissed.

During the arbitration proceedings, undisputed photographic evidence was placed before the arbitrator that showed injuries sustained by two individuals at the hands of strikers were admitted into evidence. The arbitrator found that the objects carried by the strikers were indeed dangerous, but there was no evidence that the strikers intended to threaten or intimidate anyone; therefore, the employees were only in partial breach of the valid and reasonable rule of the employer. The arbitrator found the dismissal of the employees substantively unfair and ordered their reinstatement, with final written warnings valid for 12 months.

On review, the labour court held that there was no reason to interfere with the arbitration award since it was not unreasonable and dismissed the review application. In an appeal against this, the LAC had to consider whether the arbitrator committed a reviewable error or irregularity, which led him to arrive at a decision that a reasonable decision maker

8 [2019] 10 BLLR 1139 (LAC).

could not reach on the material before him. The picketing rule of which the employees were found to have been aware expressly prohibited the employees from carrying or wielding any weapons during the strike picket and the evidence, which was not disputed, showed that the employees did carry weapons during the strike. The conduct of the employees was clearly in breach of the express terms of the picketing rule, which barred weapons of any kind from being 'carried or wielded' by picketers. There was no dispute that the rule was valid and reasonable. The LAC found it difficult to understand how the arbitrator could have concluded, on the evidence placed before him, that the rule had only been partially breached. It held further that in assessing the sanction, the arbitrator was required to approach the matter impartially, with due regard to all the circumstances, such as the reason for the imposition of the sanction and the basis of the employees' challenge.

The LAC therefore found that the arbitrator committed a reviewable irregularity and arrived at a decision that a decision maker acting reasonably could not have reached on the material before him, and that the labour court erred in finding that the decision of the arbitrator fell within the bounds of reasonableness required. The appeal was thus upheld as an important matter for regulating misconduct during strikes, which become violent all too often in South Africa.

vi Minister of Home Affairs v. Ahmed

In a significant win for asylum seekers in South Africa, the Supreme Court of Appeal decision in this case, which held that holders of asylum seeker permits in terms of Section 22 of the Refugees Act 130 of 1998 are precluded from applying for status under the Immigration Act while they are within South Africa, was successfully challenged in the CC.

The Director General of the Department of Home Affairs' blanket ban on asylum seekers applying for visas without provision for an exemption application under Section 31(2)(c) of the Immigration Act 13 of 2002 was declared inconsistent with that Act and therefore invalid. The prohibition on asylum seekers applying for permanent residence permits while inside South Africa was also declared inconsistent with Regulation 23 of the Immigration Regulations 2014, and thus invalid.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The existence of an employment contract is not a prerequisite for an employee to qualify for statutory employment rights. The definition of an employee under most South African employment legislation is wide enough to include persons (excluding independent contractors) who assist in carrying on or conducting the business of the employer even though they may not be formally employed by the employer. However, most employees in South Africa are employed under employment contracts.

The BCEA obliges employers to provide their employees with written particulars of their employment conditions once the employee commences employment. Signatures on a contract are not legally required, subject to two limited exceptions, namely for written employment contracts under the Merchant Shipping Act No. 57 of 1951 and contracts relating to learners (i.e., apprentices) under the Skills Development Act.

The conditions of employment provided for under the BCEA constitute the basic terms of any employment relationship except to the extent that any other law or terms of the employment contract provide for more favourable terms, or where the basic condition has

been varied in terms of the BCEA. Collective agreements, where applicable, can also vary the terms of employment contracts between the employers and employees who are bound by them.

Under South African law, employers and employees are generally free to conclude their contract of employment either for a fixed term or an indefinite period. The LRA places certain restrictions on the use of fixed-term contracts for employees whose earnings are below the BCEA threshold.⁹

Parties to an employment contract can only amend the contract by agreement. Agreement is obtained either through negotiation or, if this fails, after taking certain procedural steps, parties can resort to industrial action (i.e., a strike in the case of employees or a lockout in the case of employers) aimed at compelling the other party to agree.

It is mandatory that all offers of employment to foreigners who require work visas be made subject to the employee procuring a work visa before commencing employment.

ii Probationary periods

Probationary periods are permitted for newly hired employees to afford the employer an opportunity to evaluate the employee's performance and suitability for employment before confirming his or her appointment. An employer must still have a fair reason and follow a fair procedure before effecting the dismissal of a probationary employee. The minimum notice periods for termination of employment described in Section XII.i also apply to employees on probation.

iii Establishing a presence

A foreign employer can hire employees and engage independent contractors in South Africa without being required to set up a local entity. However, a foreign employer may be required to register as an external company (a branch) with the South African Companies and Intellectual Property Commission if it conducts business within South Africa as contemplated by the South African Companies Act No. 71 of 2008. A company is deemed to be conducting business in South Africa if it is (1) a party to one or more employment contracts within South Africa, or (2) engaging in a course of conduct that would 'lead a person to reasonably conclude that the company intended to continually engage in business' within South Africa.¹⁰

A non-resident employer is not obliged to withhold employees' tax from remuneration (provided that it does not have a 'representative employer', as defined in South Africa). The employees themselves will be required to settle their tax liabilities in respect of the remuneration they receive from the non-resident employer for the services that they render in South Africa. This will be done through provisional tax payments.

If a foreign employer appoints a South African resident agent to pay remuneration on its behalf, the South African agent will be regarded as a representative employer of the foreign employer in South Africa and will be required to register as an employer with the South African Revenue Service and withhold employees' tax from remuneration paid to the employees of the foreign employer.

A foreign employer will be liable for income tax on its South African-sourced income. However, if there is a double taxation agreement in place between South Africa and the

⁹ As of 17 December 2019, this is 205,433.30 rand per annum.

¹⁰ Companies Act, Section 23(2).

jurisdiction within which the foreign employer is resident (for the purposes of the double taxation agreement), and the income of the foreign employer comprises business profits, then the double taxation agreement would allocate taxing rights to the country in which the foreign employer is a resident, unless the foreign employer carries on business in South Africa through a permanent establishment. Most of South Africa's double taxation agreements are based on the Organisation for Economic Co-operation and Development's Model Tax Convention on Income and Capital (the Model Tax Convention).

The existence of a permanent establishment is determined with reference to Article 5 of the Model Tax Convention. Generally, however, what is required for permanent establishment is a fixed place of business through which the business of an enterprise is wholly or partly carried on. There must be a fixed location or facility with a certain degree of permanence that is used to conduct the business activities of the enterprise, and it must be used regularly for business operations. Generally, business is regarded as being carried out through the employees of the enterprise, but a business may also be carried on through agents or other representatives of the enterprise, particularly where those representatives are dependent on the enterprise.

Therefore, if employees of a foreign employer spend significant periods of time in South Africa and carry on the business of the foreign employer in South Africa, these employees may create a permanent establishment for the employer in South Africa. If so, then the profits of the foreign employer that are attributable to the permanent establishment may also be taxed in South Africa.

If a South African-resident company employs employees in South Africa, whether the employees are foreign or local, employees' tax must be deducted from remuneration at source and the employer is responsible for reporting and withholding the employees' tax. Employers are required to provide few statutory benefits.

V RESTRICTIVE COVENANTS

Restraint of trade (i.e., non-compete or restrictive covenant) clauses can be included in employment contracts. In principle, these clauses are valid and enforceable and, as such, many restraints are enforced in South African courts every year. Nevertheless, when an employer seeks to enforce restraint provisions, the courts retain discretion as to whether to enforce the restraints and will not enforce them if, in a particular case, the enforcement would be unreasonable or contrary to the public interest.

The reasonableness of a restraint is judged both on the broad interests of the public and the interests of the contracting parties themselves. Reasonableness as between the parties themselves depends on many factors, the most important of which is whether the employer has a proprietary interest that may legitimately be protected by means of a restraint agreement. Proprietary interests include confidential information and customer connections. The geographical area and duration of the restraint must also be reasonable.

The restraint may also operate in combination with garden leave in appropriate cases. In such cases, when assessing the reasonableness of the restraint period, the period of garden leave will be taken into account.¹¹

It is not a prerequisite for the employer to financially compensate the employee in exchange for the employee undertaking restraint of trade obligations, although where such payments are made, this may enhance the enforceability of the restraint.

11 *Vodacom (pty) Ltd v. Motsa and another* 2016 (3) SA 11 6 (LC).

VI WAGES

i Working time

Generally, no employee may work more than 45 ordinary hours a week and nine hours a day if he or she works a five-day week. Alternatively, an employee may not work more than eight hours a day if he or she works a six-day week. Total working hours may not exceed 12 hours a day. Wage-regulating measures specific to industries can have different provisions regulating working hours.

Night work (i.e., work performed after 6pm and before 6am the next day) may only be done with the employee's consent and he or she must be compensated with an allowance, which may be a shift allowance or a reduction of normal working hours. Transport must be available between his or her residence and the workplace at the commencement and conclusion of the shift. If employees regularly perform night work (i.e., work for longer than one hour after 11pm and before 6am at least five times a month or 50 times a year), the employer must inform them of health and safety hazards associated with night work and of their right to request a medical examination at the employer's expense. If a regular night worker suffers from a health condition associated with the performance of night work, the employer must transfer the employee to suitable day work within a reasonable time, if it is practicable to do so.

ii Overtime

Employees generally enjoy the following statutory overtime benefits (excluding those who are not senior managerial employees, sales staff who travel to customers' premises and regulate their own working hours, employees who work for fewer than 24 hours a month, or employees whose earnings are above the BCEA threshold):

- a* An employer can only require an employee to work overtime if the employee's agreement to do so has been obtained. If the employee's agreement is obtained on commencement of employment or within three months thereof, the consent shall lapse after 12 months and must be secured again by the employer, after which the consent does not lapse. An employer must pay an employee at least one-and-a-half times the employee's wage for overtime worked or grant the employee paid time off (i.e., 90 minutes off for every 60 minutes of overtime worked).
- b* Employees are not permitted to work more than 10 hours of overtime a week, or three hours of overtime in a day if they work a nine-hour day.

The National Minimum Wage Bill was signed into law on 23 November 2018 and came into effect on 1 January 2019. A national minimum wage of 20 rand per hour (with slightly lower minimums for farm and domestic workers) has been approved and will be reviewed annually (by a yet-to-be-appointed commission).

VII FOREIGN WORKERS

The employment of non-South African citizens who are not asylum seekers, refugees or permanent residents (foreign workers) is governed by the Immigration Act, as amended, and the regulations thereto.

The Act and regulations impose obligations on any person or organisation that employs a foreign national, regardless of size of the business or number of employees, although stricter compliance is required of any employer with more than five employees or that has been found guilty of a prior offence under the Act.

An authorisation to work is required irrespective of the duration for which services will be rendered within South Africa. A business visitor's visa is suited to temporary placements of fewer than 90 days. If a traveller, such as an academic, business person or frequent visitor, has established himself or herself as a *bona fide* frequent business visitor, he or she may be issued with a multiple-entry visa valid for two to three years, usually for visits of 30 days. Longer placements require a temporary residence work visa, such as an intra-company transfer, a general work visa, a critical skills visa or corporate worker visa, or another appropriate visa authorising the work. There is no restriction on the number of foreign workers that an employer may employ or on the number of categories under which work visas may be applied for. Nonetheless, the work visa process guards against employing foreign workers in positions that can be filled by local people.

By way of example, the regulations provide that a company wishing to obtain a corporate visa or a business visa must have a workforce that is made up of at least 60 per cent South Africans, and that an application for a general work visa must include a certificate from the Department of Labour confirming that, despite a diligent search, the employer has been unable to find a South African citizen or permanent resident with equivalent qualifications and skills or experience. The Department of Labour's application process for this certification includes the submission of proof of advertisement of the position and a letter of motivation from the employer and from a recruitment agency detailing the labour market test, and disclosing the details of all unsuccessful applicants for the position and justifying the need to employ a foreign worker in that position.

No labour market testing is required when applying for a critical skills visa, which facilitates applications for foreign nationals who meet the minimum qualifications and experience listed on the critical skills list published in terms of the regulations.

Similarly, no labour market testing is required when applying for an intra-company transfer work visa. However, an undertaking must be given to develop a skills transfer plan. Many foreign missions insist on the filing of a skills transfer plan, which identifies the South Africans to whom skills will be transferred.

There is no general legislative cap on the period for which a foreign worker may be employed in aggregate, although the Immigration Act does provide maximum periods for which certain categories of work visas may be granted. Intra-company transfer work visas may be issued for a maximum of four years and cannot be renewed. Upon expiry of the visa, the holder must depart from South Africa. If the worker wishes to apply for a different category of visa, he or she must bring the application abroad.

In general, work visa holders become eligible to apply for permanent residence after holding a temporary residence work visa for a continuous period of five years, provided that they have received a permanent offer of employment. Holders of critical skills visas may apply for permanent residence sooner. Although not legislated, the Department of Home Affairs would usually insist on proof of work experience in the relevant area of skill. Critical skills holders who have obtained a qualification listed as a critical skill in South Africa are also able to apply for permanent residence on the basis of those qualifications without the need to obtain an evaluation of their qualifications from the South African Qualifications Authority or to demonstrate prior work experience.

Any foreign worker needs to obtain a work visa to render services in South Africa irrespective of the time frame for which they are required to render services locally and notwithstanding the fact that they may be employed through a foreign entity. Foreign workers and their employers can be fined or jailed, or both, for non-compliance with their obligations in this regard.

South African employment laws are of universal application for employees who fall within their jurisdiction. They therefore apply to foreign workers working in South Africa, even if they are working illegally in contravention of their visa status.

To ensure regulatory compliance, an employer in South Africa must maintain documentary records for each foreign employee for two years after the termination of employment. The employer must also report to the authorities the termination of a foreign worker's employment and any breach by the worker of his or her status. Employers must also make a reasonable effort in good faith to ensure that they have no illegal foreigners in their employ and to ascertain workers' status or citizenship.

VIII GLOBAL POLICIES

Employers are under no legal obligation to have written rules on internal discipline, and individual employers may decide whether they want to establish written rules to regulate conduct in the workplace.

In general, an employer does not require the approval or agreement of its employees or their representative body when deciding to introduce disciplinary rules, unless the rules form part of their employment contracts and the employer wishes to amend the rules. Approval and agreement may also be required if there is a collective agreement between the employer and the representative body stipulating that employees or their representative body must approve or agree to disciplinary rules before the rules may be introduced or amended. There is also no requirement for the rules to be filed with or approved by any government authorities but they must be lawful and fair.

Although there are no mandatory disciplinary rules, issues of discrimination and sexual harassment are prohibited by specific legislation, most notably the EEA and codes published pursuant to the EEA. Employers must also report acts of corruption to the authorities.

There is no requirement that the rules governing discipline in the workplace be signed. It is nonetheless good practice to get employees to sign some form of acknowledgement that they are aware of the existence of the rules and have been given an opportunity to familiarise themselves with them. This may be done electronically.

The rules should be accessible to all employees and, if possible, copies of the rules should be given to all employees. If this is not possible, then copies should be available from designated persons, such as human resources managers, for inspection by employees. An intranet site is insufficient if the employees do not have access to it or do not know how to access it.

Individual employers are free to decide whether to incorporate the disciplinary rules into employees' contracts of employment, but generally it is not advisable to do so. If the disciplinary rules are incorporated into employees' contracts of employment, any minor breach of the rules will constitute a breach of contract that may be actionable. In addition, the rules will then become part of the employees' terms and conditions of employment and may not be changed without the employees' consent.

IX TRANSLATION

There is no legal requirement that employment-related documents be translated, unless the employee is not able to understand them, in which case the employer should ensure that the contents of the documents are explained to the employee in a language and in a manner that the employee understands.

There are no penalties if a document is not translated. However, if it is not translated (in circumstances where it is required as described above), the risk is that the employer may be directed by the Department of Labour to translate the document or it may be unenforceable against the employee in question.

X EMPLOYEE REPRESENTATION

Employees are permitted to form and join a registered trade union of their choice. At an undertaking where there are more than 100 employees, the employees, through their trade unions, are permitted to establish workplace forums to consult on numerous defined workplace issues. However, workplace forums are rarely set up.

A majority union in a workplace in which at least 10 of its members are employed may elect union representatives from its members in accordance with the following:

- a* 10 members in the workplace: one representative;
- b* more than 10 members: two representatives;
- c* more than 50 members: two representatives for the first 50 members plus one representative for every additional 50 members (up to a maximum of seven);
- d* more than 300 members: seven representatives for the first 300 members plus one representative for every additional 100 members (up to a maximum of 10);
- e* more than 600 members: 10 representatives for the first 600 members plus one representative for every additional 200 members (up to a maximum of 12); or
- f* more than 1,000 members: 12 representatives for the first 1,000 members plus one representative for every additional 500 members (up to a maximum of 20).

Unions that do not have majority representation may nonetheless elect union representatives from their members if a collective agreement is concluded with the employer concerned that allows for this. The constitution of the trade union (with any constraints and obligations that may exist in terms of a collective agreement, if any) will govern the nomination, election, term of office and removal from office of the representatives. It will also regulate the holding of meetings and the issues related thereto. In terms of the recent amendments to the LRA, any registered trade union that represents a 'significant interest' or a 'substantial number of employees' in the workplace may be entitled to be recognised for organisational rights, irrespective of a collective agreement to the contrary.

Representatives have the right to assist and represent employees in grievance and disciplinary proceedings, to monitor the employer's compliance with labour laws and any collective agreements, and to report any contraventions of these laws and agreements. They also have the right to perform any other functions as agreed with the employer and to take reasonable time off work for trade union activities. Representatives may not be discriminated against in any way, or dismissed, for their involvement in trade union activities. However, representatives remain employees of the employer, and generally remain subject to its rules on discipline and its other workplace rules.

Depending on the level of representation of the union, an employer must allow it access to the workplace to recruit members, communicate with them, hold meetings, and otherwise serve them and grant stop orders due to the union from the employees' wages.

XI DATA PROTECTION

i Requirements for registration

Comprehensive legislation regulating data protection was published in 2013 in the form of the Protection of Personal Information Act No. 4 of 2013 (POPIA), but this has not fully come into effect. The many substantive obligations provided for in the POPIA are thus not yet binding or applicable, and it is unknown when they will come into operation, despite the development referred to below. Once the substantive provisions of the POPIA are made effective, companies will be given a one-year grace period to comply with its provisions, which may be extended. Once operative, the POPIA will place restrictions on what information may be collected from employees and applicants, and processed by employers. The POPIA does not require employers to register with a data protection agency or other government body, but an employer can only collect and store personal information about its employees if it has notified the Information Protection Regulator and the employees, and it is necessary or related to a lawful and permitted purpose under the legislation. In September 2017, draft regulations were published for public comment. The final regulations were published on 14 December 2018.

Personal information may only be collected by an employer directly from and with the consent of the employee, who must be informed of the purpose of any collection and who the intended recipients are once the information is collected. Personal information should not be kept for longer than necessary to achieve the (permitted) purpose for which it was collected and it must be distributed in a way that is compatible with the purpose for which it was collected. The employer must take reasonable steps to ensure that the information is accurate, up to date and complete.

Under the POPIA, an employer must ensure that all personal information about its employees is protected against risks of loss, damage, destruction or unauthorised access. The employees must also be allowed to access their personal information and can demand that the information be corrected if it is found to be inaccurate.

ii Cross-border data transfers

The POPIA prohibits cross-border (and onward) transfers of personal information to countries that do not have substantially similar protections for the information (except under limited circumstances). Notification of transfers of sensitive personal information or the personal information of children must be given to the Information Protection Regulator, and an employer must obtain the Regulator's prior authorisation before processing any information. The employee's consent to the transfer is generally required. The transfer must also be necessary under contractual arrangements involving the employee. Authorisation from the Regulator need only be obtained once and not each time that personal information is received or processed, except where the processing departs from that which has already been authorised.

iii Sensitive data

The POPIA considers the following information to be 'special personal information' for which additional protections are required: information concerning children, religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health, sex life or biometric data, and criminal behaviour in certain instances.

This special personal information may not be processed by an employer unless specifically permitted under exemptions provided for in the legislation. An example of

an exemption would be the processing of information about race because the employer is required to comply with laws designed to protect or advance persons from groups historically disadvantaged by unfair discrimination (under the terms of the EEA).

iv Background checks

Background checks are generally permitted provided they do not involve checks that amount to unfair discrimination under the EEA.

A code of good practice issued under the EEA stipulates that an employer should only conduct integrity checks – such as checking credit references or investigating whether the applicant has a criminal record – if they are relevant to the requirements of the job. The National Credit Act No. 34 of 2005 also stipulates that a credit bureau can only issue a credit report to a prospective employer when the employer is considering the candidate for a position that requires trust and honesty and entails the handling of cash or finances, and only with the prior consent of the candidate.

Medical testing is only permitted if legislation permits or requires it or if it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. Testing an employee for his or her HIV status is prohibited unless determined to be justifiable by the labour court. Psychological testing and other similar assessments are also prohibited unless the test has been scientifically shown to be valid and reliable, and that it can be applied fairly to all employees and is not biased against any employee or group of employees.

The Immigration Act and regulations thereto provide that medical reports and chest X-rays must be submitted in support of temporary and permanent residence visa applications. Police clearance certificates are also required from all countries if an applicant for a temporary or permanent residence visa has resided for more than one year in South Africa since their 18th birthday.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Employees in South Africa may not be dismissed without cause as dismissals are required to be for a fair reason and effected pursuant to a fair procedure.

There are no requirements to notify government authorities of dismissals. In some instances, an employer must consult a trade union about pending dismissals, for example if an employee is a trade union representative or if union members are to be made redundant.

The grounds upon which an employer can fairly dismiss an employee are misconduct, incapacity (which can be either medical incapacity or poor performance) and the operational requirements of the employer (i.e., redundancy, which is dealt with in Section XIII.ii in more detail). Dismissal may be summary when it is warranted (e.g., in cases of serious misconduct) but otherwise the employee must be given notice (the BCEA stipulates minimum notice periods of one week for employees with less than six months' service, two weeks for employees with service of between six months and one year, and four weeks for employees with service of more than one year). Employers may pay their employees in lieu of notice.

An employee whose employment is fairly terminated for misconduct or poor performance is not entitled to any separation or severance pay. See Section XIII.ii regarding the severance pay requirements in cases of redundancy. It is possible for employers to conclude separation or settlement agreements with departing employees.

An employer is obliged to notify the Department of Home Affairs upon discontinuation of the employment of an employee who holds a work visa.

ii Redundancies

An employee may be dismissed for a reason relating to the employer's 'operational requirements', namely, requirements based on the employer's economic, technological, structural or similar needs. A dismissal based on operational requirements must be both procedurally and substantively fair, as is the case with any other dismissal in South Africa.

The process that must be followed when considering dismissals for operational reasons is set forth in Section 189 and 189A of the LRA. The basic Section 189 provisions apply to all retrenchments and Section 189A imposes additional procedural requirements for when large businesses conduct large-scale retrenchments. An employer is a large employer if it employs 50 or more employees.

Section 189 requires consultation with the employees who may be affected or their representatives (e.g., trade union, workplace forum) regarding the proposed retrenchments. There is no requirement to notify a works council or the government.

As soon as an employer contemplates retrenchments, it must commence consultation about ways to avoid retrenchment, to minimise the number of retrenchments, to change the timing of retrenchments, to mitigate the hardships caused to employees who are retrenched, to select the employees to be retrenched, and about severance pay. Consultation must commence with the employer issuing a written notice inviting the other party to consult and disclosing relevant information to enable the other consulting party to engage in the consultation process. Facilitation is an additional process available to the parties to a large-scale retrenchment on request. Facilitation occurs alongside the normal consultation process and is essentially consultation with the assistance of a commissioner appointed by the CCMA. The facilitator's job is to help the parties with their discussions and their attempts to reach agreement on as many issues as possible in relation to the proposed retrenchment.

If the employer falls under a bargaining council, it is advisable to check whether or not the bargaining council agreement has any special provisions relating to retrenchment with which it must comply.

No social plan is required but as part of its duty to avoid retrenchment wherever possible, the employer must explore alternatives to retrenchment. If the employer has alternative work that an affected employee can do (even if some training is required), the employer should accommodate the affected employee. The employer must also consult about the method of selecting employees to be retrenched and, in the absence of agreed criteria, must adopt fair and objective criteria. There is no category of employee protected by law from retrenchment where genuine operational requirements exist.

There are statutory rights to severance pay for retrenched employees. An employer must pay an employee dismissed for operational requirements severance pay equal to at least one week's remuneration for each completed year of continued service with that employer. Where the employer and employee have agreed, in advance or otherwise, to a higher amount of severance pay, the rights under the agreement are unaffected by the lower statutory minimum. Employees who unreasonably refuse offers of alternative employment with the retrenching employer, or any other employer, are not entitled to severance pay.

The employer must consult about the possibility of rehiring retrenched employees if business picks up or if it is later considering hiring people for the sort of work that the retrenched employees performed. Usually the parties agree on how long the rehiring arrangement will apply and make it subject to the employees remaining contactable.

Employers may conclude settlement agreements with retrenched employees that entail a release of claims from the former employees.

XIII TRANSFER OF BUSINESS

Under terms of Section 197 of the LRA, if a transfer of a business takes place, unless otherwise agreed, the new employer automatically substitutes the old employer in respect of all employment contracts in existence immediately before the date of transfer and all rights and obligations between the old employer and an employee at the time of the transfer continue to be in force, as if they had been rights and obligations between the new employer and the employee.

Various statutory requirements must be met for a transaction to fall within the ambit of Section 197 of the LRA. Whether this Section applies to a specific transaction depends on the following:

- a* the relevant business transaction must be a 'transfer' envisaged by Section 197 (which means that the business must be transferred as a going concern); and
- b* the entity being transferred must be a 'business' (which is defined to include a part of a business, a trade, an undertaking or a service).

The test for whether or not there is a going concern transfer is an objective one, where the substance of the transaction is considered, rather than its form. The courts have formulated a test that involves taking a 'snapshot' of the entity before the transaction and assessing its components. This is then compared with a snapshot of the business after the transaction is concluded to establish whether it is essentially the same business but in different hands. There is no inflexible test, however, and each transaction is considered on its own merits.

The buyer of the transferred business (the new employer) must provide employees with terms and conditions that are generally not less favourable than those that applied before the transfer. However, the buyer can transfer employees to different retirement plans or similar schemes. Employees cannot be dismissed because of the transfer of a business or any reason related to the transfer.¹² A dismissal that breaches this provision is automatically unfair.

It is possible to contract out of the provisions of Section 197 but only if the requirements of Section 197(6) are met. This means that an employer must negotiate with the same body that would have had to be consulted in the event of a retrenchment and must make full disclosure of all relevant information during the negotiation process.

Work visas are specific to an employer and a position, and holders of a work visa may not continue working on their existing work visa but must apply for an amendment to the visa to authorise work for a new employer.

XIV OUTLOOK

On 18 October 2018, the Minister of Labour published both the Compensation for Occupational Injuries and Diseases Act (COIDA) Amendment Bill 2018 and the proposed regulations on the compensation fund new assessment model for public comment. The proposed amendments to COIDA follow from an application in the North Gauteng Division

12 Labour Relations Act No. 66 of 1995, Section 187(1)(g).

of the High Court seeking to declare the provisions of COIDA that exclude domestic workers from its ambit unconstitutional and that the declaration of unconstitutionality apply retrospectively. In response to the application, the Acting Compensation Commissioner filed an answering affidavit on behalf of the Minister of Labour and the Director General, in which he indicated that the Department of Labour intended to introduce a bill amending COIDA to include domestic workers within its scope. The Commissioner further stated that the reason for the delay in extending coverage to domestic workers was due to the fact that the Department of Labour was in the process of developing its institutional capacity to administer the coverage of domestic workers under the terms of COIDA.

The COIDA Amendment Bill seeks to amend COIDA to extend coverage to domestic workers. With the inclusion of domestic workers under COIDA, the Department of Labour will need to have a firm administrative framework in place. Should the COIDA Amendment Bill be adopted in its current form, employers of domestic workers will be required to register with the Compensation Commissioner, furnish the Commissioner with the full particulars of their business, keep a record of the earnings of their domestic workers, furnish returns of earnings to the Commissioner and pay an assessment to the compensation fund. The Department of Labour will have to be prepared to manage the administrative load that this will bring about.

Other proposed changes to COIDA of importance to employers are the following:

- a* definition of 'an employee';
- b* definition of 'an employer';
- c* meaning of the financial year (currently March to February) to be changed to start on the first day of April in any year and end on the last day of March in the following year;
- d* insertion of a definition for 'remuneration';
- e* provision for the rehabilitation, reintegration and return to work of employees who have suffered an occupational injury;
- f* provision for the regulation of the use of healthcare services;
- g* provision for the reopening of claims;
- h* provision of criminal and administrative penalties;
- i* regulation of compliance and enforcement, and provision for a no-fault-based compensation system and matters connected therewith; and
- j* replacement of 'concept mandators' with contractors and sub-contractors.

At the same time, the draft changes to the Regulations on the Compensation Fund New Assessment Model under COIDA have also been published for public comment.

The main proposals are to reduce the existing 102 assessment subclasses to five main assessment classes to simplify the process of dealing with the Compensation Fund. The reason for this change is because the Compensation Fund assesses employers based on the industry in which they operate and are assigned to a specific assessment class for the basis of determining their liability to the Fund. However, because of the number of classes, employers often are registered in incorrect classes, resulting in inaccurate collection and recording of the Compensation Fund's financial performance. The current classes also contribute to fraudulent conduct by different stakeholders who may not want to pay the assessment fees relating to the industry in which the employer operates.

A new assessment class for households has been introduced as part of this proposal.

SPAIN

Fernando Bazán López, Antonio Morales Veríssimo de Mira, Paloma Gómez López-Pintor and Andrea Sánchez Rojas¹

I INTRODUCTION

The Spanish Constitution serves as the foundation of the Spanish legal system. It is the fundamental national law; all other legal provisions are subordinate to it and may not contradict it. More specifically, the following legislative framework, listed in order of priority of application, governs Spanish employment legislation:

- a* the Workers' Statute: the basic employment legislation that includes the minimum rights of ordinary employees;
- b* employment legislation approved by the government;
- c* collective bargaining agreements: agreements negotiated and formalised by and between employers and trade unions (or workers' representatives if within the company) to govern employees' employment conditions within a specific context. A collective bargaining agreement can be applicable to a specific sector or activity, at national or provincial level, of general application at a company or for a specific workplace;
- d* an individual employment contract formalised with a particular employee;
- e* case law from the Spanish and European courts; and
- f* a company's own traditions and customs.

The following public bodies exist within Spanish labour jurisdiction, whose main role is to apply and enforce employment law:

- a* employment courts: labour courts, high courts and the Supreme Court;
- b* the Employment and Social Security Inspectorate: a state body that ensures compliance with employment and social security legislation. It is authorised to visit companies, impose penalties in the event of non-compliance and even commence, at its own initiative, legal proceedings against companies. Unlike the courts, the Inspectorate can perform its functions as a result of anonymous complaints or at its own initiative; and
- c* other institutions: for example, the Spanish Women's Institute.

II YEAR IN REVIEW

Spanish employment legislation underwent several amendments in 2019, mainly as a result of the political situation, elections and changes in government. The ultimate aim of these amendments has been to foster employees' work-life balance and equality between men and women in the professional arena.

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The most notable changes are the following:

- a* the gradual alignment of paternity leave with maternity leave;
- b* the right of employees with a child under the age of 12 or with a person in their care to request adjustments to their working day or working hours, without a reduction in the number of hours worked or their salary;
- c* an obligation on employers to record their employees' working hours every day;
- d* digital disconnection right; implementation of this legislation is pending; and
- e* the negotiation of an equality plan with the workers' representatives, if any, at companies that employ more than 150 employees (gradual application until 2022).²

III SIGNIFICANT CASES

In addition to the changes noted in Section II, most of the hot topics have arisen from claims before Spanish employment courts. One that grabbed everyone's attention was a decision handed down by the Catalonia High Court in June 2019. The Court ruled that merely suspecting irregularities was not a sufficient ground for secretly installing video surveillance systems. However, when there are reasonable suspicions that serious irregularities of a significant scope have taken place, such as in the case in question, it can be considered that grounds exist for the installation of video surveillance systems. On 17 October 2019, the European Court of Human Rights confirmed this case law.

Another noteworthy topic in 2019 was the question of whether food delivery riders are considered company employees or self-employed individuals. Spanish employment courts have handed down rulings with contrasting conclusions, but the large majority uphold the consideration of this type of work as bogus self-employment. The Asturias High Court handed down one of the most recent rulings in this regard (July 2019).

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

In Spain, any service between the person rendering it, on behalf of and under the organisation and management of another, and the recipient of that service in return for remuneration requires an employment contract to be executed.

In this regard, employment contracts may be written or oral, although it is highly advisable for contracts to be executed in writing. For certain employment contracts, such as fixed-term or trainee contracts, employment law requires the contract to be in writing, otherwise it will be presumed to be an indefinite-term and full-time contract, unless evidence can be provided to the contrary.

For a written contract to be enforceable, it must be signed by the employee. Otherwise, the employment contract will be considered to be oral.

Under Spanish employment law, the following terms and conditions must be included in employment contracts:

- a* place and date;
- b* nationality of the employee and the date on which the employee takes up employment;

² This obligation will be extended to companies with more than 100 employees in 2021 and to those with more than 50 employees in 2022.

- c* nature of the services and place where they will be rendered;
- d* agreed remuneration;
- e* number and distribution of working hours; and
- f* other provisions agreed by the parties.

Under Spanish employment law, if an offer letter includes all the terms and conditions listed above, it could 'lose' its non-binding effect and be considered an employment contract.

Employment contracts may be entered into for an indefinite period or for a fixed term. Spanish law establishes the following temporary grounds for entering into a fixed-term employment contract:

- a* when the performance of specific work or a particular service requires additional personnel. This work or service must be of a temporary, specific and substantial nature within the context of a company's activity and be executed within a limited period which, in principle, is of uncertain duration (e.g., a specific project awarded to a company);
- b* when required by market conditions, a backlog of tasks or excess orders, including as part of a company's normal activity (e.g. sales); or
- c* when the contract is for substituting employees who have the right to have their position safeguarded (e.g., employees on maternity leave).

The parties may modify the terms and conditions of the employment contract by means of an addendum to the contract at any time during the employment relationship. However, if no agreement is reached, Spanish employment law provides that economic, technical, organisational or production causes must be proven by the employer.

ii Probationary periods

Employment law in Spain recognises the possibility of arranging in writing a probationary period that should be subject to the term limits negotiated with the workers' representative. If no agreement is reached between the parties or with the workers' representative, the legislation³ lays down the following limits that should be respected in all cases: (1) six months from the commencement of the employment contract for qualified line personnel; and (2) two months for other employees.

Both parties would be free to terminate the employment contract during the probationary period without needing to allege or evidence any grounds whatsoever, and without needing to provide any prior notice.

In this connection, a new wording of the Workers' Statute, which has recently entered into force, establishes that terminating the employment contract of a pregnant employee would automatically render the dismissal null and void, unless it can be evidenced that the termination is based on valid grounds unrelated to the pregnancy.

ii Establishing a presence

In accordance with Spanish legislation, companies are not initially required to be registered to hire an employee, since employees can be registered at the company of origin and be subject to a remote working agreement in Spain. In this connection, the alternative of hiring

3 Legislative Royal Decree 2/2015, of 23 October, approving the Consolidated Spanish Law on the Workers' Statute.

employees through an agency or third-party undertaking could represent a high risk for a company, because it could be considered that personnel are being illegally transferred. These situations would need to be considered separately in each individual case.

As a possible alternative, the foreign company could enter into a service agreement with a self-employed person, respecting at all times his or her autonomy and independence. In this situation, if the self-employed person provided services on an ongoing basis, it could give rise to a risk of a permanent establishment being deemed to exist, which in turn would entail tax liabilities.

Being registered with the tax and employment authorities (social security system) is an essential requirement for hiring employees in Spain, since it is the employer's obligation to withhold tax and pay in the legally applicable amounts.

V RESTRICTIVE COVENANTS

Spanish employment legislation provides for the establishment of exclusivity covenants that are effective both during the employment relationship and after it has been terminated; both parties must voluntarily agree to such a covenant, either in the employment contract or in an addendum thereto.

In relation to the exclusivity covenant, it is possible to establish various types of restrictions on entering into agreements during the employment relationship; prohibitions on both (1) providing services to other companies simultaneously when it could be considered that unfair competition is taking place, and (2) working simultaneously for any other company (i.e., agree to provide services exclusively). For such a covenant to be deemed valid, the employer must compensate the employee economically for the restrictions on his or her ability to enter into agreements with other companies, particularly if the parties have agreed to an exclusive provision of services; otherwise, the covenant could be deemed null and void.

With respect to the post-contractual non-compete covenant, a restriction will be established on the employee preventing him or her from entering into an agreement following the termination of the employment contract that bound the employer and employee. For such a covenant to be valid and effective, the following cumulative requirements must be taken into account: (1) a maximum period of two years for line personnel and of six months for other employees; (2) the industrial or business interests of the company; and (3) appropriate and reasonable economic compensation⁴ that makes up for any losses suffered as a result of the employee ceasing to perform the employment activity he or she had previously carried out.

The absence of the foregoing requirements will render the covenant null and void and unenforceable.

VI WAGES

i Working time

Employment legislation in Spain establishes certain limits on the duration of the working day, namely a maximum of 40 hours per week of effective work, calculated as an average across the full year, and a maximum working day of nine hours of effective work; in any event, a

⁴ Spanish employment courts have not established an exact formula for an amount that is deemed reasonable; however, the majority of case law considers that it should be an amount that is sufficient to enable the employee to live without working in the case of agreeing to a full restriction.

minimum period of rest of 12 hours between the end of one working day and the beginning of the following working day must be respected. The maximum number of working hours per year in each employment activity is determined by the industry-specific collective agreement.

The above-mentioned limits do not apply to employees who are not of full age. The working hours of employees between the ages of 16 and 18 are limited to eight hours of effective work per day. For people doing night shifts, their working hours are limited to an average of eight hours a day over a reference period of 15 days.

ii Overtime

Employment legislation establishes the possibility for employees to do overtime subject to the following limits: (1) it must be voluntary, except for cases of force majeure; (2) it must be compensated, either through leave or economically; and (3) an employee may not work more than 80 hours of overtime a year.

Under the collective bargaining agreement or a clause in the individual employment contract, the parties will either agree to the overtime being compensated economically, stating the amount, which under no circumstance may be less than the amount paid for normal working hours, or by means of equivalent periods of paid leave. If there is no clause, it shall be understood that overtime must be compensated by means of leave within the four months following its performance; overtime duly compensated with leave will not be included in the calculation for the aforementioned annual limit of 80 hours.

VII FOREIGN WORKERS

There is no legal obligation in Spain to keep a record of foreign employees over and above the common record of a company's employees.

The employer may hire the number of foreign workers it deems appropriate, provided that the foreign workers have the corresponding official permits (normally permits to work and reside in Spain). For employees from EU Member States, no special permit is required.⁵

With regard to obligations regarding tax and social security contributions, the bilateral double tax treaties applicable to each case must be adhered to. Also, the maximum duration of foreign workers' postings must adhere to the content of the bilateral treaties, and the employee will not be entitled to social security benefits until he or she pays into the Spanish social security system.

The legislation applicable to foreign workers will be that agreed in the employment contract or agreed with the employee, without prejudice that foreign workers should at least benefit from the same rights as local employees.

VIII GLOBAL POLICIES

Employees are governed by the Workers' Statute and any applicable collective bargaining agreement, both of which include events deemed to be breaches, the corresponding penalties and the employer's ability to sanction employees.

There is no legal provision entitling companies to approve a specific internal disciplinary regime. However, companies are free to publish a code of ethics or a code of conduct that employees are required to follow.

⁵ Note that legal obligations may be modified as a result of Brexit.

In this regard, there is no requirement to notify the state employment authority of such codes or to specifically include their content in employment contracts.

With respect to internal policies, companies are advised to have an anonymous whistle-blowing channel, a sexual harassment protocol, and policies on the use of email and computer hardware. Also, companies that have more than 150 employees in 2020 are required to negotiate an equality plan with the workers' representatives.⁶

In Spain, an express consent from employees for each internal policy is not required; it is sufficient that their existence is made known to employees. However, in the event of disciplinary action based on a breach by the employee, it will be necessary to prove that the employee was previously informed of the relevant policy by duly authenticated means.

In practice, an internal policy is communicated by email to each employee or published on the company's intranet, or both.

