ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKAT FIRMAET SCHJØDT AS
ALI BUDIARDJO, NUGROHO, REKSODIPUTRO
ALRUD LAW FIRM
ARIAS, FÁBREGA & FÁBREGA
BAYKANIDEA LAW OFFICES
BORDEN LADNER GEROVAIS LLP
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JIMÉNEZ CRUZ PEÑA
KOCHHAR & CO
KROGERUS
LAW FIRM ŠAFAR & PARTNERS, LTD
LOYENS & LOEFF LUXEMBOURG S.À R.L.
Acknowledgements

MATHESON
MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA ADVOGADOS

MINTERELLISON
MINTERELLISONRUDDWATTS
OSTERMANN & PARTNERS LLP
PERCHSTONE & GRAEYS
PEREZ ALATI, GRONDONA, BENITES & ARNTSEN
PROSKAUER ROSE LLP
RUTGERS & POSCH
SAYENKO KHARENKO
SOŁTYŚIŃSKI KAWECKI & SZLĘZAK
TSMP LAW CORPORATION
VAN OLMEN & WYNANT
VIEIRA DE ALMEIDA
VILLARAZA & ANGANGCO
WALDER WYSS LTD
WESSLAU SÖDERQVIST ADVOKATBYRÅ
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For the past nine years, we have surveyed milestones and significant events in the international employment law space to update and publish The Employment Law Review. In updating the book this year, 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 10 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This tenth 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 year, we proudly introduce our newest general interest chapter, which 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 in order to bring awareness to the prevalence of this issue in the workplace. In this new chapter, we look at the movement’s success in other countries and analyse how different cultures and legal landscapes impact 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 M&A 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, along with 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 2018 in nations across the globe, and this is one of our general interest chapters. In 2018, many countries in Asia and Europe, as well as South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulations 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 remain under-protected and under-represented in the workforce, 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 focused 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 this chapter not only underscores how the workplace is affected by religious beliefs, but also examines how the legal environment has adapted to such beliefs. 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 45 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. 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 associate, Vanessa P Avello, for her invaluable efforts to bring this tenth edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2019
Chapter 1

THE GLOBAL IMPACT OF THE #METOO MOVEMENT

Erika C Collins

I INTRODUCTION

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

The current political climate and widespread social media use helped #MeToo promulgate its message and impact 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 international jurisdictions.

II UNITED STATES

The Me Too movement was founded by Tarana Burke in 2007 during her work to provide resources to victims of sexual harassment and assault. As mentioned in Section I, the movement went viral on social media on 15 October 2017. In just 24 hours, more than 12 million posts and reactions included #MeToo. One-and-a-half weeks after Milano’s tweet, more than 1.7 million tweets across 85 different countries included #MeToo.

Milano’s tweet was set against a historic Hollywood backdrop: on 5 October 2017, The New York Times published a story exposing numerous women’s sexual assault and harassment allegations 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 leave from the Weinstein Company the same day, and was officially fired three days later from the powerful production company he co-founded. On 10 October 2017, The New Yorker released another bombshell report. Multiple women accused 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 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.

1 Erika C Collins is a partner at Proskauer Rose LLP.
The #MeToo movement existed for over a decade before it truly gained momentum and resulted in tangible consequences for those accused. The current political climate likely contributed to #MeToo’s success. Many Americans feel and act more politically inclined following the results of the 2016 presidential election. An estimated 4.9 million marchers across 673 affiliated marches attended the first planned Women’s March the day after President Trump’s 2017 inauguration. 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 sex. 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 work environment 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.

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. If employers make an adverse employment decision as a consequence of an employee submitting to or refusing to submit to the 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).

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 New York Times report was published, Weinstein was fired from the company he co-founded.

But the response in Italy was very different. Despite the credibility associated with allegations by over 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 news and 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 was originally consensual. Libero’s editor publicly stated Argento should be grateful Weinstein forcibly performed oral sex on her. 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’. 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. 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, and few other prominent Italian figures have faced similar consequences during 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 by the Weinstein report has not ‘had the same effect’ in Italy. As to why, she joked ‘in our country, there are no harassers’. She went on to admit harassment was rampant, but Italy’s ‘strong prejudice’ against women causes them to remain silent.

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. She notes that traditional Catholic education preaches gender roles that include a woman’s role as an obedient ‘good wife’. In the #MeToo context, this rigid gender role may discourage reporting unchaste or taboo acts of sexual harassment.

Italian politics may also be a more recent contributing factor to the prejudices against women in the sexual harassment context. Perhaps one of today’s most well-known Italian politicians 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. Berlusconi 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.

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8 id.
9 See Poggioli, note 6.
11 id.
12 id.
13 id.
14 See Poggioli, note 6.
15 See Poggioli, note 6.
In addition to his political career, Berlusconi is also a billionaire media mogul and 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. Though Berlusconi has not held office since 2011, his political career is currently making a comeback as his six-year ban on political office for a tax fraud conviction in 2012 nears an end. Berlusconi’s prominence likely reinforces stereotypes and prejudices against women.

ii France

#MeToo evoked a different reaction in neighbouring France. The French equivalent of the hashtag, #BalanceTonPorc, translates into ‘rat out your pig’. The hashtag encouraged French women to use social media to name their abusers and inspired hundreds of thousands of posts. French President Emmanuel Macron’s actions stand in stark contrast to Berlusconi’s: Macron generally encourages policies promoting gender equality and urged revoking Weinstein’s Legion of Honor, which he won in 2011.

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 published in a daily French newspaper, Le Monde. The letter denounces #MeToo as ‘puritanical’ and represents a feminist theory born out of the 1960s sexual revolution. These feminists believe #MeToo undoes much of the sexual revolution’s work of de-censoring sexual desire. The #MeToo backlash in France is also likely influenced by a culture that encourages flirtation and seduction. The letter also explicitly defends men’s right to pester women. Berlusconi described Deneuve’s letter as ‘blessed words’.

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. Indeed, disagreeing French feminists wrote letters in response to Deneuve’s. 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”.24 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.

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.25 This cultural value may further deter women from reporting sexual harassment. Indeed, in a May 2018 survey of over 200 large and medium-sized Japanese companies, only 14 per cent of companies surveyed said they received complaints of sexual harassment in the past year.26 A 2015 government survey found 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.27 Japanese culture pressures people to ‘bear one’s hardship’.28 This deters reporting, and may help explain the culture of widespread victim-blaming.

Women’s status in the workforce also may help account for under-reporting. Though Japanese women participate in the labour force at a higher rate than US women, their prospects for advancement and overall outcomes are often worse.29 According to OECD data from 2016, just 0.7 per cent of women employed were managers, compared to 3.5 per cent of men employed. For comparison, data from 2013 shows that in the United States, 14.6 per cent of women employed were managers, while 16.9 per cent of men employed were managers. Even more starkly, only 3.4 per cent of seats on boards of the largest publicly listed companies in Japan were held by women in 2016.30 In the United States, that number is 16.4 per cent. Japan ranked 114th out of 144 countries in the World Economic Forum’s 2017 gender gap report.31 Perhaps women’s low status in the workforce deters them from

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31 id.
reporting: an April 2018 online poll of 1,000 working Japanese women found 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. Yet companies have not prioritised improving sexual harassment policies: a May 2018 survey found 78 per cent of companies said they had not strengthened sexual harassment policies, and 77 per cent said they were not considering policy changes.

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 impact in 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, though he admitted no wrongdoing. This was the first time in 20 years that a senior official from the finance ministry resigned over misconduct. Still, the immediate reaction to the reporter’s accusation was not supportive of her accusation. The reporter 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 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 pressuring victims to face their harassers.

India

India’s violent and 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 five upper-caste men’s plan 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 pressured the police into allowing 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.

32 See Kurumi Mori, note 27.
33 Sexual harassment policies, note 26.
The committee is required to provide certain types of rectification 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.35

As Devi and 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.36 As evidenced by the public outcry following Singh’s brutal gang rape, Indians also have begun to demand safety for women from sexual assault. Still, #MeToo faces obstacles in India, where many still see women as inferior to men.37 In a common criticism of the movement, many Indians have outright rejected #MeToo 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 urban and 64 per cent of rural Indian women do not have internet access.38

#MeToo could become a rallying movement, particularly in Bollywood. In Bollywood, many female actresses find it commonplace to be asked for sexual favours in return for acting roles.39 One anonymous actress was sexually assaulted by a casting agent. When she reported the event to the police, they told her people in the film industry can do whatever they want.40 Actresses that refuse sexual advances face the possibility of retaliation or being blacklisted.41 India’s regional film industries are also slowly bringing the industry’s abuse into the public eye. Sri Reddy, a ‘Tollywood’ actress, staged a nude protest in April 2018. Videos of Reddy’s protest spread over the internet and incited comments that she was merely attempting to further her career.42 Radhika Apte, one of the few Bollywood stars to speak out about her experiences refusing producers’ sexual advances, explains one barrier to Bollywood catching onto the #MeToo movement is the system of earning film roles in Bollywood. Unlike in Hollywood, where theatre and acting education is heavily valued, earning roles in Bollywood is based on professional contacts, personal conduct and appearance.43 Bollywood’s #MeToo movement may be yet to come, given women’s reluctance to report abuses.

38 Ananya Bhattacharya, In India, the internet is a place for cityfolk and men, Quartz (21 February 2018), https://qz.com/1211218/in-india-the-internet-is-a-place-for-urban-dwellers-men-and-youngsters/.
40 id.
41 id.
43 See #MeToo: Why sexual harassment is a reality in Bollywood, note 39.
V EGYPT

Sexual abuse in Egypt is also common, as indicated by a 2017 UN poll. The poll ranked Cairo as the most dangerous megacity for women based on factors including how well-protected women are from sexual assault. 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 between six months and five years. Harassers who hold a position of power over victims, including in the workplace, face longer sentences.

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. 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. 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 impacted Egyptian society’s practice of religion. Mona Eltahawy is an Egyptian-American activist and journalist. When she was 15 years old, she journeyed to Mecca, 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 ‘taboo’ around sexual harassment ‘in sacred spaces’. Similar stories of sexual assault in the Muslim world and during holy Islamic exercises are shockingly common. Many Muslim women are hesitant to report abuse because they do not want to fuel Islamophobia. Others may fear a conservative

49 id.
50 id.
backlash that could result in men and women being separated while praying at holy sites. #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. TV host Horacio Villalobos called the women ‘irresponsible . . . to go on TV and refuse to name names and make false accusations’. Just as in Italy, the media’s reaction was overwhelmingly critical of women’s decisions to report abuse. And just as in India, some in the Mexican entertainment industry have experienced widespread sexual harassment in their industry for decades. Sabina Berman reports 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.

But the media response was not completely one-sided. Security analyst Alejandro Hope published an article with his explanation of why women choose not to report abuse in his weekly op-ed column. Hope cited numerous factors, including that women who report do not receive judicious outcomes, and 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. 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 deeply rooted in Mexico’s culture and society. Machismo culture may help account for rife gender-based violence against women in Mexico: between 2007 and 2015, the femicide rate

51 id.
53 id.
54 id.
56 See Hope, note 55.
The Global Impact of the #MeToo Movement
doubled from 1,086 per year to 2,555 per year. Rafael Vallejo Gil, a labour and employment partner at the Mexican law firm Gonzalez Calvillo, agrees that deep-seeded 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 the Mexican government’s concerted effort 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 the company’s shallow attempt to maintain a positive image.

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.

58 id.
59 Telephone Interview with Rafael Vallejo Gil, Partner, Gonzalez Calvillo (6 July 2018).
60 id.
61 id.
62 id.
EMPLOYMENT ISSUES IN CROSS-BORDER M&A TRANSACTIONS

Erika C Collins, Michelle A Gyves and Vanessa P Avello

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 any time a corporate deal is contemplated involving a global workforce.

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 such 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...
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are often less complicated than in other types of transactions. While it is still important to 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 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 countries, 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 recently enacted General Data Protection Regulation (GDPR) has significantly increased individuals’ rights with regard to their personal data, the level of protection companies handling such data 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 recently enacted in France, Mexico, Colombia and Brazil. Failure to identify the 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. It is necessary, however, 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 US 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 such 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 as well as in certain non-European jurisdictions throughout Asia and the Americas, including Brazil, Colombia, Singapore and South Korea. Where such 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 across jurisdictions, in general, a business transfer will be deemed to have occurred where an independent business unit is transferred and the activities of such unit continue with the buyer. It is also necessary to assess which employees will transfer. Typically, this inquiry is straightforward with regard to employees that work exclusively for
the transferred business but can be more complicated with regard to employees that support both transferred and non-transferred businesses, particularly employees in shared services roles. Different jurisdictions have different standards for addressing whether such employees transfer automatically or would need to consent to transfer. Finally, in some 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. Where 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 such 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 such 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 such employees’ consent. Typically, such transfers would require the maintenance of terms and conditions and recognition of years of service, 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 EU 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 such 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 in order to prepare the company for such transfer (e.g., creation of new subsidiaries for acquisition and movement of employees and other assets into or out of target companies). Such 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 until 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 UK, 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, the 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 EU, 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 US, under the doctrine of at-will employment, there are generally few restrictions on such 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). Outside the US, however, 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
Employment Issues in Cross-Border M&A Transactions

other employee representatives have the right to be consulted about planned terminations, and many countries require an employer to agree with such 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 such 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 UK, 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 in order to employ the transferred employees. In order 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 which a liaison office can undertake), a project office, joint venture or 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 both 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) in order 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 characterise many M&A transactions today. 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.
INTRODUCTION

Over 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. In the past 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 as well as 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 regulation, 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.
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 2015 and then again in 2017, members of the US Congress introduced 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 sex, sexual orientation and gender identity.

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. These under-represented groups include certain castes and religious minorities. Similarly, Malaysia and Nigeria also have affirmative action programmes for public service employees in order to attain the desired balance of ethnicities. In contrast, however, outright ‘quota’ programmes have been rejected for the most part in the US by the Supreme Court, where the prevailing philosophy is for employers to make ‘blind’ determinations with respect to race, national origin, sex 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 sex-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 sex. For employers in the US 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.

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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 boardroom 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 Norway. 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. 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 groundbreaking 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 substantially increase women’s representation on corporate boards. In Australia, the Council of Superannuation Investors and 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. As of 31 December 2018, 96 ASX200 companies had met this target. Moreover, in 2018, the ASX Corporate Governance Council issued a draft consultation recommending that ASX300 boards also achieve a 30 per cent target. 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, by 2020, of 40 per cent women among non-executive directors of companies listed on stock exchanges. 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 as well. 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 female directors on boards in the public sector. Similarly, Brazil has a 40 per cent target, by 2022, for female representation on the board of state-controlled enterprises; India’s Companies Act, 2013, requires prescribed classes of companies to have at least one female board member;
Israel and the United Arab Emirates require all companies and government agencies to have at least one woman on the board; and in 2014 Japan’s Prime Minister Shinzo Abe announced the goal of increasing the percentage of women in executive positions at Japanese companies to 30 per cent by 2020, and on 1 April 2016 a new law in Japan that promotes women’s career activities took effect that requires private and public sector Japanese companies with over 300 employees to disclose gender diversity targets.

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 US, the issue has become a linchpin of congressional debate in the last few years. 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 California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Nebraska, North Dakota, New York, Oregon, Puerto Rico and Utah, 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 US still hovers around 20 per cent.

Other countries also continue to confront pay disparity issues. Although foundational treaties in the EU guarantee equal pay for work of equal value for all citizens, the gap between men and women’s hourly gross earnings throughout the entire EU remains at approximately 16 per cent, and several Member States have adopted remedial measures in recent years. 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 obligates a corporation with over 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 who employ 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 EU 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**

A recent 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 US, 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. 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.

In the EU, some Member States have recently addressed the problem of workplace harassment by placing an affirmative duty upon 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 upon employers to protect employees from not only discrimination from superiors and co-workers, but from third parties, such as customers, as well. 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 EU 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 recent 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 will 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 EU 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, India’s Supreme Court recognised transgender people as constituting a legal third gender in April 2014, 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 the 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 US, the Supreme Court has paved the way for gay marriage. Additionally, several US jurisdictions have outlawed discrimination based on sexual orientation and, in 2015, the Equal Employment Opportunity Commission concluded 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. Also 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, significant barriers to provide equality to transgender individuals remain as they continue to face discrimination, harassment and barriers to access in the healthcare system, in addition to in society generally. For example, in 2016 and 2017, several states, including Arkansas, Tennessee, Mississippi and North Carolina, introduced or enacted anti-LGBT legislation. More recently 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 over health insurance coverage of transgender employees, including, for example, whether to cover sex-change surgeries. As this issue continues to make headlines, there will likely 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

In order 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 wholesale exportation 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

In order 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 EU, 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 emphasises 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 recently come into effect in India, Malaysia, Mexico, South Africa, South Korea, Brazil and the Philippines, among other jurisdictions. In India, the 2011 Information Technology Rules not only distinguishes ‘personal information’ from ‘sensitive personal information’, but also requires 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. 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.’ As plaintiffs’ bars around the world will likely 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. Companies should, however, 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 recent 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 not only will become more important for success in the marketplace but also will become 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.
Chapter 4

SOCIAL MEDIA AND INTERNATIONAL EMPLOYMENT

Erika C Collins

I INTRODUCTION

The early part of the 21st century has been characterised by the rapid proliferation of mobile devices and social media platforms. At the end of 2016, there were about 3.8 billion smartphone users in the world, and by 2020, there will be 5.7 billion. The Asia-Pacific will account for about half of this growth as India surpassed the United States to become the second-largest smartphone market in 2016 with 347 million smartphone connections. In the United States, by 2020 it is expected that nearly 81 per cent of all mobile users will own a smartphone – a significant increase from 26.9 per cent in 2010. In China, it is estimated that the rate of smartphone users will rise to 74 per cent by 2020. Concerning mobile devices, in the third quarter of 2017 alone, Apple announced that it sold 45.4 million smartphones. Along the same lines, Facebook, arguably the most popular form of social media, has reached 2.07 billion monthly active users, over 1.74 billion of whom access the site on mobile devices. Furthermore, Facebook-owned Instagram has over 800 million monthly active users, Twitter has 330 million monthly active users and LinkedIn has 106 million monthly active users (although LinkedIn has over 467 million members). In China, WeChat, Tencent’s popular messaging app, surpassed 889 million monthly active users in the fourth quarter of 2016, an increase of over 350 million users since the first quarter of 2015. By 2020, there will be 3.1 billion unique mobile subscribers in the Asia-Pacific compared to 2.7 billion subscribers in 2016. Most of this growth will come from India and China. The number of 4G connections in India is also forecast to grow rapidly, increasing from approximately 3 million connections at the end of 2015 to 280 million connections by 2020.

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, and 43 per cent of businesses allow all their employees to access social media sites at work. Even more important, however, is the fact that nearly 60 per cent of businesses noted that they monitor employee social media use at work. In turn, employers must be cautious about what actions they undertake 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 and Twitter (or all three) in some capacity. Additionally,
if a company wishes to join the 36 per cent of employers who ban social media use at work (one in five companies blocks 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. Regardless, if a company seeks to prohibit social media during work time, which is generally permissible, it is well advised to clearly communicate such policies and connect such 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 new technologies in the workplace.

II RECRUITMENT

Employers must determine, for example, the extent to which social media will play a role in employee recruiting efforts. Throughout the world, most employers require some form of background information on candidates for employment. 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 the candidate’s online profile and information posted on social networking sites and the internet. One survey in 2017, for example, found that 70 per cent of employers check job applicants’ social media profiles prior to making a hiring decision and 54 per cent of employers decided not to hire a candidate because of information found on social media. Information on these sites and the 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 treasure trove of information for employers considering applicants for employment, there is widespread debate – as evidenced, for example, by the debate across the EU in recent years over the ‘right to be forgotten’ – over whether this information should be reviewed and considered by

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2 EU Justice Commissioner Viviane Reding speaking in November 2011 stated that individuals would have a right to force organisations to delete personal data that they store about them. In June 2015, the Council of the European Union released their general approach to the EU Data Protection Regulation. In December
employers during the recruitment process. And this debate is reflected in the widely varying laws on this topic throughout the world. Indeed, the European Court of Justice is set to determine whether the ‘right to be forgotten’ can apply beyond the borders of the EU, which would require search engines, such as Google to remove links to certain information globally.

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 a public policy issue. In France, as long as information on 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 the violation of the right to private correspondence or privacy, then potential employers and any third parties (including recruitment agencies) are entitled to look at such information. The candidate must, however, 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 on a severe disability or equal treatment; and the employer may only solicit information from the previous employer if it has the consent of the candidate. Similarly, in the UK, 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 on a candidate if it is relevant to the job decision being made and that it views the gathering of such information as a form of vetting. Further guidance also is available from the UK’s Advisory, Conciliation and

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2015, the European Parliament, European Commission and Council of the European Union reached an agreement on new data protection rules, establishing a modern and harmonised data protection framework across the EU. The European Parliament’s Civil Liberties committee and the Permanent Representatives Committee of the Council then approved the agreements with very large majorities. In May 2016, the official texts of the EU Regulation and EU Directive with regard to the processing and protection of personal data were published in the EU Official Journal in all official languages. The General Data Protection Regulation (GDPR) entered into force in May 2016 and applies from May 2018. The Directive also entered into force in May 2016, and EU Member States were meant to have transposed it into their national law by May 2018. The objective of this new set of rules is to give citizens back control over of their personal data and to simplify the regulatory environment for business.

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.
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.

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:

- the evidentiary weight to be given to information obtained from a social media site;
- 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;
- 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 impact on a particular group; and
- 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 monitoring of such 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.

Such 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 also allow employees to choose which device or operating system is most comfortable for them. Such 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 scenarios
in which an employer will want to be able to access, review or even delete data and other information 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 also be obliged to produce such 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 residing on an employee’s personally owned device. 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 such 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 such third party’s consent could violate German data protection, telecommunication and even criminal laws. Because it would be nearly impossible to avoid this on an employee’s personally owned device, companies should access such 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 employee 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 only to work from a company-issued device (and not to conduct personal business or store personal information on such 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, such monitoring must be reasonable and not rise to the level of an invasion of privacy. Notably, the Court of Appeal for Ontario recently 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 UK 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 representatives 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 role 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 such behaviour, arguably, is yes, if such 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, what circumstances 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 US, for example, an employer is permitted to rely upon information obtained from social media sites such as Facebook and Twitter to terminate employment of its employees, 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 where such 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, the employer likely would be prohibited, under the NLRA, from terminating or taking other adverse action against such 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 such employer requests. In the UK, an employer is permitted to rely upon evidence from social networking sites when it terminates employee contracts even if such conduct takes place outside work hours and on personal equipment. The key to
the successful use of such 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 best
position them when difficult situations arise. With respect to social media, companies should
consider the following:

a determining, as a matter of principle, if personal use of social networking sites
is permitted during work time or from work equipment and any rules on off-duty
conduct. Consider whether certain sites can or should be blocked or if employees can
or should be expressly prohibited from mentioning their employer, place of work,
customers and colleagues;

b whether, as a matter of principle, business use of social media sites is permitted and set
out clear examples of acceptable behaviour;

c encouraging employees to draw a distinction between their personal correspondence
and usage and their working life;

d prohibiting the disclosure of confidential, business, client or personal information and
trade secrets and making derogatory or defamatory comments; and

e prohibiting anonymous communications to ensure that there is no risk of employees
being perceived to promote or comment on the employer’s products as well as 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 the employee that
the employer monitors employee 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).

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 such 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.
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;
c educate and train employees and managers on the policies; and

d ensure that the policies are enforced in a consistent manner.

If the 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 above 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 in 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

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 will compare 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, this chapter will focus on the relationship between headscarf bans and religious discrimination in the workplace across 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 went to the US to flee religious persecution and 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. 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 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.

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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.’ 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’. The second part, known as the free exercise clause, specially protects religion from government interference.

Title VII of the Civil Rights Act prohibits employers from discriminating against employees because of their religion. 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. Title VII also requires employers to ‘reasonably accommodate’ their employees’ sincerely held religious beliefs or practices that conflict with an employment requirement, unless the employer can show that the accommodation would cause undue hardship to the employer’s business.

A reasonable accommodation is any adjustment to the work environment that will allow the employee to practise his or her religion. Such 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 upon 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*. 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 his Sabbath. After refusing to work on Saturdays, he was fired for insubordination. The Supreme Court held that the company met its duty to accommodate, which does not require employers to breach contractual provisions. Specifically, the court explained that Title VII does not require more than a *de minimis* cost to an employer.
Although *Hardison* seemingly established a lenient standard for employers to meet in order to not accommodate an employee's religious beliefs, in practice, the doctrine has fluctuated over the decades. The Supreme Court recently discussed the nature of this duty in *EEOC v. Abercrombie & Fitch Stores Inc.*\(^\text{12}\) The case concerned a plaintiff who wore a headscarf when she applied for a position at her local Abercrombie store. During her interview, she never discussed 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.\(^\text{13}\) Furthermore, the court explained that in order 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.\(^\text{14}\)

III FRANCE

i Backdrop

Similar to the US, 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.\(^\text{15}\) 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.\(^\text{16}\)

The French word for its secular philosophy is *laïcité*. *Laïcité* requires a strict and formulistic interpretation of equality, under which the state is neutral and does not recognise the religious differences between citizens.\(^\text{17}\) Similarly, there is no concept of ‘minority rights’ or ‘minority groups.’\(^\text{18}\) 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.\(^\text{19}\) Some scholars have described France’s unique approach to religious liberty as the ‘privatisation of an individual’s faith’,\(^\text{20}\) 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.\(^\text{21}\)

\(^\text{13}\) id. at 2033.
\(^\text{14}\) id.
\(^\text{16}\) id.
Religious Discrimination in International Employment Law

ii Laws

Article 1 of the 1958 French Constitution declares that ‘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.’ Thus, the French government is legally forbidden from recognising any religion.

As a member of the EU, France abides by the principles of the 2000 EU Employment Equality Directive (the Directive). The Directive 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. 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’. 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’. However, the European Convention advises that this right may be limited to protect the ‘rights and freedoms of others’. As such, in 2010, the French National Assembly banned the wearing of niqabs, burqas and other articles of clothing that conceal one’s face in public spaces, finding the covering of the face to be ‘incompatible with the values of the [French] Republic’, and contrary to the ‘ideal of fraternity’ and the ‘minimum requirement of civility’ that is ‘necessary for social interaction’.

iii Important cases

In 2014, *SAS v. France* was brought before the European Court of Human Rights (ECtHR), a case that challenged the 2010 French law banning all facial coverings in public space. The applicant was a French woman of Pakistani origin who wore both the burqa, which covered her eyes, and the niqab, which left only her eyes uncovered. 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. There, the applicants, two French nationals, were enrolled in secondary education, but subsequently were suspended from school for wearing the niqab. The ECtHR found that the French ban was justified as necessary to maintain an environment of respect and to ensure the ability of other students to participate. As such, they were entitled to an education free from religious discrimination.

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22 1958 Constitution 1 (France).
25 Gedicks, *supra* footnote 17, at 477.
26 id.
28 *SAS v. France*, App No. 43835/11, 2014 ECtHR.
29 *Dogru v. France*, App No. 27058/05, 2008 ECtHR; *Kervanci v. France*, App No. 31645/04, 2008 ECtHR.
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 court 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 freedoms of others but also the public order.

More recently, 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. There, Ms Ebrahimian, a hospital social worker, 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 Bougnaoui 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 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 Bougnaoui was treated less favourably on the grounds of her religion and there was nothing to suggest that Ms Bougnaoui 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 likely would result in indirect discrimination as well, unless the policy pursued a legitimate aim and was proportionate.

Notably, however, in 2017, the Court of Justice 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 Directive. When an employer’s internal 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 Court 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 US, Germany supports the separation of church and state and adopts a policy of state neutrality.\textsuperscript{30} Germany’s method of achieving state neutrality is largely shaped

\textsuperscript{30} Davis, supra footnote 15, at 222.
by its history and the dramatic change in its population over the past few decades. In 1950, more than 96 per cent of the population in the Federal Republic of Germany belonged to one of the major Christian confessions. 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. By 2050, it is estimated that approximately 8.7 per cent of the German population will be Muslim. 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. This may be due in part to developments in work politics, debates on terrorism and security, and Islamism. Nonetheless, Germany neither strictly opposes state and religious communities nor entirely separates itself from them. Rather, Germany instructs authorities to assist and support the various denominations.

The German Constitution grants religious groups considerable autonomy because all religious societies regulate and administer their affairs independently within the limits of the law. Such autonomy allows each religious group to define what is legitimately classified as religion and religiously connoted behaviour, and places the government equally distant from all religious communities. However, the Constitution still allows the state to intervene and conduct a ‘plausibility check’ if it believes that a group is misusing this freedom.

ii Laws

Germany’s Constitution mandates that each of the 16 federal states remains neutral towards religion. Article 3 explains that ‘[n]o person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions.’ 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.

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

There is some private-sector recourse available under Section 75 of the Works Constitution Act. 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. The Works Constitution Act applies to all private sector companies in which a works council must be founded. The Act does not apply to discrimination in recruitment, but instead only to discriminatory treatment of current employees. It also does not apply to companies and establishments that directly and predominantly pursue political, coalition, religious, charitable, educational, scientific or artistic objectives. With such broad exemptions, private sector employees often lack legal recourse beyond invoking the employer’s general obligation to take care of its employees.

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.

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. The first is a 2003 teacher-headscarf case. There, 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

45 id.
46 id.
47 Betriebsverfassungsgesetz [Works Constitution Act], 15 January 1972, BGBl I § 75.
48 id.
49 These are companies with at least five permanent employees. See Suh and Bales, supra footnote 44, at 273.
50 id.
51 Works Constitution Act, supra footnote 47, § 118(1).
52 Suh and Bales, supra footnote 44, at 273.
specifically banning the display of religious symbols in public classrooms.54 The immediate consequence of the decision was that several German states immediately enacted laws forbidding teachers from wearing religious symbols in classrooms.55

However, in a recent 2015 teacher-headscarf decision, the Federal Constitutional Court arrived at the opposite conclusion.56 This time, 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 such 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.57 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.58 This ideology can be traced back to a few key periods. First are the Tanzimat reforms that were enacted during the Ottoman Empire.59 During these reforms, the phrase ‘religion of the state is Islam’ was removed from the Turkish Constitution of 1924.60 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.61 Finally, nine years after its introduction, laïcité was explicitly established in Article 2 of the Turkish Constitution.62

Although the Turkish notion of laïcité derived from France, laïcité, in Turkey, does not call for a strict separation of religion and the state, but rather it describes the state’s stance as one of ‘active neutrality’.63 For this reason, the Constitution contains a number of affirmative governmental duties to restrict religious expression. For example, Article 136 of the current Constitution establishes the Presidency of Religious Affairs (the Presidency),64 which is

54 Kronth and Augsberg, supra footnote 31, at 326.
55 Bundesverfassungsgericht [Federal Constitutional Court], 27 January 2015, Case Nos. 1 BvR 471/10, 1 BvR 1181/10 (German).
56 id.
57 Türkýye Cumhurýyetý Anayasasi Const. [Turkish Constitution], Article 2.
58 Ahmet Cevdet Kaplan, Turkish Constitution, supra footnote 58, Article 2.
62 Turkish Constitution, supra footnote 58, Article 2.
64 Turkish Constitution, supra footnote 58, Article 136.
mandated ‘[t]o carry out work on Islamic belief, worship, and ethics, enlighten society on religion and administer places of worship . . . in line with the principle of secularism’. Additionally, the Presidency appoints and pays all prayer-leaders (a’immah) and preachers (hatips).

ii Laws

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

In addition to Turkey’s secular constitutional provisions, in the public sphere, the By-law on the Garments of the Public Personnel covers officials and workers employed in the public sector because the prevalent idea is that the staff must represent state neutrality. As such, public officials and public sector workers must conform to specific dress codes. Thus, both men and women are prohibited from donning religious garments or symbols at 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. In recent years, 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. This article regulates the principle of equal treatment, prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion or philosophical belief, among others. However, the Labour Act does not impose a duty of non-discrimination on hiring in the private sphere. Similarly, there is no duty for employers to make reasonable accommodations for the religious needs of staff. 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.
iiii Important cases

One of the most important Turkish cases surrounding the headscarf debate occurred in 2005. This case, Sahin v. Turkey, was brought before the ECtHR, but was largely influenced by the 1989 decisions of the Turkish Constitutional Court. The 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 the ECtHR’s holding in Karaduman v. Turkey. 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 ECtHR 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 order 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. These decisions evince why Turkish courts will likely find that an employer’s desire to have a politically neutral workplace outweighs employees’ freedom of dress and religious expression.

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. Not only is Islam a central aspect of the nation’s historical identity, but it is also the basis of Saudi Arabia’s legal system, political system and social outlook.

The governing legal system is known as shariah law (shariah), and it is deeply rooted in traditional Islamic law. Shariah is based on religious texts and works of Muslim jurists.

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77 Sahin v. Turkey, App No. 44774/98, 2005 ECtHR.
78 Karaduman v. Turkey, App No. 16278/90 2003 ECtHR.
79 id.
80 Süral, supra footnote 66, at 591.
82 id. at 7.
83 id.

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and Muslim states during the last 15 centuries. Adherents of shariah believe that law and religion overlap and that 'law in Islam is divine, sacred and comprehensive.' Consequently, national policies do not legally recognise or protect religious freedom.

ii Laws

Shariah combines the Hanbali School of Law and the Wahhabi Doctrine. 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. Ultimately, Saudi judges are constrained 'solely by their own conscience in determining the will of God'. The Wahhabi Doctrine opposes innovation in religion and rejects interpretations of law and religion that are not based on traditional textual sources of law.

In 1992, King Abd al-Aziz attempted to create a more modern legal system and enacted the Basic Law of Governance. However, it was drafted absent any public debate and there was no referendum to ratify it. 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'. Article 5 establishes that Saudi Arabia is a monarchy and that rule is limited to the sons of the founder, King Abd al-Aziz, and the sons of his sons. Article 44 describes some separation of powers, with the caveat that the King shall be the final authority over the three branches of government.

The state prohibits public practice of any religion other than Islam. Women must wear a headscarf and a long cloak (abaya) that covers the entire body, head and face at all times. The law severely restricts all forms of public religious expression other than its own

84 id.
85 id.
87 Esmaeili, supra footnote 81, at 7.
90 Esmaeili, supra footnote 81, at 5.
91 id. at 29.
92 id.
93 id.
94 id.
95 id.
96 Saudi Arabia 2013, supra footnote 86, at 1.
97 Scully, supra footnote 88, at 862–63 and footnote 274.
Religious Discrimination in International Employment Law

interpretation and enforcement of Islam. In public, women must always be accompanied by a male relative. In the workplace, men and women must be segregated. In addition, the Islamic police force patrols the streets to enforce gender segregation.

In shariah courts, a woman's testimony is only worth half that of a man's testimony in capital punishment cases. 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. 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. 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. Moreover, as of June 2018, women are permitted to drive. Also in 2018, the country saw its first female anchor present the nightly news on the country's national television station. However, Saudi Arabia is still designated as a 'Country of Particular Concern' under the International Religious Freedom Act owing to its engaging in or tolerating particularly severe violations of religious freedom.

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 sex, women can be subjected to harsh penalties for intentionally or accidentally mingling with men at the workplace, even if such mingling was the result of the male's actions.

In one instance, a woman was convicted of illegal mingling after her employer entered the women's section of the workplace. 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. Similarly, Saudi Arabia criminalises contact

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99 Scully, supra footnote 88, at 862.
101 Scully, supra footnote 88, at 863.
102 Saudi Arabia 2013, supra footnote 86, at 4.
104 id.; see also Scully, supra footnote 88, at 859 and footnote 243.
105 Scully, supra footnote 88, at 827.
107 Saudi Arabia 2013, supra footnote 86, at 2, 18.
108 Human Rights Watch, supra footnote 100, at 90–91.
109 id.
between unmarried individuals of the opposite sex, which places rape victims at risk of prosecution for illegal mingling as well.\textsuperscript{110} In the high-profile \textit{Qatif} case, a court convicted a gang-rape victim of illegal mingling and blamed her for going out alone.\textsuperscript{111}

\textbf{VII INDIA}

\textit{i Backdrop}

India, a former British colony, gained independence in 1947 and enacted its Constitution in 1950. Pre-colonial Indian society was organised by the caste system, a system that segregated the population by inherited social status. In recent years, India has taken drastic efforts to overcome the bleak legacy of its caste system and to build a more egalitarian society.\textsuperscript{112} 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.\textsuperscript{113}

The reservation system is designed to promote minority populations and historically oppressed groups. Under the system, a percentage of posts that cannot exceed 50 per cent are reserved for ‘backward communities’, ‘scheduled castes’ and ‘scheduled tribes’ as defined by the government.\textsuperscript{114} Individuals who belong to one of these disadvantaged minority groups may be able to enter public jobs more easily and enjoy relaxed promotion requirements.\textsuperscript{115}

\textit{ii Laws}

The Constitution of India is arguably the most comprehensive Constitution in the world. It contains over 395 articles, numerous annexes and has been amended over 100 times.\textsuperscript{116} The Preamble defines India as ‘a sovereign socialist secular democratic republic’.\textsuperscript{117} India also 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’.\textsuperscript{118} 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.\textsuperscript{119}

\textsuperscript{110} id. at 21, 91.
\textsuperscript{111} 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. id. at 21.
\textsuperscript{113} id. at 150.
\textsuperscript{114} id.
\textsuperscript{115} id.
\textsuperscript{116} id. at 175.
\textsuperscript{117} India Constitution, preamble.
\textsuperscript{118} Alidadi, \textit{supra} footnote 112, at 174 (internal citation and quotation marks omitted).
\textsuperscript{119} id. at 170.
Article 14 of the Constitution establishes equal protection. Article 15 contains the non-discrimination principle on the basis of religion, race, caste, sex and place of birth that specifically applies to ‘access to shops, public restaurants, hotels and places of public entertainment’. Article 16 establishes the principles of equality of opportunity and non-discrimination in public employment, but allows for reservations for backward classes. Article 38 urges the state to minimalise income and status inequalities, and Article 46 promotes the educational and economic interests of weaker sections of society, in particular the scheduled castes and scheduled tribes. Notably, the Indian private sector is not subject to the reservation system. 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. As such, only victims suffering from a discriminatory act by a public body can seek constitutional legal remedies.

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. In 1976, in State of Kerala v. Thomas, the reservation system was again contested. State of Kerala involved government jobs in which the government decided to exempt members of the backward castes from taking mandatory tests for job promotions. The Supreme Court upheld such 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. 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. Under present Indian laws, the student has no legal

120 India Constitution, supra footnote 117, Article 14.
121 id. 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 Alidadi, supra footnote 112, at 176.
122 id. at 187–88.
124 id.
128 id.
recourse against the firm’s discriminatory policies.\textsuperscript{131} This story highlights how India’s lack of laws that prohibit private sector employers from direct religious discrimination sharply contrast with the US as well as most of Europe.

\section*{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 due to each nation’s unique history, which profoundly influences its political philosophy and legal system.

It makes sense that in the US, 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 have the opportunity to gain additional employment opportunities. For reasons alike, 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 \textit{laïcité} mandates that the government refrains from taking any stance on religious ideas; the Turkish notion of \textit{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.

\begin{footnotesize}
\footnote{\textsuperscript{131} id.; see also Abhishek Sudhir, Religious apartheid: India has no law to stop private sector from discriminating on grounds of faith. \textit{Scroll.in} (4 June 2015, 5:30pm), http://scroll.in/article/731392/religious-apartheid-india-has-no-law-to-stop-private-sector-from-discriminating-on-gounds-of-faith.}
\end{footnotesize}
Chapter 6

ARGENTINA

Enrique Alfredo Betemps

I INTRODUCTION

Labour laws in Argentina include:

a general laws;

b statutes for specific activities;

c collective bargaining agreements (CBAs) for different activities, trades or 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 also 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 houses (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. In order 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. In case of 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 respective 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 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 was performed or where the domicile of the employee is established. The employee can choose the jurisdiction in which to initiate the lawsuit.

II YEAR IN REVIEW

On 18 November 2017, the government sent a market-friendly draft bill to Congress known as the Labour Reform, which seeks to reduce labour claims and costs. Among other things, the bill:

a allows employers to regularise non-registered or unduly registered employment relationships. If passed, debts such as omitted social security contributions would be eliminated or reduced significantly, the employer would be exempt from payment of the aggravated compensation – payable by the employer to the employee – set forth by the Employment Act (Act No. 24,013) applicable in non-registered or unduly registered employment relationships, criminal actions for evasion of social security contributions would be ineffective and the employer would be removed from the public registry of labour sanctions;

b introduces reforms with respect to the individual labour regime, such as autonomous professionals, joint and several liability in the case of outsourcing, modifications to the employment relationship, certificate of services, licences, items that should be taken into consideration for the calculation of labour severance and interest rates;

c modifies the collective labour regime forbidding the granting of non-remunerative payments through CBAs;

d considers the possibility of setting funds for the payment of labour severance; and

e replaces the system for trainees (e.g., apprenticeships, internships).

Owing to the 2019 presidential elections and the lack of necessary congressional support, the government decided not to force the bill’s enactment during 2018 despite the Labour Reform being one of its key policies.
On 6 April 2018, the government enacted Resolution 168/2018 of the Ministry of Labour, which allows employers, with the consent of the employee, to pay employees’ salaries using mobile communication devices or other electronic media (e.g., a digital wallet). This mode of payment must not incur any cost for the employee.

On 1 October 2018, the Anti-Corruption Office approved Resolution 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 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. 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 27/2018 be understood because integrity programmes would generally be handled by HR departments with the assistance of labour law attorneys.

On 12 November 2018, Decree No. 1043/2018 was enacted, establishing a non-remunerative payment for private-sector employees of 5,000 pesos. This Decree intends to preserve the purchase power of salaries due to inflation. In December 2018, 50 per cent of the non-remunerative payment was paid in addition to the monthly salary and the remaining 50 per cent will be paid with the monthly salary in February 2019. Employees of the public sector, the agrarian regime and the special regime of particular houses are excluded from Decree No. 1043/2018. Employees who perform services in fewer working hours than the legal requirement will be entitled to a proportional part of the non-remunerative payment.

Signing parties of CBAs may adapt the terms and amount of the non-remunerative payment for companies or sectors that are in a critical situation or experiencing a decline in productivity. In addition, signing parties of CBAs in which salary increases were agreed may offset the increases with the non-remunerative payment. For employees not covered by a CBA, employers may offset the non-remunerative payment against unilateral salary increases (as of January 2018). Where the non-remunerative payment is added, compensated or absorbed, it will become remunerative in nature. Likewise, Decree No. 1043/2018 provides that until 31 March 2019, employers who decide to dismiss, without cause, employees hired under indefinite-term labour contracts should communicate the decision to the Ministry of Labour 10 days in advance. The Ministry may call the employer, the employee and the union representatives to as many hearings as it considers necessary to discuss the conditions of the labour termination. If the employer does not comply with this obligation, he or she may be subject to fines. Employees of the construction industry are excluded from this procedure.

The important and noticeable growth of work through digital platforms has attracted 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.

An important concern of employers during 2018 was the high number of labour lawsuits. Special attention was given to the significant amounts of money claimed based on illnesses and labour-related accidents, and on the non-registration or undue registration of labour relations.

There were also many union conflicts in 2018. Most of the unions and employers have agreed on the increase and revision of salaries through collective agreements.
III SIGNIFICANT CASES

On 4 July 2018, in Guala Closures Argentina SA v. Sabino Sebastián in re exclusion of union protection, the Supreme Court of the Province of Buenos Aires (SCPBA) accepted the claim raised by Mr Sabino, a union representative, against a court ruling that his union protection had been lifted. The SCPBA modified its traditional doctrine whereby a decision concerning lifting the union labour protection does not extend to the merits of the employer's decision, which should be dealt with in a later litigation. In revisiting the doctrine, the SCPBA followed the criteria established by the National Supreme Court In re Fate SAICI, and reasoned that lifting the union protection and evaluating the merits of the employer's decision in the same lawsuit and at the same time expedites the legal process, avoids duplicative legal actions and grants legal certainty.

In August 2018, the Supreme Court of Justice of the province of Mendoza issued a decision in Government of the Province of Mendoza v. Alcaraz Felipa in re exclusion of union protection, accepting the request of the province's government to lift the union protection of an employee who had reached retirement age. In relevant part, Section 252 of the LCA enables the employer to request employees who have reached retirement age to initiate the retirement process, but Section 52 of Act No. 23,551 on Trade Union Associations provides that working conditions of employees with union protection cannot be modified unless a court decision lifts the protection. The court held that it is reasonable to lift the union protection and to forbid the renewal of the union term of office from the time the employer notifies the employee that he or she should initiate the retirement process. The court reasoned that to hold otherwise would allow the employee with union protection to extend his or her employment contract indefinitely, which is contrary to the legal provisions that establish the conclusion of the employment contract in the case of retirement.

On 29 September 2018, the National Supreme Court issued a decision in Union of Employees of the Painting Industry v. Colorin Industria de Materiales Sintéticos SA in re collection of union contributions, where it held that a union has no right to collect items payable by non-members of the union following the same rules applicable to members. If a union member does not pay the corresponding member fees, the union has an efficient process to collect this debt by having it deducted from the employee's salary. The National Supreme Court decided that unions are not entitled to use this process with respect to employee solidarity contributions, payable by employees that are not members of the union, and employer solidarity contributions, payable by the employer to the unions.

IV BASICS OF ENTERING 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 of crew members (employees who render services on vessels). Since every aspect of the 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 the employer 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, fixed-term employment contracts are accepted to meet temporary requirements.
The LCA establishes that an employment contract for a fixed term should include the term of its duration and should also evidence that ‘the features of the work or of the activity, reasonably evaluated, justify that type of contract’. If the labour 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 the expiration 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 of 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 monthly salary per year of service or a further monthly salary for any part of a year that exceeds three months (see Section XII.i, ‘Compensation based on seniority’)). The fixed-term contract should not last more than five years.

There are other non-permanent contracts, such as temporary contracts for the accomplishment of specific goals of the employer related 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, 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 such regulations,
employees rendering services in Argentina should be registered in the labour books 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. These social security contributions are taken as a percentage of the employee’s salary. The employer’s contributions amount to 25.5 per cent of the employee’s salary and the employee’s contributions amount to 17 per cent.

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. In order to establish whether there is an employment relationship or an independent contract, the following circumstances should be taken into account, among others: whether the person is involved in a third party’s business, or his or her own business; whether the person performs services on an exclusive basis or for different clients; whether the person runs his or her own business organised as a company or as an individual; whether the business has its own address, which is different from the personal address of the owner; whether the business has its own employees; and 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 administration;
b register the mandatory labour book with the local labour authority;
c register each employee in the labour registries;
d report the hiring of the respective employee to the tax administration;
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 administration; and
g request information on the employee’s pension system status.

V RESTRICITVE 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 competing activities have been consented to by the employer). 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, in order 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 limit; 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 a maximum of 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 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 upon by the parties, but not beyond the working hours established by law, do not give rise to payment as overtime.

VII  FOREIGN WORKERS

Foreigners are protected by the same local employment laws as 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.

In order 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 foreigner is entitled to apply for a permanent visa. Foreigners performing scientific, technical or consulting activities, and executives, technicians and administrative personnel, who have

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

been moved from foreign countries to fill positions in their companies, receiving a fee or salary in Argentina, may also obtain a resident 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 governmental 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 rights granted to employees by applicable laws and CBAs.

Even though it is not mandatory, it is highly advisable that such rules be 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 to have a signed copy of them in the personal file of the employee. 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).

As mentioned in Section II, the Anti-Corruption Office has recently approved the guidelines that companies should comply with regarding the Criminal Liability Act. In this context, Resolution 27/2018 of the Anti-Corruption Office 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 internal channels for reporting irregularities, protection policies against reprisals and an internal manager in charge of the issues related to this law. Although it is not mandatory, having an adequate programme in line with the guidelines set forth by the Criminal Liability
Act and Resolution 27/2018 will have certain advantages for legal entities in establishing the scope of their liability under the guidelines. As a result, companies interacting with the public sector will have to carefully consider the implementation of such integrity programmes.

IX TRANSLATION

Since the official language of Argentina is Spanish, all public documents and records should be 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 case 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.

X EMPLOYEE REPRESENTATION

Union associations have been characterised as those set up on a permanent basis for the defence of the professional interests of employees.

There is a very important distinction between employee associations with union status representation (see below) and merely registered unions without union status representation: by law, only the former have union status representation rights. Employees 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, merely 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. In order 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 above, 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,\(^4\) grant union protection only to these unions,\(^5\) and prevent registered unions from representation of collective interests in a judicial action.\(^6\) Courts of lower rank must follow the decisions of the National Supreme Court.

According to Act No. 23,551, representatives of the employees in a company – whose term of office shall not exceed two years – should be members of the union with union status 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 over 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 their labour conditions 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.

### XI 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 databases 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. In order to register a database, companies must fill out 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 case of a breach, companies who have followed these recommendations are likely to be treated more favourably by the Agency.

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\(^4\) *Association of Employees of the Public Sector v. Ministry of Labour in re Unions Association Act*, 2008.


\(^6\) *Association of Employees of the Public Sector in re unconstitutionality action*, 2013.
ii Cross-border data transfers

No regulation requires the registration of transfer of data. Transfer of personal data (any kind of information, including full name, address, ID number) to countries or international organisations that afford adequate levels of protection does not require notification or consent. The transfer of 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, the international transfer of personal data to companies of the same economic group in countries that do not afford adequate levels of protection is 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 such information. Sensitive data is, among other things, personal data related 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 aspects related to his or her private life.

XII DISCONTINUING EMPLOYMENT

i Dismissal

The labour system is that of ‘improper permanency’, meaning that, in principle, the employer may dismiss any number of employees at any time (other than union representatives).

By law, the employer is not obliged to notify the union of prospective dismissals. However, as pointed out in Section II, Decree No. 1043/2018 provides that until 31 March 2019, employers who decide to dismiss, without cause, employees hired under indefinite-term labour contracts should communicate the decision to the Ministry of Labour 10 days in advance. The Ministry may call the employer, employee and union representatives to as many hearings as it considers necessary to discuss the conditions of the labour termination. If the employer does not comply with this obligation, it may be subject to fines. Employees of the construction industry are excluded from this procedure.

Dismissals in Argentina are a delicate issue. If an employer decides to carry out mass dismissals, it may be subject to actions from 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 relations.7

**Dismissal without cause**

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

**Compensation based on seniority**

The employee is entitled to receive one monthly salary for every year worked or a further monthly 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 monthly salaries. This compensation is not subject to social security contributions, or income tax payments or withholdings. In order 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 monthly salary of the employee.

**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 seniority is up to three months; one monthly salary if the seniority is up to five years; and two monthly salaries if the seniority is greater 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 thirteenth salary must be calculated, which will be added to the compensation (see below).

**Payment in full of the dismissal month**

In the month of the 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 that the employee would have been entitled to 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 that the employee is entitled to.

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7 For example, Gómez Leandro Javier and others v. PepsiCo de Argentina SRL in re request of precatory measure, 2017.
Remuneration (salary and thirteenth 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 the dismissal and the proportional part of the thirteenth salary corresponding to the part of the year worked. The amount of the salary depends on the day of termination.

Dismissal for cause

In case 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 significant enough 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 from 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 case of dismissals of women who are pregnant or have recently given birth, women who have just got married or will soon get married, and dismissals during sick leave.

As Argentina has become a controversial jurisdiction in terms of labour 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 respective Settlement Service Authority after determining if 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-monthly salary per year of service or a further monthly 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 less than the minimum percentages mentioned, the employer must give notice of the decision to the labour authority 10 days before the dismissals and also give a copy of the notice to the respective union.

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

For a transfer of business, there must be a change of employer, credit and debt related 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 case of transfer of the 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 relations terminated prior to the transfer.8 The basis of the law is to protect the employee 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 case of 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, not applying to those arising thereafter.

XIV OUTLOOK

As it is customary in presidential election years, we find it highly unlikely that important draft labour bills will be approved during 2019.

A similar trend with regard to litigation and union conflicts, as seen in 2018, is expected. In line with previous years, unions and employers will continue the negotiation and revision of salaries through collective agreements.

It is also likely, depending on the increase of prices, that the government will issue, in the same manner as in 2018, regulations establishing non-remunerative payments or salary increases for employees in the private sector.

We believe that labour attorneys and labour courts will analyse the legal framework of work through digital platforms.

I  INTRODUCTION

In Australia, the employment relationship is governed by legislation (federal, state and territory), statutory instruments (such as enterprise agreements and modern awards) and common law.

The federal Fair Work Act 2009 (Cth) (the Fair Work Act) regulates the employment of the majority of private-sector employees throughout Australia. This legislation, among other things, sets minimum terms of employment known as the 10 National Employment Standards (NES), provides for specific employee protections, regulates unions and the collective bargaining process, and outlines the role of the Fair Work Commission (the independent employment tribunal).

State and territory legislation operates in conjunction with the Fair Work Act to regulate issues such as discrimination, long service leave, workers’ compensation and work health and safety (WHS).

Enterprise agreements set minimum terms and conditions, and are negotiated between an employer and its employees (or unions on their behalf). Where an enterprise agreement applies, it excludes the operation of any award that would otherwise apply. However, the terms of the agreement must render an employee ‘better off overall’ than the terms of the award.

Modern awards contain additional minimum terms and conditions of employment, such as minimum rates of pay, overtime payments, penalty rates, dispute resolution procedures and consultation procedures. These awards may be based on industry or occupation, or both. Usually the award classifications extend only to mid-level management employees. Award coverage can be difficult to determine and should be considered case by case, especially given the risk of underpayments if it is not properly determined and applied.

As Australia is a common law jurisdiction, the application and interpretation of the various sources of law is determined by courts and tribunals. The Fair Work Commission arbitrates most statutory employment disputes. Other agencies, including the Fair Work Ombudsman (FWO), operate alongside the Commission to oversee enforcement of the Fair Work Act. Disputes can also be heard by the Fair Work Division of the Federal Court, the Federal Circuit Court of Australia, the Civil and Administrative Tribunal or the Anti-Discrimination Board.
II YEAR IN REVIEW

Some of the most significant developments in Australian employment law over the past 12 months include the following.

i Casual conversion clauses

Since 1 October 2018, all modern awards include a clause giving ‘regular casual employees’ the right to request that their employment be converted to full-time or part-time permanent employment. A regular casual employee is one who has worked a pattern of hours on an ongoing basis (generally 12 months, although in some awards it is only six months), which they can continue to perform without significant adjustment. While the specific wording varies slightly between awards, most require employers to provide eligible casual employees with a copy of the casual conversion clause by 1 January 2019 (for those who were already working as of 1 October 2018) or within 12 months of commencing employment for new casual employees. An employer is required to consider any request for conversion, consult with the employee and respond within 21 days. A request may be refused on reasonable business grounds, for example if the employee’s position will cease to exist or his or her hours will be reduced in the next 12 months. However, an employer cannot vary a casual employee’s hours to avoid their obligations under the casual conversion clause.

The current government has also announced that it will include a casual conversion right for all employees in the National Employment Standards.

ii Gig economy workers

In September 2018, the Senate Committee’s Future of Work report challenged the position that individuals who perform tasks in the gig economy are independent contractors. In the report, the Committee proposed that if a company makes money directly as a result of a worker’s labour, and if that worker is dependent on the company for work and income, then that worker should be an employee. Given the level of dependence of many gig economy workers on their relevant digital platform, it is likely many of them would be considered employees and not independent contractors under this proposed test. Although it is unlikely that the law will be changed to include this test, the Federal Labour Party (which is ahead in the polls leading up to an election in 2019) is committed to revisiting the issue.

In Joshua Klooger v. Foodora Australia Pty Ltd, the Fair Work Commission held that a former delivery rider of food delivery company Foodora was an employee despite his independent contractor agreement with the company. Consequently, the employee was entitled to (and successfully did) bring an unfair dismissal claim.

However, Uber has successfully defended two unfair dismissal claims to date on the basis that its drivers were independent contractors.

iii Underpaying vulnerable workers

In 2018 there was an increase in cases brought by the FWO against companies exploiting vulnerable workers. Since gaining greater investigatory power and access to higher penalties following the introduction of the Fair Work Amendment (Protecting Vulnerable Workers) Act in September 2017, the FWO has won more than A$7.2 million in court-ordered penalties. In one recent case, a fruit market owner and his company were fined more than
A$660,000 – the largest penalty to come out of FWO litigation – after they were found to have consciously paid a ‘vulnerable’ worker, who had poor English language skills, significantly less than the prescribed wage. In another recent case, a contract cleaning company was fined over A$510,000 after exploiting three Taiwanese workers on working holiday visas. While in these cases employers were intentionally exploiting workers, there has also been an increasing number of instances where the FWO has prosecuted employers who have unintentionally engaged in exploitation and underpayment of vulnerable workers (e.g., as a result of misunderstanding or not being aware of the terms of an applicable modern award).

III SIGNIFICANT CASES

In Workpac v. Skene, the Court found that a long-term casual employee was, in fact, a permanent employee. The Court held that paying the mandated casual loading (which compensates casual employees for not getting benefits available to permanent employees), in itself, was not a sufficient basis for classifying an employee as casual. Indicia of a casual employee include irregular work patterns, and uncertain, intermittent and unpredictable work. The decision to award Mr Skene backdated leave (in addition to the casual loading he had already received) gives rise to the possibility of incorrectly classified casual employees ‘double-dipping’ entitlements. This perceived unfairness prompted the government to change the Fair Work Regulations to allow employers to set off casual loading paid to an employee against amounts claimed for annual leave and other NES entitlements. However, the loading must be clearly identifiable as an amount to compensate the employee for the relevant NES entitlements.

Fair Work Ombudsman v. Yenida Pty Ltd & Anor was the first employee underpayment prosecution relying on race discrimination. In this case, the Court held that a hotel and its manager intentionally treated two workers of Malaysian descent unfairly (including by not paying them for all work performed) on the basis of their race and national extraction. The Court held that the underpayments amounted to adverse action.

In CSL Limited T/A CSL Behring v. Papaioannou, one doctor advised the employer that the employee would not be able to return to work in any capacity in the foreseeable future, while a second doctor said the employee would be fit for work in six months. Relying on the first doctor’s assessment, the employer dismissed the employee. The Fair Work Commission conducted its own objective assessment of the conflicting medical evidence at the time of dismissal, overturning the existing authority that said this was a decision to be left to the employer.

The Fair Work Commission dealt with a total of 31,554 applications in the 12 months to June 2018, which represents a 5 per cent decrease from the preceding year. The vast majority of these applications were for unfair dismissal.

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IV  BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i  Employment relationship

While there is no statutory requirement to issue a written employment contract to an employee, it is both advisable and common to do so. An employment contract will generally include terms expressly specifying the role, reporting relationships, remuneration, superannuation, notice of termination, protection of intellectual property and confidential information, and post-employment restraints.

A range of terms may also be implied into an employment contract, for example:

- a duty of care owed by the employer to the employee;
- a duty of fidelity and good faith owed by the employee (and possibly also by the employer); and
- a requirement that the employer provide reasonable notice of termination in the absence of an express notice provision.

Regardless of whether a written contract of employment is issued, employers must provide all new employees with a copy of the Fair Work Information Statement, which summarises the key provisions of the Fair Work Act including information about the NES, modern awards, enterprise agreements and employee rights on termination.

Generally speaking, an employer does not have the right to unilaterally change an employee’s contractual terms or conditions of employment. An employer can reserve the right in an employment contract to make reasonable changes to certain terms (e.g., place of work, duties or reporting line) but it is unlikely that it could change fundamental terms or make detrimental changes without consent. In most cases, therefore, a material change to a contractual term will require the employee’s agreement. Express agreement by way of a signed variation is preferable, but in some cases agreement may be evidenced by the employee’s conduct, for example continuing to work without objection where the employee has been advised of the change and its consequences. Consideration for the change (such as an increased salary) will usually be required to create an enforceable agreement. If the employee refuses to agree, a unilateral change may amount to a breach of contract.

ii  Probationary periods

Probation periods typically range from three to six months, during which time the employer will assess whether the employee is suitable for the role and business. An employee on probation is entitled to accrue and access their paid leave entitlements, such as annual leave and personal/carer’s (sick) leave. If an employer decides to dismiss an employee during or at the end of the probation period, it must provide notice of termination (the statutory minimum is one week) and pay out any unused accumulated annual leave. Employees with less than six months’ service do not have access to unfair dismissal protections.

iii  Establishing a presence

There is no requirement for foreign employers to set up a local entity to employ workers. Foreign employers may hire employees through a foreign company. However, that company must be registered with the Australian Securities and Investment Commission as a branch of an overseas company. Alternatively, the foreign company may create an Australian subsidiary. There are important tax implications of each option.
Generally, a foreign enterprise is likely to have a permanent establishment in Australia if it has a fixed place of business through which it conducts business. The ATO has indicated that, generally, it would regard a business that operates at or through a fixed place for a continuous period of at least six months to be sufficiently ‘permanent’ to constitute a permanent establishment. Importantly, an agent, including an employee, may constitute a permanent establishment of an entity if the agent habitually exercises the authority to enter into contracts on behalf of the entity. The scale and type of the activities conducted by a foreign enterprise in Australia, including the activities of the employees, will determine if it has a permanent establishment under Australian law.

Although there are some similarities, there are two different tests applied to determine the following:

(a) whether an employer carries on a permanent establishment in Australia for income tax purposes (income tax PE test); and

(b) whether an employer carries on an enterprise in Australia for GST (Goods and Services Tax) purposes (GST enterprise test).

If a company is considered to carry on business through a permanent establishment in Australia, it would be subject to tax in Australia on the business profits that are attributable to that permanent establishment (i.e., those that it might be expected to make if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the company). An entity is required to register for GST if it makes supplies ‘connected with Australia that exceed a AUD $75,000 per annum registration threshold’.

When determining whether an employer has a permanent establishment, the six-month rule – which considers whether employees are in Australia for 183 days or more in a 12-month period – is a key determinative when applying the GST enterprise test, whereas it is only one of the factors (among others) that must be considered when applying the income tax PE test. As such, for GST purposes, if a company’s employees will not be in Australia for more than 183 days in a 12-month period, then it does not carry on an enterprise in Australia for GST purposes. However, there are other factors (including regularity of the activities) that must be taken into account, which gives rise to a risk that the Australian Taxation Office would consider that an employer has an income tax permanent establishment in Australia.

V RESTRICTIVE COVENANTS

During employment, employees are subject to a range of implied duties that can be enforced to restrict their activities and protect the employer’s business, including fiduciary duties to prevent competitive behaviour and implied obligations to protect confidential information. In addition, express terms can be (and usually are) included in the employment contract. For example, terms requiring exclusive service or protection of confidential information and intellectual property. A breach of an employee’s obligations during employment can provide grounds for dismissal or form the basis of a claim seeking an injunction or damages.

An employer may include post-employment restraints in an employment contract. There are two main types of post-employment restraints: non-compete restraints, which prevent a former employee from working in a specified field; and non-solicitation restraints, which prevent a former employee from soliciting customers, employees and suppliers. At common law, a restraint of trade is void on its face. To enforce restraints, an employer must prove that
the restraint goes no further than is reasonably necessary to protect the employer’s ‘legitimate business interests’. Protectable interests include confidential information, customer or client connections, goodwill and maintaining a stable workforce.

In most states and territories, courts can rescue a restrictive covenant that is too broadly drafted only if they can delete the offending words and leave behind an enforceable restriction. For this reason, it is usually advisable to use cascading or ladder restrictions. The position is modified in New South Wales, where courts have the power to rewrite or ‘read down’ the terms of a restrictive covenant to make it reasonable and enforceable. It is not legally necessary to pay an employee during the restraint period in order for a restraint to be enforced.

VI WAGES

i Working time

The NES mandates that the maximum period of time a full-time employee can be required to work is 38 hours per week, plus reasonable additional hours. In practice, employers are generally able to show that additional hours are reasonable. Determining whether overtime is reasonable will depend upon statutory criteria in the NES, including:

- any risk to health and safety from working the extra hours;
- the employee’s personal situation, including his or her family responsibilities;
- the workplace’s needs;
- if the employee is entitled to receive overtime payments or penalty rates for working the extra hours;
- if the employee is ordinarily paid at a higher rate on the understanding that he or she work some overtime;
- if the employee was given enough notice that he or she may have to work overtime;
- if the employee has already stated he or she cannot work overtime; and
- the usual patterns of work in the industry.

If the request is unreasonable, an employee can refuse to work overtime, although this rarely occurs in practice.

Modern awards and enterprise agreements commonly regulate employees’ hours of work. For example, modern awards prescribe minimum rest periods, the ordinary span of hours (outside of which overtime is payable) and penalty rates for working particular shifts or weekends.

ii Overtime

Modern awards or enterprise agreements will usually prescribe payments or penalty rates for overtime. Some awards and agreements permit an annualised salary arrangement, provided the overall annual salary is higher than the amount that the employee would have earned if they were paid minimum salary and loadings, penalties and overtime rates under the applicable instrument.

VII FOREIGN WORKERS

Foreign nationals must hold a valid visa permitting them to work in Australia. The most commonly used visa is the subclass 482 temporary skills shortage (TSS) visa, which allows the
visa holder to work in Australia for up to four years for his or her sponsoring employer (or, in some cases, an associated entity of the sponsor). There are strict eligibility rules for the TSS visa, including restrictions in relation to permitted occupations, skill and work experience requirements, labour market testing, salary and English language ability.

There are also a range of other temporary visas that allow employees to work in Australia for varying periods, and permanent employer nominated visa options.

The Department of Home Affairs’ visa processing times vary considerably between visa types and are subject to change on a regular basis. Visa applications should be lodged complete if possible, to minimise any unnecessary delays in the processing times.

Australia’s statutory employment laws apply to foreign nationals working in Australia, regardless of the governing law of their employment contract or the location of their employer. However, the remedies available for breach of contract (including enforcement of post-termination restraints) may be affected if the governing law of the employment contract is not Australian law.

VIII  GLOBAL POLICIES

Most Australian employers have written workplace policies or codes in place that function as broad frameworks for ethical conduct. The content of these policies is determined by the employer and often covers a range of issues from WHS to disciplinary procedures and grievance protocols. Generally speaking, an employer will not be legally bound to comply with the terms of its company policy unless its employees’ contracts incorporate them (which is not recommended). Employees do not have to agree to policies but it is advisable to require an acknowledgement, or at least evidence of their communication to employees. Policies are commonly made available via a company intranet. There is no requirement for policies to be lodged with or approved by any government agency.

Australian federal and state equal opportunity and anti-discrimination legislation makes it unlawful to discriminate in all aspects of the employment relationship on the basis of various protected attributes. While they vary between state and federal legislation, those attributes generally include gender, marital or relationship status, pregnancy, breastfeeding, age, race, impairment or disability and sexual orientation. Sexual harassment is also unlawful under anti-discrimination legislation.

Australian courts and tribunals have recently awarded increasingly large amounts of compensation, in some cases in the hundreds of thousands of dollars, to complainants in discrimination and sexual harassment cases (in contrast to previously modest awards in the thousands or low tens of thousands of dollars). This development underscores the importance of employers educating staff on relevant policies and providing employees with training to reduce the incidence of unlawful behaviour. Relevantly, simply adopting global discrimination and harassment policies that are not tailored to Australian law is unlikely to be sufficient to successfully defend against relevant claims.

IX  TRANSLATION

English is the national language and there is no requirement for employment documents to be translated into any other language.
X EMPLOYEE REPRESENTATION

In Australia, all employees are permitted to form and become members of trade unions that represent the collective interests of workers. Unions play a significant role in Australia in the context of consultation, WHS, and negotiation and making of enterprise agreements.

Employees cannot be treated adversely because they have engaged in union activities, been appointed as union representatives or exercised any other workplace right. Under modern awards and enterprise agreements, employers have to consult with employees and their representatives (which can include a union) about major workplace changes such as redundancy. Statutory consultation may also be required with unions with respect to WHS or collective redundancies (where 15 or more redundancies are proposed).

WHS committees can be established at the request of five or more workers and, if requested, the employer has two months to establish a committee. They must meet quarterly to develop measures, rules and procedures to improve the safety of workers, and the employer is required to consult with the committee on WHS matters.

There are no statutory works’ counsels in Australia.

XI DATA PROTECTION

Although persons who collect personal data have various statutory obligations relating to its use, collection and storage under the Privacy Act (Cth) 1988 and Australian Privacy Principles (the Privacy Act) and state legislation. Some obligations vary between states but the federal obligations do not apply to employee records of a current or former employee held by an employer (commonly referred to as the employee records exemption). However, the exemption does not apply to data collected or used by employers for prospective employees or contractors.

Despite this, it is common for employers in Australia to adopt an employee privacy policy and to include wording in their employment contracts authorising the collection and use of personal data.

As a result of the employee records exemption, an employer can transfer personal data to, among others, a related company overseas. However, the company receiving the data may have its own obligations under Australian or other local law.

Employers are permitted to perform background checks (including social media searches) on prospective employees, for example, covering educational qualifications, employment history, health checks, credit checks and criminal record. In most cases, the person’s consent is required to carry out these checks and the organisation performing them must comply with the Privacy Act and other applicable legislation. The employer will also need to exercise caution in how it uses the results of any such checks, so as not to fall foul of anti-discrimination legislation, among others.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Dismissal usually requires notice unless the reason for dismissal was serious misconduct, in which case the employer can dismiss summarily without notice.
The NES prescribes the minimum statutory notice period (one to five weeks, depending on age and length of service). This notice must be in writing and may be paid in lieu at the time of termination. Contractual notice periods are often longer.

A person is protected from unfair dismissal (and can make an unfair dismissal claim seeking reinstatement and back pay or compensation) if:

\( a \) he or she has at least six months’ service at the time of the dismissal or on the date that he or she is given notice; and

\( b \) either he or she is covered by a modern award or enterprise agreement; or he or she earns less than A$145,400\(^6\) per annum (excluding superannuation, bonuses, overtime and commissions).

To avoid a finding that a dismissal is harsh, unjust or unreasonable (and therefore unfair), the employer must be able to establish a valid reason for the dismissal related to the person’s capacity or conduct and show that the dismissal was, among other things, procedurally fair. In particular, an employer must establish that the employee was notified of the reason for dismissal, given an opportunity to respond, not unreasonably refused a support person at meetings, and given appropriate warnings and opportunities to improve if appropriate (e.g., in relation to poor performance).

Genuine redundancy is also a defence to an unfair dismissal claim (see subsection ii).

If the dismissal is owing to a discriminatory reason or is in response to an employee having or exercising (or threatening to exercise) a workplace right, it will be unlawful. Workplace rights are broadly defined, and include rights under legislation or industrial instruments and complaints or enquiries about employment.

There is no requirement to notify any government body or union unless the employer decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature. In those circumstances, the employer must give a written notice about the proposed dismissals to Centrelink – a government service that provides support to individuals who face financial hardship – before the dismissals occur. This also triggers the union consultation obligation referred to in Section X.

It is not uncommon for an employer and employee to mutually agree, and document in a deed of release (i.e., a settlement agreement), terms for an employee’s dismissal.

ii Redundancies

A redundancy is where an employer no longer requires the job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise.

Unless an exception applies, an employee who is made redundant will be entitled to a statutory redundancy payment of between four and 16 weeks’ pay (depending on length of service). Enterprise agreements will often provide for more generous redundancy provisions. In addition, an employee will be entitled to notice of termination (or pay in lieu) plus payment for untaken annual leave and possibly long service leave.

Concessional tax arrangements apply to redundancy payments with a tax free amount (based on length of service) up to a specified cap and reduced rates thereafter.

As noted in Section X, consultation obligations may be triggered in cases of redundancy.

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6 This rate increases annually on 1 July.
An employer will be able to avoid an unfair dismissal claim on redundancy if it complies with all applicable consultation obligations (e.g., where a modern award or enterprise agreement applies to the employee), and it was not reasonable under all the circumstances for that person to be redeployed within the employer’s business or the wider group (which could potentially include international opportunities, although there is no obligation to pay the costs of redeployment).

XIII TRANSFER OF BUSINESS

For employment law purposes, a transfer of business arises where:

a. there is an asset sale, outsourcing or in-sourcing;
b. the employee’s employment with the old employer terminates; and
c. within three months of the termination, the employee becomes employed by the new employer (or a related entity) performing the same or substantially the same work.

There is no concept of automatic transfer of employment in Australia. Affected employees will only transfer to the purchaser if they accept an offer of employment. If offers are not made, or are not accepted, the employees remain with the vendor, who must find alternative employment for them or make them redundant.

A purchaser is generally free to determine what terms and conditions to offer (subject to commercial considerations). However, if the transferring employees are covered by an enterprise agreement, that agreement will transfer and continue to apply to any employees who accept the offer until it is replaced or terminated. In limited circumstances, such an agreement could also cover new employees that the purchaser recruits post-transfer.

Commercially, the vendor will usually insist that the purchaser’s employment offers are on the same, or substantially the same, terms and conditions (including recognition of continuity of service) because doing so may absolve the vendor of the obligation to pay statutory redundancy pay if the employee refuses to transfer.

There is no specific protection for employees in a transfer of business against dismissal, either before or after the disposal or transfer of the business.

XIV OUTLOOK

A federal election is likely to occur in May 2019, which may prompt a change in government from the Liberal Party to the Australian Labor Party (ALP). If elected, the ALP has vowed to ‘swing the pendulum back in favour of workers’. This could include introducing policies that, among other things, compel larger companies to publicly report their gender pay gap, and CEO and employee pay ratio; provide the Fair Work Commission with greater arbitration powers; and allow industry-wide enterprise bargaining.

It is also likely that Parliament will pass legislation introducing a new statutory whistle-blower regime that will have important implications for employers. For larger employers, there will also be an obligation to publish a whistle-blower policy covering prescribed matters.
Chapter 8

BELGIUM

Chris Van Olmen

I  INTRODUCTION

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

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 of 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 plays

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

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an important role with regard to disputes in individual labour law. Its actions span from preparing drafts of bills and overseeing the operation of existing employment legislation, to registering CLAs, and publishing practical comments on the 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 Programme Act of 27 December 2017 extended the use of ‘flexi-jobs’ to lots of new sectors (initially, flexi-jobs were only allowed in hotels, restaurants and bars). The system of flexi-jobs makes it fiscally attractive for persons with a principal occupation to have an additional income by having another job.3 With regard to the e-commerce sector, the Programme Act has relaxed the conditions for night work and made Sunday work possible.

The Act of 15 January 2018 introduced, inter alia, the possibility for the social inspection services to use the investigation method of ‘mystery shopping’ to combat discrimination. Under certain strict conditions, the social inspectors can pretend to be applicants, to see whether the employer’s actions are discriminatory.

The Economic Growth Act of 26 March 2018 changed the notice periods for employment contracts of less than six months. In short, employers will only have to give a notice period of one week instead of two when the employment contract is less than three months old. An unusual obligation introduced in this law is for employers and employees’ representatives to talk about company rules on ‘disconnectivity’ – that is, employees being able and allowed to disconnect from their smartphones and laptops outside work in order to improve their work-life balance. The Economic Growth Act does not make disconnectivity compulsory, but imposes regular talks on the subject, which can lead to internal rules or collective agreements being implemented. A last point of interest in the Economic Growth Act is the prohibition for sectors to ban the use of temporary agency work.

With the Act of 30 April 2018, the legislature installed a system whereby an employee who has a company car as part of his or her salary package (which he or she may also use privately) can exchange that car for a monetary mobility allowance, which corresponds to the financial advantage of the car and that is taxed in the same favourable way. The government is further looking to introduce a more general scheme – the Mobility Budget – with more eco-friendly transport options.

Further, the Act of 9 May 2018 has implemented the EU Single Permit Directive 2009/52, which obliges the Member States to use a single application procedure to establish the issuance of a single permit for residence and work to non-EU nationals.

Another major change was the General Data Protection Regulation (GDPR) coming into force on 25 May 2018, which introduced new privacy rules for EU Member States. The Regulation was partly implemented in Belgium by two acts: the Act of 3 December 2017, which introduced the new Supervisory Authority (to replace the Privacy Commission); and the Act of 30 July 2018, which specified some rules of the GDPR (mostly regarding exceptions for government data).

3 A person with a principal occupation is defined as someone who works at least four days out of five in a normal working week.
The Act of 18 July 2018 created a tax threshold of €6,130, under which employees can have an additional income from jobs in the gig economy (through digital platforms), from work for non-commercial associations and from citizen-to-citizen work (small non-professional jobs for other citizens). For this additional income, no income tax or social security contributions are required.

The Acts of 2 and 6 September 2018 expanded the possibilities to make use of parental leave and other thematic leave, and extended the leave for parents adopting or fostering.

Finally, the Act of 14 October 2018 makes it possible to include schooling clauses in the employment contracts of lower-paid employees in bottleneck professions. Previously, this type of clause, which renders it possible to reclaim the training costs if the employee leaves the company before a certain term, was only allowed in the contracts of highly paid employees.

III SIGNIFICANT CASES

In a judgment of 12 January 2018, the Labour Court of Appeal of Brussels ruled that the intentional infliction of injury to a co-worker or a superior does not necessarily constitute an urgent reason to dismiss an employee (without notice or compensation). It is possible that the facts do not make the professional cooperation between the employer and the employee immediately and definitively impossible.

On 20 February 2018, the Labour Court of Appeal of Brussels condemned an employer on the basis of discrimination on the ground of disability, because he had made no serious efforts to reintegrate an employee who had been absent for a long period because of cancer.

On 22 February 2018, the Constitutional Court considered that the fact that the Act on the Motivation of Administrative Decisions does not oblige a public sector employer to hold a hearing with a contractual employee before his or her dismissal constitutes discrimination, as the employer is only legally obliged to hold a hearing for a statutory employee, even though contractual and statutory public sector employees are in a similar situation. However, in a judgment of 5 July 2018, the Constitutional Court ruled that the same reasoning cannot be applied to the obligation for the government (public sector employers) to motivate their (dismissal) decisions. This obligation is only applicable when a statutory employee is involved (and therefore does not apply to contractual employees), and this difference can be justified by the fact that statutory employees only have a short time to appeal the decision at the Council of State, while contractual employees have one year to file a claim at the Labour Court. The Constitutional Court concluded that judges should apply their own system to decide whether the dismissal was not reasonable. Such a system can be based on the private sector system of CBA No. 109.

In a judgment of 12 March 2018, the Supreme Court ruled that employers and employees should, in all circumstances, be able to appeal against the decision of a sectoral joint committee regarding the lifting of the protected status of worker representatives. This appeal will be handled by the Labour Court, which will have the full judicial power to control the existence of the economic or technological reasons, on which basis a protected employee can be dismissed.
The Labour Court of Appeal of Antwerp referred to the European Court of Justice Tyco case in a judgment of 17 April 2018, to clarify that for mobile workers without a fixed work place, the travel time between their home and the first place of work (first customer) as well as the travel time between the last place of work and their home, constitutes work time.

On 7 June 2018, the Constitutional Court ruled that the fact that special dismissal protection only exists for prevention advisers (health and safety officers) in case of an individual dismissal and not in the case of a collective dismissal does not constitute a discrimination, as the dismissal protection is meant to guarantee the independence of the prevention adviser (which is normally not affected by a collective dismissal).

In another judgment of 7 June 2018, the Constitutional Court dismissed a discrimination claim that raised the issue that employers have to pay substantially higher compensation than any other (legal) person if they are found guilty of discrimination. The Court ruled that the higher compensation was based on objective criteria.

Finally, the Constitutional Court indicated in its judgment of 18 October 2018 that the former beneficial clauses concerning the notice periods of highly paid employees were still valid for the calculation of notice periods based on the seniority of the employee before the introduction of the new system in 2014.

IV BASICs OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

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

a training clause (Article 22 bis AEC);
b non-compete clause (Articles 65, 86 and 104 AEC);
c employment contracts concluded for a definite period of time or for a specific project (Article 9 AEC);
d part-time work (Article 11 bis AEC);
e temporary work or interim work (Act of 24 July 1987);
f work from home (Article 119.1 to 119.12 AEC);
g employment contracts concluded with a foreign worker in certain cases (Articles 12 and 13 Royal Decree of 9 June 1999);
h employment contracts concluded to replace an employee temporarily absent (e.g., on maternity or sick leave (Article 11 ter AEC)); and
i employment contracts concluded with a student (Article 123 AEC).

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).

Parties can amend the 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 the 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 must state the system and hours of part-time work agreed upon if it is a fixed work schedule, but for flexible work schedules, the contract must 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 worded either 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 automatically done by the immediate declaration of employment via the Dimona system. This declaration must be made through the NOSS website. For certain specific activities, such as temporary work, an agreement must be obtained. 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. 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 business work, provision of labour, exchange 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 as having a Belgian establishment. In this respect the foreign employer must comply with various tax formalities. It must make the professional income tax deductions, file special individual forms as well as a summary form to report the salaries paid to its employees.

5 www.socialsecurity.be.
6 www.limosa.be.
7 For example, Form 281.10.
8 For example, Form 325.10 for employees.
Belgian employees. As long as Belgian employees carry out operations 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 €34,819. There are also restrictions on their applicability if the annual gross remuneration does not exceed €69,639 (these amounts, applicable for 2019, are updated annually).

In general, a non-compete clause is valid if it is limited to activities similar to those presently 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:

- They must have an international activity or considerable economic, technical or financial interests on the international markets;
- 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 directly or indirectly acquire 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-competition 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 the employment contract, except in the case of agency work and student work.

VI WAGES

i Working time

Working time means the time during which a 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
Belgium

extensive than the periods during which work is actually performed (e.g., on-call period 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 night work. In some cases, however, daily working time may be increased as follows:

a nine hours if the employee does not work more than five-and-a-half days a week (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 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 exceed three hours.

In Belgium, 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 40-hour-a-week work schedule 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 the following:

• transport operations, loading and unloading (maximum 11 hours a day and 50 hours a week); and

• sectors where the substances processed can degenerate very quickly (maximum 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 (maximum 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 (in the absence of a trade union representative, authorisation by the inspector or head of district suffices) in case of exceptional increase of work (maximum 11 hours a day and 50 hours a week).

Overtime may also be performed in case 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;

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- to carry out urgent work on machinery or equipment for third parties;
- to carry out work within the undertaking to deal with the threat of an accident or an accident that has occurred; or
- to carry out 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 (maximum 11 hours per day and 50 hours per week).

The normal working time limits may also be exceeded for stock-taking (maximum 11 hours per day and 50 hours per 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). It may, however, 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 of daily or weekly length of working time) give rise to entitlement to overtime payment. 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:

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;
exceptional increase in workload;
work justified by unforeseen circumstances;
work carried out to deal with either an accident that has occurred, or with a new accident, or urgent repair work to machinery or equipment; and
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 100 overtime hours on top of his or her ordinary hours with a view to complete his or her remuneration. 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, however, exempt from this notification because of the nature or short duration of the activities 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 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 their employees.

Through the staff register, an employee can be lawfully listed.

In principle, nationals from an EEA country may be hired without specific restrictions, while other foreigners need to obtain a work permit. 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, the majority of social law stipulations subject to penal sanctions 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 the employees thereof. If there is no works council, the trade union
representatives or the employees 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 contain the offences and their related sanctions and the possibilities of redress open to employees who wish to object to the sanctions. All sanctions (fines, suspension, etc.) applied must be specified in the work rules. The first working day after becoming aware of the infringement, 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 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 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, combating discrimination based on gender. Discrimination on the basis of gender is forbidden, as well as on the basis of pregnancy, birth, maternity or change of gender. Two other Acts of 10 May 2007 concern the prohibition of certain forms of discrimination, racism and xenophobia. The first Act aims at creating a general framework for 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. 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 TRANSLATION**

Belgium is a multilingual federal state made up of regions (Brussels, Flanders and Wallonia) and communities (French, Flemish\(^9\) and German-speaking).

The language for ‘social relations’ between employers and employees, as well as 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.\(^{10}\) If it is in Wallonia, it must be French.\(^{11}\) If it is in the German-speaking community, it must be German.\(^{12}\) If it is in the bilingual Brussels region, either French or Dutch may be used, depending on the language of the employee.\(^{13}\) 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.

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\(^{9}\) It is the Flemish Community, but Flemish is not a language. The language of Flanders is Dutch.

\(^{10}\) Decree of 19 July 1973.

\(^{11}\) Decree of 30 June 1982.

\(^{12}\) Laws on the use of languages coordinated by Royal Decree of 18 July 1966.

\(^{13}\) id.
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. 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 the employees should be drafted in the correct language.

In a judgment of 16 April 2013, the European Court of Justice has 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 EU 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 case of conflict with the Dutch version, the Dutch version of the contract will prevail.

X 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 level.

Works councils must be set up in the private sector. Works council elections have to be held in enterprises (i.e., technical operating units) employing at least 100 employees. 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 royal decree, 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 the non-elected candidates enjoy special protection against dismissal.

14 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. The committee for prevention and protection in the workplace should be installed in enterprises employing at least 50 employees and is mostly responsible for the 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.

XI DATA PROTECTION

The protection of personal data concerning employees is regulated by, among others, 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 only allowed for legitimate purposes, like the good execution of the employment contract, internal communication 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 will have to keep a register of processing operations, which will include the following information on personal data: the purpose of processing the data; what data is being processed and the person to whom it belongs; who receives the data, including those outside the European Union; how long the employer keeps the data; and 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 the correction of incorrect data.

Biological tests, medical examinations or other reasons for gathering medical information (orally) regarding the state of health or that of an employee or a job candidate (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. 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. The same applies to employees. 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.

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16 See Article 9 GDPR and Article 9 Act of 30 July 2018.
XII 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 at the same time communicated to the employee so that he or she may claim unemployment benefits.

Normally, there are no notification and 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 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 employees.

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 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 to the right of employees 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.
XIII TRANSFER OF BUSINESS


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.

Such information and 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 the employment contract

Automatic transfer of the 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 survivor’s 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 will have the possibility to introduce a court procedure against both the transferor and the transferee in order 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 the 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 employees nearing the retirement age and students) and, on the other hand, some reasons to dismiss. This second kind of derogation relates to the dismissal for serious reasons and to dismissals based on technical, economic or organisational reasons 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 European Court of Justice, 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 in the end, the transfer results in a significant change of the working conditions to the detriment of the employee, the employment contract will be considered to be breached by acts on part of the employer (constructive dismissal).

These protection rules apply in the event of a transfer of enterprise by virtue of an agreement. When the transfer occurred within the framework of a legal composition procedure, CLA 32 bis provided 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.

**XIV OUTLOOK**

Belgium is currently implementing the EU Single Permit Directive for employing foreign employees. The government concluded a cooperation agreement on 2 February 2018 with the regional entities, and the government and the regions have published several executive decrees. The new procedure entered into force on 24 December 2018.
The government is also pushing for the introduction of a Mobility Budget (in addition to the current mobility allowance) in order to replace company cars. Further, there is a draft royal decree to install a procedure for actions of positive discrimination in companies to, among other things, increase the number of female workers in management and increase the recruitment of disadvantaged persons.

The government is expected to finalise the different elements of the ‘Jobs Deal’ of summer 2018 (a political programme consisting of various measures to be taken relating to employment), but with the collapse of the federal government at the end of 2018 and the elections in May 2019, it is very uncertain if new legislation can still be approved by Parliament.
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 the employer’s alleged breach of duty under the Act, including unfair dismissal.

Where 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 must 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. Out of that panel, the Tribunal hearing a complaint will normally comprise a panel of three persons, 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 still 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

A clear trend in the employment market over the past few years has been the wave of mergers and acquisitions that has transformed the Bermuda insurance market and caused it to contract significantly. Major transactions in 2018 include the acquisition of XL Group by Axa, the buyout of Validus Holdings by AIG, the acquisition of Aspen by Apollo, and the agreement by RenaissanceRe to buy Tokio Millennium Re. This trend continues to lead to redundancies of executive staff who are finding it more difficult to find replacement jobs in the constricted market.

The Bermuda Immigration and Protection Amendment (No. 2) Act 2017 gives the Bermuda Immigration and Protection Act 1956 primacy over the Human Rights Act 1981 to favour qualified Bermudians in the workforce. This will prevent non-Bermudians from successfully claiming discrimination in hiring on the basis of place of origin or national origin. The Human Rights Commission has criticised the amendment, but the government suggests that human rights are still protected by the Constitution and the European Convention on Human Rights. However, Bermuda’s restrictive immigration policies will continue to come under scrutiny because the local population is shrinking and ageing, and with that comes a reduced tax base and revenue stream for the island.

A 2018 survey found that the labour force dropped by more than 1,500 compared to two years ago (down to 36,646 people), a decline of nearly 4 per cent. The combined effect of the reduced labour force, the increased number of retired persons and population stagnancy, suggest that the island faces a demographic challenge with regard to its economic sustainability.

III SIGNIFICANT CASES

i The Attorney General for Bermuda v. Ferguson at al (Civil Appeal Nos. 11 and 12 of 2018)

On 26 November 2018, same-sex marriage was for the third time declared legal in Bermuda after this landmark ruling by the Court of Appeal. This decision will inevitably impact local employment as foreign nationals who are spouses of Bermudians have the right to reside and work in Bermuda without a work permit and may become Bermudians in their own right if they remain married for 10 years, subject to certain residency requirements. The Court dismissed the government’s appeal against the decision of the Supreme Court, which had ruled that the Domestic Partnership Act 2018 (DPA), which replaced marriage with a civil partnership arrangement, violated the Constitution. The Supreme Court’s ruling had opened the door for same-sex couples to marry in Bermuda and several same-sex marriages ensued. However, in December 2017, the government passed the DPA, which respects same-sex marriages that have already taken place, but prohibits any future such marriages, and introduces civil partnerships instead. The Court of Appeal’s decision that the DPA is unconstitutional now allows same-sex marriages once again to proceed, while the government considers whether to appeal to the Privy Council.

ii The Minister of Education v. Clemons (Civil Appeal No. 21 of 2016) (March 2018)

This is the first Bermuda case that considered both physical and psychiatric harm allegedly suffered by an employee in the workplace owing to stress caused by an employer’s negligence. The Court of Appeal overturned the Chief Justice’s prior ruling that the Ministry of
Education was liable for having caused personal injury to a public high school teacher by failing to provide a safe work environment. Ms Clemons’s claim for damages for psychiatric and psychological injury (post-traumatic stress disorder) was unsuccessful, but she was found to have suffered physical injury in the form of a hypertension condition. The Court accepted the principles espoused in *Hatton v. Sutherland*, that:

- there are no special control mechanisms applying to claims for psychiatric injury from occupational stress;
- the threshold question is whether the particular harm to the particular employee was reasonably foreseeable; and
- an employer is entitled to assume that the employee is able to withstand the normal pressures of the job.

The Court of Appeal allowed the employer’s appeal despite finding the employer in breach of its duty of care. However, although it was reasonably foreseeable that the teacher would suffer injury as a result of the breach, the evidence that the breach caused her hypertension was wholly lacking.


In this appeal from a decision of the Employment Tribunal, the Supreme Court applied the leading UK case of *Southern v. Frank Charlesly* in relation to an employee quitting the workplace during a heated incident. The issue was whether that action amounted to an unambiguous resignation, entitling the employer to treat the employment relationship as terminated. Applying the principle that, where ambiguous words are said by an employee in a moment of anger, there is a duty on the employer not to accept the resignation too readily, but to check clearly that it is the true intention of the employee and to enquire when matters are calmer, the Court held that, on the facts, the employer had breached that duty and thus the employee had been unfairly dismissed. Given the tumultuous circumstances, the employee’s two-day (unapproved) leave did not amount to a clear resignation.

**IV  BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP**

**i  Employment relationship**

An employment contract in the summarised form of a statement of employment (SOE) must be entered into between the employer and 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:

- the full names of the employer and employee;
- the date when the employment began;
- the job title and brief description of the work;
- the place or places of work;
- the gross wage and the intervals at which it is to be paid;
- the normal days and hours of employment or the normal pattern of shifts;
- the entitlement to holidays, including public holidays and paid annual vacation;

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2 [2002] EWCA Civ 76.
3 [1981] IRLR 278.
The SOE may also contain other details relating to the terms and conditions of employment.

Where there are no particulars to be entered into under points (k) to (o), 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. Such 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. If so, 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 XII.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 Bermuda law purposes. 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-competition 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 what express terms exist in the contract, the court may prevent an
employee from competing with his or her employer, or otherwise acting outside his or her employment, if such activities are harmful to the business. Breaching this implied duty may justify summary dismissal of the employee for serious misconduct. It is easier to rely on an express non-compete clause than on this implied duty.

Post-termination, an express non-compete clause is necessary to 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 (such as trade secrets or similar, highly confidential information, trade connections and workforce stability); it will strike down clauses that are unreasonably wide in time, geographic extent and scope of 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 often difficult to enforce.

Courts will more readily enforce non-solicitation or non-dealing clauses that prevent employees from soliciting the business of clients of the former employer, or dealing with them, and thus protect trade connections. Courts will also prevent the poaching of key employees to protect the stability of the employer’s workforce.

VI WAGES

i Working time

There are no maximum working-hour regulations 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 over 40 hours a week is entitled to be paid at the overtime rate of one-and-a-half times his or her normal hourly wage. Alternatively, the employee may be paid their 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 subsection i).

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 Department must be satisfied that there is no Bermudian or 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, save that pension contributions under the National Pension Scheme (Occupational Pensions) Act 1998 are not mandatory for foreign workers. A foreign worker can ‘opt in’ to a pension plan where the employer permits it.

VIII GLOBAL POLICIES

Internal discipline rules 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 that. There are no other mandatory workplace ‘rules’ (as opposed to laws) that apply.

Although not legally required, 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 the employee, after taking into account: the nature of the conduct in question; the employee’s duties; the terms of the contract; any damage caused by the employee’s conduct; the employee’s length of service and his or her previous conduct; the surrounding circumstances; the penalty imposed by the employer; the procedure followed by the employer; and the practice of the employer in similar situations.

IX 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.

Until now, given the large number of Portuguese foreign workers in Bermuda, as a matter of immigration policy, regulations on English proficiency applied to persons coming to work under the Portuguese Accord and those employed in construction to ensure that work duties were carried out safely. In 2018, the government announced a draft English Speaking Work Permit Policy, which introduces a language test for recruits from non-English speaking
countries in job categories where employees interact with the public or where lives could be at risk (e.g., restaurant and hotel workers, and health professionals). Costs of the tests will be paid by government and persons failing will be sent home at their employer's expense.

For work permit holders who are already employed in Bermuda but cannot speak English, the Department of Immigration will act on complaints from the public and give them a language test. Depending on the results, they may be asked to undertake training and be recalled for retesting or their work permit may be revoked.

X 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 to the trade union in lieu of membership or, alternatively, 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 avoiding undue disruption of the business. Further, employers may, by notice in writing addressed to a certified union, require that a representative may not engage in union activities on the premises without its prior permission.

XI DATA PROTECTION

i Requirements for registration

The Bermuda Personal Information Protection Act 2016 (PIPA) is the country's first piece of data protection legislation. It does not contain any registration requirements. The preliminary provisions of the PIPA were introduced in 2016 and the rest are expected to come into force in 2019. The PIPA seeks to 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, therefore, possess personal information about every employee and applicant for employment. The operation of the PIPA will be overseen by a privacy commissioner, who will also be responsible for handling complaints about alleged breaches of the Act. A graduated regime applies to the complaint procedure, starting with mediation, then followed by an inquiry by the privacy commissioner, followed by possible criminal sanctions. Every employer will be required to appoint a privacy officer who will communicate with the privacy commissioner.

ii Cross-border data transfers
All personal information protection policies apply to cross-border data transfers.

iii Sensitive data
The PIPA defines this 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.

XII DISCONTINUING EMPLOYMENT

i Dismissal
An employee who is not on a fixed-term or project-based contract, or not in their 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. Further, 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 is for an invalid reason or for no reason, it is 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.

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Employees are entitled to at least one week’s notice if they are paid on a weekly basis, 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 has never ordered 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. Where a complaint was 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 where 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:

- the modernisation, mechanisation or automation of all or part of the employer’s business;
- the discontinuance of all or part of the business;
- the sale or other disposal of the business;
- the reorganisation of the business;
- the reduction in business, necessitated by economic conditions, contraction in the volume of work or sales, reduced demand or surplus inventory; or
- 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 XII.i).
b  Severance allowance – where an employee has completed at least one continuous year of employment, the employee 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 where the employee unreasonably refuses to accept an employer’s offer of re-employment at the same place of work under no less favourable terms than he or she was employed prior to the termination.
c  Certificate of termination – see Section XII.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 (mandatory for Bermudians or spouses of Bermudians) is transferable on redundancy, including the employer’s vested contributions, usually two years 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 such 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 such 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 XII.i).
XIII 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 where 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.

XIV OUTLOOK

All employers in Bermuda will face additional administrative and financial burdens when the PIPA comes into force in 2019 and thus, they will be required to protect and control access to personal information, both physically and electronically.

It is expected that the insurance market will continue to contract through future consolidations, which means more redundancies are expected.

The job market is currently pinning its hopes on fintech, which attracts both interest and caution. A regulatory framework is already in place. The Bermuda Banks and Deposit Companies Amendment Act 2018 enables the creation, operation and regulation of fintech banks on the island. The Digital Asset Business Act 2018 sets out rules on client disclosure, cybersecurity and prudential standards, and aims to make the digital-asset business a regulated industry. Nevertheless, many questions remain unanswered, such as how the conventional banks will be affected, what career skills will be needed for employment in this sector, whether employment in the finance sector will increase, how Bermuda’s financial viability and stability will be impacted, etc.

The government promises to relax immigration policies to some extent in order to allow start-up fintech companies to bring in five employees, provided they are also hiring and training Bermudian staff. Other legislative changes being promised include a more progressive social insurance (government pension) scheme, pay equity and Bermuda’s first minimum wage, all aimed at providing relief to those at the lowest end of the economic spectrum.
INTRODUCTION

In Brazil, basic employment rights are provided for in the Federal Constitution of 1988, which establishes rights and minimum contractual conditions that must be complied with in employment relations.

The rights provided for in the Federal Constitution are codified by federal laws and in their great majority are consolidated in the Brazilian Consolidated Labour Laws (CLT), enacted in 1943. The Federal Constitution also sets forth provisions for union association rights and the right to strike.

In addition to the CLT, specific regulations are set forth in federal laws for certain professionals (engineers, physicians, attorneys, etc.) and there are also regulations relating to occupational health and safety issued by the Ministry of Labour and Employment. The Ministry of Labour and Employment is the body of the Executive Branch 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, where there is no discovery phase or trial by jury, given that 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.

Actions between employers and employees can be individual or class (multi-plaintiff); however, there are courts that do not accept class actions. Therefore, actions are usually individual. On the other hand, class actions may be brought against the employer by the union that represents the employees or by the Labour Prosecutor’s Office itself, so as to defend the interests of employees.

The employment courts are divided into three levels. The first includes the lower labour courts in which a judge rules on cases at the trial court level. The regional labour courts are the second level of labour courts and are generally located in the capitals of the states. In regional labour courts, a panel of judges typically rules on appeals against trial court decisions and class actions that involve strikes. Finally, the third level is the Superior Labour Court, which is located in Brasilia, the federal capital. Likewise, a panel of judges rules on appeals against decisions of the regional labour courts that violate the provisions of federal law or the Federal Constitution, or that are contrary to the decisions of other regional labour courts or to summaries of the Superior Labour Court itself. Appeals that address any previously heard
facts and evidence are not permitted. In addition to the labour courts, the Federal Supreme Court, which is the highest adjudicative body of the Brazilian legal system, also hears labour cases when lower court decisions violate constitutional provisions.

In the administrative sphere, in addition to audits conducted by the Ministry of Labour and Employment through its regional labour superintendents, the Labour Prosecutor’s Office monitors compliance with legislation through investigative proceedings. The Labour Prosecutor’s 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 Prosecutor’s Office can propose a settlement, granting the company a period to remedy the irregularity upon imposition of a fine, or file a public interest civil action against the company, so that the labour courts, by means of a court decision, may require the company to remedy the violation.