With respect to language, case law considers that a company policy must be drawn up in a language that the employee can understand, otherwise compliance therewith may not be enforceable and, accordingly, a breach by the employee could not be penalised. It is therefore recommended that policies be drawn up at least in Spanish to leave no room for doubt as regards their full comprehension.

IX PARENTAL LEAVE

Besides being regulated in the Workers' Statute, the right to balance work with personal and family life is also established in other legislation aimed at enabling this. Among others, leave may be granted for the following:

- a* the birth of a child and care of minors (maternity, paternity, adoption, breastfeeding, legal guardianship); and
- b* health and safety matters arising during pregnancy.

Paternity leave has recently been modified and will be increased gradually until it equals maternity leave (16 weeks) in 2021; 12 weeks' leave has been established for 2020.

Under employment law, the following social security requirements must be met to access the aforementioned leave: the employee must (1) be registered and notified as being hired for social security purposes, (2) have contributed for a minimum period based on their age, and (3) be up to date with social security contributions.

Employees who have met these requirements will be entitled to apply for maternity or paternity leave and receive a state benefit, which will be equivalent to 100 per cent of their contribution base.⁷

Under no circumstances may the exercise of this right be punished or pursued by the company. Should this occur, the company's decision would most likely be declared null and void owing to an infringement of the employee's fundamental rights.

⁶ See footnote 2, above.

⁷ This amount will not exceed the maximum contribution base, which is set at €4,070.10 for 2019.

X TRANSLATION

Although Spanish employment law does not expressly require internal policies to be drafted in a specific language, according to case law, a company cannot demand compliance with a regulation drafted in a language other than that commonly used by its workforce, on the grounds that the employees might not understand it. Therefore, although it is not mandatory to translate policies and communications, it is advisable so as to ensure enforcement and penalisation in the event of a subsequent breach.

Additionally, with respect to action brought before the Spanish courts or public authorities, these bodies require documentation to be submitted in Spanish or, where applicable, accompanied by a certified Spanish translation.

XI EMPLOYEE REPRESENTATION

Employees in Spain are entitled to participate in companies through various representative bodies. Any representative body established will depend on the size of the workforce in the workplace (or company, if it has just one workplace) and is as follows:

- a* Employee representatives in companies with fewer than 50 employees:
 - in companies with up to 30 employees: one representative; and
 - in companies with between 31 and 49 employees: three representatives.
- b* Workers' committee (collective body) in companies with 50 or more employees:
 - between 50 and 100 employees: five committee members;
 - between 101 and 250 employees: nine committee members;
 - between 251 and 500 employees: 13 committee members;
 - between 501 and 750 employees: 17 committee members;
 - between 751 and 1,000 employees: 21 committee members; and
 - more than 1,000 employees: two committee members for each 1,000 employees or fraction thereof, up to a maximum of 75.

The employee representative election procedure is heavily regulated and formalities must be observed. Employee representatives and members of a workers' committee will be elected by the employees to be represented by means of personal, direct, free and secret voting. Their tenure will be for four years, and they will remain in the role until new elections have been promoted and held.

The following guarantees, among others, have been afforded to employee representatives and workers' committee members by law:

- a* a special procedure in the case of serious or very serious penalties;
- b* priority over other employees to remain in the company in the event of a collective redundancy;
- c* freedom to express their opinions on matters relating to their representation functions; and
- d* special protection in the case of dismissal, on the grounds that this might be in retaliation for their role.

These guarantees are enjoyed for the duration of their tenure and for one year following the expiry thereof.

As regards their powers, workers' representatives are mainly be entitled, among other rights, to (1) call regular meetings with the employees (there is no legally established minimum frequency) and (2) receive a quarterly report on industry trends and the company's financial situation.

XII DATA PROTECTION

i Requirements for registration

Although the most recent data protection legislation⁸ does not require personal data filing systems to be identified for the purpose of communicating the processing of personal data, the Spanish data protection agency (AEPD)⁹ must be notified of the appointment of a data protection officer (responsible for controlling and overseeing compliance with legislation at the company) at entities which, for instance, perform mass and systematic data processing or that process big data.

Entities must notify employees of the processing of their data at the time when the data are collected, by means of a clause providing them with information on, for instance, the data retention period and the purposes of, and legitimate basis, for the processing.

The processing of employees' personal data is, in general, strictly related to the performance of the employment contract. However, in certain circumstances, and to process the data for other reasons, such as marketing purposes (sending marketing communications with partner offers or discounts), the entity may assess whether to request employees' express written consent. However, this does not prevent the entity from performing additional data processing on other legitimate bases recognised in the EU General Data Protection Regulation (legitimate interest, legal requirements, etc.).

It is very important to bear in mind that the data collected from employees should be adequate, relevant and limited to the purpose for which the data were requested. In this context, it is essential to guarantee that technical and organisational measures are taken to ensure the protection and security of these data.

ii Cross-border data transfers

As a general rule, it will not be necessary to notify the AEPD of international data transfers or request the approval thereof, unless the guarantees provided for carrying out the transfers are, for example, set forth in contractual clauses agreed by the parties and not adopted by the European Commission.

To be able to carry out an international data transfer, adequate guarantees established in the applicable legislation will need to be in place. For example, the following guarantees will be considered valid: (1) the country to which the data are transferred must have an adequate level of data protection (the transfer being subject to a decision as to suitability); (2) the signing of standard contractual clauses approved by the European Commission, codes of conduct and certificates attesting to compliance with the law; and (3) other exceptional guarantees, such as the explicit consent of the employee, vital interests or the public interest.

8 General Data Protection Regulation (EU) 2016/679 and Spanish Organic Law 03/2018 on Personal Data Protection and the Guarantee of Digital Rights (referred to as LOPDGDD).

9 Agencia Española de Protección de Datos.

In any event, any international data transfer carried out subsequently to the transfer of which the employee had initially been notified must have an adequately legitimate basis and the employee must be notified thereof.

iii Sensitive data

Special categories of data are considered to be those that reveal ethnic or racial origin, political opinions, religious or philosophical beliefs, or trade union membership, the processing of genetic data or biometric data that can uniquely identify an individual, data concerning health or an individual's sex life or sexual orientation (for example, medical data may be considered to be sensitive, but data relating to an individual's social security number would not).

As a general rule, the processing of special categories of data is prohibited, except in the following cases (mentioned by way of illustration): (1) when the employee has given explicit consent to the processing (this will not apply in cases where the sole aim is to identify the employee's ideology, trade union membership, religion, sexual orientation, beliefs, or racial or ethnic origin, in which case a different basis for carrying out this processing must be sought); (2) compliance with a legal obligation; and (3) protection of the vital interests of the data subject.

iv Background checks

To check or verify business references submitted by employees, it will be necessary to analyse the specific framework of the job that they will be performing or the information that needs to be ascertained. For instance, if the entity wants to hire a goods vehicle driver, it may ask the employee to show his or her driving licence.

Also, it will be legally impossible to ask employees to show a criminal record certificate detailing criminal convictions and infringements, except in exceptional cases authorised by law and, in all cases, subject to the proper guarantees. In principle, it will likewise not be possible to ask employees to furnish information about their credit history, unless so permitted by a legal obligation.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Under Spanish employment law, dismissal must be duly justified on either disciplinary or objective grounds, since otherwise it may be declared unjustified, the main consequence of which would be the payment of the corresponding termination severances to the employee.

However, there are certain groups that are subject to special protection under employment law, such as (1) pregnant employees and employees who have given birth within the previous 12 months or (2) those who work reduced hours for family reasons. In the event that an employee belonging to either of these groups is dismissed, the dismissal will automatically be declared null and void, unless sufficient legal grounds can be demonstrated.

Other employee groups are protected against dismissal, namely (1) employee representatives, who are subject to a special dismissal procedure, and (2) employees who have filed complaints against the company. Unless sufficiently valid grounds can be demonstrated, dismissal could be considered null and void on the basis that it constitutes retaliation for the employees' specific situations.

Except in respect of collective redundancies, it is not necessary to notify any employment authority of the decision to dismiss an employee. However, it will be necessary to notify the workers' representatives at the company.

Following the dismissal, the parties have the option of reaching an agreement before resorting to court action, so as to avoid the cost of legal proceedings and to prevent the procedure from becoming protracted.

ii Redundancies

Employment legislation in Spain provides for two types of individual dismissals, namely disciplinary grounds and objective grounds. The formal requirements are different for each, as follows:

- a* Dismissal on disciplinary grounds:
 - a written communication to the employee sets out the facts prompting the dismissal and the date on which it will take effect (other requirements may be established by a collective agreement);
 - no termination benefit or notice period is provided for; and
 - payment of outstanding salaries.
- b* Dismissal on objective grounds:
 - prior notice of 15 days (this may be more under a collective agreement) or payment in lieu;
 - a written communication to the employee stating the reason;
 - a termination benefit of 20 days' salary for each year worked at the time of notification of the dismissal; and
 - payment of outstanding salaries.

However, in the event that the legally established thresholds are exceeded,¹⁰ the dismissal will be considered a collective redundancy and a different course of action must be followed:

- c* Collective redundancy:
 - must be preceded by a period of consultation with the workers' representatives, the duration of which cannot exceed 30 days;¹¹
 - the employment authority must be notified of the commencement of the procedure and negotiations;

10 If within a period of 90 days, then a collective dismissal procedure must be followed: 10 workers in companies that employ fewer than 100 workers; 10 per cent of the number of workers in companies employing between 100 and 300 workers; or 30 workers in companies that employ more than 300 workers.

11 The Workers' Statute sets the maximum duration of a consultation period at 30 days (15 days in the case of companies with fewer than 50 employees). Nonetheless, a consultation period could end before the legal deadline by agreement between the parties, either if the parties have reached an agreement about the collective dismissal or if they consider it impossible to reach any agreement at all within the remaining days. Further, Spanish case law has admitted that consultations may be extended beyond the aforementioned maximum period if both parties so agree. In such cases, the extension of the consultation period would not render the dismissal null and void.

- the employees must be notified individually and in writing of the agreement reached with the workers' representatives, or the employer's decision, accompanied by the agreed termination benefit;
- the offer of an outplacement plan; and
- possible costs over and above termination benefits (special agreements, public treasury contribution agreements, etc.).

XIV TRANSFER OF BUSINESS

The Transfer of Undertakings Directive¹² applies in Spain as it does in numerous other EU Member States. A change in ownership of a company, workplace or independent production unit resulting from a commercial transaction in Spain will not terminate the employees' employment relationship by itself; instead, the new employer will be subrogated to the labour and social security rights and obligations arising prior to the transaction for three years, and to the other labour and social security obligations arising after the transaction.

For a business succession to be deemed to have taken place, the following requirements must be met: (1) subjective element: a change in ownership of the company or of a significant part thereof; and (2) objective element: the effective transfer of an economic entity that maintains its identity, in respect of which all the elements required for the business activity to continue must effectively be delivered.

XV OUTLOOK

Employment legislation is undergoing numerous reforms as a result of the changes in the Spanish government. These labour reforms are therefore expected to continue in 2020, with a primary focus on continuing to promote a good work–life balance, increasing paid leaves of absence and achieving gender equality.

We also consider that the obligation on employers to disclose the existence of a gender pay gap will be subject to heavy debate at both company and legislative levels, since it entails a change in the culture of many business organisations.

Another issue assessed by the new government is the implementation of an obligation to bring the salaries of subcontracted companies into line with the salaries paid by the principal company.

Without any doubt, 2020 will be an uncertain year from an employment law standpoint. Companies should therefore engage the appropriate employment advisory services and be duly informed of any legislative changes that might arise.

12 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

SWEDEN

*Jessica Stålhammar*¹

I INTRODUCTION

Swedish labour law is regulated in different legislative acts and by collective agreements. The most important piece of legislation is the Swedish Employment Protection Act, which covers most employees apart from top management. Certain provisions in the Act are mandatory whereas others can be waived by collective agreement. Other important pieces of legislation are the Co-Determination in the Workplace Act, the Working Hours Act, the Annual Leave Act, the Discrimination Act and the Work Environment Act.

Collective agreements are very common and cover a large part of the Swedish labour market. Employers can be bound by collective agreements if they become a member of an employers' organisation or enter into a collective agreement with a specific union. Swedish workers are highly unionised even though memberships have declined since the 1990s. About 70 per cent of all employees belong to a union.

Employment disputes are handled by either the Labour Court or the local district courts. When a dismissal is contested and negotiations fail to resolve the matter, the case is usually pursued with the aid of the employee's union through the Labour Court in Stockholm, which acts as the court of first and final instance. However, if the employee is acting on his or her own, is not a union member or is not bound by a collective agreement, the district court is the first instance. Under some agreements, there are provisions for arbitration proceedings instead.

II YEAR IN REVIEW

i Increasing retirement age

Pensions in Sweden vary widely depending on the age at which a person retires. The pension system has three components: a pension paid by the state, a complementary pension paid by the employer and, optionally, private pension savings.

With effect from 1 January 2020, the minimum age at which a state pension may be drawn has changed from 61 to 62 years, and the right to retain employment (known as the LAS age) has changed from 67 to 68 years.

In 2023, retirement ages will change again – the minimum state pension age to 63 and the LAS age to 69. The age limit for the guaranteed pension, which is paid to people who have had little or no pension-qualifying income during their working lives, will also change from 65 to 66 years.

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ii Parental leave and allowance entitlements for common law spouses

As of 1 July 2019, a common law spouse may take time off work to take care of a partner's child and is entitled to a parental allowance from the government. (See also Section IX.)

iii New requirements on rehabilitation plans

When an employee is expected to be absent from work for more than 60 days because of sickness, the employer is obliged to prepare a written plan for the employee's return to work (a rehabilitation plan). This plan must be prepared within 30 days of the first day of the employee's sick leave; however, failure to prepare a rehabilitation plan is not associated with any specific sanction. The purpose of the rehabilitation plan is to support the work carried out in the workplace to enable the employee to return to work.

III SIGNIFICANT CASES

i Information from the manager²

This court case arose from a situation concerning redundancy. A manager had informed five employees that a previous period of employment would be credited to them, without having a mandate to make such a decision. Further, the reliance on this information by the employees was not justified since they had contented themselves with just an oral representation of the matter without needing to provide information regarding the duration of employment and without ensuring that the arrangement had been verified at a more senior level of the organisation.

The case shows the importance of having detailed processes in place within the workplace regarding the decisions that may be made by managers at different levels of seniority.

ii Gender discrimination³

A consulting firm terminated a probationary employment of a woman. She had been on sick leave during a certain part of the probationary period owing to being pregnant, and later bore a child. The court had to decide whether the employee had been directly discriminated against when her employment was terminated. The court ruled that the chronological connection between being placed on sick leave and the termination of the probationary employment did not constitute cause to presume that the termination was related to considerations regarding future problems for the employer because of the pregnancy. Consequently, the employer had not discriminated against the employee.

iii Working remotely without reporting⁴

A person had been employed for many years, most recently from home. When working from home, the employee had not submitted the required weekly reports to the employer on a large number of occasions and had also mismanaged his communications by email and other means. In addition, he had been impolite to his immediate line manager several times. The court concluded that the employer had proved that the employee had mismanaged himself with consequent damage for the employer, and that the employer had repeatedly informed the employee about the risks associated with continuing with this type of behaviour. Objective grounds were found for termination of the employment for personal reasons.

2 Case AD 2019 No. 9.

3 Case AD 2018 No. 74.

4 Case AD 2018 No. 2.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

There is no mandatory requirement that an employment agreement must be in writing (verbal agreements are also valid), but it is recommended. However, within one month of starting his or her employment, the employee must be informed, in writing, of important terms and conditions relating to his or her employment. The information must contain at least the following details:

- a* the names and addresses of the employer and employee, the date of employment and the address of the workplace;
- b* a brief specification or description of the employee's work duties and professional designation or title;
- c* whether the employment is applicable for an indefinite term or is temporary or probationary, and the applicable period for notice of termination;
- d* starting salary, other benefits and when the salary will be paid;
- e* the length of the employee's paid annual leave and the length of the employer's normal workday and week; and
- f* applicable collective agreements, if any.

The terms and conditions of employment can be regulated by law, by collective agreement or by an individual employment agreement. As a general rule, the employer may not single-handedly change the terms and conditions of employment, and any changes are to be negotiated with the union.

Employment agreements are generally entered into for an indefinite term. Fixed-term employment is only acceptable in certain situations for a certain length of time. There are several forms of non-permanent employment:

- a* general fixed-term employment;
- b* substitute employment;
- c* seasonal work;
- d* post-retirement employment; and
- e* probationary employment.

The main rule in respect of fixed-term employment is that it cannot be terminated by the parties during the agreed term. As is the case with employment for an indefinite term, an employer must have objective grounds for termination of the employment. There are a number of other forms of employment under various collective agreements in the Swedish labour market.

ii Probationary period

Probationary employment is permitted for a maximum period of six months; no probationary period may exceed six months.

Unless the parties agree otherwise, the probationary employment may be prematurely discontinued and the terminating party need not state any cause. The employer does not have to show objective grounds but it cannot terminate the probationary employment for reasons that are discriminatory or contrary to generally accepted standards in the labour market.

If an employer intends to give notice of termination of probationary employment, either prematurely or at the end of the probationary period, the employer must give 14 days'

notice. If the employee is a member of a union, notification must be given to the union at the same time. The employee and the local branch of the union are entitled to consultations with the employer regarding the intended decision. Confirmation of termination of the probationary employment must thereafter be provided to the employee.

iii Establishing a presence

It is possible for a foreign company to hire an employee in Sweden without having a subsidiary, branch office or other infrastructure in Sweden (e.g., the employee works from a home office). If the foreign company pays salaries, however, it has to be registered with the tax authority as an employer.

If the business is carried out permanently with local employees, the foreign company must open a branch or a subsidiary. A branch is a foreign company's local office in Sweden with its own administration and corporate identity number. The branch must have a managing director who represents it, and it must be registered with the Swedish Companies Registration Office. A branch is not part of the company – it is a separate legal entity, and is subject to Swedish law and Swedish regulatory decisions with regard to legal relationships that arise in connection with business activities in Sweden. A branch does not have its own share capital, and its assets and liabilities are part of the company's total assets and liabilities.

A limited company can be started in Sweden, but it must have at least 50,000 kronor in share capital. It must also be registered with the Swedish Companies Registration Office.

The employer has the obligation to pay social security contributions and to withhold tax on paid salary for the employee.

V RESTRICTIVE COVENANTS

An employee has a duty of loyalty that, in general, entails a prohibition against competing activities during the term of employment. Even the preparation of competing activities is unlawful. The duty to be loyal expires when the employment terminates.

Thereafter a non-competition clause is required. This clause must be carefully considered and updated periodically as it is not binding if considered too far-reaching. An unreasonable non-competition clause may be adjusted or declared invalid by the court. Any sanction in the form of a penalty may be subject to adjustment. In an employment contract, the employer's interest in protecting its know-how must be weighed against the employee's interest in an unrestricted ability to participate in gainful activity.

In 1969 an agreement was reached regarding non-competition clauses in employment agreements. This agreement applies to clauses that were entered into prior to 1 December 2015. A new modernised agreement is applicable to clauses after 1 December 2015, but technically only for employers who are bound by collective agreements. However, it is assumed that the agreement will affect the whole Swedish labour market, even for parties not bound by the agreement.

In general, for a non-competition clause to be valid, it should only be applied to top management or employees who possess certain sensitive information, it should be limited to what is necessary, and compensation corresponding to a minimum of 60 per cent of the employee's salary must be paid during the undertaking period. The term may exceed 18 months only if special reasons exist.

It has become more common to use non-solicitation clauses (preventing employees from encouraging customers, suppliers and other employees to leave the employer) rather than non-competition clauses as the employer does not normally have to compensate the employee for the undertaking.

VI WAGES

i Working time

Working hours are governed by the Working Hours Act but are also regulated to a large extent by collective agreements. Working hours in Sweden are normally 40 hours per week, and a week is defined as a period of seven days. The Working Hours Act is the key statute in this context. The Swedish Work Environment Authority is the supervisory authority to monitor compliance with the Act. If an employer breaks the law, it risks incurring fines and other penalties.

ii Overtime

Overtime is time worked in full-time employment in excess of working hours and on-call time. General overtime may be worked when there is a special need for increased working hours. As a main rule, overtime is restricted to a maximum of 48 hours during a four-week period, or 50 hours per calendar month. However, not more than 200 overtime hours may be worked during a calendar year.

Extra overtime may be worked when there are special reasons. No more than 150 overtime hours may be worked as extra overtime. General overtime should be used before extra overtime is used. Examples of special reasons are the loss of an employee with certain qualifications or skills, illness or an unforeseen increase in workload. The employer is obliged to record extra overtime.

Overtime is also regulated by collective agreement. It is usually paid at a rate of 50 to 100 per cent more than the normal wage, but can also be exchanged for free time or additional holidays. It often depends on the time and day when the overtime is worked.

iii Minimum wage

Unlike most countries in the European Union, Sweden does not have a minimum wage. Wages are regulated by collective agreements between employers and the unions. These agreements often regulate the starting wages within a particular field.

VII FOREIGN WORKERS

Regulations concerning immigration and foreign nationals in Sweden are found in the Aliens Act, among others.

As a general rule, citizens from the European Union and the European Economic Area do not need a work permit or residence permit to work in Sweden. Citizens from other countries normally need both a work permit and a residence permit if they wish to work and live in Sweden.

Posted workers

A posted employee is a person who has been sent by his or her employer to another country to work for a limited period of time. If the person has been sent to Sweden, he or she is covered during the period of employment by certain provisions in Swedish law and collective agreements. New rules regarding posting in Sweden were implemented on 1 June 2017. The purpose of the changes to the legislation was to strengthen the position of collective agreements to enable the Swedish labour market model to function better in terms of protection of posted employees.

The work and employment conditions that unions can demand through industrial action are limited to minimum wage and other minimum conditions, referred to as core rights. Employers who post employees are obliged, upon request by a union, to appoint a representative who is authorised to negotiate and enter into collective agreements. Foreign employers must report postings and designate a contact person to a registry at the Work Environment Authority when they send employees to work in Sweden.

VIII GLOBAL POLICIES

There are no specific rules governing internal company policies, though there are a few policies that are statutory. However, it is recommended to enforce written policies on numerous workplace subjects such as IT, travelling, leave, sideline work, and alcohol and drugs. The employer must follow up on any non-compliance to be able to use when a termination situation arises.

The policies can, for example, be distributed by attachment to the employment agreement, by email or an intranet site. If there is a collective agreement at the workplace, the employer must discuss and negotiate with the unions before the rules are implemented.

IX PARENTAL LEAVE

Parental benefit is money a person in Sweden receives to be able to stay at home with a child instead of working. Parental benefits are available for 240 days per parent, thus a total of 480 days. It is possible to transfer up to 150 days to the other parent. However, 90 sickness benefit qualifying days are reserved for each parent.

How much the parent receives in benefit will depend on his or her sickness benefit qualifying income. Leave from work is normally not paid by the employer, but some collective bargain agreements top up the salary from the base level that the government pays to the parent.

Employees on parental leave may not be dismissed solely for being on parental leave.

X TRANSLATION

The employment agreement and other related documents are not required to be in Swedish. However, it is very important that the employee fully understands the employment contract. Best practice is to make these documents available in the employee's first language.

XI EMPLOYEE REPRESENTATION

i Workplace representation

The unions in Sweden provide employee representation at work. They operate under their own rules and there are no statutory regulations that lay down how trade union representatives should be chosen. In contrast to many other European countries, there is no works council structure in Sweden.

There is no rule about the number of union representatives that should be involved in negotiations with an employer. If there is no local union club at a workplace, the union can appoint a specified individual as the union contact for negotiations.

ii Board representation

Under the Act on Board Representation for Employees in Private Employment, people who work for companies with more than 25 employees have the right to elect two board members and two deputies. However, the employee representatives on the board can never be in the majority. The employee representatives are chosen by the local union, with which the employer has a collective agreement. They can be chosen in a number of ways, including election at a union meeting at the company, appointment by the union or a ballot of the membership.

On most issues, board members representing employees have the same rights as those representing the shareholders of the company. However, they cannot take part in discussions relating to collective bargaining or industrial action, or other issues where there is a clear conflict of interest between the company and the union. Employee members on the board, like other board members, are required to act in the best interests of the company.

XII DATA PROTECTION

The General Data Protection Regulation (GDPR) is an EU regulation that serves to protect the personal data of anyone in the European Union. It entered into force on 25 May 2018 and must be complied with. It applies to any organisation globally that handles the personal data of people in the European Union.

Sweden is currently enacting additional legislation regarding the GDPR. The Swedish Data Protection Authority is the supervisory agency. Since May 2018, the Authority has only issued sanctions in a few cases (among others, concerning facial recognition in schools).

i Requirements for registration

Employers do not have to register with the Swedish Data Protection Authority to be allowed to process personal data, but they do need to process personal data lawfully and if data is collected, it must be for a specific reason. The processing of personal data is legitimate when done in accordance with the GDPR, including when the process is necessary to fulfil either an agreement or a legal requirement.

Certain employers, such as authorities and companies whose core business is to monitor people, need to appoint a data protection officer and report the contact details of that officer to the Swedish Data Protection Authority.

An employer is required to report any personal data breach to the Swedish Data Protection Authority within 72 hours.

ii Cross-border data transfers

The provisions of the GDPR must be complied with when transferring any personal data. It applies to the processing of personal data in the context of the activities of an establishment that is part of the European Union, regardless of where the processing takes place.

iii Sensitive data

Any information relating to a person that can be used to identify the person, whether directly or indirectly, is defined as personal data – from a name, a photograph, an email address, bank account details, posts on social networking websites, medical information to a computer IP address. Some personal data is categorised as sensitive personal data, for example racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, the processing of genetic data and biometric data for the purpose of uniquely identifying a person, data concerning health or data concerning a person's sex life or sexual orientation. As general rule, the processing of sensitive data is prohibited. Despite this, an employer is allowed to process sensitive personal data if certain conditions apply, including if the employer has prior and explicit consent from the employee. The employer also has grounds for processing sensitive data if it is necessary for carrying out obligations under employment, social security or social protection law, or a collective agreement.

iv Background checks

An employer is not permitted to obtain an extract from the criminal register itself. However, the employer can ask its employee to provide such an extract from the criminal record database.

Credit checks are only allowed if the employer has a legitimate reason to conduct the check, for example, when the employer needs a risk assessment with a financial perspective.

Collective agreements may contain different rules.

XIII DISCONTINUING EMPLOYMENT

i Objective grounds for termination of employment

According to the Act on Security of Employment, dismissal of an employee must be based on objective grounds, for either personal reasons or shortage of work, including redundancy.

An employer who breaches the Act will be liable to pay not only a salary and other employment benefits to which the employee may be entitled, but also damages. Damages may be payable for the loss suffered (economic damages) and for any offence that the violation may have caused (general damages).

ii Dismissal

Dismissal is the termination of a contract based on grounds relating to an individual employee, and may be given with or without a notice period. Dismissal without a notice period may be justified only if an employee has grossly neglected his or her obligation to his or her employer – even then, it may not be based solely on circumstances known to the employer for more than two months before sending the obligatory information to the employee and the local union.

Dismissal of union members for gross misconduct, like other terminations, cannot be implemented while negotiations with employee representatives are taking place. When an

employee is dismissed, with or without a notice period, a considerable burden of justification rests with the employer. Reasonable grounds for dismissal do not exist if it is considered reasonable for the employer to relocate the employee.

Factors to take into account for objective grounds for dismissal are the nature of the business, the nature of the employee's assignment (especially if the employee is in a position of trust), the nature of the offence, the harm done to the employer, and the employee's age, length of service, prior performance and likely future conduct.

The courts also consider the measures taken by the employer to remedy the problem, for example by informing the employee of opportunities to improve. As a rule, these warnings can be delivered by the employer on his or her own initiative. Objective grounds for dismissal recognised by the courts over the years include the following:

- a* wilful violation of work rules or legitimate orders;
- b* repeated negligence;
- c* disloyalty to the employer, for example by competing secretly with him or her or revealing important business secrets;
- d* an inability to cooperate with colleagues;
- e* criminal activities at or outside work; and
- f* incompetence.

An employer who wishes to dismiss an employee by reason of circumstances that relate to the employee personally must notify the employee to this effect in advance. In cases of dismissal without notice, written notification shall be given at least one week in advance and for dismissal with notice, two weeks in advance. If the employee is a member of a trade union, the employer shall also give notice to the local organisation to which the employee belongs.

The employer must give the employee written notice of termination that contains the date, the names of the employer and the employee, the reason for the termination, an explanation of how the employee shall act if he or she wants to declare the termination null and void, and information about preferential rights.

When a declaration that the dismissal itself is invalid is not sought, but damages are, the employer must be told no later than four months after the events for which damages are being claimed.

iii Redundancies

In general, when an employer decides to restrict its operations, it is accepted as redundancy. Therefore, the employer alone normally decides when redundancy exists as it freely makes decisions with regard to its own organisation.

Even if grounds exist for redundancy, there are steps to be taken before formal grounds exist. Prior to any redundancy dismissal, the employer must first try to relocate or transfer the employee to another post. Other free posts within the company must be offered to the employee, subject to the employee having sufficient qualifications for the post. If the employee is transferred, he or she should receive this offer in writing from the employer. If the employee declines the offer, the employer has fulfilled its transfer duty. If no offer can be made, the employer must be prepared to prove that an effort has been made to find an available post.

If there are no other vacant posts within the company and there are several employees who must leave, then the employer must set up a 'short list' concerning order of priority. The Swedish general rule states that the person who has worked the longest within the company may stay. Employees with a shorter length of service within the group of companies will instead be given notice. There can, however, be different rules in a collective agreement.

The order of priority right covers all the tasks that the affected employee is competent to carry out, held by employees who have worked for a shorter time within the operation unit: examples of an operation unit include a factory or a restaurant. A unit of this kind has a geographical nature and cannot exist at several venues. Within every operation unit, a short list must be established for every collective agreement area, which consists of both organised and unorganised employees. If the employer has a collective agreement, there will normally be separate lists for blue-collar workers and for office staff.

The redundancy can be either mathematical in nature or related to one person's tasks. At a workplace with 50 employees and where 10 per cent of the production has to be reduced, and the employees can replace each other, the last five employees will be given notice. If the lack of work applies to one person's particular tasks then the transfer question must be focused on that person.

If the employee has worked for a long time within the company and there are others within the company who have worked less time, the employee – if he or she has sufficient qualifications – must be offered one of these jobs. The order of priority right covers all the tasks that the affected employee is competent to carry out, and the employment held by employees who have worked for a shorter time within the company.

The term 'sufficient qualifications' means that the employee is able to carry out the tasks immediately or after a short period of learning (up to three or four months).

According to the Co-Determination in the Workplace Act, employers have a general and extensive obligation to inform and hold consultations with the workforce via the unions. There is no specific regulation that applies to undertakings with a certain number of employees. The union will be awarded substantial damages if the employer fails to carry out consultations with the union in the prescribed manner.

An employer must give an employee written notice of termination that contains the date, the names of the employer and the employee, the reason for the termination, an explanation of how the employee shall act if he or she wants to declare the termination null and void, and information about preferential rights.

During the period of notice, the employee will receive a salary as if he or she is still working. An employee may not be given garden leave without his or her consent. The minimum statutory period of notice for both the employer and the employee is one month. The employee is entitled to the following minimum periods of notice:

- a* up to two years' employment: one month;
- b* two to three years' employment: two months;
- c* four to five years' employment: three months;
- d* six to seven years' employment: four months;
- e* eight to nine years' employment: five months; and
- f* 10 or more years' employment: six months.

The rules about the length of the period of notice are likely to be different in a collective agreement and in an employment agreement. In the latter case, only deviations in favour of the employee are binding.

An employee who has left an employer because of shortage of work has the right of precedence, within his or her unit and collective agreement area, for nine months from the end of the employment. This right of precedence presupposes that the employment has lasted for at least 12 months, the employee has informed the employer about his or her interest and that he or she has suitable qualifications for the new job.

The employer is obliged to notify the Labour Office of cutbacks in operations that will affect at least five employees. Certain formalities are required, and if the employer omits to notify the Labour Office it must pay a penalty charge.

If the employer claims shortage of work as the objective ground but the employee believes that other reasons have been taken into consideration instead, the employee can claim that the termination should be declared void. An employee who believes that the employer is in breach of the rules concerning the order of priority can only claim damages. If the violation consists of an employer's refusal to comply with a judgment, in which a court has declared a dismissal or summary dismissal invalid, then compensation must be paid according to the fixed sums stated in the Employment Protection Act, which vary according to the duration of the employment and the employee's age.

Employment disputes are often ended by a settlement agreement, where severance is paid because there is no objective ground for terminating the employment. Another relevant method is to negotiate the contents of the short list with the unions. Redundancies are very often settled by way of negotiated notices.

iv Protected categories

There is a special order of priority for union representatives, which is of great importance to the union.

In addition, employees who have been given special employment because of reduced work ability shall, in the case of dismissal owing to shortage of work, be given priority to further work irrespective of the order of priority.

XIV TRANSFER OF BUSINESS

Upon the transfer of an undertaking, or part of an undertaking, from one employer to another, the Employment Protection Act sets forth that the rights and obligations pursuant to employment with the first employer are automatically transferred to the second employer. However, the first employer will be liable to the employee for any financial obligations relating to the period prior to the transfer.

As a rule, the first employer may not terminate employment prior to the transfer because of the transfer. However, an employee is entitled to object to a transfer of his or her employment and, in such a case, the first employer can terminate his or her employment because of redundancy.

When determining whether or not a transfer of an undertaking is at hand, the Swedish courts apply the same seven criteria that have been set forth by the Court of Justice of the European Union, namely:

- a* the type of business;
- b* the transfer of tangible assets;
- c* the value of intangible assets at the time of the transfer;
- d* whether the majority of employees are transferred;
- e* whether the customers are taken over;
- f* the degree of similarity of the business and its activities before and after the transfer;
- and
- g* the period, if any, during which activities were suspended.

XV OUTLOOK

The government decided in April 2019 to appoint a special investigator to look into modernisation of the Swedish labour law. The inquiry is due to be presented to the government by 31 May 2020 and be implemented by 2021. In short, the special investigator shall prepare legislative proposals on extended exemptions from the rules on the order of priority, employers' responsibility for competence development and lower termination costs. The inquiry is based on the January Agreement, a political agreement between the Social Democrats, the Centre Party, the Liberals and the Green Party.

SWITZERLAND

*Ueli Sommer and Simone Wetzstein*¹

I INTRODUCTION

Employment law in Switzerland is mainly based upon the following sources, listed in order of priority:

- a* the Federal Constitution;
- b* cantonal constitutions;
- c* public law, in particular the Federal Act on Work in Industry, Crafts and Commerce (the Labour Act), and five ordinances issued under this Act regulating work, health and safety conditions;
- d* civil law, in particular the Swiss Code of Obligations (CO);
- e* collective bargaining agreements, if applicable;
- f* individual employment agreements; and
- g* usage, custom, doctrine and case law.

The following sources also play an important part in Swiss employment law:

- a* the Federal Act on the Equal Treatment of Women and Men;
- b* the Federal Act on Personnel Recruitment and Hiring-out of Employees;
- c* the Federal Act on Information and Consultation of Workers (the Participation Act);
- d* the Federal Data Protection Act;
- e* the Federal Merger Act;
- f* the Federal Act on Private International Law;
- g* the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (known as the Lugano Convention);
- h* the Agreement on Free Movement of Persons between Switzerland and the European Union and European Free Trade Association; and
- i* the Federal Act on Foreign Nationals and Integration.

Generally, Swiss law-governed disputes that fall within the jurisdiction of the court of first instance cannot be heard unless there has first been an attempt at conciliation before a conciliation authority. If no agreement is reached before the conciliation authority, the conciliation authority records this fact and grants authorisation to proceed. The plaintiff is entitled to file the action in court within three months of the authorisation to proceed being granted.

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For amounts in dispute not exceeding 30,000 Swiss francs, a simplified procedure is provided. Up to that amount, the parties shall not be charged any court fees and the judge shall *ex officio* establish the facts and appraise the evidence at his or her discretion.

In general, federal, cantonal and communal authorities – except the courts – do not have a very important role with regard to individual employment contracts. In some areas, however, the authorities may have a greater role, such as in the issuing of work and residence permits, notification of collective dismissal, or authorisation for night shifts or working on Sundays.

II YEAR IN REVIEW

Paternity leave was a hot political topic in 2019. Currently, fathers are entitled to one day of paid paternity leave. In September 2019, the Swiss parliament suggested a paid paternity leave of two weeks. While a committee is trying to prevent this proposal, an opposing popular initiative to ultimately achieve a more extensive parental leave seems very likely. Thus, the political discussion is ongoing. Joint parental leave arrangements also are being discussed.

III SIGNIFICANT CASES

In a recent decision, the Federal Supreme Court addressed the question of which costs relating to the use of people's homes as an office must be paid by an employer to its employee,² a matter that has been largely underestimated in the past. In this case, although the employment contract did not include a remuneration obligation for home office use, the Court ruled in favour of the employee. The Federal Supreme Court justified its decision by stating that if the employer does not provide its employees with a suitable place of work, it must bear the costs of the necessary infrastructure. In this case, the employer had not provided the employee with a workplace and therefore had to reimburse the employee for all the costs necessarily incurred to carry out the work. It was also irrelevant that the employee would have rented the room in any case and in fact had rented it before starting to work for the employer – thus the company must bear the respective home office-related costs.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Article 319 et seq. of the CO sets out the mandatory, semi-mandatory and optional provisions relating to individual employment contracts. An individual employment contract can be made in writing, orally or even implicitly (with a few exceptions, such as apprenticeship contracts, which must be in writing) and the law stipulates no time limits with regard to the conclusion of an employment contract. However, certain provisions must be agreed in writing if the parties want to deviate from the provisions set forth in the CO (e.g., notice periods or probation periods). Collective bargaining agreements may also stipulate that deviations from the provisions must be set out in writing.

2 BGE 4A_533/2018 as of 23 April 2019.

Furthermore, Article 330b of the CO states that for employment relationships with an indefinite term or with a term of more than a month, the employer must provide the following information in written form to the employee no later than one month after the starting date:

- a* names of the contracting parties;
- b* starting date;
- c* the employee's function;
- d* salary (including bonuses, allowances and other remuneration); and
- e* working hours per week.

The written form is usually recommended for all individual employment contracts, particularly because some deviations from the statutory law require written form. Thereby, it is important that 'written' means a wet signature or an electronic signature process approved by the Swiss government based on the Swiss Law on Electronic Signatures.

In addition to the above elements, it is advisable to include the following:

- a* the term of the employment relationship;
- b* rules on probation and notice periods that deviate from the law;
- c* vacation entitlement;
- d* rules on continued payment of wages when ill or pregnant; and
- e* other specific agreements made during contractual negotiations (e.g., non-compete agreements).

Changes to an employment contract can be made by mutual agreement, by concluding an amendment agreement or by issuing a formal notice of change.

ii Probationary periods

If not stated otherwise in the employment contract, the first month of employment is considered the probationary period. During this period, the employment agreement may be terminated with seven days' notice. The parties may mutually agree on a longer probation period, which may not exceed three months. Any inability to work during the probation period (e.g., owing to illness) may extend the probation period.

iii Establishing a presence

A foreign company that is not registered in Switzerland may hire employees to work in Switzerland. It may also hire Swiss employees through a Swiss agency or a third party without registering. A foreign company may also hire an independent contractor; however, due care must be taken that the contractor does not qualify as an actual employee because the risks involved can be substantial (e.g., lack of insurance cover).

An independent contractor may create a permanent establishment (PE) for tax purposes, depending on the form of organisation and the work performed. The more a contractor gives the appearance of being a part of the organisation of the foreign company, for example with offices acting in the name or on behalf of the company, the higher the risk of creating a PE. A company that establishes a PE is subject to taxation in Switzerland.

Generally, the foreign company and its Swiss employees become subject to the same social security regime as any Swiss company. Therefore, the foreign company must register with all social security organisations and establish a pension scheme for its employees.

The employees' social security contributions must be withheld by the foreign company. Withholding of income tax only applies to employees who do not have a permanent residence permit.

V RESTRICTIVE COVENANTS

Pursuant to Swiss employment law, an employee may make a commitment to an employer to refrain from any competing activity for a period after termination of their employment relationship. A post-termination non-compete clause is only binding if the employment relationship gives the employee access to customer data, manufacturing secrets or business secrets, and if the use of such knowledge could significantly damage the employer. According to the Federal Supreme Court, this is never the case when the relationship between client and employer or between client and employee is strongly personal. The non-compete clause must be made in writing and shall be reasonably limited in terms of place, time and subject, to preclude an unreasonable impairment of the employee's economic prospects. The statutory maximum duration of a post-termination non-compete clause is three years, but typically does not exceed one year. The law does not require consideration for a post-termination non-compete covenant.