II YEAR IN REVIEW

i The Labour Reform Law and the expiry of Provisional Decree 808/2017

Congress enacted Federal Law No. 13,467/2017 (the Labour Reform Law), in effect as of 11 November 2017, which implemented extensive changes to several aspects of labour relations in Brazil. Individual and collective employment-related rules were affected. In the context of labour litigation, procedural regulations were also changed. The Labour Reform Law also encompassed Federal Law No. No. 13,429/2017 (effective as of 31 March 2017), which amended provisions on outsourcing and temporary work.

On 14 November 2017, President Temer issued Provisional Decree 808/2017, which amended the Labour Reform Law. The Decree, however, was not confirmed by Congress and expired, which meant that it was only in effect from 14 November 2017 to 22 April 2018. Therefore, as of 23 April 2018 only the provisions of the Labour Reform Law are in effect.

ii Challenges to the Labour Reform Law

More than one year has passed since the Labour Reform Law came into force. The purpose of the reform is to provide more certainty regarding the application of labour and employment law provisions for a better business environment in Brazil. However, there have been some challenges – yet to be resolved – before the Supreme Court. Therefore, employers have been cautious in applying some provisions of the Law.

In June, the Supreme Court confirmed the end of mandatory union contributions, deciding that it is constitutional to make it optional for employees and employers. As a result of the Supreme Court decision, union contributions have been raised as an issue in union negotiations in Brazil, as they provided the unions with financial support.

Other challenged rules to be dealt with by the Supreme Court are:

a limitations to the right to file lawsuits without paying court fees, opposing counsel’s fees and expert’s examination fees;

b intermittent work based solely on the employer’s demand;

c indexation accrual on bonds posted for appeals in lawsuits;

d a cap on compensation for moral damages regarding employees and employers;

e permission for pregnant and breastfeeding women to engage in unhealthy work;
f permission to set work shifts of 12 hours followed by a 36-hour rest in individual employment agreements and terms; and

g obligation to disclose amounts claimed when filing labour lawsuits.

It is expected that the Supreme Court will decide some of these matters in 2019.

iii Collective dismissals

Another change brought by the Labour Reform Law is permission for employers to proceed with collective dismissals without previous negotiations with labour unions. The new rule should have been enough to put an end to the long-standing case law issued by labour courts in Brazil that obliges employers to negotiate with unions before proceeding with collective terminations, which is still confirmed by the Supreme Court. However, some labour courts are ruling against the Law. Decisions are being rendered throughout Brazil confirming the obligation to negotiate with unions, despite the change. For example, there are a couple of disputes involving private universities that terminated the contracts of professors during a holiday period in order to restructure the business. A couple of first instance labour courts decided that such terminations were unlawful and granted injunctions ordering the reinstatement of the professors. The injunctions were later confirmed by the regional courts of appeals.

The argument behind these decisions is that the Labour Reform Law does not comply with the Federal Constitution. According to some judges, the Constitution determines that unions must engage in the defence of the collective rights and interests of the employees. This rule would implicitly bring the obligation to communicate and negotiate with unions before proceeding with collective terminations.

The injunctions granted in the cases involving universities were ultimately overruled by Justice Ives Gandra Martins, who at the time was head of the Superior Labour Court of Appeals (TST). The decisions issued by Justice Martins confirmed the provision in the Labour Reform Law. The Court, however, did not decide the matter through a panel of justices, which leaves a great deal of uncertainty.

Despite the decision rendered by Justice Martins, the matter is far from being settled at the federal level. The Labour Reform Law will only prevail when the possibility to have collective dismissals without previous negotiations is ruled on by a panel of justices at the TST or at the Supreme Court. This is expected to take place in 2019.

iv The Brazilian General Data Protection Law

Following the enactment of the General Data Protection Regulation in Europe, Brazil enacted its own General Data Protection law (LGPD). The law was passed in August 2018 and will enter into force in February 2020.

The LGPD will have an impact on employment in a number of ways. It affects the gathering, use, treatment and storage of employees’ and employee candidates’ personal data. Employers’ practices such as recruitment, hiring and administering employees need to be adapted and HR procedures must to be reviewed.

It is advisable, for instance, to request express consent from candidates who apply for job positions to share their personal information with potential employers, including the maintenance of such data even the candidate is not hired. Consent may be revoked by the candidate or an employee at any time.
The LGPD also provides the legal concept of sensitive personal data, which is personal data related to race, ethnicity, religion, health or sexual life, genetics or biometrics, opinions on politics, membership of unions, and membership of religious, philosophical or political organisations.

Employment agreements are also going to be affected. It is advisable to refer specifically to personal data in the contract, including how it will be maintained and when it will be disclosed to third parties (which will require the employee’s consent). The justification must rely on legal grounds for compliance purposes. Consent given by the employee may be revoked by him or her. It is also advisable to have a privacy policy to ensure that all legal requirements are met by employers, in addition to the employment contracts on personal data protection.

The LGPD provides heavy penalties in case of non-compliance. Fines can reach up to 2 per cent of the company’s revenue. In addition to the administrative penalties, the company and its officers may be held liable in criminal and civil proceedings.

The examples above are far from being exhaustive, as the LGPD also impacts other legal labour and employment documents routinely requested by employers. Despite the long period until the LGPD comes into force, it is important that employers start to review and adapt their internal procedures to avoid ramifications.

III BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Brazilian law does not require the execution of a written employment contract and an employment relationship is permitted on the basis of a verbal employment contract. A verbal agreement is sufficient to comply with the legal requirement for registering the employee in the legally mandated employment booklet and employment registration form (employment documents).

In order to eliminate doubts concerning conditions of employment, however, companies tend to execute written employment contracts with their employees, establishing, inter alia, 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 of damages caused by employees due to fault (this requires an express provision in the employment contract), other types of payroll deductions in addition to the legal deductions, agreement of the employee to work overtime, and the offset of hours worked on Saturdays against hours worked on other days of the week. Provisions regarding the probationary period and work for a fixed term necessarily require execution of a contract and relevant entries in the employment documents.

In general, there are four types of employment contract in terms of working hours: (1) for employees in general; (2) for employees who perform external activities and are not permitted to control or establish their daily working hours; (3) for employees who hold positions of trust (i.e., employees who exercise management powers within a company); and (4) for employees who work from home.

Employment contracts in Brazil are usually executed for an indefinite term. However, contracts may be executed for a fixed term, which is limited to two years. To be valid, contracts for a fixed term must be executed only for services whose nature or temporary character
justifies its definite term or for temporary business activities. In the case of early termination of a contract for a fixed term, the company must pay to the employee half of the salary due for the remaining period, which limits this type of hiring in Brazil.

Brazilian law renders amendments to contracts null and void if they are to the detriment of the employee, even if the employee expressly agrees to them. Thus, once an employment contract has been executed, the company may not alter it unless the alteration benefits the employee (e.g., salary increase, reduction of daily working hours and promotions). Exceptions to this rule are provided in the Labour Reform Law, which states that certain provisions of employment agreements can be negotiated, either through a collective bargaining agreement (CBA) with the labour union, or individually with the employee when he or she holds a graduate degree and has a monthly salary higher than twice the maximum benefit paid by the Social Security (currently around 11,300 reais).

ii  Probationary periods

Pursuant to Brazilian law, a Brazilian company can execute an employment contract containing a probationary period that lasts 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. For the probationary period to be considered valid, it is necessary that: (1) the probationary period be provided for in the employment contract; and (2) the probationary contract must be included in the employment documents, under penalty of the probationary period being deemed non-existent.

If the probationary period has expired and the employee continues working, even if only for one day, the legal consequence is that the employment contract automatically becomes a contract for an indefinite term. In the event of early termination of a probationary contract, the company must pay an indemnity equal to half of the salary due through the end of the probationary period, except if the employer expressly agreed to the same severance pay as would be due in the event of termination without cause of an employment contract for an indefinite period. Proportional severance pay must also be paid (i.e., ‘13th-month salary’ and vacation pay, plus one-third of the vacation bonus).

iii  Temporary work

In March 2017, Federal Law No. 6,019/1974 on temporary employment, was amended by Law No. 13,429 to authorise that in the legal event of temporary substitution of regular and permanent staff due to 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 arose from unpredictable factors, or predictable factors related to intermittent, periodic or seasonal features.

These workers will be employed by an agency that is authorised by the Ministry of Labour to render this type of service. They cannot replace workers who are on strike. 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 to the temporary workers.

The manpower company is responsible for paying salary to the temporary workers. However, the same wages and other contractual rights granted to the employees of the contracting company must be also provided to the temporary workers whenever they have
similar functions. At the end of the temporary contract or in case of early termination without cause, the manpower company will have to pay severance equivalent to one-twelfth of the payment received by the temporary worker.

iv Establishing a presence

Brazilian law does not forbid the hiring of employees by a foreign company. However, if an employee is hired by a foreign company to work in Brazil, Brazilian labour laws and jurisdiction will prevail, irrespective of whether the employment contract provides for the application of the laws and jurisdiction of the foreign country. Instead of hiring an employee, a foreign company may engage consultants or independent service providers. If the services are to be performed in Brazil, the law also provides that Brazilian law will apply and that Brazil will have jurisdiction. Care should be taken to ensure that this type of service agreement is not confused with an 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. Furthermore, Brazil and the United States have not entered into a double taxation treaty pursuant to which the notion of permanent establishment could be addressed.

The most similar thing 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 hypotheses 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 such income can be attributed to activities carried out in Brazil.

From the wording of Article 147, it can be inferred that a non-resident could be deemed to be doing business in Brazil in the following circumstances:

a whenever it maintains a branch, agency or representative office duly authorised to operate in the country, through which the non-resident carries out its activities in Brazil;
b whenever a commissioned agent in the country receives goods from the non-resident to sell them in Brazil on behalf of the non-resident; and
c whenever a resident agent, commissioner, representative, or proxy holder engages in business in Brazil on behalf of the non-resident, holding powers to contractually bind the non-resident to third parties.

In addition, it could be argued that the Brazilian tax authorities could attempt to claim that a de facto permanent establishment in Brazil exists on the basis of Article 126 of the Brazilian Tax Code, which provides that tax liability arises regardless of the formal or legal incorporation of an entity in Brazil, recognition of an economic or professional unit being sufficient.
In this context, while Brazilian law acknowledges the legal personality of foreign legal entities, it does not embrace the freedom of establishment of such entities as the laws of several foreign countries do. In other words, Brazilian law (Article 1,134 of the Brazilian Civil Code) 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.

Once the subsidiary has been registered with the Ministry of Finance and the Social Security Agency, and has obtained operational licences (including regulatory authorisations, if applicable) it may commence activities and hire employees, since it may now generate its payroll and pay the respective taxes and social charges.

In Brazil, there is no legally provided time frame for the incorporation of a company, but in general, the level of bureaucracy means that the time usually ranges from two to six months and sometimes more, particularly when registration of a regulated activity is involved.

Hiring consultants or service providers through an intermediary company is possible. In relation to employment rights, the following payments to employees are mandatory:

- a monthly salary;
- b transportation vouchers;
- c family allowance;
- d profit-sharing upon achievement of goals;
- e five days’ paid paternity leave;
- f vacation pay, plus one-third vacation bonus;
- g 13th-month salary, equivalent to one-twelfth of the monthly salary for each month worked, calculated based on the salary for the month of December and paid in two instalments, the first between the months of February and November and the second on 20 December;
- h monthly contribution to the employee severance indemnity fund (FGTS), equivalent to 8 per cent of monthly remuneration, deposited monthly with a government bank;
- i 120 days’ maternity leave: this amount is not an employment right, but rather a social security right, as it is the Social Security Agency that pays the benefit;
- j rights provided for in a CBA; and
- k severance pay.

The remuneration paid to employees triggers social security contribution obligations, the percentages of which vary according to the salary earned by the employee, as per the table below.

<table>
<thead>
<tr>
<th>Salary (reais)</th>
<th>Rate for purposes of payment to the Social Security Agency (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 1,693.72</td>
<td>8</td>
</tr>
<tr>
<td>From 1,693.72 to 2,822.90</td>
<td>9</td>
</tr>
<tr>
<td>From 2,822.90 to 5,645.80</td>
<td>11</td>
</tr>
</tbody>
</table>

Employees must pay income tax related to total compensation, which must be deducted by the employer. Employers are required to withhold tax and pay the amounts directly to the Federal Revenue Office, providing the employee with annual information that is necessary for the preparation of his or her annual tax return. Withholding percentages vary according to the salary paid, as per the table below.
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 salary paid, payable or credited to an employee that provides services for it is 20 per cent. The calculation base is total compensation paid, payable or credited for work on any account during the month to the socially insured employees providing services.

Sums are added to this 20 per cent contribution to cover the cost of occupational accident insurance as well as 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 and may vary according to the economic activity of the company.2

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.

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, on pain of termination for cause, unless the employer has given authorisation in this regard (intermittent work on demand is an exception to this rule).

On account of the constitutional principle of the freedom of every person to work, the employee may carry out competing activities after contractual termination of employment, unless he or she has executed a non-competition agreement with the employer.

The effectiveness of a non-compete agreement after termination of employment is a concept that demonstrates competing concerns. One view is that non-compete provisions are always invalid, even if there is payment of consideration and the non-compete agreement is limited in time, territory and relevant business activities. Another view is that the constitutional principle of freedom to work is not absolute and can be limited, provided that there is reasonableness and that it is necessary to protect the employer’s business. In this regard, in order for a non-compete agreement to be valid after termination of the employment contract, it must be executed at the moment of hiring (it can be 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-competition

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2 On top of the 20 per cent, 1 per cent, 2 per cent or 3 per cent must be added (this will depend on the risk levels and the rate of occupational accidents of the activities of the employer, being 1 per cent for low risk, 2 per cent for medium risk and 3 per cent for high risk), and around 5.8 per cent that goes to other entities such as SENAI, SESC and SESI.
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 the 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. It must be noted 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, an express agreement in this regard is required. The company may choose to execute a separate document, provided that it is executed simultaneously with the employment contract.

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 the 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 and 44 hours per week, totalling 220 hours per month. Working hours on Saturdays may be offset by means of a written agreement, so as to be distributed throughout the five business days of the week, whereby Saturdays will be considered a non-worked business day. Overtime worked on Saturdays may misrepresent the offset, and the time resulting from the distribution on weekdays of hours worked on a Saturday may be considered overtime.

Another aspect is that if the employee is hired to work 220 hours per month but actually works only 200 or 210 hours on account of the company's policy, the company's practice will prevail and the monthly base will not be the contractual covenant of 220 hours, but rather the covenant that results from practice.

Special working hours may include uninterrupted 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 CBA.

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 in the daily 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. This deprives these employees of the right to payment of overtime in the circumstances mentioned. Such employees have the right to a weekly day of rest on Sundays.

Companies with more than 10 employees are required to maintain control of workdays of employees who are subject to compliance with working hours. Working hour records may be manual, mechanical or electronic, so that employees may record the time of entry, exit and breaks. The ‘British punctuality’ working day is not valid (i.e., if the employee always records the same time, it may be understood that the employer is forcing him or her to do so for the purpose of not paying overtime). Employees may be excused from recording their time of entry, exit and breaks provided that there is a CBA in this regard, whereby the employee would then only record overtime hours. In relation to the form of recording hours worked, if the company opts for electronic control, it must follow the guidelines of the Ministry of Labour and Employment found in Ordinance No. 1510/2009, which establishes, inter alia, the issuance of reports by the time recording system and the use of time recording equipment validated by the Ministry of Labour and Employment.

ii Overtime

If the employee works beyond his or her contractual workday, the company must remunerate the excess hours as overtime, with a minimum rate of 50 per cent over the wage for a regular hour, although there are CBAs that establish higher percentages. The employee may only work 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 200 per cent of the ordinary wage, irrespective of whether they exceed the daily or weekly limit.

The Labour Reform Law provides that the length of time it takes employees to get from their home to their workstation or workplace is not part of working hours and therefore not subject to overtime. The previous rule provided that this period of time was part of working hours when the employer provided transportation to the employees because the location of work was in a remote area or in an area with no public transportation available.

It is also provided by the Labour Reform Law that the following activities are not part of working hours and therefore not subject to overtime:

a. an employee staying longer than his or her working hours in the employer’s premises to seek protection against (1) criminal activities in the streets and other public areas or (2) bad weather;

b. personal activities such as religious activities, rest, recreation or leisure, personal studies, eating, personal networking, personal hygiene and uniform change when there is no obligation to do it at the employer’s premises.

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 Labour and Employment.

For the granting of a temporary residency visa, among other requirements, the foreigner must receive a job offer from the Brazilian company (subsidiary or not) or show evidence that he or she has graduate degree.
In relation to a temporary visa where the employee has an employment contract with the Brazilian company, upon fulfilment of job qualifications and experience requirements, the maximum term is two years, which can be postponed subject to application and confirmation by the immigration authorities. In relation to foreigners holding this visa, the number of foreigners 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 the foreigner performs work that is also performed by a Brazilian employee, other requirements such as salary parity may apply, as provided for by the Ministry of Labour. The proportionality requirement is only applicable for 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 for purposes of taxation in Brazil the totality of his or her monthly earnings (in Brazil and abroad). Thus, the Brazilian company must consider for tax (and also for 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 purposes of offsetting taxes. Dependents 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 foreigner that 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 provide to 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 foreigner 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 subject to 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 such policies do not violate Brazilian law (when applicable) and it is not necessary to obtain approval by the employees or by any government agency for the policies to be implemented. An example is demotion, which is not valid in Brazil, even if the employee agrees to such a move. 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, such practices may have legal implications. Thus, prior analysis of the possibility of application of the policy is recommended.

The policies become constituent parts of the employment contracts, including disciplinary measures, and may not be altered to the detriment of the employees. The policies
must 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 the company to have written or documentary evidence of the employees’ awareness of the policies, particularly if, based upon the terms of such 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 the employees and have evidence of such training, 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 maintain a copy available for employees on its intranet.

VIII TRANSLATION

Documents in a foreign language coming from abroad will only be valid in relation to third parties and the Brazilian government if they are certified by an entity that is authorised in the country, or by the Brazilian consular office, if applicable. Pursuant to the Civil Code, such documents must be translated into Portuguese by a certified translator.

In turn, to avoid questioning about obligations in documents written in a foreign language and signed by Brazilian employees, it is recommended that such documents be drafted in Portuguese. This is because if they are written in a foreign language and are challenged, the company will have to prove that the obligations included in the documents were understood by whoever signed them, which may not always be possible. Accordingly, it is recommended that all documents such as job offers, employment contracts, internal policies, confidentiality agreements and bonus policies, be executed in Portuguese. There are cases in which, although the document is written in a foreign language, if the subject matter of the dispute favours the employee, the labour court will accept such document as valid if it is accompanied by a duly certified translation. Yet, if the dispute concerns a condition that is contained in a document in a foreign language that is harmful to the employee, if the employee alleges that he or she does not understand the foreign language, either spoken or written, but has nonetheless signed the document, the labour court may rule that the document is invalid. However, if the employee has demonstrated spoken and written proficiency in the foreign language, whether the document will be enforced will depend upon the interpretation of the court.

IX EMPLOYEE REPRESENTATION

Article 11 of 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 vis-à-vis the employers.’

The Labour Reform Law regulates this matter, as provided by Articles 510-A, 510-B, 510-C and 510-D of the Labour Code.

According to the new regulation, the number of employees who may be elected depends on the size of the company:

a from 200 to 2,999 employees: three representatives;
b from 3,000 to 4,999 employees: five representatives; and
c more than 5,000 employees: seven representatives.
These representatives have provisional job security for one year after they have completed their term as a representative.

Irrespective of the constitutional norm mentioned above, employees are represented through the union of the profession to which they belong.

To be entitled to such representation, there is no need for employees to be unionised. They only need to work at a company of a given economic sector in which there is a union representing their profession to be automatically represented by the union, and as such, to receive the benefits of any agreements that the union executes with the employer or with the employer’s trade association. For this purpose, payment of annual union dues was mandatory and used to correspond to one day of the employee’s salary; however, under the Labour Reform Law, this obligation no longer applies. If the employee wishes to be a member of the union, he or she must pay monthly dues to the union and be entitled to the assistance provided by the union to its members. Companies may not hinder union membership of their employees, and in the event an employee should wish to become a union official, his or her employment contract may not be terminated by the company during the corresponding term of office and for up to one year thereafter. An employee who is a union official can only have his or her contract terminated because of serious misconduct and in accordance with the specific procedures for termination for due cause provided in the CLT. Otherwise, termination may be deemed invalid.

In addition to monthly dues, unionised employees are also required to pay other types of contributions to the union. Employees are also represented in the Internal Committee for Prevention of Occupational Accidents that a company must set up, according to the level of risk of the company’s activity, as well as the number of employees. Employees elected for this committee will have employee rights during their term of office and for up to one year thereafter.

Finally, a provision in the Federal Constitution (Article 7(XI), final section) provides that employees may have active participation in the management of the company. However, there is an understanding that a specific law is required to regulate such active participation. Very few companies in Brazil have accepted, whether voluntarily or by means of a CBA, to have this representation in their management.

**X DATA PROTECTION**

**i Requirements for registration**

In addition to the LGPD, which was enacted in 2018 and will come into force in 2020, a principle in the Federal Constitution already protects employees’ intimacy and privacy.

Employee personal data that can be requested by the employer is that which is inherent to the hiring of an employee (in order to fulfil the employment agreement), as well as that which is required by labour legislation. Such personal data does not include sensitive data.

Employee personal medical data may not be disclosed to third parties, and it is certain that only the employee, his or her private physician, or the company’s physician may have access to such information. If it should be necessary to use the 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. It is also advisable to inform the Federal Savings Bank regarding the
transfer, so that the employees’ severance fund accounts will not be split. This is done by means of a special form requesting the transfer of accounts, where employer is required to provide employee data.

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.

Brazilian law provides that the business group is the sole employer, which is why the transfer of information about employees of a Brazilian subsidiary to its headquarters is possible, provided that access to such information is limited to the headquarters (i.e., not made available to third parties) and the transfer can be justified for purposes of fulfilling the obligations in the employment agreement.

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 related 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 what types of background checks an employer may conduct to investigate a job applicant or an employee during the employment relationship, and there are also no provisions setting out limits on employers undertaking such investigations. Thus, background checks are reviewed according to the principles of the Federal Constitution related to the protection of employees’ intimacy and privacy. Certain practices related to background checks can be adopted by employers, provided that they are reasonable and proportional to the work to be performed by the employee.

Background checks related to education, previous jobs (position, period of employment, salaries and benefits) and other information, such as registrations with professional class councils, can be conducted by the employer, as well as a background check requesting an employee’s criminal record, as long as this can be reasonably justified. However, a criminal record check may only be conducted in connection with a position that merits such a check or a position in a financial area or that requires the handling of client funds. Checking the employee’s financial condition with credit institutions is also permitted. Whenever a background check is conducted, the company must obtain the prior express consent of the employee (otherwise, if the employee is not hired or has his or her contract terminated, he or she may claim discrimination or invasion of privacy, or both, and seek monetary damages).

XI 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 CBA. In the event of termination without cause, the employee must
receive an indemnity corresponding to termination and indemnity rights (severance pay) and at least 30 days’ prior notice of the termination, with an additional three days for each full year of employment.

There is no formal procedure for termination without cause, in which case it is common practice to deliver a written notice to the employee with information concerning compliance with the notice period or compensation in lieu of notice.

Severance pay must be paid within 10 days from the termination date. The decision as to whether the employee should work through their notice period is made by the employer. In the event of resignation, the employee must inform the employer of whether he or she will work through the notice period and it is common for the employee to request a waiver from the employer in this regard.

If the employment contract has been effective for more than one year, termination must be ratified by the union of the professional category of the employee in question or with the Ministry of Labour and Employment.

ii Redundancies

In Brazil, if the 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 the employment contract without cause with notice (preferably in writing) and with the payment of severance, which is mandatory in such cases, to the employee.

Where redundancy terminations are necessary, a review should be undertaken to determine whether the company employs any workers possessing vested employment rights, as such employees may not be terminated as a result of redundancy.

Certain CBAs 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 such circumstances, it is also sometimes the case that consultation with the union is required before effecting the terminations.

XII 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 detrimental to them.

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 Labour Reform Law provides that former shareholders are secondarily liable for labour-related debts related 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 the shareholders’ removal. Before proceeding with enforcement attempts against the former shareholder, the plaintiff must try to enforce the award first against the company (employer) and then against its current shareholders. In case 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 related to the mandatory severance pay vary according to the type of termination, as follows:

*a* Termination without cause, on the employer’s initiative:
- prior notice of 30 days increased by three days for each year of service for the same company;
- salary balance in the termination month;
- unused earned vacations and one-third additional payment;
- prorated vacation and one-third additional payment;
- 13th salary (or prorated 13th salary, depending on the termination date);
- FGTS: deposit in the employee’s dedicated FGTS account (equivalent to 8 per cent of the employee’s pay) in the termination month, as well as upon prior notice and 13th salary;
- 50 per cent FGTS fine based on the amount deposited in the employee’s FGTS account;
- any other labour right related to the termination provided for in the current CBA; and
- any other compensation or benefit contractually agreed with the employee.

*b* Termination with cause, on the employer’s initiative:
- salary balance in the termination month;
- earned vacation and one-third additional payment; and
- FGTS: deposit in the employee’s blocked account (equivalent to 8 per cent of the employee’s pay) in the termination month.

*c* Termination as a result of resignation by the employee:
- salary balance in the termination month;
- 13th salary (or prorated 13th salary, depending on the termination date);
- earned vacations and one-third additional payment;
- prorated vacation and one-third additional payment; and
- FGTS: deposit in the employee’s blocked account (equivalent to 8 per cent of the employee’s pay) in the termination month, as well as upon 13th salary.

Termination by mutual agreement is also possible, according to the Labour Reform Law. In this case, the severance pay is exactly as stipulated in the termination without cause on 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 the employee’s severance fund account.

In any termination, the Labour Reform Law provides the employer with a 10-day term from the termination date for paying severance.
The current economic, financial and political situation in Brazil, together with the consequences of Operation Car Wash, has produced several changes in the organic relationships between government agencies and institutions, and in the dynamic of commercial deals in Brazil.

In addition, the Labour Reform Law has reduced the number of lawsuits, and presents an opportunity to review companies’ practices in order to reduce labour-related costs.

The new federal government, elected on November 2018 and in office as of January 2019, is deemed to hold a far-right position. President Bolsonaro has demonstrated a liberal tendency in choosing his cabinet ministers, which indicates the continuation of flexibility in the labour laws. He intends to reduce bureaucracy and costs, putting in place an agile and cost-efficient administration with fewer ministries. In the next four years more changes to the labour legislation are expected in order to make it more flexible.
I INTRODUCTION

Canada is a federal state consisting of 10 provinces and three territories. 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 Constitution 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 the employer determines whether its relations 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 transportation, communications and broadcasting.

Canada has two legal systems in civil matters. In Quebec, the Civil Code of Quebec (CCQ) 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 Code (CLC) applies to federally regulated employers and sets forth minimum standards of employment. The Canadian Human Rights Act and the Employment Equity Act 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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1 Robert Bonhomme and Michael D Grodinsky are partners at Borden Ladner Gervais LLP. The authors acknowledge the valuable contributions of Vanessa Lapointe in the preparation of this chapter.

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 91-92.

5 1991, c. 64.

6 RSC, 1985, c. L-2.


8 SC 1995, c. 44.
under the CLC will proceed before specialised labour arbitrators. 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 does workers’ compensation regimes that provide for assistance to workers injured while on the job.

Employment litigation at the provincial level is usually conducted before the civil courts of each province, specialised 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 specialised 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 2018. Perhaps the most high-profile of these occurred on 20 June 2018, when the federal government passed Bill C-45, which amended the Controlled Drugs and Substances Act to decriminalise cannabis and permit adults to legally purchase, grow and use a limited quantity of recreational cannabis. Provincial variations on the ability of Canadians to purchase, grow and use recreational cannabis do exist. It is noteworthy that medical cannabis has been accessible to Canadian for several years.

Bill C-45 received royal assent and came into force on 17 October 2018. The decriminalisation of recreational cannabis promises to further refine the ability of employers to impose work safety rules regarding the use of cannabis at work and may also impact the (limited) ability of Canadian employers to implement drug and alcohol testing regimes.

Another important change that impacted the federal jurisdiction was the introduction of Bill C-65, which proposed amendments to the CLC regarding workplace violence and harassment (including psychological and sexual harassment) in federally regulated workplaces. Bill C-65 was passed by the federal government and received royal assent on 25 October 2018. The new provisions introduced under Bill C-65 are aimed at preventing incidents of workplace harassment, responding effectively to such incidents and supporting affected employees. It is reported that employers will need to comply with the changes brought about by Bill C-65 as early as spring 2019.

Provincial employment legislation was also the subject of important changes in 2018, including in the provinces of Alberta, Quebec and Ontario. Alberta’s new Employment Standards Code was updated, effective 1 January 2018. The changes introduced by Bill 17 were aimed at improving family-friendly workplaces, modernising employment standards

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and aligning the Alberta legislation the work-related protections found in other provinces.\textsuperscript{12} Provincially regulated employees in Alberta are now eligible for new and existing leave after 90 days of employment (rather than after one year), and seven new leaves of absence.\textsuperscript{13} Additionally, some existing periods of leave have been extended, and caregiver status is expanded to non-primary caregivers.

In Quebec, Bill 176 came into force on 12 June 2018,\textsuperscript{14} amending Quebec’s Act Respecting Labour Standards.\textsuperscript{15} Most notably, Bill 176 permits employees to obtain a third week of paid vacation after three years of continuous service with their employer. This change came into effect on 1 January 2019. In addition, Bill 176 extends some already existing leaves of absence and creates new ones.\textsuperscript{16} It also significantly changes the ability of Quebec employees to assert claims of psychological harassment in the workplace. In this regard, employees are now permitted to file psychological harassment complaints within two years following the last incident of unlawful harassment. Previously, the delay for filing these complaints was 90 days. Moreover, Quebec employers are now mandated to have psychological harassment policies in place for their personnel.

Finally, in 2017, Ontario’s provincial government adopted Bill 148, which was intended to modernise that province’s employment standards legislation, such as, for example, increasing the minimum wage to C$15 per hour (from C$11.60 in October 2017) as well as adopting equal pay for equal work provisions.\textsuperscript{17} In October 2018, following a change of government, the Ontario legislature introduced Bill 47, which represented a marked change of direction for Ontario employment standards legislation.\textsuperscript{18} Bill 47 came into force on 21 November 2018. In particular, the minimum wage in Ontario was reduced to C$14 per hour, with no planned increases until at least October 2020. Many scheduling provisions that were introduced under Bill 148 were repealed, as well as many amendments related to labour relations. Bill 47 eliminated the reverse onus on employers to substantiate that independent contractors were not actually employees.

III SIGNIFICANT CASES

\textbf{i} Unifor, Local 707A v. Suncor Energy Inc\textsuperscript{19}

In 2017, the Alberta Court of Appeal ruled on a case involving a drug and alcohol policy that provided for random testing of employees, and applied the Supreme Court of Canada’s

\textsuperscript{12} The Fair and Family-Friendly Workplaces Act.

\textsuperscript{13} The leaves of absence are the following: bereavement leave (three days unpaid); personal and family responsibility leave (five days unpaid); long-term illness and injury leave (16 weeks unpaid); citizenship ceremony leave (half-a-day unpaid); critical illness of a child (up to 36 weeks unpaid); critical illness of an adult family member (up to 16 weeks unpaid); domestic violence leave (10 days unpaid); death or disappearance of a child (up to 52 weeks unpaid).

\textsuperscript{14} An Act to Amend the Act Respecting Labour Standards and Other Legislative Provisions Mainly to Facilitate Family-Work Balance.

\textsuperscript{15} Act respecting Labour Standards (Quebec), RSQ, c. N-1.1.

\textsuperscript{16} The leaves of absence are the following: domestic or sexual violence leave (26 weeks unpaid) and parental or family obligations leave (10 days, of which up to two can be paid).

\textsuperscript{17} An Act to Amend the Employment Standards Act 2000.

\textsuperscript{18} The Making Ontario Open for Business Act 2018.

\textsuperscript{19} 2018 CanLII 53457.
decision in *Irving* (which had been released in 2013). The *Irving* decision found that random drug and alcohol testing would generally be justifiable in situations where there was a dangerous workplace, which contained enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace. The Alberta Court of Appeal ruled that the employer was not required to prove that there was a ‘significant’ problem relating to substance abuse in the workplace, such that it interpreted *Irving* as requiring only evidence of a ‘general’ problem.

In particular, the Alberta Court of Appeal ruled that the employer was not required to meet a higher threshold and bring evidence that proved that a substance abuse problem existed with the unionised employees that were part of the union’s bargaining unit (as opposed to evidence that demonstrated a generalised problem of substance abuse in the workplace, not focused on the unionisation status of the employees who were part of the workplace).

On 14 June 2018, the Supreme Court of Canada dismissed the trade union’s motion to appeal the decision. Consequently, the decision of the Alberta Court of Appeal was maintained and the trade union’s grievance was returned to a new arbitration panel for adjudication. In dismissing the trade union’s request for leave to appeal, the Supreme Court of Canada indicated its unwillingness to further examine the application of random drug and alcohol policies in Canadian workplaces, and endorsed the reasoning that had been applied by the Alberta Court of Appeal in interpreting *Irving*.

### ii  **Amberber v. IBM Canada Ltd**

In early 2018, the Ontario Court of Appeal rendered a decision that may prove to be a useful guide for Ontario employers for the purposes of interpreting and enforcing contractual termination clauses.

An employee filed a wrongful dismissal claim against IBM. The motions judge that first heard the claim ruled that the working notice and pay in lieu thereof provided by the employer, when combined, satisfied the entitlement set forth under the termination clause in the parties’ employment agreement, and that the clause was compliant with applicable provincial legislation. However, she held that the termination clause failed to rebut the common law presumption of reasonable notice. As such, she found that the clause was ambiguous.

The Ontario Court of Appeal overturned the motions judge’s decision, allowing IBM’s appeal and dismissing the employee’s cross-appeal, confirming the principle of contractual interpretation that the clauses to a contract need to be read as a whole and not ‘piecemeal’, as the motions judge had done. The Court of Appeals also stated that courts should not strain to create an ambiguity where none exists. It ruled that the employer had complied with the termination clause and with the applicable legislation. As such, the Court allowed the appeal and dismissed the wrongful dismissal action.

The Ontario Court of Appeal’s approach was strengthened by two subsequent decisions, also decided in 2018: *Raposo v. CA Canada Company* and *Burton v. Aronovitch McCauley Rollo LLP*.

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21 Ibid., at para. 31.
22 2018 ONCA 571.
23 2018 ONSC 4226.
24 2018 ONSC 3018.

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In the first decision, the employee had accepted a written offer of employment that included a termination clause (limiting his termination entitlement to the minimum set forth under provincial legislation) as well as a confidentiality agreement. The confidentiality agreement did not refer to the employee’s entitlements upon termination of employment. The employee argued that there was ambiguity between the wording of the offer letter and the confidentiality agreement, which made the termination provisions unenforceable. He therefore asked the Court to determine his entitlements upon termination of employment. The Court concluded that there was no need to find a contradiction between both documents. Rather, the Court followed the approach taken by the Ontario Court of Appeal in *Amberber v. IBM Canada Ltd* and ruled that the absence of wording in the confidentiality agreement could not cancel out what had been agreed to in the offer letter. The Court dismissed the employee’s action.

In the second decision, an employee was dismissed without cause from her employment. The termination clause in her contract stated that she was entitled to severance in accordance with the provincial legislation or, in the alternative, notice, severance pay and any other payment required by the relevant legislation. Moreover, the Ontario employment standards legislation sets forth that the employer must continue to make benefit plan contributions on behalf of an employee during the legally mandated notice period. The employee alleged that the termination clause, by not contemplating the continuation of benefits, was invalid. Again, by using the reasoning of the Ontario Court of Appeal in *Amberber v. IBM Canada Ltd*, the Court ruled that the clause implicitly included the continuation of benefits during the notice period. As a result, it dismissed the employee’s action.

### iii West Fraser Mills Ltd v. British Columbia (Workers’ Compensation Appeal Tribunal)

This decision by the Supreme Court of Canada significantly expands the obligations of site owners, who can be considered employers for the purposes of workplace health and safety legislation, even in the absence of an employment relationship with the injured worker.

In this decision, the Supreme Court upheld a decision of the British Columbia Court of Appeal, which involved an individual who was fatally struck by a falling tree. West Fraser was the ‘owner’ of the worksite, but not the employer of the worker. The Workers Compensation Board held that West Fraser had violated obligations under the provincial occupational health and safety act, thus being liable for an administrative penalty of C$75,000. The relevant legislation provided that the British Columbia Workers Compensation Board may impose such a penalty on ‘an employer’. West Fraser argued that it was not the actual employer of the worker.

The Supreme Court rejected this argument, stating that West Fraser, as the owner of the licence for the land, was necessarily an employer with respect to the worksite, and thus, the decision of the British Columbia Workers Compensation Board, and that of the Court of Appeal subsequently, was to be upheld.

This decision is based on the specific provision of law in British Columbia, but its underlying principles will likely be applied in the coming years. Thus, site owners should be aware of their increased liability in the context of employee workplace health and safety matters.

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25 2018 SCC 22.
The Quebec Court of Appeal’s decision in *Aon Parizeau* related to the importance of demonstrating that damage had been caused to the former employer of an individual that violated his covenant not to solicit and violated his legal duty of loyalty.

The employee in question left the employer to work for a competitor. Prior to his departure, he transferred his clients’ contact information to his new employer. He also contacted several clients to announce his career change, believing them to be more likely to follow him over to his new employer.

The Quebec Superior Court ruled that the employee had violated his duty of loyalty by failing to give his employer the notice of termination provided in his contract, entitling the employer to two weeks of the employee’s salary as damages. Regarding the non-solicitation covenant, the Court ruled that a significant violation had not occurred in the circumstances, but it still awarded the former employer damages corresponding to 12 months of the individual’s salary.

The Court of Appeal allowed the employee’s appeal and overturned the lower court’s judgment, stating that the violation of a contractual obligation was not sufficient to support the employer’s claim. The Court of Appeal reasoned that if damages were not proven, the employer had failed to prove a correlation between the former employee’s fault and the damages being claimed.

This decision sends an important message to employers: the mere existence of a restrictive covenant is not sufficient. Employers must be prepared to substantiate that damages have been caused by the departing employee’s misconduct. Damages must be proven in order to be compensated for, even where the employer has demonstrated a clear violation of the employee’s contractual or legal obligations.

### IV BASICS OF ENTERING 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 these contracts be 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. These periods 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 the employee is dismissed during the

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26 2018 QCCA 1346.
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 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. The enforceability of non-competition covenants depends largely on their duration and geographic 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 likely strike the covenant in its entirety, rather than reduce or rewrite the covenant to a lesser version.

27 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 (Article 2089 CCQ) and are not used where an employee has voluntarily resigned or has been terminated without serious reason (Article 2095 CCQ).
VI  WAGES

i  Working time

The employment standards legislation that exists in each Canadian jurisdiction sets forth rules governing work 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.\(^{28}\) Saskatchewan establishes a maximum of 44 hours of work per week.\(^{29}\) In Alberta, a daily maximum of 12 work hours is applicable.\(^{30}\)

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.\(^{31}\)

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.\(^{32}\) Not all employees are eligible for overtime. Managerial employees are almost always excluded.\(^{33}\) Certain jurisdictions also exclude professional employees from overtime eligibility.\(^{34}\) 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, in order to avoid the triggering of overtime and hours of work thresholds under employment standards legislation.\(^{35}\) 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.\(^{36}\) In practice, a 40-hour, Monday-to-Friday working week is virtually universal in offices.

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 length 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

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\(^{28}\) Section 17 of the Ontario Employment Standards Act 2000, S.O. 2000, c. 41, and Section 169 of the CLC.
\(^{29}\) Section 2-12 of the Saskatchewan Employment Act, SS 2013, Section S-15.1.
\(^{31}\) Section 79 of the Act respecting Labour Standards (Quebec).
\(^{32}\) See, for example, Section 55 of the Act respecting Labour Standards (Quebec).
\(^{33}\) See, for example, Section 167 of the CLC.
\(^{34}\) See, for example, Section 2 of the Nova Scotia General Labour Standards Code Regulations, R.S.N.S. 1989, c. 246.
\(^{35}\) See, for example, Section 53 of the Act respecting Labour Standards (Quebec).
\(^{36}\) See, for example, Section 18 of the Ontario Employment Standards Act 2000.
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 scenarios that make a work permit unnecessary, or that make a work permit much easier to obtain. For example, business visitors may enter Canada without the need for a work permit. In addition, certain international trade agreements 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 that 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 up 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 such workplace issues. Canadian employers are not usually required to file employment policies with government authorities.

IX TRANSLATION

Canada has two official languages, English and French. Quebec, which is predominantly French-speaking, recognises French as the official language of the state. That province’s Charter of the French Language contains provisions that require Quebec-based employers to make written communications to their staff in French, as well as provide offers of employment or promotion in French. Collective agreements for unionised employees in Quebec must be drafted in French. However, employment agreements and collective agreements may be

37 For example, the North American Free Trade Agreement or the Canada European Union Comprehensive Economic and Trade Agreement.

38 RSQ, c. C-11.

39 ibid., Section 41.

40 ibid., Sections 43, 44 and 50.
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 the French language in the workplace. Depending on the size of the workforce, Quebec-based employers may be subject to francisation requirements, which are aimed at promoting the widespread usage of French in the workplace. Francisation requirements under the Charter generally commence once the employer has reached the 50-employee threshold. 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.

X 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 over 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 enforce collective agreements, and provide for the resolution of disputes through arbitration. 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. 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. In the event a secret ballot vote is required, Canadian jurisdictions have varied thresholds for unionisation to occur. Certification votes

41 ibid., Sections 135 et seq.
42 ibid., Section 45 and 46.
43 See, for example, the Quebec Labour Code, c. C-27, or the Labour Relations Act (of Manitoba), C.C.S.M. c. L10.
44 See, for example, Section 17 of the Ontario Labour Relations Act 1995, S.O. 1995, c. 1, Sched. A.
45 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.
are generally supervised by a labour relations board, and usually take place within a relatively short time 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.46

XI DATA PROTECTION

i Requirements for registration

Canadian law provides for both private-sector and public-sector privacy legislation. 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 Act47 (PIPEDA) applies to federally regulated employers, as well as employers that are provincially regulated that operate in provinces that 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.48 In 2013, Manitoba passed private-sector privacy legislation that is not yet in force.49 It has not yet been determined whether this legislation is substantially similar to PIPEDA.

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,50 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 Freedoms51 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.

46 See, for example, Section 11 of the Ontario Labour Relations Act 1995, S.O. 1995, c. 1, Sched. A.
47 SC 2000, c. 5.
49 The Manitoba Personal Information Protection and Identity Theft Prevention Act, CCSM c. P33.7.
50 RSBC 1996, c. 373.
51 RSQ, c. C-12.
iii  Sensitive data

Under all Canadian privacy legislation, personal information is broadly defined as ‘information about an identifiable individual’, with certain exclusions. Sensitive information 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.

XII  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 such notice is not 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 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. In particular, such a provision will not be enforceable where the notice period is less than that which the employee would have been entitled to 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.

52 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.’
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.53

What constitutes just cause varies greatly, although theft, gross misconduct and insubordination would generally qualify. It is advisable for the 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 such 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.54

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 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 such a case, 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 subsection i, above. Where a mass termination has been triggered, greater periods of statutory notice may be required to be provided by the employer, and there may be an obligation to report the mass termination to a governmental entity. The criterion that is applicable to a mass termination will vary depending on the jurisdiction.

54 Section 124 of the Act respecting Labour Standards (Quebec), Section 240 of the Canada Labour Code and Section 71 of the Nova Scotia Labour Standards Code, R.S.N.S. 1989, c. 246.
Temporary lay-offs (done 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.

XIII 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.

XIV OUTLOOK

In 2019, Canadian employers will be closely watching the continued review of employment standards legislation in many jurisdictions, including changes in Ontario, Quebec and British Columbia.

In addition, the decriminalisation of recreational cannabis will continue to push the courts to examine whether current limits on drug and alcohol testing are appropriate, and whether employers should be given more latitude in reprimanding drug and alcohol use in the workplace. It is expected that cannabis-related dependency issues and requests for accommodation will continue to challenge many Canadian employers.

Finally, it is expected that 2019 will bring a continued emphasis on combating harassment and discrimination issues in the workplace, including issues associated with the #MeToo movement, gender parity and the protection of minorities and historically under-represented workers. As such, Canadian employers should be mindful of these issues in the year to come.
I  INTRODUCTION

Employment law in China affords employers and employees a certain degree of freedom in creating the terms of their working relationship. 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 of 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 labour bureaus have responsibility for issuing local regulations and enforcing them. The most significant statutes regulating employment in China are the Labour Law, promulgated on 5 July 1994 and revised on 27 August 2009, and the Employment Contracts Law (ECL), promulgated on 29 June 2007 and revised on 28 December 2012.

The laws of China are interpreted by the judiciary, which comprises three levels of courts: the Supreme People's Court; the local people's courts (further divided into three levels of authority); and special people's courts (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 occasionally release ‘internal’ guidelines or meeting minutes regarding employment law issues. Although, theoretically speaking, the local interpretation has no legal binding force, they are still followed by judges in reality. 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 the employers for disputes concerning small amounts. But most decisions of the labour arbitration commission can be appealed to the people's courts for litigation. In a litigation process, a case may be heard in two instances at most.

China is a pro-employee jurisdiction. Employment laws and regulations are restrictive and generally interpreted, 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 concept of ‘termination at will’ or

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1 Erika C Collins and Ying Li are partners at Proskauer Rose LLP. The authors would like to acknowledge the assistance of Lijuan Hou, an associate at Proskauer Rose LLP.
‘unilateral termination without cause’ does not exist in China. Employees’ contracts may only be terminated based on certain limited grounds explicitly set out in relevant laws and regulations, and as a result of this, firing employees is quite difficult and costly.

II YEAR IN REVIEW

i Significant legislation and legislative developments
On 20 July 2018, the General Office of the Communist Party of China Central Committee and the General Office of the State Council issued the Reform Plan on Collection and Management of National Tax and Local Tax (the Reform Plan). According to the Reform Plan, starting from 1 January 2019, all social insurance contributions (i.e., pension, medical insurance, work-related injury insurance, unemployment insurance and maternity insurance) will be collected by the local tax authorities instead of the local social insurance authorities as in the past. Given that the local tax authorities (unlike the local social insurance authorities) have access to employees’ salary information, it is expected that this change will effectively prevent underpayment of social insurance contributions, which has been a widespread non-compliance issue in China.

ii Statistics
According to the MOHRSS’s latest report from the end of 2017, the total number of workers in China is 776.40 million, of which 424.62 million people work in urban areas. The registered unemployment rate in urban areas in 2017 was 3.9 per cent.

As at the end of 2017, 915.48 million individuals were enrolled in the mandatory basic pension insurance and 1,176.81 million individuals were covered by the mandatory basic medical insurance programme.

In 2017, labour arbitration commissions in China heard 1.665 million employment dispute cases, a decrease of 6 per cent compared with last year.

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 some persuasive value in subsequent employment arbitration and litigation.

2 Details of the Reform Plan in Chinese are available on the website of the State Council (http://www.gov.cn/zhengce/2018-07/20/content_5308075.htm)
IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employers must provide all full-time employees with a written employment contract, which must be signed by both parties and should be in Chinese. The employment contract must contain the following:

- employer’s name, address and legal representative;
- employee’s name, address and resident ID card number;
- employment term;
- job description and work location;
- working hours, rest and vacation;
- remuneration;
- social insurance benefits; and
- information on work safety, work conditions, and prevention and protection from occupational hazards.

The parties must execute an employment contract within one month of the date on which the employee starts work. 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). The employer and employee will be deemed to have entered into 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.

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).

ii Probationary periods

Probationary periods are permissible, but they must be included as a term in the employees’ employment contracts. Furthermore, there are maximum lengths for probationary periods, which vary according to the length of the contract term. The probationary period may not exceed one month for a contract lasting at least three months and less than one year. The probationary period may not exceed two months for a contract lasting at least one year but less than three years. The probationary period for a contract with at least a three-year term or an open-ended contract may not exceed six months. 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.

Termination of employment is comparatively easier for both an employer and employee during the probation 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.

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5 See the ECL, Article 17.
6 id., Article 10.
7 id., Article 82.
8 id., Article 14.
9 id., Article 19.
immediately. An employer may terminate the employment of an employee during the probationary period without notice if the employer can demonstrate that the employee fails to meet the requirements of the position.\textsuperscript{10}

\section{Establishing a presence}

A foreign company must establish a legal presence in China before it can carry on business or hire local employees.

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 may only employ Chinese nationals (excluding Hong Kong, Macao and Taiwan residents) 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. Foreign nationals must be hired as representatives of a representative office.\textsuperscript{11} A representative office can have, at most, only four representatives, including the chief representative.\textsuperscript{12}

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 with them upon their establishment.

If a foreign company engages local Chinese people to perform services on its behalf, effectively as independent contractors, the foreign company may face myriad penalties, including an employment-related penalty for hiring the 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); foreign exchange penalties for paying the workers in a currency other than Chinese currency; penalties for not contributing to the social insurance schemes for the workers; penalties for not withholding individual income taxes for the workers; and tax exposure in China due to the permanent establishment created by the locally hired workers, and other potential penalties. While in practice it may be difficult for the Chinese government to assert jurisdiction over the foreign entity, this prohibited activity could affect the foreign entity’s future ability to establish a legal presence in China.

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) into the mandatory social insurance and public housing fund schemes, which include pension insurance, medical insurance, work-related injury insurance, unemployment insurance, maternity insurance and 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 contributions, and the local government generally adjusts the respective contribution rates and amounts annually. An employer is responsible for deducting both its and the employee’s contributions and submitting them to the applicable local authorities.

\textsuperscript{10} id., Articles 37 and 39.

\textsuperscript{11} The Interim Regulations Regarding Administration of Foreign Enterprises’ Permanent Offices in China, effective as of 30 October 1980, Article 11.

\textsuperscript{12} The Regulations on Administration of Registration of Resident Representative Office of Foreign Enterprises, effective as of 1 March 2011, Article 11.
Similarly, an employer, as a withholding agent for income taxes, is responsible for reporting and withholding the income taxes due on a monthly basis on behalf of its employees.13

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 effective during the 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.14

Post-termination non-compete agreements may not exceed two years, measured 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.15 There are no national statutory restrictions on the amount of consideration, geographic scope or damages for such agreements. Nonetheless, for a non-compete agreement to be legally viable, the former employer must pay a financial consideration to the former employee at least monthly throughout the restricted period. The Supreme Court’s latest judicial interpretation suggests that the financial consideration should not be lower than 30 per cent of the employee’s average wages during the 12 months before the termination.16 Some provinces, municipalities and industrial zones have enacted their own local regulations setting the minimum amount of consideration that is required. For instance, in Beijing and Shanghai, the financial consideration may not be lower than 20 per cent of an employee’s annual wage for each year of non-competition. Continued failure to pay the consideration for the non-compete agreement during the post-termination restricted period for three months, will render the non-compete obligation null and void.17 On the other hand, the employer is allowed to release the employee from a non-compete obligation and stop paying the non-compete compensation in the middle of the non-compete period by paying the employee three months’ non-compete compensation as damages.18

VI  WAGES

i  Working time

There are three types of working hours systems in China, namely the regular (or standard) working hours system, the flexible (or irregular) working hours system and the comprehensive working hours system. The default system is the regular working hours system under which the vast majority of employees in China are employed. Under the regular working hours system, a working day is generally limited to eight hours and a working week is limited...
to 40 hours. Subject to the approval of the local labour authorities, the flexible working hours system or the comprehensive working hours system may apply to certain employees who are unable to follow the regular working hours system owing to the nature of their jobs (e.g., senior management and sales staff) or industry (e.g., farming and 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 the night shift. Notably, the draft Regulations on Special Working Hours Systems provide that employees who work between 10pm and 6am should receive additional payment, the level of which would be set by the local labour authorities. Further, there are some local and national regulations that restrict pregnant employees from working on the night shift or working overtime, once they reach the seventh month in the pregnancy.

ii Overtime
Under the regular working hours system, overtime pay will need to be paid if an employee is required to work outside normal business working hours. The overtime pay rates provided by Chinese law are 150 per cent of the regular rate of pay on regular work days, 200 per cent on weekends or regular 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 pay for work performed on weekends or regularly scheduled days of rest. 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.

Under the flexible working hours system, employees’ working hours vary in accordance with the business needs of their employers. Employees working under this system are generally not entitled to overtime compensation, although in some cities, they may be entitled to overtime compensation for work performed on a national holiday.

Under the comprehensive working hours system, employees’ working hours are calculated on a periodic basis, 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 an employee works, on average, 40 hours a

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19 Labour Law, Article 36; and 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 provision of the Labour Law and Reduced the working week to 40 hours).

20 The draft Regulations on Special Working Hours Systems was released by the MOHRSS for public comments in May 2011. As of the time of writing, the final regulations have not yet been promulgated.

21 Special Regulations on Occupational Protection of Female Employees, effective 28 April 2012, Article 6.

22 Interim Rules on Payment of Wages, effective 1 January 1995, Article 13; Labour Law Article 44.

23 Labour Law, Article 41.

24 Measures on Approval of Adopting Flexible Working Hours System and Comprehensive Working Hours System in Enterprises, effective 1 January 1995 (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.
week. If the employees’ average working hours exceed the limit for the calculation period (e.g., 174 hours where the calculation period is by month) then the employer must pay overtime compensation to the employees.

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 work permit to legally work in China. Immigration requirements and procedures are largely carried out at a local level and each province has its local practice in this regard. There are, however, a few requirements that typically need to be met:

- the foreign worker must have special skills and a certain number of years (normally two years) of relevant experience;
- the work permit application of the foreign expatriate will need to be sponsored by a locally registered company in China;
- the foreign worker will need to live and work in the same location as his or her sponsoring company; and
- a medical examination will be required.

The immigration process generally involves the following steps:

- the foreign worker attends a physical examination;
- the Chinese employer (or sponsoring company) applies for an employment licence from the local labour authority;
- the Chinese employer applies for a work visa invitation letter from the local commerce authority;
- the foreign worker obtains a ‘Z’ visa (a work visa) from a Chinese embassy or consulate;
- 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;
- the foreign worker applies for a work permit from the local labour authority; and
- the foreign worker then 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 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 foreign expatriates’ salaries. Deductions should also be made from the salary payable to foreign workers (except those foreign workers that come from countries having social insurance exemption treaties with China) for social insurance contributions on their behalves.

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

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25 Wage/Hour Measures, Article 5.
26 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 chosen in the employment or secondment agreement, and the local rules and practice at the location of the employer or local entity in China.

**VIII GLOBAL POLICIES**

The ECL provides that employers must promulgate internal rules and policies that delineate employees’ rights and obligations. A policy manual may be contractually binding if an employment contract explicitly incorporates its terms. Employers must, however, provide their employees with such manuals to enforce legally binding compliance with them. In order to establish that the employees 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 for 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 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 rules to an employee or the employer cannot establish that it provided the rules to an employee, the rules cannot form the basis for a termination, even if the employee is in clear violation of a company rule.

Further, as of the implementation of the ECL, employers are required to consult with 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 of the employees, collect and consider their opinions and then implement the policies or rules, taking into account the respective bodies’ opinions. 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 the consultation process for them to be binding on the employees.

**IX LANGUAGE OF DOCUMENTATION**

Employment documentation, such as employment contracts, handbooks and any other agreements or policies, such as confidentiality agreements or non-compete agreements, that an employer wants to be binding on the employees should be provided in Chinese. It is at the discretion of the employer whether to execute such documentation in a foreign language.

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27 Labour Law, Article 4; and ECL, Article 4.
28 id., Article 4.
29 Reply Letter to Dalian Labor and Social Security Bureau in Response to the ‘Application for Instructions on the Issue Regarding the Legal Validity of a Labor Contract Written in Both Chinese and Foreign Languages’, promulgated by the Ministry of Labour and Social Security, effective 28 January 28, Article 1; and the Supreme Court’s Interpretations Concerning Certain Questions on 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 in order to have a binding effect on them, and implying that publication must be in Chinese).
as well. Further, in the case of employing a foreign national, an employment contract must be provided in Chinese in order to obtain a work permit for the foreign employee. The authorities will not accept an employment contract in English.

If employment documents are not translated and a dispute arises over 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 the wrongful termination.

X 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 objecting to any inappropriate disciplinary actions against employees; negotiating with an employer on behalf of employees; participating in investigations of work-related accidents; initiating arbitration and bringing any necessary appeals to settle disputes about individual or collective contracts; and assisting workers in concluding and performing employment contracts.\(^\text{30}\) The ECL further provides that the trade union should establish a collective bargaining mechanism.\(^\text{31}\) 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.\(^\text{32}\)

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\(^{30}\) Trade Union Law, effective 3 April 1991, amended 27 October 2001, Articles 20-28; and ECL, Articles 4, 6, 43, 51 and 56.

\(^{31}\) ECL, Article 6.

\(^{32}\) Trade Union Law, Article 27.
Employers are responsible for contributing dues to the trade union equal to 2 per cent of their gross monthly payroll.33 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.34 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.35

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 trade union; if the number of female employees is relatively small, the trade union committee may reserve seats for female employees.36

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.37

The establishment of basic-level trade unions, local trade unions at all levels, or national or local industry trade unions must be reported to the trade union organisation at their immediate higher level for approval. The trade unions at the higher level may assign personnel to assist and supervise companies 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.38 Their employment may be terminated, however, if they reach retirement age or commit a serious violation of the employer’s work rules. Second, before any termination of employment takes place, in practice, approval from the upper-level trade union, which is independent of the employer, is required.

The ACFTU, joined by some 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 trade unions, in all types of enterprises, including state-owned and private enterprises as a platform for

33 Trade Union Law, Article 42.
34 ECL, Article 4.
35 id., Articles 41 and 43.
36 Trade Union Law, Article 1.
37 id., Article 15.
38 id., Article 18.
employees to participate in the management of enterprises in a democratic manner. These provisions define the powers, duties, organisational structure and working rules of the ERC. The major powers of the 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 the employees (important matters regarding the business’s operation, work rules involving employees’ immediate interests, integrity of the management personnel, etc.). This disclosure is meant to solicit the employees’ comments and to subject the management to some 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.

XI DATA PROTECTION

i Basic requirements

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 the employee’s personal data public. 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 employee 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, employers are recommended to act in compliance with such 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 (the CII Providers, the definition of which must be clarified) must store personal information and important data they collect within China. If there are business needs for CII Providers to transfer this information or data outside China, security assessments must be conducted. Owing to the fact that certain details concerning the data localisation requirement (e.g., 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,\textsuperscript{40} which is intended to be a major set of implementation rules for the new Cybersecurity Law (the Draft Implementation Rules). The Draft Implementation Rules require network operators planning to transfer more than one terabyte of data out of China, or network operators that have collected data on more than 500,000 data subjects, to obtain the permission of the data subjects, as well as pass self-imposed and government-run security assessments. Although the Cybersecurity Law and the Draft Implementation Rules do not specify whether the above-mentioned requirements apply in the employment context, employers are recommended to comply with them. Based on the above, 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 Draft Implementation Rules of the new Cybersecurity Law have been passed, the employer may also be required to pass a government-run security assessment if the size of the personal data to be transferred or the number of data subjects involved meets the criteria set forth in such rules.

iii Sensitive data

The Personal Information Security National Standards 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 identification 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 of minors under 14 years old. Expressed consent is required to be obtained from the data subject before sensitive data is collected from the data subject.

iv Background checks

There is no specific Chinese law prohibiting an employer from conducting a background check or credit check for an employee employed in China, but getting relevant and accurate information can be challenging for employers in practice. An individual's credit report is available from the People's Bank of China and the central bank of China and its local 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, the NPC Decision and relevant judicial interpretation, activities that publicise private data, or disclose an individual's private information, in writing or orally, without the individual's prior consent, are considered a civil injury to the employee and may constitute a criminal offence.

\textsuperscript{40} Full text of this regulation in Chinese is available on the website of the Cyberspace Administration of China (http://www.cac.gov.cn/2017-04/11/c_1120785691.htm).
Generally, Chinese employers do not engage in drug testing. As a general rule, an employer would be expected to demonstrate a ‘compelling interest’ in screening an employee for drug use to justify any potential infringement on the employee’s privacy. Nonetheless, specific rules exist with respect to certain industries where a direct connection exists between the employee’s duties, and the safety and security of the employee and others.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Chinese law is much more protective of employees than the laws of many Western countries. Under Chinese law, only employees are given the right to terminate an employment contract without cause with 30 days’ prior written notice (which will be reduced to three days’ notice during the probation period), while employers cannot terminate an employment contract without cause. 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. In such case, if the termination by mutual agreement is initiated by the employer, the employer will be required to pay statutory severance to the employee (see below for details on the calculation of statutory severance).

Unilateral termination by employer without notice and compensation

An employer is allowed to terminate an employment contract without giving the employee prior written notice and without paying statutory severance if:

a the employee on probation fails to meet the employment requirements;
b the employee has seriously violated the employer’s policies;
c the employee is guilty of serious dereliction of duties, corruption and causes the employer to suffer significant losses;
d the employee is at the same time working for another employer, which has seriously affected his or her performance of current work tasks assigned by the employer, and refused to rectify the situation after being requested by the employer;
e the employee used fraudulent or coercive tactics to obtain the employment contract or to amend the contract; or
f the employee is subject to criminal prosecution.

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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 where:

a. after undergoing medical treatment for a period, the employee, owing to illness or non-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 is still in the stipulated medical treatment period;

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 away from legal retirement age (protected employees).44

Termination by operation of law

An employment contract will automatically terminate by operation of law under the following circumstance:

a. the employment contract expires and is not renewed by the employer and the employee;

b. the employee retires;

c. the employee passes away, or is declared deceased or missing by a court of competent jurisdiction;

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 point (a) (unless the employer proposes to renew the contract on the same terms or terms more favourable to the employee but the employee does not agree to the renewal), point (d) or (e) above, the employer is required to pay statutory severance to the employee.45

44 id., Articles 40, 42 and 46.
45 id., Articles 44 and 46.
Calculation of statutory severance

As mentioned, 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’ service with the employer. The AMW is capped at three times local average wages in the previous year (a fixed number published by the local government on a yearly basis). For example, the local average wage in Beijing in 2014 was 6,463 yuan per month and in Shanghai in 2014 was 5,451 yuan per month. The cap is not applicable for severance for service years before 1 January 2008. For any period of service of less than six months, it is rounded up to half a year; and for any period of six months or more, it should be rounded up to a whole year. For example, for the purpose of calculation of statutory severance, a service period of four years and five months will be deemed as four-and-a-half years, and a service period of four years and six months will be deemed as 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 advance notice must be given to the trade union in the event of unilateral termination of employment by employers, such a requirement has not been seriously implemented in practice as most private companies in China do not have a labour union.

After the employment termination, employers are required to issue termination notices to the terminated 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 certain days of their occurrence.

ii Redundancies

Mass lay-offs are generally not permissible, unless the individual terminations fall under one of the grounds set forth in subsection i, above, or in the event of economic lay-offs (as defined below) where employers follow the statutory procedures.

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 the following reasons:

- the employer is undergoing organisational restructuring pursuant to Chinese bankruptcy law;
- the employer is falling into serious production and business difficulties;
- 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 lay-off; or

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46 id., Article 47.
47 id., Article 43.
the circumstances upon which the conclusion of the employment contracts are based have significantly changed and, as a result, the employment contracts can no longer be performed.49

If an employer wishes to conduct an economic lay-off, it must give at least 30 days’ notice and explain the circumstances to the labour union or all the employees, consider the opinions of the labour union or employees, and report the lay-off plan to the local labour authority.50 Notwithstanding the foregoing, protected employees cannot be laid off until the circumstances based on which they are protected (e.g., pregnancy or a stipulated medical treatment period) 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, which include 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.51

Laid-off employees are also entitled to statutory severance (see subsection i, above). 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 by the employees and the labour authorities.

XIII TRANSFER OF BUSINESS

China does not have any equivalent of the UK Transfer of Undertakings (Protection of 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 subsection i, below), 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 in such case unless the terms of employment contract are changed.

ii Company split

In practice, employee transfer in a company split is more complicated than that 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

49 id., Article 41.
50 id.
51 id.
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 remain unchanged.

iv  Asset acquisition
In an asset acquisition where 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 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). The prior service of the transferred employee must be recognised or compensated for in such case.

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.

XIV  OUTLOOK
It was reported that the Chinese government is considering amending the ECL to make employment more flexible. Since the ECL was promulgated in 2007 there have consistently been complaints from employers that it is too protective of employees and imposes a high burden on employers. So far, these amendments are in an early stage of discussion, and it is still hard to say when the formal legislative procedures will be initiated for them.

There is a legislative trend of enhancing workplace protection for female employees in China. In September 2018, the NPC published a new draft of Several Sections of the Civil Code on its official website to seek public comments. The draft provides relatively detailed provisions on sexual harassment protections. Certain local governments, such as Shenzhen and Jiangsu, have also issued local rules to promote gender equality and strengthen workplace protection for female employees.
Chapter 13

CROATIA

Mila Selak

I INTRODUCTION

In Croatia, employment is regulated by the Constitution of the Republic of Croatia (National Gazette 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14), the Community acquis of the European Union, international agreements, the Employment Act (EA) (National Gazette 93/14 and 127/17), other laws and regulations, collective agreements, agreements concluded between works councils and employers, working regulations and employment contracts.

The EA provides general rules of employment law. Unless otherwise provided for by the EA or any other laws and regulations, where a right arising from employment is differently regulated, the most favourable right for employee applies (Article 9.3 of the EA).

Municipal courts are the first-instance courts for employment-related disputes, while district courts render decisions upon appeals against the decisions of municipal courts. The Supreme Court of the Republic of Croatia renders decisions upon appeals against the decisions of district courts when second appeals are allowed.

II BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Pursuant to Article 10 of the EA, employment is established by virtue of an employment contract.

An employment contract has to be concluded in writing, but its existence and validity are not affected by failure of the parties to enter into a written contract. Where the employer fails to conclude a written employment contract or fails to deliver a letter of engagement prior to commencement of employment, it is deemed that an employment contract of indefinite duration is concluded (Article 14 of the EA).

By virtue of Article 12 of the EA, an employment contract may be concluded for a fixed term if the end of employment is determined by objective conditions, such as reaching a specific date, completing a specific task or the occurrence of a specific event.

Duration of all successive fixed-term employment contracts may not exceed three consecutive years, unless where it is necessary for the purpose of replacing a temporarily absent employee or where it is established on objective grounds allowed by law or collective agreement. Interruption of less than two months is not regarded as an interruption of the

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1 Mila Selak is a partner at Ostermann & Partners LLP.
three-year period. If the employment contract is not concluded in compliance with the provisions of the EA, or if an employee continues to work for the employer after the expiry of the contract, it is deemed that the contract was of indefinite duration.

An employment contract or letter of engagement must contain information concerning:

a the parties and their residence or seat;
b the place of work or a reference that work is performed at various places;
c the title, nature or category of work for which the employee is employed or a brief specification or description of the work;
d the date of commencement of employment;
e in case of a fixed-term employment contract, the expected duration thereof;
f the duration of paid annual leave to which the employee is entitled or the procedures for its determination;
g the length of notice periods to be observed by the employee and employer or the method for its determination;
h basic salary, bonuses and frequency of remuneration payment to which the employee is entitled; and
i the duration of a regular working day or week (Article 15 of the EA).

In addition, the EA envisages mandatory content of an employment contract: (1) for permanent seasonal jobs (Article 16); (2) at an alternative workplace (Article 17); and (3) in case of expatriation of the employee (Article 18).

Employment contracts may be amended only upon the employer's and employee's mutual agreement, in writing (Article 8.4 of the EA; Article 286.2 of the Obligations Act (National Gazette 35/05, 41/08, 125/11 and 78/15)). However, pursuant to judicial practice of the Supreme Court (Revr-191/2004), the employment contract may be amended by the implied consent of both parties.

ii  Probationary periods

According to Article 53 of the EA, a probationary period may be agreed upon by the employment contract and its length may not exceed six months.

Failure to fulfil the position's requirements during the probationary period is a just cause for terminating the employment contract. In case of a contracted probationary period, a notice period is a minimum of seven days.

iii  Establishing a presence

A foreign company with a seat in an EU Member State may permanently perform business activities in Croatia and, therefore, hire employees through a company, a branch office or a business established in Croatia.

In addition, a foreign company with a seat in a non-EU Member State or in a non-European Economic Area (EEA) Member State may hire employees through a subsidiary established in Croatia (Article 52.1 of the Commerce Act (National Gazette 87/08, 96/08, 116/08, 116/08, 76/09, 114/11, 68/13 and 30/14)).

Nevertheless, within a temporary and periodical transborder provision of services and for no longer than three months, a foreign employer with a seat in an EEA Member State may assign the employee (1) to work in Croatia for the employer on a contractual basis concluded between the foreign employer and the service beneficiary in Croatia; (2) to work for the foreign employer's branch office in Croatia or for the company owned by the same group that
III  RESTRICTIVE COVENANTS

Without the employer's approval, employees may not enter into business transactions in the field of economic activity pursued by their employer (‘legal ban of competition’; see Article 101 of the EA).

Article 102 of the EA prescribes that employers and employees may establish a period of time following the termination of the employment contract during which employees are not allowed to take employment with an employer’s market competitor or enter into business transactions that are regarded as competition to the employer (‘contractual ban of competition’ (the Contract)).

The Contract may not be concluded for a period exceeding two years after the date of termination of employment. It may be an integral part of the employment contract. In any case, it must be concluded in writing.

The Contract is binding only if the employer has committed to compensating the employee for the duration of the ban in the amount of at least half of the average salary paid to the employee in the three months prior to the termination of the employment contract (Article 103 of the EA).

IV  WAGES

i  Working time

Pursuant to Article 61 of the EA, full-time work is 40 hours a week. Full-time employees are, however, allowed to conclude an employment contract with another employer for a maximum of eight hours per week or up to 180 hours per year, with the written consent of the employer or employers with whom they had already concluded an employment contract.

In accordance with Article 62 of the EA, part-time work is any working time shorter than full-time work. Employees are not allowed to work for several employers with a working time exceeding 40 hours per week.

Article 69 of the EA prescribes that the normal working hours for night employees may not, in four months, exceed an average of eight hours in any 24-hour period. However, where, based on a danger assessment, night employees are exposed to special hazards or heavy physical or mental strain, an employer has to ensure that employees do not work more than eight hours in any 24-hour period during which they perform night work.

If work is organised in shifts that include night work, a change of shifts has to be ensured to limit the uninterrupted work in a night shift to a maximum of one week (Article 71 of the EA).

Nevertheless, by virtue of Article 88 of the EA, provisions of the EA on maximum duration of weekly working time and night work do not apply to employees whose duration of work time cannot be measured or predetermined, or whose working time can be determined by the employees themselves (e.g., managing executives).
Additionally, unless otherwise provided for by specific provisions, an employer may, for his or her adult employees, provide for derogations from the provisions on duration of work time for a night employee, provided that the employee is afforded equivalent periods of compensatory rest (Article 89 of the EA).

ii Overtime
Pursuant to Article 65 of the EA, if employees work overtime, their total working time may not exceed 50 hours a week. Moreover, overtime work per employee may not exceed 180 hours a year, unless otherwise provided for by collective agreement, in which case it may not exceed 250 hours a year.

Employees are entitled to increased remuneration for overtime work (Article 94 of the EA), which has to be paid in money (Article 92 of the EA). The EA does not envisage the rate for overtime remuneration – it has to be set by virtue of employment contract, working regulations or collective agreement.

V FOREIGN WORKERS
A third-country national or a stateless person may enter into an employment contract under the conditions stipulated by the EA and the FA (Article 23 of the EA). The FA envisages conditions for employment with the employer with a seat in Croatia.

According to Article 73 of the FA, third-country nationals (those who are not nationals of an EEA Member State or the Swiss Confederation) may work in Croatia on the basis of a residence and work permit or work registration certificate issued by the Croatian Ministry of Interior, but only in the job for which they were issued the permit or certificate and only with the employer with whom they are employed.

By way of exception, third-country nationals may work in Croatia without any permit or certificate, among other things, if they have been granted permanent residence.

Also, by virtue of Article 153 of the FA, nationals of EEA Member States or the Swiss Confederation and their family members, and those who are entitled to residence in Croatia, may work and provide services in Croatia without any permit or certificate.

A residence and work permit based on the annual quota (set by the Croatian government) is granted to third-country nationals who meet the criteria for approval of temporary residence pursuant to the FA, and if they prove (1) their employment, (2) that they have acquired educational qualification and skills, and (3) that their place of employment (mentioned under point (1)) is a company, branch office, subsidiary, business, association or institution registered in Croatia (Article 75 of the FA).

Pursuant to Article 76 of the FA, residence and work permits outside the annual quota may be issued to, among others: frontier workers; third-country nationals holding key positions in companies, branch offices or subsidiaries; third-country nationals transferred as part of internal staff relocation inside companies and other necessary persons (as defined by the Protocol on the Accession of Croatia to the Marrakesh Agreement Establishing the World Trade Organization); third-country nationals employed in a company in which they hold a share exceeding 51 per cent or in a business of which they are the sole owners; and employees providing services on behalf of or in the name of a foreign employer that is not entitled to an establishment in EEA Member States. Residence and work permits for other necessary persons (as defined by the Protocol on the Accession of Croatia to the Marrakesh Agreement Establishing the World Trade Organization) and for employees providing services on behalf
of or in the name of a foreign employer that is not entitled to an establishment in EEA Member States are subject to prior approval of the Croatian Ministry of Interior. Residence and work permits outside the annual quota may also be granted to third-country nationals who meet the criteria for approval of temporary residence and who (1) perform key activities in a company, or who hold an ownership share in that company of at least 51 per cent, where the company is a holder of incentive measures in accordance with a regulation on investment promotion, or carries out strategic investment projects in conformity with regulations on strategic investment projects in Croatia; or (2) perform jobs or carry out projects in Croatia pursuant to international treaties on professional and technical assistance that Croatia concluded with the European Union, another state or an international organisation.

Residence and work permits outside the annual quota may be granted to third-country nationals under the same conditions as within the annual quota, who in addition enclose an explanation of why their employment is justified, including information on their professional knowledge, qualification and working experience, and reasons why the position cannot be fulfilled from the Croatian national employment market, with certain exceptions.

According to Article 90 of the FA, residence and work permits shall cease to be valid if:

a. the temporary residence of the third-country national ceases;

b. the conditions on the basis of which it has been issued no longer exist;

c. the third-country national performs an activity for which a residence and work permit has not been issued;

d. the third-country national works for an employer and was not issued a residence and work permit in relation to this employment; or

e. a third-country national or an employer does not respect employment regulations, health and pension insurance regulations and other regulations that have to be complied with when the related activity is being performed.

Based on a work registration certificate, certain categories of third-country nationals may work in Croatia up to 90, 60 or 30 days in a calendar year (Articles 82 and 83 of the FA).

VI GLOBAL POLICIES

Based on Article 26 of the EA, an employer with at least 20 employees is obliged to adopt and make publicly available working regulations governing remuneration, organisation of work, procedures and measures for protecting employee dignity, anti-discrimination measures and any other issues of importance for employees if the issues are not regulated by collective agreement.

Adoption of working regulations is subject to consultations with the works council (Article 150 of the EA). Working regulations must contain the date of entry into force and they may not enter into force prior to the expiry of the eight-day period of their publication (Article 27 of the EA).

According to Article 4 of the Ordinance on Manner of Publication of Working Regulations (National Gazette 146/14), working regulations have to be published in a way that is available to all employees and laid out in a visible place on the premises of employment. However, they may be made available to employees on the employer’s website, or, at the employee’s request, by email.
VII TRANSLATION

The EA does not prescribe that employment documents have to be drafted in Croatian, nor does it have provisions regarding translation of employment documents.

However, as Croatian is the official language of Croatia, in case of an inspection by the Ministry of Labour and Pension System Work Inspectorate, employers would have to translate their employment documents into Croatian if they were not in Croatian already. In addition, since employment contracts have to be submitted to Croatian pension and health insurance authorities (failure to do this is a misdemeanor), they have to be in Croatian.

Furthermore, Article 8 of the EA states that employers are obliged to enable employees to acquaint themselves with employment-related regulations before they start working. Therefore, if employees do not speak the language of the respective employment document, they are not acquainted with it. Employees could claim before a court that their employment contract is null and void because it is contrary to the aforementioned provisions of the EA or provisions of the Obligations Act on equality of subjects (Article 3) and fair conduct (Article 4) in the obligation relationship. Employees could also claim that their employment contract be determined null and void based on the fact that they were misled with respect to the content of the employment contract (Article 280 of the Obligations Act).

VIII EMPLOYEE REPRESENTATION

Employees of an employer with at least 20 employees have the right to take part in decision-making on issues related to their economic and social rights and interests (Article 140 of the EA).

By virtue of Article 141 of the EA, employees have the right to elect one or more of their representatives to create a works council. The procedure for establishment of a works council may be initiated upon the proposal of a trade union or at least 20 per cent of the employees of an employer.

Pursuant to Article 142 of the EA, the number of works council members is determined in accordance with the number of employees. The number varies from a minimum of one representative (for up to 75 employees) to a maximum of nine representatives (for 751 to 1,000 employees).

The works council is elected for a term of four years (Article 144 of the EA). All employees of an employer have the right to elect and be elected, except for members of management and supervisory bodies and their family members (Article 145 of the EA). Lists of candidates for employee representatives may be proposed by trade unions whose members are employed by an employer, or a group of employees enjoying the support of at least 20 per cent of employees (Article 146 of the EA).

Before rendering decisions prescribed by Article 150 of the EA, an employer has to consult the works council about the proposed decisions or the decisions shall be null and void. On the other hand, pursuant to Article 150 of the EA, certain employers’ decisions may be rendered only with the prior consent of the works council (on dismissing certain categories of employees, including certain categories of employees in a collective redundancy, etc.). If the works council refuses to give its consent, an employer may, within 15 days, ask that the consent is replaced by a court decision or an arbitration award.

If the works council has not been established, all its rights and obligations may be exercised by a trade union’s representative, except the right to appoint employees’ representatives in an employer’s supervisory body (Article 153 of the EA).
IX DATA PROTECTION

i Requirements for registration
According to Article 29 of the EA, employees' personal data may be collected, processed, used or disclosed to third parties only if it is regulated by the EA or any other law, or where it is necessary for the purpose of exercising rights and obligations arising from employment or pertaining thereto.


Processing of biometric data of employees is allowed for the purposes of recording working hours and recording entry and exit of the business premises, if prescribed by law or as an alternative to other solutions for recording working hours or entry and exit of the business premises, under the condition that the employee gives explicit consent for processing biometric data, in accordance with the provisions of the GDPR (Article 23 of the AIGDPR).

ii Sensitive data and background checks
Pursuant to Article 24 of the EA, when concluding an employment contract and during employment, the employee is obliged to inform the employer about sickness or any other circumstances precluding the exercise of employment obligations or harming the life or health of people that the employee makes contact with.

During the process of selecting applicants for a job and concluding an employment contract, as well as during employment, the employer may not request any information from an employee that is not directly related to employment, and answers to questions that are not allowed may be sustained (Article 25 of the EA).

The EA prohibits discrimination against pregnant women and those who have recently given birth or are breastfeeding, with respect to their employment, and therefore the employer may not request any information whatsoever about pregnancy (Article 30 of the EA).

X DISCONTINUING EMPLOYMENT

i Dismissal
The EA envisages in Article 115 that the employer is allowed to terminate employment contracts for legitimate reasons by giving statutory notice or notice stated in the employment contract (i.e., regular dismissal), if:

a the need to perform certain work ceases for economic, technological or organisational reasons (i.e., dismissal on business grounds);

b employees are not able to fulfil their employment obligations as a result of their permanent characteristics or capacities (i.e., dismissal on personal grounds);

C employees violate their employment obligations (i.e., dismissal because of misconduct);

or

d employees did not satisfy their probationary period.
When making a decision about a dismissal on business grounds, an employer that employs 20 or more employees has to take into account an employee's tenure, age and maintenance.

Also, an employer who has dismissed an employee for business reasons shall not employ another employee in the same post for six months following the date of giving notice of dismissal. Should a need for employment for the same work arise within that period, an employer is obliged to offer an employment contract to the employee that it dismissed for business reasons.

A fixed-term employment contract is terminated upon its expiry (Article 112.1.2 of the EA). It may be terminated by means of regular notice only if this option is provided for by the contract (Article 118 of the EA).

Pursuant to Article 116 of the EA, an employer has just cause to terminate employment without a notice period (i.e., extraordinary dismissal) in cases where continuation of employment is regarded as impossible as a result of a severe breach of employment obligations or any other fact of critical importance, and recognising all the circumstances or interests of both contracting parties, but solely within 15 days of the date when the employer gained knowledge of the fact constituting grounds for extraordinary dismissal.

Prior to regular dismissal because of an employee's misconduct, an employer is obliged to alert the employee in writing of his or her employment obligations indicating possible dismissal should the breach of obligations persist, and prior to regular or extraordinary dismissal because of the employee's misconduct, the employer is obliged to give the employee the opportunity to present his or her defence (Article 119 of the EA).

The notice of dismissal has to explain in writing the reasons for dismissal (Article 120 of the EA).

By virtue of Article 121 of the EA, a notice period begins on the date of notice of dismissal. However, the notice period is suspended during:

- pregnancy;
- maternity;
- parental or adoption leave;
- half-time work;
- part-time work because of intensive childcare;
- leave of a pregnant or breastfeeding employee;
- leave or part-time work to take care of a child with severe developmental disabilities;
- treatment or recovery from injury at work or an occupational disease; and
- service in national defence forces.

In case of suspension of the notice period as a result of temporary incapacity for work, employment shall be terminated, at the latest, six months after the date of notice of dismissal.

Unless otherwise provided for by collective agreement, working regulations or employment contract, the notice period is not suspended during annual and paid leave, and the period of temporary incapacity for work of the employee who is released from obligation to work during the notice period.

According to Article 122 of the EA, a notice period depends on the length of tenure with the same employer. It is a minimum of two weeks (for less than one year) and a maximum of three months (for 20 years). In case of an employee who has continuously worked for the same employer for 20 years, the notice period is extended by two weeks if the employee has reached 50 years of age, and by one month if the employee has reached 55 years of age. In case of dismissal because of an employee’s misconduct, the notice period is halved. The employer
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is obliged to pay compensation and recognise all other rights to the employee released from the obligation to work during the notice period, as if the employee had worked until the expiry of the notice period.

An employer may not dismiss employees during their pregnancy, maternity, parental or adoption leave, periods of part-time work, periods of short-time work resulting from intense childcare, leave of pregnant women or a breastfeeding mother, and periods of leave or short-time work as a result of caring for a child with serious developmental disabilities, and within 15 days of the end of pregnancy or the end of use of such entitlements (Article 34 of the EA), as well as employees who have suffered from injury at work or occupational disease during temporary incapacity for work resulting from medical treatment or recovery (Article 38 of the EA).

Article 126 of the EA prescribes that when an employer dismisses an employee following two years of tenure, unless dismissal is given as a result of an employee’s misconduct, the employee is entitled to severance pay for each year of tenure with the employer. It may not be lower than one-third of the average monthly salary earned by the employee in the period of three months prior to dismissal and, unless otherwise provided for by the law, collective agreement, working regulations or employment contract, it may not exceed six average monthly salaries earned by the employee during three months prior to dismissal.

Finally, an employment contract may be terminated by a written agreement between the employee and employer (Articles 112 and 113 of the EA).

ii  Collective redundancies

According to Article 127 of the EA, an employer that may have at least 20 redundancies, out of which at least five employment contracts would be terminated on economic grounds, over 90 days, is obliged to begin consultations with the works council in order to avoid or reduce the number of redundancies and supply the works council with all the relevant information in writing.

The employer also has to notify the Croatian Employment Service (CES) of the consultations. Projected collective redundancies notified to the CES may take effect no earlier than 30 days after the notification; however, the CES may, until the last day of the respective time limit, request that either collective or individual redundancies are postponed for a maximum of 30 days, if the employer is able to ensure the continuation of employment for employees during this extended period (Article 128 of the EA).

XI  TRANSFER OF BUSINESS

Article 137 of the EA sets the rules regarding employees’ protection in case of transfers.

In the event of a transfer to a new employer of an undertaking, business, or part of an undertaking or business retaining its economic integrity, all employment contracts of employees of the undertaking or part of the undertaking being transferred, or of those who are connected with the business or part of the business being transferred, are transferred to the new employer.

Employees whose employment contracts are transferred retain all the rights arising from employment that they had acquired until the employment contract transfer date. The employer to which employment contracts are transferred accepts all the rights and obligations arising from the contracts in unaltered form and scope, as of the transfer date.
The transferee and transferor are jointly and severally liable for obligations that arose from employment before the date of transfer.

XII OUTLOOK

No major changes are expected in the area of employment law in Croatia in 2019; therefore, employers are likely to deal with the same employment-related issues as in previous years.
INTRODUCTION

In recent years, and in particular after the accession of Cyprus to the European Union, Cypriot employment law has rapidly evolved to comply with EU legislation (directives). Cypriot employment law implements the European principles of protection of the employee rather than providing absolute freedom to the employer. Overall, the legal framework, as reformed over a period of years, is a combination of principles from both the English and Greek legal systems, and offers a secure environment for both employees and employers.

The right to work is safeguarded by Article 25 of the Constitution of the Republic of Cyprus. The majority of employment-related matters, including the termination of employment and employees’ and employers’ rights and obligations, are mainly governed by the Termination of Employment Law of 1967, as amended, and the Annual Paid Leave Law of 1967, as amended. In addition, a number of other laws make up the legal labour framework in Cyprus, most notably: the Social Insurance Law of 2010; the Safety and Health at Work Law of 1996; the Protection of Maternity Law of 1997; the Minimum Salaries Law; the Equal Treatment at Work and Employment Law of 2004; and the Law Providing for the Preservation and Safeguard of the Rights of Employees on the Transfer of Businesses, Facilities or Sections of Businesses of 2000, all as amended. Each law is supplemented by relevant regulations and decrees. Cyprus has also ratified a number of International Labour Organization (ILO) conventions, which have become part of its national legislation, most notably Convention 158 of the ILO concerning Termination of Employment at the Initiative of the Employer, which introduced the right to a fair hearing into Cypriot law.

Another instrument, the Industrial Relations Code, was negotiated and signed by the government, employers and trade unions in 1977. It is a purely voluntary agreement, and any adherence to it depends on the goodwill of the parties. Nevertheless, its procedural part is of considerable importance in practice.

Collective labour agreements have contractual but not legislative force. They are concluded by sectors of industry and also at company level on a voluntary basis.

The primary mechanisms for enforcement are through the Ministry of Labour and Social Insurance, the Industrial Disputes Tribunal and in some cases the district courts.

The Annual Paid Leave Law of 1967, as amended, is the law that formed the Industrial Disputes Tribunal and granted exclusive jurisdiction to determine matters arising from the termination of employment, such as the payment of compensation, payment in lieu of notice,
compensation arising out of redundancy and any other claim for any payment arising out of the contract of employment. Where the amount claimed as damages exceeds the equivalent of two years’ salary, jurisdiction is vested in the district court. The Industrial Disputes Tribunal is composed of the President of the Court, a judge and two lay members appointed on the recommendation of the employers’ and employees’ unions. The lay members have a purely consultative role.

The Ministry of Labour, Welfare and Social Insurance is the main state agency for the enforcement of labour and social policy, and its departments offer services for social protection, employment, industrial training, labour relations, terms and conditions of employment, and safety and health at the workplace. Its departments include Social Insurance, Social Welfare, the Department of Labour (Department for Social Inclusion of Persons with Disabilities), the Department of Labour Inspection and the Department of Labour Relations, as well as the Appropriate Authority for Retirement Funds.

II YEAR IN REVIEW

Cyprus continued to strive for economic growth in 2018.

In addition, there was a decrease in the annual number of labour disputes filed with the Industrial Disputes Tribunal.

No noticeable rises in salaries have been recorded; they remain at the same levels as the past year and the year before. The Redundancy Fund is still facing a huge number of applications, which means there will be an inevitable delay in dealing with them.

III SIGNIFICANT CASES

The Industrial Disputes Tribunal has recently made a number of judgments on the issue of redundancy and transfer of undertakings under the Law Providing for the Preservation and Safeguard of the Rights of Employees on the Transfer of Businesses, Facilities or Parts of Businesses (Law 104/(I)/2000), as amended, which harmonises EU Directive 2001/23/EC. The Law applies to any transfer of undertaking or business or part of an undertaking or business from one employer to another as a result of a legal transfer or a merger. A transfer means the transfer of an economic entity that retains its identity as an identifiable grouping of resources pursuing an economic activity, regardless of whether that venture or activity is the main or an ancillary of the economic entity.

Case report

In the case Nikos Nikolaou v. 1. G.A.P Akis Express Ltd 2. Redundancy Fund, issued on 29 April 2016, the employee had been employed, since 2004, as a driver transporting correspondence and parcels, by G.A.P Akis Express Ltd (the Employer Company), a local courier company that is a subsidiary company of a logistics group of companies in Cyprus (the Group).

In 2011, the Employer Company informed the employee that its transport and distribution department would be transferred to G.A.P Vassilopoulos Express Logistic Ltd (Logistic), another subsidiary company of the Group, and asked him whether he wished to continue his employment with Logistic. The employee refused to be transferred to Logistic and remained with the Employer Company. Shortly after, the Employer Company served a notice of termination to the employee stating that redundancy had arisen owing to reorganisation...
of the business. The employee brought proceedings before the Industrial Disputes Tribunal, claiming damages for unlawful dismissal or compensation by the Redundancy Fund in case his dismissal was found to be because of redundancy.

In its defence, the Employer Company argued that the transport and distribution department, in which the employee was employed as a driver, was taken over by Logistic and therefore the employee was dismissed because of redundancy. The Redundancy Fund, on the other hand, argued that redundancy did not occur as the transport and distribution department of the Employer Company was wholly transferred to Logistic, which carried on its operation.

In considering whether the employee’s dismissal could be attributed to redundancy, the Tribunal found that the law providing for the Preservation and Safeguard of the Rights of Employees on the Transfer of Business, Facilities or Parts of Businesses (Law 104/(I)/2000), which implements EU Directive 2001/23/EC into Cypriot national law, was applicable.

The Tribunal observed that the Employer Company’s transport and distribution department was an organised and autonomous entity that was transferred to Logistic together with its vehicles and a substantial number of its employees, continuing, therefore, to operate and hold its identity even after its transfer. Based on this reasoning, and owing to insufficient evidence as to any economic, technical or organisational alterations being carried out to the Employer Company, the Tribunal held that no redundancy grounds arose to justify the employee’s dismissal.

The Tribunal noted that according to Law 104/(I)/2000, upon the transfer of a business, the transferor is released from its employer obligations, which are transferred to and undertaken by the transferee irrespective of the employee’s wishes, and any dismissal served by the transferor is taken over by the transferee. With regard to this, the Tribunal held that the employee should have pursued his claim for unfair dismissal against Logistic and not against the Employer Company, and dismissed the employee’s claim.

IV BASICs OF ENTERING AN EMPLOYMENT RELATIONSHIP
i Employment relationship

In Cyprus, although written employment contracts are not required, the Law² imposes an obligation on the employer to provide to the employee, in writing, specific information regarding the terms of employment. Such information must include:

a the identity of the parties;
b the place of work and the registered address of the business;
c the position or the specialisation of the employee;
d the commencement date of the contract and its duration, if it is for a fixed period;
e notice periods;
f annual leave entitlement;
g all the payments (salary, bonuses, etc.) to which the employee may be entitled and the time schedule for their payment;
h the usual duration of daily or weekly employment; and
i the application of any collective agreements.

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² Law Providing for an Employer’s Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship (Law 100(1)/2000), as amended.
The only valid reasons for dismissal are exhaustively prescribed by the Termination of Employment Law, as amended. There is no requirement for employment contracts to contain termination provisions unless they are contracts of fixed-term duration. In practice, most contracts of indefinite duration copy the provisions of Article 5 of the Termination of Employment Law, which states that the contract may be terminated for inadequate performance, non-performance of lawful instructions, criminal conduct not sanctioned by the employer, gross misconduct by the employee and redundancy reasons.

An employment contract may have a fixed-term or indefinite duration. Employment under a fixed-term contract is considered to be automatically terminated upon the expiration of the specific term. Nevertheless, according to Article 5(d) of the Termination of Employment Law, a termination is lawfully effected at the end of the fixed period unless the Industrial Disputes Tribunal determines that the contract was for an indefinite period. Successive renewals or extensions of a fixed-term contract, as well as an overall employment period exceeding 30 months, will invariably lead the court to a finding of a contract of indefinite duration.

Finally, there are no specific limitations in the Law regarding amendments to the employment relationship. However, any unilateral change in employment terms may give rise to a claim for constructive dismissal and, therefore, it is advisable that any major changes are agreed between the employer and employee.

ii Probationary periods

Pursuant to the Termination of Employment Law, as amended, there is a fixed probationary period of 26 weeks that can be extended up to a maximum of 104 weeks by written agreement at the commencement of employment. During the probationary period the employer may dismiss the employee without cause.

iii Establishing a presence

A foreign company cannot hire employees without being officially registered within the territory of Cyprus to satisfy social insurance and protection-of-employment considerations set out in the relevant law. A foreign employer may operate through a local branch or register a local company. The requirements depend on the type of the economic activity that is to be performed. For financial services, licences from the Central Bank of Cyprus or the Cyprus Securities and Exchange Commission may be necessary. If a foreign company hires employees, taxes must be deducted at source and the employer is responsible for reporting and withholding.

V RESTRICTIVE COVENANTS

During an existing employment relationship, there is an implied duty of fidelity that is the basis for the existence of a contract of employment. It has long been recognised by the Cypriot courts that the employee should offer his or her services to his or her employer in a trustworthy and faithful manner. This obligation, which stems from the duty of trust and good faith that must exist in every employment relationship, requires the employee not to
act in a manner directly and substantially prejudicial to his or her employer's interests, or
generally in a manner that is capable of causing real or substantial harm to the employer's
interests.

Under Cypriot employment law, strict and unreasonable covenants that compete,
solicit or deal with customers after the employment ends are usually considered void, as it is
considered that the employee is restrained from exercising a lawful profession, which conflicts
with Article 25 of the Constitution.

If a clause is made within the limits of employment law and is reasonable in geographic
and time scope, it may be enforceable.

An employer can protect confidential information through non-disclosure contracts.
Employees have a continuing duty of good faith towards the confidentiality and protection
of their employer's property. This duty survives the termination of employment for whatever
reason. Therefore, unless anything to the contrary is provided in the employment contract,
an employee (former or present) may not use the employer's intellectual property other than
in the course of his or her business, or with the employer's express consent.

VI WAGES

i Working time

Generally, in Cyprus, the number of working hours for a five-day week should not exceed
48 hours per week, including overtime. However, in certain sectors (such as the hotel
industry) different limitations may apply. Employees are generally entitled to a minimum
of 11 continuous hours of rest per day, 24 continuous hours of rest per week and either two
rest periods of 24 continuous hours each or a minimum of 48 continuous hours within every
14-day period.

Employees may opt out of the above rules as long as they freely consent. Managerial
members of staff are also exempt from the statutory restrictions on hours worked.

Night workers should not, on average, exceed eight working hours per day within a
period of one calendar month or within any other period specified in a collective agreement.
Night workers whose work is hazardous or physically or mentally demanding should not
exceed eight hours of night work in 24 hours.

ii Overtime

Overtime pay is generally not regulated by law in Cyprus and is usually a matter of private
agreement between the employer and the employees. However, in certain industries in which
working time is regulated by specific legislation and regulations, overtime payments may also
be regulated accordingly. For example, employees in the hotel industry are entitled by law to
receive overtime pay for work performed outside the prescribed daily working hours and on
weekends and public holidays, at a rate of one-and-a-half times or double the normal pay.

Collective agreements may also regulate overtime pay. Public holidays must be taken
into account regarding the payment of overtime, depending on whether there is a collective
agreement or not. In the public sector (where there is a collective agreement) public holidays
are considered overtime; in the private sector (if a collective agreement exists) employers may
offer additional days off or, for highly paid management posts, the overtime paid may be
considered part of the existing remuneration package.
Concerning the payment of overtime, it cannot be automatically considered that it is payable as employers may offer additional days off instead of overtime payments, although this is a matter of contractual agreement between the employer and the employee, and with reference to each specific sector and the collective agreements that govern each sector.

VII FOREIGN WORKERS

The terms and conditions of employment for all foreign nationals must be the same as those for Cypriot nationals and this is guaranteed by the model employment contracts provided by the Ministry of Labour and Social Insurance. Foreign workers working in Cyprus are protected by Cyprus employment law.

EU nationals may work in Cyprus freely without any restrictions. However, if an EU citizen intends to stay and take up employment he or she must apply for an alien registration certificate at the local immigration branch of the police and also apply for a registration certificate. Applications must be submitted at the local immigration branch of the police within four months of entering Cyprus. Moreover, EU nationals must apply for a social insurance number upon securing employment in Cyprus. The registration certificate is issued within approximately six months of the date of application. The employee may work while his or her application is being processed.

With regard to non-EU nationals, an employment and residence permit is required prior to employment. The granting of work permits for foreign workers is governed by the Aliens and Immigration Legislation, along with the decisions of the Council of Ministers and the Ministerial Committee. Working in Cyprus without a valid work permit is a serious criminal offence and may result in a fine or imprisonment for both the employer and employee.

There are a number of restrictions on obtaining work permits. Generally, the criteria for the approval of a work permit are the following:

a) unavailability of suitably qualified local or EU personnel who satisfy the specific needs of the employers;

b) preservation and better utilisation of the local or EU labour force;

c) an improvement in working conditions at the workplace;

d) terms and conditions of employment of foreign nationals should be the same as those of Cypriots or EU citizens; and

e) in cases where work permits are recommended for the employment of foreign nationals with special skills and knowledge that Cypriots or EU nationals do not possess, the employer is obliged to name a Cypriot or EU national who will be trained during the period of the foreign national’s employment.

The major categories of companies for which applications are examined are local enterprises and local companies with foreign investment.

All non-EU nationals are required to apply for an entry and residence permit before travelling to Cyprus if they intend to reside or work in Cyprus. The competent authority for granting entry permits and temporary or permanent residence permits is the Civil Registry and Migration Department of the Ministry of Interior.

Any person who resides in Cyprus for more than 183 days a year must pay tax in Cyprus on their worldwide income. Pension payments and tax liabilities depend, to a great extent, on the individual arrangements made by the person as well as any double taxation treaties that may exist between Cyprus and the originating country.
An employer is required to pay contributions to the funds (social insurance, annual holidays with pay, redundancy, industrial training and social cohesion) for each of their employees, if the employee is paid a salary.

VIII GLOBAL POLICIES

In Cyprus, internal discipline rules are generally not required, with the exception of governmental and semi-governmental bodies for which such rules are usually made into subsidiary legislation.

There is no obligation for the employees to approve or agree to the aforementioned rules unless they have a retrospective effect or change the fundamental basic terms of employment. Moreover, such rules do not have to be filed with or approved by governmental authorities with the exception of rules applying to governmental or semi-governmental bodies, which are generally approved by the House of Representatives.

If internal discipline rules exist, they must be written in a language that the person who is involved can understand. There is no legal obligation for such rules to be signed by the employees. A simple notification of where the rules can be found is considered sufficient.

Finally, internal discipline rules may be incorporated into the employment contract.

As regards mandatory rules concerning discrimination, Article 28 of the Constitution contains a general anti-discrimination provision that corresponds to a number of international conventions that Cyprus has ratified. Age, disability and sexual orientation are not covered by the Constitution, but are covered by the specific legislation outlined below.

In 2004, four separate anti-discrimination laws came into force implementing the two anti-discrimination EU Directives (2000/78/EC and 2000/43/EC):

- Law 57(I)/2004 amending the existing Disability Law;
- Law 58(I)/2004 on Equal Treatment in Employment and Occupation;
- Law 59(I)/2004 on Equal Treatment (Racial or Ethnic Origin); and
- Law 42(I)/2004 appointing the Ombudsman as the Equality Body.