A judge may limit an excessive prohibition of competition. If an employer gives consideration in return for a non-compete agreement – although this is not legally required – it is more likely that the covenant will be fully enforceable. A prohibition on competition lapses if the employer no longer has a significant interest in upholding the prohibition. As a matter of law, any non-compete clause will cease to apply if the employment is terminated by the employer, unless the employee has set a reason, or even provoked the termination.

VI WAGES

i General

Two Swiss cantons have implemented a general minimum wage into their cantonal constitutions. Neither the other cantons nor federal laws provide for the same.

However, many collective employment contracts include a minimum wage. In light of the freedom of movement of labour within the European Union, the authorities started to implement a mandatory minimum wage in areas where undercutting of market standard wages by foreign labour has become an issue (e.g., in Geneva, the government implemented a minimum wage for the retail sector).

For Swiss stock corporations listed in Switzerland or abroad, the ordinance on compensation provides for a prohibition of certain compensation payments to senior management. The prohibited payments are, *inter alia*, severance payments, sign-on bonuses and bonuses for certain M&A transactions.

ii Distinction between variable pay and discretionary bonuses

Swiss law makes an important distinction between variable pay and a gratification (a fully discretionary payment). The term 'bonus' is not regulated in employment law. Hence, a bonus either qualifies as (variable) salary or as gratification.

The Federal Supreme Court has often had to deal with bonus entitlements, in particular with pro rata entitlements in the case of terminated employment agreements. While the employee has a statutory right to receive a (variable) salary, the entitlement to a gratification

only exists in the case of an agreement. Without any agreement it is basically at the discretion of the employer to provide a gratification. Whether the bonus is considered (variable) salary or a gratification is crucial as only in the latter case may the employer have a chance to deny a (*pro rata*) entitlement of an employee leaving the company.

The qualification of a payment as either salary or a gratification depends first on the wording of the employment agreement. While an entitlement would suggest (variable) salary, a possible payment in the full discretion of the employer suggests a gratification. Additionally, the communication of the employer when granting a payment is taken into account: when granting a gratification, it should always be stated that the payment was made voluntarily and at the full discretion of the employer. But even if the agreement between the parties and each bonus communication provides that the payment is not mandatory and the grant remains at the full discretion of the employer, the payment may still be qualified as salary. This is the case, for instance, if the amount of the payment exclusively depends on objective factors – for instance, if the amount of the payment can be calculated according to a certain formula. Further, the employee might have a right to the payment if the employer's reservation of the voluntary status of the bonus payments is considered rhetoric without any real meaning. Courts tend to assume this when bonus payments are made continuously for a number of years.

In addition, the Federal Supreme Court has ruled that only payments that are of a secondary nature compared with the salary itself can be considered as a gratification. In light of the Federal Supreme Court's most recent case law, this is true for employees with low incomes (i.e., below the simple median wage, which is currently 70,800 Swiss francs). For such low incomes, larger bonus payments are categorised as salary. For medium to high incomes, which are between the median wage and five times the median wage (between 70,800 Swiss francs and 354,000 Swiss francs), a bonus might only qualify as variable pay if it exceeds the level of the annual income. Whenever a very high salary is granted, a bonus will be qualified as a gratification unless the documentation indicates otherwise.

The distinction between salary and a gratification is relevant because if a bonus qualifies as (variable) salary, then the employee has a right to receive a bonus during any period of gardening leave (e.g., based on past bonus payments) and any condition that the employee may not be under notice to receive a bonus is considered void.

iii Working time

The Labour Act provides for a strict obligation for companies to maintain detailed records of time-keeping (including the start and end times of the working day and break times) of all employees being governed by the Labour Act. In principle, the Labour Act applies to all employees; only certain types of professional and very senior management personnel are exempt. Very senior management personnel are those employees who are allowed to make important decisions that can affect the structure, the course of business and the development of a business or a part of business.

A huge disparity has evolved over the past few years between this obligation and the reality of day-to-day operations in many businesses. The law provides for possibilities to simplify or even waive the obligation to record time-keeping. To be able to waive the recording of working hours, an employer must have a collective agreement in place allowing for an exemption of the time-keeping obligation. Employees to be exempted from this obligation must earn more than 120,000 Swiss francs per year and must have a high degree of autonomy

in their work. Even for a simplified record of working hours, a collective agreement between employer and employee representation must be in place, and employees benefiting from a simplified record of hours worked must have a considerable working time autonomy.

The Labour Act determines the maximum weekly hours of work, distinguishing between two categories of employees:

- a* category 1 – workers employed in industrial enterprises and white-collar workers (office workers, technical staff and other salaried employees) as well as sales staff in large retail undertakings; and
- b* category 2 – others workers, employed mainly in the construction sector, and craftsmen, workers in commerce and sales staff in small retail undertakings.

The maximum number of hours of work is fixed at 45 hours a week for category 1 and 50 hours a week for category 2. If employees in both categories are employed in the same enterprise, the maximum of 50 hours applies to all employees. Within these limits the effective hours of work are fixed by collective agreements and individual contracts.

Work between 11pm and 6am is considered night work. With the exception of certain businesses and groups of employees (as outlined by Ordinance No. 5 to the Labour Act), night work is forbidden. However, a special permit for such work may be issued if the employer evidences a special or urgent need. In any case, the night work may not exceed nine hours in a maximum time frame of 10 hours, including breaks. If the employee provides services on only three of seven consecutive nights, the night work may amount to 10 hours in a maximum time frame of 12 hours, including breaks. Employees may be entitled to a time or salary premium when working at night.

iv Overtime and excess hours

Swiss law provides for overtime and excess hours. Overtime is addressed in Article 321c of the CO and concerns cases in which an employee works more than the number of hours stipulated in the employment contract, up to the maximum working time allowed under the Labour Act (i.e., 45 or 50 hours). Pursuant to the CO, any overtime not compensated by time off must be paid by the employer with a supplement of at least 25 per cent of the applicable wage, unless there is an agreement to the contrary in writing (i.e., a collective agreement or individual employment contract). Thus, an agreement may provide that no supplement applies or that any overtime is included in the standard wage. Generally, the second option is used in management contracts.

Excess hours relate to the hours worked in excess of the Labour Act limits of 45 or 50 hours (see Section VI.iii). The payment of a wage supplement of 25 per cent of the hourly wage is a mandatory provision from which the parties may not depart by agreement (in contrast to overtime). The Labour Act specifies that for white-collar workers and sales staff in large retail undertakings, the supplement is due only if the total excess hours performed exceed 60 hours per calendar year. Additionally, excess hours worked by a single employee may not exceed two hours a day except on a free weekday or in a case of urgency and may not, for employees with a maximum working time of 45 hours a week, exceed 170 hours a year. For employees with a maximum working time of 50 hours a week, the maximum excess hours per annum may not exceed 140 hours.

VII FOREIGN WORKERS

Switzerland has a dual system for the admission of foreign workers. Nationals from countries within the European Union or European Free Trade Association (EFTA) benefit from the Agreement on Free Movement of Persons and are, in general, entitled to receive a work permit, which can be obtained quite easily. With regard to non-EU and non-EFTA nationals, only a limited number of management-level employees, specialists and other qualified employees are admitted from all other countries (subject to a quota as determined by the Federal Council).

If foreign nationals (without residence in Switzerland) work in Switzerland temporarily for more than eight days for a non-Swiss company, they must be reported to the authorities in advance even if no work or residence permit is required. Furthermore, the employer must comply with the standard working conditions, including minimum salary levels. For certain employment sectors, reporting, or even a permit, is required from the first day of work.

There is no limit to how many foreign employees may work for one company and no obligation on the employer to maintain a list of foreign workers.

All foreign employees resident in Switzerland but with no permanent residence permit are subject to tax at source. Foreign workers are subject to the same working conditions and benefits as Swiss citizens.

Pursuant to the Federal Act on Private International Law, the applicable law regarding employment relationships is that of the country where the employee usually performs his or her duties. However, the parties may agree that either the law of the country in which the employee has his or her permanent residence or the law of the country in which the employer is domiciled apply. Consequently, it may be possible to submit foreign workers of foreign entities to the laws of their home country. However, social security obligations may not be overridden by such a choice of law.

VIII GLOBAL POLICIES

An employer may establish general directives and give specific instructions about the execution of work and the conduct of its employees. Furthermore, the employer must take prescribed measures to protect the life, health and integrity of its employees and in particular to take care that the employee is not subjected to sexual harassment or discrimination. Therefore, it is very common in Switzerland for companies to set up rules on accepted behaviour and the consequences in the event of non-compliance. Usually, employees must agree in writing that they will comply with the rules. There is no strict requirement, however, that employees sign such policies, but it is recommended to have evidence on file that an employee received the policy.

The purpose of the Federal Act on the Equal Treatment of Women and Men is to ensure equal treatment at work by means of a general prohibition of discrimination based on gender – including a prohibition of sexual harassment. This Act provides for sanctions if the employer does not comply.

IX PARENTAL LEAVE

By statute, mothers are entitled to maternity leave of 14 weeks. Federal statutory maternity pay amounts to 80 per cent of the remuneration received before childbirth and is capped, currently, at a maximum of 196 Swiss francs per day during the 14 weeks. Federal maternity

pay is financed by the social security contributions of all employers and employees and administrated by a government agency. Mothers are entitled to the federal maternity pay if, during the nine months immediately prior to childbirth, she (1) was compulsorily insured during those nine months within the meaning of the Retirement and Survivors Act, (2) has been gainfully employed for at least five months during this period and (3) at the time of confinement, is either an employed or self-employed person or works in her husband's business and receives a cash wage.

In addition to the federal statutory maternity pay solution, some employers grant additional maternity pay benefits: for example, they cover the difference between federal statutory maternity pay and the employee's full salary, or pay benefits for a longer period of time, or both.

In contrast, fathers are entitled to one day of full paid paternity leave, which is paid by the employer.

There are no specific stipulations regarding entitlement to maternity or paternity leave. Further, there is no concept of paternity leave under Swiss law.

During pregnancy and 16 weeks following childbirth, employees must not be dismissed. Any termination notice issued during this period is void. Any notice served before this period starts is suspended when the period begins and then recommences after the protection period (see also Section XIII.i).

X TRANSLATION

In principle, there are no regulations regarding the required language of employment documents. However, employees need to be able to understand the employment conditions because otherwise those conditions may not be enforceable. Therefore, it is recommended to translate all employment conditions into a local language. This is very important in particular for the main documents, such as the employment contract and general employment conditions.

There are no formalities regarding the translation. However, it should be clearly stated which language shall prevail in the event of any conflict between the languages. Further, a formal translation by a recognised translator may be necessary if only foreign documents exist in respect of a court dispute. This is not the case when a document was already translated when it was drawn up.

XI EMPLOYEE REPRESENTATION

Pursuant to the Participation Act, employees at companies with at least 50 employees may elect a works council. The works council representatives must be informed of all matters on which they need information to fulfil their tasks, and they must be consulted on the following matters:

- a* security at work and health protection;
- b* collective dismissals;
- c* affiliation to an occupational pension fund and termination of the affiliation agreement; and
- d* transfer of undertakings.

Before a works council can be established, a resolution by at least one-fifth of all employees must be passed. Once a positive decision has been made, the election of the representatives

may take place. The number of representatives must be determined by the employer and the employees according to the size of the company, but may not be below three. The employer must inform the works council at least once a year about the impact of the course of business on the employees. Within the framework of the Participation Act, works councils may decide how to organise themselves.

Apart from the Participation Act, the law sets out no special rights for works councils within the company, but such rights are recognised by some collective agreements.

Generally, a substantial number of companies with more than 50 employees do not have a works council.

XII DATA PROTECTION

i Requirements for registration

Private persons must register their database if they regularly process sensitive personal data or personality profiles, or if they regularly disclose or transfer personal data to third parties. However, because employers must collect certain data about their employees pursuant to social security laws, tax law and the CO (e.g., with regard to the data required to issue a reference letter), they are exempted from the duty to register. If, however, companies collect additional data that, by law, does not need to be collected, there could be a duty to register.

Pursuant to the Federal Data Protection Act, personal data must be acquired lawfully, and processing must be lawful, in good faith and not be excessive. Further, personal data is only allowed for the purpose indicated for the processing or evident under the circumstances or given by law. Employment law further extends the scope of protection granted under the Act. Article 328b of the CO only allows the processing of data that refers to an employee's aptitude for a job or is necessary for the performance of services.

Personal data must be protected from unauthorised processing through adequate technical and organisational measures. The employee must be informed about the collecting and processing of sensitive personal data or personality profiles (see Section XI.iii), for example, in a data protection and privacy policy. An employee may at any time request access to his or her employee file.

ii Cross-border data transfers

Cross-border data transfers without the employee's consent are permitted only if adequate cross-border data protection agreements are in place and information about those agreements is given to the Federal Data Protection and Information Commissioner, or if the respective countries provide for an adequate level of data protection. With regard to the processing of data about private individuals, the Commissioner has established a list of countries that have implemented equivalent data protection legislation, which is publicly available on the internet.³ For example, the level of protection provided for private individuals by EU Member States is deemed adequate. By contrast, the level of protection provided for the United States is not considered as being adequate. To reach an adequate level of protection, the Swiss-US Privacy Shield Framework provides a valid legal mechanism to comply with Swiss requirements when transferring personal data from Switzerland to the United States.

3 Accessed via <https://www.edoeb.admin.ch/edoeb/en/home/data-protection/arbeitsbereich/transborder-data-flows.html.html>.

The processing of personal data may be assigned to third parties by agreement or by law if the data is processed only in the manner permitted for the instructing party itself, and it is not prohibited by a statutory or contractual duty of confidentiality.

iii Sensitive data

Pursuant to the Data Protection Act, personal data means all data that refers to a certain person. Sensitive personal data means all data relating to:

- a* religious, ideological, political or trade union-related views or activities;
- b* health, personal life or racial origin;
- c* social security measures; and
- d* administrative or criminal proceedings and sanctions.

The processing of sensitive personal data is only allowed if the relevant person is informed about the controller, the purpose of the processing and the categories of data recipient if a disclosure of personal data is planned.

iv Background checks

As a rule, the employer may not conduct background checks or have these checks performed by third parties without the explicit consent of the applicant. Even if the applicant has consented to a background check, the check would be – in consideration of the applicant's privacy – limited to information that strictly relates to whether the applicant fulfils the requirements of the job. For instance, any questions in regard to the applicant's health must be directed to find out whether the applicant is currently fit to work. Any further investigations to find out whether there is a general risk that the applicant could become ill in the long term would not be allowed.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

A contract concluded for an indefinite period terminates after notice is given by either of the parties (ordinary termination). In principle, no cause to terminate an employment relationship is required. The minimum notice period is set forth in the CO. However, the parties may not reduce this period to less than one month, subject to any longer periods set forth in collective bargaining agreements. Nevertheless, because of the protection against abusive termination, an employee has a statutory right to be informed in writing of the reasons for termination of the contract, on request.

A termination of an employment agreement must not be abusive. A party that abusively gives notice of termination of the employment relationship must pay an indemnity to the other party. Termination of the employment contract by either party is considered abusive if, for example, it occurs for one of the following reasons:

- a* a personal characteristic of one party (e.g., race, creed, sexual orientation, age), unless this aspect is relevant to the employment relationship or significantly impairs cooperation within the enterprise;
- b* the other party makes use of a constitutional or contractual right; or
- c* where the sole purpose was to frustrate the formation of claims arising out of the employment relationship.

If any of the parties has a 'significant cause', it may terminate the contract at any time, without prior notice (extraordinary termination or summary dismissal), and may claim compensation from the other party for the damage caused. However, if an employer terminates a contract with immediate effect without a significant cause, the employer must compensate the employee for the damage that has thus been caused to him or her, plus a penalty of up to six months' remuneration.

Generally, if an employee aged 50 or older leaves employment after 20 or more years of service, the employer must pay severance compensation equivalent to between two and eight months' salary. Severance pay is not very common in Switzerland, however, because the employer can deduct the contributions made to the (mandatory) pension plan from the mandatory severance pay.

The parties may agree upon (immediate) termination of an employment agreement at any time. The CO sets forth no explicit provisions with regard to a termination agreement. However, according to case law, the mandatory provisions of the CO shall be taken into account and the agreement must include benefits for both the employer and the employee. Otherwise, the judge may declare the termination agreement to be null and void.

In general terms, no categories of employees are protected from dismissal, but there are certain periods during which a notice of termination is invalid. After a probation period has expired, an employer may not terminate a employment relationship at the following times:

- a* when the employee is performing military service or civil defence;
- b* when the employee is prevented from working through no fault of his or her own as a result of sickness or an accident (for a certain period depending on the year of employment, up to 180 days);
- c* during pregnancy and for 16 weeks following the birth of the baby; or
- d* when the employee participates in an official aid project in another country.

Any notice to terminate an employment contract during any such period is invalid. Any notice served before such a period starts is suspended when the period begins and then recommences following recovery from illness or accident or expiry of the protection period.

In principle, an employee who is dismissed by ordinary termination of contract may be released from his or her duty to work (gardening leave) at any time. The employer must continue to pay the employee's salary until expiry of the ordinary termination period, but the employer may set off any income generated by the employee during the time of the release (if the employee was allowed to start a new job).

Apart from the regulations regarding mass dismissal, a company has no duty to inform any authority about a dismissal (although there are exceptions that apply in respect of apprenticeship contracts).

ii Collective dismissals

The CO provides special rules regarding collective dismissals. Article 335d defines collective dismissals as notices of termination in enterprises issued by the employer within a period of 30 days for reasons unrelated to the person of the employee and that affect:

- a* at least 10 employees in companies usually employing more than 20 and fewer than 100 persons;
- b* at least 10 per cent of all employees in companies usually employing more than 100 and fewer than 300 persons; and
- c* at least 30 employees in companies usually employing at least 300 persons.

Regarding collective dismissal, the employer must inform and consult with the works council or the employees. Employers must also inform the cantonal labour office of every planned collective dismissal.

Non-compliance with the procedural rules by the employer constitutes abusive termination of the affected employment, which may lead to payment of damages and additional remunerations and, in the case of substantial non-compliance, the terminations can be found void and reinstatement ordered.

Companies normally employing 250 employees or more and making within a period of 30 days at least 30 employees redundant have to negotiate with the employees or their representatives a social plan to work as a safety net for the dismissed employees. For companies below that threshold, no obligation to issue a social plan for the dismissed employees exists. However, there can be obligations to negotiate or issue a plan based on collective agreements. In addition, any mandatory early retirement obligations set forth in the pension plan regulations of a company should be considered.

XIV TRANSFER OF BUSINESS

In general, the Swiss law applicable to the transfer of undertakings is quite similar to the provisions laid out in the EU Council Directive 2001/23/EC of 12 March 2001. Pursuant to Article 333 of the CO, the employment relationship is transferred from the employer to a third party if the employer transfers the enterprise or a part thereof to the third party and if this transfer does not take place as part of a restructuring. Article 333 is also applicable if a single business unit of the enterprise is transferred. However, it is required that the business unit maintains its structure and organisation after the transfer, although it is not required that any assets are transferred with the employment relationship. Article 333 may also apply in the case of an outsourcing or re-sourcing. It depends on how the outsourcing or re-sourcing is structured, namely, the services that are outsourced or re-sourced, the assets transferred and the organisation of the provision of the services before and after the outsourcing or re-sourcing.

If a transaction qualifies as a (partial) business transfer, the employment relationships existing at the time of the transfer (including those under notice) are automatically transferred, including all rights and obligations as of the date of transfer, unless an employee objects to the transfer. If an employee objects to a transfer, the employment relationship is terminated upon the expiry of the statutory notice period, even if longer or shorter contractual notice periods apply.

The current employer and the new employer are jointly and severally liable for an employee's claims that have become due before the automatic transfer and that will later become due until the date upon which the employment relationship could have been terminated validly.

If the business transfer takes place within certain types of restructurings, the automatic transfer of employees dedicated to the transferred business does not take place. Only the employees chosen by the buyer will transfer. Also, the purchaser is – within certain types of restructurings – not jointly and severally liable with the seller for pre-transaction claims by the employees.

If a collective employment contract applies to any transferred employment relationship, the new employer would need to comply with it for one year unless the collective employment contract expires earlier or is terminated by notice.

If any redundancies, terminations or changes to working conditions are planned in connection with a business transfer, the works council, if any, or otherwise the employees need to be consulted in due time before a decision about redundancies is made or any changes in working conditions are implemented. This consultation process is also necessary if the employees will be dismissed or the changes implemented after the transfer (by the new employer), because these dismissals and changes would be regarded as a result of the transfer of the business if implemented within the first few months of the transfer. The consultation process needs to be conducted before any decisions in regard to any measures are made. The employer needs to give the works council or the employees at least the possibility to make suggestions on how to avoid any measures, specifically on how to limit the number of dismissals.

The employer has to provide all pertinent information to the works council or to the employees. According to case law, the employees or the works council need to be allowed at least 14 days to make their suggestions or proposals. In the case of a breach of the duty to consult, the employer could become liable for any damages incurred by the employees. Further, the government can force the involved parties to conduct the consultation process (which could delay a contemplated transfer considerably) and can fine the parties. In addition, it is argued by some scholars that any terminations that have been issued or changes that have been implemented are void.

After the consultation, or directly if no consultation is required, the works council or, if no works council is established, the employees need to be informed in due time before the transfer of:

- a* the reasons for the transfer;
- b* the results of the consultation process (if any are required); and
- c* the final legal, economic and social consequences of the transfer for the employees (including the number of dismissals and changes to the working conditions).

XV OUTLOOK

The revised Gender Equality Act will enter into force on 1 July 2020. In essence, it obliges employers with at least 100 employees to conduct an internal wage equality analysis, have it reviewed by an external body and inform the employees in writing about the results thereof. Listed companies must also publish the results of the wage equality analysis in an appendix to their annual financial statements. The first wage equality analyses must be conducted by 30 June 2021 at the latest.

UKRAINE

*Svitlana Kheda*¹

I INTRODUCTION

Ukrainian labour law has inherited a significant number of concepts and approaches from the Soviet era. Despite numerous changes, the Labour Code (of 10 December 1971), which is the key piece of legislation regulating employment matters, remains highly employee-focused and is full of pitfalls. Since Ukraine became independent, specific statutes have been adopted to deal with labour safety, remuneration, vacation, collective bargaining agreements, employment of the population and employment of foreign nationals, but a replacement of the Labour Code is necessary to enable Ukrainian labour law to adapt to the needs of a market economy.

Labour disputes in Ukraine are considered by labour disputes commissions (LDCs) and courts of general jurisdiction.

LDCs are created in companies with 15 or more employees and elected at a general meeting of the labour collective. The LDC hears a case if an employee fails to settle a dispute with the employer either directly or through a trade union. An LDC decision can be appealed in a local court of general jurisdiction. However, certain categories of labour disputes have to be directly considered by the courts (e.g., when a company has no LDC and wrongful dismissal cases). A new trend in Ukraine is to settle labour disputes through mediation or quasi-mediation, especially those relating to compliance violations.

There are a number of government agencies responsible for supervising and controlling labour law compliance, including the Ministry of Social Policy of Ukraine, the State Service on Labour Issues and the Ministry of Health Protection. The State Employment Service is responsible for issuing working permits to foreign employees and the State Migration Service is responsible for providing foreign employees with temporary residence certificates. The Ukrainian parliament's ombudsman (the Ombudsman) is the authorised state agency in respect of personal data protection.

II YEAR IN REVIEW

In general, 2019 was another modest year in terms of developments in employment law. In the main, various state agencies (such as the State Labour Service and the State Fiscal Service) were issuing their official interpretations of Ukrainian legislation concerning the regulation

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of working time, combining jobs (i.e., one employee holding two positions with the same employer), overtime, workforce migration, employee dismissal, employee compensation, vacation, and other key employment law issues.

Several amendments have been introduced to the Labour Code, including providing for a new ground for termination of employment, based on a court decision, on declaring assets unjustified and their confiscation by the state with respect to a person authorised to perform state or local government functions.

On 19 September 2019, the Ukrainian parliament passed Law No. 117-IX on Amending Certain Laws of Ukraine Related to Restarting Governing Institutions, which provides for simplifying the procedure for admission to and dismissal from public service, increasing the responsibility of public servants for the outcome of their activities, and establishing contract-based public service.

On 17 April 2019, the Cabinet of Ministers of Ukraine adopted Resolution No. 328 on Certain Issues on Introducing an Electronic Register of Sick Leave Certificates and Providing Information therefrom. According to the Order, a sick leave certificate shall be registered exclusively based on a medical conclusion created electronically that certifies a temporary incapacity to work. The aim of this legislative amendment is to prevent violations relating to submissions of falsified sick leave certificates, particularly during the course of employee dismissal at the employer's initiative.

III SIGNIFICANT CASES

On 4 September 2019, the Second Senate of the Constitutional Court of Ukraine adopted Decision No. 6-p(II)/2019 in Case No. 3-425/2018(6960/18) relating to establishing conformity with the Constitution of Ukraine (constitutionality) of Article 40, Part 3 of the Labour Code (i.e., banning the dismissal of employees at the employer's initiative during sick leave or vacation) with respect to employees working under a fixed-term contract. The Constitutional Court declared that this statutory guarantee of employees' rights applies to all types of employment relationships and is constitutional.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employment relationship is established in Ukraine by an employment agreement between an employer and an employee. The agreement contains the terms of employment, including the title of the position, a description of the work to be performed by the employee, the internal labour rules that the employee is obliged to observe, an obligation for the employer to ensure adequate working conditions and the salary payable for the performance of employment duties. The Labour Code provides that employment agreements shall generally be concluded in writing and establishes some specific instances when an employment agreement must be in writing (e.g., with employees under 18 years of age or with any employee insisting on this). Many Ukrainian companies (especially those with foreign participation) have been entering into formal written employment agreements with their employees more frequently.

In general, employment agreements are concluded for an indefinite term. Even though Ukrainian labour law enables an employer to conclude fixed-term employment agreements with its employees, these should be concluded only with those employees whose work is by nature of a limited duration (i.e., when it is possible to estimate the last day of employment).

It is also possible to enter into an employment agreement 'until the completion of agreed work' when it is impossible to determine the period necessary to complete the limited scope of agreed work. An employee can also state in his or her employment application that he or she is asking to be employed for a fixed term for family-related or other personal reasons.

Ukrainian labour law also provides for a special form of employment agreement called an employment contract, which may be concluded either for a fixed term or for an indefinite period. The employment contract, unlike an ordinary employment agreement, has the following features:

- a* it allows the employer to establish an employment relationship for a fixed period of time even when the nature and conditions of employment would not ordinarily warrant the conclusion of an employment agreement for a fixed term;
- b* it may contain reasons for the discharge of an employee in addition to the list of grounds provided in the Labour Code; and
- c* an employer and an employee may agree in the employment contract on their additional rights, obligations and liabilities, conditions of remuneration apart from those established by law, provided that the additional terms do not diminish the employee's rights as guaranteed by law.

The use of employment contracts is limited to instances specifically provided for by the laws of Ukraine, including in certain branches of the economy, for certain types of companies or for certain positions (e.g., for company directors, teachers, scientific research employees and paralegals).

A written employment agreement or contract can be concluded before or on the date that the employer issues a hiring order and becomes effective on the date of the hiring order. It must be signed by the employee as the party to the employment agreement or contract.

The parties can amend the employment agreement or contract at any time. To make any changes to the essential terms of employment (compensation, working hours, etc.), the employer must issue an order notifying the employee of the changes at least two months in advance.

Irrespective of the form of an employment agreement, the employer must issue an internal hiring order to document commencement of the employment relationship, stating the employee's position and salary. The employer must also notify the State Fiscal Service of all hired employees. Failure by the employer to comply with this statutory requirement may result in a financial liability, currently 4,723 hryvnia.

In addition, the employer must enter the relevant record in an employee's labour book. The labour book records the employment activity and must be kept by the employer for each employee working for more than five days.

ii Probationary periods

When concluding an employment agreement, the employer may set a probationary period, unless the employee belongs to any of the categories of employees not allowed by law to be put on probation (e.g., pregnant women, single mothers of children under 14, temporary or seasonal workers, those on a fixed-term employment agreement). The probationary period cannot exceed one month for blue-collar workers or three months for other employees. In certain circumstances (e.g., for state officials), the probationary period can be up to six months, subject to the trade union's consent. The duration of the probationary period does not include the days when an employee does not work, irrespective of the reasons for that.

Considering the complexity involved in dismissing employees under Ukrainian law, employers frequently use the probationary period as a legal and practical way to ascertain the suitability of a candidate for the position by making a candidate's employment subject to the successful completion of probation. If this is the case, the terms and conditions of the probationary period must be stated in the hiring order and the employer can dismiss a non-performing employee within this probationary period merely by stating that the results of his or her probation are not satisfactory.

The law obliges the employer to issue a dismissal notice to an employee on probation three days in advance. However, the employee is not required to provide the employer with any advance notice of his or her intended departure.

iii Establishing a presence

Generally, although the Ukrainian authorities do not welcome such engagements as no Ukrainian payroll taxes apply to them, foreign companies without an official registered presence in Ukraine are not directly prohibited from hiring Ukrainian employees, provided that they do not have a permanent establishment (PE) in Ukraine (as discussed below). Foreign companies may also use human resources agencies to hire Ukrainians to avoid registration with the Ukrainian tax authorities, in which case these agencies would be the *de jure* employers of the Ukrainian employees.

If the salary and social benefits are paid by a non-resident employer to its Ukrainian employee and this employer has no PE in Ukraine, the salary and social benefits will only be subject to the Ukrainian personal income tax and military tax payable individually by the Ukrainian employee annually.

For the purposes of taxation, the PE of a foreign entity may be created through either the acquisition of a fixed place of business by the foreign entity in Ukraine, a dependent agent, commissioner or other resident acting in a similar capacity. At the same time, a non-resident shall not be deemed to have a PE in Ukraine merely because it conducts business in Ukraine through a broker, general commission agent or any other agent of independent status, provided that those persons are acting in the ordinary course of their business. In addition, a PE arises when a foreign company provides services in Ukraine, including consulting services but excluding the provision of personnel, through its employees or other persons hired for this purpose for longer than six months during any 12-month period. The foregoing is valid unless an applicable double tax treaty to which Ukraine is a party provides otherwise.

A foreign company generally may engage an independent contractor under a service agreement without registering with the Ukrainian state tax authorities, unless the engagement creates a PE. If the foreign entity's activity through an independent contractor creates a PE in Ukraine, the foreign entity may be subject to complete taxation in Ukraine.

Finally, a Ukrainian individual has to be registered as a Ukrainian private entrepreneur prior to entering into any contracts with foreign businesses. Otherwise, any such contract may be declared invalid, resulting in penalties imposed on the responsible person.

Employees, including foreign nationals working for Ukrainian companies, are required to be paid a salary, sick leave allowance, annual holiday pay and certain other statutory benefits depending on the employee category. Statutory benefits must be declared by employers. They are also responsible for withholding personal income tax at source, unless the benefits are exempt (e.g., maternity leave compensation), as well as the unified social tax and the temporary military tax.

V RESTRICTIVE COVENANTS

The contractual obligation of an employee not to work for a competitor either during or after termination of his or her employment as part of a non-compete clause is not enforceable in Ukraine.

One of the basic employee rights stipulated in the Labour Code is the right to freely choose a profession, occupation and job. Free choice of the type of employment activity is also guaranteed by the Labour Code.

Ukrainian labour law is very protective of employees, meaning that, even though the Labour Code allows an employer to conclude employment contracts with certain categories of employees where provisions that differ from those envisaged by the Labour Code may be included, these provisions must not worsen the employees' position as compared with the Labour Code, as these provisions will then be considered null and void.

VI WAGES

i Working time

The number of working hours for full-time employees cannot exceed 40 hours per week, other than when a non-fixed working day (or week) has been established, as for certain categories of employees. The duration of the working day before a holiday or a weekend shall be reduced by one hour. In the case of a six-day working week, the duration of the working day before the weekend cannot exceed five hours.

Ukrainian law establishes, among others, the following working hour regimes:

- a* normal business hours, when overtime is paid at double the standard rate of pay and employees are entitled to a vacation allowance of 24 calendar days per year; and
- b* non-fixed working day, which may be established for employees whose working day cannot be estimated in advance. These employees are entitled to a vacation allowance of 24 calendar days per year and to an additional vacation of up to seven working days.

The Labour Code generally allows night work, provided that the working time at night is reduced by one hour. Employees working at night receive an increase in their base salaries that must not be less than 20 per cent of their base salary for each hour of night work. It is prohibited to engage pregnant women and employees under 18 years old, among others, in night work.

ii Overtime

The general rule is that overtime is not allowed. The Labour Code provides an exhaustive list of exceptions to when an employee may be required to work overtime. The maximum limit of overtime work is 120 hours per year. Overtime work also shall not exceed four hours over two consecutive days for the same employee. The employer must keep a register of overtime work.

Employers are prohibited from engaging in overtime work, among others, pregnant women, employees under 18 years old and employees who are full-time students receiving secondary or professional secondary education during term-time.

An employee's consent is required for overtime work if the employee has a child under 14 years old. A trade union must give permission for each instance of overtime work. In the

case of overtime work, employees are entitled to extra remuneration at double the standard rate for work performed in excess of the daily, weekly or monthly limit. The law prohibits compensating overtime work with only additional vacation or leave of absence.

VII FOREIGN WORKERS

The majority of labour law provisions apply equally to Ukrainian and foreign nationals. Thus, foreign employees enjoy the same benefits, guarantees and protections available to Ukrainian employees under Ukrainian labour laws and the employer's internal labour rules, policies and procedures. However, special procedures exist for hiring foreign nationals that must be followed to avoid administrative liability or even deportation of a foreign national.

In accordance with Ukrainian law, a Ukrainian employer must obtain a working permit for each foreign national that it intends to hire. However, there are some exceptions to this rule; in particular, foreign nationals permanently residing in Ukraine or working for the Ukrainian representative offices of foreign companies do not require working permits. As a foreign national may be employed by several Ukrainian employers simultaneously, each employer must obtain a separate working permit for the foreign national. An application for a working permit and the supporting documents are submitted by the employer to the respective employment centre through the centres for provision of administrative services.

A decision on the issuance of a working permit is granted by the respective employment centre within seven business days of the date of receipt of the required documents from the employer. The employer shall pay the fee for working permit issuance within 10 business days of obtaining the decision of the respective employment centre.

A working permit may be issued for a term of up to three years for:

- a* seconded employees;
- b* special categories of foreign employees, namely highly paid professionals with a salary of at least 50 statutory minimum salaries (208,650 hryvnias), shareholders or beneficiaries of Ukrainian legal entities, holders of diplomas from the world's top-ranked universities, and creative and IT professionals; and
- c* intra-company transferees.

For all other foreign employees, a working permit may be issued for up to one year, with the possibility of extension for one year.

The employer shall enter into an employment agreement (contract) with the foreign employee within 90 calendar days of the issuance of the working permit and shall submit a certified copy of the employment agreement (contract) to the respective employment centre within 10 days of its execution.

The salaries of foreign employees working for public or charity organisations and educational establishments may not be less than five statutory minimum salaries (20,865 hryvnias) and the salary of all other categories of foreign employees may not be less than 10 statutory minimum salaries (41,730 hryvnias). The minimum salary requirements are not applicable to the special categories of foreign employees (see point (b), above).

Termination of an employment agreement (contract) with a foreign national results in termination of the working permit. Thus, every time a foreign national changes his or her place of employment in Ukraine, the new employer must obtain a new working permit for him or her.

If the employment relationship with a foreign national is prematurely terminated, the employer shall notify the respective employment centre, which initiates cancellation of the working permit.

According to Ukrainian immigration laws, foreign nationals employed in Ukraine, in particular on the basis of a working permit, are not subject to the general regulation of a foreign national's stay in Ukraine. These foreign employees are deemed to be lawfully staying in Ukraine after receiving a temporary residence permit, regardless of the duration of their stay.

Violation of working permit and immigration regulations may result in liability for the employer, its executives and the foreign employee (up to his or her deportation from Ukraine).

The employer of a foreign national is also his or her tax agent for the purpose of salary payments.

VIII GLOBAL POLICIES

Ukrainian law provides that a number of mandatory employment-related regulations can be adopted by Ukrainian companies, including a collective bargaining agreement, internal labour rules (internal rules), labour safety regulations and some other documents, depending on the specifics of a particular company's business.

The most important disciplinary documents are the internal rules negotiated by the employer and the company's trade union, and approved by the labour collective. Newly hired employees have to acknowledge their awareness of the contents of the internal rules by signing a statement to that effect. The internal rules do not need to be filed with, or approved by, any government authorities.

All employment-related documentation, including the internal rules, must exist in Ukrainian, notwithstanding the company's form or ownership.

As a matter of practice, the internal rules and other internal labour policies and procedures adopted by the company are incorporated into written employment agreements or contracts by reference. However, this is not required by law.

The internal rules have to be easily accessible by all employees. They can be placed on the company intranet, but the original hard copy should also be kept.

Ukrainian companies often issue other optional internal regulations (e.g., regarding discrimination, sexual harassment or personal data protection) in accordance with their global corporate policies. The Anti-Corruption Law provides for mandatory and optional compliance policies (depending on the employer), and establishes the duty of all employees of all Ukrainian companies to comply with anti-corruption laws.

The global policies are not *per se* enforceable in Ukraine and must be incorporated into the practice of a Ukrainian subsidiary as local policies.

IX PARENTAL LEAVE

Ukrainian employment laws make a distinction between leave taken for pregnancy and childbirth (childbirth leave) and leave taken to care for a child until he or she reaches three years of age (maternity leave).

Childbirth leave must be provided to all women based on a medical opinion and extends from 70 calendar days before the expected date of childbirth to 56 calendar days after the date of childbirth (or 70 calendar days if two or more children are born or the

delivery is complicated). This leave is paid for by the employer. All 126 (or 140) calendar days of childbirth leave are provided to all women in full, notwithstanding the actual number of days taken before childbirth.

A woman or her child's father (or the grandparents or any other relative who is minding the child) may take maternity leave up until the child, as a general rule, is three years old. This leave is paid for by the government only. However, employers are entitled to provide additional partially paid or unpaid maternity leave after the expiry of the statutory three-year term. During maternity leave, women (or a child's father, grandparents or other relatives) may choose to work part-time or from home.

Pregnant women and women with children under three years old are a specially protected group of employees (Protected Employees) and it is prohibited for them to be dismissed at the employer's initiative except in the event of the employer entering liquidation. Even then, however, an employer has to look for and offer Protected Employees alternative employment prior to dismissing them. The same is true if Protected Employees are to be dismissed owing to the expiry of a fixed-term employment agreement. Until a new job is offered, an employer has to pay a Protected Employee's average salary, but only for up to three months after the expiry of a respective employment agreement.

X TRANSLATION

Under the Law on Ensuring the Functioning of the Ukrainian Language as the State Language, adopted on 16 July 2019 and revised on 2 January 2020, employment agreements (contracts) must be concluded in Ukrainian (the state language), although parties are permitted to translate agreements into any other language. Furthermore, under this Law, no one can be mandated to use any language other than Ukrainian during the performance of their employment duties, with the following exceptions: (1) rendering services to consumers and other clients who are foreign nationals or stateless persons; or (2) creating legal, technical, information and advertising texts, other notifications and documents (including verbal ones) if addressed to foreign nationals or stateless persons, legal entities, bodies and officials of foreign states and international organisations. The Law requires all official documents that certify a citizen's identity and legal status (such as passports) to be issued, as a general rule, in Ukrainian.

In practice, Ukrainian subsidiaries of multinational companies prepare and approve bilingual documents (i.e., in Ukrainian and the language of the country of the company's headquarters, with the Ukrainian text being given priority if there are any discrepancies between the versions). The translation of company documents (including employment agreements, regulations, rules, procedures and any other employment-related documents) into a foreign language has to be certified by a notary only in certain cases, including if they are official documents or have to be notarised. Therefore, no translation of company employment documentation (except for the documents certifying the employees' identity and legal status) is required to be certified.

Even though the Law on Ensuring the Functioning of the Ukrainian Language as the State Language does not specify the language to be used by Ukrainian employers, it is likely that law enforcement authorities and courts will be applying the statutory requirement of Ukrainian being the mandatory language for employment agreements and all employment-related documents issued by Ukrainian employers. Moreover, there is a risk that a company's employment-related documentation, if it exists only in a foreign language,

will not be enforceable in Ukraine in most instances. However, it is possible that a court, when hearing a case, may order an official translation of any foreign language documents (e.g., personnel policies and procedures) to protect the rights and legitimate interests of the affected employee.

XI EMPLOYEE REPRESENTATION

Ukrainian law provides for trade unions as the only representative bodies of employees at company level. If there is no trade union established within a company, some of its functions may be performed by elected employees' representatives. In general, their functions are limited to the conclusion of collective bargaining agreements, the organisation of work and representation of employees before the employer.

Ukrainian employees may freely and without any approval establish trade unions in any company. Foreign nationals may not establish trade unions, but they may become members of an existing trade union if it is specified in a respective internal regulation of a trade union. A trade union functions within a company through its elected body or representative. There are no specific requirements regarding the number of employees in a company or the company's ownership for establishing a trade union.

Normally, employees establish one trade union in a company to represent employees in negotiations with the employer and protect their labour rights. However, in large companies, a few trade unions may be established. In such cases, they should form a joint representative body with the purpose of signing a collective bargaining agreement.

The law provides for guarantees for a trade union functioning within a company, such as the amendment of an employment agreement or changes to the payment terms for an employee who is a trade union member requires the consent of the employee's trade union.

A trade union can initiate the dismissal of a company's director for violating labour legislation, not participating in collective bargaining agreement negotiations, or not fulfilling his or her obligations under that agreement and violating other laws governing collective bargaining agreements.

Trade unions also monitor an employer's compliance with labour legislation and its correct application of the established terms of payment of labour compensation, and are authorised by law to demand that the employer rectify any violations. One of the guarantees of a trade union's activity is its right to demand and obtain from directors and other company officers all documents, information and explanations relating to the terms of labour compensation, the performance of the collective bargaining agreements, and compliance with labour legislation. Trade unions are entitled to file lawsuits with respect to these issues.

Election procedures, the term of service of a trade union's representatives, the frequency of trade union meetings and many other issues are regulated by a trade union's charters.

XII DATA PROTECTION

i Requirements for registration

Under Ukrainian law, the main elements of personal data are a person's name, nationality, education, family status, religion, health condition, address, and date and place of birth. The Labour Code prohibits an employer from requesting information from candidates regarding their nationality, political party membership, origins, place of residence and other documents not required by law.

Almost all companies operating in Ukraine have been facing problems in the process of adjusting their business activities to new personal data protection legislation. The Law on Personal Data Protection (the PDP Law), which came into effect on 1 January 2011 and has been significantly amended several times, sets rules for collecting, storing, using, processing and transferring personal data. The PDP Law contains many questionable provisions, the interpretation of which is often problematic even for the representatives of the data protection authorities.

Ukrainian law provides for serious penalties for companies found in breach of the PDP Law (including fines of up to 17,000 hryvnias for each violation and up to three years' imprisonment for a company's chief executive officer). Therefore, it is absolutely necessary for all entities operating in Ukraine to become compliant with the PDP Law.

As of 1 January 2014, data controllers are no longer required to register databases containing personal data. If the processing of personal data creates a risk to the rights of the data subjects (risk data), the controller must notify the Ombudsman within 30 business days of the date of the processing. The types of data that constitute risk data are established by the Ombudsman and include, but are not limited to, sensitive data (see Section XII.iii).

Considering that, under the PDP Law, a company must obtain express consent from each employee for transferring his or her personal data to any third parties, unless otherwise required by law, Ukrainian employers normally prefer to obtain their employees' consent for collecting, storing and other processing of their data as well.

Companies that process personal data are responsible for ensuring the protection of processed data from any illegal processing and access, including by designating an employee to perform these functions.

To assist in proving the absence of guilt in violating the personal data protection legislation before the data protection authorities or the court, a sound corporate personal data protection programme should be developed by every entity doing business in Ukraine. This programme should include developing model internal documentation, such as regulations, orders, letters of consent and personal data protection clauses in employment agreements (or contracts).

ii Cross-border data transfers

The law does not require registration or notification for the cross-border transfer of personal data, unless the data in question falls under the category of risk data.

It is generally prohibited to transfer personal data to jurisdictions that do not ensure adequate protection of such data (i.e., all countries except those in the European Economic Area and other signatories to the EC Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data). However, the PDP Law provides for five exhaustive exceptions when transferring personal data to jurisdictions with inadequate protection. Three of them are relevant to employers: (1) the unequivocal consent of the affected data subjects for the transfer of their personal data to jurisdictions whose data protection regime is deemed inadequate; (2) the collection and further processing of personal data is necessary for establishing, exercising or defending a legal claim (e.g., for internal investigations); and (3) by the controller giving guarantees to the data subjects that there will be no intrusion into their personal and family lives arising from the transfer.

The transfer consent should contain, in particular, details of the data recipient, the scope of the transferred data and the purpose of its processing. It can be incorporated into the initial employee consent for data processing obtained by employers. It is advisable for an

employer to enter into an agreement with a foreign data recipient that requires an obligation to be imposed on the data transferee to ensure protection of the imported data at least at the level established by the employer.

The employer shall notify all affected data subjects of a data transfer, but only where the right to receive such a notice was not waived by the data subjects at the time of obtaining their initial consent for data processing.

iii Sensitive data

Information relating to race, ethnic origin, political, religious and ideological beliefs, political party and trade union membership, criminal prosecution and judgments in a criminal case, biometric and genetic data, as well as medical records and other data relating to the health and intimate life of an individual is considered as sensitive data that, in general, cannot be requested and processed, except in certain cases specifically permitted by law, including when the processing is required by law in the area of employment relationships. The sensitive data of an employee or candidate for employment can be transferred to third parties, including those located abroad, only after the employer obtains consent from the data subject, unless he or she has already consented to the transfer of sensitive data when giving consent for the processing of personal data.

iv Background checks

An employer may request only a limited amount of information and documentation from a candidate or current employee. In all instances, requests should be justified by law. For instance, if a certain job has specific health or age requirements, the employer is authorised to request confirmation of these requirements from a candidate.

The law clearly states which documents can be requested from a candidate or employee for each type of job (e.g., for teaching positions, criminal records can be verified) and it is forbidden for the employer to ask for additional documents or information (such as credit history or bank statements).

Personal data protection laws restrict background checks on candidates applying for a job. It is likely that express consent will be required from candidates to justify any collecting, storing, using, transferring and other processing of their personal data, except for information, documents and other data, the provision of which is expressly prescribed by the Labour Code and other applicable laws.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Termination of an employment agreement at the employer's initiative is difficult and an employee cannot be dismissed without cause. The employer may dismiss an employee only in the following limited cases provided in the Labour Code:

- a* changes in the company's activities, including its liquidation or reorganisation, bankruptcy, changes in its business or reduction of its staff. In these circumstances, the employer must notify the relevant government authorities about the pending dismissal of its employees two months in advance and provide each affected employee with a two-month dismissal notice, which cannot be replaced with a payment (discussed in

Section XIII.ii). The consent of the company's trade union is required for the dismissal of each member employee who is subject to dismissal on this ground (except liquidation of the company);

- b* non-compliance by an employee with his or her position owing to inadequate qualification or a health condition that interferes with the ability to perform employment duties;
- c* failure by an employee to fulfil his or her employment duties if disciplinary actions were previously taken against him or her;
- d* failure by the employee to appear at work for more than three consecutive hours in one working day without a good reason for the absence;
- e* failure to appear at work for more than four consecutive months owing to a temporary incapacity to work unless a longer term is permitted by law for certain diseases and unless the incapacity was caused by work-related illness or severe injury;
- f* attendance by an employee at his or her workplace in a drunken, narcotic-induced or intoxicated state;
- g* resumption of work of another employee who was previously occupying the position;
- h* an employee being found guilty of larceny of his or her employer's property;
- i* an individual owner being called up for military service or mobilised during a special period; and
- j* establishment during the probationary period of non-compliance by an employee with his or her position or work performed by him or her.

A trade union's consent is required for dismissal of an employee who is a member of that trade union on the grounds in points (a) to (f), above.

Some employees can be dismissed on the following additional grounds, stipulated in the Labour Code:

- a* gross violation of employment obligations by a director of a company or its branch, or his or her deputy, chief accountant, his or her deputy, and certain state officials;
- b* deliberate action of a company director that results in untimely salary payment or payment of a salary that falls below the statutory minimum salary;
- c* purposeful actions of an employee who is managing funds or commodities if that action results in the loss of trust in the employee;
- d* immoral misconduct of an employee performing pedagogical functions that prevents the employee from holding this position any longer;
- e* working under the direct supervision of a 'close person', in line with the meaning under the Anti-Corruption Law; and
- f* termination of the powers of a company officer.

The consent of a trade union is required for dismissal of an employee who is a member of that trade union on the grounds described in points (c) and (d) above.

Further, it is prohibited to dismiss:

- a* employees who are on sick leave or vacation (when the dismissal is initiated by the employer);
- b* pregnant women, women with children under three years old, single mothers with children under 14 or a disabled child, except in the event of:
 - company liquidation; or
 - the expiry of a fixed-term employment agreement or contract for the relevant employee;

- c* employees on the sole basis of them reaching retirement age; or
- d* employees who are members of a trade union without obtaining prior consent from the respective trade union (in most cases).

On the dismissal date, the employer provides the employee with his or her labour book and dismissal order, and settles all payments due to this employee.

When an employee is dismissed because of redundancy or other changes in the company's activities, an employee's non-compliance with his or her position, or the resumption of work of another employee, he or she is entitled to a severance payment equal to one average monthly salary. The Labour Code also establishes a severance payment due to company officers dismissed because of the termination of their authority in the amount of six times their monthly average salary.

Employees subject to dismissal on any grounds provided by Ukrainian law are entitled to receive compensation for unused vacation. The employer shall also pay to an employee any additional compensation or benefits that may be specified in a written employment agreement or contract with this employee and any collective bargaining agreement.

The law does not prohibit the employer and the employee from concluding a settlement agreement. To be enforceable, however, the provisions of this agreement must not worsen the employee's position as compared with Ukrainian labour law.

ii Redundancies

Under the Labour Code, an employer may unilaterally initiate the dismissal of its employees because of redundancy. In these circumstances, the employer must notify all its employees of their pending dismissal no later than two months before their dismissal. This notice cannot be replaced with a payment.

Under the Labour Code, employees with higher productivity levels or qualifications are given priority to stay when dismissals are carried out because of redundancy or other changes in the company (except in the event of company liquidation).

Between employees with equal qualifications and productivity levels, priority is given based on various criteria, including preference for an employee who is the only working person in a family, has been the company for a long time, has acquired a disability while working for the company or developed a work-related disease, or is within three years of reaching retirement age.

The Labour Code also entitles employees dismissed because of redundancy or other changes in the company (except for company liquidation) to be rehired by the employer within one year of their dismissal if the employer has vacancies that require similar qualifications. During the rehiring, priority is given to the aforementioned categories of persons prioritised for retention during redundancy.

Redundancy can be performed only after prior trade union consent (for member employees). The trade union shall consider the employer's reasonable written redundancy petition within 15 days, in the presence of each employee to be dismissed. The trade union must notify the employer in writing of its agreement to the decision within three days. If this deadline is not met, it is considered that the trade union has agreed with the dismissal of all proposed employees.

Employees who are subject to redundancy must be considered for employment in other available positions.

The State Employment Centre must be provided with at least two months' prior notice of a prospective mass lay-off, stating the grounds for the pending dismissal of the company's employees and the position, qualifications and salary of each employee.

The categories of employees protected from dismissal, severance and other dismissal payments, and the possibility of the parties entering into a settlement agreement are discussed in Section XIII.i and apply equally to redundancies.

XIV TRANSFER OF BUSINESS

There is no specific law in Ukraine relating to business transfers. The general employee guarantees and protections stipulated in the Labour Code apply during a business transfer (transfer of the employee's rights to the business transferee, extension of the collective bargaining agreement to the new business owners, the transfer of business does not in itself constitute a ground for employee dismissal, etc.).

The Labour Code expressly provides that in the event of a change in a company's ownership or a company's reorganisation, the employment agreements with its staff will remain in force. Employees of the seller are entitled to be transferred automatically to the buyer as a change of the target's ownership does not imply that the target ceases to be their employer.

XV OUTLOOK

It is expected, based on recent legislative developments, that the year 2020 may bring several significant changes to employment regulations in Ukraine, largely targeted at attracting foreign investment. It is hoped that these developments may include the adoption of a long-awaited and much-needed new Labour Code.

UNITED ARAB EMIRATES

*Iain Black, Catherine Beckett, Craig Hughson and Anna Terrizzi*¹

I INTRODUCTION

The United Arab Emirates is a federal state with seven emirates. Legislative and executive jurisdiction is divided between the various emirates and the Union. The federal government is entrusted with promulgating legislation concerning the principal and central aspects of the Union, and each emirate has the authority to enact its own laws and regulations in other matters. According to Article 121 of the UAE Constitution (as amended by Constitutional Amendment No. 1 of 2003), employment matters are restricted to the exclusive legislative powers of the Union.

An exception to the exclusive power to legislate in employment matters, which is also contemplated in Article 121 of the UAE Constitution, is the financial free zones, which are independent jurisdictions and have therefore been granted powers to self-legislate on civil and commercial matters, including employment matters. That is the case for the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), which have both previously enacted their own employment laws and published new employment laws in 2019: DIFC Law No. 2 of 2019 (as further amended by DIFC Law No. 4 of 2020 and supplemented by new Employment Regulations that came into force on 1 February 2020) and the ADGM Employment Regulations 2019. This chapter does not cover these laws in any detail and focuses on the federal regime only.

The main law governing employment relations in the UAE is Federal Labour Law No. 8 of 1980 (as amended) (the Labour Law). There are also several ministerial decrees and orders regulating particular aspects of employment relations, for instance inspections of workplaces, employment of women and young persons, and health and safety issues.

The Labour Law is protective of employees and any contractual provisions that are less beneficial to the employees than those provided for in the Labour Law will be null and void. The Labour Law fixes the minimum employment benefits and it is not possible to contract out of these.

The Ministry of Human Resources and Emiratisation (formerly known as the Ministry of Labour) is the main body responsible for the regulation of employment in the UAE. The role of this Ministry includes approving employment contracts and issuing work permits, and it is also responsible for the health and safety of employees by undertaking workplace inspections. Any employment-related disputes must be heard by the Labour Disputes

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Committee at the Ministry of Human Resources and Emiratization before being taken to the courts. The Labour Disputes Committee does not issue judgments or binding decisions; rather, it offers settlement for acceptance by the parties in dispute.

The courts in each emirate have jurisdiction to hear employment disputes not settled by the Labour Disputes Committee. In principle, cases brought by employees under the Labour Law are exempt from court fees at all stages of litigation, unless the claim is not accepted or is dismissed, in which case the court may order the employee to pay all or part of the court fees.

II YEAR IN REVIEW

The employment market remained relatively stable in 2019. The regulations issued during the past few years by the Minister of Human Resources and Emiratization (see Section XIII) have focused on the employment of Emiratis in the UAE.

His Highness Sheikh Mohammed bin Rashid Al Maktoum, Vice President and Prime Minister of the United Arab Emirates and Ruler of Dubai, enacted Employment Law, DIFC Law No. 2 of 2019, which came into effect on 28 August 2019 and replaced Employment Law, DIFC Law No. 4 of 2005 (as amended). This was welcome news to DIFC businesses and employees, and provided clarity to the DIFC employment legislative regime following the consultation, which began in early 2018, and the draft law published as part of that consultation. The key changes include the following:

- a* The scope of the non-discrimination provisions is expanded to include discrimination in respect of age, pregnancy and maternity, and clarity is provided on what constitutes discriminatory behaviour.
- b* A gratuity payment is paid out even in circumstances where the employee is dismissed for cause.
- c* The basic wage must not be less than 50 per cent of the annual wage.
- d* The right for expectant fathers to limited paternity leave and the statutory right to time off to attend antenatal appointments; this right is also extended to fathers of adopted children who are under five years old.
- e* The level of sick pay is reduced.
- f* Clarification is provided of the status of financial penalties for late payment of employee remuneration, whereby a penalty is only due if the amount not paid is held by the court to be in excess of a week's wages.

In addition to these changes to the DIFC Employment Law, the DIFC has implemented a new workplace savings scheme to replace end-of-service gratuity (which was a lump sum payable to employees upon termination of employment). The related consultation period closed on 18 November 2019 and DIFC Law No. 4 of 2020 (which amends DIFC Law No. 2 of 2019) and the related new Employment Regulations both came into force on 1 February 2020.

The ADGM issued the new Compensation Awards and Limits Rules 2019 (the ADGM Compensation Rules) and the new Employment Regulations 2019 (the ADGM Regulations), replacing its previous legislative framework regarding employment matters. The ADGM Compensation Rules came into force on 28 October 2019 and the ADGM Regulations came into force on 1 January 2020. The key changes under the ADGM Regulations include:

- a* new overtime provisions for employees;
- b* aligning certain employees' entitlements with those on shore (including repatriation flight tickets and sick leave);

- c* changes allowing employers and employees more flexibility in negotiating notice periods; and
- d* introducing a discretionary power for the ADGM courts to impose penalties on employers for failing to pay the employees' entitlements due on termination.

The ADGM also issued Employment Regulations 2019 (Engaging Non-Employees) Rules 2019, which are to supplement the new Employment Regulations 2019 and set out the conditions for the issuance of temporary work permits in ADGM, and applicable fees and fines for non-compliance with these Rules. The Rules are scheduled to come into force on 13 May 2020.

Federal Decree by Law No. 6 of 2019 was enacted to amend certain provisions of the Labour Law. The key amendments are that:

- a* pregnant women cannot be dismissed simply because they are pregnant. The termination of a pregnant woman's employment contract amounts to arbitrary dismissal pursuant to the provisions of Article 122 of the Labour Law;
- b* discrimination that would prejudice equal opportunity of employment is prohibited;
- c* the UAE Cabinet may, based on proposals by the UAE Minister of Human Resources and Emiratisation, issue resolutions to promote the participation of Emirati nationals in the labour market and regulating the employment of workers in establishments; and
- d* Articles 27, 28 and 29 of the Labour Law, which previously set out restrictions for women regarding late-night working and dangerous conditions, have been repealed in their entirety.

III BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The Labour Law requires that employers and employees enter into a written contract. If the parties fail to do so, the existence, validity and terms and conditions of the employment relationship may be proved by any means. It is common practice in the UAE for businesses to issue two employment contracts. A short-form standardised employment contract in Arabic and English bearing minimal details as required by the Labour Law is filed with the Ministry of Human Resources and Emiratisation for processing the employee's employment visa and work permit. A long-form contract is also signed between the employer and the employee to provide for the terms and conditions of the employment in further detail, but is not submitted to any government authorities. In situations where there are discrepancies between the short-form contract and the long-form contract, the UAE courts, whose decisions are binding, have in the past upheld the terms of the long-form contract to the detriment of the terms in the short-form contract, where these terms were more advantageous for the employee than the terms in the short-form contract. The Labour Law provides that a contract, if written, needs to specify at least the following:

- a* date of its conclusion;
- b* commencement date;
- c* type of work to be conducted;
- d* place where the work is to be conducted;
- e* duration of the contract (if for a specific term); and
- f* remuneration.

Once a contract is executed, it cannot be amended unilaterally, that is, without seeking the prior consent of the employee. Any amendment to the contract must be agreed between the parties.

Article 38 of the Labour Law provides for a distinction between contracts for a limited period and contracts for an unlimited period. A contract is for a limited period when the parties provide for a term of the contract (maximum two years). At the end of the term, the parties may agree to renew the contract for similar or shorter periods.

A contract is for an unlimited period when the contract is not in writing, does not provide for a term, or the parties continue to perform a limited-term contract after the expiry of its term without a written renewal or after the tasks for which the employee has been hired are complete and the employee continues to work. An unlimited-term contract is in effect until terminated by any of the mechanisms provided for in the Labour Law. The major difference between limited-term and unlimited-term contracts relates to the end of service gratuity (see Section XI).

ii Probationary periods

Under Article 37 of the Labour Law, employers may determine a probationary period, which shall not exceed six months. During the probationary period, the employment may be terminated by the employer without notice and without end-of-service gratuity and there will be no recourse to compensation for arbitrary dismissal if termination is during or at the end of the probationary period. The Labour Law does not provide for different probationary periods based on the type of work, the seniority of the employee or whether the contract is for an unlimited or limited term.

iii Establishing a presence, secondment agreements and independent contractors

Any foreign company wishing to hire employees to conduct business in the UAE must be established and licensed in the UAE. The general principle is that no foreign entity can conduct business in the UAE unless it has a valid licence to do so. Hiring employees is considered a business activity undertaken in the UAE and, as such, a licence issued by the local authorities is required. In addition, strict immigration requirements make it impossible for companies not established and registered in the UAE to hire foreign employees, as employees must be sponsored by companies registered in the UAE to obtain work permits and residence visas.

It follows from the foregoing that employees working in the UAE must be working for companies registered in the UAE. However, the Labour Law does not prevent employees working for companies registered in the UAE from being seconded by foreign companies. This is a common practice between subsidiaries of international companies where an employee is required to work with subsidiaries in various jurisdictions and continue to be employed by the foreign parent company. There are no legal provisions in this regard, but many companies employ seconded employees, in particular when the employment is required for a short time or it requires particular expertise. Seconded employees to subsidiaries in the UAE will have their employment contracts with the foreign entity but provide their work to the subsidiary in the UAE. The foreign entity will bear all employment costs and the subsidiary in the UAE will handle the formalities for issuing the work permit and residence visa. These formalities will require a short-form employment contract between the employee and the subsidiary in the UAE for submission to the labour and immigration authorities in

the UAE. The short-form contract is a formality and the foreign company will be responsible for all employment costs. The secondment arrangements should be documented and agreed in a secondment agreement between the foreign company and the subsidiary in the UAE.

Foreign companies not registered in the UAE may hire an independent contractor to undertake particular work for their benefit, provided the independent contractor is established and licensed to perform such work in the UAE. However, the independent contractor should not present itself as an employee of the foreign company. Setting up a presence in the UAE is a well-established procedure that requires the foreign company itself to register with the local authorities.

IV RESTRICTIVE COVENANTS

Theoretically, non-compete agreements between employers and employees are enforceable in the UAE both through the courts and through administrative channels at the Ministry of Human Resources and Emiratization. In practice, however, only the administrative route is effective, although its ambit is limited to restrictions applicable only in the UAE and to the short-form employment contracts lodged with the Ministry of Human Resources and Emiratization.

The Labour Law allows employers to seek a restraint of trade agreement that would apply after the termination of the employment contract. Article 127 of the Labour Law provides for certain conditions for the validity of a non-compete clause. The employee must be 21 years of age or older and the non-compete clause must be limited in relation to the time, place and nature of the work to the extent required to safeguard the reasonable interests of the employer. Therefore, to enforce a non-compete agreement the employer must demonstrate that the non-compete restraint is reasonable and necessary to protect its legitimate interests. The corporate and geographical scope of the restraint must also comply with this test to be enforceable. There is no statutory limit to the non-compete period clause signed between an employer and its employees, but the Ministry of Human Resources and Emiratization has indicated that it considers 12 months to be a reasonable period to limit competition.

To enforce a non-compete covenant, it is crucial that the employer includes the non-compete provision in the short-form employment contract deposited with the Ministry of Human Resources and Emiratization. As to judicial enforcement, local courts rarely order specific performance under contracts. There have been no recent cases in which the Dubai Court of Cassation or the Federal Supreme Court ordered an employee to abide by a non-compete covenant. Although the local courts recognise the right of an employer to bind its employees by non-compete obligations, they would usually only award damages for losses sustained by the breach. These types of losses can be very difficult to establish.

V WAGES

Salaries, which under the Labour Law must be paid in the national currency irrespective of the nationality of the employee, are commonly structured by breaking down the monthly figure into the basic salary and other separate allowances (such as housing and car allowances). The Labour Law does not impose any particular allowances apart from a salary; however, employers opt to divide this amount to minimise the amount of the end-of-service gratuity, which is calculated on the basis of the basic salary only. To prevent employers circumventing

the proper payment of the end-of-service gratuity, even though the Labour Law is silent on the proportions granted by the employer, the Ministry of Human Resources and Emiratisation requires that the basic component is at least half the gross salary.

i Working time

Under Articles 65 to 73 of the Labour Law, the maximum working hours are eight hours each day and 48 hours a week, and no more than five consecutive work hours may be worked without a rest period. The maximum number of daily hours may be increased to nine hours per day in commercial establishments, hotels and cafés, security services and any other operations where the increase is authorised by order of the Ministry of Human Resources and Emiratisation. The maximum number of working hours may also be reduced by order of the Ministry of Human Resources and Emiratisation in relation to operations that create health risks to the employee. During the month of Ramadan, daily working hours are reduced by two hours. The working hours may be organised in shifts and there is no limit as to the amount of night work that may be performed.

ii Overtime

Work performed by an employee in excess of the maximum daily working hours will be treated as overtime. The Labour Law provides for a maximum of two hours of overtime daily. In principle, overtime will be paid at a rate 25 per cent higher than the normal hourly rate. However, if the overtime is worked between 9pm and 4am or on Fridays (Fridays are not working days in the UAE), the overtime will be paid at a rate 50 per cent higher than the normal hourly rate. Some special classes of employees are excluded from overtime pay, for instance senior employees in managerial and supervisory positions.

iii Protection of wages

Under Ministerial Resolution No.739 of 2016 concerning the Protection of Wages, all companies registered with the Ministry of Human Resources and Emiratisation must now pay wages in full within a period not exceeding 10 days from the due date as registered in the wage protection system (WPS). The Ministry of Human Resources and Emiratisation will only continue to deal with establishments registered with the WPS. As a result, employers are urged to subscribe to the WPS immediately and comply with its requirements to prevent being subjected to the penalties outlined in that resolution. Penalties include suspension of activities of the establishment, banning the registration of new establishments by the employer, and fines. It is clear that the focus is on ensuring that wages are paid on time, protecting employees from manipulation of their financial entitlements, reducing the number of labour disputes and assisting the judicial system in labour entitlement disputes by providing evidence in relation to the same.

VI FOREIGN WORKERS

The UAE relies heavily on its foreign workforce. The pace of economic growth in the UAE during the past few years has demanded a workforce that the national population growth was not able to match. For this reason, the vast majority of workers in all business sectors is comprised of foreign nationals and in some emirates foreign nationals make up as much as 80 per cent of the population.

The Labour Law applies to all employees working in the UAE irrespective of nationality. Foreign workers enjoy the minimum benefits provided for in the Labour Law. This notwithstanding, the Labour Law establishes a preference for the employment of nationals, and foreign nationals may only be employed after fulfilling the conditions set out in the Labour Law. In theory, under the Labour Law, foreign nationals should only be employed if there are no national employees available. If this occurs, preference should be given first to Arab nationals and then to other nationalities. Nevertheless, demand is such that these requirements often are not implemented.

The preference for UAE nationals has been reconfirmed in some Emiratisation policies that have been approved through ministerial resolutions and circulars, which basically set a certain quota of Emiratis who must be employed in a particular sector. The banking sector is one of the areas in which Emiratisation is a focus. Generally, however, these Emiratisation policies have not been fully implemented or enforced and there is no limit currently on the number of foreign workers a company may hire. Generally, employers in the UAE are not required to pay any taxes or social benefits to the employees. Employers may create a savings fund for employees or may put in place a retirement or insurance scheme for the benefit of employees. As an exception to this rule, Federal Law No. 7 of 1999 regulating pensions and social insurance requires employers to pay in respect of UAE nationals (subsequently extended to cover the nationals of Gulf Cooperation Council (GCC) countries) a contributory pension to the General Authority for Pensions and Social Security. This could be seen as an extra cost of hiring UAE nationals or nationals of another GCC country.

VII GLOBAL POLICIES

The Labour Law includes a Section dedicated to disciplinary rules, under which it is not required that employers have their own disciplinary rules; in the absence of disciplinary rules, the provisions of the Labour Law apply. Any disciplinary rules put in place by employers must comply with the minimum procedural requirements set out in the Labour Law. The Ministry of Human Resources and Emiratisation has issued by Order No. 28/1 of 1981 a guide for employers issuing their own disciplinary rules. The Order serves only as a guide and is not mandatory. It provides that any new disciplinary rules must be approved by the Ministry of Human Resources and Emiratisation before they come into effect. The rules must be in Arabic (and, if necessary, in any other language) and must be filed in an appropriate place. The law does not specify what an appropriate place is but it is understood they must be made available to employees. Notification of the disciplinary rules to employees, or their incorporation in employment contracts, is not a legal requirement but is recommended as best practice.

VIII PARENTAL LEAVE

The Labour Law only provides maternity leave for female employees. There is no provision for paternal or adoption leave.

A female employee with one year of service is entitled to maternity leave with full pay for 45 calendar days, which can be taken either before or after the birth of her child. If the employee has not completed at least one year of service, she is entitled to 45 calendar days' leave at half pay. In addition, a female employee is entitled to unpaid leave of up to 100 consecutive or non-consecutive calendar days if the absence is due to an illness preventing her from resuming work and if the illness is confirmed by a medical certificate issued by

the medical service specified by the competent health authority, or if the latter authority confirms that the illness was caused by the employee's work or childbirth. Furthermore, a female employee returning from maternity leave is entitled, during the 18 months following her return, to two additional breaks per day to nurse her child; each break shall be for a maximum of half an hour. The breaks are counted as part of the hours of work and the employer is entitled to deduct any remuneration from the employee in respect of these breaks.

IX TRANSLATION

Employment contracts filed with the Ministry of Human Resources and Emiratisation are required to be in a standard bilingual English and Arabic form. Employers' guidelines and circulars to employees must also be in Arabic in addition to any other language the employer wishes to use; however, the Arabic text always prevails. Any other agreement between the employer and employee does not need to be translated into Arabic as long as it is not required to be filed with the Ministry of Human Resources and Emiratisation or any other local authority in the UAE.

The Labour Law does not make it a requirement to certify or notarise translations of any employment-related documents; however, if such documents are to be submitted to the courts or labour tribunal in relation to a dispute, it is expected that the translation will be duly certified by a legal translator.

X EMPLOYEE REPRESENTATION

The Labour Law does not contemplate any rules in relation to employee representation bodies, including works councils or trade unions. Although not strictly forbidden, there are no employee representation bodies or trade unions in the UAE. The Labour Law seems to assume that the interests of employees are protected by the Labour Law and the Ministry of Human Resources and Emiratisation in its capacity as the administrative body responsible for enforcing the Labour Law and other labour regulations.

The Labour Law provides for a procedure to settle collective disputes, which must be followed. If the dispute cannot be settled amicably, then a conciliation board including a representative of the Ministry of Human Resources and Emiratisation, a representative of the employees and a representative of the employer must hear the dispute. On certain occasions, the decision of the conciliation board may be subject to recourse to a supreme arbitration board, which includes a representative of the Ministry of Human Resources and Emiratisation, a judge from the Federal Supreme Court and an expert.

XI DATA PROTECTION

Entering into an employment contract with an employer means sharing with the employer information that often relates to the privacy of the employee. The Labour Law does not regulate the way employers create, keep and transfer data relating to their employees, but it requires employers to maintain records and files relating to each employee. This is in line with the absence in the Labour Law of provisions on the protection of privacy and the personal rights of employees, and in general with the absence of a law devoted to data protection in the UAE. Apart from ADGM and DIFC laws on data protection (which only apply within the ADGM and DIFC, respectively), a Dubai Healthcare City (DHCC) law on data protection

(which only applies within the DHCC) and some generic provisions in the Constitution and Penal Code, there are no legal provisions in the UAE determining how and when data is collected, stored, transferred, used or otherwise processed. There is no regulation on sensitive data or on the possibility of background checks. As a matter of best practice, employers are encouraged to obtain the consent of employees for handling their data or conducting any background checks. The Constitution and the laws of the UAE are generally compliant with the principles of *shariah* law, which also encourages the protection of people's privacy.

XII DISCONTINUING EMPLOYMENT

i Dismissal

An employer in the UAE may dismiss employees without cause. However, the cause is relevant to the employee's right to receive an end-of-service gratuity, which is generally due upon termination of an employment contract. A gratuity is not due if the employee's contract is terminated with cause or if the minimum period for continuous work stipulated in the Labour Law was not fulfilled. An employment contract is terminated with cause in the situations provided for in Article 120 of the Labour Law. The gratuity is also due when the employee terminates the contract, provided certain requirements (such as length of employment) are fulfilled. For example, employees with limited-term contracts are not entitled to a gratuity if they terminate the contract before it expires unless they have completed five years of continuous service.

Any of the parties to an employment contract may terminate the contract provided that the notice period (which varies depending on how long the employee has been employed and which may be replaced with payment in lieu of notice) is observed and the termination is not arbitrary.

Employee termination is arbitrary when the reason for termination is not related to the work, if the worker has submitted a complaint to the Ministry of Human Resources and Emiratisation or other authorities, or if the worker has submitted other valid judicial claims. In relation to UAE nationals, Ministerial Decree No. 212 of 2018 provides for further requirements that must be satisfied so as to terminate the employment of a UAE national.

In practice, it may be difficult to prove that a termination is arbitrary, in particular because the Labour Law does not require the employer to disclose the reasons for termination or notify any authorities of those reasons. In the case of foreign workers, employers must inform the immigration authorities of the termination, but not the reason, for the purposes of cancelling the residence visa.

When employers have put in place a savings fund or a retirement or insurance scheme for the benefit of employees, the employee is entitled to choose between the end-of-service gratuity and such schemes, whichever is more advantageous.

Upon termination, in addition to the end-of-service gratuity, employers are also responsible for the repatriation costs of any foreign employees.

ii Redundancies

The concept of redundancy is not recognised under the Labour Law and, as such, each termination is looked at individually and has to observe the rules in relation to the termination of employment contracts, namely the notice requirements and payment of the end-of-service gratuity. Redundancy programmes implemented by international companies in the UAE are mostly based on best practices and are effected on an individual, rather than collective, basis.

XIII TRANSFER OF BUSINESS

There is no separate business transfer law in the UAE. The Labour Law provides protection for employees affected by mergers, acquisitions or outsourcing transactions under the provisions of Article 126, which provides that all valid employment contracts at the time of change of ownership of a business will remain in force between the new employer and the employees and their service will be deemed continuous. The new employer and the old employer will also be jointly liable for a period of six months for the discharge of any obligations resulting from employment contracts during the period preceding the change and the new employer will thereafter bear the liability solely.

As redundancy is not recognised under the Labour Law, a collective transfer of employees is not allowed under the Labour Law and each employee will be dealt with individually on the basis of the provisions of his or her employment contract.

Although a transfer of business has a significant effect on employees' status, the Labour Law does not require the consent of employees to the transfer, only to any changes affecting their employment contracts. As such, employers should distinguish between the following two options for transferring a business according to the effects each would have on the employees' status.

**i Transfer of business with acquisition of commercial licence:
no change to name of employer**

Examples of this type of transfer are buying the shares of a limited liability company or acquiring the parent company of a branch. In these cases, employment contracts remain in force and there is no requirement to obtain consent from employees regarding the transfer unless the new owner wishes to make changes to their contracts, in which case it is mandatory to obtain the consent of each employee, individually.

**ii Transfer of business without acquisition of commercial licence:
name of employer changed**

There are two possible options in this type of transfer:

- a* the new employer may opt to hire the employees under new contracts after having their employment contracts with the old employer terminated and they have received all their end-of-service benefits; or
- b* the new employer hires the employees on continuous employment and accepts the transfer of the former employer's obligations under the existing employment contracts. In this case, the new employer and the old employer will be jointly liable for the discharge of all obligations under the employees' employment contracts for six months.

Furthermore, it is also mandatory to transfer, individually, the work permit and employment visa of each employee after making the necessary changes to the employment contract, a process that employers find onerous and time-consuming. It is also important to distinguish in this type of transfer between the procedural requirements pertaining to foreign workers and those pertaining to UAE workers and workers of other GCC countries, since the transfer of the latter should be in compliance with the provisions of the UAE Federal Law No. 7 of 1999 regarding the pensions and social security regulations, and after obtaining the approval of the General Authority for Pensions and Social Security.

XIV OUTLOOK

This chapter has highlighted that the Labour Law is not sufficiently sophisticated, and indeed is silent in some areas, regarding certain employment issues. As such, employers and employees are encouraged to seek legal advice when entering into employment contracts or when dealing with the issues that have been discussed.

There have been ongoing discussions about a new Labour Law and there are great hopes that one will be enacted that will cover areas of employment relationships that are not currently addressed. It seems there is a general agreement in the marketplace that amendments to the Labour Law might not be enough to match the phenomenal growth in the economy of the UAE during the past few years and face the challenges of the years to come. A new Labour Law must include provisions on, *inter alia*, data protection, international and local secondment of employees, the appointment of employees' representatives, a minimum wage, discrimination and harassment, pensions and healthcare, and redundancy. These areas are either not covered properly or not covered at all by the current Labour Law.

In 2016, the UAE Minister of Human Resources and Emiratisation issued new regulations to protect employees, including the notable Ministerial Resolution No. 739 on the protection of wages (see Section V.iii). Further protection for employees came in the form of Ministerial Resolution No. 591 concerning the commitment of establishments to provide accommodation for their workers, which requires employers with 50 or more employees earning less than 2,000 dirhams to provide those employees with free accommodation.

As mentioned, the focus towards the end of 2016 and beginning of 2017 centred on Emiratisation. Pursuant to Ministerial Resolution No. 930 of 2016, the UAE Ministry of Human Resources and Emiratisation provides professional guidance, training and employment opportunities to job-seeking Emirati nationals who are registered with the Ministry. Further, the Ministry revised the classification of entities based on their Emiratisation quotas pursuant to Ministerial Resolution No. 740 of 2016. In 2018, this commitment to protecting the rights of Emiratis seeking to work in the private sector was further strengthened with the promulgation of Ministerial Decree No. 212 on Regulation of Employing Nationals in the Private Sector. This regulation annulled Ministerial Decree No. 293 of 2015 on the Rules and Regulations of Employing Nationals and Ministerial Decree No. 176 of 2009 concerning the Rules and Regulations of Terminating the Service of Nationals in the Private Sector, and set out new rules in respect of the employment of UAE nationals, including:

- a* setting out the process that employers in the private sector must follow to employ a UAE national;
- b* introducing inspections from the Ministry of Human Resources and Emiratisation to ensure that Emirati employees are employed in an appropriate work environment and that the company and the UAE national make payments into the statutory pension fund for GCC nationals; and
- c* the rules applicable to the dismissal of UAE nationals.

In practice, there has been a recent change to the way Emiratisation is implemented by the Ministry of Human Resources and Emiratisation. Employers are now compelled to seek an interview with a UAE national prior to obtaining clearance to employ a non-GCC national for the same role.

As noted in Section II, the DIFC has implemented a new workplace savings scheme to replace end-of-service gratuity, which came into force on 1 February 2020. The ADGM has issued new Employment Regulations, which came into force on 1 January 2020.

UNITED KINGDOM

Caron Gosling¹

I INTRODUCTION

Employment law in the United Kingdom (comprising the three separate jurisdictions of England and Wales, Scotland and Northern Ireland) is based on contract law, supplemented by statutory employment rights or protections, for example in relation to working time, discrimination and termination of employment. Statutory rights can generally be enhanced by the employer.

The principal legislation in relation to employment is:

- a* the Employment Rights Act 1996;
- b* the Equality Act 2010;
- c* the Trade Union and Labour Relations (Consolidation) Act 1992;
- d* the Working Time Regulations 1998; and
- e* the National Minimum Wage Act 1998.

For employment claims, the primary recourse for employees and workers is to an employment tribunal, with appeals to (in ascending order) the Employment Appeals Tribunal (EAT), the Court of Appeal (CA) and the Supreme Court (SC). Relatively few employment cases make it to the Supreme Court. Under the doctrine of precedent, lower courts are bound by the decisions of the higher courts within the same jurisdiction whereas judgments from a court or tribunal of the same level or from a different jurisdiction within the United Kingdom are persuasive but not binding.

Employment claims can generally only be brought in an employment tribunal, with some specific exceptions, namely:

- a* breach of contract claims, other than arising from the termination of employment;
- b* restrictive covenant claims and injunctions; and
- c* claims relating to trade union recognition and other trade union rights, which should be brought before the Central Arbitration Committee, with appeal, as necessary, to the EAT, the CA and the SC.