Law 58(I)/2004 on the Equal Treatment in Employment and Occupation Law, as amended, applies to all natural and legal persons in both the private and public sectors. The sanctions that courts can impose against physical persons found to be guilty of discrimination cannot exceed €6,835.27 or imprisonment for up to six months, or both. For legal persons the maximum penalty is €11,960.21.

The provisions prohibiting discrimination on the grounds of age are included in the Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law 42(I)/2004, as amended, the Equal Treatment in Employment and Occupation Law 58(I)/2004, as amended, and Law 57(I)/2004 amending the existing Disability Law.

IX TRANSLATION

Employment contracts or other documents can be written in any language that is understandable to both parties or, if the contract or document is written in a language other than the employee’s native language or in a language that the employee does not understand, the provisions of the contract or document have to be orally explained to the employee.

It is generally recommended that the employer obtains the confirmation of an independent professional (e.g., a lawyer) that the terms of the contract have been appropriately
explained to the employee. Moreover, it is recommended that the employer provide the employee with an appropriately translated copy of the employment contract, the employees’ handbook, any confidentiality agreements or restrictive covenant agreements and any other document or policy containing essential terms and conditions of employment or plans. Although a certified translation is not necessary, it is advisable.

In the event that any of the above-mentioned documents have not been appropriately translated or are not in a language comprehensible to the employee, the terms may not bind the two parties, as interpreted under Cypriot contract law, and, in some cases, may not be enforceable in court.

X  EMPLOYEE REPRESENTATION

Workplace representation in Cyprus is carried out mainly through trade unions. According to the Constitution employees have the right to join any union of their choice and even incorporate their own union with a view to protecting their collective rights. There are no employees who, by law, must be represented by one or more trade unions. In practice, workers are either ‘recruited’ by union officials or apply to join unions.

Union workplace committees are elected by employees in companies with more than 10 employees, in order to deal with issues such as health and safety, work organisation, discipline and the implementation of the collective agreement. The committee also provides a link to the union structures, encouraging employees to join the union and getting support and advice from full-time union officials when necessary.

Matters pertaining to collective bargaining, collective agreements and the settlement of disputes are regulated by the Labour Relations Code. According to the Labour Relations Code, in the event of a large-scale redundancy the employer should notify the union as soon as possible and begin consultations. In companies where collective bargaining is carried out at the company level, the workplace committee may be involved in this, although more often a full-time government official will play the key role.

The right to consultation and information of the local union committees has been strengthened by the Law 78(I)/2005 Establishing a General Framework for Informing and Consulting Employees, implementing EU Directive 2002/14/EC on information and consultation, which requires management and the existing employee representatives in the workplace (the unions) to negotiate the appropriate practical arrangements for informing and consulting employees in undertakings that employ at least 30 employees.

Trade union representatives at the workplace are elected by a meeting of the members. The number of representatives elected depends on the union and the circumstances involved. Typically, the term of office is one year.

There are specific legal protections against the dismissal of workplace trade union representatives. Discrimination on the grounds of trade union activity is unlawful. Trade union representatives have general rights to enable them to carry out their duties and in larger workplaces the union will have access to a room and limited time off. In the banks and some public utilities, the main trade union representative is completely released from normal duties.

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4 Article 21 of the Constitution.
XI DATA PROTECTION

General framework
The General Data Protection Regulation (GDPR) came into force on 25 May 2018. Under the GDPR, both employers and their employees have new responsibilities to consider to help ensure compliance with the GDPR principles.

Irrespective of the GDPR’s direct effect, EU Member States were given power to legislate domestically in a few areas, one of which is employment. On 31 July 2018, new data protection legislation was enacted replacing the previous data protection legislation. The new law implements a number of provisions of the GDPR but it does not specifically deal with employee data and privacy. Employers must comply with all the principles that apply to the processing of personal data, including the principle of accountability. Accordingly, employees, as data subjects, enjoy enhanced data protection rights as set out in the GDPR.

The Data Commissioner Authority stated that any guidance and directives issued by the Cyprus Data Protection Commissioner under the previous legislation remains in force until such is expired or replaced. Therefore, the recommendation issued by the Data Commissioner in 2005 that deals with personal data processing in the field of employment is still relevant for specific data protection issues that arise in the field of employment.

XII DISCONTINUING EMPLOYMENT

i Dismissal
In Cyprus, dismissals that are not justified under any of the grounds presented below are considered unlawful and give the employee a right to compensation: 5

a unsatisfactory performance (excluding temporary incapacitation owing to illness, injury and childbirth);
b redundancy;
c force majeure, acts of war, civil commotion or acts of God;
d termination at the end of a fixed period or termination when the employee reaches the normal retirement age in accordance with custom, law, collective agreement, contract, employment rules or otherwise;
e conduct rendering the employee subject to summary dismissal; and
f conduct making it clear that the relationship between the employer and employee cannot reasonably be expected to continue, commission of a serious disciplinary or criminal offence, indecent behaviour or repeated violation, or ignorance of employment rules.

Some categories of employees enjoy increased protection from dismissal. The increased protection applies to employees who participate in trade union-related activities, pregnant women and employees on sick leave.

5 Termination of Employment Law of 1967, as amended.
Employees are generally protected from dismissal for any reason that does not justify dismissal under the law. An employer may never terminate employment for the following reasons: 6

- membership of trade unions or a safety committee established under the Safety at Work Law of 1988;
- activity as an employees’ representative;
- the filing in good faith of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations, civil or criminal;
- race, colour, sex, marital status, religion, political opinion, national extraction or social origin;
- pregnancy or maternity; or
- parental leave or leave on the grounds of force majeure.

An employer is obliged to inform the Ministry of Labour regarding redundancies, but not for dismissals. The employer is also obliged to rehire redundant employees if a position becomes available up to eight months following the redundancy. More stringent notification requirements apply for collective redundancies or where a works council is established.

The most common remedy available for unlawful dismissal is damages, which in the Industrial Disputes Tribunal cannot exceed two years’ wages. With regard to the remedies established by the law in Cyprus concerning unlawful dismissals, the only effective mechanism is statutory and contractual compensation, which is often insufficient. The remedy of reinstatement is theoretically available against employers employing over 19 people, but it is very rarely ordered by Cypriot courts.

The notice period for dismissals correlates to the length of service of an employee in continuous employment and must be in writing.

<table>
<thead>
<tr>
<th>Length of service</th>
<th>Notice period</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than 26 weeks but less than 52 weeks</td>
<td>1 week</td>
</tr>
<tr>
<td>More than 52 weeks but less than 104 weeks</td>
<td>2 weeks</td>
</tr>
<tr>
<td>More than 104 weeks but less than 156 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>More than 156 weeks but less than 208 weeks</td>
<td>5 weeks</td>
</tr>
<tr>
<td>More than 208 weeks but less than 260 weeks</td>
<td>6 weeks</td>
</tr>
<tr>
<td>More than 260 weeks but less than 312 weeks</td>
<td>7 weeks</td>
</tr>
<tr>
<td>312 weeks or more</td>
<td>8 weeks</td>
</tr>
</tbody>
</table>

No notification is required to be given to an employee on probation (provided that the trial period does not last longer than 104 weeks).

By amendment of the Termination of Employment Law on 25 July 2016, giving notice to an employee who is absent from work owing to incapacity for work for a period of up to 12 months is prohibited for a period that is equal to the period of absence plus one-quarter.

Furthermore, the employer has the right to pay in lieu of notice, for which the sum paid is equivalent to the applicable notice period, but there is no obligation for any severance or

6 Termination of Employment Law of 1967, as amended, Article 6(2).
dismissal indemnity. Private settlement agreements between the employer and the employee can be concluded provided that such agreements do not violate the minimum amounts set by the law.

Any provision in a contract or agreement providing for the reduction of the length of the statutory notice period is void *ab initio*, although the parties have the right to extend the notice period by contract, collective agreement or for any reason established by law, custom or otherwise.

### ii Redundancies

Redundancy compensation is calculated according to Table 4 of the Termination of Employment Law. An employee who is made redundant as part of a collective redundancy plan under the Collective Redundancy Law of 2001 has the same termination payment rights as an employee who is individually made redundant under the legislation of 1967.

Redundancy payments are calculated according to years of employment as follows:

- *(a)* two weeks’ wages for each year of service up to four years;
- *(b)* two-and-a-half weeks’ wages for each year of service from five to 10 years;
- *(c)* three weeks’ wages for each year of service from 11 to 15 years;
- *(d)* three-and-a-half weeks’ wages for each year of service from 16 to 20 years; and
- *(e)* four weeks’ wages for each year of service beyond 20 years.

The upper limit for redundancy compensation is 75.5 weeks’ wages. The minimum statutory compensation for unlawful dismissal payable by the employer is also calculated in the same way. Depending on the circumstances of each case, the court may award anything between the minimum (the redundancy amount) and the maximum (two years’ wages), taking into account all the facts of the case. The court may, *inter alia*, consider the age, family situation, career prospects and circumstances of termination before deciding. In the event of redundancy, the payments are made from the government redundancy fund. The Redundancy Fund was established by the Termination of Employment Law. It is a national fund to which employers pay contributions for the purpose of the payment of compensation upon redundancy. The Redundancy Fund is wholly financed by contributions from employers.

Collective dismissals under Cypriot law are dismissals for one or more reasons not related to the employees, and where the number of employees dismissed within a 30-day period is:

- *(a)* at least 10 employees, if the establishment employs more than 20 but fewer than 100 employees;
- *(b)* at least 10 per cent of the workforce, in cases where the establishment employs at least 100 but fewer than 300 employees; or
- *(c)* at least 30 employees, in cases where the establishment usually employs at least 300 employees.

An employer intending to implement a collective redundancy has a statutory obligation to notify and engage in consultations with the employees’ representatives as soon as possible to reach a settlement agreement.

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7 Termination of Employment Law of 1967, as amended.
The employer must also give notice to the Minister of Labour, Welfare and Social Insurance of any proposed redundancy dismissal at least one month before the intended date of termination. Notice must be given on a standard form and include the following particulars:

- the reasons for any proposed collective dismissal;
- the number and the description of the employees it proposes to make redundant;
- the total number of employees and the description of employees normally employed at the establishment;
- the time period during which the proposed redundancies are to take place;
- the criteria for selecting the employees that are to be dismissed; and
- the calculation method of any redundancy payment, other than the redundancy payments provided by the Termination of Employment Law.

If the number of dismissals is less than the number provided in the law, the Termination of Employment Law applies. As regards notice periods, the rules of the Termination of Employment Law, as amended, apply.

XIII  TRANSFER OF BUSINESS

The Law Providing for the Preservation and Safeguard of the Rights of Employees on the Transfer of Business, Facilities or Sections of Businesses, Law 104(I)/2000, as amended, applies to the transfer of a business or part of one, plus any business facilities, as a result of a legal transfer or merger. The legislation covers both public and private businesses irrespective of whether or not they have profitable economic activities, and applies to employees and their representatives.

For the Law to apply, a business transfer must involve the transfer of an economic entity that retains its identity. The Law does not apply to:

- vessels and ships;
- transfers by share takeovers;
- transfers involving insolvent businesses; and
- reorganisation or redistribution of functions between public bodies.

Employees are not entitled to object to a transfer. Objecting to working for a new employer may constitute a material breach of the employment contract. If the working conditions or the contract of employment are changed to the employee's detriment (e.g., if the employee's duties radically change) this may be a breach of contract by the employer. Both the transferor and transferee must consult either the employees affected by the transfer or their representatives.

All rights and duties of the transferor stemming from the employment contract or work relationship as it exists at the date of the transfer must be transferred to the transferee. The transferee must retain the same terms that have been agreed upon in any collective agreement, in the same way as was done by the transferor, for the remainder of the term of the collective agreement and for at least one year after the transfer. The employees do not retain the rights that they had with the transferor regarding old age and disability benefits, or any rights to supplementary occupational retirement benefits except those provided by the Social Insurance Legislation (Section 4(3)(a)).
XIV OUTLOOK

Economic recovery in Cyprus means that employers and employees have reasons to be positive about 2019 as there are indications that development rates will increase and financial growth will continue.

Unions have started pressing for salary increases and the reinstatement of benefits, especially in the civil service and the banking sector. However, employers are still very cautious with regard to increasing salaries and are still trying to reduce costs.

A revamp of the state pension system is a hot topic, as is there is an increased need for second-pillar pension schemes.
Introduction

Danish employment law is based on the ‘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 countermeasures to unemployment.2

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. The collective 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 certain 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.

Danish employees are unionised to a fairly wide extent (currently, approximately 70 per cent), which is mainly attributable to the Danish labour market tradition. Union membership, however, has declined substantially in recent years.

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 competence areas.

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 2018, Denmark has consistently been ranked by the World Bank3 as one of the top three best countries to do business in. According to the European Investment Bank’s annual survey,4 Denmark has a large share of firms in the top productivity quintile in the EU – especially in the construction and infrastructure sectors. Furthermore, 95 per cent of all Danish firms invested in the past financial year. Investment per employee exceeds the EU average, and a higher proportion of firms in Denmark innovate and invest abroad compared to other EU countries.

Among other significant, positive signs was the decrease in the unemployment rate from 5.7 per cent to 4.9 per cent. The hottest topic in Danish employment law was the EU General Data Protection Regulation (GDPR), which became effective on 25 May 2018. The GDPR has generated most of the legal headlines in the Danish media during the year, mainly as a result of massive marketing efforts by, among others, law firms, accounting firms, and IT companies. Most companies faced major difficulty dealing with the many challenges generated by the GDPR.

Another major development in 2018 was the parliament’s adoption of a new Holiday Act. The Act was passed on 25 January 2018 and will become effective from 1 September 2020. The Act was a result of ongoing pressure from the EU Commission on the basis of its opinion that the current Holiday Act is in contravention of the Working Time Directive (2003/88/EC). 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 period (i.e., the calendar year). The new Holiday Act includes a transitional rule, which means it became partially effective on 1 January 2019.

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3 www.doingbusiness.org.
III SIGNIFICANT CASES

On 19 February 2018, the Supreme Court gave a ruling regarding potential double compensation owing to unfair dismissal. An employee claimed to be entitled to compensation for unfair dismissal according to the Salaried Employees Act as well as a compensation according to the Commercial Training Act. The Supreme Court found that the employee could not be compensated under both laws. In addition, the Supreme Court found that the employee was entitled to compensation under the law triggering the highest compensation. This ruling is in line with previous rulings regarding ‘double compensation’.

On 12 October 2018, the Eastern High Court gave its ruling in a case regarding the definition of ‘disability’ in the sense of the Non-Discrimination Act, which has been hot topic in recent years. The ruling confirmed that the employee’s medical diagnosis in itself is not decisive and that the key criteria remains whether or not the relevant health issue results in an impairment that, in combination with any other impairments, prevents the employee from full and effective participation in working life on an equal basis with others, and that this limitation is long-term. In the specific case, the court found that the limitation was neither long-term at the time of termination nor expected to become so in the future.

From an international perspective, a notable ruling was given on 15 May 2018 by the Western High Court. The Court confirmed the general legal opinion that employees are required to act appropriately towards their employer and colleagues. In this specific case, an employee was dismissed owing to his improper text messages to a colleague, who explicitly instructed him not to send such messages. The Court found that the dismissal of the employee was fair owing to his offensive and insulting messages sent to the colleague. The case is interesting considering the recent international discussions about the #MeToo movement against sexual harassment and other sexual abuse, which seems to have generated many court cases.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

Employment relationship

Pursuant to the Employment Contract Act, employees are required to have a written employment contract, assuming that their weekly working hours amount to 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 the 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 paid 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 employee’s right to paid holiday, the right to participate in an incentive compensation scheme, restrictive covenants and special employee policies (e.g., IT policy, expenses policy, smoking policy).

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 the employer’s violation of the Act, the employer will be liable to pay compensation to the employee equal to 13 weeks’ salary (20 weeks’ salary if aggravating circumstances exist). 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 or not 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 terminated effective upon expiry of the notice, 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 as such. 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 objective reasons exist.

ii Probationary periods

For salaried employees, probationary periods lasting 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 than the normal minimum notice of termination (see Section XII.ii).

No statutory rules applicable to blue-collar workers or CEOs exist 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.

An employer that is not officially registered in Denmark can also 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.
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 10,000 Danish kroner per employee per year).

All categories of employees are entitled to 25 days’ holiday per holiday year according to the current Holiday Act (however, as mentioned in Section II, the new Holiday Act has been adopted, which will take full effect on 1 September 2020 and became partially effective on 1 January 2019). The right to paid holiday is accrued in each calendar year (2.08 paid days per month of employment), but holidays are taken in the holiday year running from 1 May in the year following the accrual year to 30 April in the next year. During the employment, the employer is required to pay a holiday supplement equal to 1 per cent of the employee’s total remuneration, which is paid when the holiday is taken. At the end of employment, 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 as opposed to blue-collar workers who – in the absence of a collective agreement – have no such right.

Taxes are deducted at source and the employer is required to report and withhold income taxes in the salary payments made to the employee.

V RESTRICTIVE COVENANTS

Generally speaking, 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 Marketing Practices Act.

A new 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 only applies to salaried employees, covers non-competition and non-solicitation of customers covenants, whereas the Act on Job Clauses is applicable to salaried employees and blue-collar workers, and covers non-solicitation of employees 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 customers covenants, apart from the requirements in the Contract Act that the said covenants must be on reasonable terms (not excessive) and that a non-competition covenant will lapse automatically, if the employment is terminated by the employer and the worker has not given reasonable cause for the termination (or because of
the employer’s material breach). However, in practical terms, the courts will in many cases be likely to deem restrictive covenants agreed with blue-collar workers unreasonable and therefore set them aside in whole or in part.

For a non-competition covenant agreed with a salaried employee to be valid, the employee must hold a particularly trusted position pursuant to the Salaried Employees Act. The said 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 the employee’s total remuneration (as at the expiry of the notice period) during the period from the end of employment and 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 the said 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 covenants 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 personally had contact, or who appears on a list provided to the employee before termination has been given.

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 as well as 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;
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 under certain circumstances and decreased to 40 per cent under other circumstances; and
g the right to set off against compensation because of other employment or self-employment is further restricted.
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 the employee's obligation to work overtime.

According to best practice (and most collective agreements) the normal working hours are 37 hours per week. However, it is set forth in the Act on Working Time (which implemented Directive 93/104/EC) that the average weekly working hours 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 daily rest period of at least 11 consecutive hours in a 24-hour period.

The above-mentioned rules and principles also apply to night work.

ii Overtime

The law does not require overtime compensation and consequently it is most 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 Regional State Administration 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 or Swiss 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 in order 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 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 employer is not required as such to register the number of foreign employees. 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 depends 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 acts and substantial case law. Internal discipline rules are not required by law, but it is generally recommended to prepare, implement and enforce written rules on discipline and appropriate conduct, as well as rules on other key workplace-related subjects.

Typically, these rules are part of an employee handbook or similar document that covers numerous workplace-related subjects, such as use of employer 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., the abolishment of a bonus scheme) 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 setting out that the rules have been duly implemented (i.e., introduced and made easily available to the employees) in order to promote enforceability of the rules.

The rules (as well as any other document setting out employment terms and conditions) 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. But 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 TRANSLATION

Employment documents are generally not required to be prepared in Danish.

Employment documents 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 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 the employment documents in a language that the employees can be reasonably expected to understand, the employment document 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.

X EMPLOYEE REPRESENTATION

Rules on employee representation are set out in the employment law and company law frameworks.

The employer’s obligation to inform and consult the 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 where the employer is not party to any collective agreement, or a collective agreement pursuant to which the employer has set up a works council and consult with the works council in relation to certain workplace-related subjects.

Under the said Act, the works council must, *inter alia*, be consulted with regard to 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 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 is 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 on information and consultation apply.

XI DATA PROTECTION

i Requirements for registration

The rules governing processing of personal data are set forth in the GDPR and the new supplementary Danish Act, the Data Protection Act, which was adopted on 17 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.

Certain fundamental requirements applicable to all processing of personal data are provided in the GDPR as well as in the Act. In particular, the GDPR requires that the
processing of personal data is conducted for an explicit and legitimate purpose, only to the 
extent required by that purpose, and that further processing must not take place in a manner 
incompatible with that purpose.

Another fundamental employer requirement is to provide certain information to the 
employees (or other data subjects, if relevant) in connection with the employer’s collection 
of employee personal data (whether from the employee or a third party). The mandatory 
information set forth in the GDPR (Articles 13 and 14) is (1) the identity of the data 
controller; (2) the purpose of the data processing; and (3) 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., the types of data collected, the 
recipients, if any, and any transfers outside the EEA).

These fundamental requirements must be satisfied regardless of any employee consent. 
Under the GDPR, an employer is – as a general rule – permitted to process personal 
employee data to a usual and reasonable extent in connection with the employer’s HR 
administration without obtaining employee consent. However, see below regarding sensitive 
data.

Access levels to personal data must, in principle, be limited to ensure that any access is 
given for a legitimate business purpose, namely on a need-to-know basis.

The data controller (typically the employer in the context of employee data) 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 
Data Protection Authority (DPA). 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. In our experience, however, the 
most detrimental (potential) consequence of any infringement is significant negative press 
coverage and bad will. The rulings of the DPA are usually published on the DPA’s website, 
which is monitored by the press to a certain extent.

**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 transfer within 
the EEA is subject to the normal rules on transfer of personal data in the GDPR. There is no 
requirement to register the transfer with the DPA.

Transfer of personal data outside the EEA is subject to special rules. The GDPR 
restricts transfer of data outside the EEA, unless the recipient is located in a geographic area 
approved by the European Commission, or if the data controller and 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, 
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. The European Union and the United States have signed an agreement establishing the legal grounds for transferring personal data from European companies to recipients in the US. The new agreement, the EU–US Privacy Shield, replaced the Safe Harbour scheme. In brief, the new political agreement imposes more stringent obligations on US companies in connection with the processing of personal data transferred from the EU. In addition, it includes a possibility for increased enforcement by US authorities, who also intend to increase cooperation with European DPAs. The agreement was deemed adequate to enable data transfers under EU law by the EU Commission on 7 July 2016, and as of 1 August 2016, companies in the United States could certify their compliance with the EU–US Privacy Shield with the US Department of Commerce.

*b Establishing appropriate safeguards: the GDPR permits cross-border transfer 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 certified by the relevant supervisory authority or standard contractual clauses comprising standard data protection clauses adopted by the European Commission. These contracts have a standard format.

*c Specific derogations: Article 49 of the GDPR includes specific approaches that permit data transfer in the event of failing to utilise the mechanisms listed in points (a) and (b). For example, a data transfer can always take place with employee 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, but the GDPR has instead introduced 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. As a general rule, the processing of special categories of personal data requires prior employee consent or other legal grounds specifically mentioned in the GDPR.

Social security numbers and criminal records are not special categories of data according to the GDPR, which means that this information is subject to the general processing rules. However, according to the Danish Data Protection Act, these data categories require a higher level of security and are essentially covered by the same rules as the special categories of data.

**iv Background checks**

Background checks are allowed as a general rule.

Some background checks, 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 employee consent.

It is only permitted for the employer to collect information revealing criminal actions if the 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 applied for 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 such records requires written applicant or employee consent according to the Regulation on the Central Criminal Register.

XII 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 (on 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. But 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 circumstances.

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. In such scenario 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 of 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 (on 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, *inter alia*: 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 such dismissal, the employer must be able to show that the dismissal was neither in whole nor in part based on the conditions on which the special protection is based.

In case of a termination in contravention of the rules affording special protection, the employer may be liable to pay significant compensation amounting to approximately three to 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 acts protect 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 six to 12 months’ based on recent case law.

ii Notice

* Salaried employees

The minimum notice required from the employer to terminate an employee is dependent on the employee’s length of continuous service, namely, 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 from the employer are:

<table>
<thead>
<tr>
<th>Employment period</th>
<th>Notice period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 5 months</td>
<td>1 month</td>
</tr>
<tr>
<td>Up to 2 years and 9 months</td>
<td>3 months</td>
</tr>
<tr>
<td>Up to 5 years and 8 months</td>
<td>4 months</td>
</tr>
<tr>
<td>Up to 8 years and 7 months</td>
<td>5 months</td>
</tr>
<tr>
<td>In excess of the above</td>
<td>6 months</td>
</tr>
</tbody>
</table>

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 (and such 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 contracts.
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. The law neither provides for a general right of reinstatement in case of unfair dismissal nor a general duty to provide suitable alternative employment.

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 – as a general rule – 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, the employer can terminate the employment without notice or with notice at the employer’s discretion.

iii Redundancies

The principles and rules applicable to dismissals (see Section XII.i and ii) also apply to redundancies, with the exception of the special rules applicable to collective redundancies mentioned below.

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 redundancies within 30 days exceed: 10 employees in undertakings employing between 20 and 100 employees; 10 per cent of the employees in undertakings employing between 100 and 300 employees; or 30 employees in undertakings employing more than 300 employees.

Under the said 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 such 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.

XIII 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 at 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 employments existing 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 has 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 after the date of the takeover.

**XIV OUTLOOK**

Most leading financial analysts expect that the financial and business climate will further improve in 2019.

The hottest topic in 2019 will probably be the GDPR. It is our forecast that within the next year or so, the European Union – and to some extent that rest of the world – will be hit by a GDPR ‘tsunami’ owing to a combination a several factors. 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 likely to be very substantial in some cases; and the anticipated increase of exercise of data subjects’ rights and upcoming disputes regarding the processing of personal data.

Further, the new Holiday Act will keep attracting attention because it 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 on 1 September 2020.

Lastly, one of the most important subjects in 2019 is the changes in the Stock Option Act. The parliament has passed a bill replacing the very employee-friendly leaver provisions with almost absolute freedom of contract with regard to equity-based incentive schemes for employees. The new rules came into force on 1 January 2019. The combination of the new rules in the Stock Option Act and the recent introduction of substantially more favourable tax rules are expected to lead to the introduction of many equity-based incentive schemes across companies established in Denmark.
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: Law 16-92 dated 29 May 1992, as amended (the Labour Code); the Regulation for the Implementation of the Labour Code No. 258-93; Law No. 87-01, which institutes the Social Security System of the Dominican Republic, as amended; all International Labour Organization agreements ratified by the Dominican Republic; and the regulations issued by the Ministry of Labour of the Dominican Republic.

Labour laws have a territorial effect, therefore any company that employs personnel in the Dominican Republic, or whose personnel provides 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.

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 most favourable for employees.

The Ministry of Labour is the main governmental agency responsible for all labour issues, supervising the relationship between employers and employees, and verifying compliance with the current labour regulation. 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 occasionally 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 governmental authorities are the Institute for Professional Technical Training (INFOTEP), an autonomous not-for-profit agency in charge of overseeing the system for 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 main topic of discussion during 2018 was the application of the Domestic Workers Convention (No. 189) ratified on 15 May 2015. The Forum for Domestic Work in the Dominican Republic proposed a bill to govern the work of domestic workers, which gave rise to discussions among the main stakeholders. There is no up-to-date consensus on the extent of the obligations the government must take to ratify the Convention, and the internal proceedings that should be carried out, if any, to render such obligations enforceable for the overall population.

The average open unemployment rate decreased from 7.3 per cent to 5.9 per cent during the first trimester of 2017, according to the results of the Continuous National Poll on Workforce. The average open unemployment rate for the period of January to September 2018 was 5 per cent.6

III SIGNIFICANT CASES

On 9 May 2018, the Supreme Court of Justice rendered a judgment related to the assessment and weight of a letter delivered to an employee terminating employment without cause, stating that ‘the plausibility and truthfulness of a termination letter must be in accordance, in this case, with the logic of the alleged employment relationship and its termination, which contradict true facts, as his designation as member of the Board of Directors of the entity, and gave a different meaning to the studied document (the termination letter) which must be analysed along with all the other evidence that was submitted.’7 Based on this reasoning, the Supreme Court of Justice annulled the judgment of the Court of Appeals, which admitted the existence of an employment relationship between the original plaintiff, a public official appointed by presidential decree, and the respondent, a governmental agency, and admitted the termination without cause, without taking into account the presidential decrees first appointing and then removing the plaintiff as public official, and disregarding the fact that the removal occurred prior to the date of the termination letter. The case was sent to a different Court of Appeals for further instruction and decision.

5 id., Articles 452-64.
7 Supreme Court of Justice, Third Hall, judgment dated 9 May 2018.
IV BASICS OF ENTERING 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. An agreement must be in writing in three exceptional cases: apprenticeship contracts; contracts for definite time; and contracts with foreign employees.

When the agreement is in writing, the following terms must be included: the names, credentials and addresses of employer and employee; the work to be performed by the employee, and the salary and benefits that the employee will receive for such work; the place and hours of work; and the term of employment if it is for a definite time period, or indication that it is for indefinite time period. 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 these 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 such provisions. The employee may claim at all times 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 the employment agreement is entered in writing, any amendment to its terms must also be in writing.

Employment agreements can be for a fixed term or an indefinite time. 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 where the parties set a date for the expiration 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 service to be provided; (2) its objective is to provisionally substitute an employee absent because of a leave, vacation, or another temporary impediment; and (3) it is agreed to be in the interests of the employee.

Under Dominican law, an employment agreement is presumed to be for an indefinite period of time, until proven otherwise.

Changes to the 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. 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 just cause for the resignation of the 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 where the employer has the opportunity to decide if the employee is capable of providing the services in the required manner.

The termination of the 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. The 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, the employer can file various records electronically through the Integrated System for Labour Registration. By acquiring an access code from the Ministry of Labour for 150 pesos for every 25 employees, the company can file all the registries regarding the payroll of permanent personnel, overtime hours records, and changes to the payroll 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, the employer contributes to the financing of family health insurance and the old age, disability and survival insurance with 70 per cent of its cost and pays 100 per cent of the labour risk insurance.

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12 id., Article 34.
14 This registration must be made each year within the first 15 days of January.
In terms of the amount apportioned on a monthly basis 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:

<table>
<thead>
<tr>
<th>Coverage</th>
<th>Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labour risk insurance</td>
<td>1.3%</td>
</tr>
<tr>
<td>Family health insurance</td>
<td>10.13%</td>
</tr>
<tr>
<td>Old age, disability and survival</td>
<td>9.97%</td>
</tr>
<tr>
<td>Total</td>
<td>21.4%</td>
</tr>
<tr>
<td>Employee</td>
<td>5.91%</td>
</tr>
<tr>
<td>Employer</td>
<td>15.49%</td>
</tr>
</tbody>
</table>

Family health insurance and the pension funds administrator are provided by private institutions, which employees can choose at will.

Additionally, the employer 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.15 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.16 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 hour worked in excess of 44 hours per week must be compensated as overtime.17 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 (1) employees serve as representatives of the employer; (2) employees serve in management or supervisory positions; and (3) employees 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 workday may run between 7am and 9pm and a nocturnal

16 Labour Code, Article 147.
17 id., Article 148.
workday between 9pm and 7am. A mixed workday includes both daytime and nocturnal workdays, if the night work is less than three hours. If the night work exceeds three hours, the entire workday will be deemed nocturnal.

Hours worked during the night shift must be compensated to employees at no less than a 15 per cent increase over the value of normal hours.18

ii Overtime
Overtime hours must be compensated depending on the amount of overtime work done by the employee on a given week. If the overtime work is done for less than 68 hours on a week, each extra hour must be paid at a rate of at least 35 per cent more than the normal value of the hour. On the other hand, 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 value of the hour.19 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.

The foreign employee will be registered in the Social Security Treasury, and the employer must pay all social security contributions for the employee. If the employee keeps contributing to the social security of his or her home country, then the employer does not need to pay contributions to the local entities regarding the social security, according to Article 5, Paragraph of Law No. 87-01 that creates the Dominican Social Security System.

In regard to the nationality of the workers, the Labour Code establishes that at least 80 per cent of the workers 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.20 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.21 These rules must be displayed in the most visible places of the establishment.22 If the internal regulations are accessible through the company intranet, the employer must secure evidence that the employee accessed the regulations and has knowledge of its content.

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18 id., Article 204.
19 id., Article 203.
20 id., Article 129.
21 id., Article 131.
22 id., 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 the collective bargaining agreements.\textsuperscript{23}

IX  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 agreement in case of 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 or 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 or get the job.

X  EMPLOYEE REPRESENTATION

Freedom to join a union is among 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 to 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 his or her meetings and tasks will be determined by the statute of the union.

XI  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

\textsuperscript{23} id., Article 134.
discretion and under objective criteria. The implementation of the system, according to the provisions of Article 44 of the Labour Code, must be notified to the Department of Labour within 30 days of the start of the implementation of such system.

The creation of databases of personal data in the Dominican Republic is subject to compliance with the provisions contained in both the Constitution and the Data Protection Law, regarding the conditions for the collection of data and the rights of the data subjects on the information kept on said databases, as well as the handling of the data. However, Article 41 of the Data Protection 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 Data Protection Law No. 172-13 includes as an exception to the requirement of consent of the data subject to access, process and transfer personal data, the 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 in a company owned or controlled server. 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 its labour and, therefore, property of the employer, which entitles the employer to have access to all emails issued regardless of the addressee.24

ii Cross-border data transfers

As previously established, if the use and handling of the data is exclusively for private purposes, the provisions of the Data Protection Law No. 172-13 do not apply. In any case, Article 28 of the Data Protection Law 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 its processing and transferring to third parties.

iii Sensitive data

Maintaining databases of sensitive data is strictly prohibited. This consists of, in general: political opinions; religious; 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.

24 Supreme Court of Justice, Third Hall, Judgment No. 40 dated 18 December 2013.
XII 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 the 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 fall under 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 a damage from the employee’s fault, except in the cases expressly provided by the law.

The employer has a 15-day term to proceed with the termination of the employment agreement under any of the causes previously indicated. The term starts to accrue as of the date the event that caused the breach of the contract took place, or as of the date the employer was informed or aware of the event taking place.

The employer has the obligation 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 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 obligated to pay severance and compensation of up to six months of ordinary salary.

ii Redundancies

This cause for termination of a contract is not expressly provided in the law. In that sense, employers can terminate the 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 the dismissal without cause applies, and the employer must pay the employee the severance; or

b if it is by mutual agreement, then the lay-offs can be done 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 cases of bankruptcy, a company’s operation terminating altogether, a lack of resources that impedes the company operating a certain section, unprofitability or another similar cause, the company must obtain an approval from the Ministry of Labour to proceed with the lay-off of employees. In this case, 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.

XIII TRANSFER OF BUSINESS

A change in ownership of the business or 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 related 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 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.

XIV 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 that employees are entitled to, as well as the implications for employers in case of non-compliance. 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 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.
I INTRODUCTION

In Finland, employment relationships are regulated by statutory law, collective bargaining agreements, employment contracts, policies and established practices.

Employment relationships are regulated by several laws in Finland. The main provisions are contained in:

- the Employment Contracts Act (55/2001, as amended) including provisions on the employment agreement, terms of employment and termination of employment;
- the Working Hours Act (605/1996, as amended);
- the Annual Holidays Act (162/2005, as amended); and
- the Act on Co-operation within Undertakings (334/2007, as amended).

Additionally, there are several other acts regarding employment relationships.

Collective bargaining agreements play a significant role in Finnish labour market regulation, as 85 per cent of employees in the private sector are covered by them. If the employer is a member of an employers’ organisation, it is bound to the collective bargaining agreement concluded by the employers’ organisation of which it is a member.

In addition to the above, employers that are not bound by any collective bargaining agreements may have an obligation to comply with the minimum terms of a collective bargaining agreement that has been declared as generally binding in the relevant field of business (approximately 160 generally binding collective bargaining agreements existed at the end of 2017). Therefore, certain terms and conditions of employment may arise from a collective bargaining agreement simply because the employer conducts business in a specific field, or alternatively from the employee’s duties.

Employment disputes are generally heard by local district courts as first instance. The Labour Court hears and resolves disputes arising from the interpretation of collective bargaining agreements and collective bargaining agreement-related industrial actions.

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II YEAR IN REVIEW

i Implementation of the ICT Directive and the Seasonal Workers Directive

The ICT Act (908/2017), implementing the ICT Directive, and the Seasonal Workers Act (907/2017), implementing the Seasonal Workers Directive, entered into force on 1 January 2018. The objective was to harmonise and facilitate the work and movement of third-country nationals in the European Union.

ii General Data Protection Regulation

The General Data Protection Regulation (GDPR) entered into force on 25 April 2018. The GDPR created a need for legislative changes in Finland and, accordingly, the new Data Protection Act entered into force on 1 January 2019 replacing the Personal Data Act. The intention is to improve data protection and the rights of the data subjects as well as to harmonise data protection legislation in the EU Member States.

iii Changes to the Employment Contracts Act and to the Working Hours Act

A legislative change in relation to variable working hours entered into force on 1 June 2018. An employer may no longer take the initiative to agree on variable working hours when its actual need for a workforce may be deemed to be permanent or on minimum working hours that are lower than its actual need for a workforce.

The rights of employees who already work variable hours were also improved as the right to sick pay and to salary for notice period were strengthened. Furthermore, the changes impose an obligation on the employer to take sufficient time to plan the shifts and to inform the employee of the shifts at least one week in advance.

A legislative change regarding apprenticeships entered into force on 1 July 2018. The aim of the change is to increase the use of apprenticeships as a form of education. As a result, an employer may offer work to an apprentice prior to offering additional work to part-time employees or re-employment to former employees under the re-employment obligation.

A new Trade Secrets Act (595/2018), including necessary amendments to implement the Directive on the Protection of Trade Secrets, entered into force on 15 August 2018. The new Act includes a definition of trade secret, regulation concerning unjustified acquisition, usage and disclosure of trade secrets as well as reporting (whistle-blowing) and legal remedies. The Act enhances the legal protection of trade secrets. The new definition of trade secret was also included in the Employment Contracts Act.

III SIGNIFICANT CASES

The Supreme Court assessed the characteristics of a business transfer in three rulings2 that heavily relied on the rulings of the Court of Justice of the European Union (CJEU). The Supreme Court declared that the importance of each criterion established by the CJEU depends on the nature and special characteristics of the business activities in question. The key in assessing whether the transfer at hand is to be considered a transfer of business is to assess whether the most important factors in keeping the business running are transferred.

The Supreme Court ruled that a business transfer had occurred in all three cases due to overall assessment as the operations were continued without interruption in the same premises and the businesses remained the same prior and after the transfer. In two of the cases, which concerned intensive care services, the Court considered the tangible assets (the premises and appliances) to be the most essential factor for the functioning of the business. Consequently, the business of intensive care services for the elderly was considered to be non-labour-intensive. Therefore, the fact that the majority of the employees were not hired by the municipality was not the decisive factor in the assessment.

In the third case, concerning schoolchildren’s afternoon activities, the Supreme Court considered the business to be largely based on the personnel but also requiring appropriate premises and furnishing. Therefore, the business is neither asset-reliant nor labour-intensive but it requires both. Thereafter, the Supreme Court stated that as the new service provider had continued providing the services in the same premises with the same furnishing to the same clientele, the transferred afternoon activities had remained similar enough rendering the transfer a transfer of business despite the fact that only one out of four employees had been hired by the new service provider.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Finnish law does not include rules on the form of an employment agreement. Therefore, written and oral employment agreements are equally valid. However, a simple written employment agreement is the most typical form, as it may otherwise be difficult to prove what has been agreed upon.

The employer must provide the employee with written information on the essential terms of employment within the first month of employment, if these are not included in a written employment agreement.

An employment agreement is deemed to be valid indefinitely unless it has, for a justified reason, been made for a specific fixed term. Agreements made for a fixed term on the employer’s initiative without a justified reason shall be considered valid indefinitely. However, it is possible to make a fixed-term employment contract with a person who has been unemployed for a long time, without a justified reason, for a maximum period of one year. It is prohibited to use consecutive fixed-term agreements when the amount or total duration of fixed-term agreements or the totality of such agreements indicates a permanent need for labour.

ii Probationary periods

Pursuant to the Employment Contracts Act, the employer and the employee may agree on a probationary period of six months at most. The employer is entitled to extend the probationary period, if the employee has been absent from work for a certain period of time as a result of incapacity for work or family leave. During the probationary period, the employment may be terminated with immediate effect by either party. However, the employment cannot be terminated on discriminatory or otherwise inappropriate grounds with regard to the purpose of the probationary period. The purpose of this period is to give an opportunity for both the employer and the employee to evaluate whether the employment relationship meets their expectations and whether they wish to continue the employment relationship after the
period has expired. This means that it is not possible to refer to the probationary period as a ground for termination if the employment is terminated for redundancy reasons (financial, production-related or reorganisational grounds).

If the employment contract is made for a fixed term of less than 12 months, the probationary period may not exceed 50 per cent of the duration of the employment. If the fixed-term employment lasts longer than a year, the probationary period may be six months at maximum.

iii Establishing a presence
A foreign company can hire employees directly without having to set up a branch office or subsidiary company in Finland. However, when business is carried out permanently and when there are employees in Finland, it may be practical to operate through a local company or a branch.

If a foreign company pays out wages or salaries regularly, the company has to register itself as an employer with the tax authorities. If a foreign company has a permanent establishment, it must also register a branch with the Finnish Trade Register. A permanent establishment could be constituted, for example, if the company has a fixed place of business through which the business is wholly or partly carried out, or if a dependent agent (such as an employee) is acting on behalf of the company and has, and habitually exercises, an authority to conclude contracts in the name of the company, unless the activities in question are only preparatory or auxiliary.

When a foreign company is registered as an employer, it will have all the same obligations as Finnish companies (e.g., it must withhold tax on paid wages, pay the employers’ social security contribution and file periodic tax returns and annual employer payroll reports). A foreign employer must also take out pension insurance, accident insurance and unemployment insurance for its employees.

V RESTRICTIVE COVENANTS
The employee is prohibited by law from engaging in competing activity causing apparent harm to the employer, such as working for a competing company during the employment relationship.

The employer and the employee may also agree on post-employment non-competition restrictions. This requires that there are particularly weighty reasons related to the operations of the employer. When assessing whether such reasons exist, weight is given to the nature of the employer’s operations and the need for protection related to trade secrets, special training given to the employee by the employer, and the employee’s status and duties. A non-competition restriction may be valid for up to six months after the termination of the employment. If the employee receives reasonable compensation for the non-competition restriction during the employment or thereafter, the covenant may be agreed to be valid for up to one year after the termination. However, the non-competition restriction does not bind the employee, if the employment is terminated for a reason deriving from the employer.

Instead of liability for damages, a clause on liquidated damages may be included in a non-competition agreement, but it may not exceed the employee’s salary for six months.

Limitations regarding the length of the non-competition restriction and the amount of the liquidated damages do not apply to employees in executive positions or in independent
positions directly comparable to executive positions. In this case, the non-competition restriction may be valid for a reasonable time and is null and void to the extent considered unreasonable.

There are no statutory rules regarding other post-employment restrictions such as non-solicitation of customers or employees. Therefore, the use of a non-solicitation clause is less strict than the use of a non-competition restriction. The use of a non-solicitation clause is limited only by what is considered reasonable.

VI WAGES

i Working time

According to the Working Hours Act, the normal maximum regular working hours are eight hours per day and 40 hours per week. However, according to most collective bargaining agreements, 7.5 hours per day and 37.5 hours per week are normal working hours.

Work that is carried out between 11pm and 6am is considered night work. According to the Working Hours Act, night work is allowed only in certain specifically mentioned tasks (e.g., period-based or shift work).

ii Overtime

Work that is done on the employer’s initiative in excess of eight hours per day and 40 hours per week is normally considered overtime work. Overtime must be compensated based on the actual working hours put in by the employee. Overtime work is compensated with the applicable hourly wage increased by 50 per cent (for the first two hours and weekly overtime), or 100 per cent depending (for the hours exceeding 10 hours) on the actual overtime hours. With certain manager-level employees, it is possible to agree on monthly lump sum compensation for overtime. The employer and employee may agree that overtime is compensated partly or completely by corresponding free time during regular working hours.

Employees in executive positions and employees working remotely, for example, from home without the employer supervising or participating in the arrangements of working hours, fall outside the scope of application of the Act and are not entitled to overtime compensation, unless otherwise agreed.

VII FOREIGN WORKERS

Primarily, employers may employ foreign employees without limitations if they have a residence permit allowing them to work in Finland. Citizens of the European Union, Norway, Iceland, Switzerland and Liechtenstein can work in Finland without a residence permit. Citizens of any other country usually need a residence permit based on employment in order to work in Finland.

Working in Finland with a permit granted by another country is usually not allowed, especially if the duration of the employment is longer than 90 days. In some cases, it is sufficient if an employee has a residence permit or a visa granted by another Schengen country or if the person is allowed to reside in Finland without a visa. Situations when an employee is allowed to work in Finland without a residence permit with or without limitations are covered by the Aliens Act (301/2004, as amended). The employer has to ensure that a foreign
employee has a residence permit entitling him or her to work in Finland. The residence permit informs the employer of what type of work and for how many hours a week the person is allowed to work.

In general, Finnish labour laws apply to foreign workers, but there may be exceptions relating to employment with international aspects.

Provisions on the minimum terms and working conditions of employees posted to Finland are laid down in the Posted Workers Act (447/2016).

The employer has to withhold tax on paid wages and pay insurance contributions and social security contributions unless an employee has a certificate showing that he or she is covered by another country’s social insurance system.

VIII GLOBAL POLICIES

Terms of employment may also derive from policies implemented by the employer, provided that such policies are in compliance with the law. There are no specific rules governing internal company policies. Therefore, establishing these policies is generally voluntary, but it is recommended that they are made in writing.

It is also recommended that the employer reserves the right to amend any policies it has adopted at its own discretion. If the policies are amended, the employees need to be duly informed about the change in order for the change to be binding on the employees.

Additionally, in order for such policies to be binding on the employees, the employer has an obligation to follow the employees’ compliance with such policies and react to any non-compliance. If the employer does not take any action in the case of a breach of a policy by an employee, the employer may have difficulties in imposing any negative sanctions based on that policy.

Certain practice followed by the employer may also constitute binding terms of employment. This often applies to certain benefits granted by the employer. The practices may become binding if these have been continuously applied for a lengthy period.

Moreover, there are a few policies that are statutory, such as the equality plan and personnel plan in order to support equal opportunities between men and women, as well as to support the employees’ skills and working capacity. Such statutory policies must typically be discussed with the personnel or their representatives on a regular basis as part of the cooperation with employees.

IX TRANSLATION

There are no rules regarding the language of the employment agreement or other employment-related documents. If, for example, the duties of the employee require English skills or it is otherwise clear that the employee understands English, the agreement and other instructions and policies can be in English. However, in order to avoid further disputes, it is important to prepare the employment documents in a language the employee fully understands. There is a risk that the employment agreement or parts of it may be declared non-binding if the employee claims that he or she has not understood the meaning of the agreement or policy.
X EMPLOYEE REPRESENTATION

The personnel groups may be represented by shop stewards, elected representatives or cooperation representatives. The most typical form of employee representation is a shop steward referred to in a collective bargaining agreement applicable to the employer under the Collective Agreements Act (436/1946) or, in case the employees do not have a shop steward representing them, an elected representative based on the Employment Contracts Act.

In general, each personnel group may separately elect among itself a shop steward. Only the employees who are members of an employee organisation that has entered into a collective bargaining agreement may participate in the election of the shop steward. The shop steward is elected for a fixed term, typically for a term of two years.

A personnel group that does not have a shop steward may elect a representative from among themselves. The election of the employee representative is not regulated, and therefore the employees may, for example, freely decide the date of the election and the candidates.

The shop stewards and elected representatives are entitled to receive the information they need to carry out their representative duties. In addition, they must be reasonably released from work obligations in order to take care of the representative duties. The employer must compensate for any loss of earnings caused thereby.

Shop stewards and elected representatives have special protection against dismissals. Their employment can be terminated on individual grounds only if the majority of the employees represented by them accept the termination. Moreover, in cases of collective dismissals, reorganisation procedures or bankruptcy, the employment can be terminated only if the work of the shop steward or elected representative ceases completely and the employer is unable either to arrange work that corresponds to the person's professional skills or is otherwise suitable, or to train the person for some other work.

If a majority of any personnel group is not entitled to participate in the election of a shop steward, the employees belonging to this majority are entitled to elect, on a majority decision, a cooperation representative from among themselves for a maximum of two years at a time to represent them in cooperation procedures.

Moreover, in order to ensure health and safety at work, the employees in every workplace with at least 10 employees should elect among themselves an occupational safety and health representative and two deputy members to represent the employees in matters regarding the safety of the workplace. The occupational safety and health representative is entitled to be released from work obligations as well as receive the essential information for carrying out the industrial safety duties and enjoys the same special protection against dismissal as shop stewards and elected representatives.

The Act on Personnel Representation in the Administration of Undertakings (725/1990, as amended) is applicable to companies that regularly employ at least 150 employees in Finland. Pursuant to the Act, an employer and the representatives of the employees can agree on personnel representation in order to promote the personnel's participation in decision-making in executive, supervisory or advisory bodies of the undertaking. However, in case no agreement can be reached, the personnel can appoint their representatives to a decision-making body covering all profit units chosen by the employer.

Moreover, according to the Act on Cooperation within Finnish and Community-wide Groups of Undertakings (335/2007), cooperation procedures between management and personnel must be established in Finnish company groups ensuring the dialogue of company management and employees. The parties may agree on the election procedure and the number of representatives.
XI DATA PROTECTION

i Requirements for registration

Under Finnish law, the employer is allowed to process the personal data of its employees without registering with the data protection authorities. However, according to the Act on Protection of Privacy on Working Life (759/2004, as amended), the employer is only allowed to process necessary personal information relating directly to the employee’s work. Primarily, the employer must collect information concerning the employee from the employee himself or herself.

Under the General Data Protection Regulation (GDPR) processing of personal data is considered lawful only if:

a the data subject has consented to the processing of his or her personal data for one or more specific purposes;

b processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract;

c processing is necessary for compliance with a legal obligation;

d processing is necessary in order to protect the vital interests of the data subject or another person; or

e processing is necessary for the purposes of the legitimate interests of the controller or a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject.

Under some circumstances the employer (the data controller) and processor must nominate a data protection officer. The duties of the data protection officer include informing and advising the controller, processor and employees in data protection matters, and monitoring compliance with data protection legislation.

ii Cross-border data transfers

In general, personal data cannot be transferred to third parties without a legal reason. However, owing to the controller’s legitimate interest, such a transfer is possible (e.g., when it is within the company group for administrative purposes). Furthermore, data processing may be outsourced to a third-party processor. In such a case, the controller must only use processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of the GDPR and ensure the protection of the rights of the data subject.

Personal data can be transferred outside the European Union or European Economic Area, or to an international organisation, 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 data. Such a transfer does not require any specific authorisation. In the absence of such a decision by the Commission, personal data can be transferred to the country or organisation if the controller or processor has provided appropriate safeguards, and on the condition that enforceable data subject rights and effective legal remedies for data subjects are available.
iii Special categories of data

The GDPR recognises special categories of personal data. The processing of these categories is generally prohibited, unless specifically allowed by the GDPR. Personal data is deemed special if it relates to the following:

a race or ethnic origin;
b political opinions;
c religious or philosophical beliefs;
d trade union membership;
e genetic or biometric data;
f health; or
g sex life or sexual orientation.

iv Background checks

The employer’s right to conduct background checks is somewhat limited and the employee’s consent is, in general, required when information is gathered from someone other than the employee, which also applies when looking to recruit a new employee. The term ‘background check’ leaves open what the employee is giving consent to.

The use of personal data regarding credit information, health and drug use is strictly regulated by law. The employer is only allowed to process personal data directly necessary for the employee’s employment relationship. No exceptions can be made to the necessity requirement, even with the employee’s consent.

Consent is not required when an authority discloses information to the employer to enable the employer to fulfil a statutory duty or when the employer acquires personal credit data or information on criminal records in order to establish the employee’s reliability. However, the employer’s right to collect such data is restricted by law and information on criminal records can only be obtained under exceptional circumstances. The employer must also notify the employee in advance that such data is to be collected.

XII DISCONTINUING EMPLOYMENT

i Dismissal

In Finland, the termination of an employment relationship requires a proper and weighty reason. Employment may be terminated with notice for reasons attributable to the employee such as serious breach or neglect of obligations arising from the employment contract or the law and having an essential impact on the employment relationship. Employment may also be terminated when essential changes to working conditions are necessary that render the employee unnecessary or redundant. The employer’s and the employee’s overall circumstances must be taken into account when assessing the proper and weighty nature of the reason.

Dismissal with grounds attributable to the employee requires a prior written warning, unless the reason for termination is such a serious breach of the employee’s obligations that it would be unreasonable to require the employer to continue the employment relationship.

The Employment Contracts Act further states that at least the following cannot be regarded as proper and weighty reasons for dismissal:

a illness, disability or an accident affecting the employee, unless working capacity is substantially reduced thereby for such a long term as to render it unreasonable to require that the employer continue the contractual relationship;
b participation of the employee in industrial action arranged by an employee union or in accordance with the Collective Agreements Act;
c the employee’s political, religious or other opinions or participation in social activity or associations; and
d resort to means of legal protection available to employees.

Prior to terminating the employment on individual grounds, the employee must be given an opportunity to be heard on the grounds for termination. The employee has the right to have a counsel present at the hearing.

Employment may be terminated by the employer with immediate effect only because of an extremely serious breach of the employee’s obligations. Otherwise, when terminating an employment contract in force until further notice, the employer must observe a notice period. Unless the employer and the employee have otherwise agreed, or the applicable collective bargaining agreement otherwise provides, the general notice periods of the Employment Contracts Act are applicable. The general notice periods to be observed by the employer depend on the length of service and vary gradually from 14 days (if the employment relationship has continued for up to one year) to six months (if the employment relationship has continued for more than 12 years). The notice period length can be agreed to be anything up to six months, but the notice period of the employee may not be longer than that of the employer.

The employer is not required to offer any severance pay in connection with termination, provided that lawful reasons for termination exist. However, the employer must pay the employee his or her salary for the notice period and compensation for accrued holidays as well as any unpaid commission or bonus.

The parties may always enter into a settlement agreement regarding the termination of the employment. There is no specific law governing settlement agreements. The parties may agree on the content of the agreement as long as the content complies with general rules and principles.

If the termination is deemed unlawful by a court, the employer will be ordered to pay compensation to the employee. The amount of the compensation could, in theory, be up to 24 months’ total salary of the employee, depending on an overall assessment of the circumstances.

Finnish employment law does not recognise the concept of void or invalid dismissal. Hence, even if a termination of employment is considered unlawful and the employer could then be ordered to pay compensation to the dismissed employee, the termination will remain in force.

ii Redundancies

Under the Employment Contracts Act, the employment may be terminated by the employer owing to substantial and permanent reduction in the work to be offered either for financial or production-related reasons, or reasons arising from reorganisation of the employer’s operations.

The length of the notice period in a redundancy is determined by the same principles as in any termination. Unless the employer and the employee have otherwise agreed, or the applicable collective bargaining agreement otherwise provides, the general notice periods (from 14 days to six months) are applicable.
However, an employee may not be made redundant if the employee can be placed in, or trained for, other duties. This obligation to offer work covers all the employer’s operations, departments and offices, and is extended to subsidiaries and other entities if the employer exercises effective control over personnel matters in such entities.

In addition, grounds for termination are deemed not to exist if a new employee has been hired either before or after the termination for similar duties without any real change in the employer’s operating conditions or if no actual reduction in work has occurred because of the reorganisation. If the employer needs new employees for the same or similar work within four months of the termination, the employer has an obligation to offer re-employment to employees who have been made redundant and are registered at an unemployment office. However, if the employment relationship has lasted for 12 years, the rehire period is six months.

Additionally, an employer employing at least 30 employees is obliged to offer employees made redundant re-employment training and has an obligation to arrange occupational healthcare for a period of six months after the employee has been released from duties. These obligations apply to employees whose employment contract has lasted for at least five years at the time of the termination of the employee’s employment contract.

If the employer employs permanently more than 20 employees, it is required to enter into cooperation negotiations under the Act on Cooperation within Undertakings with its employees or their representatives when planning measures that may lead to redundancies. The purpose of the negotiations is to discuss the grounds for the planned measures, to explain how the measures affect the employees, to find possible alternatives to terminations and to inform the employees of their rights to certain unemployment benefits and to support in job seeking provided by the public employment offices.

The negotiation procedure takes approximately three to seven weeks depending on the number of employees concerned by the planned redundancies and the size of the employer. The negotiation procedure is rather formal and should be documented carefully in order to avoid later disputes. It is important that no final decisions about redundancies or any such measures that may lead to redundancies are made prior to the fulfilment of the negotiation obligation.

If the employer has failed to comply with the obligations under the Act on Cooperation within Undertakings, each employee who has been made redundant, or laid off, or whose employment has been reduced to part-time, may be entitled to an indemnity amounting to a maximum of €34,519.

XIII TRANSFER OF BUSINESS

As a member of the European Union, Finland is required to comply with Council Directive 2001/23/EC (on the approximation of the laws of the Member States relating to safeguarding employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses) and observe the rulings of the European Court of Justice regarding the interpretation of the Directive. The minimum standards of the Directive have been implemented into the Employment Contracts Act.

Under the Employment Contracts Act, all employees within the business being transferred will automatically transfer to the new owner at the date of the transfer of business.

The legal consequences of a transfer of business are often summarised by stating that ‘employees will transfer to the service of the transferee as old employees with existing terms
of employment’, meaning that all the rights and obligations deriving from the existing employment agreements are transferred to the transferee by virtue of law and no consent is required from the transferring employees. The employees may not object to the transfer of business. However, a transferring employee has a specific right to terminate the employment as from the transfer date regardless of any applicable notice periods.

The employer is not entitled to terminate the employment contract or unilaterally change the terms of employment owing to the transfer of business without legal termination grounds. If the terms of employment are unilaterally changed to the detriment of an employee as a result of the transfer of business and the employee terminates the employment because of this, the employer is considered to be responsible for the termination of employment.

The Act on Cooperation within Undertakings includes an information obligation for the transferor and the transferee in connection with a transfer of business. The Act is applicable if the employer regularly employs at least 20 employees. Both the transferor and the transferee have an obligation to inform the representatives of the employees on the transfer date or the planned transfer date, including grounds for the transfer, the legal, economic and social consequences of the transfer, and planned measures that concern the employees.

If either the transferor or the transferee in connection with the transfer of business considers measures that may lead to termination of employment or significant changes to the terms of employment on financial, production-related or reorganisational grounds, cooperation negotiations concerning the reduction of personnel must be carried out prior to making any decision on the matter. In this situation, the above-mentioned information obligation is not sufficient. The negotiations regarding reduction of personnel are more formal with strict requirements on minimum negotiation periods and issues to be discussed during the negotiations.

**XIV OUTLOOK**

A comprehensive reform of the working hours legislation is currently under consideration and a government bill on a new Working Hours Act was submitted on 27 September 2018. The new Act is expected to come into force on 1 January 2020. Furthermore, the Annual Holidays Act will be updated. The government bill was submitted on 1 November 2018.

A government bill on an amendment to the Employment Contracts Act is also currently being prepared. The government proposes to ease dismissals in small companies for reasons related to the employee, which has sparked heated debate and political strikes. In addition, the need for reform related to post non-competition clauses and cooperation procedures is currently being assessed.
I INTRODUCTION

French labour law is mainly based on the laws and regulations that constitute the Labour Code, the reference work for labour law practitioners.

Moreover, collective agreements are particularly important in labour law. They may be binding on an employer even where it is not the signatory, if the Ministry of Labour has extended the negotiated and signed provisions by the employers and employees’ representatives.

The employment contract remains important but it must comply with the law, regulations and the applicable collective agreement. In addition, the French Constitution as well as European and international norms are frequently referred to as the guarantees of the fundamental rights of employees.

The coexistence of these norms is governed by the general principle of the hierarchy of sources: laws prevail, followed by regulations and finally collective agreements. Company-wide agreements prevail over sector-wide agreements except for 13 topics (including minimum wages, classification scheme and professional equality) on which a company-wide agreement can only prevail over a sector-wide agreement if it provides for a similar level of guarantees.

Individual disputes between employers and employees arising from an employment contract fall under the jurisdiction of employment tribunals. This instance is composed of non-professional judges, who are designated upon proposition by trade unions. The courts are divided into sections by sector of activity. Each formation consists of an equal number of employers and employees with the final decision taken by a professional judge.

The Ministry of Employment, represented at regional level by the regional agencies for business, competition, consumer affairs, work and employment (DIRECCTE), has an important role in supervising the application of labour law. At a local level, the assigned contact for the employer is the labour inspector. In addition to a supervisory mission, in particular in the fields of health and safety and ensuring that social relations are operating properly, the labour inspector has the power to make decisions in certain areas, such as the dismissal of protected employees or derogations from the rules on the duration of work.
II YEAR IN REVIEW

The Macron Ordinances, which have impacted numerous fields of employment law, were ratified on 29 March 2018. Some practical details of the application of these ordinances are yet to be determined, in particular by the administrative and employment courts, courts of appeal, and the labour authorities.

On 25 May 2018, the General Data Protection Regulation (GDPR) came into effect. Many formalities of the French Data Protection Authority (CNIL) have since disappeared. In return, the responsibilities of the employers have been strengthened. They must now ensure optimal data protection at all times and be able to demonstrate it by documenting their compliance.

The Professional Future Law was enacted by the President on 5 September 2018. The Law provides for new rules and principles in the following areas:

a Unemployment insurance: this insurance will now be available every five years for people who resign, provided that the individual justifies his or her resignation with a serious career plan. Independent contractors whose activity is subject to bankruptcy will be entitled to a fixed allowance. The creation of a penalty for companies that have recourse to precarious contracts is currently under discussion.

b Professional training: the government has modified the provisions regarding the professional training account and aims to facilitate access to training, in particular through free career transition counselling for employees who wish to have feedback on their professional situation.

c Apprenticeships: the Law has significantly modified the way that training facilities are administrated and financed. Apprenticeships have also been modified to make them more attractive – the upper age limit for registering has been raised, there is a more generous allowance and financial contributions have been created to encourage small companies to offer apprenticeships.

III SIGNIFICANT CASES

The Supreme Court has recently issued important decisions on the principle of equal treatment between employees. On 4 April 2018 the Supreme Court ruled that an employee who alleges that he or she is being treated unequally must first demonstrate that the employee with whom he or she is comparing himself or herself to is in a similar situation.

In another ruling, the Supreme Court stated that the principle of equal treatment is not applicable to employees who are part of two separate job safeguarding plans. In the Court’s opinion, the employees dismissed in the context of a second job safeguarding plan are placed in a different situation from the employees targeted in the first plan, to the extent that they cannot claim for social measures at the same level.

The Supreme Court also ruled on 14 November 2018 that retail companies specialising in furniture sales are allowed to open on Sundays. The Court stated that given the nature of the companies’ business and the consumer habits of French households, these companies can open on Sunday. The Court added that this specific exemption to the Sunday rest provisions is compliant with ILO conventions.

Finally, the Supreme Court issued numerous decisions regarding the conditions of validity of settlement agreements. For instance, it has ruled that a settlement agreement concluded before the notification of a dismissal letter is null and void; that the agreement
can only cover the disputes that are mentioned in the document; and that the settlement indemnity is exempted from social contributions only if the parties are able to prove that it compensates for a prejudice that is unrelated to the termination of the employment contract.

IV  BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i  Employment relationship

The hiring of an employee results in the execution of an employment contract. An employment contract may be recorded in the form desired by the parties, since the formation of the contract is not dependent on a written document being drawn up. However, it is preferable to record this instrument in writing to avoid disputes regarding the scope and content of the agreement, and prevent any problem of proof. Many collective agreements require the agreement to be formalised in a written contract, and the Labour Code itself requires the execution of a written contract in certain situations.

The parties are free to include any clauses on which they agree, provided they: do not restrict individual freedoms; respect his or her personal life; and comply with the law, regulations and collective agreement. Certain general clauses (such as the nature of the contract, the date on which the employee takes up his or her position and his or her professional category or remuneration), feature in virtually all employment contracts. Other clauses are only the reproduction of contractual provisions applicable to all the staff and relate to the probationary period, the duration or hours of work. Lastly, the employment contract may contain certain specific clauses relating in particular to the consequences of termination or allocating certain benefits to the employee.

As regards the amendment of the contract, under general contract law the agreement of the parties is required. Therefore, the agreement of the employee is required if the amendment relates to an element of the contract without which he or she would not have entered into the contract, or that is intrinsically part of the employment contract. In contrast, an employee cannot object to an amendment decided by the employer if such modification is provided in his or her contract or if it constitutes a simple change in working conditions decided by the employer in the scope of his or her managerial powers.

The parties may also enter into a temporary contract. However, a temporary contract cannot be used to supply labour on a long-term basis in connection with the normal and constant activity of the firm. Consequently, it may only be used for the execution of a precise and temporary task, in particular for the replacement of an employee, a temporary increase in the activity of the firm, the execution of a job of a seasonal nature or for which it is customary to enter into a temporary employment contract. The contract must be in writing and contain certain mandatory information such as the term of the contract or the reason for its use. Fixed-term employment contracts can be renewed twice. The total length of the contract should not exceed 18 months (renewal included).

ii  Probationary periods

The employer and the employee can provide that the employment contract shall only become definitive upon the expiry of a probationary period, which must be expressly provided in the employment contract. Otherwise, the hire is deemed to be definitive as of the date of execution.
The maximum duration of the probationary period – unless contractual provisions are more favourable – is two months for employees, three months for supervisors and four months for executives. If provided by the contract and by the applicable collective bargaining agreement, the probationary period may be renewed once.

During the trial period, each party has the option of terminating the contract at any time without having to comply with a specific procedure – other than a notice period – or having to provide any reasons for the termination. However, this freedom is not unlimited since it is not possible to terminate the probationary period in a vexatious manner. Such abuse is punished by the award of damages.

iii Establishing a presence

Employers whose firms do not have an establishment in France are allowed to hire employees. They satisfy their obligations relating to declarations and payment of social contributions to the Organisation for the Payment of Social Security and Family Allowances (URSSAF) of Alsace. Once completed, the URSSAF transmits the information required to all social security bodies with which the firm is registered. A representative who is resident in France must be appointed in order to liaise with labour inspectors, tax and customs agencies, and the police, being noted that per the Supreme Court it cannot be the employee.

The remuneration paid to an employee by his or her employer is subject to social contributions. The contributions due from the employee and withheld from his or her remuneration are usually between 20 per cent and 25 per cent. The employer must also pay a certain number of contributions in addition to the salary, which average between 40 per cent and 45 per cent of the gross remuneration.

Temporary employees may also be hired subject to a certain number of specific conditions. In the long term, such employment could constitute the existence of a stable establishment.

A foreign firm may also hire an independent contractor to carry out certain assignments. This category of worker is outside the scope of application of the Labour Code and the fees paid to him or her are also excluded from the basis of social contributions. However, to avoid any reclassification of the contract into an employment contract, which would create a risk of an adjustment of social contributions, the contractor must not be in a relationship of subordination; should be free to manage the affairs entrusted to him or her; must not work for the company on an exclusive basis; and must also have his or her own working tools.

If a company establishes itself in France on a permanent basis, the income generated by that establishment is taxable. French taxation rules shall apply to determine the taxable income and the procedures for the calculation and recovery of the tax due. The firm must also carry out the registration formalities with the competent authorities.

V RESTRICTIVE COVENANTS

Throughout the entire term of the employment relationship, the employee is bound to his or her employer by an obligation of loyalty, which prohibits him or her from directly competing against the interests of the employer. An exclusivity clause may also be inserted in the contract of employment, only if the legitimate interests of the firm and the nature of the tasks carried out by the employee justify it. The purpose of the clause is to forbid the employee from carrying out any other professional activity.
In principle, the employee will be free of any restrictions upon the termination of the work relationship. However, the parties may decide in the employment contract that the employee shall remain under a non-compete obligation with respect to his or her former employer. The non-compete clause must necessarily be in writing and appear either directly in the employment contract or in an amendment signed by both parties. Collective bargaining agreements can also include specific provisions regarding the content and the terms of non-compete clauses. The validity of the non-compete clause is subject to the cumulative conditions below, failing which it is null and void:

a. It must be absolutely necessary in the legitimate interests of the firm. The firm must be likely to suffer actual harm if the employee were to exercise his or her professional activity with a competing firm.

b. It must be limited in time and in space. The employer must set the temporal and geographical scope of the non-compete obligation in a precise and limited manner. In order to do so, he or she must take into account all the components of the clause.

c. It must take into account the specificities of the employee’s job. The employer must take into account the functions exercised by the employee, his or her category, strategic positioning within the firm and the difficulties he or she is likely to face in finding alternative employment.

d. It must provide for financial consideration. The amount of the consideration must be proportional to the extent of the constraint imposed and notably the problems involved in seeking new employment.

Certain industry-wide agreements determine the maximum term of application of the clause, the methods of calculating the financial consideration and the conditions under which the clause may be discharged by the parties.

If the employee does not comply with this obligation, the employer may apply to the courts to order him or her to cease his or her competing activity subject to a periodic penalty payment and to pay damages. The employee shall also lose his or her entitlement to financial consideration.

VI WAGES

i Working time

The statutory maximum duration of work in France is 35 hours per calendar week. In addition, the law provides other mandatory provisions with respect to the duration of work. Consequently, the maximum daily duration of effective work is 10 hours, but may be raised to 12 hours by a collective agreement for certain specific periods, such as an increase of the activity or for necessities of the organisation of the company. Employees are also entitled to a minimum daily rest of 11 hours, which may be reduced to nine hours by way of a collective bargaining agreement. As soon as the daily work time has reached six hours, the employee is entitled to a break of at least 20 minutes.

Employees are entitled to a weekly rest of at least 24 consecutive hours, in addition to the consecutive hours of daily rest. The rest day is usually Sunday. However, retail stores located in international touristic areas are authorised to open on Sunday subject to negotiating a collective bargaining agreement. A mayor can also authorise Sunday work up to 12 times every year. In addition to the restrictions connected with the statutory duration of work, employees are usually granted two consecutive days of rest.
Labour law mainly authorises two derogations to the aforementioned rules. First, it is possible to negotiate a collective agreement stating that working time is computed over a period of one year or less. This is subject to an annual quota of 1,607 hours. Employers may thus be exempted from the payment of additional wages for time worked over 35 hours per week but under the quota. Second, if this possibility is provided in the firm-wide or industry-wide agreement and complies with the terms set out in these agreements, the employer may enter into an individual flat-rate agreement with executives who have autonomy in the organisation of their work time, and with certain non-executive employees with effective autonomy. This agreement allows work time to be counted in days or half days. The courts have determined a certain number of conditions of validity for these agreements: the introduction of a mechanism to monitor days on which the employee has worked and those on which he or she has not, ensuring compliance with the minimum durations of daily and weekly rest, application of a reasonable daily and weekly duration of work, and the implementation of a procedure to keep track of the workload and the length of work days. Furthermore, employees benefit from a ‘right to disconnect’, meaning that the employer must establish rules to prevent employees from being permanently reachable by phone, emails or all other communication means outside of their daily working time.

Exceptionally, an employer may use night work (i.e., work performed between 9pm and 6am), either because this is necessary for the economic activity to continue, or because it concerns services of public utility. Night work may be organised only by way of a work agreement that must state the justification for the use of night work and the consideration for such work in the form of compensatory rest or wages. By way of derogation, workers may be allocated night work on the authorisation of a labour inspector, after verification of the reasons for using night work and the consideration that the workers will receive. Evening work (i.e., work performed between 9pm and 12am) is also lawful in retail stores located in an international touristic area. It is subject to the negotiation of a collective bargaining agreement, determining in particular the financial compensation offered to evening workers.

ii Overtime

The law allows firms to use overtime, which is defined as being hours worked over the statutory duration of work.

An overtime quota for each employee is determined by way of a collective agreement. Failing this, regulatory provisions have set this annual quota at 220 hours per employee.

Each hour worked in excess of the statutory duration of work entitles the employee to remuneration at an increased rate. This rate is defined in a collective agreement and cannot be less than 10 per cent. In the absence of such agreement, the rate is 25 per cent for each of the first eight hours of overtime, and an increase of 50 per cent for the following hours. Moreover, overtime worked in excess of the annual quota entitles the employee to compensatory rest in addition to the wage increases.

VII FOREIGN WORKERS

A foreign worker cannot be employed in France without a valid work permit, unless he or she is an EU citizen.

Employees seconded to France must be declared by the employer based abroad to the French authorities. The seconded employees are subject to French statutory and contractual
provisions in the following matters: individual and collective freedoms, non-discrimination, the protection of employees in maternity and paternity situations, the duration of work, paid leave, overtime, minimum wage, and the rules relating to health and safety.

Concerning social protection, employees seconded to France are entitled, unless otherwise provided in bilateral treaties, to the benefits paid by the social security regime of their country of origin. The number of employees who may be seconded to France by an employer is not limited. However, unless otherwise provided in bilateral treaties, the duration of secondment generally cannot exceed two years.

Foreign workers hired directly by a firm established in France enjoy the same rights as French employees. Consequently, concerning social protection, the employer must attach foreign workers to the French social security regime, which allows them to enjoy the same benefits as the other employees.

The employer does not have to draw up a special registry of foreign employees and it is not restricted as to the number of foreign employees working at the company. However, the employer does have to keep a registry of all the staff it employs in which, in particular, nationality and, if relevant, the employee’s work permit number must be stated.

In any event, the employer must ensure that the foreign employee has a work permit, where this is required. Failing this, the employer may apply for authorisation to the administrative authorities. In order to make this application, the employer must demonstrate that it is not possible for the post to be filled by an employee established in France. The success of the application is at the discretion of administrative authorities, which must take into account certain criteria in their decision such as the employment situation, the category of the foreign employee and his or her terms of employment. If the work permit is granted, the employer must pay a fee to the French Immigration Office, the amount of which will depend on the term of the contract and the contemplated remuneration.

On 29 May 2018, a revision of Directive 96/71/EC on seconded employees was definitively approved. The purpose of this Directive is to reduce the wage gap between seconded and local workers, and to decrease the duration of secondment in the European Union down to one year. It came into force on 30 July 2018 and Member States of the European Union have two years to transpose it into national law. The French government has included an amendment in the Professional Future Law to transpose this directive in the coming months.

VIII GLOBAL POLICIES

Internal regulations are required for any firm with 20 or more employees. This document is drafted in French by the employer and applies to all employees.

The content of internal regulations is strictly regulated. Certain provisions must be expressly set out therein: rules relating to health, safety, discipline (such as the nature and scale of disciplinary sanctions), the rights of defence of employees (procedural guarantees during disciplinary proceedings), and the protection of victims and witnesses of moral or sexual harassment and sexist conduct. The employer may also, under certain conditions, provide a ‘neutrality principle’ in order to prevent the employees from expressing their religious, political and philosophical beliefs on the premises of the company when justified, in particular, by the functioning of the company. Any other provision is unlawful.

When drafting the internal regulations, the employer must consult the works council as well as the health and safety committee for matters relating to hygiene and safety. Once
their opinion has been obtained, the regulations are submitted to the labour inspector who will verify the lawfulness of the regulations. The document must also be filed with the court clerk of the competent employment tribunal. Finally, the document must be displayed on the work premises and at the area where employees are hired.

IX  TRANSLATION

When entered into in France the employment agreement, the ancillaries thereto (in particular the variable remuneration plans) and more generally all the documents required by the employees for the performance of their work, must be drafted in French. If these documents contain foreign terms, they must be explained clearly in order to avoid any ambiguity. The Labour Code also requires firm-wide or establishment-wide agreements to be drafted in French.

However, a foreign employee may ask for these documents to be translated into his or her native language, which the employer cannot refuse. There are no particular formalities required by law to carry out this translation. Any clause to an employee’s disadvantage that is not drafted in French will not be binding on him or her.

X  EMPLOYEE REPRESENTATION

The Macron Ordinances have merged the employee representative bodies into one single representative body called the social and economic committee. Companies will have to implement this new single committee at the next electoral process and, in any event, before 31 December 2019.

Until then, companies will continue dealing with the former representative bodies.

i  Staff delegates

Staff delegates are elected in companies with 11 employees or more.

The employer negotiates a pre-electoral agreement with the trade union organisations to determine the terms and conditions of the electoral procedure. If no agreement is reached, the statutory provisions shall apply.

The employer must draw up the list of voting employees in the firm as well as the panel to which they belong. Two or three panels are organised depending on the professional category to which the employees belong (workers and employees, supervisors and executives). Each employee votes in the panel of his or her professional category. Voting is by secret ballot. Voting by correspondence is possible as well as electronic voting with strict respect of the secrecy of the vote of each employee.

The trade unions have a monopoly in presenting candidates for the first round of elections. If there are no trade union candidates at the first round or if the quorum of electors was not reached, a second round must be organised within 15 days to which all candidates of all types may present themselves, irrespective of whether they are members of a trade union.

The term of office of staff delegates is four years (unless provided for differently in a collective bargaining agreement or an in-house collective agreement). Their mission is to ensure that labour law is complied with and to pass on to the employer the claims of the employees. To this end, the employer convenes a staff delegates’ meeting at least once a month to enable them to present the questions to which the employer is obliged to respond.
ii  Works council

Works councils are set up in firms with more than 50 employees and its members are elected by way of an electoral procedure similar to the one applied for staff delegates. Members of the works council are also elected for a term of four years.

The works council constitutes the employee representative body of choice since its main mission is to give opinions on behalf of the workers on all the decisions of the employer of a financial nature or relating to the working conditions of the employees. For this purpose it is informed or consulted, on all the decisions of the employer relating, for example to the duration of work, working conditions or professional training. It is convened once a month in firms of more than 150 employees or once every two months in firms with fewer than 150 employees. It must also be convened for the purpose of extraordinary meetings if the employer intends to implement a project affecting the working community.

The works council also manages the social and cultural activities of the employees, such as family assistance programmes and holiday retreats. The council receives a contribution from the employer to run these activities.

Furthermore, in order for the works council to carry out its functions, the employer must provide a subsidy equal to 0.2 per cent of the gross overall wages paid out.

iii  Health and safety committee

A health and safety committee is set up in companies employing 50 or more employees.

The procedure for appointing members of the committee is different from the procedure for the election of staff delegates and members of the works council. A panel composed of the elected members of the works council and staff delegates is in charge of appointing the members of the committee, who are elected for a term of four years.

The mission of the committee is to ensure compliance with the rules of the health and safety of employees at the firm and, in this respect, it holds a meeting at least once every quarter. The committee members may also carry out inquiries or investigations in case of imminent danger or serious risk to the health and safety of employees.

iv  Joint representative body

Firms with fewer than 300 employees can set up a joint representative body that regroups and consolidates the staff delegates, the works council and the health and safety committee.

A decision would be taken unilaterally by the employer, subject to prior consultation with each of the three representative bodies. This decision may be taken either when one of the three representative bodies is implemented or when the mandates of either one of these three representative bodies end. The staff delegates, the works council and the health and safety committee retain their previous prerogatives as part of the joint representative body.

Furthermore, in firms with more than 300 employees it is only possible to regroup a minimum of two representative bodies. This must be negotiated and provided in a collective bargaining agreement signed by a majority of the representative trade unions. The collective bargaining agreement determines the functions, composition and modalities of the joint representative body. The institution exercises all of the prerogatives the representative bodies it incorporates.
v  **Trade union representatives**

The representative trade unions may appoint representatives if the firm employs more than 50 staff.

Trade union representatives are appointed by the trade unions that have obtained at least 10 per cent of the vote at the last professional elections and are chosen from among the candidates who themselves have obtained at least 10 per cent of the votes. Consequently, the mandate of the trade union representative must be renewed on the completion of each new election.

The mission of the trade union representative is to represent the interests of the trade union that appointed him or her. He or she negotiates the various agreements to be applied in the firm. In this respect, certain one-off or periodical negotiations are required under the Labour Code:

\[ \begin{align*}
  a & \text{ negotiation of salaries, work time and the distribution of added value each year;} \\
  b & \text{ negotiation of professional equality and work life quality each year;} \\
  c & \text{ negotiation of employment and career management every three years.}
\end{align*} \]

All the staff representatives of the firm have certain means to perform their duties, such as:

\[ \begin{align*}
  a & \text{ dedicated hours for the performance of their representative duties, which correspond to working hours and are paid as such. The number of hours varies between 10 and 24 per month depending on the type of mandate and the size of the firm; and} \\
  b & \text{ protection from dismissal throughout the term of the mandate and for a period of six months after its expiry. Consequently, the employer must consult the works council and then procure authorisation from the labour inspector before dismissing staff representatives.}
\end{align*} \]

Companies with fewer than 11 employees are covered by a joint committee implemented by a sector-wide collective bargaining agreement or, by default, by a regional inter-professional joint committee.

vi  **The social and economic committee**

The members of the social and economic committee are elected according to the same electoral process than the process previously applied for staff delegates and works council members’ elections.

The committee must be set up in companies that have at least 11 employees. In this instance, it will perform the same tasks as those carried out previously by staff delegates. In companies with more than 50 employees, the committee will carry out the same tasks as those currently devolved to the staff delegates, the works council, and the health and safety committee.

The social and economic committee is composed of an equal number of titular and deputy members (these numbers are yet to be defined by ministerial decree).

In companies that have at least 300 employees, a specific committee commission dealing with health, safety and work conditions must be established by way of collective agreement. This collective agreement determines the number of members sitting at this commission, the tasks of the commission and the means by which they are allocated.

The committee members are elected for four years and cannot have more than three consecutive mandates unless provided otherwise by collective agreement.
vii The company council

The Macron Ordinances have also made it possible for companies to appoint a company council by way of collective agreement.

In addition to the social and economic committee prerogatives mentioned above, the company council has the power to negotiate, conclude and revise collective bargaining agreements. In addition, it is possible to foresee that, on some topics, the employer’s decisions will have to be submitted to the council before their implementation.

The composition of the council is yet to be determined by way of ministerial decree. However, it is likely that the elected social and economic committee members and the trade union representatives will sit on the council.

XI DATA PROTECTION

i Requirements for registration

A major change brought about by the GDPR is that, for most of the processing, data controllers no longer have to file declarations or authorisations with the CNIL. In return, the responsibilities of the employers are strengthened; they are now accountable for proving that they comply with the requirements of the applicable regulations (e.g., notification of data breaches to the data privacy agency, implementation of internal policies and appointment of a data protection officer).

The staff representatives are consulted before the implementation or modification of certain automated processing. The employees are individually informed of the purpose of the procedure, the recipient of the data, the length of time for which the files will be kept and the rights attached to setting up such processing (right of access, rectification, to data portability, to object). Employers must take all useful precautions to maintain the security of the data and, in particular, prevent unauthorised third parties from gaining access thereto.

Processing personal data without complying with the above formalities is punishable by administrative sanctions by the CNIL and criminal sanctions of up to five years’ imprisonment and a fine of €300,000, or €1.5 million if the offender is a company. The GDPR creates significant fines if it is breached (up to €20 million or 4 per cent of the undertaking’s total annual worldwide turnover).

A law dated 6 January 1978 relating to computers, files and freedoms was aligned with the GDPR by a new amendment, adopted by Parliament on 14 May 2018. The French government announced that an ordinance – which will focus on rewriting the entirety of the above-mentioned law in order to simplify the text, include formal corrections, and promote consistency with the implementation of the GDPR – will be adopted next year.

ii Cross-border data transfers

Data transfers within the European Union are subject to the same conditions as the national process.

If the personal data processed is transferred outside the European Union, the employer must state this on the declaration or request for authorisation.

The country of destination of the data must be recognised by way of a decision of the European Commission as offering a sufficient level of protection. This is the case, for example for Argentina, Canada, Israel, Uruguay and Switzerland.

If the country to which the data is transferred does not offer such a level of protection, the employer must mention in its declaration either (1) the standard contract clauses adopted...
by the European Commission and signed by the entity importing and exporting data; or (2) the binding corporate rules (BCR) that constitute an intra-group code of conduct for transfers of personal data.

The CNIL now proposes to issue a single authorisation decision to each group that has implemented BCRs. The group’s affiliates that are data controllers and bound by the BCRs will then need to submit only a simplified registration for all their data transfers outside the European Union, based on the group’s BCRs. The affiliates do not need to obtain the CNIL’s prior authorisation for each data transfer. It was previously possible for companies based in the United States to transfer the data when the company was compliant with Safe Harbour principles. However, the European Supreme Court decided that the Safe Harbour system does not ensure an adequate level of protection of personal data, so this mechanism was made invalid. As a consequence, companies cannot use this system to transfer their data any more.

Employees whose data is transferred must be informed of the transfer and have a right of access and rectification, as well as the right to object to the transfer of the data pertaining to them. Their consent is, however, not required. All onward transfers must guarantee the same level of protection as the original transfer.

These elements have changed since the GDPR came into effect on 25 May 2018. The GDPR notably allows data transfers to countries identified by the European Commission located outside the European Union when they ensure an adequate level of protection.

In the absence of a decision from the European Commission, data can also be transferred to a country located outside the European Union when the company is covered by binding corporate rules or a code of conduct complying with GDPR principles.

iii Sensitive data
Data that discloses information on the racial origins, political, philosophical or religious opinions, trade union membership, health or sex life of the employee is regarded as sensitive data of which the processing is prohibited.

It is possible to derogate on an exceptional basis from this prohibition where the processing concerns data that the employee in question has himself or herself made public, where such processing is necessary to safeguard human life or for the recording, exercise or defence of a right before the courts.

iv Background checks
The employer may ask the candidate for various information and for a certain number of documents. However, the information requested must be used solely for the purpose of assessing his or her ability to perform the job and it must have a direct and necessary connection with such post.

An employer should never seek information on the state of health of the employee or his or her credit report, as such practices could be held to be discriminatory. However, a criminal record extract may be presented during the recruitment procedure if the job in question could make such a requirement legitimate, for example if it involves handling funds.
XII  DISCONTINUING EMPLOYMENT

i  Dismissal

The employer must invite the employee for an interview before dismissal by letter, which the employee must have received at least five days before the date of the interview, unless the applicable collective agreement provides for different time frames. It may also be contractually provided that this letter should include certain information.

The interview provides the employee with the opportunity to state his or her point of view on the accusations of his employer. He or she may be assisted by a third party, who in principle should be an employee of the firm.

The employer then notifies the employee of his or her dismissal by registered mail at least two days after the interview. The letter should state the grounds for the discontinuation of the contract. The letter should be precise as this document will determine any litigation that may ensue. The Macron Ordinances have made it possible for the employer to specify the terms of the letter after it has been sent.

The dismissal must be based on real and serious grounds that may take several forms. For example, the employment contract of an employee may be terminated for professional incompetence, as a result of the reprehensible conduct of the employee, or even where the employee's situation affects the due operation of business (in particular where the occupational doctor has found that the employee is physically unsuitable for the job).

If the employee is dismissed on grounds that are not serious, the employer is liable to sanctions. The employee can be reintegrated into the company. If either party refuses, the judge will grant an indemnity, which will be defined by a compulsory sliding scale of capped damages depending on the employee's seniority. For companies with less than 11 employees, the minimum indemnity is reduced. This scale does not apply if the termination of the employment violates a fundamental right of the employee, results from moral or sexual harassment or is discriminatory.

Unless discharge is granted, the dismissal becomes final on the expiry of a notice period that may vary according to the provisions of the contract and the applicable collective agreement being noted that its usual duration varies between one and three months depending on the length of service and professional category of the employee. By way of exception, an employee who has been dismissed because of serious misconduct will not benefit from any notice period.

The dismissed employee receives dismissal indemnity, except in the event of serious misconduct. This indemnity is equal to at least a quarter of the monthly wage for each year of seniority under 10 years, to which is added a third of the monthly wage over 10 years' seniority. The dismissed employee is also entitled to payment in lieu of leave for any outstanding paid leave (employers were previously exempted from the payment in lieu of leave. Yet, this measure was declared unconstitutional by the French constitutional council).

Once the employment contract has been terminated, the parties may terminate any disagreement between them by way of settlement negotiations that will end the dispute and prevent the employee from referring the matter before any court. The employer will agree to certain concessions, notably of a financial nature.

If an employer dismisses an employee on discriminatory grounds (i.e., if it is in breach of a freedom, such as non-discrimination or the right to strike), a judge may hold the dismissal to be null and void. Pregnant women and employees who have suffered from an occupational accident or disease are also protected. Most importantly, the dismissal of a staff representative, who has been elected or appointed by a trade union, requires the prior consultation of the
works council and administrative authorisation from the labour inspector. If the dismissal is held to be null and void, the employee is entitled to be reinstated and to receive payment of the wages lost between his or her dismissal and his or her reinstatement. If reinstatement is not possible or not requested the employee shall be entitled to dismissal indemnities and to compensation equal to at least six months' wages.

ii Redundancies

Individual redundancy

An employee may be made individually redundant on economic grounds, in particular if the firm has suffered financial losses, in the event of technological changes, the need to safeguard competitiveness or even the discontinuation of the activity. Financial losses are defined, essentially, as a significant drop in orders, turnover, cash flow or gross operating profits, or as an operating loss going for a certain period of time, which varies depending on the size of the company. These economic difficulties are assessed at the level of the sector of activity of the group to which the firm belongs, taking only the companies established in France into account.

An employee can be made redundant only after every effort of training and adaptation has been made and where it is not possible to provide alternative employment within the company or with the companies of the group established in France. If these attempts are unsuccessful, an interview prior to dismissal is held and the employer may then notify the employee of his or her redundancy. The following specificities are features of redundancy:

a The employee is entitled to priority for rehiring for a period of one year from his or her dismissal.

b In companies with fewer than 1,000 employees, the employer must offer employees with at least one year’s seniority the opportunity to take out a professional security contract with unemployment insurance agencies which provide him or her with the benefit of a set of measures to facilitate his or her reinstatement in the employment market and the partial payment of his or her previous remuneration.

c In companies or establishments with at least 1,000 employees, the employer must offer the employee redeployment leave of between four and 12 months, funded by the company and that, in addition to maintaining remuneration, provides the employee with training and the assistance of a specialised team in his or her search for work.

Collective redundancies

The procedure is different depending on the number of employees dismissed within the same 30-day period and the size of the company:

a In a dismissal of at least 10 employees within the same 30-day period in companies with fewer than 50 employees, the staff delegates must be consulted. The delegates hold two meetings that cannot be more than 14 days apart. They are provided with certain information and documents (e.g., economic reasons, number of dismissals, professional categories affected, number of employees, expected timetable of dismissals and the social measures contemplated). The administrative authorities are also kept informed of the various stages of the procedure.

b In a dismissal of at least 10 employees within the same 30-day period in companies with more than 50 employees, the employer must establish an employment safeguard plan to avoid dismissals or limit their number. There are two ways in which this employment safeguard plan may be adopted, as detailed below.
First, the employer and trade unions may enter into a majority agreement setting out the content of the employment safeguard plan and the conditions under which the redundancies may take place.

Negotiations may be opened before the launch of the procedure for the consultation of the works council. Alternatively, the employer may announce its intention to open negotiations at the first meeting of consultation of the works council, or a trade union can request such negotiation at any time during the consultation of the works council.

Moreover, in negotiating the agreement, the trade unions may receive assistance from the accounting expert usually appointed by the works council to provide assistance during the consultation period.

The labour authorities must be informed immediately that negotiations have been opened.

To be valid, the employment safeguard plan must be signed by the trade unions who have received at least 50 per cent of the votes cast at the first round of the last professional elections. Finally, the majority agreement is submitted to the works council for its opinion before signature.

Alternatively, if a collective majority agreement is not reached, a document drafted by the employer in which the content of the employment safeguard plan is set out as well as the conditions for dismissal. The employer discusses the content of this document with the works council and then finalises the document on completion of the consultation procedure.

Specific rules govern the consultation of the works council (or the social and economic committee when it replaces the works council). The employer convenes the works council in an initial meeting and provides the works council with information on the dismissal project that is communicated in parallel to the DIRECCTE. During the first meeting, the works council may appoint an expert.

The works council must hold at least two meetings at least 15 days apart; the majority agreement or an agreement on procedure may provide for a greater number of meetings. From the first meeting onwards, the works council issues its opinions within one to four months depending on the number of dismissals contemplated.

If no opinion has been issued by the deadline, the works council shall be deemed to have been consulted. The works council issues an opinion on the contemplated operation and the procedures for its application. The works council also issues an opinion on the dismissal project, and this aspect covers the employment safeguard plan as well as the procedures for carrying out the dismissals, including criteria for the order of dismissals and the timetable.

Once the works council has issued its opinions, the labour authorities must, as the case may be, approve the majority agreement entered into with the trade unions or approve the unilateral document. The DIRECCTE issues a decision within 15 days for a collective agreement and within 21 days for a unilateral document. In the examination of a collective agreement, the DIRECCTE verifies the conditions under which it is adopted and the content thereof, as well as the procedures for the consultation of the works council. In the case of a unilateral document, the DIRECCTE carries out in-depth verification and, in particular, verifies the content of the employment safeguard plan.

The Macron Ordinances have created an alternative type of voluntary departure plan called the ‘collective mutual termination’. A collective agreement, which must be approved by the Labour authorities, can define the terms and conditions of a mutual termination of the employment contract outside the framework of a dismissal and of economic justifications.
The Macron Ordinances have also provided employers with substantial leeway in adapting their employees’ contracts of employment either to face the necessities of employment, or to preserve or develop employment. The new legal framework allows employers to adapt the contract on three levels: the remuneration, the geographical and internal mobility, and the working hours. The employee is free to refuse; however, a refusal constitutes a specific motive for termination, based on a real and serious cause.

XIII TRANSFER OF BUSINESS

French and European law regulate the effects of business transfer operations on employment contracts. Employees are protected from changes of employer arising from these operations by the maintenance of their employment contracts and their rights. In accordance with European case law, the maintenance of the employment contract with the new employer is thus guaranteed in all cases of the transfer of an autonomous economic entity that keeps its identity and continues its activity. An autonomous economic entity is understood as an organised group of persons and tangible (work equipment, premises) or intangible (goodwill, brand) elements. The entity must be identified and have staff specifically allocated to it as well as its own material means to carry out business.

The employment contracts are transferred automatically. The parties cannot object thereto, as the contract survives under the terms according to which it was performed at the time of the change of employer.

The transfer of a firm leads to the termination of the collective labour agreements. However, to avoid the sudden termination of the contractual benefits enjoyed by the employees prior to the transfer, the Labour Code provides that the collective agreement shall continue in force until the agreement that substitutes it enters into force, or failing that, for a term of one year.

Where the agreement in question has not been replaced by another agreement within these deadlines, the employees no longer keep the individual benefits they have acquired. Employers are only required to maintain employees’ annual wages that must be at least equal to the wages earned during the past 12 months. The customs, atypical agreements and unilateral undertakings in force in the firm are transferred to the new employer and are automatically binding on him or her. The new employer is, however, entitled to terminate them.

A transitional agreement may also be signed between trade unions and both employers before the transfer of the business in order to delay the application for the employees that are transferred of the collective status in force in the new company for a maximum of three years.

There is no prohibition for dismissing an employee for economic reasons before the transfer. One or more employees may have their contracts terminated on economic grounds if the transfer operation is included in the employment safeguard plan to avoid discontinuation of the activity, and if these companies agree to a trade-in offer.

To ensure that employees who are allocated to the execution of a contract will keep their jobs on termination of such contract for allocation to another firm, collective agreements have been entered into in the main relevant industries to oblige the new service provider to take on all or some of the employees allocated to this contract. However, in such a case, the transfer of the employment contract requires the prior consent of the employee.
XIV OUTLOOK

Since taking office, the government has launched many reforms aimed at improving France’s competitiveness while reducing the unemployment rate. Among the main projects are the PACTE Act (an action plan for growth and business transformation). This law’s purpose is to give businesses the means to innovate, transform, grow and create jobs. Developed according to the method of co-construction with all actors, the bill was passed at the first reading in the National Assembly on 9 October 2018. At the time of writing, it is under review by the Senate.

Furthermore, the government announced that a law on occupational health should be presented in 2019. One of the most significant points raised during the pre-negotiation phase was the issue of daily allowances paid in case of sick leave. Additional points of discussion regarding occupational health and quality of life at work could be covered during the discussions on this new law.
I INTRODUCTION

In Germany, the relationship between employers and employees is extensively regulated 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 also plays 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 also 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

EU General Data Protection Regulation

As of 25 May 2018, the EU General Data Protection Regulation (GDPR) and the new German Privacy Act apply. The GDPR replaces the EU Data Protection Directive, which had been in place since 1995 and harmonised data protection law across Europe. The GDPR stipulates, *inter alia*, that Member States may provide for more specific rules to ensure the protection of employees’ personal data, in particular with regard to recruitment, the performance of the employment contract, management, planning and organisation of work, equality and diversity, health and safety, protection of employer’s or customer’s property, rights and benefits on an individual or collective basis, and the termination of the employment contract. The Privacy Act complements and modifies the GDPR; it provides, *inter alia*, for data processing in the context of employment and the designation of a data protection officer.
ii   New Maternity Protection Law

On 1 January 2018, a new Maternity Protection Act came into force with various amendments and consolidations of related laws. For example, if an employee gives birth to a disabled child, the period of protection for all rights (i.e., to maternity leave as well as pay and protection against dismissal) is now 12 weeks, instead of eight. In all other cases, the periods of protection will remain the same (i.e., mothers are not obliged to work six weeks before and eight weeks after giving birth). Further, if a woman suffers a miscarriage from the 12th week of pregnancy, she is entitled to a four-month term of protection of all her rights. Following the reform, prohibitions on working will no longer be enforced against a mother’s wishes. Employers will be primarily obliged to make arrangements in order to avoid any risks for the mother and child. Working time restrictions for expectant mothers will also be relaxed, subject to their consent. Further, the scope of applicability of the Maternity Protection Act has been extended by interns, self-employed women, students and schoolchildren.

iii   Amendment to the law on part-time employees

A draft bill was published on 19 July 2018 (Drucksache 19/3452) and adopted by the German federal parliament on 18 October 2018. It suggests the introduction of a general right to demand a temporary reduction in working hours, namely part-time employment in gaps between periods of full-time employment (bridge part-time work). As of 1 January 2019, every employee shall be able to work part-time for a predetermined period of between one and five years, before the initial contractually agreed working time is subsequently applied again. The conditions for this are that the employee has already been under contract with his or her employer for at least six months and that the employer generally employs more than 45 people. The employer may object to the part-time request if there are contrary operational reasons or contradicting working time requests from other employees. For companies in the range of 46 to 200 employees, the employer may only refuse the employee’s request if, at the time the desired reduction begins, a specific number of employees have already reduced their working time. For employees, this new entitlement is not linked to the existence of specific reasons, such as bringing up children or caring for relatives.

III   SIGNIFICANT CASES

i   Statutory minimum wage

The Federal Labour Court clarified that a limitation clause is invalid if it does not explicitly exclude the minimum wage from forfeiture (decision of 18 September 2018, Case No. 9 AZR 162/18). In this case, the employment contract of 1 September 2015 agreed between the parties stipulated that all mutual claims arising from the employment relationship would lapse if they were not asserted in writing to the other party within three months of the due date. The clause did not explicitly exclude minimum wage claims. The employee asserted a holiday compensation claim more than three months after the end of the employment relationship. The court ruled that the clause was not clear and comprehensible because it did not exclude the minimum wage.

In another case, the Federal Labour Court ruled that contractual Sunday and holiday bonuses are deductible from the minimum wage and do not have to be paid in addition to the statutory minimum wage (decision of 17 January 2018, Case No. 5 AZR 69/17). In contrast to working hours during the night, the Working Hours Act does not establish any special payment obligations on the part of the employer for work on Sundays and public
holidays. In addition to a minimum number of non-working Sundays, Section 11(3) of the Working Hours Act only provides for alternative rest days as compensation for work on Sundays and public holidays.

ii Data protection – video surveillance of workers
On 23 August 2018, in Case No. 2 AZR 133/18, the Federal Labour Court decided that the storage of image sequences from permissible open video surveillance is not rendered invalid by the passage of time, as long as prosecution by the employer is possible under substantive law. In this case, the employer dismissed an employee for stealing its property after reviewing CCTV footage that was over six months old. The Court ruled that an immediate analysis of video material is not required, and that, as long as the employer has a legitimate reason to do so, footage can be retained and reviewed at a later date.

iii Post-contractual non-compete covenant
In a decision of 31 January 2018 in Case No. 10 AZR 392/17, the Federal Labour Court confirmed its previous case law, according to which the post-contractual non-competition clause is a mutual contract. If the employer fails to pay the compensation even after setting a deadline, the employee can withdraw from the post-contractual non-competition clause. The motivation for making this declaration (alleged reaction of defiance) is not important, at least if the declaration was serious from the employer’s point of view. However, since the non-competition clause constitutes a continuing obligation, rescission is only effective for the future.