The following regulatory authorities have competence for enforcement:

- a* Her Majesty's Revenue and Customs (HMRC) for national minimum wage and issues relating to employment taxes and National Insurance contributions;

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- b* the Health and Safety Executive for health and safety matters, including working time; and
- c* the Equality and Human Rights Commission for discrimination and other matters relating to equality.

II YEAR IN REVIEW

Despite relatively little new significant legislation this year (2019), there have been two broad trends in employment law in relation to, first, employment status issues, and second, equal treatment and harassment.

Employment status is under scrutiny from the perspective of both employment rights and employment taxes.

The government issued the Good Work Plan (December 2018) in response to the Taylor Review of Modern Working Practices (July 2017).² A number of proposals to provide further protections for atypical workers are currently under consultation.

Employment status has been particularly prevalent in relation to the 'gig economy', with individuals contracted as 'self-employed' arguing that they are, in fact, 'workers'.³ Worker status entitles individuals to the national living wage or minimum wage, paid holiday entitlement, potential pension contributions and sick pay. In most cases, the individuals' argument that they are workers has been successful, but further clarification is expected from the SC in the *Uber* case, which is due to be heard in summer 2020.

In addition, the rules in relation to the taxation of 'off payroll' working are also likely to change under the new IR35 legislation,⁴ which is expected to come into force in April 2020, subject to the outcome of the further review announced by the new Conservative government in December 2019.

Non-disclosure agreements (NDAs) and sexual harassment in the workplace are also under scrutiny following the recent exposé on discriminatory practices and harassment as highlighted in the #MeToo campaign.

The Solicitors Regulatory Authority (SRA) has issued a warning notice on the use of NDAs.⁵ Lawyers face the risk of disciplinary proceedings before the Solicitors Disciplinary Tribunal if they are involved in imposing unethical NDAs.⁶ Although this is not an employment protection, as such, the net effect is broadly the same.

² See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf.

³ See, for example, the following cases, in which the individuals were held to be workers: *Uber BV v. Aslam* (Court of Appeal [CA]) [2018] EWCA Civ 2748, appeal to Supreme Court [SC] outstanding; *Addison Lee v. Gascoigne* (Employment Appeals Tribunal [EAT]) EAT 0289/1; *Dewhurst v. CitySprint Ltd* (Employment Tribunal [ET]) ET220512/2016; *Pimlico Plumbers v. Smith* (SC) [2018] SC 29; and the following cases, in which the individuals were held not to be workers: *Windle and Arada v. Secretary of State for Justice* (CA) [2016] EWCA Civ 459; *Independent Workers Union of GB v. RooFoods Ltd (t/a Deliveroo)* (Central Arbitration Committee and High Court) TUR1/985 (2016).

⁴ See <https://www.gov.uk/guidance/understanding-off-payroll-working-ir35>.

⁵ See <https://www.sra.org.uk/sra/news/press/2018/nda-warning-notice/2018/>.

⁶ See <https://www.telegraph.co.uk/news/2019/04/03/harvey-weinsteins-lawyer-facing-prosecution-use-ofgagging-orders/>.

On 21 July 2019, the government announced further proposals⁷ to impose limitations on NDAs by way of specific legislation.

The government also issued a consultation on sexual harassment (which closed for responses on 2 October 2019),⁸ with a view to strengthening and clarifying the law.

III SIGNIFICANT CASES

i Restrictive covenants

*Tillman v. Egon Zehnder Limited*⁹

This is the first case to address the enforceability of restrictive covenants to come before the SC in more than 100 years. The SC held that a restrictive covenant that sought to prevent a senior employee from engaging, directly or indirectly, or being concerned or interested in any competing business for six months after the termination of her employment was enforceable provided that the offending words ‘interested in’ were severed from the remaining parts of the covenant. The SC held that this language was too broad to be enforceable as it would capture minor shareholding interests.

The SC upheld the validity of the ‘blue pencil’ test on the basis of the threefold test set out by the CA in *Beckett Investment Management Group Ltd v. Hall*:¹⁰ first, the unenforceable provision of the covenant must be capable of being removed so that the remaining wording can stand without further modification; second, the remaining terms must be supported by adequate consideration; and third, the removal of the wording should not substantially alter the overall effect of the restrictions.

The overall effect of this judgment is that of a widening in scope and application of the ‘blue pencil’ test. It is now relatively straightforward to draft covenants in such a way that the ‘blue pencil’ test can be applied without any major change to the effect of the overall restriction. However, the SC did warn of potential costs repercussions against employers when an employee needs to litigate over unreasonable restrictions included by the employer in reliance on the wide scope of the ‘blue pencil’ test.

ii Employee monitoring

*Lopez Ribalda and others v. Spain*¹¹

The Grand Chamber of the European Court of Human Rights has held (by a majority) that there was no breach of privacy under Article 8(1) of the European Convention on Human Rights when an employer used covert video recordings to provide a reason for dismissing employees.

Video evidence showed the employees on a shop floor stealing from their employer. The employees were not told in advance that their actions were being monitored, despite notice to the employee being a requirement of Spanish law. The court held that the failure to comply with this requirement was only one factor to take into account – other relevant factors were

7 See <https://www.gov.uk/government/consultations/confidentiality-clauses-measures-to-prevent-misuse-in-situations-of-workplace-harassment-or-discrimination>.

8 See <https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace>.

9 [2019] SC 32.

10 [2007] EWCA Civ 613.

11 Application Nos. 1874/13 and 8567/13, 17 October 2019.

that the employees should have had a limited expectation of privacy on a shop floor, that the monitoring was for a limited duration; that only limited people were permitted to view the footage; and that if the employees had been told about the monitoring they would have modified their behaviour such that the employer would not be able to identify the thieves. The use of covert surveillance in this case was proportionate, and therefore the dismissals of the employees were fair.

This is a pragmatic approach to the use of covert surveillance, provided that the overall approach is proportionate and justified.

In the United Kingdom, guidance provided by the Information Commissioner's Office (ICO) confirms that only in exceptional cases will covert monitoring be justified.¹² Employers will still need to conduct an impact assessment before undertaking the monitoring, not only to determine whether it is necessary but also to conduct the monitoring in a way that is the least intrusive.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The basis of the employment or worker relationship in the United Kingdom is that of a contract between the parties. There is no requirement for this contract to be recorded in writing, but under Section 1 of the Employment Rights Act 1996,¹³ employers are required to give to employees a statement of the principal terms of their employment within two months of the start of employment.¹⁴ In practice, this requirement is often satisfied by requiring the employee to sign a written employment contract that contains the required particulars.

The principal terms to be provided in writing in this Section 1 statement include, for example, the names of each party, pay, holiday entitlement, hours and location of work, entitlement to notice of termination and other matters.

Fixed-term employment contracts are permissible, but after the fourth year of employment on a successive fixed-term contract, employment will be deemed to be permanent or indefinite unless further use of a fixed-term arrangement can be justified.¹⁵ Fixed-term employees are entitled to equal treatment with comparable permanent employees, unless the difference in treatment is objectively justified. Employers should also be aware that the expiry and non-renewal of a fixed-term employment will be a dismissal at law and the employee may be able to claim that this dismissal is unfair.

As the terms of the employment or engagement are contractual in nature, usually the consent of both parties is required to effect any changes. If the terms are drafted so as to provide flexibility, the change in working conditions may not require further consent.

12 See Section 3.4, The Employment Practices Code, available at https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf, and the Information Commissioner's Office's Supplementary Guidance, available at https://ico.org.uk/media/for-organisations/documents/1066/employment_practice_code_supplementary_guidance.pdf.

13 This right is to be extended to workers with effect from 6 April 2020.

14 From 6 April 2020, the majority of particulars will need to be given in a single statement before the job begins.

15 Regulation 8, Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 SI2002/2034.

Employers should exercise caution when proposing changes to the terms and conditions of a number of employees, particularly when one option is to terminate the current contracts and re-engage the employees on the proposed new terms: this may constitute a collective redundancy (see Section XIII.ii).

ii Probationary periods

Probationary periods are permissible and often used in practice. The use of probationary periods is subject to:

- a* compliance with the statutory minimum period of notice of termination (see Section XIII.i); and
- b* the right of the employee to bring a claim for unfair dismissal (usually after two years' service) if the employment is terminated (see Section XIII.i).

iii Establishing a presence

There is no restriction on foreign employers operating in the United Kingdom insofar as employment law is concerned. However, there may be an obligation to operate Pay as You Earn and deduct income tax and National Insurance contributions (NICs) from employees' pay at source. In addition, corporate tax liabilities may arise if an employer establishes a permanent establishment in the United Kingdom, for example, when the employer, worker or contractor in the United Kingdom is able to enter into contracts that bind the employing entity.

Employees can be hired through agencies or other third parties and there are no restrictions in the United Kingdom in terms of labour loaning or labour leasing. However, they may be agency workers and as such would be entitled to rights under the Agency Worker Regulations 2010.

UK employment law generally applies when the work is performed in the United Kingdom. Thus, employees and workers in the United Kingdom will be entitled to the benefit of the statutory protections irrespective of the nationality of their employer or the governing law of the contract.

V RESTRICTIVE COVENANTS

During employment, employees owe an implied duty of fidelity to their employer, which includes an obligation not to compete. For directors or senior employees who are classed as 'fiduciaries' by law, additional obligations will apply, such as to report any wrongdoing and to account for any secret profit made.

After employment, the ability of employers to prevent competition is more restricted as the duty of fidelity falls away, although certain obligations of confidentiality in relation to keeping trade secrets will continue.

Restrictions that go beyond confidentiality and attempt to limit the activities of the employee post-termination will be void and unenforceable unless specific conditions are met. A post-termination restriction will be enforceable only where it:

- a* protects the legitimate business interests of the employer (for example, trade connections, goodwill or employees);
- b* is the minimum required to protect that legitimate business interest; and
- c* is reasonable in scope.

This last condition requires a balancing of the interests of the employer and former employee and the factual matrix will be critical in determining whether the scope of the restriction is in fact reasonable in practice. Issues to consider will include the duration of the restriction, the seniority of the former employee, the nature of his or her role, and the nature of the industry (including whether it will be possible for the employee to obtain a new job if the restrictions were to be enforceable).

In 2019, the Supreme Court upheld the validity of the ‘blue pencil’ test in *Tillman v. Egon Zehnder Ltd* (see Section III).

VI WAGES

i Working time

The Working Time Regulations 1998 provide for limits and obligations relating to working time for employees and workers working in the United Kingdom.

Weekly working time	Limited to 48 hours on average per week (including overtime). Certain exceptions apply, for example: <ul style="list-style-type: none"> • if the worker has agreed in writing to ‘opt-out’ of this requirement. This agreement can be withdrawn by the worker on not less than three months’ prior written notice; or • if the worker is a ‘managing executive’ (i.e., he or she has the ability to determine his or her own working time).
Weekly rest break	24 hours’ uninterrupted rest in each week or 48 hours’ uninterrupted rest in each fortnight (exemptions may apply, in which case compensatory rest must be provided)
Daily rest break	11 hours’ uninterrupted rest (exemptions may apply, in which case compensatory rest must be provided)
In-work rest break	20-minute rest break when the working day exceeds six hours.
Night work	Limited to eight hours per day on average. Free health assessment for night workers when starting night work and thereafter at regular intervals. Transfer to day work where possible if night work is causing health issues.
Paid holiday entitlement	5.6 weeks (full-time equivalent) (28 days). This can include the usual bank or public holidays (note that England and Wales, Scotland and Northern Ireland have different bank and public holidays).
Records	Employer to keep adequate records to demonstrate compliance with working time obligations, including daily working time.

ii Overtime

Subject to compliance with the applicable national living wage or national minimum wage, the law does not require employees to be paid for overtime. However, when employees are paid hourly, it would be unusual for overtime not to be paid. When overtime is to be paid, the rate of pay is agreed between the employer and the employee.

VII FOREIGN WORKERS

All foreign workers who do not have the right to work in the United Kingdom must have the necessary visa or work permit. Employers are under an obligation to check that workers have the right to work in the United Kingdom and should keep a record of these checks. Other than in relation to the immigration requirements, there is no requirement to keep a specific record of foreign workers engaged in the United Kingdom, nor any limit on the number of foreign workers that may be engaged.

Whether a foreign worker is subject to UK employment taxes and NICs will depend upon a number of factors, including the duration of the assignment to or employment in the United Kingdom and whether there is a tax treaty between the host country and the United Kingdom. This is an area of considerable future uncertainty, given the potential impact of Brexit.

In general terms, foreign employees working in the United Kingdom will be entitled to the benefit of UK employment law protections, as these apply territorially. In some cases, UK employment law may also apply to employees working outside the UK when the employment is otherwise closely connected with the United Kingdom.

VIII GLOBAL POLICIES

Section 3 of the Employment Rights Act 1996 requires the employer to set out in writing (as part of the written statement of terms and conditions) the following information:

- a* to whom the employee can appeal if dissatisfied with a disciplinary decision;
- b* with whom the employee can raise a grievance in relation to his or her employment; and
- c* details of where the disciplinary rules applicable to the employment can be found (if not attached, these rules should be reasonably accessible by the employee – provided that the employees have access to the employer’s intranet site, this would be perfectly acceptable).

The disciplinary rules should contain the following information:

- a* any procedure applicable to the taking of disciplinary action relating to the employee or any decision to dismiss the employee; and
- b* any explanation of any further steps to be taken following the submission of a disciplinary appeal or grievance.

The disciplinary and grievance rules do not have to be agreed with the employees or any employee representatives (unless the employer has agreed otherwise with any trade union, works council or other employee representative body). Disciplinary and grievance procedures would normally be expressly outside the contract of employment, so as to give the employer more flexibility in changing these procedures or adapting them to particular circumstances. There is no requirement to file the procedures with any authority.

Although there are no mandatory provisions for the procedures, employers should have regard to the ACAS¹⁶ Code of Practice on disciplinary and grievance procedures,¹⁷ which sets out guidelines for fair practice. Any failure to follow these guidelines could lead to employee claims, for example, for breach of contract or unfair dismissal.

Although there is no express requirement, these procedures should be written in English so that they are readily understandable by employees. Employers may want to consider whether the procedures should be translated for employees who do not speak English.

¹⁶ Advisory, Conciliation and Arbitration Service.

¹⁷ www.acas.org.uk/media/pdf/f/11287_CoP1_Disciplinary_Procedures_v1__Accessible.pdf.

IX PARENTAL LEAVE

The law in the United Kingdom provides for the following types of leave: maternity, paternity, adoption, shared parental and parental. Pregnancy and maternity is a specific protected characteristic under the Equality Act 2010 and employees who are discriminated against on the grounds of pregnancy or maternity will have a discrimination claim against the employer.

	Length of leave / qualifying conditions	Entitlement to pay during leave / qualifying conditions	Responsibility for pay during leave	Additional comments
Maternity	Up to 52 weeks. No qualifying conditions.	Six weeks' pay at 90% of pay (averaged over specific period if variable). 33 weeks at lower level Statutory Maternity Pay, currently (2019) £148.68. Subject to qualifying conditions in terms of level of earnings and length of service (26 weeks' service as at the 15th week before the expected week of childbirth (the 'relevant week')). Can be enhanced by employer.	Employer, but there may be a right to recoup some of the cost by way of deductions from NIC liability.	Right to return to the same job after up to 26 weeks' leave, or a suitable alternative job if the return is between 26 and 52 weeks' leave.
Paternity	Two weeks to be taken on or within 56 days of the birth or adoption of the child. Qualifying service of 26 weeks as at relevant week.	£148.68 Can be enhanced by employer.	Employer	Applies to the mother's partner irrespective of gender.
Adoption	Up to 52 weeks. No qualifying conditions.	Six weeks' pay at 90% of pay (averaged over specific period if variable). 33 weeks at lower level Statutory Adoption Pay, currently (2019) £148.68. Subject to qualifying conditions in terms of level of earnings and length of service (26 weeks' service as at the date of notification of matching with a child (the 'relevant week')). Can be enhanced by employer.	Employer, but there may be a right to recoup some of the cost by way of deductions from NIC liability.	Right to return to the same job after up to 26 weeks' leave (ordinary adoption leave) or a reasonably suitable job if the return is between 26 and 52 weeks' leave.
Shared Parental	Up to 50 weeks of the mother's maternity leave can be shared with the mother's partner.	Up to 39 weeks at Statutory Shared Parental leave pay, currently (2019) £148.68. Can be enhanced by the employer.	Employer	The first two weeks of maternity leave is compulsory and reserved for the mother. The mother needs to have curtailed her maternity leave for shared parental leave to apply.
Parental	Up to 13 weeks' leave in total per child under the age of 18. Unless otherwise agreed, limited to four weeks per year. Qualifying service of one year as at the date of leave.	Unpaid	n/a	Employee needs to request leave: employer can in some circumstances postpone.

X TRANSLATION

There is no legal requirement to translate employment documents into English or the employee's local language but this is strongly recommended.

XI EMPLOYEE REPRESENTATION

There is no obligation to recognise a trade union or set up an employee representative body unless a specific and valid request has been made by the workforce.

The Information and Consultation of Employees Regulations 2004 provide that, following a valid request for a works council, if agreement is not reached as to the mandate of the works council, standard provisions will apply. These set out parameters or the obligations to inform and consult and the election process for the representatives.

The law requires information and consultation with employee representatives in certain circumstances, including in a collective redundancy situation or on a transfer of an undertaking. Where no trade union is recognised and there is no standing employee representative body, ad hoc employee representatives must be elected. There are specific conditions for this type of election set out in Section 188A of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to collective redundancies, and in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in relation to a business transfer.

All employee representatives are entitled not to be subjected to a detriment on the grounds of their status. Paid time off is available for:

- a* employee representatives for the purposes of a collective redundancy or a transfer under TUPE, to undergo training for the role and to perform the functions of that role;¹⁸
- b* employee representatives under the 2004 Regulations, to perform the functions of that role;¹⁹ and
- c* a trade union official of a recognised trade union, to carry out collective bargaining or to represent employees in relation to a collective redundancy or a transfer under TUPE.²⁰

XII DATA PROTECTION

i Requirements for registration

The Data Protection Act 2018 (the DPA 2018) implements the EU General Data Protection Regulation (Regulation (EU) 2016/679 (GDPR)) in the United Kingdom. Although there is no requirement under the DPA 2018 to notify the ICO of the processing of personal data, annual notifications should continue to be renewed, as failure to do so remains a criminal offence. An employer may also need to pay data controller fees.

Employers with at least 250 employees must keep records about data processing activities under Article 30 of the GDPR. These records must include:

- a* name and contact details of the employer and, if applicable, its data protection officer;
- b* the purposes of the processing;
- c* a description of the categories of both individuals (data subjects) and personal data;
- d* the categories of recipients to whom the personal data has been or will be disclosed (including recipients in non-EU countries);
- e* details of transfers to third countries or international organisations, including documentation relating to the transfer mechanism safeguards in place;
- f* where possible, the envisaged time limits for erasure of different categories of data; and
- g* where possible, a general description of technical and organisational security measures.

18 Section 61, Employment Rights Act 1996.

19 Regulation 27, Information and Consultation of Employees Regulations 2004.

20 Section 168(1) and (2), Trade Union and Labour Relations (Consolidation) Act 1992.

It is recommended that smaller employers also keep records so as to establish compliance as required by the general 'accountability' principle (see below).

Processing personal data must be done in accordance with the data protection principles. The first of these is that data should be processed in a lawful, fair and transparent manner – for this, the processing must satisfy one of the specific conditions in Article 6(1). The most relevant conditions for employment purposes are:

- a* data subject (employee) consent;
- b* the processing is necessary for the performance of a contract to which the data subject is a party; or
- c* the processing is necessary for the purposes of the legitimate interests of the data controller.

In an employment context, typically one of the latter two conditions will apply and so employee consent will not be required. If consent is required, it needs to be specific, informed and freely given.

Additional data protection principles are:

- a* purpose limitation: personal data must be collected only for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes;
- b* data minimisation: personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed;
- c* accuracy: personal data must be accurate and, where necessary, kept up to date;
- d* storage limitation: personal data must be kept for no longer than is necessary for the purposes for which the data is processed;
- e* integrity and confidentiality: personal data must be processed in a manner that ensures appropriate security; and
- f* accountability: the data controller must be able to demonstrate compliance with the data protection principles.

ii Cross-border data transfers

Transfers of personal data to countries outside the European Economic Area is only permissible if the data controller or data processor complies with the conditions set out in the GDPR, relating to the adequacy of protection of personal data. These conditions will typically take the form of appropriate safeguards, for example, binding corporate rules, standard data protection clauses, or certification under an approved certification mechanism as provided for in the GDPR. The third country should also have enforceable data subject rights with effective legal remedies.

iii Sensitive data

Additional conditions apply in relation to the processing of personal data that is classed as a 'special category of personal data' (sensitive personal data). The special categories of data are:

- a* race or ethnic origin;
- b* political opinions;
- c* religious or philosophical beliefs;
- d* trade union membership;
- e* genetic and biometric data;
- f* health; and
- g* sex life or sexual orientation.

Additional conditions include explicit consent, when it is necessary to protect the vital interests of the data subject, or when it is necessary for carrying out rights and obligations under employment law.

iv Background checks

Background checks are permissible provided that they are conducted in compliance with the GDPR. Before seeking any personal information, the employer should conduct a data privacy impact assessment to ensure that the information is legitimately required and that there is compliance with the data protection principles. Official criminal records checks are administered by the Disclosure and Barring Service and, in some cases, an employer may request that an employee makes a voluntary disclosure. There are specific obligations under the GDPR in relation to the processing of information relating to criminal checks.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

In relation to dismissal, an employee will have rights pursuant to his or her contract of employment and may also have statutory protections.

Rights under the contract will include prior notice of termination. The statutory minimum notice is one week for service of more than one month and less than two years, and thereafter one week per complete year of service up to a maximum of 12 weeks.

Employment contracts may provide for additional notice or payments on termination, and may also provide for the immediate termination (with or without cause), when a payment in lieu of notice is made.

Employees (in most cases, provided they have more than two years' service) are entitled not to be unfairly dismissed. The service requirement will not apply in specific cases, such as dismissal for whistle-blowing.

A dismissal will be unfair if there is no fair reason, or if the process followed is unfair. A dismissal without cause is not prohibited by law but is likely to be an unfair dismissal.

The dismissal of an employee for certain reasons (e.g., pregnancy, maternity or whistle-blowing) will be automatically unfair.

In addition to the basic award (which is calculated in the same way as a statutory redundancy payment), compensation for unfair dismissal is based on financial losses flowing from the dismissal and is generally capped at 12 months' salary or £86,444 (in financial year 2019–2020), whichever is the lower.

There is no requirement to notify any government authority of a dismissal other than in a collective redundancy situation, or in relation to payroll obligations.

There is no legal requirement to notify a trade union or works council about a dismissal unless the employer has agreed with the trade union or works council that it will do so. No social plan is required, and a dismissed employee will not have any rehire rights unless these have been agreed with the employer.

It is possible for the employee to waive any employment claims arising on termination, including unfair dismissal, by way of a settlement agreement, but this must comply with the statutory formalities to be effective and enforceable.

ii Redundancies

A redundancy situation arises when there is a reduction in the requirement for employees or a relocation resulting in dismissals. A redundancy dismissal can be unfair if it is either not a genuine redundancy or, more commonly, the process followed is unfair. A fair process would involve prior warning and consultation of the potential redundancy situation before the decision is confirmed, and selection on fair and objective grounds that have been consistently applied across the relevant employee population (the 'pool'). There is no obligation to consult with a works council or trade union in relation to a redundancy dismissal, save when the employer has already made a commitment to do so, or where there is a potential collective redundancy situation.

Employees dismissed as redundant are entitled to a statutory redundancy payment, provided that they have completed two years' service: this is calculated according to a statutory formula and is currently capped at £15,750.

The definition of redundancy for the purposes of a collective redundancy is slightly broader, encompassing all dismissals for a reason not connected with the individual employee. A collective redundancy situation arises when an employer proposes 20 or more redundancy dismissals at one establishment during a period of 90 days or fewer. Prior consultation with appropriate employee representatives is required over a minimum period of 30 days, where between 20 and 99 redundancy dismissals are proposed, or over a minimum period of 45 days where 100 or more redundancy dismissals are proposed. The Secretary of State must be notified in advance, at the beginning of the required minimum consultation period.

No social plan is required for either an individual or collective redundancy dismissal. All other rights and obligations in relation to dismissals will apply (see Section XIII.i).

XIV TRANSFER OF BUSINESS

The TUPE Regulations are the UK's transposition of the EU Acquired Rights Directive²¹ and apply to:

- a* a transfer of an entity that retains its identity (a business or asset transfer); or
- b* a service provision change (typically arising in relation to the transfer of outsourced activities).

Note that TUPE does not apply on a share transfer, but may apply in relation to any pre-share or post-share transfer reorganisation.

Where TUPE applies, employees affected by the transfer have the following rights:

- a* protection from dismissal when the reason for the dismissal is the transfer, unless there is an economic, technical or organisational reason entailing changes in the workforce;
- b* protection from transfer-related changes to terms and conditions of employment, unless there is an economic, technical or organisational reason entailing changes in the workforce; and
- c* to be represented by appropriate employee representatives for the purposes of information and consultation in relation to the transfer.

21 Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

XV OUTLOOK

The most significant events in the coming year are likely to depend upon the impact of Brexit. Employment law currently in force, even if derived from EU law, does not cease immediately on the UK's exit from the European Union, but may be changed by the next and future governments.

The SC is due to hear the appeal in the *Uber* case in summer 2020 and this may produce further guidance on employment status in relation to gig economy workers.

New IR35 legislation²² is already in force in the public sector and is due to come into force in the private sector on 6 April 2020 (subject to the outcome of the government review, to be announced mid February 2020).

In terms of legislative proposals, the government is currently consulting on (1) its proposals regarding the Good Work Plan and (2) extending the pay gap reporting to black, Asian and minority ethnic employees.

22 Chapter 10 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003, covering obligations to deduct taxes from off-payroll workers.

UNITED STATES

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I INTRODUCTION

Employment law in the United States derives from a combination of federal, state and local laws and regulations. Historically, federal law has been the primary source of employment-related statutes and rules. In recent years, however, virtually all the legislative action in the employment arena – and there is plenty of it – has taken place at the state and local levels (i.e., cities and counties).

Federal law applies to all 50 states and Washington, DC. Generally, a federal law pre-empts state or local law when the latter conflicts with the former. On the other hand, there is no federal pre-emption issue when a state or local law addresses a matter not covered by federal law, such as private sector employee paid leave.

For the most part, recent state and local measures have significantly increased employees' legal rights, protections and benefits and have correspondingly expanded employers' legal obligations. As a result, employees in many states and localities enjoy greater rights than they have under federal law. Generally, employers must follow the law that is more favourable to their employees. For instance, many states and localities have enacted minimum wage increases in the past few years that surpass the current federal minimum wage rate. Thus, employers in those jurisdictions must pay their non-exempt employees the higher minimum wage.

Moreover, the ever-broadening scope of state and local laws regulating the employer-employee relationship continues to gain strength as a formidable exception to the long-established employment-at-will doctrine. 'At-will' means that the employment relationship can be terminated by either party, at any time, without notice and for any reason, as long as the termination does not contravene the terms of a written contract (including a collective bargaining agreement (CBA)) or a federal, state or local law. The most likely laws to be raised to contest a dismissal are the anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act and the Equal Pay Act, and their state or local counterparts. Further, a discharge may be challenged under a variety of other laws that also ban retaliation, such as state and local paid sick leave laws.

In addition to termination, the anti-discrimination laws protect individuals with certain characteristics from adverse employment actions involving other 'terms or conditions' of employment, including hiring, promotion, compensation, and so on. Federal law prohibits discrimination based on race, colour, gender, national origin, religion, age, disability, military

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or veteran status, and genetic information. State and local laws in various jurisdictions prohibit discrimination based on additional categories, such as sexual orientation, gender identity, marital status and status as a victim of domestic violence. Employers doing business in the United States also should be aware that, while federal anti-discrimination laws generally apply to employers with a minimum of 15 or 20 employees, their state and local counterparts may have lower thresholds, and some may apply to all employers, regardless of size.

Anti-discrimination laws also prohibit employers from harassing employees based on a protected category, such as gender, age or race. Harassment is unwelcome conduct that is unlawful when the offensive behaviour becomes a term or condition of employment or continued employment, or when the conduct is sufficiently severe or pervasive to create a work environment that a reasonable person would consider intimidating, hostile or abusive.

These civil rights laws also protect employees and job applicants from retaliation for, among other actions, reporting harassment, discrimination or retaliation, either internally or to a government agency.

The US Equal Employment Opportunity Commission (EEOC) and its state and local counterparts oversee the enforcement of anti-discrimination laws.

Various federal, state and local government agencies enforce other laws governing the employment relationship. For example, the National Labor Relations Board (NLRB) administers, among other labour laws, the National Labor Relations Act (NLRA), which specifically permits non-supervisory and non-managerial employees in the private sector to engage in certain ‘concerted activities’, such as collectively discussing their terms and conditions of employment, engaging in union organising activities, and collectively bargaining with their employers. The US Occupational Safety and Health Administration ensures safe and healthy working conditions for American workers, and it administers several federal whistle-blower laws. Similarly, the US Department of Labor (DOL) promotes the welfare of American workers by, among other measures, overseeing the laws that protect retirement and healthcare benefits, guarantee a minimum hourly wage and overtime pay (under the Fair Labor Standards Act (FLSA)) and provide for unemployment insurance.

In addition to seeking redress for an alleged violation of an employment law via government enforcement agencies, many of these laws grant employees the right to bring a lawsuit in court, although filing a complaint with the appropriate agency often is a precondition to instituting litigation.

II YEAR IN REVIEW

i Sexual harassment and the impact of #MeToo

One of the most significant developments in employment law during the past year was the continuing, substantive impact of the #MeToo movement, sparked in October 2017 when the hashtag exploded on Twitter, resulting in a cascade of public sexual harassment and assault allegations involving high-profile names in the media, entertainment and financial services industries. In one of the swiftest transitions from cultural movement to legislative action, the #MeToo movement, which prompted the enactment of workplace anti-harassment laws in states from coast to coast, continued apace in 2019.

There are three predominant trends emanating from the recently enacted anti-harassment laws. The first has been laws mandating employee sexual harassment prevention training. This type of training is now required in California, Connecticut, Delaware, Illinois, Maine and New York. In New York, training must be conducted annually and needs to be interactive.

In California, training is required every other year and must be one hour for employees and two hours for managers. Connecticut employees must be trained within three months of hire but only need to be retrained every 10 years. Relatedly, a number of states now require that employers maintain and distribute written anti-harassment policies.

The second trend has been the pushback on the use of non-disclosure provisions in settlements of employee harassment claims. New Jersey now has a sweeping ban on the use of these non-disclosure clauses, so as to allow employees to discuss publicly the underlying facts and circumstances of their allegations. New York and California both require an employee to confirm in writing that it is the employee's preference to incorporate a non-disclosure provision before it may be added to a settlement agreement resolving a claim of sexual harassment. In New York, this requirement was recently expanded to apply to all claims of harassment, discrimination or retaliation.

The third trend has been the weakening of mandatory arbitration agreements. New York and California have essentially banned the use of pre-dispute mandatory arbitration agreements to resolve potential harassment and discrimination claims. New York's ban, which was extended in 2019 to all discrimination claims, has already been struck down by one federal court, which found that the prohibition was pre-empted by the Federal Arbitration Act (FAA). California's law, which was due to take effect as of 1 January 2020, faced a successful challenge on FAA pre-emption grounds, but further appeals may keep this law alive.

ii The FLSA

Changes to salary requirements for white-collar exemptions

On 24 September 2019, the DOL issued its Final Rule implementing various changes to the compensation requirements for the executive, administrative and professional exemptions to the FLSA's requirement to pay overtime to non-exempt employees. The changes, effective as of 1 January 2020, will result in many more workers being deemed non-exempt employees.

Under the Final Rule, the new minimum salary threshold for all three exemptions will increase from US\$455 per week (US\$23,660 per year) to US\$684 per week (US\$35,568 per year). In addition, the salary threshold for the 'highly compensated employee' exemption will increase from US\$100,000 to US\$107,432 per year.

Employers will be permitted to use commissions, non-discretionary bonuses and other incentive compensation to satisfy up to 10 per cent of the salary requirement, so long as those payments occur at least annually. The Final Rule does not provide for any changes to the 'duties' requirements for the executive, administrative or professional exemptions.

Notably, the minimum salary thresholds under the Final Rule are significantly lower than the thresholds required under state law in some jurisdictions. For example, New York State's minimum salary threshold for the executive and administrative exemptions is currently US\$58,500 per year for large employers in New York City.

New rules proposed for evaluating joint employment

On 1 April 2019, the DOL proposed a new rule establishing a four-part test for determining joint-employer status under the FLSA.

Under the current regulatory framework, two or more employers acting entirely independently of each other may be deemed joint employers if they are 'not completely disassociated' with respect to the employment of an individual who performs work for more than one employer in a working week.

Under the DOL's proposed rule, joint employment would be determined using a balancing test focused on whether the putative joint employer (1) hires or fires the employee, (2) supervises and controls the employee's work schedule or conditions of employment, (3) determines the employee's rate and method of payment, and (4) maintains the employee's employment records.

All four of these factors need not be present for a business to qualify as a joint employer. In addition, other factors could be considered if, for example, they are indicative of the putative joint employer's exercise of significant control over the terms and conditions of the employee's work.

The DOL's proposed rule is in addition to pending proposed rules being considered by the NLRB to determine joint-employer status under the NLRA.

iii NLRB developments

NLRB returns to common law independent contractor test

In its decision of 25 January 2019 in *SuperShuttle DFW, Inc.*, the NLRB returned to its long-standing test for distinguishing between employees, who have rights under the NLRA, and independent contractors, who do not. The common law test makes it easier to establish that a worker is an independent contractor, rather than an employee, than does the stricter test that replaced it in 2014.

As explained in *SuperShuttle*, factors considered under the common law test include:

- a* the extent of control that, by the agreement, the master may exercise over the details of the work;
- b* whether the worker is engaged in a distinct occupation or business;
- c* the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- d* the skill required in the particular occupation;
- e* whether the employer or the worker supplies the means, tools and the place of work for the worker;
- f* the length of time for which the person is employed;
- g* the method of payment, whether by the time worked or by the job;
- h* whether the work is part of the regular business of the employer;
- i* whether the parties believe they are creating the relationship of master and servant; and
- j* whether the principal is or is not in business.

NLRB proposes a series of new administrative rules

On 22 May 2019, the NLRB released its Unified Agenda of Federal Regulatory and Deregulatory Actions, announcing its intention to consider formal rule-making in the following areas of NLRB law:

- a* NLRB election law – procedures and timelines, the procedure by which an unfair labour practice charge may block a petition for union representation or decertification, and the conversion of construction industry CBAs into a conventional Section 9(a) bargaining relationship;
- b* the NLRB's treatment of graduate student teachers as employees; and
- c* a union's right to gain access to a company's private property.

With regard to NLRB election law, on 12 August 2019, the NLRB published a Notice of Proposed Rulemaking that would amend the agency's rules and regulations governing the path to union representation for employees (see discussion in Section XI). The NLRB proposed three significant changes to the representation petition procedure:

- a* Blocking charge policy: The NLRB proposes replacing the current blocking charge policy with a vote-and-impound procedure. Elections would no longer be blocked by pending unfair labour practice charges, but the ballots would be impounded until the charges are resolved.
- b* Voluntary recognition bar: The NLRB proposes returning to the rule of *Dana Corp.*² For voluntary recognition under Section 9(a) of the NLRA to bar a subsequent representation petition – and for a post-recognition CBA to have contract-bar effect – unit employees must receive notice that voluntary recognition has been granted and of a 45-day open period within which to file an election petition, which would allow them to vote on the issue of representation.
- c* Section 9(a) recognition in the construction industry: The NLRB proposes that in the construction industry, where bargaining relationships established under Section 8(f) cannot bar petitions for an NLRB election, proof of a Section 9(a) relationship will require positive evidence of majority employee support and may not be based on contract language alone, overruling *Staunton Fuel*.³

On 13 December 2019, the NLRB also announced its proposed adoption of a new Final Rule, published on 18 December 2019, that will restore certain provisions of the NLRB's procedures for union representation elections. The proposed rule changes timing and procedure, and permits parties to litigate issues, including whether persons are supervisors under the NLRA and whether a unit is appropriate for bargaining before the NLRB directs and conducts an election.

iv State and local sick leave and paid family leave

During the past decade, one of the biggest trends affecting employers has been the enactment of state and local laws mandating paid leave for employees to use (depending on the specific law) for their own illness; to care for family members; to address situations relating to sexual violence, domestic violence, or stalking; or when welcoming a new child to their family. Currently, there are more than 30 jurisdictions requiring some type of paid sick or safe leave for employees.

These laws take a variety of different forms and all are drafted slightly differently. Most generally provide paid sick or safe leave pay based on the number of hours the employee has worked. Some laws limit the amount of time off an employee can accrue, some require carrying over unused, accrued time from year to year, and some mandate that employees be allowed to use time in small increments (e.g., 15 minutes). The proliferation and variety of laws has made compliance tricky, especially for companies with multiple locations across the United States.

More recently, states and cities have enacted laws that expand employees' entitlement to disability or paid family leave insurance benefits to provide partially paid leave for such matters as care for a new child or an ill family member. (See also Section IX.)

² 351 NLRB 434 (2007).

³ 335 NLRB 717 (2001).

III SIGNIFICANT CASES

Several of 2019's significant cases emanate from the Supreme Court of the United States (the Supreme Court) and address the strength of, and exceptions to, the FAA, which is a statute designed to facilitate the resolution of disputes through arbitration, rather than in court. The FAA reflects a federal policy strongly favouring the enforcement of arbitration agreements.

i **Henry Schein Inc v. Archer & White Sales Inc (decided 8 January 2019)**

The Supreme Court unanimously held that the FAA does not permit a court to decline to enforce an arbitration agreement even though the court concludes that the claim of arbitrability is 'wholly groundless'.

The case concerned Archer & White Sales, a dental equipment distributor, which had entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute Pelton's equipment. Over time, the business relationship turned sour, and Archer and White subsequently sued Pelton and Crane's successor in interest, Henry Schein, Inc, alleging violations of federal and state antitrust law, and seeking an injunction, among other relief. In response, Schein, relying on the arbitration provision in the parties' contract, asked a federal district court to compel arbitration. The court, however, declined to grant Schein's request, holding that the FAA claim was 'wholly groundless' because the arbitration provision at issue specifically excluded arbitration of an action seeking injunctive relief. On appeal, the US Court of Appeals for the Fifth Circuit affirmed the ruling.

In reversing the Fifth Circuit, the Supreme Court, stressing that the FAA does not contain an exception for 'wholly groundless' claims, held that the requirement to arbitrate disputes is a matter of contract, and courts must enforce arbitration agreements according to their terms. Accordingly, where an arbitration agreement between parties delegates the 'gateway question' of whether a matter is arbitrable to an arbitrator, 'a court may not override the contract', even if the claim 'appears to the court to be frivolous'.

ii **New Prime Inc v. Oliveira (decided 15 January 2019)**

As a corollary to the *Schein* case discussed above, the Supreme Court held in *New Prime Inc v. Oliveira* that where the FAA does, in fact, contain a specific exclusion, a court may decide the issue of arbitrability relating to that exclusion, even if the arbitration agreement expressly delegates arbitrability questions to the arbitrator.

In *New Prime*, the exemption from arbitration at issue was for 'contracts of employment of . . . seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce'. Because the exemption, commonly known as 'the transportation workers exclusion', expressly refers to 'contracts of employment', many businesses seeking to cover transport workers under an arbitration agreement designate these types of workers as independent contractors.

Such was the arrangement between New Prime, an interstate trucking company, and its drivers, who had hired Dominic Oliveira to perform work as a driver pursuant to an independent contractor operating agreement. That agreement contained both an arbitration clause and a delegation clause giving the arbitrator authority to decide threshold questions of arbitrability. When Oliveira filed a putative class action against New Prime in federal court, alleging that the company failed to pay truck drivers the minimum wage, as required by federal and Massachusetts law, New Prime filed a motion to compel arbitration. New Prime contended that (1) the delegation provision in the arbitration agreement required that an

arbitrator decide the question of arbitrability, and (2) the transport workers exclusion only applied to contracts of employment, which required the worker to be an employee, whereas Oliveira was an independent contractor.

The Supreme Court rejected both arguments. With respect to the arbitrability question, the Supreme Court held that a court must first determine whether the FAA applies to the contract at issue before it can assert its power to compel arbitration. As the Court explained, a delegation clause is ‘merely a specialized type of arbitration agreement’, enforceable only to the extent that the dispute at issue meets the FAA’s requirement of ‘involving commerce’, and the transport workers exclusion is inapplicable.

As to whether Oliveira’s contract fell within the definition of ‘contracts of employment’, the Supreme Court looked at the common meaning of that term when the FAA was enacted in 1925 and concluded that the phrase was not then a term of art limited to ‘employees’. Rather, it was construed broadly to cover any work, not just work in a formal employer-employee relationship.

Accordingly, the Supreme Court affirmed the ruling of the US Court of Appeals for the First Circuit that the district court lacked authority under the FAA to compel arbitration.

iii Lamps Plus, Inc v. Varela (decided 24 April 2019)

In 2010, the Supreme Court held in *Stolt-Nielsen SA v. AnimalFeeds International Corp* that a court may not compel class-wide arbitration when an agreement is silent on the availability of such arbitration. In *Lamps Plus v. Varela*, the Supreme Court extended that holding to agreements that are ambiguous on the matter.

The case was brought by Frank Varela, who, like other employees, had signed an arbitration agreement upon commencing employment with the company. In 2016, a hacker tricked a Lamps Plus employee into disclosing the tax information of approximately 1,300 employees. As a result, a fraudulent federal income tax return was filed in Varela’s name. Varela sued Lamps Plus on behalf of a putative class of employees whose tax information had been compromised. Lamps Plus moved to compel arbitration on an individual basis, but the district court rejected the request, instead authorising arbitration on a class-wide basis. The US Court of Appeals for the Ninth Circuit affirmed the ruling, finding that the agreement was ambiguous on the issue of class arbitration, as it contained language arguably supportive of each side’s position. Following state law, the Ninth Circuit construed the ambiguity against the drafter (Lamps Plus), thus allowing for class-wide arbitration.

In a split decision, the Supreme Court reversed the Ninth Circuit, concluding that while the contract was indeed ambiguous, there was no legal justification under the FAA for construing an ambiguous provision against either party. Writing for the 5-4 majority, Chief Justice John Roberts reasoned that, since class arbitration ‘fundamentally changes the nature of the “traditional individualized arbitration” envisioned by the FAA . . . a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so’.

iv Fort Bend County, Texas v. Davis (decided 3 June 2019)

Generally, prior to initiating a lawsuit under Title VII, an individual must file a charge of discrimination with the EEOC or the appropriate state agency. However, in this case, the Supreme Court unanimously held that the charge-filing precondition to a Title VII suit is not a jurisdictional requirement but, instead, a mandatory claim-processing rule that is subject to forfeiture if not raised in a timely manner.

Lois M Davis, an information technology worker for Fort Bend County, had complained to the company's human resources department that the director of the department was sexually harassing her. After an internal investigation, the director resigned. Davis subsequently filed an intake questionnaire with the EEOC in which she alleged that her supervisor retaliated against her for reporting the harassment by limiting her work responsibilities. While her EEOC charge was pending, Davis was dismissed for failing to report to work on a Sunday, although she claimed that she had a commitment at church and had offered to arrange for another employee to cover for her. Following her dismissal, Davis supplemented her EEOC charge by handwriting 'religion' in the Employment Harms or Actions section of her intake questionnaire and checking the boxes for 'discharge' and 'reasonable accommodation'. However, she failed to revise the formal charge document.

After Davis was issued a right-to-sue letter, she filed suit in federal district court, alleging religious discrimination and retaliation for reporting sexual harassment. The court granted the County summary judgment on all Davis's claims. On appeal, the US Court of Appeals for the Fifth Circuit reversed on the religious discrimination claim and remanded the case back to the lower court, where Fort Bend, for the first time, argued that the court lacked jurisdiction to adjudicate Davis's religious discrimination claim, because it was not in her EEOC charge. The lower court agreed with the County and dismissed the case.

The Fifth Circuit again reversed, holding that the charge-filing mandate was not jurisdictional and was forfeited by the employer, because it was not asserted in a timely manner. Upon review, the Supreme Court agreed with the Fifth Circuit that Title VII's charge-filing instruction is not jurisdictional; rather, the instruction is 'properly ranked among the array of claim-processing rules that must be timely raised to come into play'.

Accordingly, the Supreme Court's ruling does not eliminate or alter the charge-filing mandate. Instead, the decision puts employers on notice that they must allege a violation of the requirement in a timely manner or forfeit the right to raise it as a defence.

v *MV Transportation, Inc and Amalgamated Transit Union Local #1637, AFL-CIO, CLC (decided 10 September 2019)*

In this case, the NLRB abandoned its long-standing 'clear and unmistakable waiver' standard for determining whether an employer made an unlawful unilateral change to union-represented employees' terms and conditions of employment under the NLRA. The NLRB instead adopted a 'contract coverage' standard, under which it will review the plain language of the parties' CBA to determine whether the alleged unilateral action taken by the employer was within the scope of the contract.

The NLRA prohibits a unionised employer from unilaterally modifying the terms and conditions of a CBA that are mandatory subjects of bargaining. As a minimum, the employer must maintain the status quo terms and conditions and bargain in good faith with the union until an agreement is reached or the parties arrive at an impasse in bargaining. Prior to *MV Transportation*, the defence available to a charge of unlawful unilateral change was that there had been a 'clear and unmistakable waiver' by the union of the particular issue. Thus, only when an employer was able to show that contract language specifically covered the matter at issue, and that it was clear the parties had fully discussed and consciously explored the change, was the union deemed to have waived its right to bargain over the action.

In *MV Transportation*, the employer unilaterally implemented several changes to its employee policies, including revisions to its schedule for progressive discipline. In response to the union's challenge to the employer's unilateral actions, the NLRB adopted the new

contract coverage standard, under which it found that the management rights clause in the parties' CBA granted the employer the right to create and implement the policy without bargaining with the union. According to the NLRB, the clause demonstrated that the 'parties bargained and agreed to vest in the [employer] the exclusive right to discipline and discharge employees for just cause and to issue reasonable new and revised work rules and policies'. Although the language of the CBA would not have satisfied the high bar of being a clear and unmistakable waiver, it met the new, more liberal contract coverage standard.

Importantly, this ruling applies only to private sector unions; therefore, in most jurisdictions, unions operating in the public sector are still subject to the clear and unmistakable waiver standard.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

As discussed in Section I, absent an enforceable contract, most US employment relationships are governed by the at-will doctrine, meaning that, absent an employment contract providing otherwise, an employment agreement may be terminated for any lawful reason without cause or notice. In fact, owing to the nature of at-will employment, generally, employers may unilaterally change terms and conditions of employment.

Employment may be established via oral agreements, which typically are deemed subject to the at-will employment doctrine, although an employer's unwritten practice of providing certain privileges or benefits, such as paid vacation, may create a legal obligation in some jurisdictions.

Employers and employees also are free to enter into written contracts governing various aspects of the employment relationship, including the term of employment, compensation, location of employment, services to be provided, restrictive covenants and benefits. A written employment contract may be amended by mutual agreement.

Employers may also establish various terms and conditions of employment through policies set forth in an employee handbook or manual. Generally, handbook provisions are not considered an implied contract of employment for any specific duration, especially where there is a disclaimer that the employment relationship is 'at-will'.

ii Probationary periods

US employers are not mandated by either federal or state law to establish probationary periods for new hires, although many employers find them useful, as they provide both the employer and new employee an opportunity to assess whether the arrangement is a good fit for both parties. Often, employees do not receive certain benefits during their probationary period, such as health insurance. Employment during a probationary period typically remains 'at-will' and that status does not change once the probationary period is successfully completed, unless a written contract between the parties specifies otherwise.

iii Establishing a presence

Generally, corporations and even unincorporated companies doing business in the United States must register with federal and state (and sometimes local) authorities, obtain a tax identification number, and pay various business and payroll taxes, such as Social Security and Medicare (at the federal level), and, depending on the state, contributions into unemployment insurance funds, government-mandated disability or family leave insurance

programmes, and workers' compensation reserves. Some taxes, such as Social Security and Medicare, also require employers to withhold the employees' share of those taxes from their salary and submit those withholdings to the appropriate government agency. Such taxes and withholdings typically do not need to be paid for *bona fide* independent contractors.

Depending on the state (and sometimes the county or city) where operations are located, as well as the nature of the business, a company may need to obtain certain licences, pass health and safety inspections, and fulfil other government-imposed obligations to establish a legal enterprise.

V RESTRICTIVE COVENANTS

An employer may include restrictive covenants in an employment contract to prohibit an employee from (1) competing with the employer, (2) soliciting the employer's customers or employees, or (3) disclosing confidential information or trade secrets after the employment relationship has ended. US state law controls whether and under what circumstances a restrictive covenant is enforceable against an employee.

In most states, including New York, Illinois and Delaware, narrowly tailored restrictive covenants that do not overly infringe upon an employee's ability to secure new employment may be enforceable, depending on whether the agreement, overall, is deemed reasonable. Specifically, factors that are commonly used to determine whether a restrictive covenant should be enforced as reasonable include the following:

- a* Does the employer have a legitimate interest to protect, such as a trade secret or client relationships?
- b* Are the time and geographical restrictions reasonable?
- c* Is the employee unduly burdened in pursuing his or her livelihood?
- d* Will enforcement harm some public interest?

To be enforceable, restrictive covenants typically also need to be supported by consideration. In most states, the commencement of new employment is sufficient consideration for a restrictive covenant. Whether continued at-will employment constitutes sufficient consideration for a later-signed restrictive covenant varies widely from state to state. A promotion, increase in compensation or receipt of another benefit (e.g., stock options) may support a new restrictive covenant.

Many, but not all, states follow the 'blue pencil' rule, which allows a court to edit or even rewrite a restrictive covenant that is overly broad in scope to reflect more reasonable terms. However, if an employer is perceived to have abused its bargaining power by requiring an employee to sign a patently unreasonable restriction, the court is unlikely to modify the covenant and more inclined to strike it completely.

A recent trend, initiated by Massachusetts in 2018, and followed to varying extents in 2019 by Maine, Maryland, New Hampshire, Rhode Island and Washington State, concerns the enactment of statutes outlawing non-compete agreements for lower-wage workers and setting strict requirements that employers must follow when asking employees to sign such agreements (including providing advance notice of the non-compete, an opportunity to consult with counsel, or some form of payment during the non-compete period).

Finally, in a minority of states, restrictive covenants are virtually unenforceable in the employment context. For instance, California generally prohibits covenants not to compete as a restraint against an employee's ability to engage in a lawful trade, business or practice.

VI WAGES

Under federal and state law, employees are entitled to a minimum hourly wage for each hour they work. Employees are also entitled to overtime pay for any time they work in excess of 40 hours in a working week. Overtime is generally calculated at one-and-a-half times the employee's regular rate of pay.

The FLSA governs the payment of a minimum wage and overtime under federal law. However, many states have enacted their own minimum wage and overtime laws, and some of these laws are more generous than the FLSA. In California, for example, employees are entitled to overtime pay for any time they work in excess of eight hours in a single day (even if they do not work more than 40 hours in the working week). Employers must comply with the laws that are most favourable to their employees.

Certain employees, such as executive, administrative and professional employees, may qualify as being exempt from federal and state overtime laws if they satisfy both the applicable tests for duties and salary basis. The duties test generally requires that employees perform exempt work as their primary duty. Typically, the kind of work they must perform depends on the particular exemption. The salary basis test generally requires that employers pay the employees on a salary basis, at a level that meets or exceeds the minimum salary threshold required for that exemption.

Both federal and state wage payment laws impose stringent record-keeping requirements on employers. The maintenance of accurate and comprehensive records has become increasingly important in recent years as more states and localities enact wage theft laws and implement aggressive enforcement initiatives of those laws. A number of states – most recently New Jersey and New York, among others – have enacted wage theft laws that provide employees greater rights to recover unpaid wages or impose stiffer penalties on employers for violations (or both).

VII FOREIGN WORKERS

When employing any individual in the United States, whether a US citizen, a permanent resident (i.e., holds a green card) or a foreign national, an employer must ensure that it is abiding by all applicable immigration laws for employment verification and work authorisation. These requirements can be broken down into (1) completing Form I-9 verification for all US workers and (2) obtaining work authorisation for foreign nationals.

i Form I-9 employee verification

The process for verifying any worker's eligibility to be lawfully employable in the United States involves the completion, verification and retention of Form I-9 for Employment Eligibility Verification. New hires, by the first day of employment, must present specified original, unexpired work authorisation documentation, including identification documents, to their employer. The employer must verify the new hire's US work authorisation within three days of the hire date, and retain the verified Form I-9 for up to three years from the hire date, or one year from the employment termination date, whichever is later.

The federal government offers a service called E-Verify, which allows employers to verify new hires electronically to supplement the Form I-9 requirements. E-Verify is voluntary under federal law, but it is mandatory in certain states, such as Arizona, North Carolina and Tennessee, to name a few. Even where not mandatory, E-Verify may be a valuable tool for employers in industries that are particularly vulnerable to employment verification fraud.

ii Types of work-authorised non-immigrant visas

US employers that wish to employ a non-US worker (i.e., a foreign national) must obtain the proper work authorisation for that individual before the person is allowed to be employed. Among the most common types of non-immigrant worker visas are:

- a* the H-1B Specialty Occupations visa for those positions that require at least a bachelor's degree relevant to the position;
- b* the L-1A visa for intracompany transferees who work in managerial or executive positions in a company located outside the United States, and the L-1B visa for intra-company transferees who work in positions that require specialist knowledge;
- c* the free-trade-based non-immigrant worker visas for nationals of Australia (E-3 visa), Canada and Mexico (TN visa), Chile (H-1B1) and Singapore (H-1B1); and
- d* the O-1 visa for individuals with 'extraordinary ability or achievements' in business, entertainment, the arts or the sciences.

Many of these non-immigrant work authorisations have specific requirements for eligibility and myriad restrictions.

iii Immigrant visas

The non-immigrant work authorisation visas discussed above also have specific beginning and ending periods. For some employers, these restrictive timeframes may make long-term employment difficult. For those situations, the immigration laws allow US employers to sponsor non-immigrant visa work authorisation holders for US permanent residency (i.e., a green card), which is known as an immigrant visa. The process for obtaining such a visa is intricate, lengthy and, without expert legal guidance, difficult to navigate.

To summarise, employers must fulfil the above employment verification mandates for their entire US workforce and obtain proper work authorisation for their non-US workers.

VIII GLOBAL POLICIES

Absent a written contract or CBA, employers may develop and implement employment policies and practices concerning a wide range of issues, including hiring, compensation, benefits, discipline, promotions, and so on. However, as previously discussed, myriad federal, state and local employment laws impose certain legal limitations and obligations on how an employer treats its employees, such as the prohibition on discrimination, harassment and retaliation concerning terms and conditions of employment based on a protected category; bans or restrictions in various jurisdictions on certain pre-employment enquiries (e.g., criminal, credit and salary history checks); and minimum wage and overtime pay mandates.

US employers also are required under federal and state law to provide reasonable accommodations to certain cohorts of workers, such as those with physical or mental disabilities and individuals with sincerely held religious beliefs, unless doing so would result in undue hardship. Some states and localities have broadened this obligation to include accommodation of pregnancy and related medical conditions (including lactation accommodation), and accommodation for victims of domestic or sexual violence.

Notwithstanding the numerous obligations and limitations imposed on employers under federal, state and local law, many US employers provide their employees with greater benefits than the law requires, such as paid vacation and holidays, and they set forth these and other terms and conditions of employment in an employee handbook. Handbooks typically

also include policies prohibiting sexual harassment and providing for equal employment opportunities, and they may set forth dress code rules and guidelines concerning appropriate workplace conduct. Many employee handbooks also provide employees with rules for use of the employer's electronic systems (e.g., use of email and the internet), including that they should have no expectation of privacy when using those systems.

As a best practice, an employer usually requires its employees to sign an acknowledgement that they have received and read the employee handbook.

IX PARENTAL LEAVE

The United States is one of the few countries that does not provide or require employers to provide paid parental leave (either for new birth mothers or for the co-parent). The federal Family and Medical Leave Act provides eligible employees with 12 weeks of unpaid leave for an employee's own illness, to care for a family member, for parental leave, or for certain military exigencies.

Some of the most recent paid sick and family leave laws provide job protection for employees who have worked for relatively short periods of time and benefits for employees working at very small companies. As of January 2020, the following states and cities provide paid medical or family leave: California, San Francisco (California), New Jersey, New York, Rhode Island and Washington State. In the coming years, Washington, DC, and the following states will also provide similar leave: Connecticut, Massachusetts and Oregon.

X TRANSLATION

For the most part, businesses, courts, legislatures and government agencies in the United States use English as their primary language. Increasingly, however, workplaces and various government offices are becoming bilingual (usually English and Spanish).

Generally, documents relating to employment are not required to be translated into an employee's primary language, nor are court documents. Nevertheless, there are some important exceptions to this general rule. Many federal, state and local laws require the posting of certain notices in the workplace. Although these must be in English, many must also be posted in an employee's primary language, if the notice is available from the appropriate government agency. For example, certain states and cities require a specific wage notice to be provided at hire, in English and in the employee's first language. Similarly, some states and cities now mandating anti-sexual harassment training require that the training be provided in an employee's first language.

If a significant portion of a workforce speaks a language other than English, it is a best practice to provide relevant documents, policies and training in that other language (or languages) to ensure that employees are aware of their obligations and rights.

XI EMPLOYEE REPRESENTATION (PROTECTED CONCERTED ACTIVITY)

The NLRA establishes the rights of most private sector employees to come together for the purpose of mutual aid and protection, and to discuss terms and conditions of employment. If employees so choose, they may organise themselves as a group or in a union for the purpose of negotiating or bargaining with their employer about the terms and conditions of their employment. Managers and supervisors with the ability to hire, fire or assign work are excluded from the NLRA's rights and protections for employees.

Certain actions taken by employers or unions may violate the NLRA. These actions are considered unfair labour practices and may result in administrative sanctions, monetary liability or the NLRB granting injunctive relief. For example, an employer may not retaliate against employees who come together to speak with their employer concertedly about issues affecting more than one employee, such as wages, work schedules or safety concerns.

Under the NLRA, employees also have the right to form or join a union (or refrain from forming or joining a union). To form a union or to decertify an existing union, an employee (or a union) may file a petition with the NLRB, with evidence that at least 30 per cent of employees in the proposed bargaining unit is interested in union representation. The employer may contest the validity of the proposed bargaining unit. Once these issues have been resolved, the NLRB will conduct an election by secret or mail ballot. If a majority of the employees who vote in the election opt to be represented, the NLRB will certify the election and the employer must bargain in good faith with that union regarding the employees' terms and conditions of employment. (The NLRB also maintains procedures for decertification elections, which allow employees to vote on whether they wish to continue to be represented by the union.) The bargaining obligation is ongoing and, in most instances, exists until employees vote to decertify the union.

Employers may not threaten employees with discipline or termination, or promise benefits to an employee, for supporting or not supporting a union. Likewise, a union may not threaten an employee with expulsion from the union or force the employer to terminate an employment agreement because an employee refuses to participate in a union or other protected concerted activity. However, employers have limited rights to restrict employee union activity on company property and during employee work time through legally compliant no-solicitation and no-distribution rules.

XII DATA PROTECTION

Currently, no one federal law addresses data protection, although specific laws address privacy protection for certain types of data, such as medical information. Here, again, states are stepping in to fill the void.

California currently leads the way on privacy legislation. Under the California Consumer Privacy Act (CCPA), employers that meet the triggering thresholds for coverage (e.g., more than US\$25 million in gross revenues) must provide applicants and employees with notice of the categories of personal information (i.e., that which is not publicly available) collected and the purposes for which the information will be used, at or before the time of collection. Employee or applicant consent to the collection of personal information is not required. There is no requirement that California employers register with data protection authorities before collecting personal information about their employees or job applicants.

The categories of personal information to be identified in the notice include:

- a* identifiers, such as a name or email address;
- b* characteristics of protected classifications under California or federal law;
- c* biometric information;
- d* internet or electronic network activity;
- e* geolocation data;
- f* audio or visual information;
- g* professional or employment-related information; and
- h* education information.

Further, employers must implement reasonable cybersecurity safeguards to protect certain sensitive employee personal information (e.g., Social Security numbers and medical or health insurance information) or risk employee lawsuits for data breach, including class actions seeking statutory damages. The CCPA broadly defines personal information as ‘information that identifies, relates to, describes, is capable of being associated with or could reasonably be linked, directly or indirectly, with a particular consumer or household’. Reasonable safeguards may include limiting access to persons with a business need to access sensitive employee information and technical measures based on a risk determination.

The CCPA is effective as of 1 January 2020; however, all employee rights other than the notice of collection and private right of action for any data breach (e.g., the right to have personal information deleted) have been postponed until 2021.

In New York, the recently enacted Stop Hacks and Improve Electronic Data Security Act (known as the SHIELD Act) mandates that all employers collecting private information about New York State residents, including employees, implement a data security programme that incorporates ‘reasonable administrative, technical, and physical safeguards to protect the security, confidentiality and integrity of the private information’. Failure to implement a compliant information security programme by 21 March 2020, may result in an action by the New York State Attorney General. Injunctive relief and civil penalties of up to US\$5,000 may be imposed against an organisation and individual employees for each violation. Reasonable safeguards may include limiting access to employees’ private information based on business need and technical safeguards, but there is no requirement that employers register with New York State government agencies.

Also of note is the Illinois Biometric Information Privacy Act (BIPA), which requires employers to provide written notice and obtain consent from employees (and customers) prior to collecting and storing any biometric data. Under BIPA, employers must also maintain a written policy identifying the ‘specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used’. In *Rosenbach v. Six Flags Entertainment Corp*, the Illinois Supreme Court held that mere collection of an individual’s biometric information may be enough to state a claim under BIPA. Texas and Washington State also have laws regulating the collection, use and disposal of biometric information.

US law does not prohibit the transfer of US resident employees’ data out of the United States. There are no legal requirements that employers register with data protection authorities, obtain employee consent, enter into a joint user agreement or make a safe harbour registration before transferring personal information about US resident employees to overseas providers, subsidiaries or third parties.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

As previously discussed, the employment-at-will doctrine allows an employer to terminate an employment relationship for any lawful reason, without cause or notice. However, the doctrine may not apply when, for example, the employee has a specified term of employment, or the employer’s policy or an employment contract provides for discharge for specified reasons, sets forth a progressive disciplinary policy, or contains a notice period requirement.

There is no statutory right to severance or separation pay upon termination of employment, but an employer may agree to provide severance in individual contracts or via a severance policy or plan.

Typically, CBAs contain just cause provisions or other contract clauses that limit the reasons why, or the process by which, an employer may dismiss an employee. Most CBAs have a dispute mechanism often referred to as the grievance and arbitration procedure, and the parties must work within that contractual framework to resolve disputes regarding employment actions, including terminations.

ii Redundancies

The federal Worker Adjustment and Retraining Notification (WARN) Act requires that employers provide notice for certain group lay-offs and plant closures. Specifically, employers with 100 or more full-time employees must provide 60 days' notice to affected employees and certain state and local government agencies when there is a qualifying mass lay-off or plant closure, as those terms are defined by the statute. Some states have 'mini WARN' laws that cover additional events or contain more stringent notice requirements. For instance, New Jersey's WARN Act now requires employers to pay severance.

If an employer provides severance pay in connection with a reduction in force (pursuant to a contract or otherwise), it is likely to require the employee to sign a release of claims in exchange for severance benefits. If an employee is aged 40 or older, employers must follow the review and revocation periods for releases, as set forth in the Age Discrimination in Employment Act and the Older Workers Benefit Protection Act.

In a unionised workplace, the CBA may dictate the notice, actions or bargaining that must take place before a group lay-off, plant or site closure, or reduction in force may occur.

XIV TRANSFER OF BUSINESS

There is no generally applicable transfer of undertakings law in the United States. In the case of a transfer of business, however, US employers should review applicable employment contracts and CBAs for relevant provisions, regardless of whether the transfer will result in the termination of employment for the employees covered by the contract.

Employers should also determine whether the transfer implicates the WARN Act or a mini-WARN Act (discussed in Section XIII.ii), although in most transactions in which the employees of the seller are merely transferred to the buyer, the WARN Act's notice requirements will not apply. On the other hand, significant post-transaction lay-offs could implicate the law.

Finally, any business closure, sale or merger involving a unionised workforce will trigger the employer's legal obligation to bargain with the union. The acquisition of a company with a unionised workforce could also activate the obligation to bargain.

XV OUTLOOK

During the past decade, new employment laws were enacted almost exclusively at the state and local levels, creating a patchwork of laws that are difficult to track and traverse, and especially unwieldy for multistate employers to navigate. This trend is likely to continue, although the results of the forthcoming 2020 presidential and congressional elections could result in a renewed focus on employment matters at the federal level. Notably, some of the presidential candidates have emphasised issues such as managing technology and privacy in the workplace, providing paid family leave to employees, and addressing the impact of artificial intelligence and the gig economy on how we think of workers and the workplace.

VENEZUELA

*Juan Carlos Pró-Rísquez*¹

I INTRODUCTION

Employment and labour relationships in Venezuela are governed by the Constitution of the Bolivarian Republic of Venezuela (the Constitution),² which establishes the fundamental rights applicable. These rights include:

- a* the right to work;
- b* the freedom to work in a job chosen by the employee;
- c* the right to be part of a union; and
- d* the right of employees to negotiate collective bargaining agreements (CBAs) with their employers.

These rights are encompassed in the Organic Labour Law for Male and Female Workers (the Labour Law),³ which introduced important changes on certain relevant matters, such as:

- a* retroactivity of seniority benefit;
- b* reduction of the working day;
- c* extension of the statute of limitations period;
- d* determination of illegal outsourcing and its prohibition;
- e* reinforcement of job stability;
- f* extension of the list of employees protected against dismissal;
- g* increase in the days of salary granted as a holiday bonus and profit sharing;
- h* extension of maternity and paternity leave; and
- i* changes to the penalty system.

The Labour Law is currently the main legislative source of employment regulation in Venezuela. It expressly recognises the right of all persons to employment.⁴ The freedom of each person to pursue their preferred activity is guaranteed, as long as the activity is not otherwise prohibited by law. It is prohibited to impede the work of others or compel them to work against their will.⁵

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2 Published (with its Amendment No. 1) in Special Official Gazette No. 5,908 of 19 February 2009.

3 Published in Special Official Gazette No. 6,076 of 7 May 2012.

4 Labour Law, Article 26.

5 *id.*, at Articles 30 and 31.

Under the Labour Law, employment is not only a right but also a duty. All capable persons are charged with a duty to work to maintain themselves,⁶ and the Law reiterates and explains the constitutional duty of the state to maintain high levels of employment.⁷

Moreover, the Labour Law recognises that treaties, pacts and conventions, including but not limited to those relating to human rights, executed and ratified by Venezuela, have a constitutional rank, and prevail over local legislation if considered more favourable. Venezuela is a member of the International Labour Organization (ILO), which establishes minimum labour standards for its members through the adoption of conventions and recommendations. Venezuela has adopted ILO conventions regarding maternity rights, union rights, free association rights, wages and profit-sharing.

The judicial branch is governed by the Supreme Tribunal of Justice (STJ) and other lower courts. There are two types of first instance courts, each with one judge: the courts of substantiation, mediation and enforcement; and the trial courts. Matters may be appealed to the courts of appeal, which may have one or three judges.⁸ Cassation (*certiorari*) of the latter decisions are pleaded before the Social Cassation Chamber (SCC) of the STJ, which is the final court of appeal. The STJ also functions as a constitutional tribunal through its Constitutional Chamber, which has the power to declare null and void any laws, regulations or other acts of the executive or legislative branch that conflict with the Constitution.

Labour proceedings must be uniform, brief, oral, free, public and contended. Judges should adjudicate with immediacy, personally presiding over the most important phases of the trial. Generally speaking, the labour trial procedure is comprised of the following phases: the filing of the claim, the preliminary hearing where evidence is to be presented, the trial hearing where evidence is substantiated, the trial court decision, the appeal, the hearing of the appeal, and the appellate decision.

At present, there are two types of procedures in Venezuela for labour claims, depending on the employee's employment stability. Employment stability encompasses the employee's right to request reinstatement if he or she is unjustifiably dismissed. There are two types of stabilities: relative, which is generally known as job stability; and absolute and clear, known as a bar against dismissal. Claims relating to the former are heard before the labour courts, while claims relating to the latter are heard before the labour inspector office. Employees with clear and absolute stability must make their claims through an administrative procedure defined under the Labour Law. These employees are protected against unfair dismissal for union activities, prevention delegates' activities,⁹ maternity, or situations in which the labour

6 id., at Article 26.

7 id.

8 Pursuant to Article 29 of the Organic Law on Labour Courts and Procedure (published in Official Gazette No. 37,504 of 13 August 2002), labour courts have jurisdiction to deal and decide on (1) any contentious labour matter other than conciliation or arbitration, (2) requests for reinstatement owing to job stability, (3) constitutional injunctions, (4) any contentious matter resulting from a labour relationship, an employment agreement and social security, and (5) contentious matters relating to collective and individual rights and interests.

9 Prevention delegates are employees elected as employees' representatives to deal with safety and health matters at the workplace. The prevention delegates and the company's representatives jointly manage the safety and health committee.

relationship is temporarily suspended (e.g., sick leave, military service, permission to study). Employees who do not enjoy clear and absolute stability must make their claims using a judicial procedure that has been set out in the Organic Law on Labour Courts and Procedure.¹⁰

The main administrative entities are the labour inspector offices, which are responsible for inspection and enforcement of compliance with labour legislation; the Social Security Institute, which handles security and pension matters; and the National Institute for Occupational Health, Safety and Prevention, which focuses on the regulation of health and safety conditions. These agencies, among others, are under the supervision of the Ministry of the People's Power of Labour and Employment (the Ministry of Labour).

II YEAR IN REVIEW

As hyperinflation and devaluation of the local currency (bolivar) continued in 2019, despite not reaching the same levels as in 2018, the minimum wage and the food benefit were reviewed and increased by the President on three occasions, reaching an increase of 8,333.33 per cent. The effects of the continuous economic downturn have had a significant effect on the employment and labour environment, resulting in further restructuring, downsizing, closures and employee cost reductions. Unfortunately, there are no official unemployment rates or statistics in Venezuela.

However, employers continue to make significant efforts to retain key personnel and talent by granting payments in foreign currencies, and providing a diversity of compensation alternatives to support employment and business, for example, payment of retention bonuses, granting of a contractual seniority benefit and nutrition benefit, and payment of education and insurance for the employee and his or her family.

III SIGNIFICANT CASES

i A Irani v. Sherkate¹¹

This case concerned payment of labour benefits in a foreign currency, taking into account the exchange rate as at the date of payment. The plaintiff stated that the payment of labour benefits was established in foreign currency (Brazilian reais) by the parties and pursuant to Venezuelan legislation, payment should be ordered at the exchange rate valid at the time of actual payment.

During the past 20 years of case law, when there has been a case in which the plaintiff received his or her remuneration in a foreign currency, the STJ has ordered payment in bolivars at the historic exchange rate at the time the specific labour benefit would actually have to be paid to the employee.

In this case, the STJ ordered payment of labour benefits and seniority benefit in bolivars at the exchange rate in force at the time of actual payment, as requested by the plaintiff, because Article 128 of the Law of the Central Bank of Venezuela states that payments established in a foreign currency can be completed by granting the equivalent amount in bolivars calculated at the exchange rate valid at the time of payment.

10 Published in Official Gazette No. 37,504 of 13 August 2002.

11 Decision No. 756 of the Social Cassation Chamber [SCC] (17 October 2018).

ii M Matos v. INIA¹²

This case concerned the payment of moral damages in petros (a cryptocurrency launched by the government). The plaintiff requested payment of moral damages for suffering from an occupational disease resulting from a toxic chemical leak at the workplace (which had been certified by the National Institute for Occupational Health, Safety and Prevention).

Pursuant to Article 1,196 of the Civil Code, a judge can order a monetary remedy for a victim without having to take into account the plaintiff's suggested amount.

The STJ, in seeking to promote the petro and protect the value of the remedy, ordered payment for moral damages in 266 petros, which have to be paid in bolivars at the value of the petro at the time of actual payment.

iii Decisions of Labour Ministry on procedure under Article 148 of the Labour Law

In three historic decisions in December 2018 by the National Labour Inspector, the Inspectorate approved the reduction of personnel and labour benefits at two companies, following the procedure set forth in Article 148 of the Labour Law. One of the companies was authorised to dismiss 52 employees and reduce the benefits of 85 others. The second company was authorised to reduce CBA benefits and reduce additional benefits to employees only fulfilling the work schedule without rendering services.

Article 148 sets forth the capacity of the Ministry of Labour to authorise employers to reduce personnel or employees' benefits when the employment source is endangered for technical or economic reasons.

iv L Armas v. Supermercados Unicasa¹³

Similarly to the original case, decided by the Administrative Political Chamber, the plaintiff requested payment of moral damages for suffering occasioned by an occupational accident resulting in a knee injury (which had been certified by the National Institute of Prevention Condition and Safety and Health at the Work Place).

The Chamber had been consistent in ordering the monetary damages in bolivars. However, it considered that, because of hyperinflation, the Chamber should modify its criteria.

In contrast to the Administrative-Political Chamber, the SCC, in seeking to protect the value of the remedy, ordered payment for moral damages in 400 units of the minimum wage, which have to be paid in bolivars at the value of the minimum wage at the time of actual payment.

v O Garcia v. Norton Rose Fulbright (formerly Macleod Dixon)¹⁴

In this case, the plaintiff, a former partner of the law firm, claimed to have been an employee and therefore requested the payment of benefits and indemnities set forth in the Labour Law. The SCC ruled that the relationship between the plaintiff and defendants was of dual nature, being both partner and employee. The SCC ordered the payment of labour benefits.

This ruling departs from previous precedent, which considered a partnership as a commercial relationship that could not create a labour one.

12 Decision No. 1,112 of the Administrative-Political Chamber of the Supreme Tribunal of Justice (1 November 2018).

13 Decision No. 169 of the SCC (26 June 2019).

14 Decision No. 375 of the SCC (21 October 2019).

Currently, both parties are awaiting a clarification to be issued by the SCC regarding the motivation of the ruling, as well as the proper identification of the defendants and method of calculating the owed amounts.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The Labour Law does not provide the obligation to enter into written employment agreements. However, it states that employment agreements shall be ‘preferably made in writing’, without prejudice of evidencing an employment relationship if the contract is verbal.

When the employment relationship has been evidenced and there is no written contract, all the statements made by the employee regarding the contents thereof are presumed to be true, unless evidence is produced to the contrary.

If an employment agreement is in writing, it must contain the following:

- a* full name, identity card number, nationality, age, marital status, domicile and address of the parties;
- b* regarding legal entities, the registration data, address and identification of the individual that represents the company;
- c* work position or title, with a description of the services to be rendered, determined as precisely as possible;
- d* starting date of the employment relationship;
- e* express indication of whether the contract is for an indefinite term, for a fixed term or for specific work;
- f* indication of the term, in the case of contracts for fixed terms;
- g* work or tasks to be performed, in the case of contracts for specific work;
- h* length of the working day;
- i* salary stipulated or the manner of calculating it, and the form and place of payment, as well as any other benefits to be received;
- j* the place where the services are to be rendered;
- k* reference to any applicable CBAs;
- l* place of execution of the work contract;
- m* any other lawful stipulations agreed between the parties; and
- n* other specifications set forth in the Regulations to the repealed Organic Labour Law.¹⁵

If there is a written work contract, the employer must record the date and time it delivered a copy to the employee, and obtain acknowledgment of receipt duly signed by the employee in a book kept for this purpose.

The general rule under the Labour Law is that employment agreements must be of an undefined or open-ended term. Fixed-term employment agreements are the exception and are only deemed valid if they are executed based on the strict grounds set forth in the Labour Law. It is only possible to execute an employment agreement for a fixed term when:

- a* it is required by the nature of the service;
- b* it is required provisionally and legally to substitute one employee for another;

¹⁵ Published in Official Gazette No. 38,426 of 28 April 2006.

- c it is required for Venezuelan employees rendering services abroad; and
- d an employee has not finished the task for which he or she was hired and the services are still needed.

Therefore, fixed-term employment agreements must establish the specific cause for entering into the agreement.

The Labour Law limits the term of a fixed-term employment agreement to one year and states that it will be deemed an undefined-term employment agreement when two or more extensions are executed within three months of its expiry, unless there are special reasons that justify the extensions, excluding the intent of continuing the labour relationship.¹⁶ A special reason is defined as the continuation of the circumstance that justified the original fixed-term agreement.¹⁷

The Labour Law also allows for the execution of employment agreements that relate to specific types of work, usually used within the construction industry.

ii Probationary periods

There is no specific regulation of a probationary period. However, pursuant to the Labour Law, an employee's job stability is established after one month of service. Therefore, the first 30 days of the employment relationship are deemed a probationary period. During that time, either party may terminate the employment relationship. The STJ has held that probationary periods cannot be included in fixed-term employment agreements.

iii Establishing a presence

Venezuelan labour legislation is based on public policy and the general rule is that it applies to employment services rendered in the territory of Venezuela (territoriality of law doctrine), regardless of an employee's nationality.¹⁸ This statute also applies to those services rendered outside Venezuela under a contract entered into in Venezuela.¹⁹ Additionally, in the event of rendering services in Venezuela, an employee has the right to receive all the statutory labour benefits established in the Labour Law.

In principle, foreign companies can hire employees to render their services in Venezuela without being officially registered to carry on business in the country. However, it is mandatory for any employer, regardless of its nationality, to register its employees with the Social Security Institute and other labour agencies.²⁰ Therefore, in practice, employers must be domiciled in Venezuela and establish either a branch or a subsidiary in Venezuela, and then register this entity with the relevant labour authorities so as to register their employees, and to withhold from payroll and pay the relevant tax contributions and special contributions to the proper authorities. Registration allows the company to obtain a labour identification number and a tax identification number.

¹⁶ *id.*

¹⁷ Regulations to the repealed Organic Labour Law, Article 26.

¹⁸ Labour Law, Article 3.

¹⁹ *id.*, at Articles 3 and 65.

²⁰ Depending on the expatriate employee's nationality, he or she may be exempted from social security payments, provided that there is a bilateral treaty in force.

Once the registration is complete, the branch or subsidiary is entitled to hire employees, who must be registered in full compliance with Venezuelan labour, social security and tax regulations. Pursuant to Venezuelan social security laws, both employers and employees have certain obligations to make social security contributions.

The employer will also be required to withhold amounts of income tax payable by the employee. Withholdings and contributions are amounts calculated as a percentage of the employee's salary, which must be paid to the relevant agency.

Contribution	Employer's rate	Employee's rate	Cap on minimum wage*	Salary basis
Social security (health and pension)	9% to 11%	4%	5 x minimum monthly wage	Normal salary
Unemployment insurance	2%	0.5%	10 x minimum monthly wage	Normal salary
Housing policy	2%	1%	None	Broad salary
National Institute of Training and Socialist Education (INCES)	2%	0.5%	None	Employer: normal salary
				Employee: profit sharing
* As of 1 October 2019, the minimum wage is 150,000 bolivars.				

Moreover, foreign companies may maintain relationships with different providers of services, consultants or independent contractors. However, the Labour Law provides that an employment relationship will be presumed to exist between whoever renders a personal service and whoever receives it. Labour courts have sustained that some relationships arising from services agreements are of a labour nature, rather than of a commercial or any other nature. The courts have relied on three principles: (1) non-waivability of the provisions of labour legislation as they are considered public policy; (2) presumption of the existence of a labour relationship; and (3) prevalence of substance over form.

In addition, the Labour Law prohibits outsourcing, which is understood to be simulation or fraud committed by employers to distort, ignore or obstruct the application of labour legislation.²¹ However, the contracting of personnel through third parties should not be deemed outsourcing, as long as the contracting has not been made with the intention of simulating or defrauding labour legislation. On the other hand, the concept of a contractor (defined as an entity that acts on its own behalf and executes work and services with its own elements, even though the work or services are rendered for the benefit of another company) is an institution legally established pursuant to the Labour Law.²²

Moreover, foreign employers who hire employees rendering services in Venezuela could fall under the permanent establishment (PE) concept for tax purposes, which means that the activities performed by the hired employee or independent contractor in Venezuela could be deemed to be part of a PE of the foreign company. Under the basic principles of the Income Tax Law (the Tax Law),²³ foreign entities are subject to Venezuelan income tax with respect to Venezuelan-sourced income regardless of whether the foreign entity has a PE in Venezuela.

21 Labour Law, Article 47.

22 *id.*, at Article 49.