IV BASICS OF ENTERING 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, the employer must lay down the essential agreed employment terms in writing, sign it and provide the employee with this record one month after commencement of the employment at the latest.

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 the employer and 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 three years. 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 requires 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 employee can mutually agree on an amendment or change of 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 employee can contractually agree on a longer notice period.

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 for a company number with the employment agency. This number is necessary with regard to forwarding social security contributions to the competent authorities.

Employees 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 gross monthly salary of the employee 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 ongoing employment relationship, employees are bound by a statutory contractual non-compete obligation.

The employer and 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 2019, the statutory minimum wage is €9.19 gross per hour and from 1 January 2020, it will increase to €9.35 gross per hour. The increase is based on a decision of 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. Thus, it might be necessary to actually pay a higher wage than €9.19 gross per hour. In addition, minimum wages apply to certain industries (e.g., cleaning services, security service, 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 basically 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 basically allowed to work overtime up to the limits of the Working Time Act. The employment contract needs to provide for such obligation. 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. Usually, these range from 25 per cent on regular working days to 100 per cent for work 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 all EU Member States, EEA Member States (i.e., Liechtenstein, Iceland and Norway) and Switzerland 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 coming 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 entry into 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.

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2 When introduced on 1 January 2015, the standard minimum wage was €8.50.
With regard to secondments within the EU, the EEA 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 concluded bilateral social security treaties with certain states (e.g., with 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 did not conclude 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 employee.
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  TRANSLATION**

There is no legal obligation under German law to translate employment documents into German or the 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.

**X  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 employed in the operation on a regular basis) are released from their normal work duties to perform work for the council only.

Works council elections take place every four years in the period between 1 March and 31 May. The regular works council election took place in 2018; the next election will take place in 2022. The works council members are generally elected for a term of four years.

If a company has more than one operation, a joint works council must be established at the company level. The works councils send delegates to the joint works council. The joint works council is competent for matters relating to the company. Also, 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 is to be established in companies employing more than 100 employees 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 where 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., downsizings).

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 termination.
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., an 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 employees 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 with more than 2,000 employees 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 employees 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, the employer must not discriminate against employees on account of their union membership.

XI 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 it 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 EU and 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 (Case No. C-362/14, Schrems), 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 on 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 toward the statutory healthcare fund, accident insurance and pension insurance).

iv Background checks
Background checks by the 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 may be requested that relate to the work of the employee or applicant. When performing background checks, the employer may not access information from social networks such as Facebook. On the other hand, it may evaluate information on the employee or applicant from professional networks such as Xing or LinkedIn.

XII 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 the employer and are employed in an operation with more than 10 employees.

Under the Dismissal Protection Act, the termination of an employment relationship needs to be justified on objective grounds, these being the following:

a operational reasons (i.e., redundancy);
b conduct-related reasons (i.e., misconduct); or
c reasons related to the person of the employee (e.g., inability to perform the work owing to long-term illness).

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 employee until the expiration 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. The works council cannot veto the termination.
The applicable notice period must be observed. It can be stipulated in the individual employment contract, collective bargaining agreement or statutory law. Statutory law provides for notice periods depending on the 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 a 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. The following formula is often applied: severance payment = factor × gross monthly salary × 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 subsection i, above, 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 the individual employees by issuing notices of termination or concluding mutual termination agreements.

If a substantial reduction in personnel constitutes a mass redundancy under German law, the employer has to notify the employment agency of the mass redundancy. A mass
redundancy occurs if the employer dismisses a certain number or portion of its employees 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.

XIII TRANSFER OF BUSINESS

The Acquired Rights Directive (Directive 2001/23/EC) has the primary intention of protecting the rights of workers on account of 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:

- type of business involved;
- transfer of tangible assets;
- transfer of intangible assets;
- assumption of personnel or part of the personnel by the transferee;
- transfer of customers;
- similarity between activities before and after the transfer; and
- 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, he or she can object to the transfer without a time limitation. 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.
XIV OUTLOOK

As a result of the decision of the Federal Constitutional Court of 10 October 2017 (Case No. 1 BvR 2019/16), as of 1 January 2019, people who identify as intersex (those who cannot be permanently assigned to either the male or female gender) can be listed as ‘inter’ or ‘divers’ in the register of civil status to protect them from discrimination. The general right of personality ((Article 2(1) in conjunction with Article 1(1) of the Basic Law) and the general equality right (Article 3(3), first sentence of the Basic Law) protect gender identity. This may require adjustments in the field of employment regarding dress code, minority quotas and wording in job advertisements.
INTRODUCTION

Hong Kong’s employment environment and its employment legislation are well recognised as being generally employer-friendly. The laws in Hong Kong applying to employees with employment in Hong Kong are 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 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 base of protection for employees, when compared with other jurisdictions with more advanced labour laws, Hong Kong has fallen some distance behind.

In addition to the EO, legislation relating to employment also exists in the areas of minimum wages, employee compensation, health and safety, discrimination and insolvency.

The EO applies to any employee with Hong Kong employment. It prescribes the minimum rights and benefits to be enjoyed by such an employee in Hong Kong. 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 bought 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. Legal representation is generally not permitted. The Tribunal’s jurisdiction includes claims arising under employment legislation, principally the EO and the Minimum Wage Ordinance (MWO).
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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1 Jeremy Leifer is a partner at Proskauer Rose LLP.
2 Legislative Council Brief for the Administration of Justice (Miscellaneous Provisions) Bill 2014 (22 April 2014).
II YEAR IN REVIEW

i Discrimination ordinances 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 higher priority areas for legislative reforms or other actions. The government has responded by introducing a bill to amend the four discrimination ordinances to take forward eight of the EOC’s priority recommendations. These include new provisions in relation to the following: to introduce express provisions in the Sex Discrimination Ordinance prohibiting direct and indirect discrimination on the ground of breastfeeding; to provide protection from direct and indirect racial discrimination and racial harassment by imputation in the Race Discrimination Ordinance; and to 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 legislation.

ii Proposed enhancement of maternity leave

In her 2018 policy address, the Chief Executive proposed to extend statutory maternity leave from the current 10 weeks to 14 weeks. The additional four weeks would be subvented so that employers would be entitled to apply to the government for reimbursement of the maternity leave pay for that additional period, which would be capped at HK$36,822. For employees with monthly income of HK$50,000 or less, the full cost of the additional period would be borne by the government.

iii Enhancement of paternity leave

In November 2018, the EO was amended to increase the period of paid paternity leave for working fathers from three to five days. The amendment will come into force on a date to be announced.

iv Amendment of EO for employee reinstatement or re-engagement

As mentioned in our 2017 review, a bill was reintroduced into the Legislative Council to give the Labour Tribunal expanded powers to make an order for reinstatement or re-engagement of an employee unreasonably and unlawfully dismissed (e.g., during pregnancy or maternity leave), and to require the employer to pay a fine for failure to comply with the order, as well as to criminalise failure to pay a fine. The bill was enacted in May 2018 and is now in force. Prior to the amendment, an order for reinstatement or re-engagement could be made only if both the employer and the employee agreed to it. Under the amended legislation, in a limited, defined set of circumstances, where only the employee expresses agreement, the Labour Tribunal must make an order for reinstatement or re-engagement.
Amendment of EO to increase regulation of employment agencies

Also mentioned in our 2017 review was a bill to address the dramatic increase in the number of complaints about the overcharging of foreign domestic helpers seeking work in Hong Kong. The bill was enacted in February 2018. The new provisions introduced into the EO that bolster the existing regime include the following: increasing the maximum penalty for certain offences committed under this part of the EO; and giving the Commissioner of Labour enhanced regulatory powers.

Proposed ending of Mandatory Provident Fund offset mechanism

In her 2018 policy address, referred to in subsection ii, the Chief Executive also proposed to address the offsetting mechanism that allows employers to deduct severance or long-service payments from the former employee’s compulsory Mandatory Provident Fund (MPF) contributions (see Section XII.v). The Chief Executive said that the government’s target is to enact legislation by 2022 to implement the abolition of the ‘offsetting’ arrangement, two years after the passage of the legislative amendments. The government has committed to provide a subsidy scheme for 25 years to reduce the impact of abolishing the offsetting arrangement on micro, small and medium-sized enterprises. The total subsidy will amount to HK$29.3 billion.

III SIGNIFICANT CASES

In 2017, there were two significant decisions of the courts that involved same-sex marriage. Hong Kong’s matrimonial legislation does not recognise same-sex marriage. Both cases have been the subject of appeals. Judgment in the first case (see subsection i) was delivered only a matter of days before the hearing of the second case. The outcome of the appeal in each case is described below.

Leung Chun Kwong v. Secretary for the Civil Service and the Commissioner of Inland Revenue (Court of Appeal)

The applicant was a Hong Kong civil servant who had married someone of the same sex in New Zealand. He had applied to the Civil Service Bureau to update his marital status to obtain benefits available under the Civil Service Regulations (CSR) to an officer’s family. He had also sought to apply to the Commissioner of Inland Revenue for joint tax assessment with his spouse. In both cases his application was rejected, on the grounds that marriage did not include same-sex marriage. At first instance, while the court upheld the Commissioner’s decision (the Tax Decision), the applicant succeeded in overturning the determination made under the CSR (the Benefits Decision). On appeal, the Court of Appeal upheld the Tax Decision and reversed the lower court’s decision in relation to the Benefits Decision, applying what was termed the ‘QT approach’ (adopted from the decision of the Court of Appeal in the case described in subsection ii), which is as follows: there are core rights and obligations unique to marriage in which the privileged treatment given to married couples is obvious and requires no justification for discrimination law purposes when compared with unmarried couples. In doing so, the law was protecting the special status of marriage. However, when

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3 The Marriage Ordinance and Matrimonial Causes Ordinance.
4 CACV 126/2017.
the differential treatment fell outside these core rights and obligations, and if the reason for the difference was the applicant’s sexual orientation, the right to equality was engaged. Unless the treatment satisfied the justification test, it amounted to discrimination based on sexual orientation. In the event, the court regarded the prevailing socio-moral views on marriage currently held by society as a highly significant factor in its analysis and ultimate decision.

ii  QT v. Director of Immigration (Court of Final Appeal)⁵
The Court of Final Appeal confirmed the decision of the Court of Appeal that the determination of the Director of Immigration under the Immigration Department’s dependant policy not to grant a dependant visa to a spouse in a same-sex marriage could not be justified and was therefore discriminatory. The Court held that the Immigration Department’s decision was plainly not rationally connected to advancing its policy aim of attracting talent to Hong Kong. It also concluded that the policy clearly was not rationally connected with the Department’s legitimate objective of strict immigration control. Given that the policy could not be justified as a measure rationally connected to these two policy objectives, a bright line test could not applied. Interestingly, the Court also held that the ’core values’ reasoning used by the Court of Appeal in this case and in the case mentioned in subsection i, should not be followed.

iii  Immigration Department policy on entry of dependants revised
Following the decision in QT, the government announced that the immigration policy on applications for entry of non-local dependants had been revised so that, with effect from 19 September 2018, a person who has entered into a same-sex civil partnership, same-sex civil union, same-sex marriage, opposite-sex civil partnership or opposite-sex civil union outside Hong Kong with an eligible sponsor in accordance with the local law in force in the place of celebration, and with this status being legally and officially recognised by the local authorities of the place of celebration, will be eligible to apply for a dependant visa or entry permit for entry into Hong Kong. This represents a welcome sea change in the Immigration Department’s policy.

IV  BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i  Employment relationship
The normal principles for formation of a contract under Hong Kong law apply to the creation of an employment contract. Although there is no requirement for the contract to be in writing, a written contract is always advisable for the employer as there are certain basic minimum compliance requirements for the employer under the employment protection legislation. An employer would be well advised to have clarity around these terms in all circumstances. The 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 management.

The key provisions recommended for inclusion in an employment contract are:

a  term;
b  job title;

⁵ FACV 1/2018.
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;
b annual leave;
i sick leave;
j period of contractual notice and right to make a payment in lieu of notice;
k termination for breach/summary dismissal;
l confidential information;
m governing law and jurisdiction; and
n personal information collection statement (PICS).

The 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 the 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 in doubt, the amendment could be executed by the employee as a deed under seal to overcome any absence of consideration. 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 the 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 such establishment. 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 the 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 alternatively, 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 locally sourced. 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; MPF contributions; 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 where 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 in time 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 the drafting of the clause wording. 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 in the contract an express gardening leave provision, 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 gardening leave are not clear. In addition, any restrictive covenant period should interlock with the gardening 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 their introduction. However, an employee employed under a continuous contract is entitled to one rest day in every seven days, and to all statutory holidays.

Under the MWO, the current minimum wage, which was set on 1 May 2017, is HK$34.50 per hour. The next review is set for May 2019.

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 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 its 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 relevant to his or her academic qualifications or working experience 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 of 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 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 employee’s contract of employment.

For rules relating to discrimination, as mentioned above, Hong Kong has four separate pieces of legislation dealing with this subject. 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 the employee from doing that act, or from doing 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 defence mentioned above. 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 TRANSLATION

As mentioned in Section VIII, there is no specific requirement that any employment documents must be translated into an employee’s first language. It is, however, 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.

X 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 have tended to be low. There is no statutory provision in Hong Kong 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 scenarios 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.

XI 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 may collect any personal data from an employee, it must first provide the employee with a PICS. The PICS 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. The DPPs, as described in subsection i, require that the employee be informed explicitly of the purpose for which the data is to be used, including a transfer out of the jurisdiction (i.e., in the PICS). If the purpose for this 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 against 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 the record.

XII DISCONTINUING EMPLOYMENT
i Dismissal
The usual events by which a contract of employment may be terminated include:

- termination by one party by giving contractual notice to the other;
- termination by one party making a payment in lieu of notice to the other; and
- termination by the employer by summary dismissal (i.e., for cause).

ii Termination by contractual notice from one party to another
The EO lays down minimum periods of notice that must be given to terminate the contract. Usually, the period of notice in the 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.

iii 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 redundancy situation) and this can be given 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.

6 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.
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.

iv Termination by the employer by summary dismissal (i.e., for cause)

This type of termination permits the employer to dismiss the 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 the employer and employee to enter into a settlement agreement where, given the seniority of the employee, the employer may want to manage termination of the relationship in a more discreet way.

v 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 will exclude 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 not less 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 for redundancy would follow the same procedure for termination as in a non-redundancy situation.

The amount of a severance payment (and long-service payment) payable to the employee is calculated by reference to his or her 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 many years and, consequently, has fallen well behind overall wage levels when 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 the employer’s mandatory contributions to the employee’s MPF account, thereby in all likelihood setting off in full (or close to it) the statutory payment made to the employee (however, see Section II.vi).
vi 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 shorter notice where reasonable, such as in a summary dismissal situation.

Additionally, if an employee is about to leave Hong Kong for more than a month, the employer must also 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.

XIII 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 less 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 across 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.

XIV 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.
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 the category of employee.

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 back to 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.

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, social welfare benefits, etc. 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, \textit{inter alia}, engaged 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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1. Debjani Aich is a partner at Kochhar & Co.
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). This law 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 states and the Supreme Court of India (India’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 over 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

As part of its objective to make it easier to do business in India, the government has proposed that the most important central labour laws be revised and possibly amalgamated into two or three labour codes. If this is implemented, substantive procedural requirements relating to compliance and filing will be streamlined. Amendments have also been proposed to federal laws relating to factories and the use of apprentices.

As a precursor to federal legislative changes, certain states in India, including Rajasthan and Maharashtra, implemented changes to their state laws relating to industrial disputes, factories and contract labour.

In March 2018, the Payment of Gratuity Act was amended, doubling the gratuity ceiling from 1 million rupees to 2 million rupees, bringing employees in the private and public sector on par with central government employees. Another significant amendment was the inclusion of a female employee’s statutory maternity as per prevalent law (now being 26 weeks) in the employment term for calculation and payment of gratuity, from the previous period of 12 weeks.

Another significant change is the beginning of unionisation in India’s IT sector (see Section IX.iii). This sector has been one of the key drivers of India’s economy, with governmental scrutiny into compliance being somewhat less intense. Unfortunately, this has caused certain employers to adopt unhealthy work practices towards employees, such as not

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.
paying the required overtime, encouraging excessive work hours and not following statutory requirements for termination. Employees have expressed dissatisfaction at these aspects over the past few years.

III BASICS OF ENTERING 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.

Companies would also have an employee handbook or manual, with details of company policies relating to discipline, leave, etc. In addition, it is quite common for companies (especially in the IT and R&D sector) to enter into confidentiality and non-disclosure agreements separately.

If the employer wishes to amend the 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 for change in specified working conditions (e.g., wages, working hours), including provision of prior notice of 21 days. For a non-workman, it is recommended that the employer obtain consent of the impacted employee to effect the change, as a unilateral change to the employment may be held as arbitrary and void.

ii Probation

There are no direct laws dealing with probation on a general basis in India; 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. Under the IESO Act, a workman can be employed on a probationary basis to provisionally fill a permanent vacancy up to a maximum of three months. Any such probationer is not entitled to dismissal notice or payment in lieu during the probation.

Certain states (such as Maharashtra) have built the concept indirectly into the SEA, by requiring an employer to provide termination notice if the employee has worked for a specific duration (in Maharashtra, three months). No notice is required if the employee has worked less than this period.

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5 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 IT and ITES sector is exempt from the IESO Act.
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 method 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
Hiring of employees requires the establishment of a legal entity to do business in India. There are various routes to set 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 like 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.

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 such 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 labour. A key aspect of the CLRAA relates to defaults in the statutory obligations of the contractor – in such case, the principle employer may need to make good the defaults (which can include payments) to the contract labour 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.

IV 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 post 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 post termination of the 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.
V  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 wages 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 around eight to 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 by 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 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 (8pm to 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 wages), leave, etc. 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 about 15 to 20 days of regular leave and about 10 national or public holidays. Some national holidays are compulsory, while others may be chosen out of a larger 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 central legislation. The main legislation includes the EPF Act, the Employees’ State Insurance Act 1948 (the ESI Act), the Payment of Gratuity Act 1972 (the PG Act), the Bonus Act and the MB 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 compensation. If a company chooses to voluntarily follow the EPF Act, 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 on this. 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 25,000 rupees per month (with effect from 1 January 2017) 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).

The MB Act provides for paid maternity leave and other benefits (such as a maternity bonus) in relation to childbirth, medical termination of pregnancy, miscarriage, etc. A female employee is generally entitled to 26 weeks of paid maternity leave up to two children and 12 weeks of paid leave for more than two children. Paid maternity leave is also available for cases of adoption of a child up to three months old and in cases of surrogacy. The law prevents a female employee from having her employment terminated if she is on statutory maternity leave.
VI FOREIGN WORKERS

As mentioned in Section V, 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), work-related visas typically need to be applied for 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 a short-term purpose, 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 foreigner travels to India, he or she should seek specific advice on the type of visa he or she needs to obtain.

VII GLOBAL POLICIES

The IESO Act provides for formation of standing orders defining the working conditions for workmen in covered establishments. The orders need to be certified by the labour authorities and made available to all workmen. Matters covered in the standing orders include:

- classification of workmen (permanent, temporary, probationer, etc.);
- intimation of working hours, holidays and wages;
- shift work;
- termination of employment and related matters, including suspension or dismissal for misconduct;
- sexual harassment matters; and
- 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.

VIII 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.

**IX 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 works committee needs 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 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 agenda behind the formation of KITU is the following: 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 creation of KITU has resulted in 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 and Karnataka.

**X 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 somewhat 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.

**XI  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 service for a minimum of one year:

a  provide the workman with one month’s written notice indicating the reasons for the retrenchment or make payment in lieu thereof;

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6  ‘Continuous service’ generally means working in an establishment for 240 days in the immediately preceding 12 months.
provide the workman with 15 days’ pay for every year or part thereof in excess of six months of continuous service; and

c serve notice to the appropriate government.

From a practical perspective, many companies do not provide this notice (especially where 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 requirement 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 hearing.

Under the ID Act, the employer needs to follow the principle of ‘last come, first go’ in case of retrenchment. An employer is statutorily required to retrench the workman last employed 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 from 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 case of any rehiring, where an employer is required to first offer employment to those workmen who were retrenched by it and are citizens of India.

Notification of employee representatives is not required in case of retrenchment unless there are recognised employee representatives or a trade union and the agreement with such body or union requires notification, especially in case of large-scale retrenchments. From a practical perspective, an employer would hold a meeting with the impacted employees or workmen and explain the termination requirement to them, and thereafter commence with 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.

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 method for them to leave the company. If this method is resorted to, this should not be a reason to deny the employee any due compensation under the law or contract.
iii Termination for misconduct

The above rules may not apply to termination of an employee because 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 terminated for misconduct. Termination because of misconduct would occur in the event of a breach of the rules of the employer or some 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 termination 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 evolved from various court decisions, including proving the misconduct of the employee. Additionally, if there were any standing orders or service rules applicable to such termination, the same would need to be followed. Broadly, in order to prevent the possibility of an employee challenging the termination before a court of law on the grounds of mala fide intentions, victimisation, etc., it is recommended that an employer follow the procedure described below:

- issue a charge sheet or a show-cause notice on the employee;
- 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;
- peruse the report of the inquiry officer; and
- 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 termination, the employer would check whether the compensation payable under law is more than that prescribed under the contract.

XII 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:

- the service of the workmen is not interrupted by the transfer (i.e., continuity of service must be maintained, which is relevant for the provision of certain statutory welfare benefits);
- the terms and conditions of service applicable to the workman after the transfer cannot be less favourable than those applicable to him or her immediately before the transfer; and
under the transfer terms or otherwise, in the event of future retrenchment, the new employer is legally liable to pay the workman 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 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.

XIII OUTLOOK

With the focus of the current government on major employment legislation reforms, it will be important to see how the changes play out over the next few years. The overall outlook is very positive, with a move to increased digitisation of processes, and transparency in compliance and governmental interventions.
I INTRODUCTION

The primary legislation governing employment relationships in Indonesia is Law No. 13 of 2003 on Manpower. This Law stipulates the primary rules for establishing an employment relationship, employment terms and conditions, and employment termination. Some time after its enactment, certain of its provisions were declared unconstitutional by the Indonesian Constitutional Court. Among the other laws that govern employment-related matters, the most important is Law No. 2 of 2004 on industrial relations dispute settlement.

The above-mentioned laws are accompanied by implementing regulations in the form, *inter alia*, of government regulations and regulations of the Minister of Manpower.

To supervise the implementation of the employment laws, the regional offices of the Ministry of Manpower provide supervisors for matters related to manpower, whose task is to ensure compliance with the provisions.

Law No. 2/2004 regulates multi-stage industrial relations dispute settlements, and categorises industrial relations disputes into the following four groups:

- disputes of rights: a dispute that arises from the non-fulfilment of a right as a result of differences in the implementation or interpretation of the prevailing laws and regulations, employment agreements, company regulations or collective labour agreements;
- disputes of interest: a dispute that arises in an employment relationship as a result of disagreements with respect to the establishment of, or changes to, job requirements to be stipulated in an employment agreement, company regulations or a collective labour agreement;
- disputes on employment termination: a dispute that arises from a disagreement with respect to an employment termination that is initiated by one of the parties to the employment agreement; and
- disputes between labour unions: a dispute that arises between two labour unions within one company owing to disagreements with respect to the membership, implementation of rights and obligations of the union.

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Under the prevailing labour laws, before an industrial relations dispute is brought to court, the parties to the dispute (the respective employer and the labour union) must first make an attempt to settle their dispute through bipartite negotiations. The dispute should be approached in the spirit of deliberation to reach a consensus.

If the negotiation is unsuccessful, either party, or both, may register the dispute with the regional manpower agency by submitting evidence of the negotiation. Following registration of the dispute, parties that have failed to reach a consensus by negotiation have the choice of trying to reach a consensus by way of conciliation, arbitration or mediation. In practice, disputing parties generally opt for mediation under the guidance of mediators who are appointed by the Ministry of Manpower. Mediation is the preferred means for the settlement of employment disputes.

Upon the completion of the mediation process, the mediator will issue a recommendation. If the recommendation is not accepted by one or both of the parties, the dispute may be brought before the Industrial Relations Court (IRC), which has the authority to examine, try and render a decision in an industrial relations dispute. For disputes specifically concerning employment rights and termination of employments, the unsatisfied party may appeal against the decision of the IRC to the Supreme Court.

II YEAR IN REVIEW

The relatively new Presidential Regulation No. 20 of 2018 (PR 20/2018) and Regulation of the Ministry of Manpower No. 10 of 2018 (MOM 10/2018) (the New Regulations), have respectively revoked Presidential Regulation No. 72 of 2014 (the Old Presidential Regulation) and Regulations of the Ministry of Manpower Nos. 16 and 35 of 2015 (the Old MOM Regulations), significantly streamlining the administration of expatriate employment.

The most important change brought about by the New Regulations is that a prospective employer will no longer be required to apply for a separate Expatriate Manpower Employment Licence (IMTA) from the Minister of Manpower in order to employ an expatriate. Instead, all the employer will need to do is submit an Expatriate Manpower Employment Plan (RPTKA) to the Minister for approval. Article 9 of the New Regulation expressly states that an approved RPTKA will simultaneously constitute the licence to employ the expatriate. Once the RPTKA is approved, the employer must take the following steps: (1) notify the Director General of Manpower Placement Development and Expansion of Job Opportunity (the Director General); and (2) pay the Director General a compensation fee of US$100 each month for each expatriate employed. Evidence of acceptance of the notification and compensation fee payment must then be submitted online to the Director General of Immigration as the basis for issuance of a limited-stay visa.

Further, under the Old Presidential Regulation, an IMTA could be issued with validity of up to one year, after which it could be renewed for a maximum of one year, except for a company director or commissioner, when it could be extended for a maximum of two years. In contrast, Article 11 of PR 20/2018, in conjunction with Article 9 of MOM 10/2018, provides that an approved RPTKA will remain valid for as long as the employer plans to employ the expatriate, or for the period of validity of the employment agreement or work agreement of the expatriate. This benefits employers because, previously, they would have been forced to renew or extend the RPTKA and (formerly) the IMTA even when the employment agreement or work agreement with the expatriate was still valid.
Further, Article 6 of PR 20/2018 allows expatriates in particular sectors to work concurrently for more than one employer. Previously, only a director or commissioner could serve with more than one company. This new provision seems to reflect a greater awareness of the need for flexibility in sectors suffering from shortages of skilled labour, in line with Article 2(2) of PR 20/2018.

III BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Law No. 13/2003 stipulates that an employment relationship is a relationship between the employer and the employee, based on an employment agreement that sets forth the specifics of the job, wages and orders or instructions.

Employment agreements can be made in writing or verbally. If the agreement is made in writing, then it may be made for a definite (fixed-term) or indefinite period. A fixed-term employment agreement must be made in writing, and it must be written in Indonesian and in the Roman alphabet. If a work agreement is written in both Indonesian and a foreign language, in the event of differences in the interpretation, the Indonesian version that will prevail.

A fixed-term employment agreement cannot be made for work that is permanent in nature. Violation of this requirement will cause the automatic conversion of an employment relationship from one that is non-permanent (fixed-term) to one that is permanent (indefinite term).

An employment agreement that is made in writing must state at least the following:

- name, address and line of business of the employer;
- name, gender, age and address of the employee;
- position of the employee or the type of work;
- place where the work is to be carried out;
- amount of wages and how the wages shall be paid;
- terms and conditions of employment stating the rights and obligations of both the employer and the employee;
- effective date of the employment agreement and the period of the employment agreement;
- place and the date where the employment agreement is made; and
- signatures of the parties to the employment agreement.

Amendments to the provisions of the employment agreement can be made at any time upon agreement of both parties.

ii Probationary period

A fixed-term employment agreement cannot provide for a probationary period. By contrast, an indefinite employment agreement may contain a probationary-period clause, but the probationary period may not be longer than three months. The employer and the employee may at any time terminate their employment relationship during the probationary period without the obligation to pay compensation to the other party, but the terminating party must pay the other party the salary for the remaining employment period until the employment termination date. It is recommended that the notice of termination be made in writing and state the intended date of termination.
iii Establishing a presence

There is no law in Indonesia prohibiting a foreign company, with no legal presence in Indonesia, from employing local employees to work in Indonesia. However, in doing so, the company faces the possibility of being deemed as having a permanent establishment (PE) in Indonesia, with the consequence that it must pay Indonesian taxes.

Likewise, a foreign company with no legal presence in Indonesia may hire an employee through an agency or another third party, and may engage an independent contractor. However, it again faces the possibility of being deemed as having a PE, in which case it will be under obligation to comply with all applicable Indonesian tax regulations, including a requirement to register with the relevant Indonesian tax office.

Permanent employees (employees who work under an employment agreement for an indefinite period) have, among others, the following statutory benefits:

- social security;
- leave entitlement;
- religious festivity allowance; and
- retirement allowance.

IV RESTRICTIVE COVENANTS

The prevailing laws and regulations on employment contain no specific provisions on non-compete covenants and related agreements.

However, Article 1601(x) of the Indonesian Civil Code provides that an agreement that restricts the employee from performing certain work following his or her termination shall be valid only if it is made in writing with the employee. The judge may, based either on a claim of the employee or upon his or her defence in a dispute, nullify the agreement either in its entirety or partially, on the grounds that, in comparison to the interest of the employer to be protected and that of the employee, the employee has been unfairly disadvantaged by the agreement. The employer cannot assume any rights if (1) it has terminated the employment unlawfully, (2) the employee terminated the employment because of a certain matter caused by the employer, regardless of whether it was intentional, or (3) the judge, at the request of or pursuant to a claim by the employee, has declared that the agreement should be terminated based on urgent reasons given by the employer.

V WAGES

i Working time

The maximum working time is 40 hours per week, with the following arrangements: seven hours a day for six working days a week; or eight hours a day for five working days a week.

It is prohibited to employ female employees under 18 years of age between the hours of 11pm and 7am. Employers are also prohibited from employing pregnant female employees who, according to a physician’s statement, are at risk of damaging their health or compromising their own safety and the safety of their pregnancy if they work between 11pm and 7am. Female employees who work between 11pm and 7am must be provided with food and beverages as well as guarantees of personal safety and decency. The employer is also obliged to provide transport for female employees who work between 11pm and 5am.
Overtime

Employers who require an employee to work outside of the normal working hours must pay overtime wages to the employee except if the employee’s position, function or job is that of a thinker, planner, implementer or controller whose working hours cannot be limited to normal working hours. Employees of this kind are not entitled to overtime wages, but they are entitled to a higher salary than the salary of ordinary employees.

Overtime can only be performed for a maximum of three hours per day and 14 hours per week. The overtime pay rate for one hour of overtime work is 0.58 per cent of the monthly wage plus fixed allowances, if any.

If overtime is performed in working days, the calculation for the overtime wages shall be as follows:

- The first overtime hour shall be one-and-a-half times the overtime pay rate; and
- Each consecutive overtime hour after this shall be twice the overtime pay rate.

If the overtime work is performed during public holidays and the employee works for five working days, the overtime wages will be as follows:

- The first eight hours shall be twice the overtime pay rate;
- The ninth hour shall be three times the overtime pay rate; and
- The 10th and 11th hours shall be four times the overtime pay rate.

New provision on payment of wages

Government Regulation 78 of 2015 on Wages reveals the government’s intention to promote transparency. For the first time, the regulation introduces a formula for the calculation of minimum wages. The regulation confirms that the minimum wage applies only to single (unmarried) employees with less than one year’s working experience. Therefore, applying the minimum wage to married or experienced employees is not something that is provided for in Regulation 78.

The formula for the calculation of the minimum wage is as follows:

\[ UM_n = UM_t \times \left( Inflation_t + \Delta PDB_t \right) \]

Where:

- \( UM_n \) = Minimum payment to be determined
- \( UM_t \) = Current minimum payment
- \( Inflation_t \) = Inflation calculated from September of the previous year until September of the current year
- \( \Delta PDB_t \) = Gross domestic product (GDP) development calculated from the development of the GDP, which consists of the third and fourth quarters of the previous year and the first and second quarters of the current year

The enforcement of this formula gives certainty to entrepreneurs as it enables them to forecast and calculate the minimum wage for the following year.

FOREIGN WORKERS

The general rule is that foreign workers are welcome to work in Indonesia, provided that Indonesian nationals cannot perform the work required. This requirement is generally applied in a lenient fashion, subject to specific requirements in a number of industries.

The employment of expatriates for work in Indonesia falls under the category of employment for a fixed term. The reasoning behind this categorisation is that those expatriates...
will need to obtain a valid permit for working in Indonesia and that this work permit is only
issued with a maximum validity of 12 months (even though it comes with a possibility of
extension).

Foreign investment companies are allowed to employ expatriates, subject to the prevailing
laws and regulations on recruitment of foreign workers. However, when conducting business
in Indonesia, a trading representative office is required to have at least three Indonesian
nationals who are simultaneously employed and trained so that the expatriates’ technical
know-how and management skills may be transferred.

An employer must obtain an expatriate manpower utilisation plan as the master
document to obtain the individual work permits for every expatriate employed by the
employer. The expatriate worker must also obtain a limited-stay visa and limited-stay permit
card for valid employment in Indonesia.

Expatriate workers are entitled to the same protections under the relevant Indonesian
labour laws and regulations as Indonesian employees.

VII GLOBAL POLICIES

Law No. 13/2003 requires employers having no fewer than 10 employees to establish a set of
enterprise or company rules and regulations (company regulations).

Under Article 111 of Law No. 13/2003, company regulations must regulate at least the
following matters:

a the rights and obligations of the employer and the employees;
b working conditions or requirements;
c employee discipline and code of conduct;
d the validity period of the company regulations; and
e the use of information and facilities provided by the employer.

The provisions of company regulations may not contravene the provisions of applicable laws
and regulations.

The draft company regulations that have been agreed by the employer and the
representative of employees (or the respective trade union in the company, if any) must be
submitted to the relevant manpower agency for approval before they can be put into effect.
The company regulations are valid for two years as of their approval date; upon expiration
they can be renewed.

If a company has a labour union, the union may enter into a collective labour agreement
(CLA) with the management of the company. The CLA is also valid for two years with the
possibility of extension.

i Discrimination

Law No.13/2003 protects employees from discrimination at the work place. Article 5 of the
Law provides as follows:

All persons that are qualified to perform a job have the same opportunity to get the job without
discrimination.
The interpretation of Article 5 provides that all persons who are qualified to perform a job have the same right and opportunity to find a decent job that is in line with interest and capability, and to earn a decent living, and may not be discriminated on grounds of sex, ethnicity, race, religion or political orientation.

Article 6 of the Law provides as follows:

(1) All workers have the right to receive equal treatment without discrimination from their employer; and

(2) Employers are under the obligation to provide workers with equal rights and responsibilities with no discrimination based on sex, ethnicity, race, religion, skin colour, or political orientation.

Indonesia has also ratified, among others, the following ILO Conventions: No. 111 of 1958 on Discrimination in Employment and Occupation; and No. 80 of 1957 on Equal Remuneration for Male and Female Workers for Work of Equal Value.

ii Corruption

With regard to corruption, Indonesia has Law No. 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by Law No. 20 of 2001 (the Anti-Corruption Law). In addition, there is Law No. 11 of 1980 concerning Criminal Acts of Bribery.

The government has not, to date, issued laws or regulations pertaining to sexual harassment. In practice, sexual harassment cases are adjudicated by using the provisions of Articles 289–296 of the Indonesian Criminal Code. To whatever extent possible, the global policies on discrimination, corruption and sexual harassment must be put in writing under the employment agreement, company regulation or CLA.

VIII TRANSLATION

Employment agreements and documents must be made in the Indonesian language. Article 31, Paragraph 1 of Law No. 24 of 2009 on the Flag, the Language, the National Emblem and the National Anthem provides that: ‘The Indonesian language shall be used in memoranda of understanding or agreements involving state institutions, government institutions, private institutions or Indonesian citizens.’ Article 31, Paragraph 2 of the Law provides that: ‘Memorandums of understanding or agreements referred to in Paragraph 1 which involve foreign parties shall also be written in the national language of those foreign parties and/or the English language.’

While Article 31 contains legal obligations, the Law does not provide for any sanctions against the contravention of these obligations. This fact has created serious legal ambiguity and raises the question of whether a private contract, not written in the Indonesian language in violation of Article 31, will be deemed null and void by a presiding judge.

The Indonesian Supreme Court has affirmed the decision of a district court and High Court that invalidated a loan agreement that was signed following the enactment of the Law because the agreement was not made in the Indonesian language. Further, under Article 40 of the Law, the use of the Indonesian language in memoranda of understanding and in agreements (including employment agreements) is to be further regulated by an implementing regulation, which is to be issued by the president (to be issued within two years after the enactment of the Law). In 2014, the government issued Government Regulation No. 57 of 2014 concerning the Improvement and Development of Indonesian Language and Literature.
IX  EMPLOYEE REPRESENTATION

The Manpower Law provides the following three forums in which employees may have representation:

a the bipartite forum, which consists of representatives of the employees and the employer, and that may be established if there are at least 50 employees;
b the tripartite forum, which consists of representatives of the labour union, the employer association and the regulator; and
c the labour union, the establishment of which is not mandatory. A group of at least 10 employees can establish a labour union.

The government’s current involvement in the area of labour unions lies solely with the registration of unions. Despite the fact that the government does not intervene in the establishment of a labour union, a union must be democratic, independent and responsible. Its membership may not be based on politics, religion, race or gender and must be in line with the principles of the Pancasila (the fundamental ideology of the Republic of Indonesia) and the 1945 Constitution.

Pursuant to Law No. 21 of 2000 on Labour Unions, every employee or labourer has the right to form or to become a member of a trade union. A trade union is formed by at least 10 employees or labourers.

A trade union must, upon its establishment, submit a written notification to the local government agency responsible for manpower affairs for the purpose of registration and record-keeping.

A trade union or labour union that has been duly registered and possesses a registration number has the right to:

a negotiate a collective labour agreement with the employer;
b represent workers or labourers in industrial dispute settlements;
c represent workers or labourers in manpower institutions;
d establish an institution or carry out activities for the improvement of the workers or labourers’ welfare; and
e carry out other manpower or employment-related activities as long as the activities are not against the prevailing laws and regulations.

Matters regarding which officials or which members of the trade union will act as the union’s representatives, as well as matters regarding the appointment of such representatives, are to be regulated in by-laws or the articles of association of the respective trade union.

The following provisions of Law No. 21/2000 are intended to protect members of a trade union, federation or confederation of trade unions.

No persons (including employers) may either prevent or force an employee or labourer from:

a forming or not forming a trade union;
b becoming or not becoming a union official;
c becoming or not becoming a union member; or
carrying out or not carrying out trade union activities by means of the following:

- terminating his or her employment, temporarily suspending his or her employment, demoting him or her, or transferring him or her to another post, another division or another place in order to discourage or prevent him or her from carrying out union activities or make such activities virtually impossible;
- not paying, or reducing the amount of his or her wage;
- intimidating the employee or subjecting him or her to any other forms of intimidation; and
- campaigning against the establishment of the trade union.

An employer must allow the officials and members of a trade union to carry out union activities during working hours, as agreed upon by the trade union and the employer, or as provided in the collective labour agreement.

Law No. 21/2000 is silent on the matter regarding frequency of meetings for trade union members and officials, and the period of service of the trade union members. These matters must be regulated in the by-laws or the articles of association of the trade union.

X DATA PROTECTION

i Requirements for registration

While Indonesia has enacted various laws relating to data privacy in a number of specific areas (e.g., banking and tax), currently no specific and dedicated laws have been enacted regarding the protection of an employee’s privacy before, during or after employment. The laws that may be applicable are Law No. 39 of 1999 on Human Rights (the Human Rights Law) and Law No. 11 of 2008 as amended by Law No. 19 of 2016 on Electronic Information and Transactions (the EIT Law).

The Human Rights Law stipulates that each individual has the right to his or her own privacy, and may not be subjected to an investigation without his or her agreement. Article 39 of the Human Rights Law provides that freedom and secrecy of communication by letter or any other electronic media may not be disturbed or interrupted except upon the instruction of a judge or other authority.

Article 26(1) of the EIT Law stipulates that, unless provided otherwise by relevant laws and regulations, use of any information through electronic media that involves an individual’s personal data must be made with the consent of the person concerned. In line with the Elucidation to Article 26(1) of the EIT Law, the protection of personal data is part of privacy rights that include the following definitions: (1) the right to enjoy a personal life, free from any disturbance; (2) the right to communicate without conversations being spied on; and (3) the right of access to information to do with an individual’s personal life or privacy. In relation to the above, Government Regulation No. 82 of 2012, as implementing regulation of the EIT Law, stipulates that an operator of an electronic system who manages the personal data in the electronic media, must maintain the confidentiality, integrity, authenticity, accessibility, availability, and traceability of such electronic information or documents in accordance with laws and regulations.

Based on the foregoing, considering the broad interpretation of personal data, any data or electronic documents related to employees may be considered as personal data; thus,
an employer may reserve the right to routinely review all employee emails sent using the employer’s email system or documents managed, maintained and held by the employee, if the employee has been granted to the employer.

ii Cross-border data transfers
The prevailing labour law and regulations do not contain restricting provisions in relation to the dissemination or exportation of data to another company in jurisdictions outside Indonesia. However, taking into account the provisions of the Human Rights Law and the EIT Law, such dissemination or exportation of employee data may be done with the employees’ consent.

iii Sensitive data
The prevailing labour laws and regulations do not provide definitions of ‘sensitive data’, nor do they set forth restrictions on processing sensitive data.

An employer may undergo a medical screening test as long as it is carried out with the aim of obtaining information that is relevant to the position’s function and duties. The employer may undergo the test by themselves or use the services of a third party.

Under the Minister of Labour and Transmigration Decision No. KEP.68/MEN/IV/2004 of 2004 on prevention and control of HIV/AIDS in the workplace, an employer is prohibited from carrying out an HIV test on an employee at any phase of the employment (or before the employment) without the written consent of the employee, except if the test is required for the purpose of the fulfilment of the employer’s obligation to provide pre- and post-test counselling to the worker.

The results of an HIV test must be treated confidentially and be protected in the same manner as that of other medical information.

iv Background checks
The labour laws and their implementing regulations do not specifically regulate employee background checks; however, see subsections i and iii. In practice, an employer or prospective employer cannot do credit checks or criminal checks on its prospective employee without the employee’s consent. A potential employer may only request applicants or prospective employees to provide a statement declaring no criminal record or clearance from the relevant police office, or their bank statements.

XI DISCONTINUING EMPLOYMENT
i Dismissal
In general, individual employment terminations or dismissals are regulated under Law No. 13/2003, but the procedure for the termination of an employment relationship is regulated in the Industrial Relations Law.

Law No. 13/2003 provides for two kinds of employment termination:

a termination without cause (where the employee is not at fault); and
b termination with cause (where the employee is at fault).
Termination without cause

Termination without cause is triggered by the following circumstances:

- (a) the employer's change of ownership or change of status, or the employer's merger or consolidation;
- (b) the employer closing down owing to continual loss, force majeure or efficiency;
- (c) bankruptcy;
- (d) the employee's resignation;
- (e) the employee's retirement; or
- (f) the employee's death.

Termination with cause

Termination with cause is triggered by the following circumstances:

- (a) the employee's violation of the employment contract or company regulation; or
- (b) the employee's gross wrongdoing or commission of a major fault.

The decision of the Constitutional Court of Indonesia in Case No. 012/PUU-I/2003, dated 26 October 2004, declared the provision in relation to committing a major fault as being in contravention of Article 27(1) of the 1945 Indonesian Constitution, with the result that it is not applicable to an employee's termination.

The subsequent Circular Letter of Manpower Minister No. SE.13/MEN/SJ-HK/I/2005 provides that such termination can only be carried out if a final and binding verdict confirming the employee's wrongdoing has been obtained from a criminal court judge.

All employment termination plans (except where the termination is caused by the resignation of the employee) require the IRC's approval, in the form of a decision. In addition, the employer is obliged to give notification of the termination plan and discuss it with the respective trade union or employee (if the employee is not a member of a trade union, or if there is no trade union in the company). The employee can be rehired by the employer after the employment termination (normally if the termination is without fault).

The labour laws and regulations do not contain a notice period requirement for an employment termination. However, owing to the requirement for prior discussion between parties, mentioned above, in practice one month's notice should be given. However, the employer may pay a certain sum of money in lieu of the notice, as long as it is agreed to by the employee concerned.

Under Law No. 13/2003, employees whose employment is terminated (except in the event the termination is caused by their resignation or commission of a major fault) are eligible for severance pay from the employer. The formula for the severance amount is discussed below.

The often cumbersome and costly procedures for an employment termination have tended to make employers opt for an amicable settlement instead as this is often more advantageous to both the employer and the employee. A mutually agreed, amicable employment termination settlement must be made in the form of a written agreement and the agreement must be registered with the IRC.

Redundancies

The labour regulations do not contain provisions on redundancies. As discussed in subsection i, in general, an employer who wishes to terminate the employment of its employees must
obtain the approval of the IRC. As such, an employer may terminate an employee’s contract
by simply giving him or her notice, followed by the procedure for the termination of an
employment relationship as regulated in the Industrial Relations Law.

Owing to the absence of specific regulations on these matters, mass lay-offs or collective
dismissals are governed under Articles 163 to 165 of Law No. 13/2003 concerning employment
termination owing to the employer’s merger or acquisition, closing down, downsizing or
rationalisation, or bankruptcy. For mass or individual employment terminations, a consultation
or discussion with the employee or the trade union is required before the termination.

The termination pay, or severance package, is calculated on the basis of the worker’s:

- a monthly wages;
- b period of service; and
- c allowances and benefits, such as leave, medical and housing entitlements.

Severance pay

The formula for severance pay is one month’s wages for each year of service with a maximum
of nine months’ wages. The calculations are outlined in the table below.

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<thead>
<tr>
<th>Length of service</th>
<th>Severance pay</th>
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<tr>
<td>Less than 1 year</td>
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<td>1 year or more but less than 2 years</td>
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<td>8 months’ wages</td>
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<tr>
<td>8 years or more</td>
<td>9 months’ wages</td>
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</table>

Service appreciation pay (merit allowance)

Service appreciation pay is calculated starting with two months’ wages for the first three
years of service, followed by an additional one month’s wages for every three years of service
thereafter, up to a maximum of 10 months’ wages for 24 years of service. The calculations are
outlined in the table below.

<table>
<thead>
<tr>
<th>Length of service</th>
<th>Service appreciation pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 years or more but less than 6 years</td>
<td>2 months’ wages</td>
</tr>
<tr>
<td>6 years or more but less than 9 years</td>
<td>3 months’ wages</td>
</tr>
<tr>
<td>9 years or more but less than 12 years</td>
<td>4 months’ wages</td>
</tr>
<tr>
<td>12 years or more but less than 15 years</td>
<td>5 months’ wages</td>
</tr>
<tr>
<td>15 years or more but less than 18 years</td>
<td>6 months’ wages</td>
</tr>
<tr>
<td>18 years or more but less than 21 years</td>
<td>7 months’ wages</td>
</tr>
<tr>
<td>21 years or more but less than 24 years</td>
<td>8 months’ wages</td>
</tr>
<tr>
<td>24 years or more</td>
<td>10 months’ wages</td>
</tr>
</tbody>
</table>
Compensation

Law No. 13/2003 defines compensation as cash compensation for the following benefits and allowances:

- annual leave (or long leave) that has not expired and has not been taken: an employee becomes entitled to annual leave after having worked for 12 consecutive months;
- relocation expenses: to return the employee and his or her family to the place from which the employee was recruited;
- medical and housing allowance: this is stipulated to be 15 per cent of the total severance pay and service appreciation pay, if any;
- compensation for other benefits: provided under the respective employment agreement, the company regulations or the collective labour agreement; and
- other compensation amounts as determined by the IRC: in general, based on the special arrangements between the employer and employee.

Calculation of severance allowance

For the calculation of severance pay, service appreciation pay and compensation, the monthly wage is defined as:

- the basic wage (gross salary);
- any kind of allowance granted to the employee and his or her family periodically and regularly; and
- the cost price of rations supplied by the employer to the employee free of charge or, if supplied at a discount, the difference between the cost price and the price at discount.

Severance package

The amount and type of severance to be paid to the employee vary, depending upon the basis of the dismissal or termination.

If the dismissal is because of the employee’s violation of the terms of the employment agreement, he or she is entitled to the standard severance pay, service appreciation pay and compensation.

If the dismissal is not because of the employee’s fault but for other reasons, such as the employee reaching the pension age (where the employer does not include the employee in a pension programme), the employee’s death or the employer’s rationalisation or redundancy scheme, the employee is entitled to twice the amount of severance pay plus the standard service appreciation pay and compensation.

XII TRANSFER OF BUSINESS

Under Article 61(3) of Law No. 13/2003, in the event of the sale of the business of the employer, all of the rights of the seller’s employees become the responsibility of the purchaser, unless agreed otherwise in the respective sale and purchase agreement, without diminishing the rights of the employees concerned.

Article 163(1) of Law No. 13/2003 provides that the employer may terminate its employment relationship with an employee in the event of the employer’s change in status, merger, consolidation or change in ownership.
i Permanent employees

In theory and in practice, a transfer of undertakings may give rise to the following three circumstances with respect to the permanent employees of the acquired, surviving, consolidated, divided or transferor company.

Where an employee is not willing to continue his or her employment with the transferee company (new employer)

In this circumstance, the employee is entitled to the severance package amount stipulated by the Labour Law, which consists of the stipulated severance amount, the service appreciation amount and the compensation amount (i.e., the basic amounts of the severance package elements, without any multiplication of the amount). IRC approval is required for this.

Where the new employer is not willing to continue the employment of a worker

In this circumstance, the employee is entitled to at least twice the stipulated severance amount, as well as the service appreciation amount, if any, and the compensation amount. IRC approval is required.

Where the new employer and the employee mutually agree to continue the employment

In this circumstance, the employment relationship is continued under the same terms and conditions, and the employee’s seniority status is recognised by the new employer and retained. The employee is not entitled to a severance package.

For details on the severance pay calculation, see Section XI.ii.

ii Non-permanent employees

Non-permanent employees are those employees who work on the basis of a contract for a specified period of time. A non-permanent employee whose employment is not continued by the new employer is entitled to receive payment of his or her wages for the remaining period of the contract, if the employment is ended before the expiry of the contract.

XIII OUTSOURCING

Regulation of the Ministry of Manpower and Transmigration No. 19 of 2012, dated 14 November 2012 regarding Conditions for the Assignment of Part of the Work Performance to Another Company, as amended by Regulation of the Ministry of Manpower and Transmigration No. 27 of 2014, dated 31 December 2014 (the Outsourcing Regulation), restricts the activities of the company (the ‘user’ of the services) that may be assigned to only five activities. These five activities are supporting activities or activities that are not the company’s core business activities, and relate to the following services: cleaning; security; catering; transportation; and mining and oil. This means that activities other than the aforementioned activities may not be assigned to another company. This is where the Outsourcing Regulation differs from Law No. 13/2003, which does not limit the supporting activities that may be assigned to only those five activity categories.

The Outsourcing Regulation clearly has the aim to solve outsourcing issues. Among other things, it requires the insertion of the transfer of undertakings (protection of employment) (TUPE) clause, the requirement of which is not mentioned in Law No. 13/2003. The TUPE clause provides protection to employees in the event that the provider company is
replaced with another provider company by the user. This clause protects the employees by ensuring that the length of their service and their salary are in line with their experience. The Outsourcing Regulation requires that the contract between the existing provider company and the employee concerned contains the TUPE clause. As long as it contains the TUPE clause or provision, an employment contract between a provider company and its employee may take the form of an employment contract for a fixed term.

The TUPE clause is stipulated in Article 19b (which requires its insertion in contracts of work agreement or labour supplier agreements between the provider company and the user company) and Articles 29(2)(c) and 29(3)(f) (which require its insertion in individual employment agreements between the employees and their provider companies) of the Outsourcing Regulation.

Article 30 of the Outsourcing Regulation stipulates the effects for non-compliance with the TUPE clause requirement for fixed-term employment contracts between provider companies and their employees, comprising:

a automatic change of employment status from employment for a fixed term to employment for an unfixed or indefinite period as of the date the fixed-term employment contract is signed by the employer and the employee; and

b rejection by the Ministry of Manpower of the registration of the labour supplier agreement between the provider company and the user.

XIV OUTLOOK

i Common contraventions of employment law

Employers in Indonesia often encounter problems that arise from obligations they are not aware of or that they neglect to fulfil, or from imposing prohibited employment rules, such as the following.

Inserting a probation clause in a fixed-term agreement

Employers often make the mistake of including a probation-period provision in their fixed-term employment agreements. Under the prevailing labour laws, an employee who is working under a fixed-term employment agreement may not be required to undergo a probation period. A probation clause in an employment agreement for a fixed term will be deemed null and void by operation of law.

Wrongfully entering into a fixed-term employment agreement

An employment agreement for a fixed term may only be entered into if the conditions for it are satisfied (see Section III.i). An employment agreement for a fixed term will automatically transform into an employment agreement for an unspecified period if the conditions for the former type of employment are not satisfied. This has the further consequence that, in the event of the termination of the employment, the employer is required to pay severance to the employee.
**Terminating an employee’s contract for reason of his or her major fault or grave wrongdoing without a verdict of a criminal court judge**

Many employers are unaware that the provision of Article 158 of Law No. 13/2003 on termination owing to a major fault was declared as no longer in effect by a decision of the Constitutional Court of Indonesia, on the ground that it is in contravention of Article 27(1) of the 1945 Indonesian Constitution.

Under Circular Letter of Manpower Minister No. SE.13/MEN/SJ-HK/I/2005, which is still in effect, the termination of an employment agreement on the ground of the employee’s grave wrongdoing or major fault can be carried out if a final and binding verdict to that effect has been obtained from a criminal court judge.

**Contracting work to a third party without following the proper procedure**

A company may contract out part of its non-core work to a third party via a labour supplier agreement or a contractor agreement. The government regulates a strict procedure that must be complied with by the company before contracting the non-core work to the labour supplier company or contractor.

Some companies fail to observe the correct procedure, however, and contract out their core work to a third party, which is prohibited. This condition may ultimately create a loss to the company because Law No. 13/2003 would then oblige the company to employ the third party’s employees as its employees.

**ii Hot topics**

The hot topic in 2018 in the field of labour law was the elimination of the IMTA and the introduction of a process for notification to the Director General of Immigration, as mentioned in Section II. In 2018, Jakarta’s minimum wage increased by 8.03 per cent compared with 2017.

**iii National Legislation Programme 2015–2019**

Currently, three employment-related bills have been prepared by the parliament. As recorded in the National Legislation Programme 2015–2019, there is the Bill on Manpower, the Bill on Supervision of Manpower and the Bill on Protection of Indonesian Workers Abroad. Among these, the Bill on Protection of Indonesian Workers Abroad was a priority of the 2017 National Legislation Programme.
Ireland

Bryan Dunne and Alice Duffy

I  INTRODUCTION

Employment in Ireland is regulated by an extensive statutory framework, much of which finds its origin in European Community law. The Irish Constitution, the law of equity and the 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;
e  the Unfair Dismissals Acts 1977–2015;
f  the Data Protection Act 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;
k  the Organisation of Working Time Act 1997;
m  the Parental Leave Acts 1998–2006;
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;
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; and
z  the Paternity Leave and Benefit Act 2016.

1  Bryan Dunne is a partner and Alice Duffy is a senior associate at Matheson.
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 will now mainly depend on whether the claim is being brought under either statute or common law.

In general terms, employers’ liability (i.e., personal injury) claims and claims of breach of contract 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 Unfair Dismissals Acts 1977–2015 or the Organisation of Working Time Act 1997) are heard by the Workplace Relations Commission (or on appeal to the Labour Court).

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 and this court 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 where 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 subsection 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. Where 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.

Following the 2015 Act, the WRC provides conciliation, advisory, mediation and early resolution services, as well as an adjudication service. The adjudication service, which was 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 the complaint 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 they 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 Unfair Dismissals Acts 1997–2015 (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.
As mentioned, the WRC also took over the role of NERA, which is now referred to as the Inspection and Enforcement Service. The purpose of this service is to monitor employment conditions to ensure compliance and enforcement of employment rights legislation.

iii  Labour Court

As of 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 (there are hearings scheduled for 2019). It is intended that the EAT will be wound up once all of the legacy cases have been heard.

The Labour Court can choose to deal with the 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 Labour Court has wide powers under the new legislation to require witnesses to attend and to take evidence on oath.

A decision of the Labour Court 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 forecasted economic growth of 2.9 per cent in 2019, even if there is a hard Brexit. There has also been a drop in the unemployment rate in Ireland, decreasing to 5.3 per cent in November 2018 from 7 per cent in January 2017.

The EU General Data Protection Regulation (GDPR) came into effect in Ireland in May 2018. The GDPR extends current obligations previously in place pursuant to data protection legislation. For example, individuals are granted greater rights in respect of access to their personal data, data erasure (the ‘right to be forgotten’), their ability to have inaccurate data rectified, their ability to restrict the processing of their personal data and their ability to object to its processing altogether (this should be on compelling legitimate grounds). In addition, data subject access requests no longer need to be in writing and are no longer subject to a fee.

Immigration to Ireland has also steadily increased, with over 11,000 employment permits issued in the 2017 calendar year. There have also been several changes to the Irish immigration system, including the replacement of the Garda National Immigration Bureau card with the Irish Residence Permit card in December 2017, to bring Ireland into line with residence permits throughout the European Union. As of May 2018, certain categories of animators are considered highly skilled for the purposes of employment permits, and there is no longer any category of employment considered ineligible for Intra-Company Transfer Employment Permits.
III SIGNIFICANT CASES

i Investigations and fair procedures

_Iarnród Éireann/Irish Rail v. Barry McKelvey_²

The High Court decision in _Lyons v. Longford Westmeath Education and Training Board_³ was arguably the most controversial employment law case of 2017, not least because the High Court appeared to suggest that an employee is entitled to legal representation as part of fair procedures in all disciplinary processes, but also because the position was at odds with the previous Supreme Court decision of _Burns and another v. The Governor of Castlerea Prison_,⁴ which was considered as the guiding authority in respect of this issue. Burns held that an employee may be entitled to legal representation in disciplinary hearings but that this right would only arise in ‘exceptional’ circumstances.

The Court of Appeal decision by Ms Justice Irvine in _Iarnród Éireann/Irish Rail v. Barry McKelvey_⁵ has now clarified the position in respect of legal representation at a disciplinary hearing. This case arose from a disciplinary process where 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 procedure and natural justice to deny him the right to legal representation. However, on appeal, the Court of Appeal did not agree with the High Court.

_Lyons_ appeared to suggest that the right to legal representation must exist were an employee could face dismissal in a disciplinary process. However, Ms Justice Irvine was of the view that the sanction of dismissal is not an exceptional feature of disciplinary hearings in the workplace. She stated that the fact that the sanction had the potential to be grave did not mean that Mr McKelvey was at any greater risk of receiving an unfair hearing without legal representation than if he was at risk of a lesser sanction. Ms Justice Irvine stated that although the consequences of any finding against Mr McKelvey in the disciplinary inquiry may have an impact on his future employment prospects and his reputation, in this regard he is no different to many employees facing allegations of misconduct in the workplace.

In wholly endorsing the _Burns_ decision, Ms Justice Irvine concluded that ‘legal representation should only be permitted in cases where the employee can demonstrate the existence of exceptional circumstances which would caution that the employee might not receive a fair hearing absent legal representation.’

Ms Justice Irvine said that the allegation of misconduct made against Mr McKelvey was a straightforward one and there was nothing in the evidence to suggest that the circumstances were in any way complex. Ms Justice Irvine also remarked that the involvement of lawyers would invariably slow down a disciplinary process and make it more costly, and that it could also potentially have significant adverse consequences for the relationship between management and the employee under investigation, and also between employees themselves.

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² [2018] IECA 346.
³ [2017] IEHC 272.
⁵ [2018] IECA 346.
Ms Justice Irvine stated that the fact that the conduct under investigation had the potential to result in criminal prosecution at a later date was not unusual in the context of an inquiry into incidents of theft in the workplace. She also commented that any finding against Mr McKelvey in the disciplinary inquiry would not be admissible as evidence against him in any future criminal proceedings, and he would be entitled to be legally represented in such proceedings.

The decision of the High Court in Lyons last year created a degree of uncertainty around disciplinary processes. However, the Court of Appeal decision provides welcome clarity for employers in that they can refuse a request for an employee to be legally represented at disciplinary hearing unless there are exceptional circumstances, such that the employee would not receive a fair hearing without legal representation.

ii Disability discrimination – duty of reasonable accommodation

*Nano Nagle School v. Daly*

This is 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 had been employed by the school since 1998 but was paralysed from the waist down following a road traffic accident in 2010, leaving her wheelchair-bound. She sought to return to work following a period of rehabilitation after the accident.

The school carried out a number of occupational health, ergonomic and risk assessments, and 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.

Ms Daly brought a claim under the Employment Equality Act 1998 (as amended by the Equality Act 2004) (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 of the Act provides that employers are obliged to take appropriate measures to enable an employee with a disability to undertake the essential duties of their 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 her compensation of €40,000. This was affirmed by the High Court, which held that the school had breached Section 16 of the Act. The school appealed this decision to the Court of Appeal, which delivered its judgment in January 2018.

The Court of Appeal considered to what extent employers are required to create new reduced roles for employees with disabilities. They confirmed that an employer must provide reasonable accommodation to an employee with a disability before they can lawfully terminate the contract. However, the Court of Appeal outlined that an employer is not expected to create a new role for an employee with a disability. A key question that arose was whether

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6 [2018] IECA 11.
Ms Daly had to be capable of only some of the tasks required of an SNA or all of the tasks required. In this regard, the Court of Appeal confirmed that employers are not required to remove the essential tasks of the position (‘the precisely essential elements that the position entails’). If no reasonable adjustments can be made for an employee with a disability, the employer is not liable for failing to consider the issue.

In this case, Ms Daly was no longer able to perform the essential tasks of an SNA in the school, regardless of the accommodations that would be put in place. Section 16 of the Act requires employers to objectively assess whether reasonable accommodations can be made to enable an employee with a disability to perform the essential duties of their role, which they would otherwise be unable to perform. The Court of Appeal also confirmed that an employer will not have failed to reasonably accommodate a disabled employee even if they do not consult the employee when considering what adjustments could be put in place. On that basis, the Court of Appeal allowed Nano Nagle’s appeal. In doing so, the decision of the Labour Court, which was upheld by the High Court, was overturned and the award of compensation of €40,000 was vacated.

This case is currently on appeal to the Supreme Court.

iii Bullying

*Hurley v. An Post*

This case relates to a postal worker, Ms Catherine Hurley, who was involved in an incident with another co-worker in 2006 who acted aggressively and was subsequently suspended. Following the suspension, Ms Hurley claimed that her co-workers ignored and isolated her, and she was not welcome to attend work social events such as the Christmas party. She raised these issues with HR several times but was told that matters would ‘die down’. The situation did not improve, which caused Ms Hurley to be absent from work on stress leave. She was dismissed by An Post in 2011. She brought High Court proceedings against An Post for negligence, breach of duty and breach of contract as a result of the bullying she had experienced.

In the High Court, Mr Justice McDermott outlined the duties that an employer owes to its employees who allege that they are being subjected to bullying by their co-workers. He confirmed that an employer has a common law duty to take all reasonable precautions for the safety of employees and not expose them to any reasonably foreseeable risk of injury. He also noted that an employer owes a statutory duty to do this under Section 8 of the Safety, Health and Welfare at Work Act 2005. He held that ‘an accumulation of petty daily humiliations and repeated spiteful or petty actions with a continuing social rejection or exclusion is the very essence’ of the legal definition of bullying. Mr Justice McDermott found that her deteriorating physical and mental health, including post-traumatic stress disorder (PTSD), should have been reasonably foreseeable. He found that An Post made no efforts to engage with Ms Hurley and did not advise her that she could make a formal complaint that could lead to disciplinary action. An Post also failed to caution other workers against this behaviour.

Mr Justice McDermott concluded that An Post were liable for the harassment and bullying of Ms Hurley by her co-workers. This judgment addressed the level of damages to which the plaintiff was entitled as a result of the personal injuries, loss and damage. Expert

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7 [2018] IEHC 166.
8 [2017] IEHC 568.
Ireland

evidence was provided from her doctors and a medical expert called by the defendant. Justice McDermott noted that the plaintiff was traumatised by the incident and felt ostracised and alone. She made a number of complaints to management staff but received no support. The company nurse told her to return to work and see how things were. The plaintiff’s GP noted that she was unable to cope with the stress at work.

Ms Hurley took various periods of sick leave between December 2006 and the termination of her contract in 2011. She complained of neck pain, shoulder pain, bursitis of the hip, insomnia and low mood. She was diagnosed with PTSD in 2012. The medical evidence in the judgment noted that she suffered stress, anxiety and PTSD as a result of the incident in 2006, and her subsequent treatment in the workplace after this. The plaintiff’s doctors concluded her symptoms were stress-related. The defendant’s medical expert disagreed that she was suffering PTSD and instead asserted she had anxiety depressive disorder.

Having examined all the medical evidence in the case, the Court concluded that the plaintiff was suffering from a moderate form of PTSD as a result of the incident and the subsequent events. Justice McDermott noted that the bullying and harassment contributed to this. He concluded that she was entitled to general damages for continuing symptoms of PTSD from 2006–2011, loss of earnings and special damages. The amount awarded in respect of loss of earnings arose from the inability of the plaintiff to carry on her duties at work owing to the negligence and breach of duty of the defendant to her as an employee. She was awarded a total of €161,133.

iv  Power of a statutory body to disregard national law rules contrary to EU law


In early December 2018, the Court of Justice of the European Union (CJEU) held that the WRC has the authority to disapply or ignore a rule of national law that is contrary to EU law. Until now, this power was confined to the High Court. This is a very significant judgment that has implications for all national bodies established by law to ensure enforcement of EU law in a particular area, as it potentially extends their powers to disregard any provision of national legislation that is contrary to EU law.

The CJEU decision arises from a preliminary ruling by the Supreme Court to the CJEU. The Supreme Court case itself involves three individuals who were refused permission to join An Garda Síochána (the police service in Ireland) because they were older than the maximum recruitment age of 35. They complained to the Equality Tribunal (now the WRC) that this upper age limit constituted discrimination on the grounds of age, which was prohibited by EU and Irish law. The Minister for Justice and Equality contended that only courts established under the Constitution had the power to decide whether to disregard a provision of national law.

The High Court held that the Equality Tribunal did not have jurisdiction to disapply national law where it is incompatible with EU law, this being a power given to the High Court only. The Equality Tribunal appealed this decision to the Supreme Court. It referred a request for a preliminary ruling on the matter to the CJEU.

9  Case C-378/17.

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The CJEU referred to the primacy of EU law meaning that national courts, in the exercise of their jurisdiction, have a duty to give full effect to the provisions of EU law and refuse to apply conflicting provisions of national law.

In deciding on the question referred, the CJEU noted that the WRC was established by the Irish legislature to ensure compliance with the Directive on equal treatment in employment and occupation.\(^\text{10}\) It noted that the WRC is required, owing to the primacy of EU law, to ensure that individuals receive the full legal protections derived from EU law. It noted that this includes the WRC, of its own motion, disapplying or disregarding any provision of national legislation where it is contrary to EU law. The CJEU noted that if the WRC could not do so, then EU law in the areas of equality in employment would be rendered less effective.

The CJEU also clarified that the WRC does not need to request or await the contrary provisions of national law to be set aside. Importantly, the CJEU noted in its judgment that it has repeatedly held that the duty to disapply or disregard national legislation that is contrary to EU law is owed by all organs of the state, including administrative authorities.

This decision is noteworthy as it means that the power to disapply or disregard national law if it conflicts with EU law is not confined to courts of law. It potentially extends those powers to all national bodies and administrative authorities in EU Member States that are tasked with applying EU law. In the area of enforcement of employment rights, this decision will likely have an immediate impact on decisions issued by the adjudication service of the WRC where provisions of Irish legislation are identified as being contrary to EU law.

v Excessive working hours

*Kepak Convenience Foods v. Grainne O’Hara*\(^\text{11}\)

This is an important Labour Court decision regarding excessive working hours in the context of the Organisation of Working Time Act 1997 (OWTA).

By way of background, Ms Grainne O’Hara was a business development executive who was required to work 40 hours per week under the terms of her employment contract. The nature of her role was that she would conduct customer site visits across Leinster during the day, and was then required to record her activities and engagement with customers on a computerised reporting system.

When Ms O’Hara’s employment was terminated in April 2017 (and prior to her having 12 months’ service), she brought a claim to the WRC stating that she worked in excess of 48 hours a week in breach of the OWTA. In the WRC, Ms O’Hara produced copies of emails that she had sent and received prior to her contractual start time and after her contractual finish time. She asserted that she worked approximately 60 hours a week. She claimed that, because a large part of her role involved conducting site visits, she was required to work from home in the evenings and at weekends in order to complete all her required tasks.

In response, her former employer, Kepak, argued that the volume of work undertaken by Ms O’Hara was in line with that undertaken by other members of staff, none of whom worked in excess of the maximum working week. Kepak submitted that she could have

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\(^{10}\) Directive 2000/78/EC.

\(^{11}\) DWT1820.
comfortably completed her work within the contracted 40 hours each week. Kepak claimed that Ms O’Hara chose to adopt a less efficient procedure for completing her administrative tasks and argued that this may have increased the time she spent on such tasks.

In the WRC, the adjudication officer noted that the OWTA provides for a maximum working week of 48 hours and criticised Kepak for having no system in place for recording Ms O’Hara’s hours of work. The adjudication officer noted that Kepak often responded to the emails late at night and so was aware that Ms O’Hara was working excessively and had permitted her to do so. Ms O’Hara was awarded compensation of €6,240.

An appeal was brought to the Labour Court by both parties. Kepak appealed the decision in its entirety, whereas Ms O’Hara brought a cross-appeal on the level of compensation that she had been awarded by the adjudication officer. The key issues considered by the Labour Court were whether Kepak had ‘permitted’ Ms O’Hara to work in excess of the maximum average working hours set out in Section 15 of the OWTA (i.e., more than an average of 48 hours per week) and whether Kepak kept proper working-time records as required by Section 25 of the OWTA.

The Labour Court held that Kepak had breached Sections 15 and 25 of the OWTA as they had permitted Ms O’Hara to work in excess of a 48 hour week and had failed to keep records of her work hours. The Labour Court also found that Kepak had failed to contradict her evidence concerning late-night emails and they were aware that she was working beyond her normal working hours. The Labour Court increased the compensation awarded to the employee to €7,500 to reflect the systematic nature of the breaches of the OWTA that had occurred.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under the Terms of Employment (Information) Act 1994, 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:

- date of commencement of employment;
- full name and address of employer, and name of employee;
- the employee’s place of work;
- the job title or a description of the nature of the work;
- if a temporary or fixed-term contract, the expiry date;
- pay, including overtime, commission and bonus, and methods of calculating these;
- whether pay is to be weekly, monthly or otherwise;
- the pay reference period;
- terms and conditions relating to hours of work and overtime;
- holiday or other paid leave entitlement;
- notice requirement;
- details of rest periods and breaks;
- details regarding sickness and sick pay;
- details of pensions and pension schemes; and
- reference to any applicable collective agreements.
The statement must be signed both by the employee and by the employer. It must 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.

Additionally, 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.

Fixed-term contracts are governed by the Protection of Employees (Fixed-Term Work) Act 2003 and provides that where 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 acquires 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.

A foreign employer will, however, be required to register for pay-as-you-earn (PAYE) income tax in Ireland where 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 the employees directly, and remit such amounts to the Revenue Commissioners. If, however, the foreign employer is engaging an independent contractor, it will be the independent contractor’s responsibility to pay the appropriate taxes, and not that of 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, at a minimum, an employer is required to provide its workforce with access to a Personal Retirement Savings Account if it does not have a pension scheme available to its employees within six months of joining their new place of work. There is also no obligation on the employer to make any contributions on the employee’s behalf.
V RESTRICIVE 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 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 Competition and Consumer Protection Commission 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 OWTA deals with maximum working hours and other matters related to working time. Pursuant to the OWTA, 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. The legislation does, however, 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 OWTA.

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 registered employment agreement (REA), SEO or an employment regulation order (ERO).

For those employees not covered by an REA, SEO or ERO that is still valid, they 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 OWTA provides that employers that require employees to work on Sundays are required to compensate them for so doing.
VII FOREIGN WORKERS

European Economic Area (EEA) nationals and Swiss nationals do not require employment permits to work in Ireland. There are different types of employment permits 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 to senior executives, key personnel or employees engaged in a training programme. Critical Skills Employment Permits can be granted to individuals earning €60,000 or more, or where the role is highly skilled and the applicant has a relevant third-level degree, between €30,000 and €59,999. General Employment Permits are also available in limited circumstances.

Most employment permits can be granted for an initial period of up to two years, after which time, they can be renewed, if required. A Critical Skills Employment Permit can only be granted for a minimum two-year job offer, after which the non-EEA national 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 expiration dates of employment permits 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.

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. In addition, a Code of Practice concerning grievance and disciplinary procedures in the workplace was introduced in 2000, 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 their dismissal.

Employers are not required to obtain the approval of employees regarding the preparation or implementation of disciplinary procedures, although agreement in relation to such matters will often be obtained where 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 such 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  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 2008, suggests that it may be prudent to make such documents available in different languages, depending on the circumstances. In **58 Named Complainants v. Goode Concrete Limited**, non-Irish employees contended that their contracts and safety documentation were defective on the basis that they were unable to understand them, and that this constituted discrimination. The Equality Officer found that the employees were treated less favourably than Irish employees in relation to their employment contracts. 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 did find 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.

There is no clear direction on exactly which documents are required to be translated or explained. The *Goode* decision, however, and common sense would dictate that this should be done in respect of employment 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’.

Where documents are not translated or explained to the employee, employers face the risk of discrimination claims where employees can be awarded up to two years’ gross remuneration.

X  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, both statutory and otherwise.

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12  DEC-E2008-020.
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 transfer of undertakings, collective redundancy situations or where 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 European Works Councils) (the 1996 Act), requires multinational employers of a certain size to set up European works councils to inform and consult with 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 EU 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 in order 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 with 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 for being a trade union member. Further, all of the above legislation specifically provides that no employee representative should be penalised for carrying out their function as an employee representative.

**XI DATA PROTECTION**

i  **General principles**

Issues regarding the keeping and disclosing of personal data relating to employees are governed by the GDPR and the Data Protection Act 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;
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;

keep the information accurate, complete and up to date;

ensure that the information is adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed;

retain the information for no longer than is necessary; and

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:

- the identity and contact details of the controller;
- the contact details of the data protection officer (if applicable);
- the purposes of the processing and the legal basis for the processing;
- the recipients or categories of recipient that personal data has been disclosed to;
- the safeguards provided by the employer if it transfers personal data to a third country or international organisation;
- the period for which personal data will be stored;
- the existence of the various data subject rights;
- the employee’s right to request rectification, erasure or restriction, or to object to such processing;
- the right to lodge a complaint with the Data Protection Commission;
- the existence of automated decision-making, including profiling (if applicable); and
- 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:

- data processing operations that, by virtue of their nature, scope and purposes, require regular and systematic monitoring of employees on a large scale; or
- 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, an external DPO or one shared by a group of organisations, provided
that they have the required expertise and that any other role that they may hold in the
organisation does not give rise to a conflict of interest with the DPO role.

Details of DPOs must be registered with the Data Protection Commission 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:

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 Data Protection Commission (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., where processing
of health data is required to assess the working capacity of the 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 Data Protection Act 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 also 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 by the employer to verify a prospective
employee’s background, it should be ensured that this 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 Data Protection Act 2018. As noted in subsection 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 Data
Protection Act 2018.
XII 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 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 where 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 matters connected with pregnancy or birth;
f making a protected disclosure under the Protected Disclosures Act 2014;
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 and paternity leave.

Where 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, minimum periods of statutory notice of termination must be given to an employee. 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 their 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 where 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. As a matter of contract law, the employee must receive something over and above what they might otherwise be entitled to in order for the settlement agreement to be enforced. The employee should also be advised in writing and given the opportunity to obtain independent legal advice in relation to the terms and conditions 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, in 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.

Where 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.

**XIII 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 EU, although the UK case *Holis Metal Industries Limited v. GMB & Newell Limited*\(^\text{13}\) suggests that they might also apply to transfers outside the EU or EEA, in respect at least of the obligations of the party to the transfer located within the EU. 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 scenario cannot be underestimated.

Transfer is defined as ‘the transfer of an economic entity which retains its identity’. Where 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 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 pre- and post-transfer is similar.

Where a transfer is taking place, it is important that the transferor and transferee take steps to ensure that the employees are informed in advance of the transfer. 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

\(^{13}\) [2008] ICR 464.
at least 30 days in advance of the transfer, where possible, to enable the representatives to be consulted with 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 where 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.

XIV OUTLOOK

It is expected that the economy will continue to improve, with employment levels continuing to steadily rise and job losses decreasing.

The national minimum wage was increased from €9.55 to €9.80 from 1 January 2019, as part of the 2019 Budget.

The Employment (Miscellaneous Provisions) Act 2018, which aims to protect low-paid and vulnerable workers by effectively banning zero-hour contracts and bringing in banded contract hours, is expected to come into operation in March 2019. Zero-hour contracts are currently governed by the OWTA and provide that an employer does not have to provide minimum (or any) working hours to an employee, but the employee must be available for work for a certain number of hours per week. This Act will amend the OWTA to prohibit zero-hours contracts in most circumstances, unless it is genuinely casual work, emergency cover or short-term relief work.

Two proposed bills on gender pay gap reporting are currently working their way through the Irish legislative process. However, it is expected that only one of these, the Gender Pay Gap Information Bill, will be progressed and ultimately enacted into law. This bill proposes to initially require publication of gender pay data in both public and private sector entities with over 250 employees. This threshold will gradually fall to just 50. Employers will be required to publish differences in hourly pay, bonus pay, part-time pay, and pay of men and women on temporary contracts. The precise mechanisms to collate and process gender pay data and the penalties for breach are yet to be determined. This bill is still early in the legislative process and is likely to be subject to further amendments.

The Parental Leave (Amendment) Bill 2017 is also currently making its way through the Irish legislative process. At the time of writing, the bill proposes to extend the parental leave entitlement to 26 weeks (six months) in respect of each child. If passed, the additional eight weeks provided for under the legislation will be made available to those parents who have already availed of the existing 18-week entitlement. The bill also proposes to increase the age of the child up to which parental leave can be taken from eight years to 12 years. There is also a proposal to introduce a new parental benefit scheme from November 2019. Legislation will be required to set out the full terms of this scheme. Once introduced, the scheme will allow employees to take two weeks’ paid parental leave for each parent of a child in their first year. The government proposes to increase this to seven extra weeks over time.
Chapter 24

ISRAEL

Orly Gerbi, Maayan Hammer-Tzeelon, Nir Gal, Marian Fertleman and Keren Assaf

I  INTRODUCTION

The employment law framework in Israel is derived from several 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. Where several legal sources apply to an employee, the one that is most beneficial governs.

The primary means for resolving employment disputes are through 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 by 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

Shortening of the working week

Pursuant to a collective agreement, which was extended to the entire market by way of an extension order, effective as of April 2018, the length of the working week has been shortened by one hour (from 43 hours to 42 hours). The day of the week that is shortened by one hour is determined by the employer, according to its needs, and insofar as possible taking into account the employees’ requests and needs.

Following the amendment, an employee who is required to perform work that exceeds the duration of the shortened day owing to the employer’s business needs, will be entitled to receive overtime payment for the hour lost. To reflect this, the government increased the amount of overtime that employees may perform per week, from 15 hours to 16 hours.

1 Orly Gerbi is a senior partner, Maayan Hammer-Tzeelon and Nir Gal are partners, and Marian Fertleman and Keren Assaf are senior associates, at Herzog Fox & Neeman.
Employees who, prior to the entry into force of the extension order, worked 42 hours or less per week, will not be entitled to an increase in their salary or any other change in the terms of their employment owing to the shortening of the working week.

**Strengthening employees’ right to rest periods**

The Hours of Work and Rest Law 5711–1951 (the Hours of Work and Rest Law) was further amended in June 2018, to, among other things, cancel the distinction between employees who observe the Jewish Sabbath and those who do not. Any employee (indiscriminately) may choose not to work on the weekly rest day. The amendment entered into force on 1 January 2019.

Under these circumstances, employees who do not wish to work on the weekly rest day are not required to provide an affidavit regarding their religion or declare that they observe the Jewish religion. According to the amendment, an employee whose employer requires that he or she work on the weekly rest day, or that intends to require such work, can inform the employer, no later than three days from the date of the requirement, that he or she does not agree to work then.

Likewise, employers within recruitment processes are forbidden from turning away candidates for the sole reason that they informed the employer upon their acceptance to work that they refuse to work on the weekly rest day, and the employer cannot require these candidates to commit to work on the weekly rest day as a condition for acceptance to the position.

The amendment does not apply to workplaces that are entrusted with maintaining public safety, or that are related to public safety, the hotel industry, the production or flow of electricity, or the existence or provision of essential services; or workplaces that have received a general permit issued by a committee of governmental ministers, in accordance with Section 12(B) of the Law.

Employers that intend to ask their employees to work on the weekly rest day, must inform their employees (including their existing employees) of this intention.

**ii Broadening of employee freedom of choice in relation to pension savings**

In an appeal in the matter of *Lilian Landsberg*, the National Labour Court furthered the trend towards eliminating, as far as possible, an employer’s involvement in its employees’ choices with respect to pension savings.

In this matter, it was determined that Section 20 of the Law for Supervision of Financial Services (Provident Funds) 2005 (the Supervision Law) expresses a fundamental principle in relation to pension savings, which is the full freedom of choice given to an employee to determine the type of pension product he or she prefers, the company that will manage the funds and the investment track in which the funds will be managed, without the employer being able to intervene in these decisions. Accordingly, employees are entitled to choose the manner in which their pension savings will be accrued, in accordance with, first and foremost, the Supervision Law.

According to the National Labour Court, the freedom of choice set out in Section 20 of the Supervision Law overrides the provisions of the Extension Order for Comprehensive

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Pension Insurance in the Market. Furthermore, just as the employer does not have to check what the employee does with his or her salary, it is also not allowed to interfere with what is done with the funds that it transfers to the employee's chosen pension arrangement. The National Labour Court further clarified that according to the provisions of the Supervision Law, not only is the employer not required to intervene in the employee's choice of pension insurance product, but its involvement in choosing the product (even where the employee requests not to be insured under a loss of earning capacity policy) may be considered as harming freedom of choice and amounts to a criminal offence punishable by one year's imprisonment or a fine.

Where the employer is involved in the choice of insurance coverage, it may harm not only the employee's autonomy but also his or her privacy. Thus, for example, it is possible that as a result of a health matter (not known to the employer), the pension insurer may refuse to provide cover to the employee or agree to do so only in return for very high premiums. The employee has no reason to provide an explanation to the employer about this and the employer has no right to block the employee's choice as a result.

III SIGNIFICANT CASES

i Ownership of a company Facebook page

Many companies manage active Facebook pages, which are usually managed by employees, and in some cases, by just one employee. When an employee is given complete independence and when matters are not clarified within a clear agreement, legal questions may arise, revolving around the ownership of the Facebook page and whether it belongs to the employer or the employee.

This question was brought before the Regional Labour Court in Tel Aviv in a case involving television show host Guy Lerer and The Zinor, a local television show, which broadcasts and commentates on internet clips. In order to determine the right of ownership (in this case whether Guy Lerer owned The Zinor Facebook page), the Labour Court set down a number of guiding questions to be examined, such as: who initiated the activation of the account and why; the degree of correlation between the account and the workplace; who bears the cost of managing the account; who participated in the management of the account in practice; was the account managed and operated in accordance with the employer's instructions and supervision; does the employment agreement include instructions as to the

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3 For context, a General Approval issued by the Minister of Economy based on Section 14 of the Severance Pay Law 5723-1963, provides for a unique arrangement (the Section 14 Arrangement), which will only be valid if it is specifically adopted by the parties, and complies with the required conditions specified in the General Approval, which include making the pension contributions at certain rates, in accordance with the Extension Order. According to the Section 14 Arrangement, the amounts accumulated in the severance fund of the employee's pension arrangement are paid in full satisfaction of the employer's statutory severance pay obligation (which is one months' salary, as at the time of termination, multiplied by the number of years of service) — that is, at the time of termination of employment, the employer is only required to release the amount accrued in the severance fund and is not be liable for any shortfall. However, under this arrangement, the employer undertakes that the amounts accumulated in the severance fund will be released to the employee in any event that the employment relationship comes to an end, including where the employee resigns (which would generally not entitle an employee to severance pay, other than in exceptional cases).

4 Judge Labour Dispute (Regional Tel Aviv) 46976-09-17 The New Channel 10 Ltd v. Guy Lerer (published in Nevo, 22 April 2018).
account; and does the workplace have a policy regarding the use of social media accounts. The Labour Court further held that none of these questions stand alone, and the answer to one does not necessarily indicate an overall conclusion; rather the answers to all of the questions will provide a complete picture.

After examining the above considerations in relation to the specific case, the Regional Labour Court reached the conclusion that the Facebook page should remain under Guy Lerer’s management.

ii  Employee mobile location reports

In the matter of Fischer Pharmaceutical Industries,5 which was recently heard by the National Labour Court, the Court deliberated an employer’s request to obtain location reports of an employee’s mobile phone, which was given to the employee by the employer for the performance of his position. This request was submitted as part of discovery, within a claim filed by the employee against the employer for various social benefits, including overtime hours.

The National Labour Court ruled in favour of the employer and accepted the request to obtain the mobile phone location report. In doing so, the Court distinguished between this matter and the Issakov ruling (in which the National Labour Court laid down the rules regarding privacy of employees in the workplace and on which the regional labour court mainly based its decision to reject the employer’s request). According to the Court, the Issakov ruling is relevant when the employer is interested in putting in place a practice that involves infringing the privacy of employees. However, in the scope of a discovery process, the employer’s right to discovery should be specifically weighed against the employee’s right to privacy.

Accordingly, and in the interest of balance, the Labour Court ruled that the location reports should first be provided to the employee, who may redact surplus information (i.e., information regarding his whereabouts for private matters). Thereafter, following the redaction of private information, the data should be provided to the employer.

iii  Email updates regarding personnel matters

The National Labour Court has recently ruled that an email sent by an employer to its employees regarding the termination of an employee’s contract constituted slander.6 In this matter, the employer sent an email to a number of company employees, following the termination of an employee’s contract, which included the employee’s name and a description of the disciplinary violations that led to her contract being terminated.

The Court held that the message constituted slander owing to its personal nature, the exaggerated and inaccurate nature in which it was drafted, and the potential distribution of the message. The Court ruled that the employer was required to pay compensation of 27,000 shekels for violation of the Prohibition of Defamation Law.

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According to the National Labour Court’s ruling, even if the message had been accurate, the email would have been considered slander, as its contents included information that could humiliate the employee. The National Labour Court emphasised that there is no public interest in publishing the information and, therefore, no defence applies.

iv Employer responsibility to accommodate employees with disabilities

In a series of rulings, the National Labour Court has shed additional light on the many open questions in relation to the implementation of the Equal Opportunities for Individuals with Disabilities Law 1998. In the matter of Copolac, the court discussed the scope of accommodation that an employer is required to make, and when this accommodation would be considered an excessive burden (as defined by law). In this matter, a production employee was injured at work. Following an absence, his physician informed the company that he can only work during certain hours, and can no longer lift heavy weights. As lifting was a large portion of his position, and as there were no alternative positions available, the company put him on unpaid leave until he would able to fulfil his position.

The National Labour Court ruled that employers have a positive and active obligation to create conditions that will enable the employment of employees with disabilities and their promotion at the workplace. The Court further ruled that accommodating employees with disabilities is not an act of kindness on the employer’s part, but rather a requirement that they revisit their structures, policies, norms and practices at the workplace.

In relation to the scope of accommodation that employers are required to make, the Court ruled that: the scope of possibilities for accommodation is unlimited; and employers must be able to demonstrate that they made sincere efforts to locate and provide the necessary accommodation to enable the integration of the disabled individual, otherwise they will be considered as having discriminated against the individual. Employers are expected to use the services of an expert to integrate individuals with disabilities, in order to ensure that they have explored all of the options.

The Court stated that there is no rule of thumb to determine what would constitute an excessive burden on the employer in this respect. This will be determined case by case by examining the cost of the accommodation; whether it is a one-off or ongoing cost; the number of employees at the workplace and the position of the employee in question; the meaning of the cost in relation to the size of the employer, its scope of activity and revenue cycle; whether the employer is from the private or public sector; whether the employee in question is a new or existing employee with an extensive length of service; any inconvenience or burden that may be borne by other employees; whether outside funding was sought; and whether the employer previously invested money for accommodation.

Even if an employer reaches the conclusion that it cannot practically implement the limitations prescribed by an occupational physician, it is expected to question its own conclusions and turn to a suitable professional before reaching a final decision.

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IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Generally, Israeli law does not require a written employment contract, subject to certain 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 them, 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 obligated to provide such 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 expiration, may entitle the other party 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 time, an employee would still be considered a regular employee for all intents and purposes. The minimum statutory written prior notice for a monthly employee 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 prior notice.

According to Labour Court ruling, during the probationary period the reasons for a termination may be examined in a more lenient manner.

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.

Generally, the engagement of individuals (whether as independent contractors or as employees) by a foreign company may create a permanent establishment exposure to that company in Israel. The main outcome of this exposure is that amounts attributed to the Israeli permanent establishment will be subject to Israeli corporate tax.

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8 Under the Prior Notice of Termination Law 5761-2001, a monthly employee is an employee whose remuneration for work is mainly paid on a monthly basis.

9 See, for example: ASK 56412-01-17 Kobi Shimoni v. Israel Railways Ltd (6 September 2017).
V RESTRICTIVE COVENANTS

Non-compete restrictions during and after the employment relationship are common in 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. 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.

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.

VI WORKING HOURS AND OVERTIME

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.

As mentioned in Section II.i, the Hours of Work and Rest Law was amended in April 2018, and in effect shortened the workday, which now consists of 8.6 hours per day on four weekdays and 7.6 hours a day on one workday 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 (not including overtime), and an employee must not carry out night work for more than one week in every two.

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.

Where a business operates a six-day working week, employees may work up to 12 hours’ overtime per week; and where a business operates a five-day working week, employees may work up to 16 hours’ overtime per week.

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 areas: 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, that is absent in Israel; and

b. his or her monthly salary shall not be less than twice the average salary in Israel (approximately US$5,500 per month).

An employer may employ an unrestricted number of foreign employees who do not require a permit. There is no limitation on the number of permits that can be applied for by the employer. However, the authorities will take into consideration the number of foreign employees employed by the employer compared to 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 employers employing foreign workers include providing medical insurance for the foreign employee, 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 which apply to any employee, except in certain cases, such as where the employee earns more than double the average salary in Israel.

GLOBAL POLICIES

There is no mandatory requirement for applying disciplinary rules. However, such 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 the 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, in order for disciplinary rules to apply to employees, the employees should consent to them, either explicitly or implicitly. It is recommended that the employer’s rules be accessible to the employees (such as on the employer’s 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 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, where 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 on whether or not 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 impact the employer’s ability to enforce them.

X EMPLOYEE REPRESENTATION

Employees are permitted, but not required, to establish a union if none currently 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 – 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 the following main rights with respect to unionisation:

a. a general right to enrol as members of a trade union and to authorise the union to act on their behalf;
b the law defends this right by prohibiting the employer from preventing any trade union representative from entering the workplace in order 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;

c 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.13 However, the Regional Labour Court in Tel Aviv ruled in the McDonald’s case,14 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 such allegations in good faith;15 and

d the trade union can also potentially declare a work dispute and initiate a strike (see below).

The law stipulates that the 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. The law, however, emphasises that this requirement does not obligate the employer to sign a collective bargaining agreement with the trade union, but rather solely requires the employer to negotiate with the union.

In workplaces in which collective relations are already established, the employer is obligated to negotiate with the representative trade union with respect to various specific employment matters, including the 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.

XI DATA PROTECTION

i Requirements for registration

The Privacy Law 5741-1981 (the Privacy Law) regulates the matter of databases and their registration. The Privacy Law defines a database as ‘a collection of data, maintained by magnetic or optical means and intended for computer processing’.

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’.

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13 Pelephone decision: New General Workers’ Union v. Pelephone Communications Ltd (2 January 2013) 25476-09-12. A motion to the HCJ was rejected.
15 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).
Under the Privacy Law, it is necessary to register a database if, *inter alia*, it:

- contains information on more than 10,000 individuals;
- contains sensitive information (see subsection iii);
- contains information about persons that was not provided by them, on their behalf or with their consent; or
- is used for direct mailing.

Human resource databases in workplaces are generally considered to include sensitive information and, consequently, should be registered according to the Privacy Law. In addition, no person may use the information in a registered database except for the purposes for which it was established.

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. On 8 May 2018, the Protection of Privacy Regulations (Data Security) 5777-2017 came into force. These Regulations establish a broad and comprehensive arrangement regarding the physical and logical protection of databases and their management.

### ii Cross-border data transfers

The export of data outside Israel from a database within Israel is regulated by the Protection of Privacy Regulations (Transfer of Information to a Database Outside the State Borders) 5761-2001. The regulations prohibit the transfer of data from a database in Israel 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 a database in Israel to a database abroad, even when the overseas law provides a level of protection that falls below that which is provided under Israeli law. The conditions include, for example, obtaining the individual’s consent to the transfer of the data and that the data is transferred to someone who has agreed to fulfil the conditions laid down in Israel.

In addition to the conditions, the regulations state that the owner of the database must ensure (by way of written obligation), that the recipient takes steps to ensure privacy of data subjects, and that the data shall not be transferred to any other person. Accordingly, onward transfer of information to a third party is not permitted, unless the owner of the database entered into a direct agreement with such third party, which includes, *inter alia*, the above requirements.

### iii 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, as encompassing types of personal information that are not specifically mentioned in the definition of data or sensitive data, all depending on the specific circumstances of the matter.

If the company maintains sensitive data by electronic means for processing, it is required to register a database.
Background checks

Candidate background checks must respect the individual’s right to privacy, and be reasonable, relevant, proportionate and carried out in good faith.

For publicly available information, there is no specific requirement for obtaining an individual’s consent. For 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 which types of offences or investigations it requires information on, and demonstrates that this is relevant for the position in the circumstances.

According to the Credit Information Services Law 5762-2002, an employer is entitled to receive a report regarding a candidate’s credit information from a licensed authority, for employment purposes where relevant to the position. There is only a need to notify the candidate if the employer decides, based on the credit report, not to hire him or her. However, it is expected that, on 12 April 2019, a new Credit Data Law (which was enacted in 2016) will come into force (the New Credit Law), which completely prohibits the employer from requesting or obtaining information regarding credit data and credit rating for purposes of employment, including through a questionnaire or declaration from the candidate. The New Credit Law also provides that the courts will have the power to oblige a person who requested or received credit data information in violation of the provisions, to pay the candidate compensation without proof of damage. The New Credit Law is expected to replace the 2002 law.

It is forbidden to request information regarding military and genetic profiles.

DISCONTINUING EMPLOYMENT

Dismissal

As a general rule, employers must exercise their right to terminate an employee’s employment in good faith, for valid reasons, 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 the 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. Israeli law prohibits the termination of certain groups of

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16 Valid reasons for dismissal may include poor performance, redundancy and disciplinary action.

17 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 (e.g., the employee being pregnant).
employees, such as pregnant employees; employees expecting to adopt, become 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;\(^{18}\) employees on army reserve duty;\(^{19}\) and employees on sick leave.\(^{20}\)

In workplaces where collective relations 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 to a social plan or rehire rights by law.

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 request 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:

- the employee was aware of the rights that he or she waived;
- the employee was presented with a clear and comprehensible account of the sums he or she received before signing the release;
- the release is clear and unambiguous; and
- the employee signed the release of his or her own free will and not owing to coercion by the employer.

ii Redundancies

As a general rule, Israeli case law requires an employer to inform and consult with 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.

\(^{18}\) Employment of Women Law 5714-1954; Ministerial approval is required for all the above-mentioned groups.

\(^{19}\) 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.

\(^{20}\) 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 utilising his or her accumulated sick leave.
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 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 with employees is only practical where an employee representative body exists and can therefore be consulted.

The obligation to inform and consult with employees does not detract from the employer’s general obligations with respect to the termination of employment, including holding personal hearings with each employee (see subsection i). Thus, employees whose contracts are terminated by reason of redundancy have the same personal rights as any other employee whose employment is terminated.

XIII TRANSFER OF BUSINESS

There are no regulations in Israel in the style of the Transfer of Undertakings (Protection of Employment) Regulations 2006. 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 such 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 recently issued an important ruling, 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.21

XIV OUTLOOK

As is clear from Sections II and III, employers in Israel are facing a range of new challenges as a result of increasing regulation, whether introduced by way of legislation, the extension of collective agreements to the entire Israeli market or from the impact of judicial decisions.

i  **Continued reinforcement of employee freedom of choice**

Following the *Landsberg* matter, as detailed in Section II.ii, which dealt with employee freedom of choice in relation to pension savings, we anticipate the further elimination of employer involvement in employees’ choices, both with respect to pension savings and in general, in order to strengthen employees’ freedom of choice with regard to matters relating to the workplace.

ii  **Continued expansion of employer accountability towards employees and contracted service providers**

In a series of court rulings, the courts have broadened employer responsibility and liability towards their employees and service providers. This responsibility has been demonstrated in the court requiring employers to make every effort to avoid the dismissal of employees with disabilities, and to diligently and actively try to locate alternative positions for employees being made redundant, especially when such employees are close to retirement age. This ruling has followed rulings in other areas of employment, such as towards service providers, and the labour courts’ decisions to broaden the scope of duties of the actual users of services, towards the contractors’ service providers.

We expect that this trend will continue, as the labour courts believe that employers have an increased duty of good faith to their employees within the context of employment relations.

iii  **Continued amendments to the Hours of Work and Rest Law**

The year 2018 saw many amendments to the Hours of Work Law, which was originally enacted in 1951. We anticipate that the law will continue to undergo amendments, to strengthen the right to rest times in general, and specifically the weekly rest.

iv  **Increased protection for employees in cases of workplace bullying and harassment**

The passing years have highlighted a growing trend to prevent general abuse in the workplace (as distinct from abuse related 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 obligated to take reasonable action in order to prevent abuse in the workplace, such as define 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 owing to an offensive work environment. The court stated that an employer
is obligated to provide a suitable work environment for its employees. The court described a pressured, 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 are the fact that the employees did not have clear working hours and that there was a high turnover of employees (owing to their inability to handle the work conditions).
Chapter 25

ITALY

Raffaella Betti Berutto

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 play 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:

- minimum content of the hiring letter;
- duration of probationary periods;
- holidays, working time and overtime;
- sick and maternity leave;
- disciplinary matters;
- minimum salary and other employment-related benefits;
- termination and notice period;
- severance payments; and
- industrial relations.

They also indicate which specific aspects can be further negotiated at territorial and 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 related 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 less 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 (the provincial labour office, the local sanitary office, etc.) are responsible for compliance, such as with health and safety legislation, night work and overtime limits.