23 Published in Official Gazette No. 6,210 of 30 December 2015.

The Tax Law provides that a taxpayer carries on business operations in Venezuela through a PE when:

- a* either directly or through an agent, employee or representative, the taxpayer has in Venezuelan territory (1) any location or fixed place of business, or any centre of activity, where it fully or partially carries on its activity, (2) a seat of management, branch, office, factory, workshop, facility, warehouse, store or other establishment, (3) construction, installation or assembly projects lasting for more than six months; or (4) agencies or representatives authorised to contract on its behalf;
- b* the taxpayer (1) performs activities in Venezuela relating to mining or hydrocarbon exploration, or agrarian, agricultural, forestry or livestock exploitation, or any other extraction of natural resources, (2) performs professional or artistic activities, or (3) owns other places of work where it wholly or partially carries out its activities, whether by itself or through its employees, agents, representatives or other personnel hired for such purposes;
- c* the taxpayer's facilities are exploited permanently by an entrepreneur or professional, as well as centres for the purchase of goods or services and those immovable goods used under a lease or other title; or
- d* the taxpayer establishes a fixed base in the country through which individuals who are foreign residents render independent professional services.²⁴

Pursuant to the Tax Law, income paid in consideration for services that are executed or used or from which benefit is gained in Venezuela is regarded as Venezuelan-sourced income.

V RESTRICTIVE COVENANTS

During the employment relationship, employees must abstain from any negotiation on their own, or on behalf of third parties, that may damage the interests of the employer, unless the employer has expressly or tacitly authorised it.

Regulations to the Labour Law state that an employer may restrict an employee's post-employment competition for up to six months,²⁵ provided that:

- a* it is for justified reasons, based on the employee's relationship with customers, whether he or she is an upper management employee, his or her knowledge of industrial or commercial secrets of the employer, and any other circumstance of a similar nature;
- b* there is a written agreement at the beginning of the employment relationship that warrants the unfair competition; and
- c* there is an agreement to compensate the employee for the duration of the prohibition.²⁶

Among other requirements, the Regulations establish that a restrictive covenant must be agreed at the beginning of the employment relationship.²⁷ In practice, employers usually include non-compete clauses in the settlement agreements of key employees at the end of the employment relationship, provided that the labour authorities have not denied the execution of the documents based on this type of clause.

²⁴ Income Tax Law, Article 7, third paragraph.

²⁵ Regulations to the repealed Organic Labour Law, Article 26.

²⁶ *id.*, at Article 168.

²⁷ *id.*, at Article 26.

VI WAGES

i Working time

The ordinary working period may not exceed five days a week. Consequently, employees are entitled to two continuous paid days of rest per week, except in the case of continuous work schedules.²⁸

The duration of the working period is 40 daytime hours per week. In the case of a mixed day, which includes at least four hours of work at night, the period is shortened to 37.5 hours per week. The weekly limit of night-time work is 35 hours. Any extension of the night shift into daytime hours shall be deemed as night-time hours.²⁹

In addition, the Labour Law provides that the following will not be subject to the limits established for daily and weekly hours:

- a* upper management employees;
- b* inspection or surveillance employees, carrying out tasks that do not require a continuous effort;
- c* employees who perform work that merely requires their presence, or discontinuous or intermittent work requiring long periods of inaction; and
- d* schedules set by CBAs between employers and employees.³⁰

In the aforementioned cases, the following rules shall apply: the working day must not exceed 11 hours; the total number of hours worked in eight weeks must not exceed, on average, 40 hours per week; and the employee must enjoy two consecutive paid days of rest every week.³¹

In addition, work schedule limits may be exceeded where the continuous work takes place in shifts, provided that on average, the limit of 42 hours per week is not exceeded during the course of eight weeks, and, for a six-day working week, the employee is granted an additional day of holiday in that year, with payment of salary but without affecting the holiday bonus.³²

Employees are prohibited from working for more than five continuous hours, and rest periods taken during the working day cannot exceed one hour.³³ The employees' right to leave the place where their services are provided during rest and meal periods is established. If employees cannot leave because their presence is required on the job site to attend orders from the employer, in the event of emergencies, or because they work rotating shifts, the length of rest and meal times may not be less than half an hour and will be imputed as effective service time.³⁴

²⁸ Labour Law, Article 173.

²⁹ *id.*

³⁰ *id.*, at Article 175.

³¹ *id.*

³² *id.*, at Article 176.

³³ *id.*

³⁴ *id.*, at Article 169.

ii Overtime

The daily working day is limited to 10 hours, including overtime. Further, no employee can work more than 10 hours of overtime weekly, or more than 100 hours in a year. In unforeseeable and urgent circumstances, overtime may be worked without the permission of the labour inspector office, provided that a notice explaining the reasons for the overtime hours is given to the labour inspector during the following working days.³⁵

Overtime work must be compensated with a 50 per cent surcharge on the employee's salary.³⁶

If the employer does not seek permission from the labour inspector office for overtime, the overtime work must be compensated with a 100 per cent surcharge on the employee's salary, without prejudice to penalties that may apply.³⁷

VII FOREIGN WORKERS

To legally render services as an employee in Venezuela, a foreign citizen must obtain a non-resident work visa (TR-L). The TR-L is a temporary visa based on an employment agreement for non-Venezuelans who are employed directly by a company domiciled in Venezuela. The visa will be granted for up to one year, or for the duration of the employment agreement if less than one year. This visa may be extended. Only companies domiciled in Venezuela can request a TR-L.

Before requesting the TR-L, a work permit must be requested from the Ministry of Labour by a Venezuelan-based company.

According to the Labour Law, at least 90 per cent of all staff (i.e., management, employees and labourers) at the service of an employer must be Venezuelan. Further, the compensation for foreign workers cannot exceed 20 per cent of the total payroll compensation.³⁸

As previously stated, foreign workers who render their services within Venezuela have the right to receive statutory Venezuelan labour benefits.

VIII GLOBAL POLICIES

Internal discipline rules are not required by the Labour Law. However, they can be, and usually are, approved by employers, indicating that any breach of the obligations set forth in the internal policies is deemed a serious violation of the labour relationship, which is a justified cause for dismissal under the Labour Law.

There are no specific formalities for the internal policies to be mandatory for the employees, except that they have to be in Spanish. The employer must be able to prove that employees have been informed of the obligations set forth in the internal policies for them to prevail.

35 id., at Article 178.

36 id., at Article 118.

37 id., at Article 182.

38 id., at Article 27.

IX PARENTAL LEAVE

Under Venezuelan law, maternity leave is divided between prenatal leave and postnatal leave. Prenatal leave starts six weeks before the birth of a child and postnatal leave extends to 20 weeks after the birth. The mother has the right to keep her job and receive her full normal salary, in accordance with social security regulations.³⁹ If there is a medical complication that requires an employee to be absent from work, both prenatal and postnatal leave can be extended.⁴⁰ Further, if the employee does not use her full prenatal leave entitlement, the remaining period can be added to the postnatal leave, as well as any pending vacation allowance. Both prenatal and postnatal leave are not renounceable.⁴¹

Paternity leave is 14 continuous days from the child's birth.⁴²

Both maternity and paternity leave are also applicable to parent employees who adopt a child under the age of three.⁴³

Furthermore, the Labour Law sets forth a special bar against dismissal of a female employee from the date of conception up to two years after the birth of the child.⁴⁴

X TRANSLATION

The Constitution clearly provides that Spanish is Venezuela's official language. The Labour Law also establishes that the official language in Venezuela is Spanish and that when, for reasons of technology, it is necessary to use a different language, there must also be a Spanish translation.⁴⁵

Therefore, policies, agreements and instructions not only have to appear in Spanish for employees rendering services in Venezuela, but the Spanish version of the documents will prevail in the event of a conflict involving a Venezuelan employee in Venezuela. Hence, at least with regard to Venezuelan-speaking and Spanish-speaking employees, documents must be distributed in Spanish.

XI EMPLOYEE REPRESENTATION

Labour unions⁴⁶ are organised in the following ways, based on a common employer, occupation, industry or economic sector:

- a* Company unions are composed of the employees of a single enterprise, including operations located in different towns and regions.⁴⁷ Twenty or more employees are required to form a company union.⁴⁸

39 *id.*, at Article 336. Social Security Law, Article 11.

40 Labour Law, Article 337.

41 *id.*, at Article 338.

42 *id.*, at Article 339.

43 *id.*, at Article 340.

44 *id.*, at Article 335.

45 *id.*, at Article 14.

46 *id.*, at Article 371.

47 *id.*

48 *id.*, at Article 376.

- b* Trade unions are composed of employees in the same profession or trade, or who have similar or related professions or skills, regardless of whether they are employed by one or several companies.⁴⁹ Forty or more employees are required to form a trade union.⁵⁰
- c* Industrial unions are composed of employees who are employed by several employers in the same industrial field, even though they work in different professions or trades.⁵¹ Forty or more employees are required to form an industrial union.⁵²
- d* Sectoral unions are composed of the employees of several employers in the same commercial, agricultural, production or service branch, even though their professions and trades differ.⁵³ Forty or more employees are required to form a sectoral union.⁵⁴

Unions also may be organised by independent employees, that is, employees who are not bound to any employer by an individual employment agreement or relationship. Formation of these unions requires 40 or more employees.⁵⁵

Labour unions may be local, state, regional or national in their geographical scope.⁵⁶ If they are regional or national, 150 or more employees are required to form the union.⁵⁷

Once a union has been registered before the appropriate labour inspector office, it gains legal recognition.

The board of directors must be appointed in accordance with the procedure set forth in the union's by-laws.⁵⁸ The board performs its duties for the period set forth in the by-laws, which cannot exceed three years.⁵⁹

To negotiate a CBA or request bargaining on the application of better working conditions or the elimination of certain working measures adopted by the employer, the union must file a collective claim with the labour inspector.

If employees are not represented by a labour union, a group of employees could attempt to negotiate collectively by delivering a proposed collective agreement to the labour inspector office of the corresponding jurisdiction.⁶⁰

Members of a union's board of directors are protected against dismissal from the date on which they are elected until three months after their term of office ends.⁶¹ This prohibition is limited to protecting directors in the following proportions:

- a* up to seven directors when the company employs fewer than 150 employees;
- b* up to nine directors when the company employs between 150 and 1,000 employees; and
- c* up to 12 directors when the company employs more than 1,000 employees.

49 id., at Article 371.

50 id., at Article 377.

51 id., at Article 371.

52 id., at Article 378.

53 id., at Article 371.

54 id., at Article 378.

55 id., at Article 418.

56 id., at Article 379.

57 id.

58 id., at Articles 399 to 410.

59 id., at Article 401.

60 See Labour Law Regulations, Article 140.

61 id., at Article 419. See also Section XIII.i, below.

When a national union has local branches corresponding to the states of Venezuela, up to five members of the local branch's board of directors in each state can benefit from protection against dismissal, from the date of their election until three months after expiry of their term of office.⁶²

The Labour Law contains provisions concerning the representation of employees in company management (co-management) in the form of councils of employees. The Constitutional Law of the Productive Councils of Female and Male Workers (the Workers' Councils Act)⁶³ regulates the establishment, organisation and functioning of the productive councils of female and male employees (workers' councils), to promote the central role of the working class and other expressions of popular power in managing the productive activity and distribution of goods and services in public, private, mixed and communal work entities, to guarantee the productive development of the nation.

The purpose of the Workers' Councils Act is to:

- a* guarantee timely access to goods and services, especially food, medicines, personal hygiene items, and all necessary input and services linked or related to the productive processes in general, for the people;
- b* contribute to the construction of the socialist economic model, of the system of production, supply, marketing and distribution of goods and services to satisfy the needs of the people;
- c* protect and safeguard productive activities by public, private, mixed and communal work entities, to guarantee timely access to goods and services; and
- d* strengthen the central role of the working class by promoting its participation in economic activity.⁶⁴

Each entity must have at least one workers' council. A workers' council shall be made up of three, five or seven elected employees, of which at least one must be a woman, one must be aged between 15 and 35 years, and one must be a member of the militia. One person can fulfil these three criteria.⁶⁵ The members of the workers' council shall serve for a term of two years, and may be re-elected.⁶⁶ They shall be eligible to a bar against dismissal⁶⁷ from the moment of their election, up to six months after the expiry of their two-year term.

Workers' councils and trade unions, as expressions of the organised working class, develop initiatives to support, coordinate, complement and express solidarity with the social labour process, with the aim of strengthening their awareness and unity. Workers' councils will have powers of their own, which differ from those of trade unions, and will be ruled by special laws to be enacted.⁶⁸

62 Labour Law, Article 419.

63 Published in Official Gazette No. 41.336 of 6 February 2018.

64 Constitutional Law of the Productive Councils of Female and Male Workers, Article 3.

65 *id.*, at Article 7.

66 *id.*, at Article 9.

67 *id.*, at Article 15.

68 *id.*, at Article 498.

XII DATA PROTECTION

i Requirements for registration

There is no data protection agency or similar body in Venezuela. In fact, there is scarce regulation on data privacy in the country.

Venezuelan law is unclear as to what constitutes private life or privacy. The right to private life and privacy is stated in the Constitution, which affords every person the right to protect his or her own private life from others.⁶⁹

The Constitution protects personal information through *habeas data*⁷⁰ in the following ways:

- a* every person has the right to access information and data on personal matters or those regarding personal goods, located on public or private registries, notwithstanding the exceptions set forth by law;
- b* every person has the right to be informed of the purpose for data collection and use; and
- c* every person has the right to request the competent courts to update, rectify or destroy the data, if they are erroneous or could affect a person's rights in an illegitimate manner.

In a decision of 14 March 2001,⁷¹ the Constitutional Chamber of the STJ stated that the guarantee of *habeas data* established in the Constitution is not applicable to employment files, unreliable information obtained from another person, notes in diaries, or domestic or commercial documents. However, some local labour commentators disagree with this statement.

Although it is advisable, it is not legally required to obtain consent from employees to collect and share their data in Venezuela, unless the data relates to an employee's medical records. The Law on Prevention, Conditions, and Health and Safety at the Workplace⁷² establishes the employer's obligation to keep employees' health information confidential, and to restrict access to medical personnel and the corresponding health authorities only, except when employees give their authorisation.⁷³ In fact, it establishes serious sanctions for breach of confidentiality or privacy of employees' health information, in the form of a fine of between 76 and 100 tax units,⁷⁴ or a shutdown of the entity for up to 48 hours.⁷⁵ Therefore, data or information regarding an employee's medical records should not be shared with third parties unless the employee gives consent.

⁶⁹ Constitution, Article 60.

⁷⁰ *id.*, at Article 28. This Article is not applicable to the confidentiality of the sources of journalistic information and other professions determined by law.

⁷¹ Constitutional injunction filed by *Insaca v. Director de Drogas y Cosméticos del Ministerio de Sanidad y Asistencia Social*.

⁷² Published in Official Gazette No. 38,236 of 26 July 2005.

⁷³ Law on Prevention Conditions and Health and Safety at the Workplace, Article 53(11).

⁷⁴ As of 10 January 2020, the tax unit applicable to all entities, except the National Tax Administration, is 0.012 bolivars (Special Official Gazette No. 6,383). A subsequent decree increasing the tax unit, currently 50 bolivars, has limited its applicability to the National Tax Administration alone (Official Gazette No. 41,597).

⁷⁵ Law on Prevention Conditions and Health and Safety at the Workplace, Article 120(14).

ii Cross-border data transfers

Owing to the fact that there is scarce regulation on data protection in Venezuela, in principle, and except in cases where employees' medical records are involved, employers do not have to request employees' consent to transfer their data, or register the transfer with a data protection authority. In fact, there is no data protection agency in Venezuela.

Based on constitutional principles, however, it is advisable to obtain employees' consent to transfer their data.

iii Sensitive data

Based on the opinion of local commentators, it is understood that a third party violates the right to privacy when it gains unauthorised access to information relating to a person's private life, such as a person's financial situation, personal correspondence, customs, way of life or personal mishaps.

Venezuelan legislation considers employees' medical information to be sensitive and, therefore, it establishes the obligation on employers to keep this information confidential (see Section XII.i).

Moreover, the Law on Prevention, Conditions, and Health and Safety at the Workplace establishes the obligation on employers to take all appropriate measures to guarantee the privacy of employees' correspondence and communications, and provide free access to all data and information referring to them. We consider that this obligation is related to the employees' health information, pursuant to the purpose of the Law, since it regulates matters concerning the conditions of health, safety and well-being in the workplace, even though the wording is very generic.

iv Background checks

It is not legally possible to investigate the criminal background of a current employee or a candidate for employment; there are provisions that protect employees and candidates from this kind of investigation. The Labour Law expressly provides that nobody can be subject to discrimination with regard to the right to work based on a criminal background.⁷⁶ Additionally, there is an implicit prohibition to pursue an investigation into the criminal background of employees, as the Law on the Registration of Criminal Records establishes that it is only possible to issue simple copies or certified copies of the registration of a criminal background to public authorities, when collaborating with a criminal procedure, for reasons of security and social interest, in the cases established by law.

Although there is no specific prohibition against conducting credit checks on potential employees or current employees, the Credit Card Law⁷⁷ prohibits financial institutions from disclosing credit or debit card holders' personal financial information to any company or institution, unless the persons in question authorise them to do so.⁷⁸ This authorisation is revocable.

⁷⁶ Labour Law, Article 21.

⁷⁷ Published in Official Gazette No. 39,021 of 22 September 2008.

⁷⁸ Credit Card Law, Article 62.

There is no specific prohibition against verifying educational degrees or conducting background checks by calling previous employers. Further, there is no obligation to inform a candidate of the reason for not hiring him or her, which reduces the risk of being accused of discrimination.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Pursuant to the Bar Against Dismissal Law,⁷⁹ no employee can be dismissed without just cause as previously authorised by the labour inspector office.

In fact, the Labour Law has been structured to guarantee a source of employment, and prevent lockouts or reductions in personnel. The Ministry of Labour is able to intervene in a company's operations to guarantee its activity whenever there is a risk that (1) a source of employment will be closed, (2) there will be a reduction in personnel, or (3) there will be changes in labour conditions. Moreover, if an employer illegally closes a company or starts a lockout, and fails to comply with an order from the Ministry of Labour to resume operations, the Ministry may take over the company's operations so as to protect the rights of employees. Failure by company management to resume operations may also result in imprisonment for up to 15 months.

In principle, and except for upper management employees and those hired for an undefined term with less than one month of service, no employee may be dismissed without just cause.⁸⁰

To justifiably dismiss employees covered by the Bar Against Dismissal Law, the employer must obtain authorisation from the competent labour inspector office by means of a dismissal qualifying procedure, which must be initiated before the labour inspector in accordance with the terms provided in the Labour Law.⁸¹ The dismissal must be based on one of the reasons for justified dismissal set forth in the Labour Law,⁸² which include:

- a* dishonest or immoral behaviour while at work;
- b* violence, except in legitimate defence;
- c* causing injury to, or demonstrating a serious lack of respect towards and consideration of, the employer, its representatives or family members;
- d* an intentional or seriously negligent act that affects health and safety at the workplace;
- e* omissions or imprudent acts seriously affecting health and safety at the workplace;
- f* unjustified absence from work for three working days in one month;
- g* material damage intentionally caused by or because of serious neglect to the employer's machinery, work tools and utensils, furniture, raw materials, finished products or those in preparation, or to plantations or other properties;
- h* revealing the employer's secrets of manufacture, fabrication or procedure;
- i* serious violations of the obligations imposed by the labour relationship;
- j* abandonment of work; and
- k* bullying or sexual harassment.

⁷⁹ Published in Special Official Gazette No. 6,419 of 28 December 2018.

⁸⁰ Bar Against Dismissal Law, Article 3.

⁸¹ Labour Law, Article 422.

⁸² *id.*, at Article 79.

If an employee is unjustifiably dismissed by his or her employer, he or she has one month to request reinstatement and payment of unpaid salary and labour benefits before the labour inspector office.

If an employer fails to request authorisation to dismiss from the Labour Inspectorate prior to the dismissal of an employee, that employee has the right to request reinstatement, unpaid salaries and labour benefits.⁸³ Failure to comply with a reinstatement order may trigger six to 15 months of imprisonment as a breach of an order to reinstate an employee who is protected by the Bar Against Dismissal Law or trade union rights.

ii Redundancies

The general rule under the Labour Law is that no employee can be dismissed without just cause unless he or she is offered an indemnity for dismissal equal to the amount of his or her seniority benefit and he or she accepts it (i.e., job stability – see Section I). However, since 2002, employees are protected with a special bar against dismissal that has been extended until 28 December 2020.⁸⁴ As long as the special bar against dismissal is in force, employers cannot freely dismiss employees without just cause and without previously obtaining authorisation from the labour inspector office.

When an employer wishes to lay off a substantial number of employees, the matter must be treated as a collective dispute,⁸⁵ even if the employer cites technical or economic reasons to support the decision.⁸⁶ The existence of a collective dispute means that the employer can apply the procedures established for the resolution of disputes that arise between employers and employees.⁸⁷ Notice of an employer's request for such a procedure must be provided to the respective labour union or, in the absence of a union, to the employees themselves. If the parties do not reach an agreement by means of the collective dispute procedure, the matter will be submitted for arbitration.⁸⁸

As with any other collective dispute, employees are protected by a bar against dismissal.⁸⁹ Also, a request to reduce personnel will not be allowed while employees are exercising their right to organise and negotiate collectively.

In the case of a mass lay-off, the Ministry of Labour is authorised to stop or suspend that action by means of a special resolution to uphold the principle of freedom of work. A mass lay-off is one that, within three months (or longer, if circumstances indicate a critical situation), affects a number of employees equal to or greater than the following:

- a* 10 per cent of the employees of a company that has more than 100 employees;
- b* 20 per cent of the employees of a company that has more than 50 employees; or
- c* 10 employees of a company that has fewer than 50 employees.⁹⁰

⁸³ *id.*, at Article 425.

⁸⁴ Presidential Decree on Special Bar Against Dismissals No. 3,708 published in Special Official Gazette No. 6,419 of 28 December 2018.

⁸⁵ Labour Law, Article 95.

⁸⁶ *id.*

⁸⁷ *id.*, at Articles 472 to 485.

⁸⁸ *id.*, at Articles 492 to 496.

⁸⁹ *id.*, at Article 419.

⁹⁰ *id.*, at Article 95.

The Labour Law provides that a study is to be made over three months by a labour inspector, or longer if the circumstances so warrant. In fact, as indicated below, the labour inspector set aside a period of at least six months to conduct his or her study.

A mass dismissal does not take place because of a request made to the labour inspector to authorise it. Rather, it is a declaration made by the Ministry of Labour based on reasons of social interest⁹¹ when it becomes aware of a dismissal that, by virtue of its size, falls within the aforementioned limits provided under Article 95 of the Labour Law.

In fact, the Regulations to the repealed Labour Law regulate the procedure for the suspension of mass lay-offs.⁹² It establishes that if the labour inspector of the jurisdiction becomes aware of a mass lay-off either *ex officio* or through an application by an interested party, he or she will initiate a procedure, through a notice ordering the employer to appear for questioning, to determine the number of employees added to the payroll during the previous six months, and the number of dismissals during the same period, identifying the employees who have been dismissed.

The procedure stated in the Labour Law must be followed and at the end of the evidentiary stage, the labour inspector must prepare a report for the Ministry of Labour, which specifies the number of employees on the employer's payroll, the number of employees dismissed and the time taken to do so. If a mass lay-off is determined, the Ministry of Labour can order the reinstatement of the ex-employees and payment of lapsed salaries and other corresponding benefits, within 20 days of receipt of the report.

If an employer has to proceed with a mass lay-off to reduce personnel, it could choose to request authorisation from the Ministry of Labour to do so. This must be initiated before the labour inspector office in the respective location and the procedure for the resolution of collective disputes arising between unions and employers must be followed. According to the Regulations to the repealed Labour Law, the employer can request a reduction of personnel based on ongoing economic circumstances or technological advances or modifications.⁹³ The recommended circumstances for requesting a reduction of personnel would be the real existence of economic circumstances that endanger the activities or existence of the company.

The disadvantage of the procedure for the resolution of collective disputes arising between unions and employers is that, for its duration, (1) the employees are protected by the bar against dismissal, (2) the union to which the affected employees belong must be notified, where applicable, and (3) if no agreement is reached between the employer and its employees, the matter may be referred to arbitration.

The labour inspector office can also require any supporting documents and information it deems appropriate, conduct inspections and supervisions, and order expert opinions.

A conciliation board made up of two representatives and one deputy for each delegation is appointed to process the dismissal procedure. The conciliation board's purpose is to achieve

91 See Ruling No. 85 of the Constitutional Chamber of the Supreme Tribunal of Justice of 24 January 2002, according to which: 'Social interest has been defined: d) Social interest – This is a notion associated with the State protection of determined groups of the country's population, who are recognized as not being in the same conditions as other people with whom they are related in a specific activity, and who the State therefore defends in order to avoid such condition of inequality in which they find themselves working against them and causing them patrimonial damage, or leading them to an inferior or dangerous quality of life that would create social tensions.' (See Cabrera Romero, Jesús Eduardo. *Las Iniciativas Probatorias del Juez en el Proceso Civil Regido por el Principio Dispositivo*, Edifove, Caracas 1989 p. 262).

92 Labour Law, Articles 40 to 45.

93 Regulations to the repealed Labour Law, Article 46.

unanimous agreement in regard to the employees who will be affected by the reduction in personnel, the term within which the reduction in personnel will be accomplished, and the indemnities for which the affected employees could be eligible. The recommendation of the conciliation board may contain specific agreements on settlements, or that the dispute is submitted to arbitration. The conciliation board may agree to one of the following solutions:

- a* amendment of the job conditions contained in the applicable CBA;
- b* collective suspension of work for no more than 60 days, during which time the employees will not be required to render their services and the employer will not be required to pay employees for their services, with a view to overcoming the alleged economic crisis; or
- c* the initiation of a recapitalising and reactivation process for the company, with the participation of the employees, under the concept of co-management. To encourage this, the state will help with (1) obtaining credits under preferential or government-subsidised conditions, (2) renegotiating agreements for payment of debt owed to the national treasury or for social security contributions, or (3) tax or financial preferences or other incentives.⁹⁴

According to the provisions of the Labour Law, the only way to fully and finally terminate the relationship between an employee and his or her employer is through a written settlement agreement containing a detailed report of the events that caused the termination and the employee's rights comprised therein. A settlement executed before the competent authority has the legal effect of *res judicata*, precluding an employee from bringing any further claim against the employer.⁹⁵

XIV TRANSFER OF BUSINESS

Under Venezuelan law, a transfer of undertaking is referred to as an employer successorship.

The Labour Law defines an employer successorship as the transfer of the property, ownership or business of an establishment from one person to another for any reason, with the continued operation of the business.⁹⁶ An employer successorship is considered to have occurred even though ownership of the company is not transferred. The rule is that if a new employer continues to carry out the activities of a prior entity with the same personnel and facilities, there is an employer successorship regardless of whether ownership of the company has changed.⁹⁷

An employer successorship does not alter existing employment relationships. The new employer must recognise the seniority of all employees who continue to work in the company, and all other benefits and terms of employment.⁹⁸

In addition, for up to five years, the former employer will be jointly liable with the new employer for all the labour obligations that arose before the employer successorship.⁹⁹ In the

⁹⁴ id., at Article 46.

⁹⁵ Labour Law, Article 19.

⁹⁶ id., at Article 66.

⁹⁷ id.

⁹⁸ id.

⁹⁹ id., at Article 68.

event that there are pending labour actions at the moment of employer successorship, the former employer's responsibility for those cases will continue for a period of five years from the date of a final decision on the labour action.¹⁰⁰

For an employer successorship to be valid, written notification must be given to the affected employees. Written notice of the employer successorship should also be provided to the labour inspector and the union to which the employees belong.¹⁰¹

If an employee does not accept the employer successorship because it conflicts with his or her interests, the employment relationship may be terminated at the employee's request, and the employee will be entitled to employee benefits and indemnities as if it were a case of unjustified dismissal.¹⁰²

If, with the purpose of employer successorship, an employer pays termination benefits and indemnities to an employee who nevertheless continues performing services for the company, the payment is considered an advance on the amount that would be owed to the employee on termination of the employment relationship.¹⁰³

XV OUTLOOK

The current economic, financial and political situation in Venezuela has resulted in several changes to the organic relationships between employers and employees, and to the dynamic of commercial deals. The minimum wage has increased several times as a result of hyperinflation.

Significant reforms to the labour law are not currently expected.

100 id.

101 id., at Article 69.

102 id.

103 id., at Article 70.

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Debjani Aich is a partner in the Bangalore office of Kochhar & Co. She is one of the main lawyers responsible for the firm's employment law practice, and she represents some of the world's largest IT companies in relation to their India operations. Debjani's other practice areas include contracts, telecommunications, defence and government procurement, and competition and antitrust law.

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Debjani regularly conducts workplace training on employment laws, including in relation to anti-sexual harassment laws and discrimination, at a senior management and general employee level. She is a frequent speaker on employment and human rights issues at international and national conferences and events.

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Zahida actively lobbies for immigration reform by preparing representations to the South African Department of Home Affairs on new and proposed legislative changes, including

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Agnieszka Fedor specialises in advising on matters of individual and collective employment law, both substantive and procedural. She represents and advises foreign investors in creating new job placements and adapting acquired workplaces to corporate requirements. Agnieszka is experienced in advising employers in various business sectors regarding restructuring projects, including redundancies, outsourcing of employees, optimisation of employment costs, acquisitions of businesses and related transfers of employees. She has vast experience in representing employers in relations with trade unions, and in negotiating and drafting agreements and incentive plans for executives. Agnieszka has also great achievements in advising parties to court proceedings, develops litigation strategies and represents business entities and members of their governing bodies in litigation and mediation. As head of the employment practice, Agnieszka is regularly recommended by *Chambers and Partners* and *The Legal 500*. She is a member of the European Employment Lawyers Association, founder and member of the Polish Employment Law Association, and author of many publications concerning civil and labour law.

GORDON FENG

JunHe LLP

Gordon Feng is partner in the employment law practice of JunHe LLP. Mr Feng handles various employment matters relating to daily advice, document review, mass lay-offs, hiring, terminations, and labour arbitration and litigation.

Mr Feng received his LLB from East China University of Political Science and Law in 1998 and his LLM from Columbia Law School in 2010. Mr Feng also passed the bar exam of China in 1999 and holds a current practising certificate in China. He is also admitted to the State of New York. He is fluent in Mandarin and English.

MARIAN FERTLEMAN

Herzog Fox & Neeman

Marian Fertleman is a senior associate in Herzog Fox & Neeman's labour and employment law practice group, advising local and international clients on a wide range of labour and employment law matters.

GREGORY J FIGUEROA-ROSARIO

Ferraiuoli LLC

Gregory J Figueroa-Rosario is a senior associate in Ferraiuoli LLC. His practice has included employment litigation in state, federal and administrative forums, and providing compliance and preventive consulting to employers in a variety of matters concerning labour and employment laws. He has also had experience in ERISA litigation, in handling complex issues regarding the operation of pension plans, and the merger and transfer of assets between retirement plans. Mr Figueroa-Rosario supports the mergers and acquisitions corporate practice, for which he performs due diligence from a labour and employment standpoint, and has worked in various complex commercial transactions.

NIR GAL

Herzog Fox & Neeman

Nir Gal is a partner in Herzog Fox & Neeman's labour and employment law practice group, advising local and international clients on a wide range of labour and employment law matters.

COLIN GANNON

Matheson

Colin Gannon is an associate in the employment, pensions and benefits group. He advises clients across various industries in both the public and private sectors on all aspects of the employment relationship, from recruitment and day-to-day management to the termination of employment (including dispute resolution and mediation).

Colin advises on all aspects of contentious and non-contentious employment law matters, including contractual and policy matters, workplace investigations, dismissals, redundancies, disciplinary processes, performance management processes, employee relations issues, senior executive appointments and terminations, and advising on the employment aspects of corporate restructurings, outsourcings, and individual and collective redundancy situations.

IGNACIO GARCÍA

Porzio Ríos García

Ignacio García is a partner of the firm. His professional focus is on corporate law, employment and labour law, as well as customs law and international trade. He advises the firm's national and international clients with regard to corporate and commercial matters, mergers and acquisitions, labour contracts, litigation, immigration, social security, pensions, transfers of executives, downsizing and union negotiations. He is also a consultant in private international law matters, contracts and international trade, customs law, international trade defence for the World Trade Organization and customs disputes. Mr García was previously a partner at Baker & McKenzie Chile, where he worked for 16 years and where he founded and directed the Labour Group and the International Trade Practice. He is currently a professor at the College of Law of the Catholic University of Chile and the University of Los Andes and appointed correspondent for the State of Chile before UNIDROIT.

ORLY GERBI

Herzog Fox & Neeman

Orly Gerbi is the head of Herzog Fox & Neeman's labour and employment law department. Orly leads a professional team consisting of more than 35 members, eight of whom are partners, in what is known as one of Israel's foremost labour law practices. Orly and her team are consistently ranked as first-tier in all domestic and international ranking guides.

Orly has extensive expertise in representing leading international and local entities in both the public and private sectors. She advises these entities on a wide range of labour and employment law matters, including employee benefits and executive compensation.

Orly is a board member of the Israeli Society for Labour Law and Social Security. She has also been the leader of the employment and labour law forum of the Association of Corporate Counsel for many years. She frequently organises, moderates and lectures at a broad spectrum of local and international conferences as well as forums and seminars including with the Ministry of Economy and the National Israeli Economic and Social Counsel.

The labour and employment law department is one of the stand-out practice groups among Israeli law firms. It combines the experience and expertise normally found in a leading 'boutique' law firm with the capabilities of a major full-service international law firm.

PALOMA GÓMEZ LÓPEZ-PINTOR

Deloitte Legal SLP

Paloma Gómez López-Pintor joined Deloitte in 2018, and she is currently an associate in the employment and social security practice in the firm's Madrid office. Previously, she worked for Garrigues in its employment and social security law department.

During her career, Paloma has provided advice on senior management contracts, employment implications of collective restructuring processes and outsourcing. Moreover, she has represented clients before the labour and social security courts and inspection services.

Paloma has a degree in law and international relations from the Comillas Pontifical University in Madrid, a master's degree in corporate legal practice and access to the legal profession from the Instituto de Empresa/LLM International Law, Business and Trade, DePaul College of Law (Chicago, US). She is a practising lawyer and is a member of the Madrid Bar Association.

KATHERINE GONZÁLEZ-VALENTÍN

Ferraiuoli LLC

Katherine González-Valentín is a capital partner at Ferraiuoli LLC and director of the labour and employment department. With more than 20 years of experience in representing management and as a former Assistant US Attorney, Ms González-Valentín has a solid background in litigating employment law cases and counselling employers. She has considerable practical and substantive experience in local and federal laws concerning employment rights, compliance requirements, mergers and acquisitions from a labour perspective and the broad spectrum of employment-related topics, in addition to representing health plans in Medicare-related litigation. Through years of successful exposure to complex litigation, mediation and arbitration proceedings, she has extensive experience of handling conflict resolution, achieving comprehensive and mutually beneficial settlements in state and federal judicial, administrative and extrajudicial claims. Ms González-Valentín's experience is further enhanced by her leadership roles in key associations within and outside Puerto Rico, and her many years of lecturing and providing training to companies, management and attorneys on myriad employment law and civil practice topics at the local level and in the continental United States.

CARON GOSLING

Deloitte LLP

Caron Gosling advises employers on employment law in the United Kingdom, covering project-based work (focusing in particular on employment law issues arising from change, restructuring or transformation projects) and general advisory support, covering day-to-day obligations for employers. She has specific experience in advising employers on issues relating to privacy and data protection, both in relation to employee on-boarding and employee monitoring. Caron's clients include both private and public sector, publicly listed companies and small and medium-sized enterprises in a variety of sectors. She regularly advises clients on TUPE, redundancies, changing terms and conditions of employment, relocating workforces, the employment law implications of mobility, data protection and other day-to-day employment issues, such as hiring, firing and employment rights more generally. Caron has more than 20 years' experience of advising on employment law. She holds a BA (hons) in jurisprudence from the University of Oxford and an LLM in employment law from the University of Leicester. She qualified as a solicitor in 1995. She volunteers as part of Deloitte's One Million Futures and mentors teenagers to help them identify and achieve their goals.

MICHAEL D GRODINSKY

Borden Ladner Gervais LLP

Michael D Grodinsky is a member of BLG's labour and employment law group. His practice encompasses virtually all aspects of labour, employment, human rights and privacy law.

Michael is frequently called upon to advise and represent clients with respect to workplace matters, including hirings, dismissals, disciplinary measures, employment agreements, workplace policies, workplace investigations, electronic communications and social media issues, discrimination claims, harassment claims, restrictive covenants and confidentiality agreements, as well as workplace restructurings, language issues and access to information and privacy law issues.

He has appeared before courts and tribunals in Quebec and is regularly involved in employment litigation, collective bargaining and grievance arbitration.

SUSAN GROSS SHOLINSKY

Epstein Becker & Green, PC

Susan Gross Sholinsky is a shareholder in the employment, labour and workforce management practice in the New York office of Epstein Becker & Green. She counsels clients on a variety of matters, in a practical and straightforward manner, with an eye towards reducing the possibility of employment-related claims.

Ms Sholinsky counsels multinational companies on the unique labour and employment issues they face. Day to day, she counsels employers on avoiding disputes on matters stemming from employee discipline, leaves of absence and accommodation requests, reorganisations and termination of employment (including voluntary and involuntary reductions in force). Ms Sholinsky also drafts various agreements for clients, and develops and audits employers' policies and procedures to ensure compliance with applicable federal, state and local law and best practices.

Ms Sholinsky also conducts workplace training seminars for employees, managers and human resources personnel in a variety of industries, and conducts investigations into alleged wrongdoing.

In 2019, Ms Sholinsky was recommended by *The Legal 500 United States* in the area of workplace and employment counselling. Within the firm, Ms Sholinsky serves as vice chair of the National Employment, Labour and Workforce Management Steering Committee and of the Diversity and Professional Development Committee. She also serves as New York co-chair of 2020 Women on Boards: Global Conversation on Board Diversity (2020WOB), a campaign to increase the number of women board directors. She also serves on the adjunct faculty of the Cornell University School of Industrial and Labour Relations, where she teaches courses concerning human resources and the law. Ms Sholinsky frequently speaks on employment law topics and authors numerous publications on the subject.

ERIC GUILLEMET

Deloitte | Taj Société d'avocats

Eric Guillemet is a lawyer and partner in labour law at Deloitte | Taj Société d'avocats, the French law firm of Deloitte Legal in France.

After having practised labour law at the International Department of the FIDAL law firm and at the Parisian business law firm Lefèvre Pelletier & Associés (now LPA-CGR), he joined Taj in 2007.

For more than 18 years, he has been assisting companies with their development and their day-to-day management to help them reach their strategic objectives.

He intervenes on behalf of a French and international clientele comprising large groups, medium-sized companies and investment funds on matters of restructuring and reorganisation; collective labour relations (implementation of redundancy plans, relations with staff representatives, collective bargaining, working time, employee savings plans, etc.); individual labour relations (contracts of employment, individual dismissals, day-to-day personnel management); international mobility (expatriation, personnel posting); and labour law due diligence.

He is also a member of the Magellan Institute, a community of inter-company practitioners bringing together human resources directors and a network of more than 1,400 professionals in international human resources, for which he gives law classes in international mobility in the context of the Institute's MBA and training certificate programmes.

MAAYAN HAMMER-TZEELON

Herzog Fox & Neeman

Maayan Hammer-Tzeelon is a partner in Herzog Fox & Neeman's labour and employment law practice group. Maayan advises on a wide range of labour and employment law matters, including employee recruitment, employment terms and conditions, compensation and retirement packages, human resources policies, equal opportunities and terminations. In addition, she advises on international transactions, mergers and acquisitions, organisational changes and privatisations. Maayan also represents clients in litigation proceedings in all courts, as well as arbitration and mediation proceedings.

STUART HARRISON

ENSafrica

Stuart Harrison is a director at ENSafrica in the employment law department. He specialises in all aspects of employment law, including executive appointments and dismissals, disciplining employees involved in procurement irregularities and who contravene the Public Finance Management Act, as well as restraint of trade matters.

He has acted and appeared for clients in various litigious matters in the labour courts, High Court and the Commission for Conciliation, Mediation and Arbitration, and he has conducted extensive eviction litigation in the Land Claims Court.

Stuart's experience includes drafting split employment contracts for employees rendering services in multiple jurisdictions, litigation against former executives for the recovery of unauthorised expenditure incurred in breach of fiduciary duties, test case litigation on second generation outsourcing, drafting agreements for clients with labour brokers, and preparing and revising constitutions for employers' organisations and bargaining councils. He also has experience in drafting bargaining council main agreements, dealing with the eviction of dismissed employees and other occupiers under the onerous security of tenure legislation and litigating on discrimination law. He has worked extensively on issues around restructuring in the public sector and the employment law consequences relating to mergers and acquisitions. He has extensive advisory experience, having assisted in dealing with disciplinary matters, poor performance, absenteeism and other forms of incapacity matters and rooting out theft rings operating within workforces, as well as successfully running large-scale retrenchment exercises for employers. He also has experience in employee benefits and pension law.

He is the author of the chapter on pension law in Juta's annual labour law publication. He is the co-author of chapters on South African labour law for a number of international comparative employment law publications, such as the *Little Mendelson Guide to International Employment* and Labour Law, Law Business Research's *The Employment Law Review* and the Centre for International Legal Studies' *International Employment Law* publication. He has also contributed to *Labour Law for Managers: A Practical Handbook*. He has served as an independent trustee for commercial umbrella funds and for pension, provident, preservation and retirement annuity funds. Stuart regularly presents at client seminars, training courses, workshops, and has been a speaker at various public seminars and conferences on numerous issues, including labour brokers, second generation outsourcing, white-collar crime, pension law and ensuring legal and tax compliance in employment contracts and policies.

EMI HAYASHI

Dai-ichi Fuyo Law Office

Emi Hayashi is an associate at Dai-ichi Fuyo Law Office. She graduated from Keio University in 2008 and the University of Tokyo School of Law in 2010. She joined Baker McKenzie's Tokyo office in 2012 and Dai-ichi Fuyo Law Office in 2018. She earned an LLM (business specialisation) from University of California, Los Angeles, School of Law in May 2017. She is admitted to practise in both Japan and the state of New York. Her areas of specialism are labour and employment, and corporate.

TINGTING HE

JunHe LLP

Tingting He is an associate based in the firm's Shanghai office. Her practice focuses on employment law. Ms He received her LLB and LLM from Shanghai JiaoTong University School of Law in 2016 and 2019, respectively. Ms He passed the bar exam in China in 2015 but does not currently hold a practising certificate. She is fluent in Mandarin and English.

ANNEMARTH HIEBENDAAL

Rutgers & Posch

Annemarth Hiebendaal is a specialist in employment law in the widest sense. She advises both national and international clients. In her practice, she acts for both employers and employees, using her specific knowledge and experience of employee representation, employment termination law, civil servants law and (statutory) directors.

VIVIAN HOLNESS

Arias, Fábrega & Fábrega

Vivian D Holness is a highly effective labour lawyer, recognised for her practical termination strategies and by her skills to minimise unnecessary labour disputes.

As part of the Arifa multidisciplinary team advising international companies doing business in Panama, Ms Holness brings to the table her vast experience on the many labour and immigration benefits granted under the free zone and special economic zone regimes designed to attract and promote investments and logistics services, to identify the most tax-efficient special regimes options for her clients.

Ms Holness has an LLM from the Latin American University of Science and Technology and an LLB from Panama University. She speaks Spanish, English and Portuguese.

CRAIG HUGHSON

Dentons & Co

Craig Hughson is a senior associate in the UAE corporate and commercial team. Craig advises on matters ranging from company establishments and company administration to mergers and acquisitions and employment matters.

TOMOAKI IKEDA

Dai-ichi Fuyo Law Office

Tomoaki Ikeda is an associate at Dai-ichi Fuyo Law Office. He graduated from Meiji University in 2010 and the University of Tokyo School of Law in 2012. He mainly provides legal services in labour and employment.

SVITLANA KHEDA

Sayenko Kharenko

Dr Svitlana Kheda is a counsel at Sayenko Kharenko, heading the firm's labour and compliance practice and leading its labour and employment, privacy and data protection, and anti-corruption and anti-bribery practice groups. Svitlana is an internationally recognised expert in all these areas of law, with more than 20 years' experience in advising clients on the wide range of the complex and complicated issues in all areas of her expertise.

Svitlana was named Lawyer of the Year in labour and employment by *Best Lawyers International* 2017. She has been recognised as a leading labour and employment law lawyers by *Best Lawyers International* 2020, *The Legal 500* 2019, *Chambers Europe* 2019 and *Ukrainian Law Firms* 2019. She is also recommended as one of the best employment law lawyers and mediators in Ukraine by *Client's Choice: Top 100 Lawyers in Ukraine* 2019.

Svitlana is a certified mediator, with more than 10 years' experience in practising and teaching employment mediation and quasi-mediation. She is a founding member of the Mediation Practices Club under the auspices of the Ukrainian Mediation Centre, and serves on the boards of the Ukrainian National Association of Mediators and Bukovyna Mediation Centre. Svitlana has been actively involved in drafting and promoting the draft Law on Mediation. For several years, she has been a board member of the Labour Law Committee at the Ukrainian Bar Association.

Before joining Sayenko Kharenko, Svitlana ran the Programs Department of the International Law Institute (Washington, DC) and worked in the Kiev office of a leading Western law firm operating in Ukraine. Svitlana graduated *summa cum laude* from Kiev National Taras Shevchenko University, where she was later awarded a PhD (LLD) in international private law. She obtained her LLM in international legal studies from Georgetown University Law Center (Washington, DC). Svitlana is the author of more than 100 documents published in the United Kingdom, the United States, Ukraine, Turkey, India and Canada, including a monograph and a chapter on labour mediation in a textbook for lawyers.

SHIONE KINOSHITA

Dai-ichi Fuyo Law Office

Shione Kinoshita is a partner at Dai-ichi Fuyo Law Office. She graduated from Waseda University in 1982 and earned an LLM from the University of Illinois College of Law in 1992. She served as a vice chairman of Dai-ichi Tokyo Bar Association (2004–2005). She was a visiting professor of the University of Tokyo School of Law (2010–2013) and has been a vice president for human rights of the Tokyo Institute of Technology since 2013. She has been involved in a number of labour cases, including collective bargaining, labour management and litigation in the district and high courts, and the Supreme Court, as well as before labour tribunals. She also handles non-contentious negotiation and settlement matters. Her clients include major companies in the retailing, data processing, manufacturing and financial services as well as government agencies.

MOMOKO KOGA

Dai-ichi Fuyo Law Office

Momoko Koga is an associate at Dai-ichi Fuyo Law Office. She graduated from Kyushu University in 2012 and Waseda Law School in 2015. She mainly provides legal services in labour and employment.

HIROAKI KOYAMA

Dai-ichi Fuyo Law Office

Hiroaki Koyama is a partner at Dai-ichi Fuyo Law Office. He graduated from Waseda University in 2004 and Keio University Law School in 2007. He mainly provides legal services in labour and employment.

STEFAN KÜHTEUBL

Schönherr Rechtsanwälte GmbH

Stefan Kühteubl is a partner at Schoenherr in Vienna and is head of the firm's labour and employment practice. He has more than 15 years of experience as a lawyer and holds an individual ranking in the employment law section of *Chambers and Partners'* renowned legal directory. Stefan's field of expertise includes all aspects of contentious and non-contentious employment law, including providing continuing advice to employers on out-of-court matters, restructurings and transactions, advising and representing managing directors and management board members, as well as international employment law and public sector law, including outsourced entities. Stefan holds law degrees from the University of Vienna (*magister iuris* and *doctor iuris*). Furthermore, he spent six months working with the European Parliament. Stefan regularly speaks at seminars and conferences on labour and employment law and has published numerous articles and textbooks on labour and employment law matters.

FOLABI KUTI

Perchstone & Graeys

Folabi Kuti graduated with an LLB (upper division) from Obafemi Awolowo University, Ile Ife. Upon being called to the Bar, he subsequently obtained an LLM from the University of Lagos.

He previously worked with one of the leading law firms in Lagos, where he garnered extensive knowledge of litigation, before joining Perchstone & Graeys in 2005.

Since joining the firm, Folabi has demonstrated competence in employment law, corporate commercial litigation, alternative dispute resolution, intellectual property law, insolvency and secured credit transactions. He provides important insight accrued over several years of experience in core litigation and he currently oversees the litigation and employment law departments of the firm. He has a keen interest in the development of Nigerian law as well as the laws of other jurisdictions.

His resourcefulness has contributed immensely to broadening the corporate and commercial advocacy practice of the firm. Folabi is a prolific writer and has published articles and commentaries on a wide range of subjects, such as commercial litigation, civil procedure and literary criticism.

Folabi is a member of the Nigerian Bar Association and the International Bar Association. He is a notary public and is registered with the Securities and Exchange Commission to practise in the Nigerian capital market.

JEREMY LEIFER

Proskauer Rose LLP

Jeremy Leifer is a Hong Kong-qualified solicitor who has been resident in Hong Kong for over 25 years. He is a corporate transactional lawyer by training and his experience has encompassed two major economic cycles in Asia, which reflects the broad nature of the practice of law in Hong Kong. As an adjunct to his corporate practice, he has also focused on non-contentious employment matters that have included advising on contract formation and termination and employee pay and benefits, and privacy issues. His practice also encompasses mergers and acquisitions and private equity transactions, and securities laws in Hong Kong.

IAN LIM

TSMP Law Corporation

Ian Lim heads TSMP's employment and labour team. His practice has a specific emphasis on all aspects of Singapore and regional employment law, particularly on both contentious and non-contentious issues of restraint of trade, confidentiality and data privacy, dismissal, harassment, statutory employee transfers and industrial relations. Ian is the lead author for the Singapore chapters of annual international publications *The Employment Law Review* and *Getting the Deal Through: Labour & Employment*, and the Employment Contracts chapter of *Law Relating to Specific Contracts in Singapore*.

Ian is an appointed referee of the small claims tribunals in the state courts and a fellow of the Singapore Institute of Arbitrators. He is also active in *pro bono* and charitable work, with a focus on migrant worker welfare.

MAGNUS LÜTKEN

Advokatfirmaet Schjødt AS

Magnus Lütken is a partner at Advokatfirmaet Schjødt AS, one of Norway's big five law firms. Lütken is a specialist in employment law, company law and litigation, and assists clients in all areas of business law, both in an advisory capacity and in disputes before the courts. He has a special focus on restructurings, workforce reductions and transactions, often supporting clients in a pure M&A capacity as well as within employment law.

In 2011, Magnus worked as a deputy judge in Ringerike District Court. He has published several articles, and also holds a bachelor's degree in management, with a particular emphasis on law and economics.

YUKIKO MACHIDA

Dai-ichi Fuyo Law Office

Yukiko Machida is an associate at Dai-ichi Fuyo Law Office. She graduated from Keio University in 2006 and Keio University Law School in 2008. She joined Shin-yotsuya Law Offices in 2009 and founded Law Office of Itsumi & Machida in 2012. She joined Dai-ichi Fuyo Law Office in 2020. Her areas of specialism are labour and employment.

MARÍA JUDITH (NANI) MARCHAND-SÁNCHEZ

Ferraiuoli LLC

María Judith Marchand-Sánchez is a founding partner of Ferraiuoli LLC and a capital partner with more than 25 years of experience in successfully litigating before first instance and federal courts, government agencies and administrative forums, including participation in mediation proceedings. Her practice includes consulting in human resources matters, internal investigations, including labour aspects of corporate acquisitions, mergers and commencement of operations, protection of confidential information and labour audits. Ms Marchand has been authorised by the Supreme Court of Puerto Rico to provide continuous legal education courses and has been invited by several professional associations to present lectures on labour and sexual harassment, progressive disciplinary measures, mediation as an alternative to traditional litigation and medical cannabis in the workforce. She is a mediator certified by the Supreme Court of Puerto Rico.

TJAŠA MARINČEK

Petra Smolnikar Law Firm

Tjaša Marinček is currently studying at the Faculty of Law, University of Ljubljana. She is very active at the Faculty, cooperating intensively with management, drafting opinions and conclusions on pedagogic and research work, and she is one of the star students. Among her various activities, she engages enthusiastically in her role as the Representative of Students in the Senate of the Faculty and is an active member at the Slovenian Student Organisation. Tjaša has been working at Petra Smolnikar Law since 2019. Mostly assisting in the fields of employment and labour law, family law and civil law, she is also passionate about environmental and food law. One of her main points of interest is comparative research in the field of employment of graduates in Slovenia and abroad, thereby investigating the pros and cons of employment on the domestic and international market.

PATRICIA M MARVEZ-VALIENTE

Ferraiuoli LLC

Patricia Marvez-Valiente is a special counsel in Ferraiuoli's labour and employment practice. She has 16 years of experience as a litigator defending and counselling employers and management in industries such as hospitality, service, healthcare, pharmaceuticals and manufacturing. Ms Marvez's practice includes labour and employment law litigation in local and federal courts, administrative agencies and arbitration forums covering claims of discrimination, retaliation, wrongful discharge, sexual harassment, defamation, employment torts, employment contracts, workers' compensation and welfare benefits, to name a few. Ms Marvez also assists employers in the creation and revision of their employment policies and employee training and advises them on disciplinary and internal investigative processes, complex issues involving highly compensated individuals, employee classification, administration of leaves of absence, requests for reasonable accommodation, employee dismissals, planning and execution of reductions in force, among other matters. Ms Marvez also covers the welfare benefits arena by providing legal counsel and representation in litigation to plan sponsors and administrators on issues affecting the administration of group health plans and compliance with applicable laws and regulations, such as ERISA, HIPAA and COBRA.

Based on her years of exposure to litigation, labour compliance and preventive consulting, Ms Marvez approaches mergers and acquisitions from an employment law perspective and from a practical standpoint, helping clients in their due diligence when commencing, merging or closing operations in Puerto Rico, and guiding them through the labour and employment-related statutory and regulatory requirements.

YUKI MINATO

Dai-ichi Fuyo Law Office

Yuki Minato is a partner at Dai-ichi Fuyo Law Office. He graduated from Keio University in 2004 and Chuo Law School of Law in 2006. He mainly provides legal services in labour and employment.

JORGE MONDRAGÓN

Gonzalez Calvillo, SC

Jorge Mondragón has 26 years of experience in providing comprehensive legal advice to foreign and domestic companies, including corporate and transactional labour matters. He is the founder of the firm's labour practice, has a business-oriented style and a strong corporate core, which enables him to provide labour advice with an understanding of the clients' needs.

He also has ample experience in cross-border matters, relating to business development, including corporate start-ups, franchise expansion and training programmes, and of corporate foreign policies to comply with Mexican law. His legal labour practice includes preparing legal opinions to determine courses of action for employee management in Mexico (transfers, hiring, massive lay-offs, etc.), including the proper documentation of employment relationships through agreements, the implementation and adaptation of foreign corporate policies, and handbooks to ensure compliance with applicable Mexican frameworks.

ANTONIO MORALES VERÍSSIMO DE MIRA

Deloitte Legal SLP

Antonio Morales Veríssimo de Mira is currently a senior associate in the employment and social security practice of Deloitte Legal, at its office in Madrid.

During his career, Antonio has participated in multiple employment and social security processes, advising companies from different sectors and activities. He is a specialist in integrated advisory services to companies and senior executives on business- and employment-related issues (advisory services on dismissal proceedings and corporate restructuring, employment and social security due diligence, assistance in employment and social security-related judicial proceedings, advisory services in employment and social security inspection proceedings, collective bargaining with workers' representatives, etc.).

Antonio has a degree in law from the Complutense University of Madrid and a master's degree in labour law from Centro de Estudios Garrigues. He is a practising lawyer and has been a member of the Madrid Bar Association since 2009.

Antonio is also a lecturer on the master's degree programme for employment law at Centro de Estudios Garrigues and on the master of laws access programme at Carlos III-ISDE University in Madrid. He is recognised as a leading lawyer in the *Best Lawyers* directory.

ALEJANDRO ALFONSO E NAVARRO

Villaraza & Angangco

Alejandro Alfonso E Navarro is the managing partner of Villaraza & Angangco and head of the labour department. His fields of practice include bank and securities law, labour law, election law, and civil, commercial, bank securities fraud, criminal and tax litigation. He has broad experience in dealing with stockholders and intra-corporate disputes, bank and securities fraud, labour issues and cases, including mediation proceedings and negotiations for collective bargaining agreements. Al earned his bachelor of laws from the University of the Philippines College of Law in 1989, graduating in the top 10 of his class.

METTE NEVE

Clemens

Mette Neve has more than 15 years' experience of advising Danish and multinational companies on a variety of employment-related matters, and she is generally recognised among peers as a leading employment lawyer.

Mette regularly advises on contentious matters and is known to provide useful and pragmatic advice to her clients, taking into account both the client's commercial interests and the legal framework. Clients tend to laud Mette in particular for her pragmatic solution-oriented approach to her work, and her profound understanding of their business.

Mette advises clients in all sectors. Among her key clients are: Uponor, Interflora, Bureau Veritas, Nordic Aviation Capital, Ensure A/S (leading Danish insurance broker), Indasia A/S and Aarhus School of Marine and Technical Engineering.

Mette is also very engaged in international work and participates in international legal conferences each year across the globe.

Mette has spent 95 per cent of her working hours advising on employment law cases between 2004 and 2015, and since then 70 per cent of her time, including 11 years as a senior associate in Kromann Reumert's Band 1 employment law practice.

NICHOLAS NGO

TSMP Law Corporation

Nicholas Ngo is a senior associate with TSMP's employment and labour team, and frequently advises on employment and labour, and data privacy matters and disputes. He also handles a wide range of corporate and commercial disputes and arbitrations. His experience includes shareholder, insolvency, investment, employment and labour, harassment and tenancy disputes, and he acts for clients from multinationals to the man on the street. Nicholas has also co-authored the Singapore chapter of *Getting the Deal Through: Labour & Employment* with Ian Lim.

CHISOM OBIKOYE

Perchstone & Graeys

Chisom Obiokoye is a graduate of the University of Benin, where he obtained his LLB degree with second-class honours (upper division). He was called to the Nigerian Bar in 2014.

Chisom commenced his legal career with Perchstone & Graeys in 2014, and has garnered vast experience and skills in diverse sectors, which has seen him working independently

and collaboratively with brilliant teams to provide excellent and innovative legal services to clients. His passion and hard work in the provision of innovative and excellent legal services has seen him work with the finance, corporate commercial, real estate, alternative dispute resolution and employment law departments of the firm.

In his current position as an intermediate senior associate, Chisom harnesses his advanced legal and analytical skills in the drafting and review of legal documents, proffering solution-driven legal advice to a diverse range of clients and representing clients up to the courts of appeal. Additionally, Chisom is a member of the firm's editorial team and contributes to the monthly and quarterly newsletters, which provide stimulation for readers globally.

TAKEAKI OHNO

Dai-ichi Fuyo Law Office

Takeaki Ohno is an associate at Dai-ichi Fuyo Law Office. He graduated from Tokyo University in 2013 and University of Tokyo School of Law in 2015. He joined Anderson Mōri & Tomotsune in 2016 and Dai-ichi Fuyo Law Office in 2019. He mainly provides legal services in labour and employment.

CHARLOTTE PARKHILL

Dentons Kensington Swan

Charlotte Parkhill is a partner in the Dentons Kensington Swan employment team. She assists a wide range of international companies and New Zealand corporates and other organisations on any issues that arise with their employees, including personal grievances, restraints of trade, restructures and compliance with the Holidays Act.

Charlotte has extensive advocacy experience in the New Zealand employment jurisdiction. Her background as a criminal prosecutor provides specialist expertise in carrying out investigations into matters such as fraud, bullying, harassment and theft. She is committed to achieving commercial outcomes to difficult employment issues through understanding her clients' business objectives and how they want to manage their people.

BRIAN PATTERSON

ENSafrica

Brian Patterson is head of ENSafrica's employment department. He specialises in integrated employment solutions, international split employment contracts, global mobility, executive terminations, restructuring and retrenchments, transfers of business, employment equity and unfair discrimination, collective bargaining, employment-related pension law matters, and drafting and enforcement of restraint of trade agreements, as well as the law relating to confidentiality and privacy.

Brian has done extensive African employment law work and significant international employment law work in the United States and the United Kingdom, and for many overseas law firms. He is qualified in South Africa and the United Kingdom.

Brian has acted for numerous African and international clients, and has provided advice to corporate clients in most sectors, including the financial services, retail, hospitality/gaming, pharmaceutical, mining, metal engineering, ITC and chemical industries. He has also dealt with the South African aspects of restructuring and mergers of multinationals in respect of a number of jurisdictions.

In addition, Brian's experience includes giving tactical and strategic individual and collective employment law advice, and he has extensive litigious and corporate employment law experience. He also engages in alternative dispute resolution mechanisms when necessary.

Brian has been involved with some of the leading employment law cases reported in southern Africa since the inception of employment law, and he has personally argued many matters in the labour courts and the Labour Appeal Court. Brian has also acted as a labour court judge and was an assessor of the Labour Appeal Court.

Brian is co-author of the South Africa chapter of the *International Labour and Employment Compliance Handbook* and *The Employment Law Review* and has contributed articles in many local and international publications. He is a regular speaker on employment and labour law issues and has appeared on many television programmes over the years.

TIAGO PILÓ

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Tiago Piló joined Vieira de Almeida in 2001 and is currently a managing associate of the labour practice. In this capacity he has been actively working in the areas of employment and labour law, public employment, employment and labour litigation, collective bargaining agreements and social security law. He also assists the human resources departments of clients of the firm every day in the organisation and restructuring of their respective workforces. Tiago is admitted to the Portuguese Bar Association, specialising in labour law. He is also a member of the European Employment Lawyers Association.

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Rashel Ann C Pomoy is a senior associate at Villaraza & Angangco and is a member of the firm's labour department. She has extensive experience in advising clients on matters concerning labour law, including regulatory compliance, labour standards, employee benefits, employment contracts, reorganisations, internal investigations, labour relations and labour litigation. Rashel earned her *juris* doctor degree from the University of the Philippines in 2013, where she was awarded the Dean's medal. She also has a degree in philosophy from the same university, graduating *magna cum laude*.

NANCY GUNZENHAUSER POPPER

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Nancy Gunzenhauser Popper is an associate in the employment, labour and workforce management practice in the New York office of Epstein Becker & Green.

Ms Popper advises employers in all facets of the employment relationship, from pre-employment considerations and hiring to terminations and post-employment restrictions, including auditing employers' employment policies, procedures and handbooks to ensure compliance with applicable laws and best practices, and preparing employment, consulting and separation agreements. She counsels clients on compliance with equal employment opportunity laws, the Americans with Disabilities Act, the Family and Medical Leave Act, worker classification issues, and other federal, state and local statutes governing the workplace.

Ms Popper also assists in defending clients in labour and employment-related litigation in a broad array of matters, such as discrimination, harassment, retaliation, breach of contract, and wage and hour disputes. Within the workplace, she conducts training seminars on a variety of topics for employees, managers and human resources personnel.

Prior to joining Epstein Becker & Green, Ms Popper worked as an intern in the law department of the Kings County Supreme Court, the employment law department of one of the world's largest professional services, risk management, and insurance brokerage firms, and the Social Security Administration, among other positions.

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Jan Procházka is a partner at Deloitte Legal. Jan primarily focuses on corporate, contractual and labour law. In labour law, he assists clients with day-to-day labour issues and in dealing with legal disputes (court, out-of-court and proceedings with state authorities) and conducting legal due diligence.

Among other things, he has gained extensive experience in projects focused on setting contractual arrangements with management of companies, management liability, corporate reorganisations, foreign assignment structures, agency employment and group share-option plans. As a member of the German desk of the law office, he also provides comprehensive legal services to German-speaking clients.

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Dr Juan Carlos Pró-Rísquez is the head of the labour and employment department of Dentons' Venezuelan practice. He received his law degree, *magna cum laude*, from the Central University of Venezuela (UCV) in 1990 and his LLM from the Southern Methodist University in Texas in 1994. He completed his doctorate of laws with the highest honours at the UC in 2008. He has been head professor of labour and employment law at the UCV since 2009.

Juan Carlos, who has oriented his practice to labour law and its litigation, has a strong background in negotiating and drafting individual employment contracts and labour settlements, as well as in distribution contracts, labour and employment planning, and consultancy agreements. He has also been involved in labour and employment matters, and has extensive experience in negotiating collective bargaining agreements on behalf of employers.

Juan Carlos has acted as lead counsel in implementing codes of conduct and conducting ethics compliance investigations in Latin America, in employment litigation in Venezuela and on the coordination of expatriate hiring, transferring and litigation in Latin America. He also represented multinationals in occupational health and safety claims, and counselled them on tax planning for the effective use of employee stock options. He also has experience in legal audits, social security legislation and prevention, the collective oil convention, data privacy, exchange regime matters relating to employment and labour law, labour constitutional injunctions and corporate law.

Juan Carlos is considered a Star Individual by *Chambers Latin America* (2013–2020) and has received the Best Lawyer award for labour and employment from *Best Lawyers* several times. He has also been recognised by *Acritas Star*, *LACCA Approved*, *The Legal 500*, *Who's Who Legal*, *Euromoney*, *PLC* and *Latin Lawyer*. He won the International Law Office award for labour and employment law in 2012 and 2020.

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Dario Abrahão Rabay has more than 25 years of experience in representing many of the largest Brazilian and multinational companies in labour disputes across various industry sectors, both in labour courts and labour agencies. He also advises clients in all aspects of labour and employment matters, including executive compensation and benefits.

OLGA K RANKIN

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Olga Rankin was called to the Bermuda Bar in 2009 after completing her studies and obtaining her bachelor's degree in social sciences with a focus on international studies from New York University (*summa cum laude*) (2003); a master's degree in humanities and social thought from New York University (2004); an LLB degree from the University of Kent (first-class honours) (2007); and a postgraduate diploma in legal practice (LPC) from the College of Law at Guildford.

Ms Rankin has practised in civil litigation since 2009, with a focus on employment and labour law since joining Canterbury Law Ltd in March 2018.

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Efren II R Resurreccion is a junior associate at Villaraza & Angangco and is a member of the firm's labour department. He has assisted and advised clients on matters and issues concerning labour law, including regulatory compliance, labour standards, employee benefits, employment contracts, reorganisations, internal investigations, labour relations and labour litigation. Efren obtained his law degree from the University of the Philippines in 2016. He served as a member of the editorial board of the *Philippine Law Journal* in 2013 and was awarded the Justice Irene Cortes Prize for Best Paper in Constitutional Law in 2016.

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Nicole G Rodríguez-Velázquez is an associate at Ferraiuoli LLC focusing on employment law litigation and counselling. She graduated *summa cum laude* from the Inter American University of Puerto Rico School of Law in June 2019. Ms Rodríguez-Velázquez wrote for the *Inter American University Law Review* and has had an article about medicinal cannabis in the workplace published (53 *Revista Juridica* UIPR 467 (2019)). She has also served as teaching assistant to various professors and law clerks.

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Carlo Augustine A Roman is a junior associate at Villaraza & Angangco and is a member of the firm's labour department. He is experienced in providing legal advice on employment matters affecting the operations of, among others, multinational companies and major Filipino corporations, and has conducted comprehensive reviews of companies' employment documents and represented clients before Philippine labour tribunals. Carlo earned his *juris*

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Dirk Jan Rutgers is co-founder and partner at Rutgers & Posch. He specialises in employment law and advises national and international clients on mergers, reorganisations, dismissals, employee representation and statutory board membership. Dirk Jan also works as a boardroom adviser on organisational issues and strategic collaborations between institutions. Many of Dirk Jan's clients are active in the financial and public sectors, and in media and healthcare.

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Vinicius Sabatine has more than 10 years of experience in labour and employment practice. He routinely represents employers in high-stakes labour litigation claims, including public civil actions with the Labour Prosecution Office. He also has a strong background in settlement projects.

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Hideaki Saito is a partner at Dai-ichi Fuyo Law Office. He graduated from Keio University in 2004 and the University of Tokyo School of Law in 2006. He joined Nishikawa Sidley Austin Law Joint Enterprise in 2007 and was appointed as an appeals judge at the National Tax Tribunal in 2011. He joined Dai-ichi Fuyo Law Office in 2014. He earned an LLM from University of California, Berkeley, School of Law in May 2016. During his study at Berkeley, he was a general member of the *Berkeley Journal for Employment and Labor Law*. He is admitted to practise in both Japan and the state of New York. His areas of specialism are labour and employment, and taxation.

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Gisela E Sánchez-Alemán is an associate at Ferraiuoli LLC. Her practice includes employment litigation in judicial and administrative forums, compliance and preventive consulting in matters concerning labour and employment laws, as well as the creation, revision and implementation of company policies. Since law school, Gisela has been dedicated to labour and employment matters, becoming a member of the Labour Law Pro Bono clinic and participating as student attorney in the labour and employment legal aid clinic of the University of Puerto Rico School of Law.

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Andrea Sánchez Rojas joined Deloitte Legal in September 2019. She has a degree in law and political science and administration from the Pablo de Olavide University in Seville, and a double master's degree in access to law and legal-labour advice and consultancy from the Carlos III University of Madrid.

With experience in labour advice, Andrea has participated in various labour restructuring projects of national and international companies in different law firms.

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Mary Serobyán joined Concern Dialog Law Firm in August 2019. She currently holds the position of junior associate.

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Janna Simonyan, attorney, joined Concern Dialog Law Firm in 2007. At present, she holds the position of a partner. She is a specialist in contract, labour and corporate law, and performs court representation for administrative and civil cases.

Janna Simonyan has also extensive experience in court representation of contract and employment disputes, debt collection and real estate issues. She represents the protection of the clients' interests in the scope of administrative proceedings and in administrative court.

She also practises in the sphere of legal outsourcing of client companies.

Janna Simonyan regularly organises individual and group courses on the Labour Code.

PETRA SMOLNIKAR

Petra Smolnikar Law Firm

Petra Smolnikar founded the boutique employment law firm Petra Smolnikar Law at the beginning of 2017. Recognised for providing tailored solutions, she works frequently with international clients seeking legal advice in or in relation to Slovenian law and the Slovenian market. With more than 12 years of professional experience gathered at international law firms, at court and in private companies, she mainly focuses on labour and employment law matters, both contentious and non-contentious, data protection, corporate and M&A, and regulatory and compliance matters. Petra advises both foreign and domestic clients on all aspects of employment relationships, mainly on termination procedures, transfers of undertakings, matters with unions, works councils and collective bargaining agreements, inspectorial proceedings, occupational health and safety, working permissions, labour and social rights. Within the field of data protection, Petra has been very active in advising on new practices implemented by the EU's General Data Protection Regulation and its effects in Slovenia. On the corporate side, Petra advises on general matters of corporate law, mergers, cross-border transactions, liquidation procedures and entries of foreign companies into the Slovenian market. Regulatory work includes various aspects of administrative law, in particular environmental and food law, cosmetics and pharmaceuticals, consumer protection.

Petra speaks excellent English and has a working knowledge of German and Croatian.

JULIANA M SNELLING

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Juliana Snelling (née Horseman) is a Rhodes Scholar, a director and partner of Canterbury Law Limited and a member of the Bar of England and Wales (1994), the Law Society of England and Wales, and the Bermuda Bar (1995). She is also a member of the Honourable Society of the Inner Temple and a member of the Chartered Institute of Arbitrators.

Ms Snelling's principal work involves advising local and exempted companies and senior-level business executives on a whole range of issues concerning Bermuda employment and labour law. She also practises in most areas of civil litigation.

She currently serves on the Bermuda Medical Council, assisting with legal matters concerning medical practitioners. She served for three years as chair of Bermuda's Land Valuation Appeal Tribunal and for several years as a member of the Professional Conduct Committee of the Bermuda Bar Association and the Treatment of Offenders' Board.

Who's Who Legal: Labour & Employment 2019 writes: 'Juliana Snelling is recommended by peers internationally for her labour and employment practice, which includes advising offshore companies and senior executives on employment matters.'

The 2018 edition of *Who's Who Legal: Labour & Employment* stated: 'Juliana Snelling stands apart as the top labour and employment lawyer in Bermuda, according to our research, thanks to her comprehensive understanding of the area.'

UELI SOMMER

Walder Wyss Ltd

Ueli Sommer is a partner at Walder Wyss Ltd, one of the leading law firms in Switzerland. Ueli heads the firm's employment group. He has many years of experience in all aspects of employment law, with a focus on compensation and benefits. He also advises international companies and private individuals on immigration issues. He has supported many companies and high-level executives in regard to the conclusion and termination of employment agreements and termination arrangements. He has also an extensive experience in restructuring and lay-offs.

Born in 1970, Ueli Sommer was educated at Zurich University (*lic iur* 1995, *Dr iur* 1999) and at the University of New South Wales in Sydney (LLM 2001). In 2001 and 2002, he worked as a foreign associate for Allens Arthur Robinson in Sydney.

Ueli Sommer is a member of the board of the European Employment Lawyers Association, past chair of the International Employment Law Committee of the ABA Section of International Law, former president of the board of the Australian Swiss Chamber of Commerce and Industry, and senior vice chair of the Discrimination and Equality Law Committee of the International Bar Association. He publishes regularly in legal journals and gives speeches at national and international congresses.

Ueli is recommended by *Chambers and Partners* for his employment expertise and is mentioned as a leader in his field by *The Legal 500*.

JESSICA STÅLHAMMAR

Wesslau Söderqvist Advokatbyrå

Jessica heads the firm's labour and employment law expert group, and is also a member of the dispute resolution expert group.

Jessica works closely with companies' HR departments, providing advice on both day-to-day operational and strategic issues, and on labour and employment law negotiations and legal proceedings. As part of the day-to-day operating activities, she also assists many foreign clients with cross-border relationships. Jessica is in demand as a public speaker and columnist in the field of labour and employment law.

Jessica began her working life on the judiciary career path, but in 2000 she joined MAQS Law Firm as a legal associate in employment law. In 2009, she became a joint owner of Wesslau Söderqvist. Jessica now has also almost 20 years' experience in providing advice on every aspect of labour and employment law.

CAROLINE SYLVESTER

Clemens

Caroline Sylvester is an attorney in the employment, corporate immigration and data protection law department at Clemens, a substantial full-service firm by Danish standards.

Caroline advises a variety of Danish and multinational clients on all aspects of employment law. Among her specialisms are termination of employee contracts, employee disputes, restrictive covenants and multi-jurisdictional employment matters.

Caroline also has a lot of experience in data protection law. She advises clients on the GDPR and has been involved in several GDPR compliance projects for mainly medium-sized and large companies, including several large multinationals.

Owing to her specialisms, Caroline has a profound understanding of the interfaces between data protection law and employment law considerations, which is highly relevant when advising clients.

She is a member of the Danish Association of Labour and Employment Lawyers. Before joining Clemens (on 1 September 2016), Caroline worked for several years with Tommy Angermair in the employment department at Kirk Larsen & Ascanius.

ANNA TERRIZZI

Dentons & Co

Anna Terrizzi is an associate in the UAE corporate and commercial team. Anna advises on commercial matters, ranging from company establishments and company administration to supply and distribution arrangements and employment matters.

ROMANA ULČAR

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Romana Ulčar graduated from the Faculty of Law, University of Ljubljana, and is currently continuing with her studies by attending the master's study programme, commercial law module. The topic of her master's thesis is The Current Issues of Student Work in Practice. During her studies, she gain valuable experience from the Pitamic competition, the Employment Law Clinic and the Legal Solution competition.

She has been a legal assistant at Petra Smolnikar Law since 2019, advising clients on various employment-related areas, such as termination of employment relationships, health and safety at work, working hours, collective agreements and employees' special protection against dismissals. Romana drafts a variety of working regulations, employment and other work-related contracts. She also assists in data protection matters and civil law questions. She speaks English and basic Russian.

CHRIS VAN OLMEN

Van Olmen & Wynant

Chris Van Olmen is the founding partner of Van Olmen & Wynant, a boutique law firm focusing on employment law. He is also co-founder of L&E Global, an international alliance of leading niche employment law firms.

For more than 20 years, Chris has been lecturing on social law in the traineeship programme organised by the Brussels Bar. He also served as a member of the Brussels Bar Council and is a board member of the Association for Social Law.

Chris is past chair of the International Bar Association (IBA) Employment and Industrial Relations Law Committee and Secretary of the Global Employment Institute of the IBA.

Chris is also a member of the European Employment Lawyers Association and of the American Bar Association (labour and employment law section), and has been a speaker or moderator at numerous national and international seminars and conferences.

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José Daniel Gatti Vergna provides consultancy and litigation support to foreign clients in all types of labour and employment matters, including international labour law. He also has broad experience in reviewing the labour and employment aspects of cross-border corporate and finance transactions.

FERNANDO VILLALOBOS

Porzio Ríos García

Fernando Villalobos joined the firm in 2015. He is a senior associate and a member of the employment, labour and social security team. In 2014, he worked for the International Labour Organization, Switzerland, and for the regional office for Asia and the Pacific, Thailand, as legal consultant in social security matters. From 2010 to 2013, he was Legislative Adviser for the Ministry of Labour and Social Security of the Republic of Chile. He is a professor for the LLM programme of study at the Catholic University of Chile. Mr Villalobos worked previously with Carey & Co, Baker & McKenzie Chile and CorreaGubbins.

LI WANCHUN

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Li Wanchun is a senior associate with TSMP's employment and labour team, and assists clients on various aspects of employment and labour law. Wanchun also handles a wide variety of corporate and commercial disputes and arbitrations, including matters concerning fraud, trusts and equity, insolvency, investment and international trade. A Chinese national, Wanchun also advises on a number of corporate and restructuring matters concerning Chinese corporates and transactions.

JAMES WARREN

Dentons Kensington Swan

James Warren is a partner in the employment team at Dentons Kensington Swan, with specialist experience supporting organisations in both the United Kingdom and New Zealand with workforce change, employee relationships and disputes, and the employment issues arising out of commercial transactions.

He advises a range of clients in various industries with domestic and international footprints, having a particular interest in the technology, media and retail sectors.

James is regularly instructed on multi-jurisdictional projects and business transformations, complex reorganisations and the implementation of global policies. He is also an approachable and responsive advocate when dealing with disputes, grievances and claims, focused on delivering practical and commercial solutions.

SIMONE WETZSTEIN

Walder Wyss Ltd

Simone Wetzstein is a managing associate in Walder Wyss' employment group. She specialises in the areas of employment, social security and residence law, and also practises in contract and corporate law. She advises in contentious and non-contentious matters and appears on behalf of her clients in the Swiss courts. Simone has a particular interest and legal expertise in anti-discrimination law and matters of gender equality.

Born in 1984, Simone Wetzstein was educated at the University of Zurich and the University of Haifa, Israel (*lic iur* Zurich 2010). She graduated with an LLM from Columbia Law School in May 2017 as a Fulbright Scholar.

THOMAS WINZER

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Thomas Winzer heads Gleiss Lutz' employment practice. He advises German and international clients on complex matters concerning labour and employment law, in particular in connection with corporate transactions and reorganisations, compliance investigations, works council matters and co-determination, as well as on occupational pension schemes.

Thomas is a member of the German Bar Association's labour law working group and the European Employment Lawyers Association. Thomas studied law at the universities of Heidelberg and Munich. He joined Gleiss Lutz in 2002. In 2004–2005, Thomas was seconded to a law firm in New York City and San Francisco. Thomas has been a partner in Gleiss Lutz's labour and employment group since 2009.

JACK YOW

Rahmat Lim & Partners

Jack Yow heads the litigation practice at Rahmat Lim & Partners. His areas of practice include corporate, banking, industrial relations and employment law litigation. Jack's extensive experience includes, among other things, acting for a local financial institution leading to recovery of a multimillion-ringgit facility from a public listed company, obtaining a favourable KLRCA (AIAC) arbitration award for the Malaysian subsidiary of a public listed German company in a multimillion-dollar contractual dispute, advising receivers and managers of companies in receivership as well as acting for liquidators in insolvency proceedings.

Jack is consistently recognised by legal publications for his professionalism, including *Chambers Asia-Pacific*. The publication noted that he is 'very professional, ethical and really humble' and described him as 'very knowledgeable'. *The Legal 500 Asia-Pacific* has recognised that Jack offers both 'sound advice' and 'pragmatic advice and out-of-the-box thinking'. Jack was also listed as a Local Disputes Star in *Benchmark Asia-Pacific*.

ANNEMEIJNE ZWAGER

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As an employment law specialist, Annemeijne Zwager advises both national and international clients on a broad spectrum of employment law issues, including individual and collective dismissals, reorganisations, mergers and acquisitions, and employee representation. Annemeijne also litigates on these subjects.

Appendix 2

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