II YEAR IN REVIEW

In 2018 there was a significant reversal regarding the regulations applicable to dismissals of employees with open-ended contracts hired on or after 7 March 2015, and requirements for the lawful recourse to temporary work. This reversal is the result of a labour market reform (the 2018 Reform; see Section IV.i) introduced by the newly elected government, in office since 1 June 2018, and reflects the ideology of the Five Star Movement, which significantly contrasts with that of the former government.2

In particular, greater importance has been given to open-ended employment contracts by introducing considerable restrictions to temporary work (e.g., fixed-term contracts). Regarding the protections afforded against unfair dismissals, any form of automatic calculation of compensatory damages exclusively based on employees’ seniority has been declared unconstitutional (see Section III).

III SIGNIFICANT CASES

During 2018, the following notable cases appeared before the courts.

In Decision No. 194 rendered on 25 September 2018, the Constitutional Court declared unconstitutional the provision of Article 3 of Legislative Decree No. 23 of 4 March 2015,

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2 The Five Star Movement is a political party in Italy, whose ideology is considered populist and anti-establishment. It gained the largest number of votes in the 2018 general election.
according to which, regarding dismissed employees hired on or after 7 March 2015, the amount of damages is exclusively linked to the employee's length of service (i.e., two months' salary for each year of service, from a minimum of four up to a maximum of 24 months' salary). The Constitutional Court stated that this system of automatic calculation of compensatory damages contravenes the principles of equality and fairness, and is in breach of the provisions set forth by the European Social Charter, according to which the dismissed employee must be granted appropriate compensation. As a consequence, in cases of unfair dismissal of employees hired on or after 7 March 2015, the damages shall be determined by equity, taking into account, in addition to the employee's length of service, the size of the employer and the general behaviour and conditions of the parties.

In Decision No. 29,582, rendered on 11 December 2017 and published in 2018, the Civil Court of Cassation clarified that, as regards the liability arising from the breach of health and safety obligations in executing service agreements, the principal cannot be held automatically responsible for any injury caused to the contractor's personnel assigned to perform the services. Notwithstanding Legislative Decree No. 81 of 9 April 2008, which requires the principal to assess any risks that may arise if the contractor's services interfere with the ordinary business activity, the principal is required to refrain from controlling, managing and directing the performance of these services.

Decision No. 1853 rendered on 10 September 2018 by the Tribunal of Milan and Decision No. 778 rendered on 7 May 2018 by the Tribunal of Turin, ruled for the first time on the status of riders working for food delivery companies and in particular on the gig economy (or platform worker) model. The rulings held that riders working for the food delivery companies Foodora and Glovo were independent contractors and not employees, mainly on the ground that they were free to accept or refuse work. In addition, the type of control and supervision carried out by the food delivery companies was not compatible with the employee status. It has been clarified that food riders cannot be categorised as subordinate employees as they are not required to comply with minimum daily or weekly working hours (and food delivery companies are not required to guarantee a minimum number of working hours). Also, according to aforementioned tribunals, setting up a website where food orders are placed, organising work shifts, and checking when the riders log in to the app and where their starting points are, are signs of coordination activity rather than the exercising of a hierarchical power over the food rider.

IV BASICS OF ENTERING 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 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 to unilaterally 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.

In 2010, a very long and important process was commenced, aimed at encouraging and simplifying the use of 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.

Prior to the implementation of the above-mentioned laws, all fixed-term agreements could be executed without the indication of any cause, for a maximum overall term (including any extension up to a maximum of five times or renewal) of 36 months, unless otherwise provided for by the applicable national collective bargaining agreement. Following the 2018 Reform, the 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; and 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, inter alia, with respect to the hiring of employees:

a for a start-up activity for the duration established by the NCBA; 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 contract’s expiration 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 scenario, 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 good standing certificate 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 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 after the termination of the 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 or after the hire.

Under Article 2,125 of the ICC, the non-compete covenant:

- cannot be for a term exceeding three years for employees and five years for executives;
- 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
- must provide for consideration.
The employer is free to choose whether to pay such consideration during or at the end of the employment relationship. If paid during employment, the consideration usually amounts to 15 per cent to 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 30 per cent to 40 per cent of the last annual salary multiplied by the years of non-competition and it 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 over a period not exceeding one year. This allows employers to exceed the standard working time in certain periods of the year and to reduce it through an offset in other periods, 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 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 over 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

In Italy, employers 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 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 from 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, however, 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 the 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 EU) have been enacted to ensure more control and better protection for posted employees. In Italy, the Directive has been implemented by the 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, as well as 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), the 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, the 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 employees are aware of and understand the code. 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  TRANSLATION

There is no legal obligation to translate employment documents into Italian or the employee’s native language. However, it is recommended for employers to make employees 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 case of 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 the unenforceability of 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.

X  EMPLOYEE REPRESENTATION

In Italy, 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 the 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 a majority of employees entitled to vote cast their votes. 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 the employer has to comply with. Among others, the Workers’ Statute prohibits the 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, collective agreements also provide for the ongoing obligation of the employer to inform and consult with works councils over specific matters.

XI DATA PROTECTION

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 controller’s duties is to appoint a data protection officer (DPO). The 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 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 (in this latter case, 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:

- the identity and contact details of the controller and, for controllers established outside the European Union, of the controller’s representative;
- the contact details of the DPO, where applicable;
- the purposes for processing the data as well as the legal basis for processing, including the legitimate interests pursued by the controller or by a third party;
- the recipients or categories of recipients of the personal data, if any;
- 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 lawfully carry out the transfer and the means by which to obtain a copy of them or where they have been made available;
- the period for which the data will be stored, or if that is not possible, the criteria used to determine that period;
- the data subject’s rights;
- 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;
- the right to lodge a complaint with a supervisory authority;
- whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data; and
- 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, inter alia, when the data is necessary for the performance of a contract to which the data subject is party; when the data is necessary for compliance with a legal obligation to which the controller is subject; or when the data is necessary for the purposes of the legitimate interests pursued by the controller or by a third party.

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 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 and free. 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 some 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 in order to establish, exercise or defend legal claims.

The transfer of data to third countries is, however, always allowed if the 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.

There are also restrictions on background checks. From both a privacy and a labour
standpoint background checks may only be carried out provided that:

\( a \) the purposes of the investigation are previously 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 there are laws
or regulations authorising its processing.

**XII DISCONTINUING EMPLOYMENT**

**i Dismissal**

Subject to limited exceptions, employees may only be dismissed with cause. This may consist
of a just cause or of justified reasons for dismissal. 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 for termination, which is
payable upon termination regardless of the reason of the termination; the \textit{pro rata} amounts
of the 13th 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 reasons), such as failure to comply with the employer's
instructions, repeated unjustified absence from work or, in the event of reorganisation
(objective justified reasons), abolition of a job position arising out of a reorganisation
(Article 2118 ICC). When dismissed for a justified reason, the employee is entitled to notice
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.

ii Dismissals based on discriminatory reasons or in breach of other mandatory provisions
Regardless of the hiring date and the number of employees, if the dismissal is based on discriminatory reasons, 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 employers shall be subject to reinstatement of the employee and payment of damages equal to the salary accrued from dismissal until reinstatement (a minimum of five months’ salary).

iii Disciplinary dismissals
Regardless of the hiring date and provided that the employer is staffed with more than 15 employees, if the court ascertains that the 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 the applicable collective agreement.

In any other cases where disciplinary dismissals are deemed unlawful (e.g., the 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 upon 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 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.

iv Economic dismissals
In case of dismissal based on an economic reason, and provided that the employer is staffed with 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 subject to reinstatement and payment of damages up to 12 months’ salary. Otherwise, in the event that the court does not intend to apply the aforesaid sanctions, or the lack of the organisational or business reason is not straightforward, the employee will be entitled to damages only, ranging 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 subject to pay compensation in compliance with the criteria set forth by the 2018 Reform (see subsection iii).

If the employer employs 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 ranging 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.

The employee must challenge the 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. While they are also not entitled to reinstatement in case of dismissal 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.

v 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 from receipt of the notice to request a detailed explanation of the need for redundancies and to discuss possible alternative solutions.

If within 45 days of receipt of the notice an agreement with the unions is not reached, 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:

- the positions to be made redundant;
- the possible relocation of employees to other business units;
- the possible redeployment of employees;
- the possibility of entering into a government-funded job saving scheme;
- the provision of an enhanced severance payment to mitigate the effect; and
- 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 within 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 in the five-redundancies threshold.

XIII  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 according to a special waiver procedure. The transfer of business does not in itself represent a justified reason for dismissal. Employees that have suffered a material change as a result of the transfer may resign for cause within three months from 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 the transfer of business entails a change of employer, including the case of transfer of a going concern and merger. Special rules apply in the case of a bankruptcy, insolvency or winding-up of the company transferring the business.

Subject to certain requirements, the transfer of business is conditional on a previous information and consultation procedure to be complied with by the transferor and transferee 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 the claim with the competent employment tribunal within the subsequent 180 days.

XIV  OUTLOOK

The principal aim of the 2018 Reform is to ensure the stability of employees’ jobs by reverting to the previous labour market inspired by labour flexibility. As a result, more restrictions will be imposed on employers, reducing their flexibility in managing employment relationships in accordance with their business needs. However, as the Reform has only recently been implemented, the outlook for 2019 with regard to employment law is uncertain.
Chapter 26

JAPAN

Shione Kinoshita, Shiho Azuma, Yuki Minato, Hideaki Saito, Hiroaki Koyama, Keisuke Tomida, Emi Hayashi, Tomoaki Ikeda and Momoko Koga

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) was enacted in 2007 and 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) 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 sex. Employees’ rights are also expanded by other laws, such as the Child Care and Family Care Leave Act and the Part-time Employment Act (PEA). In addition, the Worker Dispatch Act (WDA) enacted in 1985 and amended in 1999 extended the scope of occupations that were covered under the worker dispatching system. As a result, the worker dispatching system was considered a social problem, so the WDA was amended in 2012 and in September 2015.

Each labour law has a different supervision and conflict-resolution system, so the overall system is complicated. The LUA stipulates the Labour Relations Commission system. 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.

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 such disputes. Local labour departments (governmental agencies) also conduct mediations to settle such disputes.

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1 Shione Kinoshita, Shiho Azuma and Yuki Minato are partners, and Hideaki Saito, Hiroaki Koyama, Keisuke Tomida, Emi Hayashi, Tomoaki Ikeda and Momoko Koga are associates, at Dai-ichi Fuyo Law Office.

2 The Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment.

3 The Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave.

4 The Act on Improvement, etc. of Employment Management for Part-time Workers.
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

On 29 May 2018, the Work Style Reform Act was enacted. This Act mainly sets forth the following two areas: correction of working long hours; and improvement of working conditions for irregular workers.

Regarding correction of working long hours, the Work Style Reform Act introduced new regulations regarding the maximum limitation of overtime working hours under a labour management agreement with criminal liabilities. The new regulations will become effective from 1 April 2019. Under the new regulations, the maximum limitations on overtime working hours 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.

Regarding improvement of working conditions for irregular workers, 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 employment management 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 a 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 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 dispatched workers, the WDA has been amended to improve their working conditions. Under new regulations, certain methods based on a labour-management agreement must be agreed between a staffing company and the representative of its dispatched workers. These regulations will become effective from 1 April 2019.

As explained in Section III, the Supreme Court issued two important decisions on 1 June 2018 with regard to Article 20 of the LCA. Many decisions were also issued in district courts and appeal courts with regard to Article 20. 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.

III SIGNIFICANT CASES

There were three noteworthy cases of the Supreme Court in 2018, two of which relate to fixed-term employment. The main legal issue under these two cases was, in a situation where employment conditions for a fixed-term employee are different to those for an open-term employee and where both employees are hired by the same employer, whether the conditions for the fixed-term employees are regarded as 'unreasonable labour conditions' under Article 20 of the LCA.
Nagasawa Unyu case (1 June 2018)

The plaintiffs were truck drivers who terminated their employment contract because they reached the retirement age (60). Just after the termination, they were hired as fixed-term employees by the same employer. The plaintiffs argued that their salary as fixed-term employees was approximately 20 per cent lower than their salary before they reached retirement age and they were not receiving the same allowances as regular employees, and that this should be regarded as unreasonable labour conditions.

The Supreme Court first held that the nature of the regular employees' work and that of contract employees' work was the same, and that the skills required for their work was the same.

Employment conditions, such as the amount of wages, are substantially affected by negotiations between employers and employees. Therefore, the history of these negotiations should be considered as 'other circumstances' under Article 20 of the Employment Contract Act. The following are underlying facts for considering the wages system for re-employed employees: (1) the wage system for regular employees was based on the assumption that the company would employ those regular employees for a long time whereas employees who retired from the company and were then rehired were not likely to be employed for a long period; and (2) re-employed employees who were below the retirement age received the same wages as regular employees until they reached retirement age, when they would receive the old age pension provided they satisfied certain conditions. Therefore, the fact that the plaintiffs were re-employed employees should be considered as ‘other circumstances’ under Article 20 of the Employment Contract Act.

To judge whether the differences in working conditions (such as wages or allowances) between fixed-term employees and regular employees are unreasonable, the reasons for the differences should be considered, in addition to comparing the total amount of wages and allowances of both types of employees.

Based on the above, the Supreme Court judges decided the following in respect to the differences in working conditions in this case.

<table>
<thead>
<tr>
<th>Differences (i.e., allowances only paid to regular employees)</th>
<th>Violation of Article 20 of Employment Contract Act</th>
<th>Reasons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Difference in respect to salary and productivity incentive*</td>
<td>No violation</td>
<td>(1) The total amount of the basic salary and percentage fee for the fixed-term employees was only between 2% and 12% lower than the total amounts of the basic salary, incentive salary (which is calculated based on the type of truck the employee drives and the hours he or she works) and productivity incentive (a fixed allowance that depends on the type of truck); (2) the fixed-term employees were re-employed employees and could receive the old age pension by satisfying certain conditions; and (3) the fixed-term employees will receive equalisation payments until they start receiving the proportional part of the old age pension corresponding to the amount of salary.</td>
</tr>
<tr>
<td>Regular attendance allowance</td>
<td>Violation</td>
<td>There was no difference in the content of the work of the fixed-term employees and the regular employees. Therefore, it was not necessary to incentivise only the regular employees by paying this allowance.</td>
</tr>
<tr>
<td>Housing allowance</td>
<td>No violation</td>
<td>There was a wide spectrum of ages among the regular employees that did not exist among the fixed-term employees, and it is reasonable to pay costs or expenses for housing and living for families of regular employees.</td>
</tr>
<tr>
<td>Family allowance</td>
<td>No violation</td>
<td></td>
</tr>
</tbody>
</table>
Differences (i.e., allowances only paid to regular employees) | Violation of Article 20 of Employment Contract Act | Reasons
--- | --- | ---
Bonus (five times the basic salary) | No violation | In light of the fact that (1) the fixed-term employees were re-employed employees who were receiving the retirement fee, as well as the old age pension, and the equalisation payment (a monthly allowance paid to re-employed employees by the company); and (2) the salary for fixed-term employees is supposed to be approximately 79% of their salary before retirement.

* Regular employees receive the basic salary (fixed amount), incentive salary and productivity incentive, whereas fixed-term employees only receive the basic salary and a percentage fee, but do not receive the incentive fee and productivity incentive.

ii Hamakyorex case (1 June 2018)
The main issue in the Hamakyorex case was similar to the Nagasawa Unyu case: whether the difference between regular employees’ salaries and those of fixed-term employees should be regarded as unreasonable working conditions. The Supreme Court held that the content of the regular employees’ work and that of contract employees’ work is the same, while the range of utilisation of human resources between them is different. Based on this, the Supreme Court judges decided the following in respect to the differences in working conditions in this case.

Differences (i.e., allowances only paid to regular employees) | Violation of Article 20 of Employment Contract Act | Reasons
--- | --- | ---
Housing allowance | No violation | Regular employees may need to relocate for a permanent position.
Regular attendance allowance | Violation | There is no difference in the content of the work (i.e., driving) and the need to encourage regular attendance.
Clean driving licence allowance | Violation | There is no difference in the content of the work (i.e., driving), and the need to drive safely and prevent accidents.
Special work allowance | Violation | The company pays this allowance to all regular employees regardless of their tasks. In addition, the nature of the work of regular employees and fixed-term employees is the same – there is no ‘special work’ subject to this allowance.
Meal allowance | Violation | The need for meals is the same for regular employees and fixed-term employees. Further, work shifts are the same for regular employees and fixed-term employees.
Commute allowance | Violation | The cost of the commute is the same, regardless of whether the employee's contract is regular or fixed-term.

iii Ibiden case (15 February 2018)
The Supreme Court decided that the lack of response of a parent company to the request for consultation from an employee of an affiliated company does not constitute violation of the duty based on the principle of good faith and mutual trust. In this case, the parent company established a compliance system for its affiliated companies and had a help desk through which it could deal with consultation requests from its employees.

X, a contract employee working at an affiliated company of Ibiden, was repeatedly asked to go on a date by A, an employee of another affiliated company of Ibiden working at the same workplace, who also burst into X’s home. X resigned because of A’s behaviour. At the time of A’s actions, Ibiden was in the process of establishing its compliance system, which includes a code of conduct for employees to ensure compliance with the laws of Japan and other countries, articles of incorporation, internal rules and company ethics. Over eight months after A’s actions, an employee of one of Ibiden’s affiliated companies made a request for consultation with Ibiden on X’s behalf. Ibiden, via its affiliated company, ultimately only interviewed A because it was notified that there was no evidence to support X’s claim. X then
sought compensation from Ibiden for damage arising out of A’s violation of duty under the principle of good faith and mutual trust, by virtue of non-performance of obligations and tort liability.

The district court dismissed X’s claims because there was no evidence showing that A carried out the alleged actions. The appeal court overturned this decision.

The Supreme Court found that because Ibiden had established its compliance system, if an employee who has suffered as a result of a violation that took place at one of the affiliated companies or if an employee requests a consultation, Ibiden has a duty under the principle of good faith and mutual trust to appropriately deal with complaints or requests from employees, and to take necessary measures in accordance with the compliance system. However, the Court also found that Ibiden’s lack of response to X’s request for consultation (including a lack of investigation into the request) did not constitute violation of the aforementioned duty for various reasons, including the following:

a) there are no facts to suggest that, as part of the compliance system, all the requests submitted to the help desk must be resolved;
b) X’s request for consultation with Ibiden related to actions that occurred outside the workplace and out of working hours, and was not directly related to A’s performance at work; and
c) at the time of the request for consultation, X no longer worked at the same place as A and over eight months had passed since the alleged actions of A were conducted.

IV BASIC OF ENTERING 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 its work rules stipulating reasonable working conditions and has informed its employees of the work rules, the contents of an employment contract shall be based on the working conditions provided by the work rules without any consent of the job applicant. A job applicant and an employer may enter into or change, by agreement, an employment contract that includes working conditions different from those under the work rules. However, any parts of an employment contract that stipulate working conditions that do not meet the standards established by the work rules shall be invalid. In this case, the invalid portions shall be governed by the standards established by the work 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 conditions before or upon entering into the employment contract. The employer can fulfil this requirement by giving the applicant a written employment contract or by providing a copy of its work rules.

Fixed-term employment is lawful, but the term cannot be longer than three years, except in limited circumstances.

5 Such as wages, working hours, term of contract, workplace and the nature of the work.
6 Article 15, Paragraph 1 of the LSA.
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 work rules. Generally, probation periods range from one to six months and a typical probationary period is three months. Extremely long probationary periods will be void because of 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 the employee. This means that an employer is required to show a lack of fitness of its employee based on facts (e.g., low job-performance ratings and unsatisfactory attitudes) in order to properly exercise its reserved cancellation rights.

iii  Establishing a presence

Whether a foreign company is required to register will be decided based 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 continuously operate its business in Japan, it must register with the relevant legal affairs bureau. In this case, while the foreign company does not have to establish its 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 continuously operate its business 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, for example provided that the contractor is 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 work 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 work rules, both setting 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 work 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

Where 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 that represents the majority of employees at a workplace, and then notify the relevant government agency of the agreement.9

As stated in Section II, the Work Style Reform Act will become effective on 1 April 2019. Under the new regulations, even if a labour-management agreement is executed, the overtime hours will, in principle, be capped at 45 hours per month and 360 hours per year. It will be possible for employers to have employees work more where special circumstances exist based on the labour-management agreement. However, even under these special circumstances, the maximum limitations on overtime working hours 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.

Exemptions to statutory working hours

The LSA stipulates certain modified working-hour systems, such as flexitime and annual, monthly or weekly modified working-hour systems. Under these systems, an employer may require its employees to work beyond the statutory working hours to the extent permitted by law.

7 Article 32 of the LSA.
8 Article 119, Paragraph 1 of the LSA.
9 Article 36 of the LSA.
Exemption for managers

Further, certain employees, such as those in management, are exempted from the regulations on statutory working hours.\textsuperscript{10} This means that an employer may require the exempted employees to work in excess of the statutory working hours without entering a labour-management agreement.

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.

\begin{center}
\begin{tabular}{|l|c|}
\hline
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 late at night (between 10pm and 5am) & 25\% \\
Work late at night in excess of statutory working hours & 50\% \\
Work late at night in excess of statutory working hours exceeding 60 hours in a month & 75\% \\
Work late at night on statutory days off & 60\% \\
\hline
\end{tabular}
\end{center}

Employees who are exempted from the regulations on statutory working hours (e.g., employees in management) are entitled to a minimum premium of 25 per cent for work late at night (between 10pm and 5am). However, such employees are not entitled to receive the other premiums.

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 employees as a basis for engaging in discriminatory treatment concerning certain working conditions, such as wages and working hours.\textsuperscript{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 the person's information, such as name, resident status and date of birth. The employer is also required to give notice to a relevant job-placement office in the case 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 residence status and period of stay in Japan will be determined. The foreign national can conduct activities within its resident status. The foreign national can only reside in Japan for his or her period of stay as approved.\textsuperscript{12}

\textsuperscript{10} Article 41 of the LSA.
\textsuperscript{11} Article 3 of the LSA.
\textsuperscript{12} Article 12 of the LSA.
of stay. A foreign national who wishes to continue conducting the same activities in Japan with his or her current resident status beyond the period of stay must apply for an extension no later than the last day of the period.

As mentioned in Section IV.iii, there are four types of insurance that are obligatory for employers in Japan. This insurance also covers 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 from employment in Japan).

VIII GLOBAL POLICIES

The adoption of work rules is mandatory for any employer who hires 10 or more employees on a continuing basis. This employer must submit its work rules to the relevant local LSIO. When establishing its work rules, an employer must hear an 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 at a workplace. When submitting its work rules to the relevant local LSIO, the employer must attach a document stating the opinion.

The work rules must include the following information:

- **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).

Work rules must also cover the following if the employer has a policy relating to 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 injury or illness outside the course of employment;
- **g** commendations and sanctions; and
- **h** other matters applicable to all employees at the workplace.

The work rules must not infringe any laws and regulations or any collective agreement applicable to the workplace in question.

To amend work rules, the employer must request an opinion on its amendment from either a union or an employee (if there is no union in the workplace) that represents

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12 Article 89 of the LSA.
13 Article 90 of the LSA.
14 Items 1–3, Article 89 of the LSA.
15 Article 92 of the LSA.
the majority of the employees at the workplace. The employer and the employees may, by agreement, amend the work rules. However, if (1) the employer informs its employees of the changed work rules, and (2) the changed work 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 work rules; and the status of negotiations with a labour union or a representative employee), the employer may amend its work rules without the employees' consent.

IX TRANSLATION

When employing foreign workers, an employer is not required to provide the worker with relevant documents (e.g., work rules and 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 at a 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.

X 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 to 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.

XI DATA PROTECTION

i Requirements for registration

Data protection in Japan is governed by the Act on the Protection of Personal Information (APPI). The APPI 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 information. 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). 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.

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. 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.

A company must not, in principle, provide any personal data to any third parties without obtaining the prior consent of the person.

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 needs to delete personal data without delay. Also, a company must take necessary and proper measures for the prevention of leakage, loss or damage, and for other security control of the personal data. A company must exercise necessary and appropriate supervision over its employees to ensure the security control of the personal data.

ii Cross-border data transfers

A company must, in principle, obtain the prior consent of the person when it provides personal data to any third party. The same shall apply for cross-border transfer of personal data.

A company does not have to obtain the prior consent of the person in cases that are not regarded as the transfer of personal information to a third party. 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 APPI with regard to the handling of personal data.

16 Article 15, Paragraph 1 of the APPI.
17 Article 16, Paragraph 1 of the APPI.
18 Article 18, Paragraph 1 of the APPI.
19 Article 18, Paragraph 2 of the APPI.
20 Article 23, Paragraph 1 of the APPI.
21 Article 19 of the APPI.
22 Article 20 of the APPI.
23 Article 21 of the APPI.
24 Article 23, Paragraph 1 of the APPI.
25 Article 24 of the APPI.
26 The cases are stipulated in Article 23, Paragraph 5 of the APPI.
27 Article 24 of the APPI.
iii Sensitive data
The amendment of the APPI defines sensitive information 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 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. A company must not acquire sensitive personal information without obtaining the person’s consent to do so, except in certain circumstances.

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 applicants of its choosing, it may collect personal information about applicants (such as information related to their credit records), to a reasonable extent, as part of a background check. However, when collecting sensitive information, such as criminal records, an employer must obtain the applicant’s consent to do so.

The collection of sensitive information needs to be carried out by commonly accepted proper methods and care must be taken to respect applicants’ privacy.

XII 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’.

Cause for dismissal includes poor performance, repeated misconduct, serious misconduct, redundancy and medical incapacity. However, an employer’s right to dismiss its 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 right and be invalid.

Other laws (such as the LSA) set forth certain restrictions on dismissals, such as during maternity leave or medical treatment of work-related injury.

Where an employer wishes to dismiss its 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 less than 30 days, except under certain conditions. An employer is not generally required to give notice to a works council or trade union when the employer dismisses its employee.

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28 Article 2, Paragraph 3 of the APPI.
29 Article 17, Paragraph 2 of the APPI.
30 Article 20 of the LSA.
Based on its work rules, an employer may dismiss its employee because of a disciplinary action (punitive dismissal). In a case of punitive dismissal, courts will judge the validity of the dismissal pursuant to Articles 15 and 16 of the LCA.31

ii Redundancies

As mentioned in subsection i, the validity of the redundancy is also judged by whether it lacks objectively reasonable grounds and whether it is considered to be appropriate in general societal terms. 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 redundancies were reasonable and redundancies were fairly carried out.

d Reasonable process: the employer conducted sufficient consultations with its employees and labour unions.

XIII 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 a case of asset transfer, 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 validly transfer their employment contracts to the purchaser. The employees may decide whether they continue working at their current employer, so there is no specific Japanese labour law to protect employees affected by asset transfer.

iii Company split

In a case 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

31 Article 15 of the LCA 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.’
sets forth general procedures for the company, the Labour Contract Succession Law regulates the transfer of employment contracts in a company split because of the impact of the split on employees.

XIV OUTLOOK

The most important issue regarding employment in Japan is the reduction in the labour force as a result of the declining birth rate, ageing society and a declining population. To solve this issue, the Diet is discussing the amendment of the Immigration Control Law to accept more foreign workers from other countries. It is expected that the status of residence for foreign workers will be expanded to unskilled labour, such as construction work.

However, it is recognised that there are human rights issues regarding foreign workers who come to Japan with foreign trainee or technical intern visa status. Among other things, working conditions are very poor and workers are not allowed to change their job under these visas. In addition, many foreign students obtain a student visa to come to Japan for work and not for study. As the country is experiencing a labour shortage, chain stores (e.g., convenience stores and restaurant chains) cannot continue their operations without foreign workers, most of whom are students. Despite the requirement for labour, it is generally argued that these issues must be dealt with before accepting more foreign workers into the country.
Chapter 27

LUXEMBOURG

Annie Elfassi, Emilia Fronczak and Florence D’Ath

I INTRODUCTION

Luxembourg employment law is mainly based on:

a. EU regulations;
b. the Labour Code;
c. special laws;
d. grand-ducal regulations implementing provisions of special laws;
e. agreements declared generally binding by grand-ducal regulations;
f. case law;
g. collective bargaining agreements and agreements resulting from multi-industrial social dialogues; and
h. custom and practices that may be relied on in specific cases.

The labour courts are competent to hear disputes between employers and employees. An employee can sue his or her employer in the court of the employer’s registered seat or where the employee habitually carries out his or her work. An employer may bring proceedings against an employee in the court where the employee is domiciled.

Actions are brought by way of a petition that the plaintiff must submit to the court, indicating:

a. the name of the parties;
b. the purpose of the legal action;
c. the points of contention; and

d. any arguments.

The parties will then be summoned to appear before the court. After the first hearing, the court will schedule a second hearing, during which the parties will set out their respective arguments. After examining the case, the court will issue its judgment. It typically takes between eight months and 18 months for a court to reach a first-instance decision.

Either party can appeal a labour court judgment within 40 days of the date on which the judgment is notified to the parties. Appeals are lodged with the court of appeal and will be sent to the chamber examining labour matters. The matter will be instructed in writing by

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the judge appointed to this effect, at which point the parties will be invited to a final hearing, during which they will present their arguments. After examining the case, the court of appeal will issue its judgment.

The Court of Cassation is at the apex of the judicial pyramid. Its main function is to review decisions of the courts of appeal and certain other decisions that are not subject to any further appeal. Review by the Court of Cassation is restricted to questions of law. In case of reversal, the court must remand the case for further proceedings.

The following institutions and government agencies assist in the administration or oversight of employment law:

a The Labour and Mines Inspectorate is in charge of monitoring standards of health and safety for employees in all sectors of industry and ensuring the implementation of the legislation relating to the working conditions (wages, working hours and holidays), employment of children and teenagers, equal treatment of men and women, as well as protection against sexual harassment in the workplace. The Labour and Mines Inspectorate is also in charge of monitoring the election of employee representatives and responsible for the prevention and resolution of disputes that do not fall within the competence of the National Conciliation Body.

b The Employment Administration, whose main role is to register unemployed persons as job seekers and to seek work for them.

c The National Conciliation Body, which is in charge of preventing or resolving collective labour disputes.

II YEAR IN REVIEW

On 1 January 2018, the duration of certain types of special leave were amended or abolished. For example:

a paternity leave was increased from two working days to 10 working days, to be taken immediately after the birth of the child;

b adoption leave was increased from two working days to 10 working days for the adoption of a child under the age of 16; and

c leave for an employee’s marriage has been decreased from six working days to three working days.

Articles L. 234-50 to L. 234-55 of the Labour code have been amended. In particular, family leave has been extended to 12 days for each child aged up to four years, and to 18 days for each child aged from four to 13 years.

Postnatal leave has been extended to 12 weeks for women who are not breastfeeding.

On 1 August 2018, Article L. 261-1 of the Labour Code regulating surveillance at work was amended to reflect the provisions of the EU General Data Protection Regulation (GDPR) (see Section XI).

Social elections have been postponed from October 2018 to March 2019.

New provisions on permits in favour of trainees were introduced on 1 August 2018, amending the Law on Immigration.
III SIGNIFICANT CASES

In a case of 31 May 2018, the Court of Appeal of Luxembourg\(^2\) ruled that an employer discovering emails sent by an employee to her husband detailing confidential matters of the company was not general monitoring of employees, and was legitimate to protect the company’s assets. The Court declared admissible the emails as evidencing documents in order to bolster the wrongdoings committed by the employee concerned and the fairness of the dismissal.

In a case of 12 July 2018, the Court of Appeal of Luxembourg\(^3\) held that the unilateral undertaking of an employer to maintain an employee’s salary during the notice period – even when the employee could find new employment – signed by an individual who does not have powers to bind the company, constitutes an ‘apparent mandate’, which in this case led the employee to believe that the accountant of the company, who signed the documents, had such powers.

In a case of 13 July 2018, the Labour Court of Luxembourg\(^4\) reiterated case law on the level of detail required for a letter of justification and considered that a letter notifying an employee of termination with immediate effect for gross misconduct must satisfy the same requirements to enable the employee to know the facts underlying the dismissal and to assess whether a court action must be brought against the employer. The Court ruled that it is not possible to invoke additional reasons that are not contained in the letter of termination. The Court then considered that termination with immediate effect was not appropriate with respect to the employee’s misconduct in this case, stating that a disciplinary sanction would have sufficed.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Employment relationships are essentially characterised through a legal link of subordination between the employer and employee. The employee must perform his or her duties under the authority and instruction of his or her employer. The employment relationship relies on the following:

- the provision and performance of effective work or services;
- compensation granted for the performance of work;
- the subordination of the employee to the employer; and
- the employer’s powers of direction and control over the employee.

A written employment contract is required regardless of whether the employment is entered into for an indefinite term or for a definite term. Employment contracts must be executed in writing and signed no later than the date on which work commences. Fixed-term employment contracts are permitted in certain circumstances. They may not be renewed more than twice and may not exceed 24 months, including renewals.

Employment contracts must contain the following minimum requirements:

- the names of the parties;
- the employee’s start date;

\(^2\) Court of Appeal, 31 May 2018, No. 43972 of the docket.
\(^3\) Court of Appeal, 12 July 2018, No. 2017-00015 of the docket.
\(^4\) Labour Court of Luxembourg, 13 July 2018, number 2740/2018 of the docket.
the place of performance of work;
d the employee’s function;
e the employee’s daily or weekly standard hours;
f the employee’s working schedule;
g the employee’s remuneration, including any benefits;
h paid holidays;
i the length of the employee’s notice period upon termination;
j the length of the employee’s probationary period, if any;
k any supplementary provisions;
l reference to the collective agreement, if any; and
m reference to the pension scheme, if any.

Additional implied terms should be inserted in employment contracts for part-time and fixed-term employment.

Even if there is no written employment contract, the employment relationship is deemed valid. However, in case of a dispute between the employer and the employee, the terms and conditions of employment may be brought in as evidence by the employee through any means.

Any substantial amendment to an employment contract that is detrimental to the employee will be deemed as a substantial modification to the terms and conditions of employment. Under Luxembourg law, employers may impose essential modifications to the detriment of an employee for real and serious reasons. The procedure to be followed is similar to that relating to dismissals (e.g., in terms of notification, notice periods, requests for grounds and the obligation to communicate the reasons for the substantial amendment).

Non-substantial amendments to an employment contract can be implemented through a written amendment to the existing employment contract and must be signed by both parties.

ii Probationary periods

Probationary periods are allowed, provided that a specific clause is inserted in the employment contract in this respect. The length of the probationary period depends on the employee’s qualifications and salary, and cannot be extended. Probationary periods may be between two weeks and 12 months.

During the probationary period, each party may terminate the employment relationship by giving notice and without providing a reason. Termination may not occur during the first two weeks of the probationary period, save for gross misconduct.

The length of the notice period during the probationary period depends on whether the latter is expressed in weeks or in months. If expressed in weeks, the length of the notice period shall be equal to one day per week. If expressed in months, the length of the notice period shall be equal to four days per month, with a minimum of 15 days and a maximum of one month.

iii Establishing a presence

According to the Law of 2 September 2011, as amended (the Business Licence Law) a written authorisation from the Ministry of Economy, Middle Classes and Tourism section (the Ministry) is required in order to carry out commercial, industrial or craft activities and certain independent professions. This authorisation is typically referred to as a business licence and is compulsory for both individuals and legal entities performing the above
activities. The purpose behind the business licence is to ensure that commercial businesses are adequately managed and avoid unqualified and inexperienced persons setting up badly managed businesses.

Commercial activity (e.g., sales of goods) is defined as ‘all the economic activities which involve performing commercial acts within the meaning of the Commercial Code’.

However, the Ministry exempts certain types of activity from the business licence requirement (e.g., ‘one-off’ transactions, financing activities by holding companies and transactions within a group of companies).

The Business Licence Law also requires each commercial company to have an appropriate establishment in Luxembourg from which the company’s activities are permanently and effectively managed. The establishment must be suitable for the company’s activities and must have sufficient infrastructure for the performance of these activities.

A business licence is not required for companies established within the territory of the European Union that perform services within Luxembourg occasionally or temporarily.

Companies wishing to perform activities in Luxembourg on a permanent basis that are established in one of the Member States and whose activities are exempted activities under the Business Licence Law, or other applicable laws, may hire employees. They may also engage independent contractors.

An independent contractor may, under certain circumstances and depending on the provisions of the applicable convention for the avoidance of double taxation between Luxembourg and the country where the foreign company is established, create a permanent establishment of the company. The Luxembourg domestic tax law follows OECD Model Tax Convention principles in this respect and refers to the concept of a permanent representative (i.e., an agent or employee who allows the company to carry on an activity in Luxembourg and who acts in lieu of the company that he or she represents).

In principle, under most of the conventions for the avoidance of double taxation, the existence of a permanent establishment requires a fixed place of work through which the company carries out its business. One of the key characteristics of an independent contractor is the authority to conclude contracts in the name of the company. In this respect, the decisive factor from a Luxembourg tax perspective is not the power of signature, but rather to know if the representative or employee binds the company by confirming a deal.

If the existence of a permanent establishment is recognised under a specific convention from a Luxembourg point of view, the profits and wealth attributable to the permanent establishment may be subject to taxation in Luxembourg.

Apart from the monthly remuneration, and any additional benefits in kind agreed upon between the company and the employees, there are no specific statutory benefits to be granted to employees. The company will have the obligation to register with the social security administration and deduct from the monthly remuneration social security contributions if the employees are subject to the Luxembourg mandatory state social security regime. It will also have to withhold tax from the monthly remuneration of the employees and pass on the withheld amount to the Luxembourg tax administration.
V  
RESTRICTIVE COVENANTS

Non-compete clauses are regulated by the Labour Code. In accordance with Article L.125-8 of the Code, in order to be valid, a non-compete clause must fulfil the following conditions:

a  it must be in writing;

b  it must apply only to employees who go on to run their own company after leaving their employer;

c  the employee signing the employment contract or any modification containing a non-compete clause must be at least 18 years old;

d  the employee must earn an annual salary of at least €55,517.30 (value based on Index 814.40) on the day that the employee leaves the company;

e  it must refer to a specific professional sector and professional activities that are similar to those performed for the former employer;

f  it must be limited to 12 months, beginning on the day that the employee’s employment contract ends; and

g  it must be limited geographically to Luxembourg.

VI  
WAGES

i  Working time

The normal working time is eight hours per day and 40 hours per week. The normal duration of work may be extended to a maximum of 10 hours per day and 48 hours per week, including overtime. Employees should be provided with a reasonable period for meals. Duty-free meal periods need not be paid. Employees must take a 30-minute break after every six working hours. Further, employees must rest for at least 11 consecutive hours over each 24-hour period.

Night work is work carried out between 10pm and 6am, and is limited to an average of eight hours per 24 hours over seven days. Night work is prohibited for adolescents during 12 consecutive hours, between 8pm and 6am unless duly authorised by the Labour Minister. Pregnant women and women breastfeeding their children, until the child’s first birthday, may refuse to work at night.

ii  Overtime

Generally, overtime must be paid for hours worked in excess of 40 hours per working week.

Since the introduction of new provisions in the Labour Code, overtime is limited to specific circumstances. Overtime will either be compensated with time off or be recorded in a savings account provided for by a collective agreement, an arrangement between social partners or an internal regulation such as a working hours plan.

If time off cannot be granted, overtime pay will be calculated at a rate of 140 per cent of the employee’s regular rate of pay.

Exemptions to the regulations on working hours are provided for certain sectors (e.g., home carers, agriculture, hotels and catering, healthcare and goods transport). Further, the regulations on working hours do not apply to:

a  river transport firms;

b  fairground establishments;

c  family-run enterprises;

d  teleworkers;
The reference period may be extended to a maximum of four months upon relevant information given and consultation with employee representatives, if any, or employees in the absence of employee representatives.

The provisions set appraisal criteria for overtime work within the framework of the reference period. It also provides for additional days of leave.

VII FOREIGN WORKERS

There is no specific provision that employers must keep a register of foreign workers. In principle, employers must keep a register of their employees (whether foreign or not) in respect of overtime work, and work on Sundays and legal holidays.

No express limitation on the number of foreign workers a company must have is provided for under Luxembourg law. However, employers must, under penalty of a fine, advertise all vacant positions before hiring a worker. This may be considered as a restriction as the Employment Administration may argue that it has found suitable candidates for the job offer as declared. Moreover, the Employment Administration imposes certain restrictions with regard to non-EU workers: the employer would be able to hire a non-EU worker only after the Employment Administration had a reasonable time frame to find a worker residing in Luxembourg who might be similar to the candidate researched by such employer and had issued a certificate.

In order to work legally in Luxembourg, a person must hold a temporary residence permit with the right to work. The Law on Immigration makes a distinction between EU citizens and third-country nationals. EU citizens, European Economic Area (EEA) citizens and Swiss citizens may freely perform work in the Luxembourg territory. They only need a valid passport or national identity card. For administrative purposes, EU, EEA and Swiss citizens must declare their arrival within eight days of entry into the country. Subsequently, if they wish to stay in Luxembourg for a period exceeding three months, they shall request within three months of arrival the issuance of a registration certificate, available at the town hall of their chosen place of residency.

Non-EU, non-EEA and non-Swiss citizens should obtain a residence permit for their employment in Luxembourg. Such residence authorisation is not necessary if they are a family member of an EU citizen already living in Luxembourg. The residence permit is valid for a certain period of time, and may be renewed if the legal requirements are satisfied. The residence permit is only granted if the employment of the foreign nationals does not harm the priority of employment benefiting certain employees pursuant to national and European legislation.

Such authorisation must also serve the economic interests of Luxembourg and the employee shall have the required professional qualifications for the position.

Foreign workers duly authorised to work in Luxembourg benefit from the same protection that local employees are entitled to under the legal provisions.
VIII GLOBAL POLICIES

Under Luxembourg law, there is no express requirement to have internal discipline rules within a company. The text of, or an amendment to, the internal discipline rules cannot be adopted by the employer before it has been submitted to the employees’ representatives, if any. The internal rules may only contain those disciplinary rules that are necessary to allow the coexistence of all employees and the proper performance of their work. The internal discipline rules must also be proportionate and in compliance with the Luxembourg legal provisions. The text of, or an amendment to, the internal discipline rules must be drafted into a language that is understood by the employees. To be enforceable against the employees, the internal discipline rules must expressly mention the date on which they will enter into effect and should have been notified to all employees. An express acknowledgment by the employees of the internal discipline rules should be sought by the employer to prove that the employees had knowledge of their content and the sanctions listed therein. They may be attached to the employment contract in case of a new hire.

IX TRANSLATION

Luxembourg has three official languages: French, German and Luxembourgish. There are no mandatory rules as to the specific language to be used in employment contracts. Parties may draft the employment contract in the language understood by them and specifically by the employee, who should be able to read and understand the terms and conditions of his or her employment contract.

In the event of court action, parties might be required to provide the court with a translation of the employment contract in one of the official languages. English versions are, in principle, accepted.

X EMPLOYEE REPRESENTATION

Employee representatives must be elected in companies employing at least 15 employees during the 12 consecutive months preceding the first day of the month that details of the election are published.

The number of employee representatives depends on the employee headcount.

Depending on the number of employee representatives, a certain number of alternates must be elected. The employee representatives are elected for five years and may be re-elected. The new elections will, in principle, take place in March 2019.

The employee representatives’ role is to preserve and defend employees’ interests in respect of employment conditions, health and safety, and social position. Their duty is also to prevent and resolve any individual or collective disputes as well as to put forward to the employer individual or collective claims and the application of the provisions of employment law and collective agreements.

Works councils have been abolished (under the old provisions, works councils were established in companies employing at least 150 employees). All the competencies of the works council will be taken over by employee representatives in companies hiring at least 150 employees.

Any company employing at least 150 employees is required to hold a monthly meeting with employee representatives.
Companies employing fewer than 150 employees are required to hold at least three meetings per year with employee representatives.

Employee representatives may meet once a month during the working hours by giving notice of at least five working days to the management of the company, unless a shorter notice has been agreed upon. They must hold meetings at least six times a year.

Employee representatives enjoy protection from dismissal. Employee representatives will, upon their dismissal, be able either to request the voidance of their dismissal and ask for their reinstatement (this option was already foreseen through the former statutory provisions) or claim compensation for damages for unfair dismissal, which is the new alternative employee representatives have in the event of dismissal.

XI DATA PROTECTION

i Requirements for processing

The Law of 2 August 2002 on the protection of persons with regard to the processing of personal data, as amended (the 2002 Law), does not require the data controller to register with the Luxembourg Data Protection Authority (CNPD), but requires the data controller to notify each instance of personal data processing. It may, therefore, be necessary for one data controller to lodge several notifications. The notification is mandatory, unless the processing is exempt from the obligation to notify.

The following, among others, are exempt from notification:

a The processing of data relating exclusively to personal data necessary for the administration of the salaries of persons in the service of or working for the controller, insofar as this data is used exclusively for the said administration of salaries and is only communicated to such persons as are entitled.

b The processing of data relating exclusively to the management of applications and recruitments, and the administration of the staff in the service of or working for the controller. The processing may not cover data on the health of the data subject, or sensitive or legal data and may not be communicated to third parties, except in the context of application of a provision of law or regulation, or if they are essential to achieving the objectives of the processing.

The obligation to notify each instance of personal data processing provided for by the 2002 Law no longer exist as of 25 May 2018 – the date that Regulation (EU) 2016/679 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 (the GDPR) became enforceable.

To compensate for the absence of mandatory notification, the GDPR introduces a new obligation, according to which each controller and, where applicable, the controller’s representative must maintain a record of processing activities as part of its responsibilities. According to the Law of 1 August 2018 on the organisation of the National Data Protection Commission and the general data protection framework (the 2018 Law), it is possible for the CNPD to require from the controller any information necessary for the CNPD to assess whether the processing is compliant with the GDPR, and may request to consult the controller’s record of processing activities. In accordance with the GDPR this obligation to maintain a record of processing activities does not apply to small enterprises or organisations employing fewer than 250 people, unless (1) the processing it carries out is likely to result
in a risk to the rights and freedoms of data subjects; (2) the processing is occurs frequently; or (3) the processing includes sensitive data, including personal data relating to criminal convictions and offences.

The 2018 Law also provides for a specific framework concerning surveillance at work. Consequently, prior information must be given not only to the employees but also to the staff delegation. This must include detailed descriptions of the purposes of the surveillance and the envisaged methods, as well as the retention period (or indication of criteria to calculate the period). Furthermore, the employer must formally declare not to use personal data it has collected for any other purposes.

Unless an employer is legally obliged to implement surveillance measures, it may only implement such measures following a co-decision procedure involving the staff delegation, if it is for the following purposes:

a health and occupational safety;
b control of production or performance of an employee, if this is the only possible measure to determine the exact salary; or
c a flexible working schedule, implemented in accordance with the Labour Code.

The employees or the staff delegation may, within 15 days of the notification, request an opinion from the CNPD on the envisaged measures. The CNPD has one month to respond and, during this period, the surveillance cannot be implemented.

In any case, the employees may lodge a complaint with the CNPD, which cannot be used as a ground for dismissal.

ii Rights of the data subjects

The data subject has the right of access to be informed about the relevant aspect of the processing, to be given access to his or her personal data and the right to rectify it in case the personal data is inaccurate or incomplete. In some circumstances, the data subject also has the right to request the erasure of his or her personal data, to object to the processing of his or her personal data and to obtain restriction of processing from the controller. In some cases, the data subject may also exercise his or her right to data portability.

In accordance with the data subject’s right to be informed, the data controller must supply the data subject, no later than the date at which the data is collected and regardless of the type of media used, with the following information:

a the identity of the controller and of his or her representative, if any;
b where applicable, the contact details of the data protection officer;
c the purpose or purposes of the processing for which the data is intended;
d the recipients or categories of recipients to whom the data might be disclosed;
e where the processing is based on the legitimate interests of the data controller, what the legitimate interests pursued by the controller or by a third party are;
f where 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;
g where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation outside the EEA, and the existence or absence of an adequacy decision by the CNPD, or in the case of transfers based on additional safeguards, reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available;
b the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

c the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;

d the right to lodge a complaint with a supervisory authority;

e whether answering the questions and providing personal data is compulsory (because of a statutory or contractual requirement, or a requirement necessary to enter into a contract) or voluntary, as well as the possible consequences of failure to answer or provide the data; and

f where applicable, the existence of automated decision-making, including profiling, and at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

 donated title="Luxembourg"

iii Principles relating to processing of personal data

The GDPR establishes six important principles relating to the processing of personal data, according to which the data controller must ensure that:

a personal data is processed in a fair and lawful manner (lawfulness, fairness and transparency);

b personal data is collected for specified, explicit and legitimate purposes and not further processed in a way that is incompatible with those purposes (purpose limitation);

c personal data is adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed (data minimisation);

d personal data is accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that is inaccurate, having regard to the purposes for which it is processed, is erased or rectified without delay (accuracy);

e personal data is kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed (storage limitation); and

f personal data is processed in a manner that ensures appropriate security, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (integrity and confidentiality).

In accordance with the integrity and confidentiality principle, the data controller must implement all appropriate technical and organisational measures to ensure the protection of personal data against accidental or unlawful destruction or accidental loss, falsification, unauthorised dissemination or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

In particular, the personnel processing personal data should be trained to process the data in a lawful way, and the company should limit access to personal data that is processed.

In accordance with the lawfulness, fairness and transparency principle, the processing of personal data is lawful if it is based on one of the recognised legal grounds set out in Articles 6 to 10 of the GDPR.

For example, processing of general personal data (i.e., non-sensitive data) is lawful if it is necessary for the performance of a contract to which the data subject is party, if it is
necessary for compliance with a legal obligation to which the controller is subject, or if the
data subject has given consent to the processing of his or her personal data for one or more
specific purposes.

As far as sensitive data is concerned, more restrictive legal grounds apply (Articles 9
and 10 GDPR).

iv  Processors and data processing agreements

The data controller may wish to transfer personal data to a processor, who will execute
the processing of personal data on its behalf. The data controller must choose a processor
that provides sufficient guarantees with regard to the technical and organisational security
measures pertaining to the processing to be carried out. It is up to the data controller as well
as the processor to ensure that the said measures are respected.

Any processing carried out on behalf of the data controller must be governed by
a written contract or legal instrument binding the processor to the data controller (data
processing agreement). Data processing agreements must stipulate the obligations pertaining
to the processor, as listed in Article 28 of the GDPR. In any case, a processor may not engage
another processor (sub-processor) without prior specific or general written authorisation of
the controller. In the case of general written authorisation, the processor shall inform the
controller of any intended changes concerning the addition or replacement of sub-processors,
thereby giving the controller the opportunity to object to such changes. Furthermore, in
case a processor engages a sub-processor, the same data protection obligations as set out in
the data processing agreement between the controller and the processor shall be imposed on
that sub-processor. Where the sub-processor fails to fulfil its data protection obligations, the
initial processor shall remain fully liable to the data controller for the performance of that
other processor’s obligations.

v  Cross-border data transfers

The data controller must supply the data subject with the information about the recipients or
categories of recipients to whom the data might be disclosed. If these recipients are established
outside Luxembourg, this should also be indicated.

As a general rule, personal data may only be transferred to countries within the EEA
or to countries that provide an adequate level of protection of personal data in the sense of
Article 45 of the GDPR. If personal data is transferred to a country that does not provide an
adequate level of protection of personal data (‘non-adequate’ country), such 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 in case of transfer of
personal data towards a non-adequate country, the data exporter and the data importer may
sign standard data protection clauses adopted by the European Commission.

For transfer 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.

When no additional safeguards are in place, the data controller will only be allowed
to transfer personal data to non-adequate countries based on one of the legally recognised
derogations, such as the explicit consent of the data subject, where appropriate.
vi  Sensitive data

Sensitive data is personal data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or that concerns health or sex life, including genetic data. Sensitive data also includes personal data relating to criminal convictions or offences, such as a criminal record.

It is, in principle, forbidden to process sensitive personal data, unless a specific legal ground allows for such processing. Currently the processing of sensitive data is only permitted on the basis of one of the recognised legal grounds laid down in Articles 9 and 10 of the GDPR. For example, as far as personal data relating to criminal convictions or offences is concerned, one of the following two grounds must apply: the data may be processed under the control of an official authority; or the processing of the data has been specifically authorised by EU or Member State law (e.g., Luxembourg employment law).

vii  Background checks

Background checks are allowed, provided that they comply with the provisions prohibiting discrimination and those related to the protection of privacy.

The employer’s right to request a criminal record is strictly limited according to the legal provisions of the Law of 23 July 2016. This Law has substantially amended current provisions related to criminal records, as follows:

a  During the recruitment process, the potential employer will only be able to request a criminal record excerpt in writing and shall justify the reasons for such a request in view of the role requirements. The requirement to provide a criminal record excerpt shall be indicated in the job offer. A criminal record excerpt obtained in the recruitment phase can only be kept for one month starting from the signature of the contract. If the candidate is not hired, the excerpt must be destroyed.

b  During the course of employment, the employer will only be able to request a new criminal record excerpt if:
   •  the employer is permitted by law to request a criminal record excerpt; or
   •  the employee’s post will change and the new role requires renewed verification of honourability.

A criminal record excerpt obtained during the employment relationship can only be kept for two months, unless provided otherwise under other legal provisions.

Requesting a criminal record excerpt in breach of the new legal provisions will be a criminal offence that may be sanctioned by a fine of between €251 and €5,000, and a term of imprisonment between eight days and one year. Retaining a criminal record excerpt in excess of the time frame is also a criminal offence that may be sanctioned by a fine between €251 and €3,000.

The employer will have to keep record of:

a  the job offers from future employers requesting a criminal record excerpt with justification for the request; and

b  the requests for a criminal record excerpt from current employees with justification for the request.

Credit checks are covered by personal and private data provisions and therefore cannot be the subject of employer enquiries. However, depending on the applicant’s position and the nature of his or her activities, an employer may request him or her to provide such information.
Employers may ask whether a job applicant has authorisation to work in Luxembourg and request evidence thereof. During the hiring process, employers are prohibited from making enquiries based on sexual orientation, religion, convictions, disability or ethnic origin.

XII DISCONTINUING EMPLOYMENT

i Dismissal

An employment contract entered into for an indefinite period of time may be terminated by either party immediately for gross misconduct, with notice or with the mutual consent of both parties. Only termination with notice and termination with immediate effect for gross misconduct will be defined in this section. The decision to opt for either the termination with immediate effect or the termination with notice will mainly depend on the grounds on which the dismissal is founded.

Dismissal with notice

An employment contract entered into for an indefinite period of time may be terminated by the employer for serious and real cause with a notice period, by giving notice to the employee.

The employee may also terminate the employment contract by giving notice to the employer in accordance with the provisions of the Labour Code.

In case of a dismissal with notice, the reasons for dismissal must be supported by demonstrable and explicit facts, including reasons in relation to:

- the employee’s aptitude;
- the employee’s conduct; or
- the operating needs of the business, establishment or department.

Furthermore, if requested by the employee within one month of receiving notice of dismissal, the employer must provide him or her with a justification letter that clearly and precisely specifies the reasons for termination. The employer must send this justification letter by registered letter within one month of the employee’s request. If an employer fails to provide an employee with the grounds for dismissal within the statutory time frame, the dismissal will be deemed unfair and the employee may be entitled to a compensation for damages.

A settlement arrangement may, however, be agreed upon between the employee and the employer, under which the employee would receive a settlement amount in consideration for his or her waiver of any rights deriving from the employment relationship.

On termination, employees are entitled to a notice period calculated according to their length of service within the company.

Unless the employer and employee have agreed otherwise in the employment contract, notice periods are calculated as follows.

<table>
<thead>
<tr>
<th>Service</th>
<th>Employer</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 5 years</td>
<td>2 months</td>
<td>1 month</td>
</tr>
<tr>
<td>5 to 10 years</td>
<td>4 months</td>
<td>2 months</td>
</tr>
<tr>
<td>10+ years</td>
<td>6 months</td>
<td>3 months</td>
</tr>
</tbody>
</table>
Unlike laws in other jurisdictions, Luxembourg law provides that notice takes effect only on the first day or the 15th day of the month. Thus, notice given before the 15th of the month takes effect on the 15th of the same month and notice given after the 14th takes effect on the first day of the following month.

Dismissal without notice

Dismissal without notice is possible in the event of gross misconduct by the employee. Gross misconduct is considered conduct that immediately and definitively makes it impossible to continue the employment relationship. The appraisal of this notion is purely factual and rests with the courts, which consider the employee’s professional behaviour, level of education, social situation and any other relevant factors to determine his or her responsibility.

Before notifying an employee of his or her dismissal resulting from gross misconduct, the employer may temporarily suspend the employee, with immediate effect and without any particular form. Until the employer provides notification of the dismissal, the payment of the remuneration must be maintained.

If the termination (with immediate effect) is a result of gross misconduct, the dismissal letter must include the specific reasons for termination.

Employees dismissed for gross misconduct are not granted a notice period.

Pre-dismissal interview

Any employer with at least 150 employees wishing to dismiss an employee must, before reaching a decision in this respect, convene the employee concerned to a pre-dismissal interview. Notice should be made by way of a registered letter or by providing the employee with a convening notice letter after having sought proof of receipt thereof. The convening notice letter must provide sufficient information in relation to the purpose of the interview, and mention the date, time and place where the interview should be held. Dismissal with notice or without notice cannot be notified before the expiry of the day following the interview and no later than one week later.

Process for giving notice

In the case of dismissal with notice as well as without notice, the employer must notify the employee of his or her termination by way of a registered letter or by providing the employee with a dismissal letter after having sought proof of receipt thereof.

Severance payment

In addition to the notice period, employees dismissed with notice are entitled to a severance payment calculated according to their length of service. Severance payments are calculated as follows:

- from five to 10 years of employment – one month’s salary;
- from 10 to 15 years of employment – two months’ salary;
- from 15 to 20 years of employment – three months’ salary;
- from 20 to 25 years of employment – six months’ salary;
- from 25 to 30 years of employment – nine months’ salary; and
- over 30 years of employment – 12 months’ salary.

Employees dismissed for gross misconduct are not granted a severance payment.
Protection against dismissal

Pregnant employees and employees on maternity leave

Under Luxembourg employment law, pregnant employees enjoy protection from dismissal. Dismissal of pregnant employees is prohibited from the time the employee is medically certified as being pregnant, except where the pregnant employee has committed gross misconduct. Any dismissal notified in breach of this protection will be deemed as null and void. The same protection against dismissal will apply to a woman on maternity leave during the entire maternity leave period, and up to 12 weeks from the delivery.

Employees on sick leave

Employees suffering from a medical disease, a workplace accident or occupational disease benefit from protection from dismissal during the period of the sick leave up to 26 weeks. A new law that entered into force on 1 September 2015 amended the provisions related to an employee's inability to work, both from the perspective of employment law and social security law.

Payment of an employee on sick leave will cease from the date the National Health Fund of Luxembourg (CNS) notifies the employer to cease such a payment, and can only resume once the decision has been modified as a result of legal recourse. The employer will be informed by the CNS as to whether they should cease any payment of salary to an employee, and if a decision has been reached that should change this. The protection against dismissal of 26 weeks in favour of employees on sick leave may thus cease prematurely under certain conditions.

Employees on parental leave

Employers cannot dismiss an employee on parental leave. Protection against dismissal starts two months before the first day of maternity leave if the employee is on the first parental leave (i.e., the parental leave that immediately follows the maternity leave), and six months before the first day of parental leave if it relates to the second parental leave (i.e., the parental leave taken before the child reaches the age of six).

ii Redundancies

Article L.166-1(1) of the Labour Code defines collective redundancies as ‘dismissals effected by an employer for one or more reasons not related to the employees concerned’ where the number of redundancies is either: over 30 days, at least seven; or, over 90 days, at least 15.

The statutory procedure regarding collective redundancies as set out in the Labour Code must be followed as soon as an employer wishes to dismiss at least seven employees within 30 days or to dismiss 15 employees within 90 days. If, however, at least four employees are dismissed during the relevant period for a reason unrelated to their behaviour, the employer must also include, when calculating how many employees are involved in the dismissals:

a terminations for economic reasons that are made by mutual consent; and

b departures by employees who are retiring as a result of the company’s economic reasons before the usual retirement date.

This procedure requires the employer to enter into negotiations with employee representatives before proceeding with collective redundancies, in order to come to an agreement relating to
the establishment of a redundancy scheme. Before commencing negotiations, the employer must inform the employee representative of the measures envisaged by providing him or her in writing with the information legally required.

A written notification of the envisaged collective redundancies must be provided by the employer to the Employment Administration. The notification is sent by the Employment Administration to the Labour and Mines Inspectorate.

Upon the employer and the employee representatives reaching an agreement, the redundancy scheme is signed. After the signature of the redundancy scheme, the employer can notify the termination to each of the employees concerned.

If no agreement is reached between the parties within 15 days of the beginning of the negotiations, signed minutes of the negotiations are sent to the Employment Administration. Within three days of the signature of these minutes, the employer and the employee representatives must jointly refer the matter to the National Conciliation Body.

The members of the parity committee shall be appointed to consider the issues. Unless the parity committee has deliberated, the employer shall not be entitled to notify the dismissals on an individual basis to each of the employees concerned.

Collectively dismissed employees have the same rights as employees dismissed on an individual basis, but the statutory rights on collective dismissal are extended. The dismissal will be qualified as unfair on the same basis as the one applicable to individual dismissals.

Collectively dismissed employees may also negotiate with the employer to reach an amicable settlement arrangement.

XIII TRANSFER OF BUSINESS

Luxembourg legal provisions relating to transfer of undertakings apply to any transfer of an undertaking, business or part of an undertaking or business as a result of a contractual sale, merger, inheritance, division of companies or incorporation of a company. These provisions are applicable to any transfer where an undertaking, business or part of an undertaking or business to be transferred is located in Luxembourg. Thus, it would theoretically apply to situations where the transferor is located within the territory of Luxembourg and the transferee is located in another state.

A transfer must be of an economic entity that retains its identity. In essence, this means an organised grouping of resources that have the objective of pursuing an economic activity, whether that activity is central or ancillary. Luxembourg case law makes clear that the activities performed by the employees must be carried out after the transfer with a view to achieving the same purpose, meaning the continuation of the existence of the business but not of its legal structure.

A transfer of an undertaking within the meaning of the legal provisions shall operate the effect of an automatic transfer of the employment contracts to the transferee. Luxembourg law does not provide for any right of objection by which an employee may prevent the transfer of his or her employment. If an employee refuses the transfer, he or she will be considered as a resigning employee, hence, not entitled to any legal indemnities as provided for in the Labour Code. Employees transferred cannot be dismissed on the grounds of the transfer. However, they can be dismissed on the basis of the organisational measures provided it can be evidenced that the reorganisation is not directly linked to the transfer.
A specific procedure shall be followed in this respect, which consists essentially of the obligations to notify, inform and consult the employees concerned prior to the occurrence of the transfer.

**XIV OUTLOOK**

A reform of the rules on employees’ inability to work will enter into force in 2019, amending both the employment law provisions and social security provisions, and introducing a gradual return to work for therapeutic grounds. The 12-month reference period during which an employee’s sick leave is calculated will be extended to 18 months in 2019. Sickness benefits will be paid by the National Health Fund up to 78 weeks for any reference period of 104 weeks.
Chapter 28

MEXICO

Rafael Vallejo

I INTRODUCTION

i Legal framework

Employment relations in Mexico are governed primarily by the Mexican Constitution, in which the guidelines for employment in Mexico 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 related to employment relations in Mexico and is divided into two main sections: Section A, for private employment relations (between private employers and their employees); and Section B, for relations between government entities and their employees.

The Federal Labour Law (FLL) is the statute that regulates the labour and employment principles set forth by the Constitution, covering in detail all aspects related to individual and collective employment relations 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 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).

Throughout its history, the labour legislation has undergone two major amendments and some other minor reforms. As a result of the amendments to the FLL, the trends in labour and employment law have resulted in new methods of handling and managing employment and industrial relations 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 different 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 arbitration boards) and through its administrative labour authority (the Ministry of Labour and Social Welfare), is in charge of resolving controversies that are related to the following industry sectors or activities:

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Mexico

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, as well as 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 mechanic or electric auto 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 the manufacture in sawmills or of plywood;
t glass industry, exclusively the manufacture of flat, plain and cut glass, glass containers;
u tobacco industry, covering the benefit or manufacture of tobacco products; and
v banking.

Application of the law with regard to any other industry branch or activity not mentioned in the above list 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 Social Security Institute, and both parties are obliged to make the applicable social security contributions for employees’ protection (employees’ contributions are withheld from their paycheck and paid by the employer to the Social Security Institute on behalf of the employee). The Law also outlines the rights and access of employees and employers to the social security system benefits, which encompass the following insurance or coverage services in favour of employees: occupational risk; health and maternity; disability and life; retirement pensions; and day care.

The Law for the National Fund for Housing of the 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 their 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 Articles 107 and 123 of the Constitution and the consequent reforms to the corresponding legislation, including the FLL, the labour boards will cease to exist and will be replaced by labour courts, which will be dependent on the judicial system (see Section II). Currently, there are both federal and local labour boards, depending on the industry branch, covering the activities of the companies involved in such 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 subsection 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, the labour legislation has undergone major amendments and reforms in order 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 hot topics this year regarding Mexican labour and employment law.

i Reform of Articles 107 and 123 of the Constitution

One of the major amendments to the labour legislation occurred on 13 October 2016, when the initiative to reform Articles 107 and 123 of the Constitution was approved by the Senate. The initiative was a result of the ‘Dialogues for Daily Justice’ carried out by the Economic Research and Teaching Centre, which consulted with academics and lawyers to elaborate a set of proposals on this matter. The main aspects of the constitutional reform are:

a The creation of labour courts to replace the boards of conciliation and arbitration, 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 labour conflict.

c The collective bargaining agreements (CBAs), internal labour regulations and the procedures for their execution, filing, registration, conciliation and litigation will be

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2 The reform has already been published in the Official Gazette of the Federation, and became effective the following day. However, the Federal Congress still needs to make all the necessary legal adjustments to the FLL in order to implement the mandated changes. Those amendments are still being discussed, but are highly likely to be implemented in 2019.
concentrated in a newly created governmental decentralised body, which will depend on the executive branch and will be in charge of the above-mentioned collective matters, as well as the conciliation centres.

d Regarding outsourcing arrangements, it is expected that the sanction of considering the beneficiary of the services as the employer of the employees providing the services will be eliminated, returning to the formula that the beneficiary will only be considered jointly liable in case of non-compliance by the third-party company service provider.

e 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), as well as to have those employees request or approve the call to strike.

On 24 February 2017, the decree declaring the amendments to the provisions of Articles 107 and 123 of the Constitution was published in the Federal Official Gazette. The decree entered into force in February 2018. As a result, in June 2018, the Council of the Federal Judiciary created the Unit of Implementation of the Reform in Labour Justice, whose main purpose is to prepare and issue advisory opinions on matters related to the creation of procedural legislation on labour matters, as well as be responsible for the programmes related to the planning, training and dissemination of regulatory projects, budget programming, and institutional monitoring of the above-mentioned reform.

Some interesting new interpretations and concepts have recently come to light. The following is a summary of the hot topics this year regarding Mexican labour and employment law.

ii International Labour Organization Convention 98

On 18 September 2018, the Senate ratified Convention 98 of the Internal Labour Organization, which relates to collective labour rights for employees. The main aspects of the ratification of Convention 98 that will have a significant impact on companies in Mexico are the following:

a The elimination of ‘white’ or ‘ghost’ unions, by requesting the approval of the employees regarding the CBA applicable at the workplace and the union that represents them, allowing unions to participate in company matters and informing employees of the existence of the union and the CBA in place.

b Strengthening of the individual freedom of association of employees, by prohibiting companies from forcing employees to affiliate to the union that is in the workplace or to stop being a member of a union, so that they are able to affiliate to unions of their choice.

c Further strengthening employees’ freedom of association by allowing for two or more CBAs applicable in a company executed with two or more unions.

d New obligations for companies to eradicate discrimination against employees in relation to their freedom of association.

This will be a positive development for unions and workers’ representation, taking into consideration that Convention 98 is fundamental in terms of unions’ collective bargaining rights and will be in line with the new reforms to the labour laws regarding collective bargaining and representation of workers.
The main goal is to avoid concentrating solely on workers’ best interests and to encourage both parties in the labour relationship to reach an agreement in line with the basic principle of labour peace, as well as preventing or eliminating white or ghost unions.

iii  Mexican Official Standard on Occupational Health and Safety

On 23 October 2018, the Mexican Official Standard NOM-035-STPS-2018 on psychosocial risk factors at the workplace – identification, analysis and prevention (NOM-035) was published in the Federal Official Gazette, as a result of the Ministry of Labour and Social Security’s proposed regulation to promote a favourable environment for employees in the workplace. NOM-035 aims to identify, analyse and prevent psychosocial risk factors at the workplace that can cause anxiety disorders, severe stress disorders or adjustment disorders, arising from the nature of the work the employees carry out, among other things. The risk factors set forth by NOM-035, which must be identified and analysed by companies, are the following: conditions of the work environment; workload; lack of control over work; work shifts and rotation of shifts; interference in work – family relationship; negative leadership and relationships; and violence at the workplace. The creation of 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.

III  SIGNIFICANT CASES

In February 2018, the Supreme Court of Justice issued a decision stating that payslips that do not have the signature of the employee but instead contain a digital seal, in accordance with Article 99, point III of the Income Tax Law, have full evidential value in a labour trial. The FLL, taking into consideration the evolution of scientific and technological knowledge, allows for the use of certain documents resulting from such progress, such as digital documents or electronic media, where the method by which they were generated can be considered completely reliable.

IV  BASICS OF ENTERING 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 five different types of contracts for hiring personnel. The standard contracts are entered into for an indefinite term, 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 validly enter into these
agreements, employers must justify their 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 maturity in case of fixed-term employment or at the completion of the undertaking in case of 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.

The two new types of contracts added to the FLL and the trial period provided for in the amendment are as follows:

a Seasonal contract: this contract allows employers to hire personnel when the workload increases during a certain time of the year (e.g., Christmas or the summer season).

b Initial training contract: this contract allows employers to train their employees for three months (six months for high-level executives) and if at the end of the training period the employer considers that the employee does not meet the requirements set forth for the job, the contract terminates naturally without any liability for the employer other than that of paying the corresponding salaries and benefits accrued during the trial period. In this regard, at the end of the training period the employer must verify that the employee did not meet the requirements for a permanent engagement and that it heard the recommendation of the joint committee of the company.

c Trial period: this addition to temporary and permanent contracts of employment allows companies to assess their new personnel for 30 days (180 days for employees in high-level positions (e.g., executive, managerial, supervisory) and for employees with a bachelor’s or technical degree), which cannot be extended. If at the end of the contract’s term the company determines that the employee does not have the abilities or skills required to perform the job, the contract may be terminated without any liability for the employer, except to pay the corresponding benefits accrued during the trial period. In this regard, employers must include objective elements in the 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 for one period only. Once the term of the trial or training period has ended, the contract and the employment relationship would be terminated accordingly, unless the employer deems that the employee meets the requirements for the position, in which case the employment relationship may be extended and considered as indefinite as a matter of law.

Article 25 of the FLL provides the statutory content required for every employment contract:

a name, nationality, age, gender, marital status, personal ID number, taxpayer registration number, and address 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 such contracts are 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;
the day and place for salary payment;

indication that the employee will be trained in terms of the plans and programmes established by the company, pursuant to provisions of the FLL; and

any other term and work condition, such as days of rest, holiday and any additional agreement reached between employee and employer.

In addition, although they are not mandatory, it is also advisable to detail any benefit paid to the employees as part of their 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 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 in it or if benefits above the minimum required by the FLL are first liquidated with the authorisation of the employee through the payment of the corresponding severance.

ii 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 related 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 ID 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. On the other hand, 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 ID 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 provisions provided by Article 15A of the FLL as well as to negotiate the outsourcing agreements in terms such 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.

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 holiday, holiday premium and Christmas bonuses. The law foresees minimum standard benefits that cannot be waived, and employers cannot grant anything below those minimum standards.

Holiday is granted according to employees’ seniority: for the first year of service, employees are entitled to a minimum of six days’ holiday; 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’ holiday are added every five years. In addition to this, employees are entitled to 25 per cent of the salary earned during their holiday (at least) as a holiday premium.

Employees are also entitled to a Christmas bonus equivalent to at least 15 days’ salary, which must be paid before 20 December of each year. The purpose of this bonus is to cover all expenses required for all the year-end festivities.

In connection with the taxes, employers are bound to withhold and deliver to the 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.

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 from the exercise of the aforementioned right. However, if such clauses and agreements are executed or established to be in force for the duration of the employment relationship with the employees, 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 have a deterrent effect on employees for not
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 (soon-to-be labour court) 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.

VI WAGES

i Working time

The FLL states that for every six working days, employees shall be entitled to one day of rest. There are three different work shifts, as follows:

a eight hours a day for daytime work (48 hours a week);
b seven hours for night 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 their meals during their shift, and this time shall be considered as part of their work shift. It will also be considered as part of the employees’ work shift 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 work time.

Even though the statutory daily work shift sets out a maximum of eight working hours for the daytime work 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, which is why employees would be able to work for more than eight hours per day as long as their weekly work shift does not exceed the statutory maximum of 48 hours.

Any time worked in excess of the mandatory 48 weekly hours will be deemed overtime and, as such, employers shall pay any overtime worked.

The FLL foresees seven working hours for those 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 that the working hours for the three different work shifts are:

a daytime shift, which is between 6am and 8pm;
b night shift, which is between 8pm and 6am the next day; and
c mixed work shift, which covers periods of both day and night shifts, as long as the night-time period is less than three-and-a-half hours long. If an employee working a mixed work shift works more than these three-and-a-half hours of night work, the work shift shall be deemed as a night shift and subject to the statutory maximum of 42 working hours a week.
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 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 nine 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 worked in view of the activities they perform. Nevertheless, this should not be understood to mean they are not entitled to overtime pay, because they do have the possibility under the FLL to claim overtime pay with the labour boards. However, material or manufacture workers are used to receiving overtime pay whenever they work overtime, appealing to the maximum overtime allowed by the FLL and the corresponding salary to the extra hours worked.

Overtime compensation is paid along with the salary and any other benefit to which the employee is entitled for a certain period of time. Employers have to be vigilant about paying overtime in a timely manner; otherwise, employees are entitled to claim for their pay before the labour boards with jurisdiction over the workplace.

FOREIGN WORKERS

Pursuant to the FLL, a company should employ at least 90 per cent Mexican workers, but can fill the remaining 10 per cent of the companies’ positions with foreign workers. Technical and professional workers must be Mexican, except in those cases where the activities to be performed are so specialised that there are no Mexican workers available with the required skills. Nonetheless, this does not apply to directors and general managers. Another exception to the above rule is that physicians, railway employees and employees on any Mexican vessel must be Mexican nationals, and civil aviation crews must also meet the same requirement.

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.

Foreign employees must apply for a working visa from the National Immigration Institute and for such purposes the employer must be registered as an employer with the Institute.

Pursuant to the FLL, foreign nationals shall earn the same salary and benefits as Mexican nationals who perform the same activities. 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 committee 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 along with the disciplinary measures, which cannot exceed those foreseen in the statute. A reference to compliance with the regulations must be included in the employment contracts 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 spot in the workplace or by handing 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 the internal work regulations incorporate, by reference, the global policies as part of the regulations and guidelines that must be observed by the employees, in order for the company to vest such policies with enforceability effects.

IX 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 written 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.

X 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 several issues at work, 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.

XI DATA PROTECTION

i Requirements for registration

On 5 July 2010, the federal government published in the Federal Official Gazette the Federal Law for Personal Data Protection Possessed by Private Persons (DPL), which has been in force since 6 July 2010 and is intended to protect personal data held by private persons – either companies or individuals – in order to regulate the lawful, informed and controlled treatment of the data, with the objective of ensuring the right to privacy as well as the right of informational self-determination of persons. The DPL protects personal data that is subject to process, use or transfer, at a national and international level.

To clarify the content of the DPL, on 21 December 2011, the Ministry of the Economy published in the Federal Official Gazette the Regulations of the DPL (the Regulations), which have been mandatory since 22 December 2011. The Regulations provide in detail the conditions for the compliance and enforcement of the DPL to bring legal certainty to its regulated subjects.

Both regulatory instruments have a direct impact on employees, either by strengthening their right to privacy in relation to their employer and its subcontractors or to establish duties they must comply with in order to preserve the privacy of the personal data that is processed in the course of their activities.

In terms of the DPL and its Regulations, there is no obligation to register the company – in its role of data controller – with the Mexican data protection agency (the National Institute of Transparency, Access to Information and Protection of Personal Data (INAI)) or any other government body. However, diverse obligations should be fulfilled in order to comply with the provisions of the DPL and its Regulations.

The Regulations compel employers to create an inventory of processed personal data to identify its nature – as sensitive, financial or economic personal data requires the written express consent of the data subject to be collected and processed, and should be protected by stronger measures than ‘ordinary’ personal data. In addition, the inventory may determine the form of the processed data (i.e., whether it is expressed or contained in a digital format, in printed form, or in visual or audio format).

For the collection and processing of personal data, the general rule is that the data subject must be informed by means of a privacy notice about the collected data, the purposes for the processing and the data transfers, and the means to exercise the right to access, rectify, cancel and oppose the data processing, as well as the means to express his or her consent to authorise the data processing and transfers. However, the data subject’s consent is not required for the processing of personal data to be lawful if it is necessary to comply with

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3 The Ministry of Economy published in the Federal Official Daily of 17 January 2013 the Privacy Notice Guidelines, which provide the interpreting criteria of diverse elements of the Data Protection Law and its Regulations, such as those related to the processing of personal data, the elements that the privacy notice must include, the forms of the privacy notice and the ways to deliver it.
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 to transfer their personal data to a third party.

The Regulations compel companies to limit access to personal data only to authorised employees owing to their position or functions. The DPL also provides that companies must implement and maintain administrative, technical and physical security measures to protect personal data against damage, loss, alteration, destruction, use, access or unauthorised use (Article 19 of the DPL and Chapter III of the Regulations).

Under Article 48 of the Regulations, the employer is compelled to implement a range of actions to ensure that their employees comply with the DPL and its Regulations such as:

a. developing binding and enforceable privacy policies and programmes within the organisation;

b. implementing a training and staff awareness programme on the obligations regarding personal data protection, including any modifications that are made;

c. establishing an internal system for supervision and monitoring, verification or external audits to test compliance with privacy policies;

d. allocating resources for the implementation of privacy programmes and policies;

e. providing mechanisms for the enforcement of privacy policies and programmes, as well as for sanctioning lack of compliance;

f. establishing measures for tracking personal data during its processing;

g. establishing procedures to receive and respond to doubts and complaints from the personal data holder;

h. establishing measures for the assurance of personal data, in other words a set of technical and administrative actions that guarantee the responsible party’s compliance with the principles and obligations set forth by the DPL and its Regulations; and

i. establishing measures for the traceability of personal data, that is, actions, measures and technical procedures that allow for the tracking of personal data while it is being processed.

Privacy regulations should be related to a company's internal labour regulations in order to enforce sanctions for infringement.

ii. Cross-border data transfers

In terms of the DPL and its Regulations, companies are not compelled to register their data transfers at the INAI or at any other government agency and, as a general rule, data transfers are subject to the consent of the data subjects (generally granted through the privacy notice). However, the DPL provides for a few exceptions in which the employee’s consent is not required for the data transfer:

a. the transfer is necessary for preventive treatment or medical diagnosis, the delivery of healthcare, medical treatment or the management of health services;

b. the transfer is to companies under the same corporate control (subsidiaries and affiliates under the common control of the data controller), or to a parent company or an associated company that operates under the same processes and internal policies;
the transfer is necessary under a contract that has been concluded, or a contract to be concluded, in the interest of the employee by the employer and a third party; or

d the transfer is necessary for the maintenance or fulfilment of a legal relationship between the company and the employee (Article 37 of the DPL).

Neither the DPL nor the Regulations require safe harbour registration for data transfers or for carrying out an onward transfer.

iii Sensitive data

In terms of the DPL, sensitive data is defined as data that pertains to the data subject’s most intimate sphere, or 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 (Article 3, Section VI of the DPL).

Financial and economic data is not included within the category of sensitive data; however, the processing of this data requires the express consent of the data subject, except as provided by law (Article 8, Section IV of the DPL).

The requirement for consent for the collection of sensitive data is more stringent than in the case of non-sensitive data. When sensitive personal data is collected, the privacy notice must address explicitly that it deals with this type of data (Article 16 of the DPL). 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 regulated subject (Article 9 of the DPL).

If infringements to the DPL are committed in the processing of sensitive data, the penalties can be increased to twice the established amounts (Article 64, Section IV 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 consent, as such records include sensitive data.

Employers must be aware of processing personal data under the principles of lawfulness, consent, information, loyalty, proportionality, confidentiality and accountability, and must be aware of processing the candidate’s or employee’s personal data or information on a non-discriminatory basis.

XII DISCONTINUING EMPLOYMENT

i Dismissal

It is not easy to terminate an employment relationship in Mexico owing to the principle of ‘employment stability’ governing employment relations. 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 when it comes to trusted employees, particularly when the employee commits any act that leads to the employer losing confidence or trust in him or her.

When lawfully terminating an employee’s contract under a statutory cause, the employer must provide him or her with a written notice stating the causes for termination and the dates in which the actions were carried out, 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.

When terminating an employee’s contract with sufficient cause, the employer has to pay only the accrued benefits. If the employer fails to prove the causes for termination or the delivery of said 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, consisting of: three months’ integrated salary;\(^5\) 20 days’ integrated salary for each year of service; a seniority bonus, equal to 12 days’ salary for each year of service;\(^6\) and accrued benefits owed to the employee, such as Christmas bonus, holiday earned and holiday premium.

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 in one of the following ways:

a having the employee address a unilateral communication to the employer advising his or her voluntary separation from the job (i.e., a resignation letter). A signed payment quitclaim with the breakdown of the benefits paid to the employee should also be obtained from the employee upon payment by the employer of the amount agreed; or

b a termination agreement may be executed. This document can be ratified by the parties with the corresponding labour board, however it is not mandatory.

The second option provides the parties with added legal security since the document issued as a result of ratifying the termination agreement with an authority has the effect of an official judgment.

\section*{ii Redundancies}

Whenever an employer wishes to make an employee redundant it has to follow the same process of dismissal or termination without cause described in subsection 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

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\(^4\) A trusted employee is any individual who performs activities of management, oversight and inspection within the workplace.

\(^5\) Integrated salary comprises any and all entitlements or payments in cash or in kind granted to the employee for the previous 12 months.

\(^6\) For calculation purposes, in this case, salary is capped at two times the general minimum wage in force in the region where the employees render their services.
to the employees are required. In a redundancy, the common practice is to offer the employee full statutory severance pay in exchange for the execution by the latter of the corresponding termination documents (termination agreement or resignation and quitclaim).

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 scenarios:

a. *force majeure* or acts of God not attributable to the employer, or, where the employer is an individual, his or her physical or mental disability, producing the necessary, immediate and direct termination of the employment relations;

b. unaffordability of the business;

c. exhaustion of the subject matter of the extraction industry;

d. causes foreseen in Article 38 (mining-related causes); and

e. legally declared bankruptcy of the employer, if the authorities or creditors resolve the definitive closure of the company or the definitive reduction of their 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 leaving out the 20 days’ integrated salary payment per year of work. 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 work and a seniority premium.

When redundancies are the result of implementation of new production processes involving new automated technologies or installation of new machinery in the workplace, employees are entitled to four months’ integrated salary plus 20 days’ integrated salary for each year of service, along with the salaries and benefits accrued.

**XIII 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 among 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 employment relations already existing, as well as 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 with the labour boards the granting or observance of their corresponding salaries, seniority, benefits and conditions, or even to rescind the labour relationship with cause and with responsibility on the employer.

Employment substitutions do not require the employee’s consent to be effective and do not trigger any severance payments. The law requires employers to deliver a substitution...
notice to the employees, as well as to the Social Security Institute. When informing the Social Security Institute of the substitution, the National Fund for Workers’ Housing is automatically advised of the substitution by the Institute.

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 obligation existing before the effective date of the substitution.

Finally, the amendment to 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.

XIV OUTLOOK

There has been considerable progress in labour matters in 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 in 2019 are likely to be the following: transparent collective bargaining; creation and implementation of labour courts, laws and regulations for the new labour judicial procedures, freedom of association; union elections and limitation of unions’ power over employers; discrimination; minimum salary; and the transition process from the current administration of justice model to the new model as a result of the constitutional reform of labour legislation.
Chapter 29

NETHERLANDS

Dirk Jan Rutgers, Inge de Laat and Annemarth Hiebendaal

I INTRODUCTION

i Sources of employment law

In the Netherlands, employment is regulated by three main sources: legislation, collective bargaining agreements (CBAs) and individual employment contracts.

The most important labour law regulations are set forth in Book 7 of the Dutch Civil Code. Various aspects of Dutch labour 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, greatly impacts Dutch labour 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 with 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 clauses agreed upon 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 of the administrative law sector of the court. In cases involving civil servants and social security issues, appeal is taken to the Central Appeals Tribunal, which is a special appeals tribunal.

1 Dirk Jan Rutgers is a partner, Inge de Laat is the managing partner and Annemarth Hiebendaal is an associate at Rutgers & Posch.
The Employee Insurance Agency (UWV) is the government authority responsible for administering employee benefits (such as social security and welfare) and helping unemployed persons find work. In addition, the UWV determines the 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 Authority oversees compliance with personal data protection laws.

The Netherlands Institute for Human Rights 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

In November 2018, the legislative proposal for the Balanced Labour Market Act, which includes measures that will lead to major changes in employment law, was submitted to the House of Representatives. The Act is intended to enter into force on 1 January 2020. The most important changes resulting from this legislative proposal are outlined below.

At present, a request to terminate an employment contract submitted to the competent court must be based on a specific dismissal ground (e.g., inadequate performance or a damaged working relationship), which must be fully substantiated. The legislative proposal introduces a ‘cumulative dismissal ground’, which can be used for dismissal in cases where the facts and circumstances are not sufficient to fully substantiate one of the dismissal grounds stated in the law. If the court rescinds the employment contract on the basis of a cumulative dismissal ground, it may award the employee additional compensation of up to half the transition payment on top of the regular transition payment. Every termination, other than following retirement or for an urgent cause, will give rise to an obligation to pay the departing employee a transition payment. The payment is made up of one-sixth of the employee’s gross monthly salary for each period of six months the employee has worked for the employer, with the total amount depending on the number of years in employment (e.g., the portion of monthly salary increases after 10 years’ employment). The proposed amendments regarding the calculation of the payment will affect employees employed for more than 10 years and employees employed for less than two years.

Furthermore, at present, employers cannot offer their employees more than three consecutive fixed-term employment contracts over two years, without that contract being converted into an open-ended contract, unless the two-year period is interrupted for six months or more. Based on the legislative proposal for the Balanced Labour Market Act, the two-year period will be extended to three years.

Amendments to the current probationary period rules have also been proposed. Employers and employees would be allowed to agree to a probationary period of up to five months for open-ended employment contracts, as opposed to two months. With regard to fixed-term employment contracts concluded for two years or more, the legislative proposal seeks to increase the maximum probationary period from two months to three months.

III SIGNIFICANT CASES

On 23 July 2018, the Amsterdam court delivered a ruling on the question of whether the contract for services that Deliveroo (a food delivery company that works only with self-employed individuals) had concluded with one of its couriers should not in fact be
regarded as an employment contract. In this highly casuistic case, the court found that no employment contract existed under the circumstances, and examined not only the parties’ intention when they entered into the contract, but also the way in which they had shaped their relationship. Case law has established that no single factor is determinative, but the relevant factors that persuaded the court to rule in favour of a contract for services were the following:

a. the average Deliveroo courier works for approximately four months for Deliveroo and desires maximum flexibility;
b. the courier knowingly agreed to the conclusion of a contract for services, which offered him great flexibility;
c. the courier could state his availability for work at any desired time and turn down any order;
d. the courier could work in his own clothes, including the clothes of Deliveroo’s competitors; and
e. the courier could have someone else stand in for him, as long as Deliveroo’s safety regulations were met.

The fact that Deliveroo employs a ranking system that rewards good performance with priority access enabling couriers to book a time slot and delivery zone first, was insufficient for the court to conclude that a relationship of authority existed between parties. Deliveroo’s invoicing process, in which it records when a courier has worked and how many meals were delivered, also failed to establish the requisite authority. Nor was it sufficient that Deliveroo sets the rates, as market forces would have to play a role.

On 22 June 2018, the Supreme Court provided some guidance on the question of when an employer’s specific non-contractual course of conduct results in an acquired employee benefit. Although no clear answer was given in this ruling, the Supreme Court did formulate six points of view, which are required to be taken into account in order to assess this question:

a. the content of the course of conduct;
b. the nature of the employment contract, and the employer’s and employee’s position towards each other;
c. the length of time that the employer followed the specific course of conduct;
d. everything the employer and employee have declared, or have not declared, to one another in respect of the course of conduct;
e. the nature of the advantages and disadvantages associated with the specific course of conduct for both the employer and employee; and
f. the nature and size of the group of employees in respect of which the employer followed the course of conduct.

In 2018, the Supreme Court also rendered an important judgment on the potential entitlement to a transition payment in the event of a justified instant dismissal. Under Dutch law, an employer does not, in principle, owe any transition payment if the employee commits a serious imputable act. On 30 March 2018, the Supreme Court ruled that a justified instant dismissal does not automatically imply that serious imputable acts have been committed. In the case in question, the employer instantly dismissed the employee because he came to work inebriated several times, which was not allowed under the employer’s alcohol policy. The employee argued that he could not be blamed for his alcohol addiction, or that he was only partly to blame. The Supreme Court stated that a legally valid instant dismissal
did not automatically disqualify the employee for a transition payment. Furthermore, the establishment of urgent cause does not mean that the dismissal is the result of serious imputable acts or omissions on the part of the employee.

IV BASICS OF ENTERING 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 upon 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 obligated to provide the employee with a written or electronic statement listing the following employment details:

- name and address of the parties;
- place where the work will be performed;
- position of the employee or nature of the work;
- date of commencement of employment;
- if the contract is concluded for a fixed term, the duration of the contract;
- the holiday entitlement or the manner in which holiday entitlement is calculated;
- remuneration and the periodic frequency of payment;
- usual daily or weekly number of hours of work;
- whether the employee will join a pension plan;
- any applicable CBA or scheme made by or on behalf of a competent authority;
- whether the employment contract is a secondment contract as defined in Section 690 of Book 7 of the Dutch Civil Code; and
- 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 a select number of cases. 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. 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 the 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 to 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.

As explained in Section II, the Balanced Labour Market Act introduces longer probationary periods of up to five months for open-ended employment contracts and three months for fixed-term employment contracts of two years or more.

### 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 or may voluntarily register with the Dutch tax authorities 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, it 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 an 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 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). Effective 1 May 2016, a company is required to determine whether or not it has a withholding obligation for wage tax and social security contributions in relation to independent contractors. In 2017, the government published plans for the introduction of new legislation on the withholding of wage tax and social security contributions for independent contractors. The new legislation, which is scheduled to be introduced on 1 January 2021, will determine on the basis of two elements – the hourly rate and the duration of the contract – whether a working relationship qualifies as an employment contract or an independent contractor agreement. Until 1 January 2020, the Dutch tax authorities will pursue a lenient enforcement policy regarding the use of independent contractors, except in cases involving deliberate fraud or deception.

Companies must pay their employees a statutory minimum wage. The minimum wage amount depends on the employee’s age.

All employees are entitled to a statutory minimum holiday that is calculated by multiplying the number of hours they work per week by four. This comes to 20 days in the case of full-time employment and 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 for the first mentioned 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 employer’s interests sought to be protected 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.

Under the Balanced Labour Market Act, an employer can only enforce a non-compete clause where it terminates an open-ended employment contract during the probationary period and if it substantiates its major business interests in writing to the employee.

VI  WAGES

i  Working time

Under the Working Hours Act, employees are allowed 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 less than eight hours, and 36 consecutive hours of rest once every week or 72 hours every two weeks.

Night work is allowed subject to a maximum of 10 hours per shift, which may be extended by two hours for a maximum of five times per two weeks 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 14 hours. In the case of 16 night shifts in 16 consecutive weeks, employees may only work for a maximum of 40 hours a week.

ii  Overtime

Overtime pay is not regulated. The question of whether overtime is payable 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 or time off in lieu.

Similarly, there are no statutory rates for overtime pay. The maximum working hours mentioned above also govern the maximum overtime.
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 may be kept for a maximum of five years after the termination of employment. The law does not limit the number of foreign workers in a workplace or company.

Under the Employment of Foreigners Act, a work permit and residence permit is required for workers from outside the European Union. 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 only be granted a permit if it proves that no EU workers are available for the job. Workers from outside the European Union 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 first obtain a temporary residence permit (MVV) before coming to the Netherlands. Foreigners from a number of countries (Australia, Canada, New Zealand, the United States, Japan and South Korea) 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 and residence permit is 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., taxes, social security contributions and customs duties). 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 on a regular basis and if they earn sufficient income. Since 1 January 2010, all foreigners are required to pass an integration test to be eligible for a permanent residence permit.

The most common work and residence permit for highly skilled workers is the knowledge migrant permit (KMR). 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 younger than 30, at least €3,299 gross per month (these amounts apply for 2019). 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 (ICT) Directive (Directive 2014/66/EU), must apply for an ICT permit. The Directive’s scope covers employees transferred by a company based outside the European Union to an establishment of the same company or group of companies in the European Union, and having a contract with the home entity. 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, after which it can be converted into a KMR permit, regardless of whether the contract is transferred to the host entity. The salary thresholds will, however, 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, both publicly and privately held, 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 manner, but can also help 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:

\[\begin{align*}
\text{a} & \quad \text{compliance with laws and regulations;} \\
\text{b} & \quad \text{preventing conflicts of interests;} \\
\text{c} & \quad \text{attention to people and environment;} \\
\text{d} & \quad \text{fairness in financial reporting;} \\
\text{e} & \quad \text{protecting the company’s assets;} \text{ and} \\
\text{f} & \quad \text{commitments relating to human rights, freedom of association, elimination of forced or child labour and elimination of discrimination and harassment.}
\end{align*}\]

Some companies have extended the application of codes 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 acknowledgments in employment contracts with their employees. Some companies require their employees to acknowledge receipt and understanding of the code, including its updates, on an annual basis.

IX 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. The employee must, however, 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 of non-skilled employees into the employees’ native languages. Documents not drafted in Dutch are often drafted in English.

X EMPLOYEE REPRESENTATION

Workers have freedom of association and representation, based on the European Social Charter and the Dutch Constitution. Under the Works Council Act, workers can furthermore be represented by a works council or an employee representative body. Trade union 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 the employees as best as possible, a works council has various rights and obligations, including:

- the right to be consulted on the company’s important financial, economic and organisational decisions;
- the right to approve regulations concerning the social policy pursued by the company; and
- the right to be consulted on the appointment and dismissal of the company’s managing board.

If management violates these rights, the works council may seek redress in court.

Works councils consists 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 their works council members a specified number of hours to meet and discuss works council matters with other members during working hours, for which hours the members will receive full pay.

Companies that employ between 10 and 50 employees may be under an obligation to establish an employee representative body.

ii Trade union

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:

- assisting in the negotiations regarding the collective terms of employment in connection with the formation of CBAs;
- drafting redundancy plans; and
- providing guidance in the event of forced redundancy in organisations.

CBAs dominate at industry level. Negotiations normally take place between the trade unions 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. Additionally, they cover issues such as working hours, holiday entitlements, pension and pre-pension plans, and social matters. At the company level, the employer’s representatives bargain directly with the workers’ representatives.
XI DATA PROTECTION

i Requirements for registration

The General Data Protection Regulation (GDPR) was implemented in all European countries on 25 May 2018 to harmonise data privacy laws across Europe. The GDPR replaces the Dutch Personal Data Protection Act and is accompanied by the General Data Protection Regulation (Implementation) Act.

Under the GDPR, a data controller or joint data controllers must keep records of all processing activities. As a consequence, all organisations must have a privacy policy to provide the supervisory authorities with relevant information if required. This internal documentation obligation does not apply to companies or organisations of fewer than 250 people, 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’. The records must include the name and contact details of the data controller and the contact details of the data protection officer, a list of the various types of categories of data that are processed, whether the data will be sent to countries outside the European Union and what kind of security measures have been taken.

The data protection officer (if available) has the obligation to inform the data subjects, among other things, about the identity and contact details of the data controller, the contact details of the data protection officer, the purpose of processing data, the recipients of the data and the retention period.

The data controller must implement appropriate technical as well as organisational measures to secure personal data against loss or against any form of unlawful processing. These measures will guarantee the appropriate level of security given the risks associated with the processing and the nature of the data being protected. The measures must also aim to prevent unnecessary collection and further processing of personal data.

In principle, the data should be accessible to the data subjects. Consequently, data subjects may ask, at reasonable intervals, whether (and what) personal data relating to them is processed. Furthermore, data subjects can, under certain circumstances, request the employer to rectify, supplement or erase personal data, or can object to certain processing of personal data.

The Dutch Data Protection Authority supervises compliance with legislation on the use of personal data. This data may be processed in a personnel file if it is necessary in connection with the performance of the employment contract. The obligations arising from the Data Protection Authority include the following:

a Employers are responsible for ensuring that the data in their personnel records are correct and accurate.

b Data in personnel files must be sufficient, serve the purpose at hand and not be excessive, given the purpose for which they are processed.

c Employers must inform their employees about the purposes for which they are collecting the employees’ data.

d Employers must take suitable technical and organisational measures to secure personal data against loss because of any form of unlawful processing.

e Personal data may not be stored any longer than is necessary to achieve the purposes for which they are collected and subsequently used.
Employers must afford their employees the opportunity to inspect their personal data and to correct them. This right of inspection generally applies to the entire personnel file.

The Dutch Data Leaks (Reporting Obligation) Act took effect on 1 January 2016. This Act imposes an obligation on organisations (both businesses and government bodies) to immediately notify the Data Protection Authority in the event of a serious data breach.

ii Cross-border data transfers

Personal data may not be exported to countries outside the European Union, unless the receiving country guarantees an adequate level of protection. No exceptions apply to transmitting personal data to group companies. The party responsible must assess whether the receiving country provides an adequate level of protection. For example, such an assessment might be made by checking whether the European Commission (EC) or the Dutch Minister of Justice has issued an opinion about the level of protection in the third country. The EC has decided that the following countries provide adequate levels of protection: Jersey, Andorra, Argentina, Canada (the parts that fall under the Canadian Personal Information Protection and Electronic Documents Act), Faeroe Islands, Guernsey, Isle of Man, Switzerland and Uruguay. The countries belonging to the European Economic Area also are deemed to guarantee an adequate level of protection.

Given that no general federal legislation on the protection of personal data exists in the United States, it is difficult to assess whether an adequate level of protection exists. On 12 July 2016, the EC adopted the EU–US Privacy Shield adequacy decision. Every organisation in the United States that is certified by the privacy shield has an appropriate level of protection (for the duration of the certification).

iii Sensitive data

The processing of special personal data, such as data regarding race or ethnic origin, political opinions, religious or personal beliefs, membership of a union, genetic or biometric identification data, health, sexual preferences or criminal record is, in principle, prohibited. The GDPR provides circumstances where the processing of sensitive personal data is allowed, for example, if the data subject has given his or her explicit consent, or if he or she has manifestly made the data public.

iv Background checks

It is common for companies to conduct a background check when they intend to hire a new employee. This background check may include asking the job applicant for additional background information, researching public resources (the internet, social media) or 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 obtain information about credit records through the applicant or employee through a public source or with his or her permission. Applicants and employees are not obligated to answer questions about their credit record, unless it is relevant to the performance of the job. Whether processing these data is permitted will depend on the
position. Information about criminal records of applicants and employees qualifies as sensitive personal data. Processing these data is prohibited unless a statutory exception applies. If, however, criminal records are relevant for the performance of a job, applicants and employees must inform the employer about them (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 Ministry of Security and Justice if the certificate is relevant for the position.

In addition to the above, it is generally prohibited to request medical tests, ask questions about the use of illegal narcotics (in spare time) and to process health data. Drug or alcohol tests are considered medical tests and the related data is health data.

XII 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 memorialise their terms in a settlement agreement.

Termination by mutual consent

Settlement agreements are valid only if they are concluded in writing. Employees have the option to terminate settlement agreements within 14 days, either by withdrawing their consent (without giving a reason) 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 period 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 ground of an employee's long-term illness (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 and is 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, with a maximum of six months for the employee, but in that case the employer's notice period must be twice as long as the employee's notice period. Payment in lieu of notice is not allowed.

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 due to pregnancy or childbirth, is based on the employee's membership of a trade union, is based on the employee's attendance of meetings of political organisations, is based on the employee exercising his or her right to parental leave, or involves any discrimination.

**Requesting the sub-district court to rescind the employment agreement**

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, 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. When terminating the contract, the court will take the applicable notice period into account and deduct the time the court proceedings took. 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**

All employees employed for two years or more and whose employment contracts end, or employees with fixed-term employment contacts that are not renewed, are generally entitled to a transition payment. As a rule, employees are not entitled to a transition payment if their employment contracts are terminated by mutual consent, but this will naturally play a role when arrangements are made regarding the termination. In addition, employees are not entitled to a transition payment (1) if the employment contract is terminated on 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 payment is not age-related and amounts to one-sixth of the monthly salary for each six months of service over the first 10 years of the employment contract. For each period of six months after that, the transition payment amounts to one-quarter of the monthly salary. Until 2020, a higher calculation standard applies to employees above the age of 50, except in
the case of small employers (with 25 employees or fewer) where the dismissal was prompted by the small employer’s poor financial situation. Monthly salary means one month’s gross salary plus fixed wage components. The payment is set at a maximum of €81,000 gross or one annual 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.

If 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.

Under the Balanced Labour Market Act, employees will be entitled to a transition payment from the first day of employment. Furthermore, the distinction between 10 or more years of service will be eliminated: the transition payment will amount to one-third of the monthly salary for each year of service. Moreover, if a termination is based on the cumulative dismissal ground, the court may grant the employee an additional payment of a maximum of 50 per cent of the transition payment.

**Instant dismissal**

Both employers and employees are entitled to terminate employment contracts 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. 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 (e.g., notification period, pay in lieu of notice, severance payment, categories of employees protected against dismissal) described in subsection i also apply to cases involving redundancy.

In the event of mass lay-offs, 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 of 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 aforementioned 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 proposed decision to reorganise the organisation. The employer is obliged to submit its proposed 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 impact on the proposed decision. A request for advice must, at a minimum, include a statement of the grounds for the proposed decision, the consequences anticipated for the persons 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 is 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.

Where 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 to with the works council, or simply drafted unilaterally by the employer.

XIII  TRANSFER OF AN UNDERTAKING

The Dutch Civil Code (Article 7:662 et seq.) applies where 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 (the TUPE Regulations) 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 the
TUPE Regulations, the employees employed by the transferor, including all their rights and obligations, are automatically transferred to the transferee. This means that the employees’ 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.

XIV OUTLOOK

The Civil Servants Normalisation of Legal Status Act will enter into force on 1 January 2020. This Act makes the legal status of civil servants 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), the military service, 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 will be subject to civil law instead of the rules of administrative law.

As set out in Section II, a number of significant changes are proposed in the Balanced Labour Market Act, which is expected to enter into force on 1 January 2020.

With regard to independent workers, the government has announced that it will draft a new act to replace the existing Deregulation of Assessment of Independent Contractor Status Act. The reason for amending the existing legislation is twofold: to strengthen the position of independent contractors and to afford employers a greater degree of certainty about the nature of the relationship (independent worker versus employee). The new act is currently expected to enter into force in 2020, but the government has already announced that, owing to the complexity of this subject, it might be difficult to meet this deadline.
I INTRODUCTION

The Employment Relations Act 2000 (the Employment Relations Act) establishes the framework for employment relationships in New Zealand, as well as establishing the country’s statutory bodies that rule on employment disputes, and their jurisdiction.

There are three specialist institutions that deal with employment dispute resolution in New Zealand: the Mediation Service; the Employment Relations Authority; and the Employment Court. The Employment Relations Act promotes mediation as the primary problem-solving mechanism to reduce the need for judicial intervention. Accordingly, in most instances, an employment relationship problem is first directed to the Mediation Service, which is part of the Ministry of Business, Innovation and Employment.

Where a matter is not resolved through mediation, it may be heard by the Employment Relations Authority, which has extensive jurisdiction pursuant to the Employment Relations Act. The Employment Relations Authority is an investigative forum that resolves employment relationship problems through an inquisitorial process of establishing facts and making a determination according to the substantial merits of the case, without regard to technicalities. Its aim is to promote good-faith behaviour, and act in equity and good conscience, consistent with the Employment Relations Act and the relevant employment agreement.

A party is able to appeal any determination of the Employment Relations Authority to the Employment Court and can elect to have their appeal heard de novo. Most challenges to the Employment Court are de novo.

The Employment Court is a court of record and follows the traditional adversarial model as opposed to the inquisitorial model adopted by the Employment Relations Authority. Decisions of the Employment Court may be appealed to the Court of Appeal, but only on an important point of law, and the Employment Court’s interpretation of the construction of an individual or collective agreement may not be challenged. Any decision of the Court of Appeal on an employment law issue may be appealed to the Supreme Court provided it is an important point of law.

A key aspect of the Employment Relations Act (as opposed to its predecessor, the Employment Contracts Act 1991) is that it imposes a statutory duty of good faith on each party to an employment relationship. This duty, unique to New Zealand, is wider in scope

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1 Gillian Service is a partner and June Hardacre is a senior associate at MinterEllisonRuddWatts.
2 An important question of law is a matter that, by reason of its general or public importance, or for any other reason, ought to be submitted to the Court of Appeal (Section 214, Employment Relations Act 2000).
3 Section 4, Employment Relations Act 2000.
than the implied mutual obligations of trust and confidence, and requires parties to be active, constructive, responsive and communicative in establishing and maintaining a productive employment relationship.\(^4\) Parties to an employment relationship include (among others) employer and employee, employer and trade union, and trade union and union members.\(^5\)

Other key pieces of employment legislation in New Zealand include: the Holidays Act 2003 (the Holidays Act), which governs the law in relation to statutory holidays and leave, and methods for calculating such leave; the Minimum Wage Act 1983 (the Minimum Wage Act), which governs the minimum wage paid to employees; the Parental Leave and Employment Protection Act 1987, which governs statutory rights for employed parents; the Equal Pay Act 1972; the Human Rights Act 1993; the Privacy Act 1993 (the Privacy Act); the Protected Disclosures Act 2000 (New Zealand's whistle-blower legislation); and the Health and Safety at Work Act 2015. In addition, there is legislation covering the government superannuation framework (KiwiSaver) and workers' compensation framework (Accident Compensation).

**II YEAR IN REVIEW**

The year 2018 saw a lot of change in the employment landscape. This included a number of amendments to the Employment Relations Act, as well as proposed legislation concerning equal pay, triangular employment relationships (involving an employer that contracts an employee to another third party that has some direction or control over the employee in its own right) and protection for victims of domestic violence. In addition, the government established the following working groups:

- **a** Pay Equity: to develop new legislation to tackle pay equity;
- **b** Film Industry: to consider the status of film industry workers;
- **c** Fair Pay: to consider a proposal to return to sector-level bargaining;
- **d** Holidays Act: to consider a new or significantly amended Holidays Act that is future-proofed and easier to use; and
- **e** Future of Work: to consider what the future may look like for the country’s industry.

The Employment Relations Amendment Bill received royal assent on 11 December 2018. Certain provisions came into effect on that date, with others coming into effect on 6 May 2019. The amendments implement the government’s post-election commitments to restore certain minimum standards and protection of employees, as well as a suite of other changes aimed at promoting and strengthening collective bargaining and union rights in the workplace.

The Domestic Violence – Victims’ Protection Act 2018 was passed into law. This Act provides 10 days’ additional leave and permits short-term flexible working arrangements for victims of domestic violence.

**III SIGNIFICANT CASES**

In *Prasad v. LSG Sky Chefs*,\(^6\) the Employment Court considered a triangular labour hire arrangement. Workers were engaged as contractors by Solutions Personnel Ltd, which then deployed them to perform work for LSG Sky Chefs, with whom it had a commercial

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\(^4\) Section 4(1A), Employment Relations Act 2000.


\(^6\) [2017] NZEmpC 150.
relationship. In this case, there were no written employment agreements between the workers and LSG Sky Chefs. However, the Court considered the true nature of the relationship and found that the workers were in fact in an employment relationship with LSG Sky Chefs, the ‘host’ organisation. Specifically, the Court held that the workers:

- had no control over the way they did their work;
- had no control over where they did their work;
- had no economic interest in the way in which the work was organised;
- were subject to the strict direction and control of LSG supervisors at all times they did not work as individuals they had no say in the terms on which they performed the work;
- had no input into the documentation that purported to reflect what sort of relationship they had with LSG, through Solutions;
- could do little to make their putative business more profitable;
- were required to wear LSG uniforms;
- were provided with training by LSG;
- were fully integrated into the LSG business; and
- had no other real source of work.

In *FGH v. RST*, the Employment Court considered the relationship between managing poor performance and mental health. In its decision, the Court was critical of RST for not seeking further information on the medical condition of an employee it was managing, despite knowing that the employee was suffering from attention deficit disorder and an anxiety disorder, which affected her performance. Ms H had raised a disadvantage grievance asserting that RST had failed to provide a safe work environment when dealing with her performance issues and subjected her to unwarranted stress. The Court rejected Ms H’s claims that she was being bullied. However, the Court was highly critical that, despite knowing Ms H’s medical issues and concerns regarding health and safety, RST never sought further information on her medical condition. The Court held that to commence and maintain the performance management process and two disciplinary processes, in the absence of steps to obtain medical advice, was not what a fair and reasonable employer could have done in all the circumstances. Ms H was therefore successful in establishing that she had been unjustifiably disadvantaged by RST’s actions.

While the Court sought further submissions from the parties regarding remedies, as only limited evidence was presented on this point at the substantive hearing, it is a useful case to be aware of when managing an employee with an underlying mental health condition. The Court’s decision makes it clear that an employer should not simply proceed with a typical disciplinary or performance management process if an employee’s underlying medical condition may be contributing to their performance or behavioural issues. Rather, the employer should consider seeking further medical information from the employee to ensure that they manage the process appropriately.

In *Lyttelton Port Company Limited v. Arthurs*, the Employment Court set out the following key principles to be considered in a medical incapacity enquiry:

- The employer must give the employee reasonable time (in the circumstances) to recover from the injury or illness.

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7  [2018] NZEmpC 60.
The employer is required to carry out a fair enquiry and then to make its decision about whether to dismiss the employee, balancing fairness to the employee and the reasonable dictates of its practical business requirements.

Fair and reasonable procedure will include notification of the possibility of dismissal and a fair enquiry enabling an informed decision, including seeking input from the employee.

The terms of the employment agreement and any relevant policy, the nature of the position held by the employee and the length of time the employee has been employed with the employer are factors that are likely to inform an assessment of what is reasonable in the particular circumstances.

Where the actions of the employer caused an employee’s condition, the employer may have an ongoing responsibility to take reasonable steps to rehabilitate the employee.

Even in a large organisation, an employer is not obliged to keep a job open indefinitely.

The relationship is a ‘two-way street’. A lack of positive engagement from an absent employee may count against any later complaint.

This enquiry needs to balance fairness to the employee and the reasonable commands of the organisation’s practical business requirements. The Court held that, even in large organisations, there comes a time that an employer can fairly ‘cry halt’. In this case, the employer was justified in terminating the employee’s contract on medical grounds given the circumstances. The medical information provided an uncertain prognosis about the employee’s return to work, and the employee was criticised for his lack of positive and constructive engagement in the process.

In *Richora Group Limited v. Cheng*, the Employment Court attributed dollar figures to the financial bands that had been created for evaluating compensation for humiliation, loss of dignity and injury to feelings under Section 123(1)(c)(i) of the Employment Relations Act. The Employment Court determined that the bands are as follows: band one, low-level harm, up to NZ$10,000; band two, medium-level harm, NZ$10,000 to NZ$40,000; and band three, high-level harm, NZ$40,000 and over. In this case, the harm was considered to fall within band three.

Ms Cheng was an employee of Richora Group Limited, which specialises in exporting manuka honey. Ms Cheng became an employee of the company in approximately January 2017 (although the exact date was disputed) but she stopped working in March after Mr and Mrs Li, the owners of the company, accused her of complaining to the Inland Revenue Department (IRD) about their failure to pay her wages. Ms Cheng had not signed an employment agreement and, after learning of the IRD complaint, Mr and Mrs Li attempted to get Ms Cheng to sign an employment agreement and agree to accept NZ$3,000 in exchange for her resignation. The following day, Ms Cheng had an acute stress reaction and attempted to commit suicide. A couple of weeks later, Mr Li posted negative comments about her on an online forum popular with the Rotorua Chinese business community. Although she was not identified by name, the Chinese community in Rotorua is small, and Ms Cheng was easily identifiable as the person whom Mr Li was complaining about.

The Court accepted Ms Cheng’s evidence as to the start date of the role and that she had worked the hours that she claimed. The Court found that, despite being aware of Ms Cheng’s mental health issues, Mr and Mrs Li aggressively pursued her resignation such that it

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was no surprise that she felt she had effectively been dismissed. Ms Cheng was awarded lost wages plus back payment for her unpaid wages. With respect to compensation for Ms Cheng’s hurt and humiliation, the Chief Judge considered the ‘dramatic’ effect that the actions of the employer had on her mental health. Her Honour referred to the bands identified in *Archibald v. Waikato DHB* and considered that the harm suffered fell into the highest band (band three). The Chief Judge traversed other cases where significant effects on the employee’s mental health followed an unjustified dismissal. Despite considering that the case fitted into band three, the Court only awarded Ms Cheng NZ$20,000 in compensation for hurt and humiliation as that was all that was sought by her.

### IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

#### i Employment relationship

The concept of good faith underpins employment relationships in New Zealand. Under the Employment Relations Act, employers are required to provide individual employees with written employment agreements and to retain a signed copy of the employment agreement. It is best practice for employers to require employees to sign an employment agreement before they commence work. However, prospective employees should be given a reasonable period of time to obtain independent advice before signing an employment agreement.

The absence of a written employment agreement does not necessarily mean that no employment relationship exists. An employee may refuse to sign the employment agreement offered to them. In this case, the employer must retain a copy of the agreement offered to the employee along with evidence setting out the processes it has followed when offering the employee the employment agreement and why the employee will not sign. If an employee does not have an employment agreement, or an employer does not retain one on file, the employer may be subject to fines imposed by the courts.

There are two broad types of employment agreements in New Zealand: individual employment agreements and collective employment agreements.

Individual employment agreements are between an individual employee and an employer. These agreements can be permanent, full-time, part-time, fixed-term or casual. They must contain the names of the employer and employee, a description of the work to be performed, hours of work, salary or wages, the place of work, an employment relationship problem-resolution clause, a clause setting out the process the employer will follow in restructuring situations and a description of the expectations surrounding public holidays.

Collective agreements are between at least one employer and at least one registered union, and must cover at least two employees who are members of the union. They can cover permanent, full-time, part-time, fixed-term and casual employees, and may cover all or some of the employees in a workplace. They must also include a coverage clause specifying exactly what type of employees and jobs are covered. In addition, they must name all the unions and employers that are parties to the agreement, contain a variation clause, an employment

10 Section 64, Employment Relations Act 2000.
11 Section 65, Employment Relations Act 2000.
relationship problem-resolution clause, a clause setting out the process the employer will follow in restructuring situations, and set out when the agreement will expire (a maximum of three years).\(^\text{12}\)

Good-faith bargaining applies to bargaining for both individual employment agreements and collective agreements. The parties must consider and respond to each other’s proposals, and be responsive and communicative. The collective bargaining regime is more prescriptive than the regime for bargaining for an individual employment agreement as it takes place between a union and an employer, and requires the following: agreement as to the collective bargaining process; the formal exchange of claims in bargaining, and the negotiation and agreement on those claims; and a formal ratification process with union members who are covered by the collective agreement.

Fixed-term employment agreements are lawful provided there is a genuine reason, based on reasonable grounds, for the agreement to be of a fixed term – for example, at the close of a specific date or period, the occurrence of a specific event or the conclusion of a specific project. Common examples are where a fixed-term arrangement is used to cover an individual who takes parental leave or who is required for a specific, technical project. In addition, the employment agreement must state the reasons for the fixed term and when it will come to an end.\(^\text{13}\) Fixed-term agreements cannot be used to assess an employee’s suitability for permanent employment.

Individual employment agreements can be varied by agreement between the employer and employee. Often, variations must be recorded in writing or as required in the employment agreement. A variation clause is required in any collective agreement, and the agreement can be varied in accordance with this clause. This is usually by a vote of union members who are impacted by the change.

**ii  Probationary periods**

The Employment Relations Act provides for statutory trial periods, which from 6 May 2019 will only be available for employers who have fewer than 20 employees. A statutory trial period enables an employer to dismiss an employee within the first 90 days of employment and the employee is not able to bring a personal grievance for unjustified dismissal. Trial periods can only be used for new employees, must be agreed to in writing before the employee starts work and may only last for a maximum of 90 days.\(^\text{14}\) However, employees in a trial period are able to pursue other types of employment-related claims, such as for sexual harassment or discrimination.

The Employment Relations Act also recognises probationary periods, which essentially provide for a truncated performance management time frame within an employment agreement.\(^\text{15}\) An employee dismissed during a probationary period still has the right to bring a personal grievance for unjustified dismissal.

**iii  Establishing a presence**

A company that is not registered in New Zealand cannot employ anyone to carry out business in New Zealand. Foreign companies are required to be registered on the Companies Office’s

\(^{12}\) Sections 52 and 54, Employment Relations Act 2000.

\(^{13}\) Section 66, Employment Relations Act 2000.

\(^{14}\) Section 67A, Employment Relations Act 2000.

\(^{15}\) Section 67, Employment Relations Act 2000.
Overseas Register if they are carrying on business in New Zealand under the Companies Act 1993. Registration occurs by sending the prescribed form to the Companies Office. Companies must also register with the IRD as an employer. To do so, a company must have an IRD number. Companies can automatically register for an IRD number, goods and services tax and as an employer when they are registered with the Companies Office. It is possible for an overseas company to engage a worker from a labour hire company in New Zealand. The employee remains either employed or engaged by the labour hire company, but will carry out work for the overseas company as the client. However, care needs to be taken with such arrangements, as in some circumstances the client may be deemed to be the real employer of the worker, rather than the labour hire company.

V RESTRICTIVE COVENANTS

A restraint of trade is a contractual provision that limits an employee’s post-employment conduct. Depending on how it is drafted, a restraint of trade clause will typically prevent an employee from soliciting fellow staff members, clients or suppliers following termination of their employment, or prevent them from working for a competitor within a certain geographical range for a stipulated period of time.

Restraint of trade clauses are prima facie unlawful and, therefore, unenforceable. However, if a restraint of trade is reasonably necessary to protect an employer’s legitimate proprietary interests and not contrary to public policy, it may be enforced by the Employment Relations Authority or Employment Court. Proprietary interests that an employer can protect include confidential information, client relationships and the stability of its workforce.

A restraint of trade should only go as far as necessary to protect the employer’s interest, and be limited in scope and duration. If the Employment Relations Authority or Employment Court consider that the clause is aimed at preventing competition, rather than protecting the employer’s business, it will not be enforceable. The reasonableness of a restraint will be assessed by considering the relevant circumstances at the time the restraint is agreed upon. The employee must also have received consideration for the restraint, although entry into an employment agreement will be sufficient for a new employee.

There are other provisions an employment agreement may contain that protect an employer’s proprietary interests, including confidentiality and intellectual property clauses. Employees also have an implied duty to maintain confidentiality and not use an employer’s confidential information for alternative purposes. When seeking enforcement of a restraint of trade provision, the Employment Relations Authority or Employment Court will consider whether the restraint is reasonable and necessary, or whether the employer’s interests may be protected by these other provisions.

VI WAGES

i Working time

There are two key pieces of legislation governing wages in New Zealand: the Minimum Wage Act and the Wages Protection Act 1983 (the Wages Protection Act). The Minimum Wage Act prescribes the minimum rates at which employees must be paid. The adult minimum wage is currently NZ$16.50 per hour. The Wages Protection Act (among other matters)
provides for limited circumstances in which deductions can be made from employee wages, and stipulates that employees must provide written consent for certain deductions (other than those required at law).

There are no maximum working hour regulations that apply to the general workforce, although some industries do have specific regulations and limits (e.g., commercial drivers and airline pilots). However, an employer and employee must agree in the employment agreement that the employee will work more than 40 hours in a week. In addition, where an employee will work fewer than 40 hours in a week, there should be an effort to limit the number of days on which those hours are worked to no more than five. Health and safety laws recognise fatigue as a hazard and, as such, hours need to be monitored to manage that risk.

There are no limits on the amount of night work that may be performed. However, employees who are younger than 16 years old are not permitted to perform night work.

### Overtime

The law does not require compensation for overtime. Payment for overtime can be agreed to as a matter of contract in the employment agreement.

If an employee who is paid wages is required to remain available for work beyond the guaranteed hours in their employment agreement, they will need to be provided with ‘reasonable’ compensation for remaining available for work. For salaried employees, there will need to be express agreement that the employee’s salary compensates them for remaining available for work.\(^\text{16}\)

### VII FOREIGN WORKERS

Employees who are not citizens or residents of New Zealand need a work visa in order to lawfully perform work in New Zealand. There are various visas available with differing durations, for example, a business visitor visa, an essential skills work visa, a specific purpose or category visa, and a resident (skilled migrant) visa. There is no obligation to keep a record of foreign workers or any limit on the number of foreign workers a business can have, as long as they all hold valid work visas.

All foreign workers are subject to New Zealand employment laws, and tax laws apply to foreign workers as they would to domestic workers.

### VIII GLOBAL POLICIES

While workplace policies are not required by law, they are common. Most employers have a set of policies or an employee handbook that sets out the employer’s expectations and helps the employee understand what the rules are in the workplace. Some common policies include harassment and bullying, health and safety, discipline and conduct, flexible working, privacy and internet use. Employers are able to create their own policies that best fit their business and these do not need to be filed with or approved by the government.

It is best practice to consult with employees and unions when new policies are introduced in the workplace or when current policies are amended. However, the employer must get the consent of its employees (or union if applicable) before it amends or introduces

\(^{16}\) Section 67D, Employment Relations Act 2000.
policies if they are contained in an employment agreement, the employment agreement requires employee or union consent to amend or introduce policies, or the amended or new policies contradict to the employment agreement.

Occasionally, employment agreements contain information that would usually be contained in a policy, such as disciplinary processes, internet use, privacy, or drug and alcohol testing. It is best practice for this information to be contained in separate policies, as this enables the employer to amend policies from time to time without requiring changes to the employment agreement of the employees (or union if applicable).

It is important to ensure that an employer has a good set of policies, particularly in relation to sexual harassment, bullying, and health and safety. Under the health and safety legislation, among other things, employers must ensure, as far as is reasonably practicable, the health and safety of workers and other persons. Having clear workplace policies in place is a good step in demonstrating that the employer is doing all that is reasonably practicable.

Policies do not need to be signed by employees, but employees do need to be familiar with the policies and be able to access them easily. It is common for employment agreements in New Zealand to include a provision stating that the employee agrees to be bound by and comply with all policies (as may be amended or introduced from time to time). Policies may need to be translated into foreign languages in workplaces with many foreign workers.

An employer must follow all the policies it has in place. For example, if an employer has a specific disciplinary policy that sets out a number of steps in the disciplinary process, the employer must follow those steps in conjunction with the legislative requirements.

IX  TRANSLATION

The national languages of New Zealand are English, Te Reo Māori and New Zealand Sign Language. English is the most widely spoken language in New Zealand. It is the language commonly used in the courts and Parliament, in the education system and by the public sector.

Employment agreements and other documents do not need to be translated into an employee’s native language, but if an employee does not understand the content of an individual employment agreement and the employer is aware of this, a claim for unfair bargaining could arise. Unfair bargaining occurs when an employee is significantly disadvantaged in negotiating an individual employment agreement.

If the use of English is a problem in proceedings before the Employment Relations Authority or the Employment Court, an interpreter may be required.

X  EMPLOYEE REPRESENTATION

Employees are entitled to form or join trade unions. The rate of union membership is approximately one in five employees,17 and is higher in the public sector than the private sector. Union membership is particularly prominent in the healthcare, social assistance, and education and training sectors. A union must have 15 members in order to become an incorporated society and the union must register with the Registrar of Unions. The role of a union is to promote the collective interests of its membership.

17 June 2016 Statistics New Zealand.
It is unlawful to discriminate against an employee on the basis of union membership or for involvement in union activities. The Employment Relations Act actively promotes collective bargaining for a collective agreement and there are prescribed rules to govern bargaining in good faith. Where bargaining is initiated, there will be a duty to conclude that bargaining for a collective agreement unless there are genuine reasons based on reasonable grounds not to conclude a collective agreement (from 6 May 2019). When bargaining, employers and unions must meet to bargain, and consider and respond to proposals made in the bargaining. There is an obligation not to undermine the bargaining, or the authority of the representatives at the bargaining. Where there are multiple employers involved in the bargaining, the duty to bargain in good faith applies but there is no obligation to reach agreement where there are genuine reasons based on reasonable grounds not to.

Unions can elect representatives in accordance with the rules they have established. There are no legally prescribed rules on election of representatives or the length of a representative’s term. Union representatives are entitled to access an employer’s workplace without consent in certain circumstances, as long as there are union members at the workplace either covered by a collective agreement or bargaining towards one. Union representatives must be mindful of normal operating hours and follow health, safety and security procedures when accessing a workplace.

XI DATA PROTECTION

i Requirements for registration

The Privacy Act governs data protection. Employers, as agencies, are subject to this Act. While employers are not required to register with a data protection agency or other government body, they are under a duty to appoint a privacy officer, whose responsibilities include encouraging the employer’s compliance with the Privacy Act and working with the Privacy Commissioner in relation to investigations.

Under the Privacy Act, employers are bound to comply with 12 information privacy principles (IPPs), which conform to a number of international agreements. The IPPs are rules about the collection, retention, use and disclosure of personal information. In accordance with the IPPs, personal information relating to an employee must be collected directly from that employee (unless an exception applies), providing that it is collected for a lawful purpose that is connected with a function of activity of the employer and the collection of information is necessary for that purpose. The employer must take reasonable steps to ensure, among other things, that the employee knows the information has been collected, why it has been collected and that he or she has the right to correct the information. Further, the employer must reasonably secure the information against loss and unauthorised access or misuse.

18 Section 104, Employment Relations Act 2000.
19 Section 20, Employment Relations Act 2000.
20 Section 23, Privacy Act 1993.
21 Section 6, Privacy Act 1993.
22 Section 6, principle 2, Privacy Act 1993.
23 Section 6, principle 3, Privacy Act 1993.
24 Section 6, principle 5, Privacy Act 1993.
Cross-border transfers

The Privacy Commissioner has discretion to prohibit cross-border transfers of personal information. To exercise this discretion, the Commissioner must be satisfied on the following reasonable grounds: first, that the information is likely to be transferred from the receiving state to a third state that does not have information safeguards similar to those in New Zealand; second, that the information transfer would likely lead to a contravention of the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. The Commissioner cannot exercise discretion to prohibit the transfer if the information is required by legislation or any obligation at international law.

Sensitive data

The term used in New Zealand law is personal information, as there is no separate definition for sensitive data. Personal information is defined in the Privacy Act as information about an identifiable individual. Requests for personal information by individuals about themselves are governed by the Privacy Act, but the IPPs do not apply to personal information held solely or principally in connection with an individual’s personal, domestic or family affairs.

Background checks

Generally, offers of employment are made to prospective employees on the condition that the employer is satisfied with any background checks that the employer requires. If an employer is not satisfied with a background check, it may withdraw the offer.

Employers may check a prospective employee’s references with the employee’s consent. The prospective employee is deemed to give consent where he or she provides a prior employer’s name and contact details in an application for employment.

Employers may also check an employee’s criminal records with his or her consent. However, in certain circumstances, employees do not have to declare criminal convictions. Under the Criminal Records (Clean Slate) Act 2004, if an individual satisfies relevant eligibility criteria, they will be deemed to have no criminal record for the purposes of any question asked about their criminal record. This scheme, known as the ‘clean slate scheme’, applies to every question asked about and every request made for the disclosure of the individual’s criminal record, including questions asked and requests made by prospective employers. The relevant eligibility criteria include, among other requirements, having completed a rehabilitation period of at least seven years since the date of sentencing, never having had a custodial sentence imposed and never having been disqualified from driving (or subject to an alcohol interlock sentence) in respect of certain serious driving offences. The clean slate scheme does not apply to individuals applying for employment in a position that involves national security, in the justice sector, as a law enforcement officer or in a role involving the care and protection of children.

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25 Section 114B, Privacy Act 1993.
26 Section 2, Privacy Act 1993.
28 Section 6, Criminal Records (Clean Slate) Act 2004.
30 Section 7, Criminal Records (Clean Slate) Act 2004.
31 Section 19, Criminal Records (Clean Slate) Act 2004.
Under the Credit Reporting Privacy Code 2004, employers can only access credit information about a prospective employee with his or her consent and for the purpose of a pre-employment check for a position involving significant financial risk.32

XII DISCONTINUING EMPLOYMENT

i Dismissal

Employment is not ‘at will’ and cannot be terminated unilaterally by an employer without cause. The employment laws require a lawful reason to terminate an employee’s employment and any termination must be legally justified.

The test of justification is whether the employer’s actions, and how it acted, were what a fair and reasonable employer could have done under all the circumstances at the time the dismissal or action occurred.33 This includes having a substantive reason for the dismissal and following a fair process in reaching the decision to dismiss. A fair process will ordinarily involve raising concerns with an employee, allowing the employee to respond and investigating the matter before reaching any decision in relation to it.

The employer must provide the employee with the notice in their employment agreement in all cases except where the termination is the result of serious misconduct. Payment in lieu of notice and working alternative duties during the notice period are permissible where these are contemplated in the employment agreement. There is no legal requirement for the length of a notice period other than that it must be reasonable. Common practice is four weeks’ notice, with the exception of more senior staff, for whom it can be up to six months’ notice. In the case of serious misconduct, termination without notice is permitted.

There is no requirement to notify any government agency, works council or trade union of the dismissal. There is no requirement for a social plan.

Employees can seek the remedy of reinstatement to their role in the event that they bring proceedings before the Employment Relations Authority in relation to the dismissal. There is no obligation to offer alternative employment except in a redundancy situation (see subsection ii), and there is no obligation to pay the employee severance or other dismissal indemnities.

The parties are able to enter into a settlement agreement in relation to the dismissal if they wish to agree to a waiver of claims against the other party. This agreement can be certified by a mediator from the Ministry of Business, Innovation and Employment. Where a mediator certifies a settlement agreement, the agreement is not able to be brought before the Employment Relations Authority except for enforcement purposes.

ii Redundancies

A redundancy is treated in a similar way to any other termination of employment. Therefore, the employer is required to justify the decision to terminate the contract of the employee on the grounds of redundancy both substantively and by following a fair process. The employer is therefore required to demonstrate a commercial rationale (genuine business case) for the

33 Section 103A, Employment Relations Act 2000.
redundancy in order for it to be justified. While redundancy is not defined in New Zealand legislation, it is commonly accepted to mean a situation where the role is or will become surplus to the needs of the employer.

A fair process in a redundancy situation will require an employer to propose the restructuring of its operations first and to seek feedback through consultation with employees. Once that feedback has been heard and considered, the decision can be reached to disestablish roles. If an employee’s role is disestablished, the employer is required to consider redeployment opportunities for the employee into other roles within the business (including any roles established as part of the restructuring process).

If an employee is made redundant, there is no statutory obligation to pay redundancy compensation. However, if redundancy compensation is payable under the employment agreement, the employer will be obliged to pay it.

There is no requirement to notify any government agency, works council or trade union of the redundancy. There is no requirement for a social plan.

XIII TRANSFER OF BUSINESS

The Employment Relations Act provides protection to certain categories of employees where their employer proposes to restructure its business so that the work undertaken by those employees is carried out by a new employer.34 These categories of employees, set out in Schedule 1A of the Employment Relations Act, also known as vulnerable employees, cover employees who work in cleaning, catering, caretaking or laundry services (Schedule 1A employees). Statutory protection has been granted to Schedule 1A employees as they are usually employed to work in sectors where contracting out occurs frequently, which can have the effect of eroding terms and conditions of employment.

Where there is a transfer of an undertaking (outsourcing, second generation outsourcing or insourcing), Schedule 1A employees are entitled to elect to transfer to the new employer on the same terms and conditions of employment as with their old employer. In addition, their service is treated as continuous between the old employer and the new employer. If an employer makes any Schedule 1A employee who transferred to its employment redundant for reasons relating to the transfer, the employee may be entitled to bargain for a redundancy entitlement. If an agreement is not able to be reached, the employee can apply to the Employment Relations Authority to have the redundancy entitlement fixed by the Authority.35

Currently employers who employ 19 or fewer employees are exempt from the Schedule 1A employee transfer requirements. From 6 May 2019, the provisions will apply to all ‘vulnerable employees’ regardless of the size of their employer.36

For all other employees, the Employment Relations Act requires that all employment agreements have an employee protection provision, which must set out the process that an employer will follow in the event that all or part of its business is sold, transferred or contracted out. An employee protection provision generally requires an employer to negotiate with the new employer to offer employees employment.37

34 Section 69A, Employment Relations Act 2000.
36 Section 69CA, Employment Relations Act 2000.
37 Section 69OF, Employment Relations Act 2000.
The amendments to the Employment Relations Act, which resulted from the passing of the Employment Relations Amendment Bill 2018, will affect New Zealand’s employment law landscape in 2019. Several of the amendments impact industrial relations and, as a result, this may increase both the frequency of industrial action and the number of cases brought before the Employment Relations Authority or Employment Court concerning industrial relations. Further, the restriction on the use of 90-day trial periods and the reintroduction of reinstatement as the primary remedy for the resolution of employment disputes will have a significant impact.

It is also likely that once the various working groups convened by the government have reported back (see Section II), there may be new legislation introduced in respect of equal pay and fair pay agreements. The government’s proposed solution to the issues with the Holidays Act 2003 may also become apparent, including whether the resolution will be new legislation or amendments to the current legislation. The ongoing conversation about the future of the workforce and the suitability of New Zealand’s existing employment frameworks is likely to continue, with the Employment Relations (Triangular Employment) Amendment Bill still making its way through Parliament, and the possibility that New Zealand may follow in the footsteps of the United Kingdom by introducing a third category of worker to sit in between an employee and a contractor (currently referred to by the government as a ‘dependent contractor’).

Bullying, harassment and appropriate corporate conduct was a significant focus in 2018 following the #MeToo movement. WorkSafe New Zealand, the country’s health and safety regulator, has committed to building its capability to meet public expectations around sexual harassment and bullying, so it is likely that these issues will continue to be explored in both the health and safety, and employment space, moving forward.
Chapter 31

NIGERIA

Folabi Kuti, Ifedayo Iroche and Chisom Obiokoye

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 Act 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), 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 Court of Appeals hears appeals from the NICN regarding questions of fundamental rights contained in Chapter IV of the CFRN, in relation to matters under its jurisdiction. However, where an appeal from the NICN relates to other employment matters, it must be with leave of the Court of Appeal.

II YEAR IN REVIEW

According to the Labour Force Statistics – Unemployment and Underemployment Report produced by the National Bureau of Statistics (December 2018), as at the third quarter of 2018, Nigeria had a labour force of 90.5 million people, of which 69.54 million were in employment. An analysis of the report reveal that 51.3 million Nigerians were in full-time

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1 Folabi Kuti is a partner, Ifedayo Iroche is the Head of Chambers (Lagos Office) and Chisom Obiokoye is an intermediate senior associate at Perchstone & Graeys.
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 as well as International Best Practices in reaching decisions, on a case by case basis and with an air of finality.
4 Section 243 (2) of the CFRN.
employment and 18.21 million were in part-time employment. As 2019 is an election year, there is a chance that these figures will be improved, as there has been a rise in the number of young entrepreneurs.

A number of issues that arose in 2018 have been addressed by the NICN or the passing of new or amended laws, such as the more comprehensive Job Creation and Protection (Establishment) Bill 2013. Globally, the employment landscape is changing, forced by the advent of new technology and diversity in the workforce. For example, with millennials largely making up the modern workforce, employers are now being forced to consider more flexible and sustainable working arrangements.

Outsourcing arrangements and contract staffing remain a major issue. In 2018, there were protests against arrangements that allow employers to avoid certain obligations such as pensions, insurance and gratuity. Technological innovations have introduced novel employment structures, which are quite dynamic but somewhat vague, especially in relation to the classification of persons working under such arrangements. Consequently, in 2018, the National Industrial Court was provided with an opportunity to determine the nature of the relationship between Uber and Taxify and their drivers, that is, whether they could be classified as employees or independent contractors. However, this could not be determined by the court owing to an absence of sufficient facts and evidence to inform a substantive determination. This remains an area of interest.

Other trending issues in employment law include the scope, validity and enforceability of non-compete clauses; enforceability of arbitration clauses in employment contracts; liability of former employers in giving false or malicious references to a former employee; and the ability of financial institutions to recover staff loans after employment contracts are terminated. Additionally, the National Labour Congress and the federal government have been engaged in discussions on the upward review of the national minimum wage. While the President is yet to assent to the proposed review, an increase in the current minimum wage is feasible.

III SIGNIFICANT CASES

A number of noteworthy labour cases were decided in 2018.

The age-long debate about the reasonableness of non-compete clauses to protect commercially sensitive trade secrets of an employer came to the forefront again in two decisions of the NICN. In *Infinity Tyres Limited v. Mr Sanjay Kumar,*6 the NICN held that the non-compete clause restricting the first defendant from joining ‘any other company in Nigeria for one year’ upon cessation of employment with the claimant company was reasonable with regard to the geographic coverage and the one-year restraint, but unreasonable with respect to ‘any other company in Nigeria’. In *7th Heaven Bistro Limited v. Mr Amit Desphande,*7 a similar issue arose. In this case, the NICN declared as ‘inhuman and stifling’, and consequently to constitute an unfair labour practice, a restrictive covenant mandating that ‘for whatever reason even if his employment is terminated [the employee] shall not accept employment with any other employer in Nigeria . . . for a period of (3) years from the date of termination or resignation as the case may be’.

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In Raphael Adula Odama v. Federal Judicial Service Commission & 3 Ors and Iretiolu Wemimo Dada v. Ondo State Judicial Service Commission & Anor, the NICN considered whether a dismissed employee, whose contract was terminated because of irregular or void employment status, is liable to pay back all remuneration received during the period of employment. In the Odama case, the court noted that the remuneration for which a refund was sought was a special type of damages that must be specifically pleaded and proven. However, beyond a bare reference to the period, the very particulars or quantum of remuneration received was not given or stated in Dada’s case. The Court nevertheless held that the appointment of Dada as Chief Magistrate was void, and granted the defendant’s counterclaim asking for a refund of all remuneration received during the purported employment.

Adjudicatory processes involving the enforcement of the principal legislation dealing with arbitration (in relation to aspects of employment contracts) were the focus in three NICN decisions. The facts in Giuseppe Francesco E Ravelli v. Digitsteel Integrated Services Limited, Chandra Prakash & 11 Ors v. Orleans Invest Holdings Limited & 4 Ors and Mr Michael Ajilore v. KLM Royal Dutch Airlines were somewhat similar, as was the verdict rendered in the preliminary objection raised in all three cases. For example, in Ajilore, the applicant was an employee of the respondent and had executed a training bond while in the employment of the respondent. Upon resignation and after taking the benefits of the bond, a dispute arose as to the interpretation of parties’ rights and obligations. The bond contained an arbitration clause that covered the resolution of possible disputes arising from its interpretation. When both parties could not agree on a sole arbitrator, the applicant applied to the court for the appointment of an arbitrator. However, the NICN did not have jurisdiction because it is not contemplated within the meaning of ‘court’ as the term appears in the Arbitration and Conciliation Act. One significant point from these decisions is the question of whether it is appropriate, or necessary, to insert arbitration clauses in employment contracts. The NICN encourages the swift resolution of employment-related disputes through its court-assisted alternative dispute resolution mechanism.

The facts in Udenigwe Udogu v. Provost, Institute of Ecumenical Education & Anor, among other things, highlight the legal liability associated with giving a false, malicious and misleading work reference to the prospective employer of a former employee. In this case, the claimant, a former lecturer, received 8 million naira in damages for what he would have earned if his previous employer’s false and malicious work reference had not truncated the claimant’s new-found employment.

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10 Unreported suit No. NICN/LA/559/2016, ruling delivered on 16 February 2018; per Kanyip J.
11 Unreported suit No. NICN/LA/521/2017, ruling delivered on 5 March 2018; per Bassi J.
The NICN held in both *Darlington Eriseye Lawson v. Keystone Bank Limited*\(^\text{14}\) and *Jacob Folarin v. Union Assurance Co Ltd*\(^\text{15}\) that the employer acted in a discriminatory manner and carried out an unfair labour practice by making *ex gratia* payments to former employees whose employment relationships were terminated in the same or similar circumstances as that of the claimant, but failed to make the same payment to the claimant.

In *Mrs Gloria Chukwudi-Nneke v. Registered Trustees of Dowen College, Lagos*,\(^\text{16}\) the defendant was asked to pay damages to the claimant ‘for the manner in which she was disengaged by the defendant given her status as a pregnant woman’.

*Oluosanya Adeosun v. Stag Engineering Nig Ltd*\(^\text{17}\) and *Mr Bala M Yesufu v. Nigeria Breweries Plc*\(^\text{18}\) bring into focus the need for clarity and precision in HR recruitment and termination documentation. The court, in determining the required notice period to be given by the claimant when opting for early retirement, specifically directed the defendant (employer) to ‘take immediate steps to include and incorporate in the [defendant’s] HR Policy and Employee Handbook the entitlement conditions and packages for Early Retirement as well as the Exit Notice Period’.

It seems that the NICN, with few exceptions, will not allow a former employee to avoid fulfilling contractual obligations. For example, an employee cannot avoid the repayment of loans using the excuse that the loss of employment has made it impossible to repay the loans advanced in the course of the employment relationship. See *Mrs Kikelomo Kola-Fasanu v. Prestige Assurance Plc*,\(^\text{19}\) *Ms Kate Iyamah v. First Bank of Nigeria Plc*\(^\text{20}\) and *Mr Adebayo Gbolahan Adepoju v. Coscharis Group*.\(^\text{21}\) The court in *Kola-Fasanu* distinguished the contract of employment and personal loans between the parties as two separate subject matters that are not mutually dependent.

In *Oladapo Olatunji & Anor (Representing themselves and other Uber and Taxify Drivers in Nigeria in a Class Action) v. Uber Technologies System Nigeria Limited & 2 Ors*,\(^\text{22}\) a case regarding ride-sharing applications that allow users to order a taxi that appears within a few minutes of a request, the drivers, mainly owners of the taxis, brought a suit to determine whether they are independent contractors or direct employees of Uber, Taxify, etc. In this case, the claimants sought, among other things, for a declaration that all Uber and Taxify drivers are employees of Uber and Taxify and, as such, are entitled to certain employee benefits. They contended that they were engaged subject to certain conditions (vehicle standards and maintenance, charges


\(^{21}\) Unreported suit No. NICN/LA/409/014, judgment delivered on 16 February 2018; per Kanyip J.

\(^{22}\) Unreported suit No. NICN/LA/546/2017, judgment delivered on 4 December 2018; per Kanyip J.
per trip, code of conduct, etc.), and work was periodically assigned for which they were paid ‘weekly wages’. While the court dismissed the case, largely as a result of the claimants’ failure to provide sufficient facts and evidence to inform a substantive determination, it made reference to the imprecise language of Section 91 of the Labour Act, which seems to be broad enough to favour the classification of ride-sharing drivers as employees.

IV BASICS OF ENTERING 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 his or her job. The contract must contain:

- the employer’s name or group of employers;
- the worker’s name, address, position and date of engagement;
- the nature of the employment;
- the date of expiry, if a fixed-term contract;
- the notice period for termination;
- wages, frequency of payment and method of calculation;
- hours of work, holiday pay and conditions for incapacity owing to sickness and injury; and
- special conditions of the contract.

Generally, the contract must be signed in order 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. Fixed-term contracts are permissible and must specify the above 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.

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. Where 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.

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. Industry practice is usually for probation to last

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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 probation.29

iii Establishing a presence

For a foreign company to hire employees to carry on business in Nigeria, it must establish its presence30 by incorporation under the Companies and Allied Matters Act (CAMA).31 It cannot own a place of business before incorporation, except for receiving correspondence, notices and other documents preliminary to incorporation. The CAMA32 empowers the National Council of Ministers, on application by a foreign company, to grant exemption from incorporation in limited circumstances.33

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).34 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, as amended (PITA) obliges the employer to ensure monthly remittance of employees’ taxes. The Pension Reform Act 2014 (PRA)35 requires the employer to make monthly deductions of a minimum of 8 per cent from its employees’ salaries, plus an additional 10 per cent minimum contribution of its own, 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.

V RESTRICTIVE COVENANTS

Generally, all covenants in restraint of trade are unenforceable, unless they are reasonable with respect to the interest 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 upon the enforcing party.

30 Sections 54 and 55, CAMA.
31 Chapter C20 LFN 2004.
32 Section 56.
33 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.
34 Section 25(1), Labour Act.
35 The PRA 2014 was signed into Law on 1 July 2014, repealing the Pension Reform Act 2004.
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 the 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

Recently, 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 raised to 30,000 naira; however, the proposed increase is yet to be transmitted to the National Assembly for enactment into law.

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.36

i Working time

Pursuant to the Labour Act, normal working hours in 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 actual working day, which in practice is regulated by company policy. The statutory minimum for rest periods and leave37 must be considered when determining work 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 work38 does not extend to women employed as nurses or holding management positions, or those who are not ordinarily engaged in manual labour.

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.

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36 Sections 1 and 2, Labour Act.
37 The Act provides that where 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.
38 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.
While the Act is silent on a threshold for the actual amount 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 and 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,\(^39\) 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.\(^40\) Persons entering Nigeria for business purposes must obtain the Minister’s consent.\(^41\)

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 dependents (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.

The legislation regulating tax matters for individuals is the PITA.\(^42\) A company must remit tax on behalf of its foreign employees where the employer is in Nigeria or has a fixed base in Nigeria, or where 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 period of absence) or more in any 12-month period; and

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\(^39\) 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.

\(^40\) Sections 34 and 18(1).

\(^41\) Sections 8(1) and 14(1).

\(^42\) See Section IV.iii, above.
the remuneration of the employee is liable to tax in the other country under the provisions of the avoidance of 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 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 commonplace for organisations to have a handbook containing additional details on matters pertaining to the relationship. Although internal discipline 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 the 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 to 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., where the employees are unionised). Acceptance of the employment offer is usually predicated on acceptance of internal rules. The employees, however, must be notified of the existence of internal rules and any subsequent changes to them. While there is no prescribed format for where such 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, which is forbidden in the workplace. 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 ground’. The Trade Union Act, as amended (TUA) 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’. 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.

43 Section 42, CFRN; other laws, such as the Discrimination Against Persons with Disabilities (Prohibition) Act 2018 and the HIV and AIDS (Anti-Discrimination) Act 2014, reflect this.
44 Section 17, CFRN. As regards corruption, there are a number of Nigerian laws in this respect.
45 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.
46 Section 12(2).
IX 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.47 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.

X 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 its members. 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.

47 The Labour Act defines foreign contracts as contracts for the employment of citizens outside Nigeria. Section 38 provides requirements specific to such contracts, including that the contracts are read to or translated into a language understood by such persons.
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) recently 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). The Personal Information and Data Protection Bill is pending before the National Assembly. In practice, employers provide for data protection in their handbooks or employee contracts.

Requirements for registration

There is currently no data protection agency requiring registration. Where data is used in the course of the company's usual line of business, consent or notification to the employee may, arguably, not be necessary. Where it is assumed that the 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, processing of personal data is considered lawful if, among other things, it is necessary for the performance of a contract in which the individual is a party, it is in compliance with a legal obligation, or consent has been given to its 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 omission 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.

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

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48 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.

49 The Bill, if passed, will provide a legal framework for privacy and data protection.

50 The Cybercrimes Act does, however, require cybercafe operators to register as a business concern with the Computer Professionals Registration Council and as a business name with the Corporate Affairs Commission.

51 Section 22.

52 Sections 2.1(2) and (3), and 2.6, NDPR.
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 interest 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.53

### 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, trades union membership, criminal records or any other sensitive personal information; and requires measures to be put in place to protect it.54 Nigeria does not operate a social security system; however, medical information, client–solicitor communications and bank–customer communications do enjoy conditional protection by law.55

### iv Background checks

Background checks are not the subject of statutory regulation. However, evidence suggests that many employers conduct such 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.

### XII 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 was substantially altered by the decisions of the NICN in 2016. 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 apex court) had followed. By its decision in the leading case of *Aloysius v. Diamond Bank*,56 in certain

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53 Sections 2.11 and 2.12, NDPR.
54 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.
55 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.
56 (2015) 58 NLLR (Pt.199) 92; the NICN stated: “that 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 one connected with the capacity or conduct of the claimant’s duties in the
circumstances, an employee cannot be terminated 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,
etitling 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.\(^{57}\) 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.\(^{58}\)

Severance pay in a dismissal is dictated by the employment contract. Employers
may also make (discretionary) *ex gratia* payments. The parties may, however, 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 worker’s
representative of the reasons for and extent of the anticipated redundancy. In certain
industries, this requirement may extend to the regulator.\(^{59}\)

There is no statutory redundancy notice period, but the applicable contract, handbook
or CBA may stipulate the period.\(^{60}\) The employer must fulfil its severance, statutory and
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.

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\(^{57}\) In the oil and gas industry, a notification of a termination or dismissal must be submitted to the
Department of Petroleum Resources.

\(^{58}\) See Section 9(6), Labour Act.

\(^{59}\) In the oil and gas industry, employers are required to notify the Department of Petroleum Resources.

\(^{60}\) In practice, although this is not a legal requirement, notice periods are generally between three and six
months.
XIII TRANSFER OF BUSINESS

Nigerian law imposes no obligation to protect employees in an employer's 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 where its intention is to transfer an employee's contract. Such a transfer is subject to the employee's consent and authorisation of the transfer by an authorised labour officer. Redundancy provisions and policies of the company may be relevant (depending on the transfer base structure).

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 (ISA), the CAMA and the Company Regulations of 2012.

Companies proposing a merger or acquisition shall, in compliance with the ISA, file with the Securities and Exchange Commission (SEC) a pre-merger notice and a formal application for approval of the proposed merger. Companies must comply with post-approval requirements, including obtaining a court order sanctioning the arrangement and, within five days of the order, file a notice with SEC. The obligatory filings with the Corporate Affairs Commission and associated costs are controlled by the CAMA and accompanying regulations.

XIV OUTLOOK

The courts are increasingly determining 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 evolving technology. 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.

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61 Section 10(1), Labour Act.
62 Pursuant to Sections 16, 585 and 609, CAMA.
Chapter 32

NORWAY

Magnus Lütken and Andrea Cecilie Rakvaag

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 with employees and may not be departed from to the detriment of the employee, unless otherwise explicitly provided by the Act.


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 from 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 has been a hot topic in 2018. Among others, the Court of Appeal has pronounced two judgments on the topic, of which one, the Skanska case, has been appealed and admitted by the Supreme Court (see Section III).

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).

There has also been a dispute between LO and NHO about whether seniority shall be the main selection criterion in connection with the selection of redundant employees, or

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whether the selection shall be based on an overall assessment of relevant criteria – seniority being one of these. The dispute has been settled, whereby the parties have agreed that seniority shall form the starting point of, and be a relevant factor in, the assessment, but that its relative weight in the assessment is a different matter and will depend on a holistic assessment of all relevant considerations.

ii Amendments to the legislation regarding permanent employment, as well as hiring from staffing enterprises

As of 22 June 2018, the parliament amended the WEA regarding temporary and permanent employment, as well as hiring from staffing enterprises. The new regulations entered into force on 1 January 2019. See Section XIV.

iii Proposed amendments to the regulations on whistle-blowing

In November 2016, an expert group was appointed at the government’s initiative to review the whistle-blowing regulations. The group delivered its report on 15 March 2018, and has suggested amendments in the applicable legislation in order to strengthen employees’ whistle-blower protections under Norwegian law. The expert group has in this regard also suggested establishing a separate national whistle-blowing ombudsperson, as well as a whistle-blowing dispute resolution board.

III SIGNIFICANT CASES

i Correct application of seniority

In the *Skanska* case of 12 February 2018, the main question before the Court of Appeal 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 LO and NHO had been correctly applied in the process. In the judgment, the Court of Appeal pronounced that seniority implies that seniority and length of service shall be the starting point for the selection of redundant employees, and that this starting point may only be departed from in the event that it is deemed to be objectively justified. The Court of Appeal further pronounced that it is not permitted to depart from seniority as the starting point and main rule, which the employer, Skanska, had done. As the *Skanska* case was appealed and admitted to the Supreme Court, the judgment from the Court of Appeal is not legally binding.

ii Dismissals as part of a redundancy process

In the *Bravida* case of 14 June 2018, the main question before the Court of Appeal was whether dismissals of three employees, who had all been made redundant as part of a larger redundancy process, were objectively justified, and further whether the principle of seniority in the CBA between LO and NHO had been correctly applied in the process. In the judgment, the Court of Appeal decided that the dismissals not were objectively justified, as the employer could not sufficiently produce evidence of the assessments that had been made in connection with the selection of the redundant employees. The Court of Appeal thus did not consider

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2 LB-2017-75155.
3 LG-2018-7314.
whether or not the selection of redundant employees was in accordance with the principle of seniority in the CBA between LO and NHO. This case demonstrates the importance for an employer to be able to prove that sufficient assessments in connection with a redundancy process have taken place. The *Bravida* case is legally binding.

### iii Travel time

On 4 July 2018, the Supreme Court pronounced an important judgment on travel time, regarding whether a police officer’s travel time to another place of work other than his or her normal place of work was to be regarded as working hours. The Supreme Court concluded that the travel time was to be regarded as working hours. The judgment has caused some uncertainty regarding the relationship between travel time and working hours in certain instances.

### iv Employees’ right of choice in connection with a transfer of business

On 11 October 2018, the Supreme Court pronounced its judgment in a case regarding an employee’s ‘right of choice’ in connection with a transfer of business.

The main rule under the WEA is that employees have a right of reservation, meaning that they may reserve themselves from being transferred to the new employer in a transfer of business, but their employment with the former employer ceases as of the transfer date. The right of choice, however, implies that an employee, in some instances, has a right to choose to remain with the former employer after a transfer of business. The right of choice applies where the transfer of the employment relationship to the new employer will entail ‘not insignificant negative changes’ of an ‘intrusive nature’ for the employee.

The main question before the Supreme Court was whether the employee was entitled to invoke her right of choice, as she would lose her right to AFP (a pension supplement established by collective agreement) if she was transferred to the new employer. The Supreme Court concluded that this triggered the right of choice in the specific instance.

### IV BASICS OF ENTERING 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 at least one month following commencement of the employment at the latest. In employment relationships of a shorter duration than one month or in connection with 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 the employment agreement. According to Section 14-6 of the WEA, the 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, commencement date, provisions relating to a probation period (if relevant),

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4 HR-2018-1036-A.
5 HR-2018-1944-A.
the employee’s right to holiday and holiday allowance, notice period, salary, duration and disposition of the daily and weekly working hours, 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 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 in the employment relationship subject to the management prerogative. However, the management prerogative is not unlimited. According to case law, the scope of the employer’s management prerogative will depend on a holistic assessment of, among others, the employment agreement, the employee’s job description, the circumstances surrounding the appointment, customs in the industry and practice in the employment relationship in question, in addition to any limitations under applicable legislation, regulations or CBAs.

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 so-called ‘variation termination’ (a formal dismissal with notice according to the WEA combined with a new offer of employment on revised terms).

An employee shall, as a main rule, be hired on a permanent basis. However, a fixed-term contract may be agreed upon 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 period 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 alternative. If, on expiry of the agreement period, an employee who is temporarily appointed pursuant to this alternative is not offered continued employment, the employer shall be subject to quarantine for 12 months. During this period, the employer may not make new appointments subject to this alternative for work tasks of the same kind.

Maximum periods of temporary employment of three or four years, depending on the basis for the temporary employment, also apply.

The chief executive of the undertaking may always be appointed for a fixed term.

ii Probationary periods

The employer and the employee may agree on a probationary period of a maximum duration of six months from the commencement of the employment relationship. The probationary period may, however, be extended 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 in the probationary period is 14 days and commences the first day after notice is given, unless otherwise agreed in writing or in applicable CBAs.
iii Establishing a presence

All foreign companies that have employees in Norway are required to register in 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 online and shall, among other things, contain information regarding employment, salary, tax withholding and the employer’s national insurance contributions.

Further, 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 the company is to be regarded as a permanent establishment, this will, as a main rule, trigger tax liability for the company to Norway.

In order to comply with the above-mentioned obligations, foreign companies have a right to register with the Central Coordinating Register for Legal Entities to obtain a Norwegian organisation number. The organisation number is unique to each company and is used to identify the company in most public contexts, including when submitting the a-melding. Foreign companies that are carrying out business operations in Norway are also obliged to register in 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, as well as hire employees through an agency or another third party. As a main rule, it is not necessary to register in any registers to do so, nor will it be necessary for the foreign company to submit the a-melding. However, as stated above, the company is required to register in the Register of Business Enterprises if the company is conducting business operations in Norway, as well as reporting the assignments in Norway to the SFU. Employees hired from agencies are entitled to equal 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 the foreign company operating in Norway. If the foreign company is to be regarded as an employer, it will have the employer’s reporting liabilities and registration obligations 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

New and stricter regulations regarding non-competition and non-solicitation of customers (restrictive covenants) came into full effect in January 2017. The 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

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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 in order to safeguard the employer’s particular need for protection against competition.

VI  WAGES

i  Minimum wage requirements

There is no minimum wage by law in Norway. However, for some industry sectors, collective agreements have been given general applicability, which means that they apply to all employers and employees in that industry sector, even if they are not party to the relevant CBAs. These generally applicable collective agreements may include minimum wage regulations.

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 employees 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 upon calculation of average working hours, within certain limits.

Night work between 21.00 and 06.00 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 his or her salary in addition to the salary received by the employee him or her 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.

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 length 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 in order 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.

Employees from countries outside the European Union or the EEA who wish to work in Norway, however, need a residence permit for work. An employee cannot start working
before he or she has been granted the residence permit. The residence permit will have an expiry date, but most residence permits are renewable. Employers who employ foreign employees who do not have the right type of residence permit, may be subject to fines or imprisonment.

Business travellers may, however, 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.

The employer is obliged to report wages to the Norwegian tax authorities, and to withhold and pay tax on behalf of its 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 in order 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, as well as undertakings with office activities, employing more than 10 persons 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 TRANSLATION

It is not required to translate the employment documents into Norwegian, nor into the employee’s native language. However, the employer should ensure that the employment documents are written in a language the employee understands.

X 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 upon such issues with employee representatives. 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.

In addition, the Private Limited Liability Companies Act and the Public Limited Liability Companies Act provide rules on employee representation on boards of directors.

The employees’ right to be represented on the board of directors depends on the number of employees in the company. In companies with more than 30 employees and with no corporate assembly (see below), a majority of the employees may demand that up to one member of the board of directors and one observer (both with deputies) are chosen by and among the employees. In companies with more than 50 employees and no corporate assembly, a majority of the employees may demand that up to one-third and at least two employee representatives,
with deputies, are chosen by and among the employees. In companies with more than 200 employees, and where it has been agreed that the company shall not have a corporate assembly, the employees shall elect one board member (with deputy) or two observers (with deputies) in addition to the representation described for companies with 50 to 200 employees.

Companies with over 200 employees must have a corporate assembly, unless otherwise agreed upon between the company and a majority of the employees or a union that represents at least two-thirds of the employees. A corporate assembly is primarily a supervisory body that supervises the board of directors’ management of company business, but that also has certain decision-making powers. One-third of the members of the corporate assembly shall be elected by the employees.

The Public Limited Liability Companies Act also contains rules on gender representation.

XI DATA PROTECTION

i Requirements for registration

The 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. The employer is not required to register with the data protection authority or any other governmental body, but it must identify the information being processed concerning employees, and keep an overview of personal data on employees. The employees must be informed of what personal data the employer is processing. The employer is not allowed to process personal data on employees that is not necessary to achieve a legitimate purpose. Further, the employer must take all necessary measures to protect the personal data against unauthorised access and ensure that staff are sufficiently aware of data protection obligations.

Consent is highly unlikely to be a legal basis for processing personal data on employees, unless employees can refuse without adverse consequence. Employers will have to rely on another legal basis than consent, such as legitimate interest.

Any transfer of personal data on employees from the 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 what 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 countries within the European Union or the EEA.

Transfer of personal data concerning employees to third countries or an international organisation may take place where 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. Such transfers do not then require any specific authorisation. Transfer of personal data to other countries or international organisations is only allowed if the employer or the processor has provided appropriate safeguards, and on 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 restrictions on processing sensitive data. Processing sensitive data on employees is only allowed when the processing is necessary for the purpose of carrying out the obligations and 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

The 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, the 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 in the job advertisement.

XII DISCONTINUING EMPLOYMENT

i 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 owing to the company's financial or operational situation will usually be objectively justified. The employer is required to first consider less drastic measures than redundancy, for instance temporary lay-offs. When selecting redundant employees, the selection area 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 the employee is available within the company, in addition to carrying out a weighing of the respective interests of the employer and the employee. Many collective bargaining agreements 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 related to the individual employees. In the event of collective redundancies, the employer must inform and consult with the employees’ representatives regarding specific topics that must be covered before a final decision on redundancies is made. In addition, the 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 smaller redundancies as well.

A termination based on circumstances related to the employee will in general be objectively justified if there is a breach of duty or if the employee has neglected his or her
obligations as 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 high.

Pursuant to Section 15-14 of the WEA, the employer may summarily dismiss an employee if he or she is guilty of a gross breach of duty or other serious breach of the contract. Summary dismissal implies that the employment relationship is terminated with immediate effect.

The employer is obligated to consult the relevant employee before deciding whether to give notice of dismissal or a summary dismissal. The employee is entitled to bring an adviser to the meeting.

A decision on termination of employment shall be made only after the 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 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, such clauses 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 due to workforce reductions have a preferential right to new employment with the same company for a period of 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 the undertaking may waive his or her employment protection in return for severance pay, in which case the material and procedural requirements outlined above do not apply.

XIII TRANSFER OF BUSINESS

The rules on transfers of business are derived from two European Union 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’.

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 with the employees’ representatives regarding the prospective transfer and certain specific topics. The consultation and information obligation has 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 also obliged to inform the employees affected by the transfer of business as early as possible.

With respect to the right of reservation and possible right of choice, see Section III.ii.

XIV OUTLOOK

As mentioned in Section II.ii, legislative changes with respect to permanent employment, as well as hiring from staffing enterprises, have entered into force as of 1 January 2019. These changes are expected to be a hot topic in the year to come. The proposed amendments to the whistle-blowing regulations are also expected to be a hot topic, as discussed in Section II.iii.

With respect to case law, we would not be surprised to see some cases pertaining to Chapter 14A of the WEA on restrictive covenants start to make their way through the courts, and we expect the seniority principle in redundancies to remain an important issue.
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.

Labour disputes, depending on the nature of the dispute, 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, in 40 years, labour regulations have undergone only one major reform, 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 introduced between 2017 and 2018 are the approval of three days of paid paternity leave, and the employers’ obligation to have an internal procedure to attend complaints filed resulting from discriminatory actions in the work place.
III SIGNIFICANT CASES

Even though labour claims are filed daily before the courts, there has not been 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 never get to be discussed before the courts because of the common tendency to settle all disputes. Both parties benefit from the settlement of disputes. 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 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 that is 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 the personal information of the employee;
b names of the employee’s dependants;
c the work to be performed and method of performing it;
d the place of work;
e the term of the agreement;
f the duration of the workday;
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 shall be delivered to the employee and one shall be submitted for registration with the Ministry of Labour.

Employment contracts may be executed for an indefinite period, for a specified period of time or for a specified piece of work.

Contracts for a specified period of time may not be used with the purpose of temporarily filling a job that is permanent in nature, excluding certain exceptions contained in the Labour Code. The duration of the employment contract for a specified period of time 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 on 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 services providers to engage employees locally.

On the other hand, depending on the nature of the services, foreign companies not officially registered in Panama may acquire the services of independent contractors. In these cases it is important to verify that the services provided 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 contractor acting in the ordinary course of their 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 such power habitually. In that case, a permanent establishment would be created with regard to the activities of such contractors in Panama.

If a permanent establishment is created, the company would be subject to income tax in Panama 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 would be advisable to consider incorporating an entity in Panama or registering a branch of the foreign company to facilitate all compliance and reporting processes.

In employment relationships, employees are entitled to social security coverage. 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). In this system, both employers and employees must contribute a percentage of the employee’s salary to the 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 on 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, as well as the income tax generated must be withheld, declared and paid by the employer monthly to the Social Security System.
V RESTRICITVE 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 to include 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 the above-mentioned working periods shall be classified as day shift (day work) and night shift (night work) respectively. A mixed shift is one made up of hours in both periods of work, provided that the period of night service shall be 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 work week will be a maximum of 42 hours. The maximum duration of a mixed shift is seven-and-a-half hours, and the corresponding work week is a maximum of 45 hours.

ii Overtime

Working time exceeding the limits set forth in the preceding section, or exceeding the lower time limits as provided by contract or special legally prescribed limits, constitutes overtime and has the following surcharges 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 the night period or when mixed shifts, which had started in the daytime, are prolonged; and

c 75 per cent of ordinary wages when the overtime work shift is an extension of the night shift or of the mixed shift that had started during the night period.

In addition, there are the following limitations:

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 the 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.
When for any reason the employee renders services in an overtime period in excess of the limits stated in point (d) above, the excess shall be paid with an additional 75 per cent surcharge, apart from other penalties prescribed by law.

VII FOREIGN WORKERS

As a general rule, all employers must contract Panamanian employees or foreigners 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 the ordinary employees, and may engage expert or technical foreign personnel 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 that hold certain special immigration statuses are exempted from complying with these restrictions. Some of these employees with special immigration statuses are residents under the Marrakech Treaty, foreign professionals that do not require licences to practise said professions or nationals of certain nationalities 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 will be given for renewable one-year periods, except for nationals of certain nationalities 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 headquarter licence or that 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 that has 10 or more employees must have approved internal work regulations. These have to be previously approved by the Ministry of Labour, and, even though the employees’ consent is not required, they have 30 days to comment on the 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 of women and minors; safety and hygiene measures; employees’ obligations and prohibitions; employer’s obligations and prohibitions; disciplinary measures; and company committees. Among the employees’ and employers’ obligations and prohibitions, discrimination and sexual harassment provisions are covered.

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 of unrestricted access. In addition to employment contracts, internal work regulations regulate the particularities of employment relationships in every workplace.
IX TRANSLATION

As a general rule, all documents related to employment relationships must be drafted in Spanish. Exceptionally, instructions relating to the performance of the work may be written in the language in which the employee has shown 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.

X EMPLOYEE REPRESENTATION

Both the Constitution and the Labour Code recognise the right of employees to form or join unions. In order 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, if they are comprised of persons of the same profession, occupation or speciality;

b. company unions, if they are comprised of persons of several professions, occupations or specialities, who work for the same company;

c. industrial unions, if they are 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, if they comprise 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. The union may establish ordinary and extraordinary contributions for its members. The employer has the obligation to withhold the contributions established by the union from the employees’ salaries. In addition, the employer has the obligation to deliver those contributions to the union. Employees who are not members of the union may be subject to contributions in case they receive benefits from the collective agreement entered into between the union and the employer.

Any employer with employees who are members of a union has the obligation to execute with the latter a collective bargaining agreement when 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. the members of unions in formation;

b. the members of the directing council of the unions, federations, confederations or workers’ centres;

c. the substitute members of the directing council, even if they are not active; and

d. the union representatives.
Employees protected by union immunity cannot be dismissed without the prior authorisation of the labour court based on a justified cause provided in the law.

In addition to unions, in every workplace, company or establishment that employs 20 or more employees, a company committee must be established, comprising 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 an employee or an employer of their obligations.

XI DATA PROTECTION

i Requirements for registration
Panama does not have a government body that oversees data protection matters, and except for medical and credit or financial information, there is little regulation on the subject. Moreover, particularly, the Labour Code does not contain provisions regulating the protection or privacy of the employees’ data. In fact, in recent years there has been a trend for payroll services that deal with employees’ salary payments 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 the employees' personal data outside Panama.

iii Sensitive data
Only medical information is considered sensitive and the employee is not obliged to disclose this information to the employer, except – and only if authorised by the employee – for purposes of obtaining private medical or life coverage. This information must be treated with strict confidentiality.

iv Background checks
As a general rule, background checks are allowed. It is customary that potential employers independently verify the information provided by potential employees on work applications relating to former employment, personal references and academic background, for which the employees’ consent is not required. In addition, credit and criminal record checks are also allowed; however, both require the applicant’s written authorisation.
XII DISCONTINUING EMPLOYMENT

i Dismissal

Employees who have served continuously for less than two years can be dismissed without cause. In this case, the employer must give notice of the unjustified dismissal to the employee 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, assessed pro rata. The salary for this purpose will be the average monthly salary of the last six months of employment.

On the other hand, 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 workmen and women, except in cases 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 by the 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 expiration of one year, starting from the date of suspension of the contract, owing to the employee’s illness or non-employment-related accidents; and

c force majeure or acts of God that provoke as a necessary, immediate and direct consequence, the definitive stoppage of the employer’s activities.

The third group consists of causes of an economic nature, namely the following:

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
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 it must specify the reasons for termination. In case 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 mutual consent provided it is expressed in writing and does not involve the waiver of acquired rights; by expiration of the term of the contract, provided the employment relationship has been validly stipulated for a definite period; and by 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 X, 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 subsection i, above. 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 though 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 of salary per 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 the employer may try to terminate the employment relationship by offering the employee a mutual termination agreement offering the payment of severance, unless the employee has less than two years of service, in which case they may be dismissed with the payment of severance and 30 days’ prior notice or payment in lieu.

XIII 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, which are:

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 under an agreement or imposed by law that arose before the date of the substitution for one year, 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 of 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 their work 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.

XIV OUTLOOK

Given that the current administration will leave office in July 2019, we do not foresee that any changes to the Labour Code or any other labour-related regulations will be introduced, other than the applicable minimum wage rates.

Minimum wage rates are revised every two years, and the current term ends on 31 December 2019. During the months prior to December 2019, the government will meet with both employees’ and employers’ representatives to discuss the new minimum wage rates that will apply for 2020–2021.
Chapter 34  

PHILIPPINES

Alejandro Alfonso E Navarro, Rashel Ann C Pomoy and Efren II R Resurreccion

I  INTRODUCTION

Philippine labour law is fundamentally intertwined with the principle of social justice. The Civil Code declares that the relations between capital and labour are not merely contractual but are instead impressed with public interest such that labour contracts must yield to the common good, 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.’ The Labour Code provides similar protections such that in case of doubt, all labour legislation and all labour contracts shall be construed in favour of the safety and decent living of the labourer. Philippine case law also provides that ‘[w]hen 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.’

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 wide latitude of discretion to regulate all aspects of employment, provided that the policies, rules and regulations on work-related activities of the employees are always fair and reasonable. The Supreme Court has often declined to interfere in legitimate business decisions of employers, as long as the company’s exercise of the same is in good faith to advance its interest and not for the purpose of defeating or circumventing the rights of employees under the law or valid agreements.

i  Legal framework

The Labour Code primarily governs labour standards and labour relations. It is subdivided into sections that regulate (1) pre-employment, including the recruitment and placement of overseas workers, and the employment of non-resident aliens; (2) human resource development, including training for apprentices and learners; (3) labour standards, including

1 Alejandro Alfonso E Navarro is a managing partner, Rashel Ann C Pomoy is a senior associate and Efren II R Resurreccion is a junior associate at Villaraza & Angangco.
2 Article 1700, Civil Code.
3 Section 18, Article II, Const.
4 Article 4, Philippine Labour Code; Article 1702, Civil Code.
hours of work, rest periods, wages and premium pay; (4) health and safety, and social welfare benefits; (5) labour relations, including regulations on union organising and activities, collective bargaining, and strikes and lockouts; and (6) post-employment, including termination and retirement.

There are also special laws regulating certain aspects of employment, including the following.

a Laws that require mandatory employer contributions to a state fund, such as:
- the Social Security Law (the SSS Law), which establishes the state pension fund designed to protect its members from hazards of disability, sickness, maternity, old age, death and other contingencies resulting in loss of income or financial burden;
- the National Health Insurance Act, which governs the state fund designed to provide comprehensive healthcare services to all Filipinos through a socialised health insurance programme; and
- the Home Mutual Development Fund Act, which governs the state fund designed to cater to its members housing needs.

b Laws that grant certain benefits to specific groups of employees, such as:
- maternity leave of 60 or 78 days for pregnant mothers under the SSS Law;
- paternity leave of seven days under the Paternity Leave Act;
- parental leave of seven days for single parents under the Solo Parents Welfare Act;
- special leave of two months for women who have undergone surgery caused by gynaecological disorders under the Magna Carta of Women; and
- special leave of up to 10 days, extendible for victims of violence under the Anti-Violence Against Women and their Children Act (the VAWC Law).

c Laws that affect specific aspects of employment, such as:
- the Occupational Safety and Health Standards Act, which strengthens the compliance requirements for safe workplaces;
- the Sexual Harassment Law, which defines and penalises workplace sexual harassment;
- the Data Privacy Act, which regulates the collection and processing of an employee's personal information; and
- the Comprehensive Dangerous Drugs Act, which regulates policies on legal drug testing in the workplace.

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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 Philippine employment law as it clarifies the law where gaps may have been left by the 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 such efforts fail, the issue is referred to the appropriate DOLE office or agency, which includes the office of the regional labour arbiters of the National Labour Relations Commission (NLRC).

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 of the labour arbiter may be appealed to a division of the NLRC.

Parties seeking an alternative means for dispute resolution may also mutually agree to bring their employment disputes before a DOLE accredited voluntary arbitrator. Voluntary arbitrators also 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 through its attached agencies. The Secretary of Labour and Employment, or any of his or her duly authorised representatives, is granted with visitorial 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
The regularisation of employees (i.e., declaring an employee to be a regular employee under a principal employer) who have been deprived of security of tenure and been subject to illegal contracting or subcontracting arrangements remained a big issue in 2018. On Labour Day, President Rodrigo R Duterte issued Executive Order No. 51, which affirms the government’s commitment to prohibit illegal contracting or sub-contracting. In turn, the DOLE renewed its commitment to regularising employees by enforcing the Stricter Regulations...
on Contracting and Sub-contracting Arrangements released in 2017. In August 2018, the DOLE reported that it had ordered the regularisation of 213,000 employees and doubled its targets to 600,000 employees regularised by the end of the year.\(^{20}\)

The DOLE also expressed its support for the Security of Tenure Bill certified as urgent by President Duterte, which intends to introduce into law: (1) stricter definitions and regulations for contracting arrangements; (2) a reclassification of seasonal and project employees as regular employees; (3) a prohibition on other forms of employment; and (4) a requirement for employers to submit to the DOLE proof of the basis of terminations owing to authorised causes and payment of separation pay.

In 2018, various other pieces of labour legislation were either enacted or came close, particularly the Act strengthening the Occupational Safety and Health Standards and imposing penalties for violations of the Standards, which was passed; the Telecommuting Act, which regulates work from home arrangements, was passed; the Bill granting an expanded 105-day maternity leave, which is at an advanced stage of legislation; and the Bill expanding the mandatory service incentive leave days from five to 10, which was passed by the House of Representatives.

### III SIGNIFICANT CASES

In *American Power Conversion Corporation, et al. v. Lim*,\(^{21}\) the Supreme Court declared that where a group of entities are involved in an elaborate scheme whereby they all benefit from an employee’s industry, for all purposes beneficial to the employee, all the entities should be considered as his or her employer. In this case, four distinct corporate entities were found by the Philippine Supreme Court as having engaged in a scheme to allow one entity, which is not registered to conduct business in the Philippines, to sell products in the Philippines. In effect, the employee was selected and engaged by the first foreign entity, received his salary and benefits from the second (Filipino) entity, and was supervised and controlled, and supposedly had his contract terminated, through a redundancy scheme implemented by the third and fourth foreign entities. While from the circumstances the Supreme Court found that the first foreign entity was the respondent’s true employer, and that for this reason the termination of his employment by the third and fourth foreign entities was ineffective, this did not prevent the employee from recovering damages, including attorneys’ fees, from all four entities. The Supreme Court found that for all purposes beneficial to the employee, all four entities were considered as his employer, and all four entities were guilty of violating the Labour Code as a result of their concerted acts of fraud and misrepresentation.

In *Digital Telecommunications Phils, Inc v. Ayapana*,\(^{22}\) the importance of the principle of social justice in labour cases was again reaffirmed as the Philippine Supreme Court made an exception, allowing an employee who was dismissed for a wilful breach of trust and confidence to receive separation pay because the questioned acts were motivated by zealosity in acquiring and retaining subscribers rather than an intent to misappropriate

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\(^{21}\) G.R. No. 214291; 11 January 2018.

\(^{22}\) G.R. No. 195614; 10 January 2018.
company funds. While his zealouslyness manifested itself through acts that warranted his dismissal, the Philippine Supreme Court granted him separation pay amounting to one month for every year of service.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under Philippine law, employment relationships are contractual in nature, but are impressed with public interest, such that labour contracts must yield to the common good. 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 that is signed at the beginning of the engagement.

One exception to the rule involves the employment contracts of employees hired by independent contractors as these must be executed in writing and must contain the specific description of the job, work or service to be performed by the employee, and the place of work, the conditions of employment, and a statement of the wage rate applicable to an employee.

The Labour Code classifies employees as either regular, seasonal, project or casual. Regular employees are those who 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 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 in 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) that it satisfactorily appears that the employer and the employee dealt with each other on more or less equal terms, and that neither exercised moral dominance.

ii Probationary periods

The law allows an employee to be placed on probation, providing that the employee is informed of his or her status as a probationary employee at the start of employment, and informed of the reasonable standards he or she must meet to qualify for regularisation at the start of employment. Failure to satisfy these requirements means that the employee is hired as a regular employee.

23 Article 1700, Civil Code.
The probationary period must not exceed six months from the date the employee started 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 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;\(^{26}\) and its directors, trustees and officers are at risk of being penalised with a fine of not less than 1,000 Philippine pesos but not more than 10,000 Philippine pesos or by imprisonment for not less than 30 days but not more than five years, or both.\(^{27}\) 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;

\(c\) a 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: (1) five days of service incentive leave after rendering one year of service, (2) seven days of maternity leave and up to 78 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 under the VAWC Law.

\(g\) 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.\(^{28}\)

\(^{26}\) Section 133, Corporation Code.

\(^{27}\) Section 144, Corporation Code.

\(^{28}\) ITAD BIR Ruling No. 241-12.
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 interest of the employer; whether the covenant creates an undue burden on the employee; whether the covenant is injurious to the 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. The courts have also tested the validity of non-compete clauses based on the reasonableness of the limitations imposed as to time, trade and place.

Notably, apart from case law finding that confidentiality and non-compete clauses must be clear and unambiguous, 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 in a 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 who, owing to the nature of their work, either have to stand or have to spend long hours sitting. 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 Regulations allow employers and employees to agree to flexible work arrangements, including: compressed working weeks where the normal workday 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 flextime schedules where 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 where employees agree to take holiday on alternative days (e.g., if the employee provides services for a foreign company, he or she may choose to avail of his or her holiday benefit on a public holiday of the foreign country, as opposed to a Philippine holiday).

33 DOLE Advisory No. 04-2010.
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, is 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.\textsuperscript{34} 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 following cases:\textsuperscript{35}
\begin{itemize}
\item[a] when the country is at war or when any other national or local emergency has been declared by the National Assembly or the Chief Executive;
\item[b] when it is necessary to prevent loss of life or property, or in case of imminent danger to public safety owing to an actual or impending emergency in the locality caused by serious accidents, fire, flood, typhoon, earthquake, epidemic, or other disaster or calamity;
\item[c] when there is urgent work to be performed on machines, installations or equipment, in order to avoid serious loss or damage to the employer or another cause of similar nature;
\item[d] when the work is necessary to prevent loss or damage to perishable goods; and
\item[e] where the completion or continuation of the work started before the eighth hour is necessary to prevent serious obstruction or prejudice to the business or operations of the employer.
\end{itemize}

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 (BI).

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 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 if 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 BI.

\textsuperscript{34} San Miguel Corporation v. Layoc, 537 SCRA 77 (2007).
\textsuperscript{35} Article 89, Philippine Labour Code.
The foreign workers engaged and performing work in the Philippines are subject to Philippine tax regulations, and the 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 the foreign worker.

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. 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, requiring the employer to consult with the employees regarding the proposed changes before they can be implemented. 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 X) consult employees regarding the change in the policy prior to the issuance of a memorandum declaring the change in policy;

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 in order 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 TRANSLATION

English and Filipino are considered the two official languages in the Philippines for communication and instruction. For this reason, generally, all 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.

37 Article 267, Philippine Labour Code.
38 ibid.
39 See W Land Holding, Inc v. Starwood Hotels and Resorts Worldwide, Inc, G.R. No. 222366, 4 December 2017; see also Section 7, Article 14, 1987 Const.
For documents that take the form of a release, waiver and quitclaim, it is advisable that its stipulations be in English and Filipino or in the dialect known to the employee.40

**X 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.41

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 only open 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.42 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 such employer unit.43

A union selected as the sole exclusive bargaining representative shall retain this status: for one year from the last certification election; during the course of negotiations for a CBA; during a bargaining deadlock; and during the five-year validity of a CBA, except within the last 60 days prior to its expiration. Once selected, the bargaining representative and the employer have a duty to bargain collectively.

The following acts are considered unfair labour practices under the Labour Code:

\( a \) to interfere with, restrain or coerce employees in the exercise of their right to self-organisation;

\( b \) to require as a condition of employment that a person or an employee shall not join a labour organisation or shall withdraw from one to which he or she belongs;

\( c \) to contract out services or functions being performed by union members when such will interfere with, restrain or coerce employees in the exercise of their rights to self-organisation;

\( d \) to initiate, dominate, assist or otherwise interfere with the formation or administration of any labour organisation, including the giving of financial or other support to it or its organisers or supporters;

\( e \) to discriminate with regard to wages, hours of work and other terms and conditions of employment in order to encourage or discourage membership in any labour organisation;

\( f \) to dismiss, discharge or otherwise prejudice or discriminate against an employee for giving or preparing to give testimony under the Labour Code;

\( g \) to violate the duty to bargain collectively;

41 Article 266, Philippine Labour Code.
43 Section 1(q), Rule I, Book V of the Omnibus Rules Implementing the Philippine Labour Code.
to pay negotiation or attorneys’ fees to the union or its officers or agents as part of the settlement of any issue in collective bargaining or any other dispute; or

to violate a CBA. Consequently, unfair labour practices are not only violations of the civil rights of both labour and management but are also criminal offences.44

XI 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).

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 the information of its employees. It is required to implement ‘reasonable and appropriate organizational, physical, and technical security measures for the protection of personal data’.45 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 subsection iii, below) of at least 1,000 individuals; the processing is likely to pose a risk to the rights and freedoms 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.46 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.47 An employee must be informed of the following prior to the processing of his or her personal information:

a the description of the personal data to be entered into the system;
b the purposes for which they are being or will be processed;
c the basis of processing, when processing is not based on the consent of the data subject;
d the scope and method of the personal data processing;
e the recipients or classes of recipients to whom the personal data are or may be disclosed;
f the methods utilised for automated access, if allowed by the data subject, and the extent to which such access is authorised;
g the identity and contact details of the personal data controller or its representative;
h the period for which the information will be stored; and
i the existence of the employee’s rights as data subjects, including the right to access, correct and object to the processing, as well as the right to lodge a complaint before the NPC.48

ii Cross-border data transfers

Cross-border data transfers are allowed under Philippine law. A cross-border data transfer is considered data sharing under the Data Privacy Act. The employee’s consent is required even

44 Article 258, Philippine Labour Code.
45 Section 25, Implementing Rules and Regulations of the Data Privacy Act.
46 Section 21(a), Implementing Rules and Regulations of the Data Privacy Act.
47 Section 34(b)(2), Implementing Rules and Regulations of the Data Privacy Act.
when the data is to be shared with an affiliate or mother company, or similar relationships.\textsuperscript{49} 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 the employees. The data sharing agreement is subject to review by the NPC on its own initiative or upon the complaint of an employee.

There is no specific requirement to register a cross-border data transfer with the NPC subject to the registration requirements discussed in subsection i.

iii  Sensitive data
The implementing rules and regulations of the Data Privacy Act define sensitive personal information as personal information:

\begin{itemize}
  \item[a] about an individual’s race, ethnic origin, marital status, age, colour, and religious, philosophical or political affiliations;
  \item[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;
  \item[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
  \item[d] that is specifically established by an executive order or an act of Congress to be kept classified.\textsuperscript{50}
\end{itemize}

Generally, the processing of sensitive personal information is prohibited unless the employee has given prior consent to the processing for a declared, specified and legitimate purpose, or under the specific circumstances provided by the Implementing Rules and Regulations of the Data Privacy Act.\textsuperscript{51} 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.\textsuperscript{52} Employers commonly conduct background checks to determine a potential employee’s prior criminal records 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.\textsuperscript{53} However, processing the employee’s information may require the employee’s express prior consent if it involves the processing of sensitive personal information.

However, 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.

\textsuperscript{49} Section 20(b)(1), Implementing Rules and Regulations of the Data Privacy Act.
\textsuperscript{50} Section 1(t), Implementing Rules and Regulations of the Data Privacy Act.
\textsuperscript{51} Section 22, Implementing Rules and Regulations of the Data Privacy Act.
\textsuperscript{53} Section 34(b)(2), Implementing Rules and Regulations of the Data Privacy Act.
XII 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:

- serious misconduct or wilful disobedience;
- gross and habitual neglect of duties;
- fraud or wilful breach of trust;
- loss of confidence;
- 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
- other causes analogous to the foregoing.54

The authorised causes for termination are:

- installation of labour-saving devices;
- redundancy;
- retrenchment to prevent losses;
- closure or cessation of business;55 and
- 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.56

The cause of dismissal determines which procedure must be followed prior to the dismissal. For just causes, an employer must:

- serve the employee with a written notice containing the specific causes or grounds of termination against him or her, giving him or her an opportunity to explain at least five calendar days from receipt of the notice to clarify his or her defence;
- 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
- serve the employee 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.57

Separation 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 appropriate DOLE regional office at least one month before the intended date of termination. The employee must also be granted separation pay at the rate prescribed by the Labour Code or by a CBA.

54 Article 297, Philippine Labour Code.
56 Article 299, Philippine Labour Code.
Failure to comply with the procedural requirements for the dismissals shall not invalidate a dismissal where just or authorised causes actually 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 employees 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 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 separation pay as provided by law or as provided in a CBA.

An employer may implement termination by redundancy when the following are present:

- there must be superfluous positions or services of employees;
- 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;
- there must be good faith in abolishing redundant positions;
- there must be fair and reasonable criteria in selecting the employees whose contracts are to be terminated; and
- there must be an adequate proof of redundancy such as feasibility studies or proposals.58

An employer may also implement termination through a retrenchment programme that complies with the following requirements:

- the retrenchment must be reasonably necessary and likely to prevent business losses;
- the losses, if already incurred, are substantial, serious, actual and real, or if only expected, are reasonably imminent;
- the expected or actual losses must be proved by sufficient and convincing evidence;
- the retrenchment must be in good faith and not to defeat or circumvent the employees’ right to security of tenure; and
- 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.59

Mass termination as a result of closure of business may also be implemented when the following elements are present:

- there must be a decision to close or cease operation of the enterprise by the management;

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58 Section 5.4(b), DOLE D.O. No. 147-15.
59 Section 5.4(c), DOLE D.O. No. 147-15.
the decision was made in good faith; and
there is no other option available to the employer except to close or cease operations.60

Further, termination as a result of the installation of labour-saving devices is allowed when
the following requirements are met:
there must be introduction of machinery, equipment or other devices;
the introduction must be done in good faith;
the purpose for the introduction must be valid, such as to save on cost, enhance
efficiency and other justifiable economic reasons;
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
the criteria for selecting employees whose contracts are to be terminated are fair and
valid.61

An employee whose contract has been terminated as a result of the above causes is entitled
to separation pay of at least one month’s pay or half-a-month’s pay for every year of service.
However, when closure is the result of serious business losses or financial reverses, no
separation pay is required.

An employee may question the dismissal and allege that they have been illegally dismissed
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.

XIII 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 case 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.62 Thus, the
absorbed employees become regular employees of the surviving corporation on the day the
Securities and Exchange Commission approves of the merger.63 In this regard, the surviving
company may have a valid good faith basis to establish redundancy for positions where the
functions of certain employees will be duplicated.

In transactions involving the acquisition of assets of an ongoing concern, provided that
the sale is in good faith, the transferee or buyer has no legal duty to absorb the employees of
the seller.64 An innocent transferee that acquires a business in good faith has no liability in

60 Section 5.4(d), DOLE D.O. No. 147-15.
61 Section 5.4(a), DOLE D.O. No. 147-15.
62 Bank of the Philippine Islands v. BPI Employees Union-Davao Chapter-Federation of Unions in BPI Unibank,
63 id.

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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 the qualified separated employees.65

XIV OUTLOOK

As the DOLE pushes for Congress to pass the Security of Tenure Bill, employers should anticipate possible changes to regulations on contracting arrangements, fixed-term employment, regular employees and dismissals owing to authorised causes. Recent trends also point to possible increases in employee benefits, and a renewed focus on the health and well-being of employees.

65 id.
I INTRODUCTION

Polish employment law is primarily regulated by the Labour Code of 26 June 1974, which has been substantially amended. There are numerous laws and regulations apart from the Labour Code 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 as well as other collective arrangements, regulations and policies. The provisions of such 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 such courts.

The State Labour Inspectorate (SLI) is the competent authority to enforce employment laws. The primary tasks of the SLI include the following: supervision and inspection of compliance with labour law; taking legal action in cases related to the establishment of labour relations (reclassification); and prosecuting infringements of employees’ rights and other infringements related to the performance of work and legality of employment.

II YEAR IN REVIEW

i Sunday trading ban

As of 1 March 2018, a new act on restriction of trade on Sundays, public holidays and certain other days entered into force. Pursuant to the general rule following from the new law, performing trade and trade-related activities in commercial premises, as well as entrusting a natural person (working on the basis of an employment contract or civil law contract) with trade and performing trade-related activities in commercial premises, is prohibited on Sundays and public holidays. In the case of Sundays, the prohibition is being introduced gradually between 1 March 2018 (starting with two Sundays a month subject to the prohibition) and 31 December 2019. Starting from 1 January 2020, the prohibition will apply to all Sundays except for seven Sundays a year enumerated in the act. In addition, on Good Saturday and Christmas Eve, trade and trade-related activities may be performed in commercial premises until 2pm.

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A breach of the restrictions indicated in the act is punishable by a fine of between 1,000 zlotys and 100,000 zlotys. Malicious or persistent breach of the prohibition on trade is a criminal offence punishable by a higher fine or a restriction of freedom.

ii  Act on Employee Capital Plans

The Act on Employee Capital Plans (PPK) was introduced in 2018 with effect as of 1 January 2019. Its aim is to introduce an additional pension-saving vehicle. Under the 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.

Employers are required to (1) enter into agreements with a financial institution pertaining to management and maintenance of the employee capital plan for each entitled individual and (2) pay contributions for each individual (part of contributions will be financed by the employer and the other part will be financed by the individual). The employer's contribution will be 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 will also contribute to the employee capital plan.

iii  Significant changes to the Labour Code concerning monitoring

On 25 May 2018, the new provisions of the Labour Code entered into force, which allow monitoring in the workplace. Video surveillance may be used if it is necessary to ensure safety of employees, protect property, control production processes or keep sensitive information confidential. The surveillance of emails and other types of surveillance may be applied if it is necessary to ensure employee efficiency (full use of working time) and the proper use of work tools. This surveillance cannot violate the privacy of correspondence. The purpose, scope and manner of surveillance should be established in a collective bargaining agreement, employment regulations or in a relevant notice. The provisions also specify that the retention period for recordings is, in principle, three months. After this time, the employer is required to destroy recordings containing personal data.

iv  Amendments to the Act on Trade Unions

An amendment to the Act on Trade Unions was introduced in 2018 with 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 economic situation of the employer, as well as the structure and expected changes in employment.

III  SIGNIFICANT CASES

There were two significant rulings in 2018.

On 14 November 2018 (Kp 1/18), the Constitutional Tribunal ruled that the pending amendment to the Social Security System Act, which was set to significantly increase the social security contributions from highly paid individuals starting from 1 January 2019, violates the Constitution. The amendment was supposed to remove the cap on social security
contributions, which applies to remuneration in excess of 30 times the forecast average monthly salary. As a result of this ruling, the cap remains in force. Although the ruling was based on flaws in the legislative process rather than content of the new law, it is not expected that the contemplated changes will be reintroduced in the near future for political reasons.

In a judgment of 7 February 2018 (II PK 22/17), the Supreme Court ruled that seniority may not always constitute a justified reason for pay differentiation between employees. In certain professions, the length of time the employee has been in the role or his or her professional experience plays a significant part in ensuring a high level of quality, for example in complex mental work (e.g., coding or accounting) or in work requiring knowledge of the construction and operation of various types of machines. However, employers should be cautious when determining employees’ remuneration using this criterion because it cannot be justified in every profession (even though the law explicitly lists seniority as one of the allowed criteria).

IV BASICS OF ENTERING 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 executed, performance of work on the terms and conditions specified above 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 employment agreement for an unspecified period (open-ended); and

b employment agreement 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.

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 employment.
ii  **Probationary periods**

Polish law provides for the possibility to execute a separate probationary period agreement. This agreement may precede either of the two types of employment agreements discussed above. The maximum probationary period is three months. The employer has no obligation to continue the employment after the lapse of the probationary period.

The probationary period employment agreement may be terminated by either party by notice before the expiration of the probationary period. 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 OECD 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 business activity of the company performed through a PE would be subject to VAT 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. If the employees are employed directly by a foreign company, they are responsible for paying the income tax advances during the year by themselves. In certain instances (in particular when the employees are employed by a company from the EU), deduction of social security dues remains the responsibility of the foreign employer. An EU-based foreign employer and an employee may execute an agreement on 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 the 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 case 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 has a work permit and relevant residence title in the territory of Poland (e.g., a visa) or a (joint) residence and work permit;
- he or she 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;
- he or she is a citizen of an EU Member State, a citizen of another European Economic Area (EEA) Member State, a citizen of a non-Member State of the EEA who may enjoy
freedom of movement on the basis of a treaty executed between the state and the EU and its Member States, a family member of a foreigner in one of the categories listed here (subject to additional criteria); or

d he or she has a residence permit for a specified period of time granted to practise a profession requiring high qualifications.

In principle, the work permit may be issued for a period not exceeding three years, although it may be extended. In certain specific situations, the work permit may be issued for five years. Following receipt of the 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, a joint residence and work permit may be applied for. The period for which it 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 related to parenthood. The employer is obliged to pay taxes and social security dues for the foreign worker, subject to double tax treaties and any similar international treaties related 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 contents of the policies, 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.

Such disciplinary procedures should be addressed in the employment regulations (a specific document described below) and not in global policies or in 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’ representative 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. Such issues 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 the 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  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, etc.

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.

X  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 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 council

The works council is a body representing the employees of a given employer, employing 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, that the employer has agreed to inform the works council of 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 works council members 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 lasts four years from the day of the election.

The number of members of the works council depends on the number of employees and is as follows:

a  three members if there are between 50 and 250 employees;

b  five members if there are between 251 and 500 employees; and

c  seven members if there are more than 500 employees.

There are certain advantages for the employees connected with their membership of the works council; in particular, the employer is not allowed to unilaterally terminate an employment agreement while the employee is a member of the works council without the council’s consent.

ii  Trade unions

Trade unions are established by virtue of a resolution adopted by eligible persons (employees). The trade union acquires legal personality 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, the trade unions have co-determination rights in certain areas.

Some of the employer’s fundamental obligations towards trade unions are:

a  the obligation to agree certain internal regulations with the trade union;
the obligation to consult the trade union regarding any collective redundancies;

the obligation to inform and in some cases to consult the trade union regarding the issues related to a transfer of undertaking;

the obligation to obtain the consent of the trade union to termination of the employment agreement of 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;

the obligation 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

the obligation 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, the 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 employees.

XI 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.

Requirements for personal data processing

An employee’s consent for the 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 indicated in Article 221 of the Labour Code).

Processing of employee personal data can be based on other legal grounds such as necessity for performance of employment contracts (Article 6.1.b of the GDPR), necessity for compliance with a legal obligation to which the employer is subject (Article 6.1.c of the GDPR) or legitimate interests of the employer (Article 6.1.f of the GDPR). The employer is required to notify employees on the processing of their personal data and to provide them with the information required by Article 13 of the GDPR (e.g., information on the purposes and legal grounds for the data processing, information on data recipients and information on 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 on instructions from the employer. However, there is no obligation imposed on employers to register processing of employees’ personal data with the data protection authority (DPA).

ii Cross-border data transfers

With respect to cross-border transfers of personal data of employees, registration of the transfers with the DPA is not required. However, it is required 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 transfer to such countries, as indicated in the GDPR, are met (e.g., explicit consent of the data subject, 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 and for transfers of personal data 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 the transfer may be effected without the DPA’s consent; however, as it may be questioned whether the consent was freely given by an employee based on the nature of the employment relationship, obtaining the DPA’s consent to a transfer of the employees’ personal data or 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. They cover data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or 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, processing of special categories of personal data is prohibited and allowed only in certain cases, 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 written form of such consent. 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 providing for appropriate safeguards for the rights and freedoms 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 or credit checks. The Labour Code specifically lists information that the employer may request from the employee, in particular, date of birth, education, previous employment and parents’ names.

XII DISCONTINUING EMPLOYMENT

i Dismissal

There are three general methods by which employment agreements may be terminated in accordance with the Labour Code: termination by mutual agreement; termination with notice; and termination without notice.

Each type of employment agreement may be terminated at any time by mutual consent of the employee and the employer. In general, such 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 it is allowed to shorten the notice period). It is admissible to unilaterally release an employee 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 upon notice by 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 (i.e., underperformance) or the employer (i.e., liquidation or restructuring). The employer has no duty to specify a reason when terminating fixed-term agreements.

If there are trade unions operating at the employer's business, the employer must seek the trade union's opinion regarding the intention to terminate the employment agreement for an unspecified period for an employee represented by such 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 terminated 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 the job (which also involves payment of some compensation) or award the employee damages in an amount not exceeding three months’ remuneration for the given 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 the pre-retirement period, pregnant women, employees on parental or childcare leave, and employees on sick leave.

In case of termination of employment for reasons not related 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 the 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:

\[\begin{align*}
a & \quad \text{at least 10 employees if it employs fewer than 100 employees;} \\
b & \quad \text{at least 10 per cent of the employees if it employs at least 100 but fewer than 300 employees;} \\
c & \quad \text{at least 30 employees, if it employs at least 300 employees.}
\end{align*}\]

If the above limits are not met, the 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, the company is obliged to consult the unions regarding the 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 the agreement has not 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 the 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 of such information and consultation procedure.

The company is also obliged to provide two notifications to the local employment office on the contemplated collective dismissal measures. The first notification is to be made simultaneously with the notification of trade unions or employee representatives. The second notification should be made after the consultation process has been completed.

If the company intends to terminate employment relations 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, within 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 to 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 (understood as the amount equal to the salary an employee does not earn because of agreeing an immediate or a short-term employment expiration date) are allowed. In the case of collective redundancies, the employer is obligated to provide statutory severance pay. 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 2019 at 33,750 zlotys gross. Although this is not required under the provisions of the law, employers often grant additional compensation related to termination of employment to employees. 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.

XIII TRANSFER OF BUSINESS

Poland has implemented 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.² 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 impact on outsourcing projects, since the transfer of an undertaking could also occur in the event of hiring and changing an external provider or insourcing of previously outsourced tasks.

If the transfer covers the entire business (all employees of the 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 a part 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:

- the contemplated date of the transfer;
- the reasons for the transfer;
- the legal, economic and social implications of the transfer for the employees; and
- any measures envisaged in relation to the terms and conditions of employment including working conditions, remuneration and retraining.

If there are no trade unions at either of the employers, a notification of these details should be made in writing to each individual employee of the employer.

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 the contemplated transfer (prior to any binding decision being made in this respect), if such a council is established at either the transferor or transferee.

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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 the above procedure shall have the same consequences as those envisaged under labour law for termination of the employment relationship upon notice by the employer.

XIV OUTLOOK

A minimum wage per hour for persons rendering work or services to entrepreneurs under mandate or service agreements has been increased from 13.7 zlotys to 14.7 zlotys as of 1 January 2019. A minimum monthly wage for persons rendering work under employment contracts has also been increased from 2,100 zlotys to 2,250 zlotys.

The governing conservative and socially oriented Law and Justice Party is working on introducing further changes to the restriction on Sunday work in retail trade aimed at the curtailment of the current practices applied by some of the employers, which can be viewed as circumvention of the new law. The pending amendments are expected to reduce the number of admissible exceptions from the ban on Sunday trade.

There are pending legislative changes to the provisions on processing of personal data of candidates and employees to ensure compliance of local laws with the GDPR. It is envisaged that the changes will amend the scope of personal data that the employer may gather from the employee, which is part of the aim to align the existing provisions with business needs. The prospective changes are also set to increase the protection of employee privacy in some areas. In particular, it is expected that retrieving employee criminal records will be forbidden even with prior consent of the employee, subject only to a few exceptions set out in specific sector laws.
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 other forms of employment, such as fixed-term contracts, temporary agency work, independent contractors and outsourcing of services to provide for their staffing needs.

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 related to parenthood protection (Decree-Law 91/2009 of 9 April), work-related accidents and sickness (Law 98/2009 of 4 September), and health and safety at work (Law 102/2009 of 10 September). Civil servant or public employment relationships are governed by special regulation.

Judicial litigation as well as the application of administrative fines are handled by labour courts, which, in Portugal, are part of the system of ordinary courts, as courts with a specialised competence. This specialisation also led to the creation of particular 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 entity with responsibility for inspection and enforcement of compliance with the labour legislation is the Working Conditions Authority (ACT), which performs 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 related to equality and non-discrimination between women and men, and the protection of parental rights.

II YEAR IN REVIEW

At the beginning of 2018, the government, backed by the left-wing majority in parliament, approved extensive amendments to the Portuguese legal framework based on the Transfer of Undertakings (Protection of Employment) Regulations, with a view to increasing employees’
protection. One of the most controversial amendments introduced is the possibility for an employee to object to a transfer in limited circumstances, namely when the transfer may seriously damage his or her labour status. In this event, he or she may choose to remain in the service of the transferor.

Another amendment that provoked a lot of discussion is the obligation to share the relevant transfer contract with the transferring employees and their representatives.

With the exception of the above, 2018 was marked by a stable trend regarding labour developments. The effects of the economic downturn that had a significant impact in past years (which resulted in 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 2018 was 6.7 per cent – the lowest for over a decade.2

Companies are increasingly investing in the Portuguese market and employers are also 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 Regular bonuses should not be included in the annual leave allowance
In October 2018, the Oporto Court of Appeals confirmed that bonuses paid on a regular basis should not be included in the calculation of annual leave allowance.

ii Group companies may be liable before the individual
In a landmark ruling in February 2018, later confirmed by another ruling in April 2018, the Lisbon Court of Appeals confirmed that a group company may, under certain circumstances, be liable to pay the employee certain labour credits.

iii Fringe benefits do not survive lapse of the collective bargaining agreement
Also in February 2018, the Lisbon Court of Appeals confirmed that fringe benefits, such as a supplementary retirement pension, do not survive once the collective bargaining agreement (CBA) that regulates them lapses.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship
Permanent employment contracts follow the general rule for civil contracts: no written document is required and the employment relationship may be proven by any means. The following types of contract, however, must be in writing: fixed-term contracts; part-time contracts; home-based contracts; and certain top management contracts.3

Although not mandatory, it is increasingly common to have permanent contracts entered in writing, as this makes it easier to determine the agreed terms and conditions. Furthermore,

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.
the employer may take advantage in executing written contracts to simultaneously comply with mandatory information obligations and include clauses to facilitate the future management of the employment relationship.

Fixed-term contracts are allowed only if 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 (first-time jobseekers and long-term unemployed individuals) and the start-up of new enterprises or companies. These contracts can only be renewed up to three times and their duration is limited to:

- a) 18 months if it concerns an individual looking for a job for the first time;
- b) two years for starting a new activity of uncertain duration, starting up a new company or establishment belonging to a company with fewer than 750 employees or hiring a long-term unemployed person; and
- c) three years in other situations.

Parties are entitled to amend or change the contract, unless it is expressly forbidden by law. 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 six years.

### 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; and
  - 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; and
  - 240 days for senior management and other senior staff; and
- c) for top management contracts: 180 days.

The duration of the probationary period set by the law cannot be increased, but it may be reduced or eliminated, either by collective or individual agreements, in writing. The party that unilaterally terminates the contract during the 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 a seven-day notice; if the contract has lasted more than 120 days, the employer must comply with a 15-day notice.

### 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 shall be registered before the social security agency. For this purpose, it is necessary to have a Portuguese VAT number, which must be requested from the

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4 For instance, as a rule, the employer is not allowed to unilaterally reduce the employee’s salary or to demote the employee even with his or her consent.

5 Except in the case of top management contracts where the probationary period must be expressly stipulated by the parties.
Portugal

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 making personal income tax withholdings. Therefore, employees hired by companies without a PE are subject to social security deductions only, and not the aforementioned withholdings.

V RESTRICTIVE COVENANTS

There is a general prohibition on any clauses intended to limit 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 of 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 in terms of 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.

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 CBA may, nonetheless, establish different maximum hours of work per day as long as the legal maximum 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 time up to 12 hours a day and 60 hours a week. This is the case for the adaptability regime (where the normal working period is defined on an average basis), the bank of hours regime (where the employee can ‘bank’ time) and the concentrated working period regime (where the working period is concentrated in 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 in order 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 this time period), 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 up 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 for the following 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 of time off. The mandatory rest day is established by the employer, and it is usually on a 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 a free movement of people agreement.
The types of visas that allow an individual to work in Portugal are the following:

- a temporary stay visa, which allows entrance for accomplishing a professional assignment either dependently or independently, and whose duration does not exceed, as a rule, one year; and
- a residence visa, which allows entry in order to apply for a residence permit. The residence visa is valid for two entries and enables its holder to remain for four months.

The hiring or termination of contract of 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, policies regarding discrimination, sexual harassment and corruption.

Internal regulations will not enter into force unless employees are notified through 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 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, in order to avoid employees’ claims based on a misunderstanding of such documents’ contents.

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 (and, in particular, to the ACT) must be written in Portuguese or accompanied by a Portuguese translation.

X 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, they are entitled to be informed and consulted on several matters regarding the overall organisation, activity and company’s budget, working conditions and change of the share capital, as well as to control the company’s management and participate in the company’s 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:

- In a company with up to 50 employees, two may be elected;
- In a company with 51 to 200 employees, three may be elected;
- In a company with 201 to 500 employees, three to five may be elected;
- In a company with 501 to 1,000 employees, five to seven may be elected; and
- In a company with 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 their work performance for periods of varying duration, notwithstanding any other right or entitlement, including the right to receive the remuneration corresponding to the time off.

XI  DATA PROTECTION

i  Requirements for registration

The LC has several provisions concerning processing employees’ personal data, but there are no specific provisions concerning processing employees’ personal data within the employment relationship other than normal data processed by the company’s human resources department.

This means that all situations of data processing that fall outside this limited scope may be subject to notification to the Portuguese Data Protection Authority (CNPD) and require prior written authorisation from the employee. The notification must identify what data is being processed and for what purpose, along with the identification of any data processors to whom the information is disclosed, and measures related to security and transparency of the data processing. The consent of the employee is not necessary if the data processing is considered necessary for the performance of the contract. In any case, as it is difficult to determine exactly what data is strictly necessary, it is prudent to obtain consent from the employee to process his or her data.
The CNPD can, however, exempt certain specific data processing from notification, and it has issued general exemption decisions that cover the basic processing of employees' data that is necessary for the management of the staff and for payroll purposes.

The employer, as data controller, must ensure that the personal data of the employees is processed in secure technical conditions and that access to the information is limited to those staff members who need to access this information to perform their job functions.

ii Cross-border data transfers

Any transfer of an employee's data from the employer to another entity must be authorised by the employee.

Cross-border data transfers must be disclosed to the CNPD when registering data processing. The transfer will require the CNPD's prior approval if it is made to a country that is not an EU Member State, unless it is a country listed by the EU as guaranteeing an adequate level of protection. Additionally, onward transfers are restricted to parties that are bound by agreements setting a minimum level of protection.

iii Sensitive data

Portuguese law considers information revealing philosophical or political beliefs, political views, trade union membership, religion, privacy, racial or ethnic origin, or health or sexual life, including genetic data, as sensitive data.

Processing sensitive data is prohibited unless there is a prior approval of the data processing by the CNPD. In the employment field, there are some other kinds of data processing that are subject to prior approval, such as the use of remote surveillance mechanisms.

iv Background checks

The Constitution contains a general right to privacy regarding personal and family life, which is confirmed by the LC. The employer may not demand from an applicant or employee to provide information related 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.

XII 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 of 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, any kind of dismissal does not require 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 as 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 where 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
The termination of the employment contract by the 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 and 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.

Where 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 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 cases, 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 selection criteria used for 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:

- worst performance review;
- worst academic or professional qualifications;
- higher salary;
- shorter length of service on the job; and
- 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 struck 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 possibility 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 purposes of unemployment benefit. Regarding the formal requirements, the agreement must be in writing, two copies must be made and signed by both parties, and it has to include the date of its signature and also the date the agreement will go into effect. The agreement can be revoked by the same terms mentioned above.

XIII TRANSFER OF BUSINESS


A transfer of business is not 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 in 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 the CBA that was 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 and reasons of the transfer, its legal, economic and social consequences, and the measures regarding the employees that shall be adopted owing to the transfer.

An extensive amendment to the Portuguese transfer regulations was enacted in mid 2018. The main amendments were the following: the employee may object to the transfer whenever it may be seriously detrimental to his or her labour status; under the same circumstances, the employee may resign with cause and claim compensation from the transferor; and the relevant contract must be shared with the transferring employees and their representatives.

XIV 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.

Under this framework, the government struck a deal with the unions and employers’ associations to introduce further amendments to the L.C. Some of these amendments will repeal the most controversial austerity measures agreed by the previous government with the EU troika, such as the bank of hours regime (see Section VI.i), term contracts, temporary contracts through employment agencies and lapsing of CBAs.
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 over 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 Department of Labour and Human Resources of Puerto Rico (PRDLHR) is responsible for the administration of public policy related 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

After a major overhaul of Puerto Rico’s employment-related legislation as a result of the Labour Transformation and Flexibility Act (LTFA) of 26 January 2017, statutes and regulations were enacted thereafter to clarify or further expand the 2017 employment law reform. These include the following:

a Act No. 60 of 27 January 2018 prohibits employers from taking into consideration an employee’s justified use of sick leave when evaluating an employee’s efficiency and performance, and deciding upon salary increases, promotions or imposition of disciplinary actions. Employers are expressly prohibited from having policies that penalise employees for using accrued sick leave.

b Act No. 28 of 3 January 2018 provides six additional days of special sick leave to all employees owing to certain catastrophic illnesses. The illnesses include AIDS, tuberculosis, lupus, cystic fibrosis, cancer, autism, multiple sclerosis and post-organ transplant procedures. This is an annual entitlement that does not accrue from one year to the next.

c Act No. 115 of 20 June 2018 allows employers to deduct from non-exempt employees’ salary any amounts owed to them for a loan, payroll advance, or for the cost of goods or materials provided by the employer to employees in direct relation to the needs created by an official state of emergency. Employees must authorise the deduction in writing and the deduction cannot be for an amount exceeding 20 per cent of their payroll.

d On 4 April 2018, the PRDLHR issued Regulation No. 9017 for the application of Act No. 379 of 15 May 1948 (Act 379), as amended, the Working Hours and Days Act, regarding work schedules, making up time owing to absences from work not covered by a leave, meal periods, reduction of meal periods, meal penalties, administration and management of personnel records and settlement of claims, among other matters.

e On 23 July 2018, the PRDLHR issued Opinion No. 15832 interpreting the application of the new one-year statute of limitation under the LTFA regarding wage and hour and unjust dismissal claims, and when the prior three-year statute of limitation applies.

f On 2 August 2018, the PRDLHR issued Opinion No. 15833 clarifying that all non-exempt employees must work at least 130 hours each month to accrue vacation and sick leave pursuant to the amendments to Act 180 by the LTFA.

III SIGNIFICANT CASES

i Sexual harassment in the workplace and retaliatory measures

In Gretchen Caballer Rivera v. Nidea Corporation (2018 TSPR 65), the plaintiff accused one co-worker and two supervisors of sexual harassment and also alleged that they had taken retaliatory actions against her. The Puerto Rico Supreme Court determined that the agents and supervisors of an employer are not responsible in their personal capacity for acts of retaliation pursuant to Act No. 115 of 10 December 1991 (Act 115), under the provisions of Act No. 69 of 6 July 1985 (Act 69), which prohibits sex discrimination, and under Act No. 17 of 22 April 1988, which prohibits sexual harassment in the workplace. Neither Act 115 nor Act 69 provide an independent cause of action for retaliatory measures taken by an agent or supervisor, unless the supervisor or agent is also responsible for sexual harassment.
ii  Wrongful termination, and successor employer liability and mere continuation of business doctrines

In *Roldan Flores v. M. Cuebas* (199 DPR 664 (2018)), the Puerto Rico Supreme Court determined that neither the mere continuation of business nor the successor employer liability doctrines apply when a business has permanently closed during the transfer of assets. This case follows from *Meléndez Gonzalez et al v. M. Cuebas* (193 DPR 100 (2015)). In the 2018 case, two employees sued their former employer and the buyer of the former employer’s business for wrongful termination under the mere continuation of business and the successor employer liability doctrines. For the former to apply, the business must continue or be expected to continue operating indefinitely as it is being passed from one employer to the next. Defendants in this case successfully argued that the continuation of business doctrine did not apply because the business in question had permanently closed during the negotiation and subsequent transfer of assets, thus relieving the seller from any responsibility towards the plaintiffs. The Supreme Court found no reason to apply the successor employer liability doctrine as it requires the original employer to have a legal obligation towards former employees. The employer did not have such an obligation.

iii  Employee benefits

In *Iglesias Saustache v. Calderón Félix* (2018 TSPR 154), the Puerto Rico Supreme Court ruled that the surviving spouse of a deceased participant in a retirement plan governed by the federal Employee Retirement Income Security Act of 1974, as amended (ERISA), has the right to receive pension payments when the plan participant remarries and does not revoke a prior beneficiary designation form in favour of his former spouse. The Supreme Court reiterated that ERISA contains an ‘assignment and anti-alienation provision’ that prohibits the payment, transfer, assignment or transfer of benefits of a retirement plan to a person other than the beneficiary or participant thereof. The Court discussed ERISA’s exception to said prohibition, specifically that a person may obtain rights to the benefits of a retirement plan through a qualified domestic relations order and thereby be treated as a beneficiary under the plan even when he or she is not the surviving spouse. ERISA provides that a qualified domestic relations order creates or recognises the existence of a right of an alternate beneficiary to receive part or all the benefits. In this case, when the participant remarried, the new spouse automatically became his beneficiary under the plan regardless of the divorce agreement and the prior beneficiary assignation insofar as neither the plan’s form nor the agreements in the divorce proceedings were considered a qualified domestic relations order. Here, the plan document clearly stipulated that the beneficiary had to be the participant’s spouse. Accordingly, if the participant died while married, the widow would become the beneficiary of the plan, unless otherwise indicated by written consent of the widow or through a qualified domestic relations order. The Supreme Court did not address potential claims the plaintiff may have to assert her rights, if any, under the stipulations of the divorce agreement under Puerto Rico law.

IV  BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i  Employment relationship

Employment rights can stem from employee handbooks, employment offers, collective bargaining agreements or an 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.

- Agreements with non-exempt employees to reduce the statutory meal period, to fragment the use of vacation leave, to use non-working days as part of the 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.
- Non-competition agreements and some other restrictive covenants.
- Voluntary agreements with non-exempt employees to establish alternate, 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 No. 80 (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 periodical 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 discussed in subsection i, as well as a statutory Christmas bonus, unemployment insurance, worker accidents and non-occupational disability insurance compensation, and leaves of absence for maternity, adoption, breastfeeding, jury duty, renewal of a driver's licence, participation in Olympic games and other world championships, appearance as 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 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 the activities the employee performed during his or her employment.

b  The duration of the prohibition shall not exceed one year after 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 where 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 of time prior to the termination of employment or during a period immediately before said termination, and who were still customers of the employer when the employee's employment ended.

e  The employee must receive adequate consideration in exchange of 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 US federal Fair Labour Standards Act (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 the following:

a  hours worked in excess of eight hours or daily overtime;
hours worked in excess of 40 hours or weekly overtime (also recognised under US federal law); 
hours worked during the meal period; 
hours worked during the seventh consecutive day or day of rest; 
statutory entitlement to vacation leave under Act 180; and 
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 period for non-exempt employees. Administrators, executives, professionals, computer programmers and outside sales persons, as these terms are defined by the Regulation No. 13 of Puerto Rico’s Minimum Wage Board or US Federal Regulation No. 541, are 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, alternate 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 periods, 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 period. The meal period can start after the second hour of work and, to avoid a meal-period work penalty, it must also be scheduled before the beginning of the sixth hour of work. If a non-exempt employee’s workday consists of up to six hours, the meal period may be waived. If the employee works for a period exceeding 10 hours per day, the employee is entitled to a second meal period. This second meal period may be waived when a workday does not exceed 12 hours and provided the first meal period was taken by the employee.

The meal period 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 period 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 period.

According to Act 379, eight hours of work is the regular work 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 per 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 during Sundays in retail establishments is no longer considered overtime work subject to premium pay.

Overtime

The current minimum hourly rate is US$7.25 per hour. Through company policy, employers may establish limits to 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 period, the day of rest, and 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 Alternate 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 alternate, 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, 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 if he or she works 30 hours or more per week, has worked for at least one year for an employer and has not made the same request in six months. 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 made the request. Priority must be given to employees who are head of a family or have sole custody of 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 the Employment Eligibility Verification Form (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 the workers’ identity and their authorisation for employment in the US. 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 US 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 US under an employment-based visa category are restricted to the activity or reason for which their non-immigrant visa was issued. The
The length of stay in the US will depend on the specific employment-based visa category under which the foreign worker was authorised for employment in the US 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 US. 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 transferee in managerial or executive positions); and
d. L1B (intra-company transferee in positions utilising specialised knowledge), among other categories.

In general, Puerto Rico source income paid to a foreign worker will be subject to local income tax withholdings at source and US FICA taxes. 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, and provide a copy to employees, of the rules of conduct in the employee handbook.

Although not required in general, the best practice is for employers to have and distribute written basic rules of conduct, policies and procedures, as they are important tools to manage 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 law requires 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 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 can speak, read and write English fluently.

Notwithstanding this, there is no law that requires employers to maintain employment documents in Spanish or English. Many employers, however, 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.

X 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 US National Labour Relations Act of 1935, as amended (NLRA). The NLRA created the National Labour Relations Board (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 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 subjected 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 also 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, in 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. 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 bargain collectively in good faith with a genuine objective to reach agreements. 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 of opposing union activity and questioning employees about their feelings toward 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. 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.

XI 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 employees’ employment records and private data.

ii Cross-border data transfers

Companies do not need to register for 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 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 such information in limited circumstances with supervisors, safety personnel and government officials investigating compliance with the ADA.

Additionally, Act No. 207 of 27 September 2006 prohibits 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.

Puerto Rico’s legislation prohibiting discrimination owing to sexual orientation and gender identity also requires employers to keep information about gender identity and sexual orientation 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 the confidential information to persons without a need to know.

Furthermore, Act 59 requires employers who perform drug tests to job applicants and employees in the private sector to treat test results and related data confidentially. Also, to the extent 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 US federal 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 (including criminal and credit checks) on job applicants and current employees, subject to legal parameters. Employment decisions that consider the results of background checks cannot have an adverse impact 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.

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 job applicants’ or employees’ genetic, medical and disability-related information. Considering other categories revealed in background checks, such as filing for bankruptcy, military service or discharge records, may also expose employers to discrimination claims.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Act 80, known as the Unjust Dismissal Act, regulates employment termination of any person 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 law 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; lack of competence and inability to perform the reasonable requirements of the employer; and if the employee is the subject of complaints received from clients;
c 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;
d 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;
e 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
f 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 business’ 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 the dismissal to the employee 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 cases, 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 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, Act 80, and local and federal anti-discrimination and anti-retaliation statutes, regulate redundancies in Puerto Rico. 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 scenarios.

Employers must also comply with Act 80 when they have 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 their products’ style, design or nature;
d  changes in the employer’s services rendered to the public; and
e  necessary employment reductions because of reduced production, sales or profits or with the purpose to increase business’ 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 a 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 closing or mass lay-offs. Notice must be given to employees, employees’ representatives, the local chief elected official and the state dislocated worker unit.

**XIII TRANSFER OF BUSINESS**

Act 80 specifies the protections granted to employees and employers’ obligations when transferring a business. 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 toward terminated employees if deemed a 'successor employer'. A similar rule applies by virtue of case law to other employment-related liabilities toward the discharged employee (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. Where a transferred employee is later terminated without just cause, the successor employer is responsible for the severance payment provided by Act 80. The total years of service of the employee under the former and successor employer will be considered to calculate the payment. Also, see Section III.ii on Roldan Flores.

**XIV OUTLOOK**

Puerto Rico’s employment law panorama has seen substantial change since the enactment of the LTFA almost two years ago. 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. State courts and government agencies, influenced by years of employee-friendly interpretations, however, are expected to continue to have a hard time adopting the new legislative objectives of flexibility sought by the LTFA. We are already seeing the dichotomy between the more lenient, legislative intent of the LTFA and new regulations being approved by the PRDLHR. This will continue to generate employment-related litigation that will affect and most likely transform employment law practice in coming years.

Nothing has been more impactful, however, than the changes to the workplace resulting from Hurricanes Irma and Maria, which hit Puerto Rico in September 2017 only two weeks apart, the effects of which are still being felt. 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, operational closings, reductions in force 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, US federal government contractors, and personal investments and entrepreneurship.
We have continued to adapt and transform legal services because of these major natural and legislative events. This transformation and a swift adaptation to change must be long-term as the country prepares for other significant events and situations, including the Puerto Rico tax reform; a damaged economy and 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; continued and extreme policy changes implemented by the Trump administration that have a direct impact on workplace law, most of which are beneficial for employers and corporate interests; a growing movement in favour of equality, women's rights and protection from sexual harassment; and the uncertainty of the legitimacy of the medical cannabis industry. There is no doubt that employee handbooks and workplace policies and practices will need to be revised or rewritten, and that management training will become a priority as we prepare for a new labour law era.
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 relations based on constitutional principles. Additionally, there are federal laws regulating various important aspects of labour relations.

In Russia, cases related 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.

Along with the judicial opportunity to protect labour rights, there are also other options set forth in the Labour Code. An employee may alternatively 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 the employer’s and employee’s representatives 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: general issues related to state supervision and control of labour are the responsibility of the Federal Service for Labour and Employment; 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); personal data processing is the responsibility of the Federal Supervision Agency for Communication, Information Technology and Mass Communication; and sanitary and epidemiological control is covered by the Federal Supervision Agency for Customer Protection and Human Welfare. Authorities of the constituent states of Russia, municipal bodies and the Public Prosecutor’s Office also oversee the observance of employment law.

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II YEAR IN REVIEW

During 2018, a number of significant amendments to the labour legislation and related areas were introduced. These include the following.

i Representatives of employees admitted to board meetings

As of 14 August 2018, representatives of employees are entitled to participate in board meetings of the company in which they work. The actual implementation of this right depends on whether it is established (1) by a federal law, (2) by a constituent document of the company, (3) by a local statutory act of the company or (4) by a collective bargaining agreement. The employees will not be able to directly influence the decisions of the board as they have only an advisory voice. A trade union, or another employees’ representative body, may appoint the employees who will participate in the meetings. If these employees disclose any sensitive information constituting a secret protected by law, which became known to them through their participation in the meetings, they can be held liable.

ii Disciplinary action for failure to comply with anti-corruption legislation

The Law amending the Labour Code came into force on 14 August 2018.

The Law provides that breaches of the anti-corruption legislation constitute a specific type of disciplinary offence, in relation to which the term of disciplinary action imposed has been extended to three years. Under the Labour Code, these breaches are defined as failure to comply with the restrictions, prohibitions and obligations established by the anti-corruption legislation.

iii New requirements in relation to migration registration of foreign citizens

The Law amending the procedure of migration registration of foreign nationals in Russia came into force on 8 July 2018.

The Law requires that each foreign citizen must be registered at the address where he or she actually resides or lives in Russia. In particular, foreign citizens can be registered at the address of:

a a residual property (apartment, etc.) where he or she actually lives; or
b a hotel, campsite, resort spa, etc., as well as medical institutions, where he or she actually resides.

Under the Law, a foreign national can be registered at the address of his or her employer (or at the address of the premises owned by the employer) only if he or she actually resides or lives there. The Law does not have retrospective effect; there is no need for foreign nationals already registered at the address of their employer (even if they do not actually reside or live there) to register again, as long as their migration registration is effective.

iv 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 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 above obligations in the form of a fine:

- for individuals: from 2,000 roubles to 4,000 roubles;
- for officials of legal entities (e.g., a general director): from 45,000 roubles to 50,000 roubles; and
- for legal entities: from 450,000 roubles to 500,000 roubles.

v New grounds for unscheduled checks by the State Labour Inspectorate

The Law establishing new grounds for unscheduled checks by the State Labour Inspectorate came into force on 11 January 2018.

Under the Law, the State Labour Inspectorate may conduct unscheduled checks of an employer on the following grounds: intentional evasion from entering into an employment contract with an employee; conclusion of an employment contract with an employee in an improper form; and entering into a civil law contract for services, consulting, etc., with the employee that in fact regulates the employment relationship. Crucially, the employer will not be notified in advance about a check initiated on the above grounds. The check may be carried out without prior approval of the Prosecution Office (as normally required for the State Labour Inspectorate to visit an entity for an inspection).

vi Early retirement and pre-retirement age

Under the Law of 3 October 2018, men aged 60 with 42 years of work experience and women aged 55 with 37 years of work experience are entitled to retire two years earlier than the regular retirement age.

The following categories of employees, among others, are also entitled to early retirement:

- women aged 56 with at least 15 years of work experience who have given birth to four children and raised them until the age of eight; and
- women aged 57 with at least 15 years of work experience who have given birth to three children and raised them until the age of eight.

The Law of 3 October 2018 also provides for a pre-retirement age, which is defined as being five years younger than the retirement age.

As of 14 October 2018, there is criminal liability for unjustified denial of hiring a person because he or she is the pre-retirement age and dismissal of a person who reaches pre-retirement age. The penalty could be a fine of up to 200,000 roubles; a fine equivalent to a maximum of 18 salaries of the convicted person; or up to 360 hours of obligatory work. Criminal liability under Russian law is not imposed on legal entities; however, it can be imposed on authorised officers of the legal entity (e.g., general manager, HR manager).

III SIGNIFICANT CASES

In May 2018, the Supreme Court published a decision in which the main conclusion with regard to an employer was as follows: the labour relationship between an employer and an employee is not only established as a result of formal features (e.g., presence of a staff schedule, an employment contract), but also on the characteristics of the labour relationship (e.g., the
strength of relations between the employer and employee, how well the employee performs his or her tasks. If an employee has started work (with knowledge or on behalf of an employer), the employment relationship is deemed established.

The Constitutional Court also made the following significant decisions in 2018:

a It is not necessary to offer an employee who has been dismissed because of staff redundancies a temporary vacant position (e.g., to cover an employee on maternity leave) – this is an employer’s right, not an obligation.

b The Labour Code does not restrict an employee’s right to receive, upon dismissal, pecuniary compensation for all unused holiday. There is no limitation period.

IV BASICS OF ENTERING 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 actually 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 only be concluded on the grounds provided by law. These circumstances are divided into two groups: where a fixed term is required and where a fixed term can be decided upon between the parties. In all other cases, the contract should be for an indefinite period.

A fixed-term employment contract is required when the employee is hired, in particular, under the following circumstances: to perform the duties of an employee who is on a leave of absence but who retains his or her job; to perform temporary (up to two months’) work or seasonal work; to be sent to work abroad; to perform work that goes beyond the framework of an employer’s ordinary activity; to work for organisations that are intentionally formed for a fixed period of time or for the purpose of completing a certain task; to carry out a defined task, the term of whose completion cannot be determined by a specific date; and in some other cases provided by law.

Upon agreement of the parties, a fixed-term employment contract may be executed under, *inter alia*, the following circumstances: with persons hired by small businesses (including individual entrepreneurs) that have up to 35 employees, or 20 employees in case of businesses (individual entrepreneurs) operating in retail or consumer service sectors; with pensioners (who obtain this status because of their retirement age); with persons who are only allowed to perform temporary work, pursuant to a properly issued medical certificate; 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; with creative employees of the mass media, cinematographic organisations, theatres, theatrical and concert organisations and circuses, etc.; with the heads, deputy heads and chief accountants of organisations; and in some other cases 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 on the parties, place and date of conclusion. It must specify the place of work, its 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, sex 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 from the day the employee was actually admitted to work.

Substantial provisions of an employment contract can only be modified at the mutual consent of the parties thereto, for instance, by addenda or attachments to the employment contract. In the event of changes to the organisational or technological conditions in the company, the employment contract can be amended without the consent of the employee provided that his or her function will not be changed. Such changes are subject to two months’ prior notice.

ii  **Probationary periods**

An employer has the right to establish a three-month probation for a newly hired employee. As an exception to this rule, an employer may establish a six-month probation for employees hired for certain top 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 that are starting a job within one year of graduation from an educational institution.

The probation period should be specifically provided for by the employment contract. In the absence of this provision in the employment 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 with 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 corresponding taxes.
Under certain conditions, tax registration issues and permanent establishment (PE) risks for a foreign company may arise.

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 the local benefits provided to Russian employees (e.g., payment for annual holiday).

Some statutory benefits are not subject to personal income tax. Income that is not taxable includes:

\[
\begin{align*}
\text{a} & \quad \text{state allowances, including maternity leave and unemployment benefits; and} \\
\text{b} & \quad \text{all types of compensation payable in accordance with effective laws within established limits (e.g., reimbursement of harm caused by injury or other damage to health, dismissal of employees, compensation for unused holiday and the expenses involved in the improvement of professional skills of employees).}
\end{align*}
\]

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-competition clause is included in an employment contract, it cannot be legally applied 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 (CEO) can work for another employer only upon 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 to dismiss 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 working conditions.

An employee may be expressly engaged for night work according to the working conditions or production necessity with obligatory consent of the employee. In this case, 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 over 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 (fire, accident, disasters, etc.).

Pursuant to the labour laws, overtime should be compensated as follows:

a for the first two hours of overtime, the compensation should be no less than one-and-a-half times the usual hourly rate;

b for subsequent hours of overtime, the compensation should be no less than double 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 on weekends or 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

The Labour Code contains Chapter 50.1, which specifies the general conditions and requirements of employment of foreign nationals. The basic requirements are:

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 their 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
in case of expiry of a work permit (as well as work patent, residence permit or temporary residence permit, and voluntary medical insurance policy) the employer is obliged to suspend the foreign national employee from work until the employee 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, except 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, the 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 next 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 violation of 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.

The 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 with respect to such categories of employees.

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 types 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 and have permission to employ foreign workers in order to legally hire 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, the work permit is issued for up to one year and the work permit for highly qualified specialists can be issued for up to three years. If the 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 work in Russia, rather than travel 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. The employer should also provide the 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 in 12 consecutive months and more than 183 days in a calendar year) and 30 per cent for non-Russian tax residents (individuals staying in Russia for less than 183 days in 12 consecutive months).

For those foreign employees who have the status of highly qualified specialists (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 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 cases of temporary or permanent injury to the health of employees (including death) that occurs within the course of performing employment duties (as a result of a professional illness or 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 the 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, such rules 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 a labour contract; the work regime; the rest periods, incentives and punitive measures applied toward employees; and other regulations concerning labour relations, including the disciplinary rules.

The internal labour regulations do not need to be filed with or approved by 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 sex, race, skin colour, nationality, language, ethnic origin, property, family, social status and 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.

The internal labour regulations of the company 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 records management.

When the 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 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 in 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 can be located on the company’s intranet, but in any case the company must have them as a hard copy.

The disciplinary rules can be incorporated into the employment contract by reference to them.

IX TRANSLATION

Russian is the official language of Russia and must be used by all companies – regardless of their ownership structure – for all HR documentation (including employment contracts) and records management. There are no formalities such as notarial certification of translation or use of certified translator.

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 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.
X 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.

The 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 said powers.

The existence of this other representative shall not be deemed an obstacle to the primary trade union organisations exercising their 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, consideration of labour disputes of employees with an employer.

The trade unions shall independently formulate and approve their rules. Such rules 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 joining the trade union’s membership 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 related 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 transportation and communication necessary for their activity in conformity with the collective agreement or with the agreement.
XI 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 Communication, 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 personal data processing 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, obtaining consent for the processing of employee personal data is required. If personal data may only be obtained from the 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, as well as of 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 to the data being processed of his or her own free will and in his or her own interest. As mentioned above, the employer is entitled to request personal data that is necessary for 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. 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 employee personal data, which is necessary to fulfil particular functions. Employers shall adopt an internal policy covering the procedure of processing the personal data of employees. Such a policy shall be adopted in Russian (or in a bilingual form) by order of the CEO 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 with the use of databases located in the territory of Russia at the moment of collection of 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 imply all possible types of processing in Russia. Only the following types of processing must be performed with 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. Namely, personal data shall be initially placed in ‘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.

In addition to the above, 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 web pages on the internet, website addresses), where the data is processed in violation of rights of personal data subjects, into the special registry of violators of data subject rights (the Registry). Under this mechanism, the Federal Service for Supervision in the Sphere of Communication, Information Technologies and Mass Communications is granted the power to restrict access to such information resources for users from Russia. The Federal Service for Supervision in the Sphere of Communication, Information Technologies and Mass Communications can apply such 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 for the cross-border transfer of personal data, 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 Communication, Information Technologies and Mass Communications as states providing adequate protection of the rights of the subjects of the personal data despite their non-membership to the aforementioned Convention (such states are listed in the respective order issued by the Federal Service for Supervision in the Sphere of Communication, Information Technologies and Mass Communications). If the employer performs a cross-border transfer of 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 transfer that the employer obtains the written consent of the subject of the personal data, stating the scope of the personal data to be transferred cross-border, the purpose of the processing and the recipients of personal 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.
Additional transfers of the personal data are allowed if the employee’s consent covers 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, the employer may not request and process sensitive data. In cases directly associated with the issues of labour relations, the employer may obtain and process information on the private life of the employee only with his or her personal consent.

For a cross-border transfer of sensitive data the 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 on a candidate or an employee. The main principle is that the volume and character of personal data to be obtained on a candidate should be justified by a lawful reason. The Labour Code gives a full list of such reasons:

- **a** to observe laws and regulations, for example if a certain check is prescribed by law the employer can demand this information, or if a certain job is prohibited to a specific category (e.g., employees under 18), the employer can also request personal data;
- **b** to assist in employment, training and promotion (this may imply any information that this reasonably and lawfully requires to efficiently hire, train and promote);
- **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 (quality and volume of work done); and
- **e** to ensure the safety of assets (the general principle of non-excessiveness is to be observed).

As mentioned above, Russian law gives a full list of documents the candidate must present, and prohibits the employer from requiring extra certifications. Thus, bank statements, credit repayment records, etc., 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 if this is explicitly provided for in the legislation (e.g., public servants should present information on 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 educational work is prohibited to those with a criminal record. 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 of information an employer is entitled to learn 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 an invasion of privacy took place.

An employer should also avoid receiving any information about, for instance, an applicant or employee’s political, religious or other views, or membership of social organisations.

Obtaining information about an applicant or employee’s private life is permitted only to the extent it is relevant to the job. For example, obtaining information about dependants is relevant to determining whether an applicant or employee is entitled to certain guarantees.
XII  DISCONTINUING EMPLOYMENT

i  Dismissal

Pursuant to the law, employment may be terminated only on the grounds provided for by the law. The Labour Code stipulates the list of 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 owing to a company being wound up and redundancies (see below). If the 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 the employer initiates dismissal of a trade union member for the reasons of staff reduction, insufficient qualification of the employee or numerous failures of the employee to fulfil his or her labour duties provided 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 the employer decides on a staff reduction, 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 in three months 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 various notice periods for different types of dismissals. 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 the probation period can be dismissed by giving three days’ notice.

A fixed-term contract is terminated upon its expiration. 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 the 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, the 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 of employees:

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 prolonged until the end of the pregnancy);

b. employees under 18 (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 case of termination of employment owing to the company being wound up, as well as in case of redundancy (as described below); and 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 his or her medical certificate\(^2\) prohibiting him or her from remaining in the current job, or if the employer does not have an appropriate job;

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 employment contract terms.

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 such termination shall be concluded.

## ii. Redundancies

If the company decides to apply the redundancy procedure, 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 dismissal, and each employee should confirm 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.

The company further offers the employees all suitable vacancies the company has (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 in the company, the employee should be served the appropriate notices and confirm the receipt thereof.

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\(^2\) A medical certificate must be issued according to the procedure established by federal laws and other normative legal acts of Russia.
Under Russian legislation there is no difference between collective dismissal or reduction in the workforce. Mass lay-offs are not directly regulated. However, provisions in the Russian labour legislation related to ‘downtime’ indirectly regulate lay-offs. Under these provisions, in case of 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, 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 owing to an employer’s fault shall be remunerated in the amount of not less than two-thirds of the employee’s average salary. A period of downtime owing to 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 case of collective dismissal, the employer must provide notifications to the State Employment Agency of certain information in the following two stages.

In the first stage (three months before the dismissals):

a details of the employer and employees;
b a list of all the organisation’s employees 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 (the profession, number of persons, date of dismissal).

In the second stage (two months before the dismissals), the employer must again provide details concerning itself and also information about 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 of a child under three years old in a large family bringing up minors where another parent is not employed and takes care of their children.

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 the performance is evaluated.

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3 Dismissal may be considered to be collective depending on the number of employees that are planned to be dismissed by the company. The exact thresholds for collective dismissal are provided in agreements relevant to a specific industry sector or territory.
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, etc.

Actual termination of the employment contract cannot take place while the 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 of a company winding up, as well as 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 in employment service within two weeks from 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.

### XIII. TRANSFER OF BUSINESS

In the case of a sale of shares of the employing company to another owner, 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. The 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 sale 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 after it has obtained 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 (merger, accession, division, split-off or transformation) of the company is also not a ground to terminate employment with a company 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. In this case, the employment will be terminated.

XIV OUTLOOK

There are no particular trends or significant developments in employment law expected in 2019; however, the following changes were implemented in January.

i Extra days off for employees undergoing standard medical examination

As of 1 January 2019, employees undergoing medical examination have the right to be released from work for one working day (once every three years) while preserving their place of work (position) and average earnings.

According to the changes, certain categories of employees are entitled to be released from work for two working days (once a year) while preserving their place of work (position) and average earnings. These categories of employees include persons of pre-retirement age, as well as working pensioners.

The named days off can be approved based on the written application of the employee.

ii Deadline for conducting special evaluation of working conditions

The procedure for certification of workplaces was replaced with a special evaluation of working conditions at workplaces (a special evaluation). The deadline for the transition period, and therefore for all companies to have completed a special evaluation, was 31 December 2018. As of 1 January 2019, if a company cannot produce documents confirming completion of a special evaluation, it may be subject to administrative liability. Each company must publish a summary of the results of its special evaluation on its website. A special evaluation must take place at least once every five years, or where required by law (e.g., if an employer establishes a new workplace).

Starting from 2020, based on data from the information system that records results of the special evaluations of working conditions, the Federal Service for Labour and Employment will automatically penalise companies that fail to conduct a special evaluation.

iii Employer’s exemption from criminal liability for partial or full non-payment of salary

On 9 January 2019, amendments to the Criminal Code came into force. According to the Code, if an employer commits a crime for lucrative or personal interests that results in partial non-payment of employees’ salaries for three months, or full non-payment for two months, it will be subject to criminal liability. Under the amendments, however, the employer may be exempted from criminal liability if it committed the crime for the first time and it provided employees with their full salary as well as a percentage for salary payment delay within two months of the date the criminal case was initiated.
Chapter 39

SAUDI ARABIA

John Balouziyeh and Jonathan Burns

I  INTRODUCTION

Saudi Arabian law is based fundamentally on shariah (Islamic law) as taught by the Hanbali school of jurisprudence. Secondarily, the Saudi Arabian authorities and governmental agencies issue, *inter alia*, royal decrees, resolutions and circulars that have the effect of creating binding law. Generally, the codified law in Saudi Arabia is limited mainly to matters of commercial law and public order.

The employment law framework in Saudi Arabia is based on the Labour and Workmen Law, enacted by Royal Decree No. M/51, dated 23/8/1426 H, corresponding to 27/9/2005 G (as amended) (the Labour Law) and its Implementing Regulations enacted by Ministerial Resolution No. 1982 dated 28/6/1437 H corresponding to 6/4/2016 G (the 2016 IRs), as well as by shariah, as interpreted and applied in Saudi Arabia.

In addition to the Labour Law, numerous subsequent circulars enacted by the Ministry of Labour (MOL) are applicable to any relationship pursuant to which a party agrees to work in Saudi Arabia for another party. The Labour Law applies to and governs the employment relationship between the two parties.

The Commission for the Settlement of Labour Disputes (the Commission) under the aegis of the Ministry of Justice is the Saudi Arabian entity that is currently primarily responsible for adjudicating labour disputes. However, before a case reaches the Commission, it must first be heard by the Labour Office for mandatory mediation. Only if the employer or employee refuses to accept the non-binding decision of the mediator may the case advance to the Commission.

As a general rule, the Labour Law is drafted in favour of the employee, creating statutory rights that the employee may not waive (Article 6, Labour Law). Among other issues, it regulates the employment of non-Saudis, training and qualification of employees, labour relations, work conditions, part-time work, protection against occupational hazards and industrial accidents, and the employment of women and minors. The most common areas of dispute under the Labour Law between the employer and employee relate to the scope of wages, working hours, overtime pay, termination and severance pay.

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2 In 2015, the MOL and Ministry of Justice announced that jurisdiction over labour disputes would be transferred to the Ministry of Justice and a proper tribunal system implemented. In 2016, the Ministry of Justice announced that specialised labour courts would begin operating during the current Hijri year of 1438 (corresponding to 2 October 2016 to 21 September 2017) after designated assistant judges had completed specialised training on resolving labour disputes.
II YEAR IN REVIEW

i Saudisation

The national policy of encouraging employment of Saudi nationals in the private sector, known as Saudisation, has always been a major topic throughout the years. Saudisation was originally enacted as a result of pressure exerted by Saudi Arabian nationals complaining that the job market had been saturated by Saudi Arabia’s significant expatriate population, leading to high unemployment rates among Saudi nationals. In response, the MOL in October 2011 stated that it would cut the number of foreign workers in Saudi Arabia from the current rate of 31 per cent of the population to 20 per cent over the next several years.

The difficulty for employers to comply with Saudisation policies fluctuates with the performance of the local economy. For example, where depressed oil prices affecting state spending results in company closures and large lay-offs across the country, the authorities tend to increase Saudisation obligations on all employers generally to make up for the loss in Saudi employment. Conversely, where state spending is robust, resulting in a more liquid local economy, Saudisation obligations tend to decrease and hiring of expatriate employees becomes easier.

In that regard, while past years saw higher oil prices and state spending, and thus a more relaxed approach towards Saudisation and a move towards revising certain elements of the Labour Law in favour of employers, the hot topic of 2017 was an intensified Saudisation campaign and a significant increase in pressure on employers, their non-Saudi employees and even their families to comply with the country’s Saudisation policies. This remained the case in 2018.

The policy of Saudisation is implemented, enforced and regulated by several government programmes and policies, and is reflected in nearly every facet of the public and private sectors. For example, foreign companies wishing to establish a presence in Saudi Arabia must include in their application packet to the Saudi Arabian General Investment Authority a plan for hiring and training Saudi nationals as employees, while any company undertaking a government contract is required to adhere to certain Saudisation and localisation measures. As another example, companies are required to draft and adopt a detailed internal Saudisation plan whereby each position of employment within the company is described and a time frame for replacing non-Saudi employees with Saudi employees is specified. In addition to other Saudisation measures, legislation lists 18 specific jobs that have been ‘Saudised’ and may not be held by non-Saudis, in addition to employing a minimum and maximum age limit for expatriate employees.

Furthermore, the Nitaqat programme gives significant effect to the policy of Saudisation. It labels companies as platinum, green, yellow or red based on a formula involving two or more of the following variables: the number of employees; the size of the company; and, under certain circumstances, the activities of the company. Failure to hire

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3 For instance, large companies are required to employ a greater number of Saudi nationals than small companies.

4 For instance, small laboratories with between 10 and 49 employees must employ 10 per cent to 14 per cent Saudi nationals in order to remain in the yellow category. In contrast, in the agricultural industry, only 2 per cent to 4 per cent of Saudi employees are required for a company of the same size.
the required percentages of Saudi employees under the Nitaqat programme may result in fines, non-renewal of residency permits, non-issuance of future employment visas and similar actions.

Previously, the MOL required employers to pay a Saudi employee a minimum monthly wage of 3,000 Saudi riyals in order to count him or her as a full Saudi employee under the Nitaqat programme. In 2018, the MOL announced that Saudi employees over the age of 60 will no longer be counted in the employer’s Saudisation rate.

ii 2018 Saudisation issues

As mentioned in subsection i, 2018 saw a continuation of the previous year’s intensified pro-Saudisation campaign and significantly increased pressure on employers and non-Saudi employees and families. This topic manifested itself in many ways.

For example, the Ministry of Finance exacts fees on the dependents of non-Saudi employees residing in the country. This has resulted in a significant departure of families from the country, although in some cases a single breadwinner may stay behind to continue working. Although many in the business community have decried this measure as harmful to the local economy, it has been deemed by government policy as a necessity to increase local employment and free up jobs for Saudis. Following an increase in fees in 2017, fees were increased again in 2018, resulting in a larger departure of expatriates.

Another application of Saudisation in 2018 came in the form of an iqama (work permit) rules. Non-Saudi employees are required to have an iqama, which states the individual’s sponsor and job title. Working in a role other than as stated in the iqama is a violation of the Labour Law. In the past, iqamas could be reissued with amended job titles, if needed for work reasons; however, in an effort to spur local hiring and reduce the expatriate labour force, the MOL suspended this service in 2018.

Related to this point, a large part of the MOL’s enforcement efforts are conducted via inspections on companies and employers. In the past, these inspections were carried out by MOL officials. However, in 2018 the MOL announced that inspections would be privatised and delegated to private sector inspection services, in order to increase efficiency and supervision.

iii Shifting public sector employment to the private sector

As described below, the working week in Saudi Arabia is 48 hours, with Friday as a paid day of rest (see Section VI.ii). Nevertheless, the public sector, which is the largest employer of Saudi nationals, operates from Sunday to Thursday with Friday and Saturday constituting a two-day weekend.

Due to fiscal burdens on the government and public sectors in maintaining a large local workforce, a significant part of Saudi policy in 2018 was aimed at encouraging Saudis to take jobs in the private sector. However, many government employees enjoying a two-day weekend and 40-hour working week tend to reject the private sector’s 48-hour, six-day working week.

As mentioned above, there are currently 18 specific jobs that are Saudised and may not be held by non-Saudis. Thus, policymakers in Saudi Arabia have discussed and considered implementing a 40-hour working week only applicable to existing Saudised jobs, and to add more job titles to this list – in an effort to entice more Saudis away from public sector employment and into the private sector with a guaranteed two-day weekend.
iv New penalties and increasing female employment

Pursuant to Ministerial Resolution No. 4786 issued on 28/12/1436H (corresponding to 12 October 2015), the MOL adopted a regime of fines and penalties applicable to employers for certain specified violations. Pursuant to Ministerial Resolution dated 01/05/1439H (corresponding to 18 January 2018), the MOL adopted a number of new fines and penalties.

Most of the new fines and penalties adopted in 2018 reflect a clarification or confirmation of existing requirements in the Labour Law. However, a large part of the new fines and penalties are aimed at curbing employer abuses, and creating a work environment that is accessible and welcoming to female employees.

For example, reduced government spending has resulted in financial scandals involving poorly managed and poorly capitalised companies that became unable to pay employee salaries. The MOL has sought to combat this occurrence by adopting new fines and penalties for employers who fail to pay salaries on time.

In the latter case, reduced government spending and high unemployment has resulted in a new phenomenon in Saudi Arabia where families need extra income – accordingly, more female members of the family have decided to seek employment and income in the marketplace. In the past, families could afford to meet expenses on the salary of only male family members, and cultural and religious practices encouraged families to avoid sending female members of the family into the public workspace. However, the needs of families for more income in order to meet expenses is slowly changing this viewpoint. Nevertheless, cultural sensitivity still exists, and therefore the MOL has sought to enact measures that make females’ attendance in the workplace a suitable and safe solution. For example, new provisions penalise the employer’s failure to have a separate ladies section and nursery, if required.

v Anti-Harassment Law

Additionally, Saudi Arabia adopted the Anti-Harassment Law under Royal Decree No. 488 dated 14/9/1439H corresponding to 29 May 2018G. The Anti-Harassment Law is not aimed specifically at the employment relationship. However, certain provisions are made expressly applicable to employers and impose a duty on them to fulfil certain obligations. For example, employers are required to adopt an internal complaints mechanism and procedure, which must include confidential investigation requirements. Although the Anti-Harassment Law is framed in a gender-neutral manner, most in Saudi Arabia agree that it is aimed at reforming society in preparation for more female involvement in the workplace and in public life.

vi Occupational safety

Finally, Saudi Arabia implemented a series of changes to better promote occupational safety and prevent occupational hazards. Minister of Labour and Social Development Resolution No. 161238, dated 10/8/1439 H, corresponding to 26/4/2018 G, approved the Regulation of Occupational Safety and Health Management (the Occupational Safety Regulation), which requires businesses to develop written policies for occupational safety and health in the languages most commonly used by members of the respective companies. The policies are intended to protect the safety and health of all members of facilities, visitors and passers-by who may be affected by passing through the workplace, by preventing work-related injuries, illness, diseases and accidents (Section 1.1, Occupational Safety Regulation). In addition,
in June 2018, the Ministry of Labour and Social Development began inspecting companies that employ 50 or more workers to ensure their compliance with the National Strategic Programme for Occupational Safety and Health.

The Labour Law continues to require all companies to take adequate steps to protect the health and safety of their employees. This duty is deemed to be an extra-contractual in that it applies regardless of whether it is memorialised in the contract between the parties.

III  SIGNIFICANT CASES

Saudi Arabia is not a jurisdiction where case law forms binding precedent or is a source of law. Further, case law is not even available to the public for review. Therefore, any review of the laws governing Saudi labour law should focus on laws, implementation rules, circulars and other regulations put forth by the MOL and other relevant government institutions, as well as the knowledge and experience of counsel.

IV  BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i  Employment relationship

As defined by the Labour Law, employment relationships in Saudi Arabia are created by a ‘contract concluded between an employer and the employee, whereby the latter undertakes to work under the management or supervision of the former for a wage’ (Article 50).

The employment contract must be duplicated, with one copy to be retained by each of the two parties. However, the law provides for situations where an employment contract is not in writing (and thus not signed). In this case, the contract is deemed to exist, but the employee alone may establish its existence and his or her entitlements arising therefrom. To do so, he or she may introduce any evidence, including testimony as to oral agreements entered into, in order to prove the existence of the contract. When the contract is not written, either party may demand at any time that it be put in writing (Article 51, Labour Law). The 2016 IRs use a standard form of work contract as a template, presumably in an attempt to make contract drafting easier for employers and encourage them to have a written contract, since this is often overlooked, resulting in disputes.

Discussing specifically employment contracts for non-Saudi nationals, the Labour Law requires that they be in writing (Article 37). The Law does not state what would transpire if the contract was not in writing. Presumably, Article 51, which recognises employment contracts even if they are not written, would come to apply. Under Article 51, the employee is allowed to prove the existence of an unwritten employment contract by any means available.

For Saudi employees, both fixed-term and at-will5 employment contracts are permitted. Fixed-term contracts automatically terminate upon expiration of the duration term as specified in the contract, without giving rise to any claim against the employer should it opt against renewal.

For non-Saudi employees, only fixed-term employment contracts are available. The employment contract for non-Saudi employees must define with particularity the duration

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5 As further discussed in Section XII.i, the term ‘at will’ does not strictly apply to indefinite term contracts, as 60 days’ notice and a valid reason are still required to terminate the contract. That is, parties are not permitted to immediately terminate an indefinite contract without any reason as in most at-will jurisdictions.
of the contract. However, if the contract does not include a term specifying the duration, then the duration of the work permit shall serve as the term of the employment contract (Article 37, Labour Law).

It is recommended that an employment contract be made in writing and, even though not required under the Labour Law, signed by both parties in order to bind the parties to certain terms generally required under Saudi Arabian law and to avoid disputes. It is recommended that all employment contracts in Saudi Arabia include the following terms:

- a probation period (as discussed below);
- a stipulation of salary to be paid in Saudi riyals;
- a provision noting Article 98 of the Labour Law, which states that employees shall not work more than eight hours a day during non-holidays, and no more than six hours a day during the month of Ramadan;
- a provision providing at least 21 days of annual vacation, to be increased to at least 30 days if the employee spends five consecutive years working for the employer, as required by Article 109.1 of the Labour Law;
- a provision providing the employee an entitlement to days off with full pay during national holidays as set forth by the MOL, and pursuant to Article 112 of the Labour Law and Article 25 of the 2016 IRs, including:
  - four days for Eid al-Fitr (marking the end of Ramadan);
  - four days for Eid al-Adha (Festival of Sacrifice); and
  - Saudi Arabian National Day;
- a provision providing for sick leave during a single year pursuant to Article 117 of the Labour Law, including:
  - sick leave for the first 30 days at full pay;
  - 60 days following the first 30-day period at 75 per cent pay; and
  - 30 days following the 60-day period without pay, provided that the employee can substantiate his or her sickness; and
- a provision providing for an ‘end of service’ reward pursuant to Articles 84 and 85 of the Labour Law. The employer must pay the employee a reward for his or her period of service, the calculation of which is dependent on whether the employment relationship has expired, was terminated by the employer or was terminated as a result of the employee’s resignation from the employer. In each of these cases, the end of service reward shall be calculated as follows:
  - employee dismissal or expiration of employment relationship – half a month’s wages for each of the first five years the employee has worked for the employer; and a full month’s wage for each year following the first five years (collectively the EOS Reward); and
  - employee resignation – one-third of the EOS Reward for an employee whose period of service was not less than two consecutive years and not more than five years; two-thirds of the EOS Reward for an employee whose period of service was

6 Article 25 of the 2016 IRs clarified that national holidays and sick days falling within an employee’s annual leave shall not count towards the 21 or 30 days of minimum annual leave.

7 The Labour Law defines ‘wage’ (or ‘wages’) as ‘actual wage’, which includes all amounts paid to the employee under an employment contract, including fixed and periodic allowances (e.g., transportation, accommodation) and any other accrued amounts owed to the employee (e.g., commission, profit).
greater than five years and not more than 10 years; and the entire EOS Reward if the employee’s period of service is greater than 10 years.

Parties must conclude an employment contract before the start of the employment relationship. The process for amending or changing an employment contract or the terms of employment are the same as those that apply to contracts generally in Saudi Arabia: through mutual rescission, termination or completion of the term of an existing contract, followed by the execution of a new contract, or otherwise by executing a valid substitute agreement that, with the agreement of both parties, expressly or impliedly revokes a former contract and includes new terms.

ii Probationary periods

Article 53 of the Labour Law allows for a 90-day probationary period, which may be extended if the probationary period falls during either Eid al-Fitr or Eid al-Adha or both. During the probationary period, either party may terminate the employment contract for any reason whatsoever, unless the contract states that only one party is entitled to do so. The Labour Law does not impose any notice period requirement on a party seeking to terminate the employment relationship during the probation period.

According to the amendments to the Labour Law that took effect in 2015, the parties may agree to extend the probation period by an additional 90 days after the first period expires. Prior to implementation of the 2016 IRs, it was unclear if the extended probation period could be decided from the start by placing a 180-day probation period in the employment contract, or if the employer and employee were required to execute a separate agreement providing for an additional 90-day probation period after completion of the first 90-day period. Pursuant to Article 20 of the 2016 IRs, the latter view prevails – that is, an employee may be subject to a total 180-day probation period – but it must be separated into two 90-day periods. The first 90-day period must be included in the employment contract, and the second 90-day period must be mutually agreed in separate writing by the employer and employee.

Further, as per Article 54, an employer may place an employee on an additional probationary period as long as both parties agree and either (1) the scope of employment involves a different profession or work\(^8\) or (2) the employee has returned from a leave of absence of six months or more.

iii Establishing a presence

A foreign company may not hire employees without being officially registered to carry on business in Saudi Arabia. Moreover, a company may not hire employees through an agency or another third party without being registered in Saudi Arabia. This is because of the Labour Law’s requirement that employees be under the sponsorship of their employers (Article 3, Labour Law).

According to Article 39 of the Labour Law, non-Saudis may not work for anyone other than the sponsor, except with authorisation through the MOL’s Ajeer system pursuant to the

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8 There is an exception for household (domestic) help employed in Saudi Arabia. In July 2013, the Council of Ministers passed a law that, among many other things, gave employers the right to place household help on probation for a maximum of three months.
Ajeer is an online portal whereby licensed and approved manpower providers and their clients must pay fees and electronically document the arrangement. When this has been satisfied, a notice is issued that serves as proof of the non-Saudi secondees’ authorisation to work for the client. Notices are valid for only one labourer and for only one month (‘free’ account) or up to six months (‘excellent’ account, for 20 Saudi riyals per month per notice). Thus, in two years, four notices will need to be issued consecutively every six months for each secondee under the excellent account, or the notices must be issued monthly under the free account. Notices may only be issued for clients seeking manpower in the following activities: construction; operation and maintenance; cleaning and maintenance; consultancy and business services; institutes; and colleges. Only companies that are compliant with Saudisation policies may participate in the Ajeer system.

Companies not registered in Saudi Arabia may second employees to a locally registered company (subject to concerns about doing business without a licence or under concealment). During this period, the secondee will remain under the sponsorship of the local company, which will continue to pay the employee’s salary and provide his or her benefits.

A foreign company that is not officially registered in Saudi Arabia may engage an independent contractor.

Saudi law defines a permanent establishment of a foreign company in Saudi Arabia as the permanent place of the foreign company’s activity through which the company carries out business in Saudi Arabia. Under the Income Tax Law (ITL), the following are deemed to constitute permanent establishments:

- business carried out through the company’s agents in Saudi Arabia (Article 4(a));
- construction sites, assembly facilities, sites used for surveying for natural resources, a fixed base where a non-resident natural person carries out business (Article 4(b)); and
- a branch of a non-resident company licensed to carry out business in Saudi Arabia (Article 4(b)).

Sites used for storage, displaying goods belonging to the non-resident, keeping stock belonging to the non-resident for the purpose of processing by another person or for the collection of information for the non-resident are not deemed to constitute a permanent establishment (Article 4(c), ITL).

Therefore, if the work of a contractor comes to create a relationship of agency with a foreign company through the formation of a relationship whereby the parties agree to the contractor’s acting on behalf of the foreign company and subject to the foreign company’s control, the contractor’s business in Saudi Arabia on the foreign company’s behalf can come to be deemed a permanent establishment of the foreign company, thus triggering certain tax and reporting duties. For example, any payments made from the contractor to any person or company that is not resident in Saudi Arabia must pay a withholding tax on behalf of the non-resident when the payment derived from any activity in Saudi Arabia (Article 68, ITL). This withholding tax may range from anywhere between 5 per cent and 20 per cent of the payments to be made.

The employer must provide employees with health care in accordance with the standards set forth by the MOL, taking into account the provisions of the Council of Cooperative Health Insurance (Article 144, Labour Law), whose directives require employers to provide health care.
health insurance to all of their employees based in Saudi Arabia. In addition to the legally mandated minimum, some companies also provide other insurance, such as business travel and accident insurance, to their employees.

At the conclusion of an employment contract, the employer must provide the employee with a certificate of service and settle his or her entitlements, including the end of service reward (Article 88, Labour Law). If the employee is non-Saudi, the employer must also bear the costs of a ticket for a return flight to the employee’s homeland (Article 40.1, Labour Law).

V RESTRICTIVE COVENANTS

Article 83.1 of the Labour Law permits non-competition clauses in the employment contracts of employees whose scope of employment necessarily entails that they shall become acquainted with the employer’s customers. For non-competition clauses to be valid, they must be in writing and include the following terms and conditions, which must be narrowly tailored to protect the legitimate interests of the employer:

a. the duration of the clause, which shall not exceed two years as of the date of termination of the employment contract;

b. the venue by which the employee shall be prohibited from seeking employment with a competitor; and

c. the type of work that the employee shall be prohibited from engaging in with a competitor.

In addition, Article 83.2 permits confidentiality clauses in the employment contracts of employees whose scope of employment necessarily entails that they shall become acquainted with the employer’s business or trade secrets. For confidentiality clauses to be valid, they must be in writing and be specific in terms of time, place, and type of work.

According to Article 83.3, an employer may sue an existing or former employee for breach of non-competition or confidentiality undertakings within one year of discovering the violation.

VI WAGES

i Payment

According to the recent and ongoing implementation of the Wage Protection System in Saudi Arabia, Article 90.2 of the Labour Law provides that all employee wages shall be paid into each employee’s account through an accredited bank within Saudi Arabia. As of the end of 2018, the Wage Protection System is now applicable to firms employing 11 or more employees.

ii Working time

Article 98 of the Labour Law provides that employees shall not work more than eight hours a day or 48 hours in a week during non-holidays (normal working hours), and no more than

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9 The Saudi comprehensive healthcare insurance scheme covers family members and other dependants holding a residency permit in Saudi Arabia.
six hours a day or 36 hours during the month of Ramadan.\textsuperscript{10} Friday is a paid day of rest. Article 106 of the Labour Law provides an exception to the normal working hours period, and allows working hours to reach up to 10 hours a day or 60 hours per week (extended working hours) in the following circumstances:

\begin{itemize}
  \item[a] annual inventory activities, budgeting, liquidation, closing of accounts and preparations for discount and seasonal sales, as long as the extended working hours do not exceed 30 days a year;
  \item[b] if the work is intended to prevent occurrence of a hazardous accident, mitigate its impact or avoid imminent losses in perishable materials;
  \item[c] if the operation is intended to confront extraordinary work pressures; and
  \item[d] holidays, other seasons, occasions and seasonal activities defined by a minister’s decision.
\end{itemize}

Article 101 provides that no employee shall work more than five hours without a break of not less than 30 minutes for rest, prayer and meals, and that no employee shall be required to remain at the workplace for more than 12 hours in any one day.

Articles 150 and 163 of the Labour Law place limitations on the number of hours that women and minors can work during the night. Women may not work at night for a period of at least 11 consecutive hours except in certain enumerated instances, such as in the case of \textit{force majeure} or emergency, or if the work takes place in a shop that sells women’s supplies. Minors may not work for a period of at least 12 consecutive hours without receiving approval from the MOL.

\textbf{iii \ Overtime}

Article 107 of the Labour Law requires that employees be paid overtime compensation – calculated as the regular wage plus 50 per cent of the regular wage – for employees who work beyond the normal working hours or during national holidays. Pursuant to Article 23 of the 2016 IRs, an employee’s yearly overtime shall not exceed 720 hours, unless by exception of the MOL.

\textbf{VII \ FOREIGN WORKERS}

Employers must compile and keep detailed paperwork regarding their employees for the purpose of obtaining employment visas, contributing to the Occupational Hazards Branch of the General Organisation for Social Insurance, and so forth. Article 16 of the 2016 IRs requires employers to draft, adopt and implement an internal Saudisation plan. The plan must include a description of each job position in the company describing its tasks and duties, a time frame for replacing non-Saudi employees with Saudi employees, and providing training to Saudi Arabian employees. Employers must also maintain a record of Saudi employees who have replaced non-Saudi employees. However, there is no central database or register in which companies must participate or contribute employee information.

\textsuperscript{10} Days, months and years mentioned in the Labour Law are references to the Hijri (Islamic) calendar, and not the Gregorian calendar, unless otherwise stated in the employment contract or agreed with the employee. The Hijri calendar year is approximately 11 days shorter than the Gregorian calendar year. In most cases, and as a matter of practice, employers and employees use the Gregorian calendar. This should be made clear in the employment contract.
There is no strict limit on the number of foreign workers a workplace or company may have. However, there are required minimums as to the number of Saudi employees that a company must have in relation to the number of foreign workers hired. Therefore, the more foreign employees that are hired, the more Saudis must also be hired. Failure to hire the required percentage of Saudi nationals under the Saudisation policy may result in fines, non-renewal of residency permits and non-issuance of future employment visas.

There is only one tax that companies must pay for foreign workers: the contribution to the Occupational Hazards Branch of the General Organisation for Social Insurance. The employer’s payment of 2 per cent of the employees’ total wages is out of its own pocket rather than deducted from the employee’s salary. For Saudi Arabian employees, the employer must pay an additional 9 per cent of the employees’ total wages out of pocket to the Annuities Branch of the General Organisation for Social Insurance, as well as 1 per cent of the employees’ total wages out of pocket for Saned, the unemployment insurance scheme implemented by the General Organisation for Social Insurance.

Foreign workers are protected under the Labour Law, and are permitted to work in Saudi Arabia as long as they uphold the provisions of the Labour Law and secure valid work permits from the MOL. Article 33 of the Labour Law imposes the following conditions precedent to the issuance of work permits to foreigners:

a. the employee has entered the country legally;
b. the employee possesses educational qualifications and professional qualifications that the country needs and that the nationals do not possess; and
c. the employee has entered into a valid employment contract with his or her employer, whereby the employer agrees to hold itself responsible for the employee.

VIII GLOBAL POLICIES

As a preliminary matter, both the employer and the employee must acquaint themselves with all contents and provisions of the Labour Law so that each party may be aware of its obligations. In addition, all employers are required to adopt internal work rules.

A standard form of internal work rules was provided in previous implementing regulations. However, pursuant to the 2016 IRs, a new standard form of internal work rules was adopted. Pursuant to Article 4 of the 2016 IRs, companies must log on to the MOL’s E-Portal and either accept the MOL’s standard form of internal work rules or, alternatively, insert additional terms, which will be reviewed electronically by the MOL for consistency against Saudi Arabian rules and regulations. However, existing companies that have already adopted internal work rules are exempt from this requirement so long as their current rules are not inconsistent with the Labour Law or its implementing regulations.

Once approved, the employer is required to post the rules in a conspicuous location within the employer’s establishment, or use any other method of communication to make employees aware of the rules (Article 13, Labour Law).

The Labour Law sets forth a list of permissive internal work policies and disciplinary measures that an employer may invoke. Under the Labour Law, an employer has the power to impose the following penalties:

a. a fine, in which the employer must specify in a written record the employee’s name, wages, the amount of the fine, and the cause and date of the fine;
b. deprivation or postponement of allowance, but only for one year and no longer;
c. postponement of promotions, but only for one year and no longer;

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Each of these measures must be comprehensive in nature, and define the scope of the measures, with particular emphasis on the privileges and rules related to violations and disciplinary penalties (Article 66, Labour Law).

Further, the standard form of internal work rules under the 2016 IRs lays out a specific and detailed scheme for discipline carried out by employers specifying the type of penalty that may be applied for 49 specific acts depending on whether the act was committed for the first, second, third or fourth time.

Moreover, there are no mandatory global policies required under Saudi Arabian law. It is advisable, however, that all companies seeking to establish a uniform set of global policies declare adherence to Saudi Arabian laws and regulations when drafting, for example, the following common corporate global policies:

- **Workplace standards**: a workplace standards policy should be written such that it does not contravene shariah, including, but not limited to, the prohibition against the consumption of alcohol, pork and pork products on the employer’s premises.

- **Anti-bribery policy**: an anti-bribery policy should adhere to the Combating Bribery Law, enacted by Royal Decree No. M/36, dated 29/12/1412 H, corresponding to 1/7/1992 G, which seeks to counter both the offer and receipt of bribes involving public officials in Saudi Arabia. Under the Combating Bribery Law, a public official is deemed as having received a bribe if he or she has solicited for him or herself or a third party, or accepted or received, a promise or gift for the purpose of obtaining or retaining business or securing some other improper advantage. Further, an anti-bribery policy should additionally require employees to comply with the US Foreign Corrupt Practices Act and, if a shareholder of the employer has a presence in the UK, the UK Bribery Act.

- **Anti-money laundering policy**: an anti-money laundering policy should comply with the relevant anti-money laundering legislation in Saudi Arabia, which is the Anti-Money Laundering Law enacted by Royal Decree No. M/20 dated 05/02/1439H (25/10/2017G).

- **Corporate authority and executive committee policy**: a corporate authority and executive committee policy may need to take into consideration the following Saudi Arabian laws and regulations:

11 A public official includes: (1) a person employed by any of the Saudi Arabian public administrative authorities, regardless of whether the employment is permanent or temporary; (2) an arbitrator or expert appointed by the Saudi Arabian government or any entity having judicial specialisation; (3) a person assigned by a government authority or any other administrative authority to perform a specific assignment; (4) a person employed by a joint-stock company or company in which the state has a holding, a company that carries out banking operations or a company that manages and runs or maintains a public facility or that is performing a public service; and (5) certain chairmen and directors of companies.

12 A public official is deemed as having received a bribe if he or she has solicited for him or herself or a third party, or accepted or received a promise or gift in exchange for: (1) abstaining from carrying out his or her duties; (2) violating the functions of his or her duties; (3) performing or abstaining from one’s duties as a result of a request, recommendation or mediation; (4) exercising real or alleged influence in order to obtain or attempt to obtain from any public authority any act, decision, contract, licence, job, service or any other kind of a benefit or advantage; and (5) lobbying a government authority on the basis of his or her position.
the Anti-Harassment Law enacted under Royal Decree No. 488 dated 14/9/1439H corresponding to 29 May 2018G.

- the Capital Market Law, enacted by Royal Decree No. M/30 dated 2/6/1424 H, corresponding to 31/7/2003 G;
- the Regulations for Companies promulgated under Royal Decree No. 3/1437, dated 28/1/1437H, corresponding to 10/11/2015G, as amended;
- the Bankruptcy Law, enacted by Royal Decree No. M/05 dated 28/05/1439H (corresponding to 13/02/2018G);
- the Banking Control Law, enacted by Royal Decree No. M/5, dated 22/2/1386, corresponding to 11/6/1966 G;
- the 2017 Corporate Governance Regulations (as amended);
- the 2006 Real Estate Investment Fund Regulations;
- the 2007 Mergers and Acquisition Regulations (as amended); and
- the Commercial Agencies Law, enacted by Royal Decree No. M/11 dated 20/2/1382 H, corresponding to 22/7/1962 G, as amended.

Securities trading: a securities trading policy should adhere to the relevant legislation in Saudi Arabia, which includes the Capital Market Law.

Records retention: a records retention policy should comply with the Law of Commercial Books (the CB Law) (discussed in more detail in Section XI).

In addition to the above, it is also advisable that companies operating in Saudi Arabia include a policy that the company and its employees are expected to conduct themselves in a manner that does not offend local laws, practices and customs in Saudi Arabia, or do anything that would bring prejudice to the company in Saudi Arabia.

IX TRANSLATION

Article 9 of the Labour Law mandates that all data, records, files, employment contracts and all other documents provided for in the Labour Law, including any other decision issued by the MOL, shall be written in Arabic. In this regard, between an employment document translated in Arabic and the same contract translated in a foreign language, the general rule is that the Arabic version shall prevail. In addition, it is recommended that employee handbooks and company policies be translated into Arabic in the event that the global policies become subject to litigation in the Saudi Arabian courts. It is common practice for most information to be in English, which is also the common commercial language.

X EMPLOYEE REPRESENTATION

In April 2013, the MOL announced that it would promulgate legislation for the establishment of the General Union of Saudi Workers (the Workers’ Union), which will aim to represent Saudi employees in their efforts to improve salaries and working conditions, seek promotions, increase benefits and ensure vocational safety. The Workers’ Union will only be available to businesses employing more than 100 employees. As of the end of 2018, the Workers’ Union was still not operational.

XI  DATA PROTECTION

i  Requirements for registration

Article 1 of the CB Law requires that ‘every merchant shall keep the commercial books required by the nature and importance of his trade in a way that shows his exact financial status and the rights and obligations pertaining to the merchant’s trade.’ Moreover, Articles 6 and 8 of the CB Law, when read together, provide that all merchants must keep for 10 years ‘an exact copy of all correspondence and documents relating to his trade, issued or received by him’, which shall be ‘kept in a regular way that facilitates review of the accounting entries, and ensures, where necessary, ascertaining of profits and losses’.

Articles 3 to 6 of the CB Law suggest that a company must identify with particularity the information being processed, including, but not limited to, financial transactions, inventory and other company financially related information.

ii  Background checks

Background checks and credit checks are permitted. In practice, there are no areas that are prohibited from investigation and review.

XII  DISCONTINUING EMPLOYMENT

i  Dismissal

Under the Labour Law, an employee may not, regardless of whether the contract is an indefinite or fixed-term contract, be dismissed without cause unless the dismissal occurred during and pursuant to the employee’s validly negotiated probationary period. Rather, dismissal must be supported by a valid reason specified in a written notice. There is no guidance as to the scope of a valid reason, and there is some evidence to suggest that courts are more willing to find a valid reason for dismissal when the employee is an expatriate, rather than a Saudi Arabian national.

An employer may dismiss an employee bound to a fixed-term contract in one of the following three ways: non-renewal of the employment contract at the end of the contract’s duration;14 an event that triggers any of the contract’s terms with respect to dismissal or termination, unless such terms are contrary to the Labour Law or to Saudi public policy; or a conversion of the fixed-term contract to an indefinite term employment contract, which permits termination with 60 days’ notice and a valid reason – however, the Labour Law provides that the expiration date of the work permit shall serve as the fixed term of the contract for expatriate employees if no fixed term is specified. Thus, in practice only Saudi nationals may have indefinite term contracts.

14 However, pursuant to Article 19 of the 2016 IRs, the MOL adopted a standard form of work contract that encompasses obligatory as well as optional terms. Employers are not required to use the standard form of work contract, but employment contracts may not have any terms that are inconsistent with the standard form. Pursuant to Article 2 of the standard contract, it is obligatory that all fixed-term contracts are automatically renewed unless either party notifies the other in writing otherwise at least 30 days prior to the expiration date of the contract. Thus, employers may not let an employee go simply by failing to renew the fixed-term contract at the expiration of its term. Rather, the employer now must affirmatively provide 30 days’ notice prior to the expiration date.
In the event that none of these options is applicable, the Labour Court may, nonetheless, be willing to approve the dismissal of the employee for other reasons that it may deem valid, provided that adequate compensation is paid to the employee (e.g., the equivalent of three months’ salary).

As a last resort, an employer may terminate an employment agreement with cause if the employee engages in egregiously inappropriate behaviour (e.g., by assaulting the employer; see below for a more detailed discussion of for-cause termination). In these cases, the employer must give the employee a chance to object to the termination and state his or her reasons for the same (Article 80, Labour Law).

Dismissal of employees bound to indefinite term employment contracts, in addition to a valid reason, requires that the employee receive written notice describing the reason for the dismissal. Employees who are paid monthly must receive the notice at least 60 days prior to the termination, whereas all other employees must receive such notice at least 30 days in advance. The employer may, however, forgo the employee’s respective statutory notice period in exchange for a payment to the employee equal to the employee’s wage for the duration of the notice period.

As a general rule, an employer must provide a dismissed employee with a statutory end of service reward or indemnity. The Labour Law, however, does not require the employer to pay the reward or any other indemnity in the following cases of for-cause termination:

a. the employee assaults the employer or any of his or her superiors;
b. the employee fails to obey the orders of his or her superiors or does not meet the essential obligations under his or her employment contract;
c. if there is proof to suggest that the employee has adopted bad conduct or behaviour, or has committed an act affecting honour or integrity;
d. the employee commits an act with the intention to cause material loss to the employer;
e. the employee resorts to forgery in order to obtain the job;
f. the employee is dismissed during his or her contractual probationary period;
g. the employee is absent without a valid reason for a period of time specified in the Labour Law, so long as a warning is first served;
h. the employee unlawfully takes advantage of his or her position with the employer in order to receive personal gains; or
i. the employee discloses work-related confidential information or trade secrets (Article 80, Labour Law).

Irrespective of the way in which the employee’s contract is terminated, the employer is required to pay the employee’s wages and settle all of the employee’s entitlements within one week of the dismissal or termination date. If the employee is an expatriate worker, then the employer must also bear the costs of a return ticket to the employee’s homeland, unless the employee resigns in the absence of a legitimate reason (Article 40.2, Labour Law).

In cases in which an employer wishes to terminate the contract of an employee for cause, but the employee disputes the basis of the termination, the parties may enter into a settlement agreement in order to avoid protracted litigation before the Commission for the Settlement of Labour Disputes, which has jurisdiction to adjudicate disputes between employers and employees. Usually, agreements to settle are entered into between the parties after an employee has already filed a complaint.
Redundancies, conclusion of certain activities and closure

Redundancies are deemed to be valid reasons for terminating employment contracts. If company restructuring or some other business decisions lead to redundancies in personnel, a company may terminate the contracts of certain redundant employees, provided that it fulfils the statutorily mandated notice period or makes payment in lieu thereof.

In addition, where a company ceases operations in a certain activity, or ceases operations altogether, the amendments to the Labour Law that went into effect in 2015 provide, as a matter of statute, that the contracts of the relevant employees working in such operations may be terminated (Article 74).

TRANSFER OF BUSINESS

The Labour Law offers protection to employees affected by a merger, acquisition or other business transfer recognised under Saudi Arabian law. Article 18 provides that all employment contracts affected by a valid business transfer shall be deemed as continuous, regardless of whether the contract is with the predecessor company or the successor company.

Both the predecessor and the successor shall be held jointly liable for all of the employee's entitlements for the period preceding the business transfer, including severance awards and wages. However, with respect to individual establishments involved in a transfer of ownership, the successor and predecessor may, but are not required to, agree on the transfer of all previous entitlements of the employees to the new owner subject to the employees' written approval. If an employee does not approve of the agreement, then he or she may demand termination of his or her employment contract and delivery of all of his or her entitlements from the predecessor (Article 18).

Notwithstanding Article 18 of the Labour Law, Article 11, which provided that both parties are jointly responsible to provide employees with all rights and privileges granted by the original employer where the employer sells all or part of its business to another, was amended as part of the 2015 amendments to remove such joint responsibility and place sole responsibility on the successor.

It would therefore appear that there is a conflict between Articles 11 and 18 of the Labour Law.

OUTLOOK

Saudi Arabia is still experiencing growing pains as state spending is curtailed as a result of volatile oil prices, and this is reflected in the labour market and the pressure on companies to comply with Saudisation policies by focusing on the hiring, training and promotion of Saudi employees. There is hope that a renaissance of diversification will bring a renewed sense of optimism to the economy, but for the time being, companies doing business in Saudi Arabia should anticipate a continuation of 2017’s intensified pro-Saudisation campaign and anti-expatriate sentiment. Long-standing policies of restricting expatriate employment and conditioning the issuance of employment visas to foreign workers on satisfactory levels of employment of Saudi nationals will remain and Saudi policy is likely to require ever-increasing percentages of Saudi nationals among workforces, even in fields where there is a shortage of skills among Saudi nationals, as well as higher levels of protection for Saudi employees generally.
I INTRODUCTION

The Employment Act serves as the central piece of employment legislation in Singapore, outlining salient terms and conditions for employment, as well as rights and responsibilities of employers and employees under contracts of service. Notably, significant amendments to the Employment Act will be introduced on 1 April 2019. These changes will now afford all employees in Singapore coverage under the Employment Act (with the exception of Singapore government employees, seamen and domestic workers), which impacts around 430,000 more workers.\(^2\)

The current version of the Employment Act, in addition to the above categories of employees, does not apply to those employed in managerial or executive positions (including professionals) earning more than S$4,500 per month.\(^4\) In other words, such persons do not have statutory rights and benefits (such as protection from wage deductions and wrongful dismissals) under the Employment Act’s provisions. However, the forthcoming amendments will now provide these employees with coverage. Part IV of the Employment Act also provides additional protection (such as mandatory rest days, overtime pay and maximum hours of work) to select groups of employees, namely (1) workmen (essentially manual labourers) earning a maximum of S$4,500 in basic monthly salary; and (2) employees other than workmen and persons employed in managerial or executive positions, earning a maximum of S$2,500 in basic monthly salary (or S$2,600 after 1 April 2019).\(^5\)

In addition to the Employment Act, other statutes govern specific aspects of employment in Singapore, including the Retirement and Re-Employment Act, the Child Development Co-savings Act (concerning maternity and 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 (the Tripartite Guidelines), some of which the relevant courts and tribunals would be statutorily required to have regard to from 1 April 2019.\(^6\)

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1 Ian Lim is a partner, Nicholas Ngo is a senior associate and Li Wanchun is an associate at TSMP Law Corporation.
2 Employment (Amendment) Bill (No. 47/2018), Paragraphs 2(c) and 2(f).
4 Employment Act (as at 3 January 2019), Section 2(1).
5 id., Sections 2(2) and 35; Employment (Amendment) Bill (No. 47/2018), Paragraph 7.
6 Employment (Amendment) Bill (No. 47/2018), Paragraphs 26(9)(b), 26(12)(b) and 26(17).
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 and the Ministry of Manpower (MOM). In particular, the amendments to the Employment Act contemplate employment-related claims up to S$20,000 (or S$30,000 for union-assisted claims or claims where the employee has participated in a tripartite mediation) in quantum (each), which are heard at first instance before the Employment Claims Tribunals (ECT), a division of the state courts. The ECT was established under the Employment Claims Act 2016, facilitating access to justice for employees who cannot afford legal representation.

II YEAR IN REVIEW

The most significant development to Singapore’s employment and labour law regime in 2018 was the announcement of sweeping changes to the Employment Act and related statutes, which have now been passed by Parliament and, as mentioned in Section I, are expected to come into force on 1 April 2019. In connection with these amendments, Tripartite Guidelines on Wrongful Dismissal are expected to be published prior to 1 April 2019. These Guidelines certainly bear close watching as the Employment Act amendments envisage paradigm shifts to Singapore’s approach to wrongful dismissal, which are to be clarified by the Guidelines.

There have also been some notable developments insofar as case law is concerned, as detailed in Section III.

III SIGNIFICANT CASES

The High Court’s decision in Hasan Shofiqul v. China Civil (Singapore) Pte Ltd (Hasan Shofiqul) was a particularly significant employment case decided in 2018 concerning overtime pay. It concerned a foreign construction worker who was paid a basic salary of S$2,200 a month. The employee held the title of site supervisor, and oversaw six to seven workers. The employee was required to work long hours (sometimes through the night, and on his rest days) without receiving any overtime pay. After his termination, the employee lodged a claim for, among other things, overtime pay.8

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 a site supervisor (and therefore a manager or executive), the employee was not 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 termination.

In coming to its decision, the High Court reasoned that ‘Supervisory responsibility does not mean the person cannot be a workman’ for purposes of Part IV.9 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 specialised skills or training, and was largely involved in ‘hands-on’ supervision. The employee’s supervisory

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7 [2018] SGHC 128.
8 ibid at [3].
9 ibid at [19].
functions were also not executive functions but in fact 'regular on-site routine administrative work'. The employee also did not have authority to hire, dismiss or promote any of the workers who he was ‘in charge’ of.

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 PMEs’ (employees labelled as professionals, managers and executives (PMEs) when they are actually not). The MOM has now warned that it ‘takes a serious view of attempts to misclassify employees in order to avoid employer obligations’. 10

There have also been notable case law developments in 2018 in the area of restrictive covenants, in particular, non-compete clauses. See Section V.

IV BASICS OF ENTERING 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 the employment contacts, and specifically brought to the employees’ attention where possible. This is important, as the courts have leaned in favour of the employee when construing onerous terms in employment agreements,11 and have also endorsed the concept of an implied duty of mutual trust and confidence between the employers and employees. 12

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.13

The distinction between independent contractors and employees is as follows: the latter includes freelancers and gig workers, who are engaged through contracts for services and who

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11 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).
13 Employment Act (as at 3 January 2019), Section 10(3).
are presently not entitled to any particular statutory rights or protection under Singapore law; and the former 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 National University Hospital (Singapore) Pte Ltd v. Cicada Cube Pte Ltd held, there is no single, clearly defined test that determines whether an individual is an employee or a contractor. Yet, the distinction is an important one, as 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.

For example, in Public Prosecutor v. Jurong Country Club, a district court found that a club was liable for Central Provident Fund (CPF) contributions to a gym instructor because it misclassified the instructor as an independent contractor. In coming to its conclusion, the court looked at factors, such as (1) the degree or extent of control exercised by the club over the individual; (2) whether the individual was given any employment benefits; and (3) whether the contractual terms allowed the club to terminate the relationship without notice. The court observed that although the club did not control the manner in which the individual carried out his work, the club tracked his attendance, dictated his hours, required him to seek approval before taking leave and did not authorise him to publicise his training programmes without its approval. The court also noted that having worked at the club for approximately 25 years, there was ‘a certain degree of permanency in [the individual’s] relationship with the club’, and ‘some expectation on the part of both parties for this relationship to continue indefinitely’.

While there is presently a pending appeal against the decision in Public Prosecutor v. Jurong Country Club, employers should nevertheless make a conscious and deliberate effort to properly classify the individuals they engage (whether they are independent contractors or employees, and if the latter, what benefits they are entitled to). Notably, the prosecution in the aforementioned case sought an order that the club pay S$416,924 in CPF contributions that should have been paid to the gym instructor over a period of around 18 years, and employers who wrongly classify their employees may face similar consequences. While the district court in that case did not exercise its discretion to grant such an order, it remains to be seen whether such an order may be granted on appeal.

ii  Probationary periods

Probationary periods are allowed and are generally one to three months. The contractual notice period for termination is also, in practice, shorter during probation periods (e.g., one week, as opposed to one month post-probation). There are no present statutory requirements in this respect.

iii  Establishing a presence

A foreign company must be registered in Singapore in order 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.

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 where a business is wholly or partly carried on from. 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 in Singapore 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), 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 subsection 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 the 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 the ex-employee on the other. As the Court 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 bolstered in the course of employment.

Where 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

18 [2008] 1 SLR(R) 663.
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 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, as discussed in subsection 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). Such clauses are again subject to the requirement of reasonableness, taking into account 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 also 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 subsection i are already protected by other clauses. In its earlier decision of Stratech Systems Ltd v. Nyam Chiu Shin (alias Yan Qiu Xin and others) (Stratech), 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 that were 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).

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), the judge commented that it did not seem logical that an employer that had both a non-compete covenant and a confidentiality clause had a lower chance of using the non-compete covenant to protect its confidential information than an employer that had only a non-compete covenant with no confidentiality provision, as the employer would have been able to enforce the non-compete under the Stratech principle. However, the High Court noted that it was bound by Stratech and Man Financial as they were Court of Appeal decisions.

Thereafter, a different High Court judge in Lek Gwee Noi v. Humming Flowers & Gifts Pte Ltd (Humming Flowers) 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 Court ultimately did not grant the non-compete injunctions sought, and in any event, the position that trade connections can support both a non-compete and a non-solicitation clause is questionable on the present

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19 [2005] 2 SLR(R) 579.
21 [2014] 3 SLR 27.
authority of *Man Financial*. Like *CCL*, the *Humming Flowers* decision was appealed to the Court of Appeal, but settled before it could be heard. The *Stratech* principle therefore remains law for now.

In the High Court’s June 2018 decision in *Solomon Alliance Management Pte Ltd v. Pang Chee Kuan (Solomon Alliance)* (which did not refer to *Stratech* at all), two non-competes against an independent contractor (one restraint operating during the term of the contract, and the other restraint operating both during the term and for one year after the term of the contract) were upheld. In coming to its decision, the Court found a legitimate proprietary interest ‘in ensuring that an independent contractor . . . [the plaintiff] had hired to market products sold by [it] did not market those same products on behalf of other companies while the contract was still in operation between the parties’ (presumably to justify the first non-competition restraint) over and above the plaintiff’s ‘interest in safeguarding and maintaining its trade connections with its product suppliers and in preventing the use of its confidential information’ (presumably to justify the second post-employment non-competition restraint along with restrictions on the use of confidential information).

This decision is an unprecedented recognition by the Singapore courts of a legitimate proprietary interest in the exclusive marketing of an entity’s products. It could be the Court’s way of avoiding the application of *Stratech*, but it also could be that this decision will eventually prove itself 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).

The High Court’s October 2018 decision in *Powerdrive Pte Ltd v. Loh Kin Yong Philip and others (Powerdrive)* made some reference to the decision in *Stratech*. The Court recognised that *Stratech* remains binding, though it also reiterated that concerns have been raised over that decision in *CCL* and *Humming Flowers*. Apart from those brief remarks, in *Powerdrive* the Court essentially bypassed the issue of whether there was a legitimate interest capable of justifying the restraint in holding only that the non-competition restrictive covenant in question was unreasonable and therefore unenforceable. The Court took the view 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*’.

Some observers note that the High Court appears to consciously avoid the application of the *Stratech* decision where possible, while waiting for an appropriate case to be brought before the Court of Appeal to determine whether the decision ought to remain good law.

### iii Non-compete clauses and the notion of reasonableness

*Powerdrive* 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).

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22 [2018] SGHC 139.

23 ibid at [105].

In *Powerdrive*, the 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. 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.

Considering the scope of activities restrained, the Court observed in *Powerdrive* 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’.

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 generally speaking, shorter periods of restraint would be relatively easier to justify).

That is not to say that long periods of restraint would always be unreasonable and unenforceable though. In the earlier April 2018 decision of *Tan Kok Yong Steve v. Itochu Singapore Pte Ltd*,[28] 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 specialised 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 at least two years to rebuild the same contacts without any interference from the ex-employee.

### iv Severance

If a restrictive covenant is indeed 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)*,[29] 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

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25 ibid at [26].
26 ibid at [44].
27 ibid at [40] and [48].
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 High 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 of time after employment. However, the employer should take great care in
doing so.

In the Court of Appeal’s decision in *Mano Vikrant Singh v. Cargill TSF Asia Pte Ltd
(Mano)*,30 the Court 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 in order to be
enforceable. The employer in *Mano* attempted to retain a declared and vested deferred bonus
payment due to his employee pursuant to the employment agreement, and the Court held
that the restriction was unreasonable because, among other things, it had no geographical
limit. This was 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 such 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 headstart 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)*,31
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;

31 [2017] 3 SLR 657.
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, and the appeal was in fact allowed by the Court of Appeal, overturning 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 of time 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, the High Court stated that the springboard doctrine did not apply, as the two-year period in the relevant confidentiality clause had expired and the information was no longer confidential. On the other hand, where a period of time was not expressly stipulated in a confidentiality clause (and the relevant clause did not indicate how long this obligation would last), the Court of Appeal in Tang Siew Choy and others v. Certact Pte Ltd ruled that the period of time to restrain the 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 under Part IV of the Employment Act 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 eight- or nine-hour 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 work employees, any continuous period of 30 hours, as a rest day each week.

33 [1993] 1 SLR(R) 835.
without pay. The employer can determine which day of the week the rest day shall fall on, which is usually Sunday by default. However, these employees may elect to work on, and be remunerated for, the rest day.

An employee may work overtime at higher rates of pay for more than those numbers of hours or on a rest day, provided that no employee works overtime for more than 72 hours in a month. An employee covered under Part IV of the Employment Act also cannot work for more than 12 hours a day save in exceptional circumstances. In the 2013 High Court decision in *Monteverde Darvin Cynthia v. VGO Corp Ltd*, 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.

No statutory restrictions as to working hours, days or periods presently apply to employees not covered by Part IV of the Employment Act, 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 (i.e., workmen earning up to S$4,500 in basic monthly salary and non-workmen earning up to S$2,500 (or S$2,600 as of 1 April 2019) in basic monthly salary) 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 double, where the employee is requested by the employer to work on a rest day. In this respect, the overtime rate applicable to non-workmen covered by Part IV of the Employment Act is capped at the salary level of S$2,250, even for employees earning between S$2,250 and S$2,500, to help employers manage costs, though this lower cap will be removed in April 2019 (with the aforesaid Part IV salary limit of S$2,600 for non-workmen then applying to their overtime rates). There is no such statutory cap for workmen covered by Part IV of the Employment Act, and the Part IV salary limit for workmen of S$4,500 therefore applies to their overtime rates. Overtime payment 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 also entitled to an extra day’s salary at the basic rate of pay. Alternatively, and provided that the employee is employed in a managerial, executive or professional position, he or she may be given a day off or part of a day off in lieu of an extra day’s salary. This option will, as of April 2019, be extended to all employees under the Employment Act who are not covered by Part IV.

### 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

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34 [2014] 2 SLR 1.
employee may be employed or work without a valid work pass. 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 types of work passes are valid only for the employer, type, place or time of employment expressly specified, and each work pass is issued with mandatory conditions the 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. This 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. A Work Permit typically lasts two years, and there are limitations on quotas and maximum employment periods, depending on the industry sectors, and the employee’s skill level and nationality. In comparison, there are no maximum employment periods with respect to S Pass holders, which usually apply to skilled workers such as technicians, though employers are bound by quota restrictions that are calculated by way of various prescribed ratios on a case-by-case basis. The minimum qualifying salary for a foreign employee to be issued an S Pass is being raised progressively from S$2,200 to S$2,300 as of 1 January 2019 onwards, and S$2,400 from 1 January 2020 onwards. At the next level, foreign PMEs earning at least S$3,600 a month with acceptable qualifications could apply for an Employment Pass. There is no foreign worker quota imposed on 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 also subject to renewal requirements.

Foreign workers are not, however, 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.

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 above clearly to their employees.35 The Tripartite Standards on Grievance Handling have also been published, along with a Grievance Handling Handbook

on requirements and guidelines in managing grievances within the workplace. While these particular Tripartite Guidelines are not legally binding \textit{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 the employees on the company's intranet or detailed in the company's HR policies or employee handbook, and are usually expressly incorporated into the employee's employment contracts.

\section{IX 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 the employees can understand, especially with respect to the 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.

\section{X EMPLOYEE REPRESENTATION}

The Trade Unions Act allows employees to form or join trade unions to regulate their relations with their employers through collective agreements. Following amendments to the Industrial Relations Act in 2015, PMEs 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 where there is a real or potential conflict of interest between the PMEs and the non-PMEs, or where management effectiveness may be undermined.

Once formed and registered with the Registrar of Trade Unions, the 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. These collective agreements 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. 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. Where the employer continually refuses, the MOM Commissioner for Labour may then 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.

\footnote{Available at https://www.tafep.sg/publication/grievance-handling-handbook (accessible as at 3 January 2019).}
as an interim step. MOUs are contracts where, 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 Industrial Arbitration Court (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: it has any other object than the furtherance of a trade dispute; if it is in furtherance of a trade dispute of which the IAC has cognisance; or if 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.

XI DATA PROTECTION

The Personal Data Protection Act 2012 (PDPA) governs personal data protection and applies to all organisations except for 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.

Requirements for registration and protection of personal data

The PDPA does not contain any express requirement for an organisation to register itself 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., the 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 themselves with the PDPC.

The PDPA generally requires that an individual’s consent be obtained before the 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 ‘evaluative 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 employees’ 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 related 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. Under the PDPA, 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.

Revisions to the PDPA that impose stricter breach reporting rules can be expected. Proposed revisions that may come into effect in 2019 include requiring organisations to notify individuals who have been affected by a data breach as soon as practicable. Organisations would have 30 days to determine the veracity of suspected breaches, following which they would have 72 hours to notify the PDPC of the breach. Additionally, the PDPC has approved a proposal for organisations to share blacklists to detect fraud and prevent abuse of data, provided that the organisation ensures that the consumer is not harmed in any way and the data is not abused.

**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.

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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, guidelines published by the PDPC (which will be applied by the PDPC in interpreting the PDPA from 1 September 2019) 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 Employment Act, which includes 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 evaluative or investigative purposes, as discussed above.

XII  DISCONTINUING EMPLOYMENT

i  Dismissal

Employees may generally be dismissed in one of three ways:

a  termination with notice (if the employee is covered by the Employment Act and his or her employment contract does not state the applicable notice period, the periods prescribed in the Employment Act will apply);

b  termination with payment in lieu of notice; and

c  summary termination without notice or payment in lieu.

The scenarios in points (a) and (b) are generally understood as termination without cause, while the scenario in point (c) is generally understood as termination for cause.

Sections 11(2) and 14(1) of the Employment Act, when applicable to the employee concerned, 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. As noted in Section VI.ii, the Employment Act presently does not cover PMEs earning above S$4,500 monthly, but it will from 1 April 2019 (when it will essentially cover all private-sector employees).

The Employment Act expressly requires that an employer conduct a ‘due inquiry’ process before dismissing the employee on second ground listed above, whether summarily or with notice or payment in lieu. A similar due inquiry process may also be required before summary termination on the first ground, and should be assumed to be the case as a matter of prudence. While the term ‘due inquiry’ is not defined under the Employment Act, TAFEP has advised that: a decision to dismiss an employee should be based on documented poor performance or misconduct; and an inquiry should be conducted to allow the employee to present his or her case before any decision is made dismissing the employee. The MOM’s website also provides general guidelines for holding an inquiry, which have been referred to by the High Court. Employers and employees can also expect the new Tripartite Guidelines on Wrongful Dismissal to provide important further guidance in this regard. These Guidelines are expected to be released prior to the Employment Act amendment date (1 April 2019) and bear close monitoring as they should answer some of the above questions.

A contract of employment can also 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 such agreements is subject to provisions of the Employment Act and general common law principles.

There are presently no statutory notification requirements for dismissing employees, unless there is a termination or retrenchment exercise (see subsection ii). There is also no absolute statutory prohibition against dismissals, save for a few situations including the following:

a. employers cannot dismiss female employees during the period of 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.

An employee covered by the Employment Act who feels that he or she has been dismissed without just cause or excuse, regardless of whether notice or payment in lieu of notice has been provided, may make representations within one month of dismissal to the Minister of Manpower through the MOM. If the MOM finds for the employee, the employer may be directed to reinstate the employee to his or her former employment, compensate the employee for lost wages, or both. After changes to the employment regime are implemented by April 2019, all employees may bring wrongful or unfair dismissal claims before the ECT (which

38 Available at https://www.tafep.sg/disciplinary-actions-dismissals-retrenchment.
presently only hears employment payment disputes). As previously mentioned, the Tripartite Guidelines on Wrongful Dismissal should soon provide greater clarity on what amounts to wrongful dismissal and what the appropriate level of compensation for the wrongful dismissal should be (which the ECT and the courts would be statutorily required to have regard to).

With the exception of employment assistance payments, which are payable under the Retirement and Re-Employment Act to employees of 62 years of age or older who are terminated and not re-employed, 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 in order to maintain morale, reputation, industry norms or consistency with group offices in other jurisdictions (and a number do, in particular multinationals). The Tripartite Guidelines on Managing Excess Manpower and Responsible Retrenchment, which are non-binding but may be considered by the ECT and the courts, suggest a scale of two weeks’ to one month’s pay per year of service, which is the customary norm.41

ii 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. This administrative retrenchment notification requirement will become a statutory requirement after amendments to the Employment Act are implemented in April 2019.

The Tripartite Guidelines on Managing Excess Manpower and Responsible Retrenchment 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. Those with less than two years’ service should at least be granted an ex gratia payment. Employers are also urged to help affected employees look for alternative jobs.

Apart from this set of Tripartite Guidelines, which are not presently statutorily binding, there are no other rules mandating the provision of retrenchment benefits. While Part IV of the Employment Act provides that an employee covered by that part 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.

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XIII 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 include all private-sector PMEs from 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). Where there are unionised employees 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, and more clarity over what exactly constitutes a transfer of an undertaking would be helpful in determining whether any employees automatically transfer or not, and if so, which ones. In this regard, while no statutory amendments to Section 18A are imminent, a set of guidelines or frequently answered questions are expected to be released, which should help to provide greater clarity.42

XIV OUTLOOK

The far-reaching amendments to the Employment Act and related statutes in 2019 represent a seismic shift to Singapore’s employment landscape. The degree to which Singapore will remain a de facto at-will employment jurisdiction with these new changes, and the new jurisdiction of the ECT to hear wrongful dismissal cases, should be closely monitored. Measures specifically directed at concerns over 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.

Since 2016, there has been a trend of according employees greater rights and protection, as well as access to justice, which is expected to continue into 2019. As the jurisdiction of the ECT expands to allow employees to make various types of wrongful dismissal and other employment-related claims at low cost, it now behoves employers to thoroughly familiarise themselves with the statutory rights afforded to employees. At the other end of the spectrum, further clarity on the law of restraint of trade, and the principles of enforcement for non-compete covenants (and the degree of availability of springboard injunctions) should be closely watched as well, especially if a suitable case goes before the Court of Appeal in this respect.

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42 Singapore Parliamentary Debates, Official Report (20 November 2018) Vol. 94 (Mrs Josephine Teo, Minister for Manpower). At the time of writing, there is no clear indication of when the guidelines or frequently asked questions will be released.
Chapter 41

SLOVENIA

Vesna Šafar and Martin Šafar

I INTRODUCTION

In Slovenia, employment relationships are regulated by the Employment Relationships Act (ERA). It entered into force in 2003 and fundamentally changed the regulation on employment relationships between employers with a registered office or residence in Slovenia and their employees. In 2013, a new ERA was passed with necessary changes that had been planned for years. The Act is aligned with European law and incorporates international conventions and the directives of the European Parliament and European Council. It also applies to the employment relationships of employees of state bodies, local communities and institutions, and other organisations, as well as private persons carrying out a public service, although individual rules may be regulated differently by special laws.

A significant autonomous source of law to which the ERA refers is collective agreements. These are regulated by the Collective Agreements Act (regulating the parties; content; procedure for concluding a collective agreement; its form, validity and termination; the amicable settlement of collective labour disputes; and the registration and publication of collective agreements). Collective agreements are usually concluded for a specific activity or occupation, but may also be concluded by individual employers. Certain rights are defined in the ERA, but their scope is determined by collective agreements, which are particularly important when determining the starting salaries in individual tariff classes, since trade unions and employers are engaged in constant dialogue on this issue.

A special court for labour and social disputes has jurisdiction over the resolution of labour disputes – both disputes concerning status and other matters. An appeal against the judgments of the court of first instance may be filed with the Higher Labour and Social Court. In certain cases stipulated by law, it is possible to file an extraordinary appeal against a settled labour dispute with the Supreme Court of Slovenia.

The implementation of the ERA, as well as regulations, collective agreements and general acts of the employer regulating employment relationships, is supervised by the Labour Inspectorate of Slovenia according to the regulations governing inspection supervision.

The government’s measures on the labour market are aimed at ensuring the implementation of services in the field of employment, active employment policy measures and the functioning of the unemployment insurance system, and are regulated by the Labour Market Regulation Act. The most important body tasked with applying the measures under this Act is the Employment Service of Slovenia, which reports to the Ministry of Labour regarding its performance and use of funds.

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II YEAR IN REVIEW

Along with economic growth, the rate of employment has increased in most areas of the private sector. However, the public sector, which employs a large number of people, is responsible for a huge financial burden that the private sector has to pay for, which influences the overall cost of work and makes Slovenia relatively unattractive to invest in.

The Class Action Act entered into force in April 2018, which introduces collective lawsuits and collective settlements for the first time. This Act makes it easier for employees to file compensation claims collectively, and the burden of caseload on certain courts will be more evenly spread and backlogs reduced more than they were in the previous few years.

III SIGNIFICANT CASES

In the past few years the number of cases regarding ordinary terminations of employment contracts for business reasons has significantly declined. The case law remains relatively unchanged; as a rule, courts are not competent to supervise the business and organisational decisions of an employer, and as regards the existence of substantiated business reasons the courts can only judge, based on the statements of parties, whether the reason is fictitious and constitutes a breach of the prohibition of discrimination within the meaning of Article 6 of the ERA.

In 2018, a court of second instance issued a judgment that differed from established case law, deciding that an employee was entitled to wages despite the fact that he was absent from work and did not inform the employer about the reasons for his absence. The Supreme Court will decide upon the question of whether an employer is obligated to pay wages in such a case. The decision is expected to be issued in 2019.

An important judgment was passed by the Supreme Court in September 2018 regarding special protection of employee representatives. The judgment states that employee representatives are not only protected against termination of the employment relationship but are also protected against termination with the offer of a new contract.

A significant decision of the Supreme Court was issued in December 2017, which states the following:

If there are other suitable options to guarantee the efficient operation of the employer (instead of the termination of employment contracts), which do not harm business, the employer cannot establish a justified business reason that prevents the continuation of work under the conditions set out in the employment contract. If the employer does terminate employment contracts due to business reasons (because there is a need to reduce the number of workers), and employs workers for a fixed term, or hires agency workers or students in the same workplace, it is not irrelevant. Therefore it is not irrelevant that the employer has hired agency workers, including the type and extent of the work they have been hired for. When the employer is deciding to reduce or streamline the business, the preservation of the employment relationship of workers is, in principle, a priority over providing work to agency workers who are not in an employment relationship with the employer.
IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The ERA provides that an employment relationship is entered into based on an employment contract, which must be made in writing. An employment contract is deemed to have been validly concluded when it is signed by both the employee and the employer. The employer must submit a written draft of the employment contract to the employee at least three days before the envisaged signing of the contract and a written employment contract upon its conclusion. Even though the ERA prescribes that an employment contract must be concluded in writing, the Act itself and the established case law indicate that a relationship between an employee and an employer that has all the elements of an employment relationship and is actually implemented as such is deemed to exist, even if the employment contract is not executed in writing. In such a case, the employee has the right to request that the employer submits an employment contract at any time during the term of the employment relationship and may exercise judicial protection. In the case of a dispute about the existence of an employment relationship, it is presumed by law that such a relationship exists if all the elements of the relationship exist. Under the ERA, an employment contract must contain the following elements:

a details of the contracting parties, including their residence or registered office;
b the date of commencement of the work;
c the title of the position or type of work, including a brief description of the work the employee must perform pursuant to the employment contract and for which there is the requirement of a corresponding level of education and other conditions for carrying out the work;
d the place where the work is to be carried out – if the exact place is not stated, it shall be presumed that the employee is to carry out the work at the employer's registered office;
e the duration of the employment contract, the reason for concluding a fixed-term employment contract and the manner of taking annual leave, if the latter is agreed on;
f a stipulation stating whether the employment contract is for part-time or full-time work;
g a stipulation of the daily or weekly working time;
h a stipulation of the amount of the basic salary in euros that the employee shall receive as remuneration for carrying out work in accordance with the employment contract and on any other remuneration;
i a stipulation of other components of the employee's salary, payment period, payment date and manner of payment of the salary;
j a stipulation of the annual leave or the manner of determining the annual leave;
k length of the notice periods; and
l collective agreements that are binding on the employer or the employer's general acts that specify the employee's working conditions.

In addition to other mandatory elements, an employment contract may stipulate other rights and obligations in cases laid down by the ERA. Regarding the issues referred to in points (g), (i), (j) and (k) above, the parties may refer to the applicable laws, collective agreements or the employer's general acts. If an employment contract does not contain all the elements listed above it does not make it invalid, but any provisions that have been included that are contrary to the law are void.
An employment contract is normally concluded for an indefinite period of time, but may also be concluded for a fixed term in the cases listed in the ERA. If a fixed-term employment contract is concluded contrary to the law or collective agreement, or if an employee continues to work after the employment contract has expired, it is deemed that the employee concluded an employment contract for an indefinite period of time. The Act also stipulates that the employer may not conclude several successive fixed-term employment contracts for the same work, the total continuous duration of which would exceed two years. The sanction for violating this provision is the transformation from a fixed-term employment contract into an employment contract for an indefinite period of time.

If both parties are willing, they can always agree to amend the employment contract or a specific provision thereof. An amendment to the employment contract or the conclusion of a new employment contract can be proposed by either the employee or the employer. An employment contract may be amended by an annex thereto. If the amendment concerns a change of job position, the place where the work is to be carried out, the duration of the employment contract or the weekly working hours, the employee and the employer must conclude a new employment contract. An amendment to the employment contract is not possible if either of the parties disagree with it.

The ERA contemplates an ‘economically dependent person’, meaning a self-employed person who does not employ employees and who – stemming from a civil relationship with the employer – performs work for the latter in person, in return for remuneration and for a longer period of time. He or she also has to get at least 80 per cent of his or her yearly income from the same client. These persons have the right to a limited protection under the provisions of the ERA.

ii Probationary periods

Under the ERA, the employee and the employer may agree on a probationary period in the employment contract, which may not last for more than six months and may be extended in the case of a temporary absence from work. During the probationary period, the employer monitors the employee’s performance and, upon its expiry, decides whether the employee has successfully passed the probationary period or not. If, at the end of the probationary period, the employer does not make a decision or determines that the employee has successfully passed the probationary period, the employee will continue working under the employment contract; however, if the employer establishes that the employee did not successfully pass, it may ordinarily terminate the employment contract (which means that the employee is issued an ordinary termination of the employment contract and the employment relationship terminates after seven days).

Under the ERA, the employer can terminate the employment contract during the probationary period if it determines that the employee’s work is not satisfactory.

During the probationary period, the employee may terminate the employment contract with a seven-day notice period without explanation.

iii Establishing a presence

The ERA only applies to employment relationships between employers with a registered office or residence in Slovenia and their employees, or between foreign employers (without a registered office or residence in Slovenia) and their employees if the employment contract was concluded in the territory of Slovenia. In the case of employees posted to Slovenia by a foreign employer on the basis of an employment contract pursuant to foreign law, the ERA
is applied in accordance with the provisions regulating the position of employees posted to work in Slovenia. This means that the posted employees perform work in Slovenia under the conditions laid down in the regulations on the work and employment of foreign citizens. A foreign employer is obligated to ensure that an employee posted to Slovenia enjoys the rights according to the regulations of Slovenia and under the provisions of the collective agreement for the respective branch of industry that regulates working time, breaks and rest periods, night work, minimum annual leave, salary, health and safety at work, the special protection of employees, and equal treatment, if these are more favourable for the employee.

The ERA allows for the possibility that employers may, through special persons (employers who carry out the activity of providing workers to another user), hire employees who actually perform work for them but are not employed by them. A foreign employer may actually provide services in Slovenia through its contractual partners as well, provided that it has concluded an appropriate contract with these partners for work and that it holds the relevant authorisations prescribed by Slovenian law. Under the Companies Act, a foreign employer may establish a branch in Slovenia, through which they perform their activity. Such a branch and its employees are subject to the same rules as Slovenian employers. If an employment relationship exists, the employer must keep accounts, and pay taxes and contributions from the employee's salary to the appropriate state sub-accounts (budgetary funds).

V RESTRICTIVE COVENANTS

Under the ERA, employees must refrain from all actions during the employment relationship that, in view of the nature of the work that they carry out for the employer, are detrimental or could potentially be detrimental to the employer's business interests in material or moral terms. Under the ERA, employees must also protect the business secrets of the employer and may not represent a source of competition to the employer during the employment relationship without the employer's written consent.

If the employer believes that the employee is gaining technical or business knowledge and business connections while carrying out work or in relation to work, it may include a special non-compete clause in the employment contract, prohibiting the employee from pursuing a competing activity for a period that may not be longer than two years after the termination of the employment contract. A non-compete clause is only valid if (1) it is stipulated in writing; (2) the employer provides monthly compensation to the employee for respecting the non-compete clause equalling at least one-third of the average monthly salary of the employee in the last three months before the termination of the employment contract; and (3) the employment contract is terminated owing to extraordinary termination by the employer either by way of mutual agreement between the parties, ordinary termination by the employee or termination with cause.

A non-compete clause has to prescribe reasonable limitation periods for the prohibited competition, may not exclude the possibility of appropriate employment for the employee and must not be contrary to the principle of the equality of reciprocal duties.

VI WAGES

In Slovenia, an employee's salary is composed of a basic salary (one of the mandatory elements of an employment contract), individual performance-related pay, bonuses and company performance-related pay, if so agreed in the employment contract or collective agreement. The
amount of salary is agreed by the parties upon signing the employment contract and during the employment. The amount of the basic salary is entered in the employment contract; benefits are usually specified in the respective branch collective agreement or the collective agreement at the level of the employer, whereas performance-related pay is determined on the basis of adopted criteria and conditions. The criteria and conditions may be specified in the general act of the employer or the collective agreement. The tariff section of the branch collective agreements includes the classification of job positions into tariff classes for which the minimum wage amounts are determined for a specific activity. The salaries determined in the employment contract may not be lower than the minimum wage prescribed in the collective agreement for the relevant tariff class. The minimum wage in Slovenia is prescribed by law. In 2018, the gross monthly minimum wage was €842.79. If the parties to the branch collective agreement agree to increase the minimum wage by tariff class, and this is the basis on which the wages are calculated, the employees’ salaries also increase.

i  Working time
The ERA defines working time as the effective working time and break time, as well as the time of justified absences from work, in accordance with the law and the collective agreement or a general act. Full-time work may not exceed 40 hours a week according to the ERA. The law or a collective agreement may stipulate a working time shorter than 40 hours a week, though full-time work may not be less than 36 hours a week.

The working hours of employees performing night work are limited. If the work is organised in shifts, the employer is obligated to ensure the periodical rotation of shifts. An employee in a certain shift may not work at night for more than one week. Within four months, the working time of a night worker may not exceed eight hours a day on average, while the working time of a night worker occupying a position that – according to the risk assessment – involves a higher risk of injury or damage to health, may not exceed eight hours a day. Night workers should be given longer annual leave, an appropriate meal during work and professional guidance in the working or production process. An employer may not assign an employee to night work if the employee does not have transport to and from work.

The employer does not have full discretion when assigning night work, as some employee categories cannot be assigned night work, or may only be assigned night work in exceptional cases stipulated by the law. Such employee categories include employees under the age of 18, employees during pregnancy and while breastfeeding, employees who are parents of a child under the age of seven or a child who is severely ill or severely physically or mentally disabled and live alone with the child, and older employees (aged 55 and over). The prohibition of night work does not apply to all cases and categories alike, as the ERA does permit night work for these employee categories, specifying the cases where night work is possible subject to the written consent of the employee.

ii  Overtime
The ERA stipulates that work exceeding full working hours – overtime work – is only permitted in special cases specified in the Act. These cases involve an exceptionally increased workload, provided the continuation of work and the production process is required in order to prevent material damage or a risk to the life and health of people, or provided this is necessary in order to ensure the safety of people and property and the safety of traffic, as well as in other exceptional, urgent and unforeseen cases provided for by the law or by the branch collective agreement. Overtime has to be ordered in advance in writing, but if this is not
possible, it may be ordered orally; however, in such a case, a written order must be handed to
the employee subsequently. Just as in the case of night work, there are categories of employees
that may not be ordered to do overtime work. These include employees under the age of 18,
employees over the age of 55, and employees during pregnancy, childcare and parenthood.

Overtime work may not exceed eight hours a week, 20 hours a month and 170 hours
a year. If an employee consents, overtime work may exceed this limitation, but must not
exceed 230 hours a year. Overtime work is considered work under special conditions and an
employee is entitled by law to special overtime pay. The amount of overtime pay is determined
in the branch collective agreement. Overtime pay is usually 130 per cent to 150 per cent of
an employee’s regular hourly rate of pay.

VII FOREIGN WORKERS

The Act redefines the employment of foreign nationals and introduces a single permit for
work and residence. A single permit enables people from third countries to enter, reside and
work in Slovenia. A single permit for residence and work is issued by the Administrative Unit
offices, with the consent of the Employment Service of Slovenia. The first single permit can
be issued for a maximum of one year, but can be extended.

Some categories of foreign nationals such as priests, foreign media reporters, business
visitors and professional athletes do not require the single permit for residence and work,
and can be employed, self-employed or perform work if their residence is in accordance with
regulations governing the residence of foreign nationals.

Citizens of Member States of the European Union, as well as citizens of Norway,
Liechtenstein, Iceland and the Swiss Confederation have the right to free access to the labour
market. This means that they can be employed, self-employed or perform work without the
consent of the Employment Service of Slovenia.

Foreign nationals residing in Slovenia on the basis of a permit for temporary residence
for family reunification with a Slovene citizen also have the right to free access to the Slovenian
labour market.

Upon the conclusion of an employment relationship with a foreign worker (which
must be in accordance with the law governing labour relationships and potential collective
agreements binding to the employer), an employer is obligated to register a foreign national
in social insurance schemes. Foreign nationals who are employed in Slovenia have equal
rights and obligations, arising from the work relationship, to those of Slovenian citizens.
If a foreign national is employed on the basis of a single permit, he or she has all the rights
and obligations in accordance with national law related to wages, working time, breaks, rest
periods and safety at work, among others.

Taking into account the situation and anticipated trends of the labour market, the
government may, in accordance with its migration policy and by decree, annually determine
the quota of work permits through which it restricts the number of foreign nationals on the
labour market.

VIII GLOBAL POLICIES

The ERA only defines the employee’s obligations in general terms. An employee must:

a carry out work with due diligence;
take consideration of the work and business organisation and comply with the
requirements and instructions of the employer in the fulfilment of contractual and
other obligations arising from the employment relationship;
respect and implement the regulations on health and safety at work;
inform the employer of any relevant circumstances that affect or might affect the
fulfilment of their obligations;
refrain from all actions that – in view of the nature of the work carried out by the
employee for the employer – are detrimental to the interests of the employer in material
or moral terms; and
protect business secrets.

The employee must not become a source of competition to his or her employer. As the
ERA only defines an employee’s obligations in general terms, an employer must, in practice,
prescribe the procedures and methods of work and expected conduct of employees – by way of
instructions, general acts, ethical codes, etc. – allowing it to determine whether an employee
has breached his or her obligations in each specific case. The ERA expressly stipulates that
employees must be informed of the provisions with which they should be familiar to fulfil
their contractual and other obligations, which indicates that an employer that is unable to
apply the general provisions on obligations must specify the employees’ obligations by way of
instructions, general acts and other regulations.

Before adopting general acts that specify the obligations with which employees should
be familiar to fulfil contractual and other obligations, the employer must submit them to
any relevant trade unions, or if no trade unions exist, the employer must submit them to the
workers’ council or the workers’ representative, which may provide an opinion thereon. The
employer must then discuss this opinion and present its position about it. If no trade union
or workers’ council is organised at the workplace and no workers’ representative has been
elected, the employer must directly inform all the employees about the general acts. In the
case of issues that are regulated in collective agreements according to the ERA, the workers’
council or the worker representative enjoys the same rights in such a procedure as a trade
union. The general acts should be notified to all employees at the workplace in an obvious
way (usually by being presented in the human resources department or the legal department).
If all employees have the option of using a computer, the general acts can be posted on the
employer’s intranet. The ERA does not stipulate that employees should agree with the general
acts, but they must be informed of their content by publication in an established way.

The ERA specifically refers to the prohibition of sexual and other harassment in the
workplace, as well as discrimination and retaliation. Even though the Act defines the notion
of discrimination in the workplace and the content of sexual and other harassment and
mobbing in the workplace in great detail, it also explicitly obligates the employer to provide
a working environment where none of the employees are subjected to sexual and other
harassment or bullying from the employer, a superior or co-workers, and that the employer
must, to this end, take appropriate steps to protect employees.

IX TRANSLATION

Under the Public Use of the Slovenian Language Act, the official language in Slovenia is
Slovenian. Employers (legal or natural persons) performing their activity in the territory
of Slovenia must do business with customers in Slovenian. However, when their business
involves foreign customers, they may use a foreign language in addition to Slovenian. All the
general acts of all the employers performing registered activity in the territory of Slovenia
must be in Slovenian. Internal operations must also be conducted in Slovenian when they
refer to the regulation of the rights and duties arising from an employment relationship,
the issuing of instructions, the provision of information to employees and to occupational
safety. A foreign language may be used alongside Slovenian if an employment relationship is
concluded with a foreign citizen who performs seasonal work. Employers cannot request job
applicants to submit applications only in a foreign language.

As the rights and duties arising from the employment relationship are elements of the
employment contract, the contract must also be drawn up in Slovenian. In practice, foreign
employers use a foreign language in addition to Slovenian. The validity of an employment
contract or general act of an employer does not depend on whether the contract or general
act is only compiled in a foreign language, since the relevant text can be officially translated
in any case, but such an omission does constitute an offence, for which a fine is imposed.

If the contracts and general acts of the employer are drawn up in Slovenian and a
foreign language, the Slovenian version applies in the case of a dispute.

X EMPLOYEE REPRESENTATION

Employees of companies, public utility companies, banks and insurance companies, regardless
of the form of ownership, can organise a workers’ council or elect a workers’ representative and
thus take part in the management of the company. A special Act regulates the establishment,
composition, term of office and the election of a workers’ council, the method and election
of its members, the termination of membership in a workers’ council, the protection of the
right to vote, employee participation in the bodies of the company, employee participation
in the management of the company and the resolution of mutual disputes. It is crucial for
the workers’ council or the workers’ representatives to be elected so that the employees can
execute their right to participate in the management according to law. If representatives are
not elected, these rights can only be executed individually.

Employees of a company are entitled to elect a workers’ council if the company
employs more than 20 employees who have the active right to vote (the active right to vote
is enjoyed by all employees who have been employed by the company for six continuous
months; managers, procurators and family members of management staff do not have the
active right to vote). If a company has fewer than 20 employees with the active right to vote,
the employees participate in management through a representative. In larger companies, the
size of the workers’ council would be as follows:

a up to 50 employees – three members;
b between 50 and 100 employees – five members;
c between 100 and 200 employees – seven members;
d between 200 and 400 employees – nine members;
e between 400 and 600 employees – 11 members;
f between 600 and 1,000 employees – 13 members; and

g in a company with more than 1,000 employees, the number of workers’ council
members increases by two per 1,000 employees.

The term of office of the workers’ council members is four years with the possibility of
re-election. If a company already has a workers’ council, a resolution is adopted to schedule
an election for the workers’ council. If not, this resolution is adopted by a council of all employees, which may be convened on the initiative of three employees or of the representative trade unions in the company. Depending on the size of the company, the function of a workers’ council member may be professionalised, in which case the cost of the salary of those members is borne by the employer. The establishment of a workers’ council or the election of workers’ representatives is a legally defined right of employees that an employer cannot deny.

Employee participation in company management is exercised by directly informing employees, by allowing them to make proposals and give opinions or by informing them through a workers’ representative or a workers’ council. In the latter case, the workers’ representative or council will then make proposals and give opinions, require joint consultation with the employer, make joint decisions on specific issues and even require a stay on specific decisions made by the employer until a final decision is adopted by the competent body. A workers’ council must be informed about issues pertaining to the economic position of the company, the development targets of the company, the state of production and sales, the economic position of the branch as a whole, changes of activity, changes in the organisation of production, technological changes, and the annual accounts and annual report. Before adopting decisions regarding status, human resources and decisions related to health and safety at work, the employer is obligated to hold a joint consultation with the workers’ council and strive to seek agreement with the council. The employer is obligated to obtain the consent of the workers’ council for decisions about the bases for determining the following:

\begin{itemize}
  \item [a] the use of annual leave and other instances of absence from work;
  \item [b] the criteria for the assessment of work performance;
  \item [c] the criteria for remuneration for innovative activity in the company;
  \item [d] the employee promotion criteria;
  \item [e] in cases where its status changes, the disposal of the company or its significant part; and
  \item [f] changes in the company’s activity, organisational changes, technological changes or a decline in economic activity that results in an increase or decrease of employee numbers.
\end{itemize}

If the workers’ council does not give consent, it has no effect on the regularity and legality of the decision of the employer. If, however, the employer adopts a decision without informing the workers’ council about the issues referring to the changes of the company’s activity, organisational changes, technological changes or a decline in economic activity, or if it adopts a decision regarding these issues without conducting the prescribed procedure, the workers’ council may adopt a resolution to stay the execution of the employer’s decision and at the same time initiate a procedure for the resolution of a mutual dispute. This action may also be taken by the workers’ council if the employer does not comply with the legal deadlines set for the individual stages of the joint consultation procedure or if it fails to request a joint consultation on status and human resources issues. In both cases, the employer may not implement its decision until a final decision is adopted by a competent body (i.e., arbitration composed of an equal number of members appointed by the workers’ council and the employer, and a neutral chair whose appointment is agreed on by both parties). The employer may have a permanent arbitration body in place; if not, the minister in charge of labour compiles a list of arbitrators based on the proposals of the representative trade unions and associations of employers.

The rights of the workers’ council and the exercise thereof are specified in more detail in a written agreement between the workers’ council and the employer. By way of such an agreement, participation rights may be extended beyond the scope provided for by the law.
The workers’ council meets during working hours, if the work process allows it. If a meeting is held outside working hours because the needs of the work process so dictate, that time is considered work time for the members of the workers’ council. The employer is obligated to ensure that members of the workers’ council are entitled to five paid hours a month for participation in council meetings. Moreover, the employer must cover the expenses arising from the work performed within the scope of the workers’ council – as a minimum, the costs of the premises needed for meetings, the reception of customers and the remuneration of professional members, the costs of material assets used and the costs of administrative staff.

Employee participation in the management of the company is implemented in a two-tier system through workers’ representatives on the company’s supervisory board or supervisory committee, and possibly through a representative of the employees who sits on the management board of a company (worker director). In a single-tier management system, employees participate in management through representatives sitting on the board of directors or a committee of the board of directors, and possibly through a representative among the executive directors of the company. The number of workers’ representatives on the supervisory board is determined in the company’s articles of association and must be a minimum of one-third and a maximum of half of the seats on the supervisory board. The number of workers’ representatives on the management board is also specified in the company’s articles of association and must not be fewer than one. A company with a two-tier management system employing more than 500 employees has a worker director who is nominated to the management board by the workers’ council, while in a company with a single-tier management system with more than 500 employees, the workers’ council nominates a workers’ representative sitting on the board of directors to the position of executive director.

If a trade union is established within an organisation, the employer is obligated to provide conditions for the expedient and efficient performance of trade union activities, as well as access to the data necessary for such activities. The trade union must inform the employer about the election of a trade union chairperson and trade union representatives or shop stewards. The trade union and the employer determine in the collective agreement or special agreement how many and which trade union representatives or shop stewards will enjoy special protection.

Representatives of employees – namely, members of the workers’ council, workers’ representatives, members of the supervisory board representing employees, and appointed or elected trade union representatives or shop stewards – constitute a special protected category of employees and their employment contracts may not be terminated by the employer during their term of office and for one year after the contract expires. The employment contract of an appointed or elected trade union representative or shop steward whose actions are in keeping with the law, the collective agreement and the employment contract, may not be terminated without the consent of the body he or she is a member of or without the consent of the trade union, except in the case of termination for business reasons when the trade union representative or shop steward rejects an appropriate employment position that has been offered or in the case of termination due to the employer’s winding-up procedure.
XI DATA PROTECTION

i Requirements for registration

Within the Slovenian legal system, personal data protection is still regulated by the Personal Data Protection Act, passed in 2004. The ERA and the Labour and Social Security Registers Act apply to the personal data of employees along with the Personal Data Protection Act. Because it is deemed that employment relationships entail a marked inequality of power among the parties, the legislation in this area disallows the complete autonomy of parties; the collection and processing of an employee's personal data, with his or her consent, is only permissible exceptionally. An employer or employee who is specifically authorised by the employer for this purpose may only collect, process, use and provide to third parties the personal data of an employee or job applicant if this is provided by the law, and is necessary to exercise the rights and obligations arising from the employment relationship. Once the legal basis no longer exists, the employer must immediately stop using and delete the employee's personal data. Article 13 of the Labour and Social Security Registers Act stipulates the contents of the records of employees, while other data may only be collected if it is necessary in order to exercise the rights and obligations arising from or related to the employment relationship. The personal data of employees may only be accessed by persons specifically authorised by the employer, while the latter is obligated to provide adequate technical protection of collected personal data under the provisions of the Personal Data Protection Act.

The employer must inform the Information Commissioner of Slovenia about the existence of all records of personal data they are processing. Employers (administrators) with fewer than 50 employees are not obligated to provide entry in the personal data collection register, though this exception does not apply to certain activities and professions.

ii Cross-border data transfer

If an employer wishes to transfer legally obtained personal data to an EU Member State or to a country that can ensure an adequate level of protection for personal data, it does not need authorisation to do so. However, before transferring data to a third country, it must obtain a decision from a national supervisory body stating that the country in question ensures an adequate level of protection of personal data, except in cases specified in Article 70 of the Personal Data Protection Act.

iii Sensitive data

The Employment Relationship Act stipulates that, when concluding an employment contract, the employer may not demand that the applicant provides information on family or marital status, pregnancy, family planning or other information, unless it is directly related to the employment relationship.

An employer may only process sensitive data if it is necessary as part of the obligations and special rights bestowed on it by the law, which also specifies appropriate safeguards for individuals' rights. Pursuant to Article 14 of the Personal Data Protection Act, this data must be specially marked and protected by the employer to prevent unauthorised persons from accessing it.

2 Amendments to this Act incorporating the provisions of the EU General Data Protection Regulation are expected, but the date of implementation has not been established.
iv Background checks

The assessment of whether the personal data on job applicants and employees is verified should be made case by case, taking into account the principle of proportionality. Depending on the employment conditions, an employer may in some cases justly require an employee to submit a certificate of no conviction, a certificate of medical suitability or similar. If an employee does not comply with this requirement, it could amount to a violation of the obligations arising from the employment relationship, which could result in a written warning or ordinary termination of the employment contract (see Section XII.i). If this and similar data is not necessary to exercise the rights and obligations arising from an employment relationship, an employer may not request it from an employee. In no case may an employer require an employee to provide information on his or her family or marital status, pregnancy, family planning or other information unless it is directly related to the employment relationship.

XII DISCONTINUING EMPLOYMENT

i Dismissal

The methods of terminating an employment contract in Slovenia are explicitly defined in the ERA and are as follows:

a upon the expiration of the period for which the employment contract was concluded;
b upon the death of the employee or employer, where the latter is a natural person;
c by agreement;
d by ordinary or extraordinary termination;
e by a court judgment;
f by law in the cases stipulated by this Act; or

g in any other case stipulated by the law.

The employment contract must be terminated in writing, regardless of whether it is terminated by the employee or the employer. If an employment contract is terminated by the employee, the latter need not provide an explanation. However, if it is terminated by the employer, the cause of termination must be explained in all cases and the employee must be cautioned about legal protection and his or her rights arising from unemployment insurance. An employment contract may only be terminated entirely. The employer must serve the termination notice on the employee in person. On the day notice is served, the notice periods and the period for claiming judicial protection commence. As a rule, the termination notice is served by the employer at its premises to the employee in person or at the employee's address (indicated in the employment contract) by a registered letter in a special ZPP envelope,3 or by publication on the bulletin board.

An employer may ordinarily and extraordinarily terminate an employment contract with cause, or it may ordinarily terminate it owing to an occupational disability, for business reasons or owing to the employee's incapacity to perform work owing to disability under the terms and conditions laid down in the employment contract, in accordance with the regulations governing pension and disability insurance, and the regulations governing the vocational

3 This type of envelope can only be bought in Slovenia. It contains a special warning stating that if the envelope is delivered to the post office and the recipient does not pick it up, presumption of delivery applies after 15 days.
rehabilitation and employment of disabled persons. Ordinary termination with cause and extraordinary termination of the employment contract by the employer must be based on a substantiated reason. The ordinary termination of an employment contract owing to an occupational disability does not constitute fault on the part of the employee, but nevertheless the employer must provide a substantiated reason for termination in this case as well. The voluntary payment of severance does not give an employer the right to terminate an employee’s employment contract without reason. In practice, however, if the offered severance pay is accepted by the employee, the employment contract is considered terminated by agreement.

Prior to ordinary termination of an employment contract with cause, the employer is obligated, within 60 days of becoming aware of the violation and within six months of the occurrence of the violation, to remind the worker in writing of the question of the fulfilment of obligations and the possibility of cancellation of his or her employment contract if the worker repeats the violation of the contractual and other obligations deriving from the employment relationship within one year (unless otherwise stipulated by a branch collective agreement but for no longer than two years) of the receipt of the written warning.

In the case of ordinary termination of an employment contract with cause, and extraordinary termination and ordinary termination owing to an occupational disability, an employer is obligated to first inform the employee in writing about the reasons for termination, provide an explanation and allow the employee to defend himself or herself within a reasonable period (a minimum of three days).

If so required by the employee, the employer must inform the trade union of which the employee is a member in writing about the intended ordinary or extraordinary termination of the employment contract upon the initiation of the termination procedure. If no trade union exists within the employer’s organisation, the role of the workers’ council or the workers’ representative is identical to the role of a trade union. The trade union, workers’ council or workers’ representative may give its opinion within six days; it may deliver a negative opinion if it considers that there are no substantiated reasons or that the procedure was not implemented in accordance with the ERA. It must explain its opinion in writing. Irrespective of an unfavourable opinion of the trade union, workers’ council or workers’ representative, the employer may cancel the employment contract with the worker. The role of the trade union differs in case of termination of the employment contract of a workers’ representative, as they are protected by the ERA from having their employment contract terminated by the employer. In such a case the trade union may oppose the ordinary termination owing to an occupational disability or cause, or the extraordinary termination of the employment contract, as a result of which the employee may request a stay of termination of the employment contract. If this occurs, the termination of the employment contract will not be effective until the expiration of the term for arbitration or judicial protection. If the employee proposes a temporary injunction to stay the termination of the employment contract in a lawsuit contesting the termination, the stay may be prolonged until the court hands down a decision about the proposal for the issue of a temporary injunction (the deadlines in which a court must render a decision in such a case are extremely short, as is the appeal procedure).

If the employment contract is terminated with cause, an employee is not entitled to severance pay. However, in the case of an ordinary termination of the employment contract with cause or owing to an occupational disability, an employee is entitled to a notice period, which is 15 days for the latter, while the length of the notice period for the former is stipulated in the ERA and differs depending on the length of service with the employer:

- 15 days for up to one year of service with the employer;
b 30 days for a period exceeding one year of service with the employer;
c after a two-year period of employment with the employer, the 30-day notice period shall increase for each year of employment with the employer by two days, but shall not exceed 60 days; and
d after a period of 25 years of service with the employer, the period of notice shall be 80 days unless a different notice period is specified by a branch collective agreement, but in no circumstances can it be less than 60 days.

The above also applies in case of ordinary termination of the employment contract for business reasons. Instead of enforcing part of or the entire notice period, the worker and employer may agree in writing on adequate compensation. The extraordinary termination of an employment contract – regardless of whether it is terminated by the employer or the employee – is without notice.

In the case of an ordinary termination with cause and the extraordinary termination of the employment contract, the employer has no financial obligations towards the employee and after termination the employee has no preferential right to re-employment with the employer. This is not the case in the ordinary termination of an employment contract owing to an occupational disability. As this termination does not constitute a termination with cause, the employer is obligated to pay severance to the employee, which is calculated based on the average monthly salary of the employee in the three months preceding the termination and the number of years in service with the employer. The severance pay may not exceed 10 times the average monthly salary of the employee, unless provided otherwise in the branch collective agreement.

If an employment contract is terminated extraordinarily by the employee (which is only possible in the cases listed in the ERA), the employee must inform the employer and the labour inspector about the employer’s breach of obligations in writing prior to termination. An employee is entitled to request salary compensation from the employer for the period of notice and severance pay as though the employment contract was terminated by the employer.

The ERA protects some categories of employee from having their employment contracts terminated by the employer. These categories include workers’ representatives, pregnant employees and recent mothers for up to one year after birth if they breastfeed the child, and parents on parental leave with full absence from work and for one month afterwards. The employment contract of employees during pregnancy and while breastfeeding, and employees on parental leave with full absence from work may be terminated if the employer obtains the consent of the Labour Inspector, provided that the employment contract termination is extraordinary or owing to the initiation of a winding-up procedure of the employer.

ii Redundancies
An employer may only terminate the employment contract if there is a substantiated reason preventing further work under the terms and conditions of the employment contract. An employer may terminate an employment contract for business reasons when the need for specific work under the terms and conditions of the employment contract has ceased for economic, organisational, technological, structural and similar reasons.

The deadlines and procedures that the employer has to comply with in the case of termination for business reasons depend on the total number of employees and the number of redundancies. If an employer that employs more than 20 and fewer than 100 employees is making at least 10 employees redundant, if an employer that employs at least 100 and fewer
than 300 employees is making at least 10 per cent of employees redundant and if an employer that employs 300 or more employees is making at least 30 employees redundant, it is obligated to terminate the employment contracts by (1) following a special procedure, (2) preparing a dismissal programme for the redundant employees, and (3) notifying the trade union and the Employment Service of Slovenia about the reasons for the redundancies, and the number and projected categories of employees to be made redundant.

The trade union plays an important role in the preparation of the dismissal programme for redundant employees, as the employer must first consult with the trade union about all the material circumstances of termination and agree with it on the proposed criteria for determining the redundant employees, possible ways of avoiding and limiting the number of terminations, and the possible measures to prevent and mitigate harmful consequences.

The employer cannot terminate the employment contract of workers’ representatives and employees who are soon to be retired (those aged 58 or over and those who will meet the requirements for retirement after five years of pensionable service) for business reasons unless it submits new and appropriate employment contracts to them to sign, or if they are receiving the unemployment benefit from the Employment Service of Slovenia until they are able to fulfil the minimum conditions for the old-age pension. The employer also cannot terminate the employment contract of an employee for business reasons during pregnancy and breastfeeding up to the child’s first year, or the employment contracts of employees on parental leave and the disabled. In case of the ordinary termination of an employment contract for business reasons and owing to an occupational disability, the employer can consider the possibility of offering the employee another appropriate work position (i.e., work that requires the same level and type of education as the work performed in the redundant position, to be performed in the working hours agreed in the previous employment contract and at a location that is not more than three hours’ travel in both directions by public transport from the employee’s residence).

If the employer wishes to ordinarily terminate the employment contract of a disabled employee owing to business reasons or disability (the difference is that in the former case, the employer no longer needs the work performed by the employee under the employment contract, while in the latter case the employer has no work that could be performed by an employee who has work-related disabilities recognised by a special decision), the Act prescribes that before termination, the employer must obtain an opinion from a special committee composed of the representatives of the institutions administering disability insurance (i.e., the Pension and Disability Insurance Institute of Slovenia, the Employment Service of Slovenia and the Labour Inspectorate of Slovenia, as well as representatives of the employers and trade unions).

If an employee’s employment contract is terminated for business reasons or disability, he or she is entitled to special severance pay (the conditions and amount are the same as for termination for an occupational disability) and his or her employment relationship ceases when the notice period expires, which is the same as in the case of termination owing to an occupational disability.

Bankruptcy, court liquidation, compulsory settlement and other forms of company winding-up also constitute reasons for the termination of employment contracts. In this case, the notice period is shorter (15 to 30 days) and the employees whose employment contracts are terminated are entitled to severance pay, which is equal to that for an employment contract termination for business reasons or owing to an occupational disability.
XIII TRANSFER OF BUSINESS

The ERA stipulates that if an employer changes as a result of the legal transfer of a company or a part of it, a merger or a division, that change does not constitute a change of employment relationship and employees retain all the rights and obligations arising from the employment relationship with the original employer. The Act specifically lays down that the new employer must provide the employees with the rights and obligations from the collective agreement that was binding on the original employer for a minimum of one additional year, unless the collective agreement expires before that period, has lapsed or a new one is concluded during that period.

According to case law, the new employer does not have to conclude new employment contracts with employees in the above cases, although the Act provides the employees with the option of declining employment with the new employer. In such a case, the employment relationship is terminated by the original employer as an extraordinary termination. Employees whose employer changes and whose rights under the employment contract deteriorate for objective reasons, may terminate their employment contracts but are granted the same rights as though the employment contract was terminated by the employer for business reasons.

According to the ERA, a change of employer does not constitute legitimate grounds for the termination of an employment contract for business reasons.

XIV OUTLOOK

Businesses in Slovenia are still waiting for amendments to be made to the Personal Data Protection Act that will incorporate the provisions of the EU General Data Protection Regulation. However, we believe the impact will be much smaller than expected as most of the measures are already in place.

It is expected that economic growth will slow down considerably over the next two years. Employers should therefore prepare for the next recession. Some companies in Slovenia are already facing a decline in business and consequently redundancies are expected.
Chapter 42

SOUTH AFRICA

Stuart Harrison, Brian Patterson and Zahida Ebrahim

I  INTRODUCTION

South Africa’s Constitution 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, \textit{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, \textit{inter alia}, the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA), industry bargaining councils, the Labour Court and the Labour Appeal Court (LAC), which is, in principle at least, the final court of appeal for labour matters. However, where the dispute involves a constitutional issue, or the Constitutional Court is of the view that a matter raises an arguable point of law of general public importance which ought to be considered by that court, it is still possible to take the matter to the Constitutional Court. 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

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1 Stuart Harrison, Brian Patterson and Zahida Ebrahim are directors at ENSafrica. Susan Stelzner was also a director of ENSafrica. She sadly passed away on 5 January 2011 but this chapter continues to reflect her invaluable contribution and it remains dedicated to her memory.

industry concerned. In addition, the Minister of Labour (the Minister) may make sectoral determinations setting basic conditions for a specific sector and area, a number of which have already been made. National minimum wage legislation setting minimum wages is in effect as of 1 January 2019.

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 get 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 fulfill 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

The past year saw the Constitutional Court decriminalise the private use of cannabis, which in turn has employers asking many questions about testing employees at work for being under the influence of the drug. This new development will need careful navigation from employers and employees alike.

In November 2018, President Cyril Ramaphosa signed into law four new bills, namely, the National Minimum Wage Bill, the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill and the Labour Laws Amendment Bill.

The National Minimum Wage Act introduces a new national minimum hourly wage that trumps sectoral determinations and restricts employers' ability to unilaterally change terms and conditions of employment or working hours. It also introduces a minimum daily wage and an exemption procedure for employers that are unable to comply with the national minimum wage, and provides for increases to the minimum wage.

The Labour Relations Amendment Act introduces measures aimed at trying to curb protracted or violent strikes, for example via advisory arbitration panels that can be appointed.
to facilitate the resolution of unresolved disputes, the prohibition of pickets without picketing rules in place (CCMA commissioners will have the power to establish rules where the parties are unable to agree) and provisions for mandatory secret ballots of members by trade unions before embarking on strikes.

The Basic Conditions of Employment Amendment Act introduces new forms of leave for employees namely, parental leave of 10 days, adoption leave of 10 weeks and commissioning leave (where a surrogate mother is involved) of 10 weeks.

During 2017, the CCMA ruled that certain Uber drivers were employees of Uber’s South African subsidiary (Uber SA) and that once a driver was ‘deactivated’, it was essentially an unfair dismissal. However, in 2018 the Labour Court set aside the CCMA ruling and held that, in the absence of any contractual arrangements between Uber SA and the Uber drivers, the Uber drivers were not employees of Uber SA and, therefore, had no right to refer an unfair dismissal dispute to the CCMA against Uber SA. The drivers had contracts with Uber BV, a Dutch-registered Uber company, but Uber BV had not been sued by the drivers and whether the Uber drivers were employees of Uber BV or whether they were independent contractors of Uber BV is a matter that remains undetermined.

The most significant changes affecting foreign nationals are the lifting of the blanket ban on asylum seekers applying for a change of status or permanent residence in South Africa and the proposed relaxation of travel rules applicable to minors travelling to South Africa.

III SIGNIFICANT CASES

i The cannabis judgment

In Minister of Justice and Constitutional Development and Others v. Prince, National Director of Public Prosecutions and Others v. Rubin and National Director of Public Prosecutions and Others v. Acton and Others, the Constitutional Court considered whether it should confirm the decision of the High Court that declared various provisions of the Drugs and Drug Trafficking Act 1992 and of the Medicines and Related Substances Control Act 1965 unconstitutional, in so far as they prohibit the use of cannabis by an adult in a private dwelling and where the possession, purchase or cultivation of cannabis is for personal consumption by an adult. The Constitutional Court had to determine whether the various impugned statutory provisions infringed the constitutional right to privacy and, if so, whether this limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The Constitutional Court accepted that most of the impugned provisions infringed the right to privacy and that this limitation of the right to privacy could not be justified to the extent that it is inconsistent with the right to privacy provided for in Section 14 of the Constitution. It emphasised the importance of the ‘individual’s intimate personal sphere of life’ and that no justifiable limitation thereof can take place. The Constitutional Court therefore issued a declaration that the impugned provisions were invalid to the extent that they made the use of cannabis in private by an adult person for his or her own consumption a criminal offence; and to the extent that they prohibited the cultivation of cannabis by an adult for his or her own consumption in private. This order was suspended for a period of

24 months in order to enable Parliament to rectify these constitutional defects. However, it also granted interim relief pending Parliament’s amendments to the impugned statutory provisions. The Constitutional Court summarised the interim relief granted as follows:

a. an adult person may use or be in possession of cannabis in private for his or her personal consumption in private;

b. the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons is not permitted;

c. the use or possession of cannabis in private other than by an adult for his or her personal consumption is not permitted; and

d. the cultivation of cannabis by an adult in a private place for his or her personal consumption in private is no longer a criminal offence.

Importantly, the Constitutional Court removed the High Court’s limitation that the use, possession or cultivation of cannabis is restricted to a person’s ‘home’ or ‘private dwelling’. The Constitutional Court preferred the use of the words ‘in private’ for purposes of use and possession of cannabis, and ruled that cannabis can be cultivated in a ‘private place’ for personal consumption.

ii  Assign Services (Pty) Ltd v. National Union of Metalworkers of South Africa and others

In this case, the Constitutional Court dealt with the question of whether a client who is deemed to be the employer of an assignee in terms of Section 189A becomes the sole employer of the assignee or whether the temporary employment service (TES) also remains an employer of the assignee. The Constitutional Court has now provided certainty in a majority decision of nine judges who came to the conclusion that, after the deeming provision takes effect, there is only one employer, the client. In 2015, Assign Services, a TES, placed 22 workers with Krost Shelving and Racking (Pty) Limited, many of whom were members of the National Union of Metalworkers of South Africa (NUMSA). The workers rendered services to Krost for more than three months and were ultimately working on a full-time basis. Assign Services’ view was that Section 198A(3)(b) created a dual employer relationship, while NUMSA argued that the Section created a sole employer relationship. The CCMA supported NUMSA’s sole employer interpretation of the section.

On review, the Labour Court held that a proper reading of the section could not support the sole employer interpretation – instead, it held that Section 198A(3)(b) created a dual employment relationship, in which both the TES and the client have rights and obligations in respect of the workers. On appeal by NUMSA, the LAC agreed that the sole employer interpretation best protected the rights of placed workers and promoted the purpose of the LRA. The Constitutional Court ultimately held that the purpose of Section 198A must be contextualised within the right to fair labour practices as set out in Section 23 of the Constitution as well as the purpose of the LRA as a whole. The majority found that, on an interpretation of Sections 198(2) and 198A(3)(b), for the first three months the TES is regarded as the employer and once the three months have lapsed the client becomes the sole employer. The majority found that the language used by the legislature in Section 198A(3)(b)
is plain and that when the language is interpreted in the context, it supports the sole employer interpretation. Consequently, the Constitutional Court granted leave to appeal but dismissed the appeal with costs.

**iii Rustenburg Platinum Mine v. SAEWA obo Meyer Bester and Others**

In this case, the Constitutional Court dealt with the question of whether an employee referring to a colleague as a ‘swart man’ (black man), in the circumstances, constituted misconduct justifying dismissal. The employee in this matter was employed by the Rustenburg Platinum Mine. He had been allocated a specified parking bay at his place of work. In April 2013, the manager in charge of allocating parking bays, allocated the adjacent parking bay to an employee of a subcontractor at the mine. Though parking in a limited space was possible, it was difficult to reverse into it and the employee became concerned that the vehicles may be damaged in the process. He decided to take the matter up with the manager in an effort to arrange for the other vehicle to be parked elsewhere. The employee made repeated efforts to raise the issue without any success. On 24 April 2013, an incident occurred that led to the employee’s dismissal as a result of alleged racist comments made by him. The employee challenged his dismissal in the CCMA. At the CCMA arbitration, the version proffered by the mine’s witnesses was that the employee stormed into a meeting with other employees convened by the manager and said, in a loud and aggressive manner, that the manager must ‘verwyder daardie swart man se voertuig’ (‘remove that black man’s vehicle’) and that if he did not do so, he would take the matter up with management. The CCMA accepted that employee had used the term ‘swart man’ but came to the conclusion that the term had been used in a descriptive sense rather than a derogatory sense. On review, the Labour Court set aside the CCMA’s finding. It accepted the version of events described by the employer’s witnesses and held that the remark had racist connotations. The LAC, in turn, disagreed with the Labour Court’s approach and accepted that the dismissal on this ground had been unfair. This decision was then taken on appeal to the Constitutional Court.

The Constitutional Court found that:

- in interpreting ‘swart man’, the reality of South Africa’s past of institutionally entrenched racism cannot be ignored. Therefore, the starting point for interpreting the use of ‘swart man’ cannot be presumed to be from a neutral context; and
- the term ‘swart man’ was racially loaded and, hence, derogatorily subordinating.

In particular, the Constitutional Court held that:

> . . . racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regards to race but it can also be seen with reference to gender discrimination. In both instances, such prejudices are evident in the workplace where power relations have the ability to create a work environment where the right to dignity of employees is impaired.

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It went on to hold that:

Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society. The Constitutional Court emphasised that ‘South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations.’

In this regard, the Constitutional Court found that the employee had shown no remorse. He had persistently denied ever using the term ‘swart man’, and, in doing so, was dishonest. Such dishonesty weighed heavily against him when considering sanction. The Constitutional Court therefore held that ‘by his actions he has shown that he has not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme’. It further held that the test to be applied in determining whether the term ‘swart man’ was racist and derogatory ‘is whether objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning’.

iv Malatji v. Minister of Home Affairs and Another

In this case, the LAC had to determine when *mora* interest, the interest accrued on overdue payment, should begin running, in circumstances where the Labour Court had ordered the substitution of an arbitration award granting retrospective reinstatement with an order for the payment of compensation, but had made no provision for the timing of interest. In essence, the LAC was required to determine whether *mora* interest should be calculated from the date of the initial arbitration award or from the date on which the arbitration award was reviewed and set aside by the Labour Court. In this matter, the Department of Home Affairs (the Department) dismissed its chief director of legal services after a disciplinary hearing where he was found guilty on various charges. Subsequently, an unfair dismissal dispute was referred to the General Public Services Sector Bargaining Council (GPSSBC). On 14 August 2006, the GPSSBC issued an arbitration award retrospectively reinstating the chief director of legal services and ordering the Minister of Home Affairs (the Minister) and the department to pay him compensation equivalent to 12 months’ remuneration. The GPSSBC’s award was subsequently varied on 30 August 2006. The Minister and the Department launched a review application in respect of the GPSSBC’s award. On 2 April 2013, the Labour Court reviewed and set aside the GPSSBC’s award, substituting the relief in the award with compensation equivalent to nine months’ salary. Thereafter, the substituted award was made an order of the Labour Court; however, no order was made in relation to the payment of interest.

On 24 April 2013, the Department paid the principal compensation amount and interest from 2 April 2013, the date of the Labour Court judgment. However, the chief director of legal services insisted that he be paid interest from 1 September 2006, the date on which the GPSSBC award was varied. He contended that the effect of the Labour Court’s order in substituting the award was that he was entitled to the payment of interest from the date of the arbitration award and not the judgment. He relied on Section 143(2) of the
LRA, which provides that: ‘If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.’

An application was launched in the Labour Court for a declaratory order that the Minister and the Department were liable to pay the chief director of legal services interest from date of the variation of the award until 24 April 2013, which was the date on which the department paid interest on the principal amount. Harper AJ dismissed this application, reasoning that Section 143(2) of the LRA does not address a circumstance where an arbitrator’s award is substituted in its entirety with an order of the Labour Court. The matter was taken on appeal to the LAC, which confirmed that, as set out by the Labour Court in Top v. Top Reizen CC, Section 143(2) of the LRA does not depart from the common law position that interest begins running from the date on which the debtor’s claim is ascertained. In this regard, the LAC noted that the question that needed to be answered in this matter was whether a debtor’s liability for the payment of interest can be said to have arisen where the validity of an arbitration award is subject to challenge through a review process. In this regard, the LAC pointed out that:

a. mora interest can only be levied and begin to accrue once the amount of compensation is ascertained or easily ascertainable;
b. where an award is subject to review, it cannot be said that the quantum is readily ascertainable, nor is the time for performance by the debtor fixed; and
c. consequently, there is no obligation on the debtor, in such circumstances, to pay the debt.

With reference to the Constitutional Court judgment in Myathaza v. Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others, the LAC noted that:

a. while Section 145(3) of the LRA empowered the Labour Court to stay enforcement of an award pending a review application, it did not follow automatically that the award was enforceable, because if awards were to be so enforced, applicants in review proceedings would be prejudiced and exposed to irreparable harm in the event that the award is set aside; and

b. arbitration awards constitute administrative action and are not claims capable of being enforced.

Rather, the last step in the adjudication of unfair dismissal disputes is either a Labour Court judgment, where the Court has jurisdiction in respect of such a dispute, or a Labour Court order making an arbitration award an order of court. To the extent that the GPSSBC award was for reinstatement, the LAC held it did not constitute a debt, which has been authoritatively defined as being an obligation to pay money or deliver goods or to render service by a judgment debtor. As a result, it held that interest in this instance could not have accrued from the date of the issue of the award and that, in any event, the Labour Court’s order awarding the chief director of legal services compensation equivalent to nine months’ salary substantially altered the original reinstatement award made by the GPSSBC. Therefore, the LAC held, it could not be said that the minister and the department were in mora from the date of issue of the award or its subsequent variation, but rather only from the date of the Labour Court judgment. The LAC held that the consequence of its judgment was that a judgment debtor would only be entitled to the payment of interest a tempore
on an unliquidated claim from the date of an arbitration award, if the award is not challenged through a review process, or from the date of a review judgment pursuant to a court’s determination of the quantum of the claim. Accordingly, the LAC only partially upheld the appeal in that it set aside and substituted the Labour Court’s order, but only to the extent that interest on the compensation award was to begin running from the date of his judgment, being 2 April 2013, to the date of final payment.

v Minister of Home Affairs v. Ahmed

In a significant win for asylum seekers in South Africa, the outcome of the Supreme Court of Appeal decision in Minister of Home Affairs v. Ahmed, 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 Constitutional Court.

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 the Immigration Act 13 of 2002 and 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 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. Most employees in South Africa are, however, 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 earning below the BCEA earnings threshold.\(^7\)

\[^7\] As of 27 November 2018, this is 205,433.30 rand per annum.
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 such a work visa before commencing employment.

ii  
Probationary periods
Probationary periods are permitted for newly hired employees in order 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. A foreign employer may, however, 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.8

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 behalf of the foreign employer, 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 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 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 OECD 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

8  Section 23(2) of the Companies Act.
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 business activities of the enterprise, and it must be utilised on a regular basis 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. Such clauses are in principle valid and enforceable and, as such, many restraints are enforced in South African courts every year. Nevertheless, when the employer seeks to enforce restraint provisions, the courts retain discretion as to whether to enforce the restraints and they will not enforce them if, in a particular case, such 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.9

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.

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, the employee may not work more than eight

9 Vodacom (pty) Ltd v. Motsa and another 2016 (3) SA 116 (LC).
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, and transport must be available between his or her residence and the workplace at the commencement and conclusion of the shift. If employees perform night work on a regular basis (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 who earn above the BCEA earnings threshold):

a An employer can only require an employee to work overtime where 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 (e.g., 90 minutes off for every 60 minutes overtime worked).

b Employees are not permitted to work more than 10 hours overtime a week or three hours 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 2002, as amended, as well as the regulations thereto.

The Act and regulations impose obligations on any person or organisation that employs a foreigner, regardless of the business's size 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 less than 90 days. Where a traveller, such as an academic, business person or frequent visitor,
has established himself or herself as a *bona fide* frequent business visitor, they may be issued with a two- to three-year multiple entry visa, 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 such certification includes the submission of proof of advertisement of the position as well as 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 foreigners 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 they wish to apply for a different category of visa, they 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. Critical skills holders 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 such qualifications without the need to obtain 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 that 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 internal discipline rules 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 discipline 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 where there is a collective agreement between the employer and the representative body stipulating that employees or their representative body must approve or agree to discipline 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 such disciplinary rules must be lawful and fair.

Although there are no mandatory discipline 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’ employment contracts, but generally it is not advisable to do so. In cases where the disciplinary rules are incorporated into the employee’s contract 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 the 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 documents or they 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. Employees, through their trade unions, are also permitted to establish workplace forums in their workplace where the employer employs more than 100 employees to consult on numerous defined workplace issues. Such workplace forums are rare.

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 ratio:

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 (together 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 in order 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 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, although the likely date appears to be closer than was previously the case given 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 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 the employer must ensure that the employee’s information is protected against risks of loss, damage destruction or unauthorised access. The employee must also be allowed to access his or her 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 Regulator, and an employer must obtain the Information Regulator’s prior authorisation before processing such 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 Information 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 of a data subject; 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 racial information because the employer is required to comply with laws designed to protect or advance persons from groups historically disadvantaged by unfair discrimination (in 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 an integrity check – such as contacting credit references and investigating whether the applicant has a criminal record – if this is 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 where the temporary or permanent residence visa applicant has resided for more than a year 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 where the employee is a trade union representative or where union members are to be made redundant.

The grounds upon which an employer can fairly dismiss an employee are misconduct, incapacity (which can be in the form of medical incapacity or poor performance) and the operational requirements of the employer (i.e., redundancy, which is dealt with below in more detail). Dismissal may be summary where this 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 between six months and one year, and four weeks for employees with service over 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. For the severance pay requirements in cases of redundancy, see subsection ii, below. It is possible for employers to conclude separation or settlement agreements with departing employees.

The employer is obliged to notify the Department of Home Affairs upon discontinuation of the employment of a work visa holder.

### 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, where 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) on the proposed retrenchments. There is no requirement to notify a works council or the government.

The employer must commence the consultation process as soon as it contemplates retrenchments. The employer must consult on 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 on 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. Where 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 employee 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 employee.

XIII TRANSFER OF BUSINESS

In terms of Section 197 of the LRA, if a transfer of a business takes place, unless otherwise agreed, the new employer is automatically substituted in place of 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 in order 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 picture of the business after the transaction is concluded to establish whether it is essentially the same business but in different hands. There is, however, no inflexible test 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. 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 the employers 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 employer and position specific, and a work visa holder may not continue working on the existing work visa but must apply for an amendment to the visa to authorise work for the new employer.

10 Section 187(1)(g) of the LRA.
XIV OUTLOOK

The Employment Equity Amendment Bill 2018 (the Bill), as well as proposed amendments to the Employment Equity Regulations (the Proposed Regulations), aim to rectify the staggered pace at which transformation is currently taking place within South Africa. Two of the most important proposed amendments to the EEA are aimed at enhancing the efficacy of the affirmative action provisions found in Chapter III, while the other deals with the important issue of medical testing.

Section 53 of the EEA, as presently formulated, provides that every employer ‘that makes an offer to conclude an agreement with an organ of state for the furnishing of supplies or services’ to that organ of state, or makes an offer for the letting or hiring of anything, must:

- if that employer is not a designated employer, comply with the provisions of Chapter II of the EEA (i.e., must not unfairly discriminate against employees);
- if that employer is a designated employer, comply with Chapters II and III of the EEA, the latter chapter dealing with affirmative action.

It is further provided that employers that seek to make an offer as described above must attach a certificate to the offer, issued by the Department of Labour, confirming that the employer has complied with the relevant chapter or chapters of the EEA. Alternatively, the employer may attach a declaration to the offer stating that it complies with the provision of the relevant chapter or chapters. Failure to comply with these requirements is sufficient ground for rejecting any offer made by an employer.

Section 53 has not been brought into effect. The reason given in the Executive Summary as to why this Section was not initially brought into effect was that employers needed time to put processes and systems in place in order to comply with the law. However, the slow pace of transformation has meant that it has become necessary to strengthen enforcement mechanisms.

The Executive Summary envisages that an amended Section 53 will be brought into effect. The proposed amendment removes the possibility of an employer attaching a declaration to the offer to do business with the organ of state. More importantly the Department of Labour will only issue certificates of compliance if the employer:

- has met any applicable sectoral targets, or has provided reasonable grounds justifying non-compliance;
- has submitted its Employment Equity Report to the Department of Labour; and
- has not been found by the Commission for Conciliation, Mediation and Arbitration or a court to have, within the previous 12 months, breached the prohibition on unfair discrimination or has failed to pay the national minimum wage.

In terms of the Proposed Regulations, these certificates will be valid for a period of 12 months from the date on which they are issued. This is a significant proposed amendment with important ramifications for employers.

It is further envisaged that the definition of ‘designated employers’ will be amended. Currently, employers who employ fewer than 50 employees, but generate in excess of an annual turnover threshold, are defined as designated employers. The proposed amendments suggest that employers who employ fewer than 50 employees will no longer be designated employers, regardless of the annual turnover they generate. Currently, employers who do not fall within the definition of designated employers are permitted to give notice to the Department of Labour, indicating their willingness to comply with the EEA and the reporting...
provisions therein. It is envisaged that this section will be repealed. This may be an attempt to limit the workload of the Department of Labour and also to eliminate the burden placed on smaller employers when complying with Chapter III of the EEA.

Section 8 of the EEA, in its current form, provides that employers are only be able to use psychological testing if the test:

a has been shown to be scientifically valid and reliable;
b can be applied fairly to all employees;
c is not biased against any employee or group; and
d has been certified by the Health Professions Council of South Africa (HPCSA).

In the matter of Association of Test Publishers of South Africa v. the President of the Republic of South Africa, the association launched an application to have the requirement that psychological tests must be certified by the HPCSA declared null and void. The basis of that argument was that there was no regulatory structure within the HPCSA that provided for objective certification of tests. As such, none of the psychological testing that is available could be used by employers, given that none of these tests had been or could be certified by the HPCSA. The High Court accordingly found that the requirement that tests must be certified by the HPCSA before they could be used by employers was null and void. Accordingly, the Bill proposes the removal of the requirement of Section 8(d) of the EEA, and as such, employers would be able to use psychological testing if the remaining requirements of that section are complied with.

At this stage, the Bill and the Proposed Regulations are still in the early stages of the legislative process and it is unlikely that they will be enacted in their current form. However, it is clear that there is a legislative drive to more strictly ensure and enforce transformation in South African workplaces, particularly given the slow pace of transformation in the past 20 years. This will significantly influence the labour and employment sphere.

The Draft White Paper on International Migration in South Africa was approved by the Cabinet in March 2017.

The White Paper recommended strategic interventions in eight policy areas: admissions and departures; residency and naturalisation; migrants with skills and capital; ties with South African expatriates; international migration within the African context; asylum seekers and refugees; integration process for international migrants; and enforcement.

At a press briefing on 25 September 2018, former Department of Home Affairs Minister, Malusi Gigaba, confirmed that the Department will relax the rules on travelling minors who are foreign nationals (mainly owing to its negative impact on tourism). The details of eased requirements for foreign minors travelling to South Africa were meant to have been settled in an international travel advisory that was due to be gazetted before the end of October 2018, after consultation with the Immigration Advisory Board. The travel advisory has, to date, not been issued. Nonetheless, the Department has confirmed that the amendments, when effected, will mean that parents of foreign minors will not be forced to carry parental consent documentation and unabridged birth certificates when travelling to South Africa. Instead, foreign travellers are ‘strongly advised to carry these documents’ to prove kinship, as immigration officials will retain the discretion to insist on seeing these documents where it is deemed necessary or where a situation appears to pose high risk. It is proposed that foreigners no longer be refused entry if they do not have these documents, but will instead be allowed the opportunity to prove parental ties and consent.
Chapter 43

SWEDEN

Jessica Stålhammar

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 with the exception of 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. Where the 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  Requests for criminal records

Regarding job applications, there is a trend in Sweden that employers ask the applicant to get a copy of their own criminal record, even in branches where there are no requirements to do so. Owing to personal integrity issues, the authorities want to restrict the use of criminal records when it is not relevant. The government appointed a government inquiry (Dir. 2018:12), which was due to be completed in January 2019.

ii  New Trade Secrets Act

A new Act on Trade Secrets entered into force on 1 July 2018. The Act implements EU Directive 2016/943 on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure.
The essence of the old Act will remain unchanged, but there are some alternations and supplements, including the following:

- a new legal definition of ‘trade secrets’ is included, clarifying the necessary components of a trade secret and that employees’ personal experience and skills fall outside;
- the provisions regarding damages in cases of unauthorised infringements of trade secrets are extended;
- a court will now be permitted to decide that a person who has committed and participated in an infringement of trade secrets shall pay for the appropriate measures to disseminate information about the judgment; and
- the minimum penalty for grave cases of industrial espionage is increased to six months’ imprisonment.

iii Annual pay survey

Amendments have been made to the Swedish Discrimination Act. In Sweden the employer must now carry out annual pay surveys. Employers with at least 10 employees are required to document their work on pay surveys. The employer shall analyse whether existing wage differences are directly or indirectly related to gender.

The analysis shall take particular regard of differences between women and men performing work that is regarded as equal:

- a group of employees performing work that is, or is usually regarded as, female-dominated, and a group of employees performing work that is deemed to be equivalent to such work but that is not, or usually not, regarded as female-dominated; and
- a group of employees performing work that is, or is usually regarded as, female-dominated, and a group of employees performing work that is not, or not usually regarded as, female-dominated but pays higher wages although the requirements of work are deemed lower.

The government has appointed an inquiry (Dir. 2018:99) to look into how the surveillance from the discrimination authorities over the compliance can be improved, and if amendments need to be made to the system concerning damages.

III SIGNIFICANT CASES

i Discrimination

A woman had applied for a job as an interpreter. At the interview the woman refused to shake hands with the male interviewer. The reason for refusing was that her religion forbids her to shake hands with men; it would be a sin. The recruitment procedure was cancelled, and the woman sued the company arguing that she had been discriminated against indirectly.

The company argued that it had a policy that all employees should shake hands with each other. It argued that the policy is suitable and reasonable, and does not discriminate against Muslim women since most women do shake hands with men. The purpose of the policy was to counteract special treatment based on gender and that it would be uncomfortable for people not to have the handshake reciprocated.

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2 Case AD 2018 No. 51.
The Labour Court concluded that by not employing women who do not shake hands with men, more Muslim women than other women cannot meet the requirements. Therefore, the policy discriminates against Muslim women, and is not suitable and reasonable. The woman was granted 80,000 kronor in damages.

ii Non-recruitment clause

An employment contract for computer game developers contained a non-recruitment clause that stated that employees who leave the employer may not try to recruit or otherwise cause other employees to end their employment for two years after leaving.

The Labour Court ruled that the clause was unreasonable and therefore not valid. When evaluating if a clause is valid or not, the purpose of the clause, the impact it will have on the employee and if the employee will be granted compensation must be considered. In this case, the specific clause affected all employees in the workforce, and employees who had been employed after the affected employee had stopped working. The Court mentioned that a non-recruitment clause could be valid if the actions mentioned were prohibited for a short period of time (e.g., six months); as it was two years in this clause, it was ruled invalid.

iii Vacation without permission

An employee had requested holiday for one week, which was not granted by the employer. The employee took the holiday anyway. During the dispute, the employer argued that the employee had quit his employment when leaving, and that there was also an objective ground for dismissal. The court concluded that the employee had not himself left employment, but by going on holiday without approval, the employer could dismiss the employee.

IV BASICS OF ENTERING 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 notice of termination period;
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.

3 Case AD 2018 No. 61.
4 Case AD 2018 No. 66.
The terms and conditions of employment can be regulated by law, by collective agreement or by the 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 non-permanent employment forms:

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, but the probationary period may not exceed this.

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 the employer intends to give notice of termination of probationary employment, either prematurely or at the end of the probationary employment, it must give 14 days’ notice in advance. 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, 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 person, 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 withhold tax on paid salary for the employee.

V RESTRICTIVE COVENANTS

The 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 that 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.

In recent years 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 the employer breaks the law it risks incurring fines, among 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. The general overtime should be used before extra overtime is being 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 of the overtime.

### 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. The agreements often regulate the starting wages within that field.

### FOREIGN WORKERS

#### Foreign workers

Regulations concerning immigration and foreign nationals in Sweden are found in the Aliens Act, among others.

Citizens from the European Union and European Economic Area as a main rule 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 in order 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 by certain provisions in Swedish law and collective agreements during the period of employment. Since 1 June 2017 there are new rules regarding posting in Sweden. The purpose of the changes to the legislation is to strengthen the position of collective agreements in order for 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 actions are limited to minimum wage and other minimum conditions, referred to as core rights. Employers who post employees are obligated, 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.

### 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 it in a termination situation.

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  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 main language.

X  EMPLOYEE REPRESENTATION

i  Workplace representation

In Sweden, the unions provide employee representation at work. The unions 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 the employer. Where 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, employees in companies with more than 25 employees have the right to elect two board members and the same number of deputies. The employee representatives, however, can never be in the majority. The employee representatives on the board 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 the union meeting in the company, appointment by the union or a membership ballot.

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.

XI  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. At the time of writing, in 2018 it had conducted 400 inspections of organisations, authorities and private companies, of which 60 have received injunctions.

i  Requirements for registration
Employers do not have to register with the Swedish Data Protection Authority in order to be allowed to process personal data, but the employer needs to process personal data lawfully and the data must be collected for a specific reason. The processing of personal data is legitimate when done in accordance with the GDPR, including when the process is necessary in order to fulfil an agreement or to fulfil a legal requirement.

Some employers need to appoint a data protection officer and report the contact details of the data protection officer to the Swedish Data Protection Authority.

If there is a personal data breach the employer is required to report this 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 of the European Union, regardless of whether the processing takes place in the European Union or not.

iii  Sensitive data
Any information related to a person that can be used to directly or indirectly identify the person is defined as personal data. It can be anything from a name, a photograph, an email address, bank 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 processing 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 in order to carry out obligations under the employment, social security or social protection law, or a collective agreement.

iv  Background checks
The employer is not permitted to obtain an extract from the criminal register itself. However, the employer can ask the employee to provide it with such an extract from the criminal record database.

Credit checks are only allowed if the employer has a legitimate reason to conduct the check, including, for example, when the employer needs a risk assessment with a financial perspective.

Collective agreements may contain different rules.
XII DISCONTINUING EMPLOYMENT

i  Objective grounds for termination of an employment

According to the Act on Security of Employment, dismissal of an employee must be based on objective grounds, which can consist of either personal reasons or shortage of work, which includes redundancy.

An employer who breaches the Act shall not only be liable to pay salary and other employment benefits to which the employee may be entitled, but also to pay damages. Damages may be payable not only for loss suffered (economic damages) but also for the offence that the violation may have caused (general damages).

ii  Dismissal

Dismissal is the termination of a contract based on grounds related to the individual employee, and may be given with or without a notice period. Dismissal without a notice period may be justified only if the 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 that the employer 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 was 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 his or her chances 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:

- wilful violation of work rules or legitimated orders;
- repeated negligence;
- disloyalty to the employer, for example by competing secretly with him or her or revealing important business secrets;
- inability to cooperate with colleagues;
- criminal activities at or outside work; and
- 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. If the employee is a member of a trade union, the employer shall also give notice to the local organisation of employees to which the employee belongs.
The employer must give the employee written notice of termination, which contains the date, the name 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.

Where 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 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, with the condition that the employee has 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 a free post.

If there are no other free 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 time 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 for which the affected employee is competent to carry out held by employees who have worked for a shorter time within the company. 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 there has to be a short list 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 one list for blue-collar workers and one list 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 work 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 work 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 consult 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 consult with the union in the prescribed manner.

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.

During the period of notice the employee will receive a salary as if he or she was 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:

- up to two years’ employment: one month;
- two to three years’ employment: two months;
- four to five years’ employment: three months;
- six to seven years’ employment: four months;
- eight to nine years’ employment: five months; and
- 10 or more years’ employment: six months.

There can be different rules about the length of the period of notice in a collective agreement or in the employment agreement. In the latter case, only deviations in favour of the employee are binding.

An employee who has left the 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 also 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 fee.

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 lack of work, be given priority to further work irrespective of the order of priority.

**XIII 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 case, the first employer can terminate his or her employment because of redundancy.

When determining whether or not a transfer of 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.

**XIV OUTLOOK**

One of the hottest topics for 2019 will be the follow-up to compliance with the GDPR, and how the authorities will assess the impact of the Regulation at the national level.

In September 2018, Sweden held national elections. Owing to the outcome of the elections, Sweden has not been able to form a new permanent government, and the crisis will most likely end in new elections. Consequently, the outlook for 2019 is hard to predict.
Chapter 44

SWITZERLAND

Ueli Sommer and Simone Wetzstein

I  INTRODUCTION

The employment law in Switzerland is mainly based upon the following sources, set out in order of their 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 (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 Foreigners.

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 authorisation to proceed being granted.

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1 Ueli Sommer is a partner and Simone Wetzstein is a managing associate at Walder Wyss Ltd.
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.

Federal, cantonal and communal authorities – except the courts – in general do not play a very important role with regard to individual employment contracts. In some areas, however, the authorities may play a greater role, such as in the issuing of work and residence permits, notification of collective dismissal, or authorisation for night shifts or work on Sundays.

II YEAR IN REVIEW

The State Secretariat for Economic Affairs tightened its licensing practice for hiring out employees from one group company to another group company. Its previous practice was liberal and practicable but was not compatible with the Federal Act on Personnel Recruitment and Hiring-out of Employees. Accordingly, hiring out within a group is only exempt from authorisation if it is an individual case and exclusively promotes the acquisition of experience in technical, linguistic or other respects, serves the transfer of know-how within the group or occurs occasionally.

III SIGNIFICANT CASES

Swiss law distinguishes between variable pay and a fully discretionary bonus. The distinction is important because in the case of variable pay, the employee has a right to a pro rata payment (if the employment is terminated before the payment date) and any change to the bonus needs to be enforced in the same way as a contractual change.

The courts consider a variety of elements for the determination of what constitutes variable pay and what constitutes a discretionary bonus – for example, how often bonuses are paid, how they are calculated (e.g., when they can be calculated exactly they are variable pay and not a discretionary bonus), and the ratio between base pay and a bonus (whereby a high bonus is, in principle, an indication for variable pay). The Federal Supreme Court ruled in August 2015 that the ratio between base pay and a bonus is not important for very high salaries, which are defined as being five times the median salary (currently every annual salary above 354,000 Swiss francs).2 Recently, the Federal Supreme Court further and sensitively restricted the case law applicable to the ratio between base pay and a bonus by creating a new employee category of ‘medium to high incomes’.3 For these incomes, which are defined as being between the median wage and five times the median wage (i.e., currently an annual salary of between 70,800 and 354,000 Swiss francs), a bonus might only qualify as variable pay if it exceeds the level of annual income. In the present case, the bonuses claimed by the employee did not surpass the level of annual income, which meant that his argument that the payments were a variable salary to which he had a pro rata entitlement was rejected.

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2 BGE 141 III 407 as of 11 August 2015.
3 BGer 4A_714/2016 of 29 August 2017.
IV BASICS OF ENTERING 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.

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 time 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 the employees. The employees’ social security contributions must be withheld by the foreign company. Withholding of income tax only applies to employees that do not have a permanent residence permit.

V RESTRICTIVE COVENANTS

Pursuant to Swiss employment law, an employee may make a commitment to the employer to refrain from any competing activity for a period after termination of the 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 the 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. Other cantons or federal laws do not 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

As outlined in Section III, Swiss law makes an important distinction between variable pay and a gratification (a fully discretionary bonus). 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 in 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 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 latest 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 of companies to maintain detailed time-keeping records (including the start and ending 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 two possibilities to simplify the time-recording obligation: employees who meet certain requirements may not be required to record their hours at all or will be required to keep track of their hours in a simplified form. In order to make use of one of these possibilities, companies must meet very strict requirements. 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, and employees to be exempted from this obligation must earn more than 120,000 Swiss francs per year.

The Labour Act determines the maximum weekly hours of work, distinguishing between two categories of employees:

- 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
- other workers, mainly in the construction sector, and craftsmen, workers in commerce and sales staff in small retail undertakings.

The maximum hours of work are fixed at 45 hours a week for the first category and 50 hours a week for the second. If both categories of employees are employed in the same enterprise the maximum of 50 hours applies to both categories. 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 the employee works more than the working hours stipulated in the employment contract, up to the maximum working time allowed under the Labour Act. 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 subsection 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 of 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 EU or EFTA countries benefit from the Agreement on Free Movement of Persons and, in general, do not need a work permit if residence is taken in Switzerland. 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 as 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 employees.

Pursuant to the Federal Act on Private International Law, the applicable law regarding employment relationships is the country where the employee usually performs his or her duties. The parties may, however, 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 choice of law.

VIII GLOBAL POLICIES

The employer may establish general directives and give specific instructions about the execution of work and the conduct of employees in the company. Furthermore, the employer must take prescribed measures to protect the life, health and integrity of the employees and in particular to take care that the employee is not subject to sexual harassment or discrimination. Therefore, it is very common in Switzerland to set up rules on accepted behaviour and the consequences in case of non-compliance. Usually, employees must accept that they will comply with the rules in writing. 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 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 such 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 for the translation. However, it should be clearly stated which language shall prevail in the event of any conflict between the languages. Further, formal translation by a recognised translator may be necessary if only foreign documents exist in case of a court dispute. This is not the case when the document was already translated when it was entered into.

X EMPLOYEE REPRESENTATION

Pursuant to the Participation Act, employees may elect a works council in companies with at least 50 employees. 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.

The establishment of a works council must be passed by a resolution of at least one-fifth of all employees. 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 the 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.
XI 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 the employers must collect certain data of the employees pursuant to social security laws, tax law and also 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, and 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 the employee’s aptitude for the 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 collection and processing of sensitive personal data or personality profiles (see subsection 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 if adequate cross-border data protection agreements are in place and information about such 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 of private individuals, the Commissioner has established a list of countries that have implemented equivalent data protection legislation, which is publicly available on the internet. For example, the level of protection provided for private individuals by EU countries is deemed adequate. By contrast, the level of protection provided for the United States is not considered as being adequate. In order 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.

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
Personal data pursuant to the Data Protection Act 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 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.

XII DISCONTINUING EMPLOYMENT

i Dismissal

A contract concluded for an indefinite period terminates after a notice 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. The parties may not, however, 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, the employee has a statutory right to be informed of the reasons for the termination in writing, 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. The termination of the employment contract by either party is considered abusive if, for example, it occurs for one of the following reasons:

a personal characteristic of one party (e.g., race, creed, sexual orientation, age), unless they are relevant to the employment relationship or significantly impair the 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 for the damage caused from the other party. But, if the employer terminates the contact 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 of between two and eight months’ salary. Such severance pay, however, is not very common in Switzerland, 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 the case law, the mandatory provisions of the CO shall be taken into account and the agreement must include benefits for both employer and the employee. Otherwise, the judge may declare the termination agreement as null and void.

No categories of employees are protected from dismissal in general, but there are certain periods during which a notice of termination is invalid. After the probation period has expired, the employer may not terminate the employment relationship at the following times:

- when the employee is performing military service or civil defence;
- 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);
- during pregnancy and for 16 weeks following the birth of the baby; or
- when the employee participates in an official aid project in another country.

Any notice to terminate an employment contract during such period is invalid. Any notice served before such period starts is suspended when the period begins and then recommences after recovery from illness or accident or expiration of the protection period.

In principle, an employee who is dismissed by ordinary termination may be released from his or her duty to work (gardening leave) at any time. The employer must continue to pay 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 the company has no duty to inform any authority about a dismissal (exceptions apply in regard to 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:

- at least 10 employees in companies usually employing more than 20 and fewer than 100 persons;
- at least 10 per cent of all employees in companies usually employing more than 100 and fewer than 300 persons; and
- 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 damages payment 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 terminated 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.

### XIII  TRANSFER OF BUSINESS

Generally speaking, the Swiss law applicable to the transfer of undertakings is quite similar to the provisions laid out in the EU Council Directive 2001/23 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 within a restructuring scenario. 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 together 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 the ones 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 periods 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 validly been terminated.

If the business transfer takes place within certain restructuring scenarios, 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 restructuring scenarios – not jointly and severally liable with the seller for pre-transaction claims of the employees.

If a collective employment contract applies to any employment relationship transferred, 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 in the 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 the decision to make employees redundant is made or the changes in the working conditions 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 such dismissals and changes would be seen 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 the case law, the employees or the works council need to have 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 of 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 issued or implemented changes are void.

After the consultation, or directly if no consultation is required, the works council or the employees, if no works council is established, 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 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).

**XIV OUTLOOK**

The legislative process for a new data protection law commenced some time ago. The Federal Council published a draft of this law on 15 September 2017, which is similar to the EU General Data Protection Regulation. The draft is currently under discussion and will be amended during the legislative process.
I INTRODUCTION

The sources of Turkish labour law are those of law, custom, jurisprudence and contract. Legal and contractual sources are as follows.

i Legal sources

a The Constitution of the Republic of Turkey;

b private statutes:
   • Labour Law No. 4857 (the Labour Law);
   • Law No. 6552 on Amendment to Labour Law and Several Laws and Executive Orders and Restructuring of Some Credits;
   • Law No. 6325 on Mediation of Legal Disputes;
   • Trade Union Act No. 2821;
   • Law No. 6356 on Trade Unions and Collective Bargaining Agreements;
   • Work Permit for Foreign Workers Law No. 4817;
   • Maritime Labour Law No. 854;
   • Law No. 6458 on Foreigners and International Protection;
   • Press Labour Law No. 5953;
   • Labour Courts Law No. 7036 (the Labour Courts Law); and
   • Social Insurance and Universal Health Insurance Law No. 5510;

c public statutes:
   • the Law of Obligation; and
   • the Civil Code;

d regulations; and

e by-laws.

ii Contractual sources

The contractual sources of labour law are collective bargaining agreements, employment contracts, internal regulations, business practices, and employers’ injunctions and prescriptions.
iii Implementation and enforcement

Supervision of business
The Ministry of Labour and Social Security occasionally supervises business activities at regional directorates with the help of business inspectors. Upon receiving complaints from employees about their employers, investigations are carried out by business inspectors. Employees, employers and the employers’ attorneys are required to give statements and to submit the required information and documents upon demand of the authorised persons.

The business inspectors and authorised officers also ensure that decisions of special arbitrators and the High Board of Arbitration regarding collective bargaining agreements are applied.

Social security
The Social Security Institution, which is a part of the Ministry of Labour and Social Security, was established to provide social security as guaranteed by Article 60 of the Constitution.

Employment services
The Labour Law enables the establishment and operation of private employment offices as regulated in Agreement No. 181 of the International Labour Organisation. The government may provide employment services, as may natural and legal persons if they meet the required conditions. The legal employment institution of the government is the Turkish Employment Organisation, which is supervised by the Ministry of Labour. This institution is financially and administratively autonomous and is responsible for providing public services.

Labour jurisdiction
Disputes between an employee and employer arising out of an employment contract as described in the Labour Law shall be settled by the labour courts. The labour courts are authorised to settle legal disputes between those persons who are considered employees according to the Labour Law and employers arising out of an employment contract or any provision of the Labour Law. The labour courts’ authority includes public regulations. Labour courts are at the level of the civil courts of first instance (with a single judge) and are established to settle legal disputes. The civil courts of first instance are authorised to try labour cases in the locations where no labour court exists.

II YEAR IN REVIEW
On 12 October 2017, the Labour Courts Law entered into force and the effective date of Article 3-11-12 related to the requirement of application to a mediator was 1 January 2018. Mediation was introduced to the Labour Law through the Mediation Law of Legal Disputes No. 6325, which also entered into force on 1 January 2018.

Within the scope of the revisions to the Labour Courts Law conducted by the Ministry of Labour and Social Security, a foreign applicant requesting permission for temporary or

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2 Certain businesses and relationships are exempted from the law, including some activities in the maritime and air transport sector, and in agricultural and forestry businesses with fewer than 50 employees. Domestic servants, apprentices, sportspeople, persons being rehabilitated and some family businesses are also exempted.
permanent work must have a registered email address that must be used for all applications for a work permit, and applications must bear an e-signature. The application will be rejected if the applicant does not meet these requirements.

As of 11 November 2018, through Communique No. 2018/1, a further 36 occupations have been added to the list of occupations that cannot be worked without obtaining a professional qualification certificate.

III SIGNIFICANT CASES

A decision of the Supreme Court Assembly of Civil Chambers dated 28 February 2018 stated that seasonal employees whose annual work period exceeds 11 months cease to be seasonal employees.3

A decision of the 9th Judicial Office of the Court of Appeals dated 5 February 2018 stated that in a situation in which an employer requests that an employee move to another workplace and the employee declines, while the employee may terminate the employment contract on justified grounds (e.g., because his or her quality of life would be negatively affected by the move), he or she cannot request to move to an alternative workplace.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The employment contract is a contract governed by private law through which the employee undertakes to perform work within a period of time or indefinitely and the employer undertakes to pay a salary in consideration for that work. The employment contract is a consensual contract resulting in reciprocal obligations. It is not obligatory for the parties to explain their intent in an ordinary agreement. It is possible to make a service agreement implicitly. Employment contracts can be made for a fixed or indefinite term.4

The employment contract is an agreement through which one party (the employee) undertakes to execute work dependently and the other party (the employer) undertakes to pay a salary. Unless otherwise specified by law, the employment contract does not need to be in a specific form; however, employment contracts lasting one year or more must be drawn up in writing. As the employment contract obliges the employee to perform work and the employer to pay a salary, it is necessary to include details of the following:

a when payment will be made;
b sanctions to be imposed if payment is delayed;
c the wages to be paid to the employee in case of overtime and work on non-business days;
d any provisions relating to the obligations of the employer regarding the surveillance of the employee, assisting the employee or providing equipment for the employee;
e a job description;
f the obligations of the employee regarding compliance and commitment;
g the procedures and sanctions to be followed if the employee violates the requirements of the job;
h the start date of the employment contract; and
i the terms for termination.

3 Verdict No: 2018/385.
4 Article 9 of the Labour Law.
The provisions specified in the contract cannot be inconsistent with the provisions stipulated in the Labour Law. However, as it is not obligatory to draw up an employment contract in writing (with some exceptions), even if there is no arrangement made regarding these issues, the provisions specified in the Labour Law shall be applied.

The parties can determine in the contract the date from which the contract provisions shall apply. Employers should draw up a statement of employment for the purposes of social security registration. The date the employee signs the employment agreement is considered the start date.

Fixed-term employment contracts are permissible in Turkish labour law. This type of employment contract terminates upon the expiration of the term agreed between the parties and can only be concluded if the work that the employee undertakes lasts for a certain period of time. In other words, there is no obligation to provide notice of termination to either party and work that will last for an indefinite period cannot be the subject of a fixed-term employment contract. However, if a party's intention is to terminate the contract before the expiration date, it must have a justifiable reason to do so. Without a justifiable reason, a premature termination shall be deemed as unjust. Regarding fixed-term contracts, employees are entitled to severance payment but are not entitled to a payment in lieu of notice.

Procedures for amending the terms of employment can be specified in the employment contract. If no such procedures are specified, the parties can amend the contract terms by drawing up a new contract or a supplementary protocol. As in most cases the employment contract is not required to be in writing, the parties can amend provisions stipulated in the contract implicitly.

ii Probationary periods
The parties can specify a probation period in the contract. In general, the probation period can last for a maximum of two months, although this period can be extended to four months through a collective bargaining agreement. During the probation period, the parties can terminate the employment contract without advance notification and without paying compensation. The employee shall, however, still be entitled to the wages and other rights accrued during employment.

iii Establishing a presence
Under Turkish law, all persons working for a company must be registered as employees, even if the company is a foreign corporation. If a foreign company hires employees through an agency, the company is still required to register the employees.

A foreign corporation that is not registered can hire an independent contractor or subcontractor registered in Turkey. The independent contractor can open a branch itself, which will be subject to commercial and tax legislation and must be registered. It is necessary to register the employees employed in this branch and to fulfil legal obligations.

The company must also meet the social insurance liabilities and other liabilities applicable to regular employees for its short-term employees. It is possible, however, to benefit from several tax deductions and insurance deductions depending on the legal arrangement. The company must register the short-term employees and declare the work to the Social Security Institution through a statement of employment.

5 Article 15 of the Labour Law.
V RESTRICTIVE COVENANTS

Non-compete provisions can be specified in an employment contract. Even if such a provision is not specified, an employee may not compete with his or her employer during the period of employment. This is because an employee’s duties of privacy, secrecy, loyalty and non-competition arise out of the employment contract. Non-competition after termination of an employment contract is dependent on an additional non-compete agreement drawn up between the employee and employer or included in the employment contract.

VI WAGES

i Working time

The Labour Law provides for a maximum working time of 45 hours per week. This may, however, be reduced by mutual agreement of the parties. Working hours are divided equally among the working days of the week, unless otherwise agreed, but in any case an employee cannot work more than 11 hours in one day. Through a process known as ‘equalisation’, employees may work more than 45 hours in a normal working week provided that the average weekly working hours of the employee over two months do not exceed 45 hours. The two-month basis for calculation can be increased to four months through a collective bargaining agreement.

The Labour Law also specifies a limit on night work, which cannot exceed seven-and-a-half hours. Employees who work at night cannot work overtime. If an employee works a night shift for one week, the employer must schedule the employee for day shifts in the following week. It is possible to work night shifts for two consecutive weeks provided that this is followed by two weeks of day shifts. An employee whose shift will be changed from night to day or vice versa must be given 11 continuous hours off before starting a new shift.

In accordance with Article 63 of the Labour Law, a health report must be obtained before recruitment certifying that the workers who will perform night work are suitably healthy to do so. Night workers must undergo a medical check by the employer at least once every two years. The costs of such medical checks are covered by the employer.

Pursuant to the regulation added by Law No. 6552 to Article 63 of the Labour Law, the maximum working hours of underground mining employees shall not extend beyond 36 hours per week and six hours per day.

ii Overtime

It is permissible to work overtime for reasons such as the general national interest or to increase production, and overtime is permissible for certain types of work. Overtime is work exceeding 45 hours weekly. If the employer equalises working hours, provided that the average weekly working time of the employee does not exceed normal weekly working time, this work will not qualify as overtime. Where the employee's working hours exceed his or her daily working hours and the weekly working hours exceed 45 hours, the employer must pay overtime. If the parties agreed to a weekly working schedule of less than 45 hours and working time exceeds the average weekly working time but remains under 45 hours, the employer must still pay overtime. Typically, the total overtime cannot exceed 270 hours per year.

Overtime pay is the usual hourly rate plus another 50 per cent. For extra work (which exceeds the agreed weekly amount but is under 45 hours), the employer must increase the usual
hourly remuneration by 25 per cent. This amount can be increased according to employment contracts and collective bargaining agreements. Instead of receiving overtime, the employee may elect to take compensatory time off of 90 minutes for each hour of overtime worked.

The employee’s approval is required for working overtime.

Underground mining employees shall not be asked to work overtime unless urgent and extraordinary conditions as set out in the Labour Law apply. Under such urgent or extraordinary circumstances, the hourly payment for every hour exceeding 37.5 hours shall not be less than the full normal hourly payment.

VII FOREIGN WORKERS

The Work Permit for Foreign Workers Law No. 4817 regulates the employment of foreign workers. The objective of this law is to regulate the employment of foreign workers with a system of work permits and to specify the rules regarding the permits to be given.

In principle, employers must inform the Social Security Institution (through a statement of employment) about the persons working under an employment contract. It is necessary for employees to be registered for social security purposes. Foreign workers must hold a work permit, which they must obtain before they start work in Turkey, unless otherwise provided in international treaties.

There are limitations regarding the employment of foreign workers. These limitations relate to qualifications, rather than the number of foreign workers employed. Sometimes, however, these limitations regarding qualifications also limit the number of foreign workers. Limitations relating to the employment of foreign workers are set forth in several laws and legal regulations; there are also some professions that do not permit the employment of foreign workers, for example, healthcare.

An employer who employs foreign workers is liable to meet the obligations relating to the foreign workers, such as insurance premiums and other liabilities, in the same way as it does for other workers. Foreign workers are also legally protected by the mandatory provisions of the Labour Law.

Article 89/4(b) of Law No. 6458 on Foreigners and International Protection states that a refugee or subsidiary protection beneficiary, upon being granted this status, may work independently or be employed, without prejudice to the provisions stipulated in other legislation restricting foreigners to engage in certain jobs and professions given in Article 89/4(c) of the Law. The identification document issued to a refugee or subsidiary protection beneficiary can also be substituted for a work permit, and this information is written in the document.

Thus, legally, if a refugee or subsidiary protection beneficiary has an identification document that includes his or her status, he or she does not need a work permit. Refugees and subsidiary protection beneficiaries are the only exceptions to the rule of foreigners requiring a special permit to work in Turkey.

VIII GLOBAL POLICIES

Company work rules are a part of the employment contract, and employees must obey these rules. The method for establishing internal rules can be chosen by the employer. An employer can establish the rules or can let the employees or an employee-related organisation establish them.
Internal rules do not require government approval. Internal regulations that are contrary to commercial law are invalid (as are conditions of employment agreements that are contrary to commercial law).

There is no legal obligation to write the global policies in the local language and the language can be decided by both parties. It is advisable, however, to prepare it in the local language. There is no need for employees to sign such policies, as they arise from the employer’s management right and become a part of the employment agreement automatically.

The law is silent on how companies should inform employees about global policies. A notification to employees or an announcement of their release on the company intranet should be sufficient, as such rules supplement the main agreement, and they are rules that employees are obliged to obey automatically. Rules related to discipline can be added to the employment agreement or can be regulated through internal regulations.

IX TRANSLATION
Details relevant to labour agreements in Turkish Law are given above. There are no additional legal requirements, such as arranging contracts in a native language or translating documents into a native language. However, in case of a dispute, the court shall ask to translate all documents notarised in a foreign language into a native language. As a result, labour contracts, offer letters and confidentiality agreements written or conducted in a foreign language will still be effective and applicable.

X EMPLOYEE REPRESENTATION
Employees may join councils or representative bodies. Employees may also join a labour union, either as a member or a founder.

In accordance with Law No. 6536 on Trade Unions and Collective Bargaining Agreements, the number of union representatives in a business is limited: if there are 50 or fewer employees in the workplace, there can be one representative; if the number of employees is between 51 and 100, there can be two representatives at most; for 101 to 500 employees, three representatives; for 501 to 1,000 employees, four representatives; for 1,001 to 2,000 employees, six representatives; and for more than 2,000 employees, eight representatives.

The authorised union may nominate a representative to make a collective agreement. The union must choose this union representative from among the members working for that employer. The candidate should be qualified to perform the role. The responsibilities of all union representatives at the business last until the authorisation of the union expires.

The union representative in a business cannot be suspended even for a reason such as a transfer of the undertaking (i.e., a divestment or merger). The employment contract of a union representative can be only be terminated for a just cause. Further, without the written approval of the relevant union, the duties of the union representative cannot be changed.

The union representatives must be allowed to carry out their union activities during working hours in line with the law. Meetings are arranged regularly as per the union regulations. If there is no regulation on this issue, the meetings are held once every four years.
XI DATA PROTECTION

i Requirements for registration

Employees have a right (which they may not waive) to social insurance and consequently their employment must be registered and notified to the Social Security Institution. Information regarding employees is, therefore, recorded and kept by both the government and the employer. The company does not have to submit all the employee information it processes to the government, but it may be obliged to supply certain information to government institutions.

A personnel file must be kept for each employee containing prescribed information, including a certified copy of the employee's national identity card, certificate of domicile, criminal record information, marriage licence, documents concerning family and children, the employment agreement, job application form, graduation certificates and references. To process other personal information, an employee's permission must be obtained. Access to the data related to employees is allowed if it is gained pursuant to a legal obligation.

Employers should take all necessary precautions to prevent the loss, alteration or damage to the information they hold about employees and to prevent the unauthorised dissemination or transfer of the data.

The relevant arrangement of Article 75 of the Labour Law is as follows:

Employee's Personal File: The employer arranges for a personal file for each employee. The employer is obliged to keep the identity particulars of the employees as well as any document and record pursuant hereto and to other laws and submit the same to authorized officials and bodies, when required.

ii Cross-border data transfers

Transferring an employee's data without his or her consent is illegal. The employee can prepare a common use agreement to assist the employers' record-keeping obligations. The database controller is responsible for keeping the information secure.

Regarding the use of personal data, the following provision has been regulated in Article 419 of the Turkish Code of Obligations: ‘The employer may only use the personal data of the worker to the extent that it is necessary for the employment of the worker or for the performance of the service contract.’

iii Sensitive data

Health information, social insurance numbers, family information, bank business records or account information can be considered sensitive information and limitations can be placed on the handling of such information, which is regulated by several laws. If these laws are violated, legal action may be taken in the form of security measures and administrative fines for entities, and penal sanctions for individuals.

iv Background checks

Background checks, including credit checks, are permissible, but with certain legal limitations. Attorney–client privilege applies to meetings between a candidate and his or her lawyer.
XII DISCONTINUING EMPLOYMENT

i Dismissal

In offices where job protection provisions are not in force, an employer can dismiss an employee without giving a reason on the condition that it is not malicious. There are, however, notice and severance provisions.

The employer must notify the Social Security Institution that an employee has left a job within 10 days of the employee leaving and within 10 days of an employment contract with an employee ending, and must submit the employee’s resignation letter to the Institution. The employer is supposed to notify the relevant district office and Turkish Employment Agency within 30 days.

A union may intervene in a dispute between an employee and employer at the written request of the employee. The company's termination of the employment contract may prompt such an intervention. There is no provision making it compulsory to notify the labour union of dismissals. For mass dismissals, the employer must notify the union representative in writing.

Provision of notice is mandatory. The employer has to abide by minimum notification times when terminating an employment contract. These range from two weeks’ notice for employees who have worked for under six months up to eight weeks’ notice for employees who have worked for three years or more. These notification periods can be increased by contract. If the employee is not given notice, the employer must make payment in lieu of notice, corresponding to the salary the employees would have earned during the notification period.

There are no categories of employees protected from dismissal. Employment contracts can be terminated without giving valid reasons or any reason. If an employer terminates the contract of an employee employed for at least one year without giving reasons, however, a seniority indemnity must additionally be paid equivalent to 30 days’ social aid for every full year worked. If an employer terminates the employment contract of an employee without abiding by the notice period, it must make a payment in lieu of notice.

As an employment relationship is contractual, the parties can draw up a settlement agreement concerning the termination of the employment contract and can waive compensation and legal rights mutually. In labour law, however, some rights (e.g., payment in lieu of notice) are mandatory and cannot be wholly contracted out of or modified if the change is disadvantageous to the employee.

ii Redundancies

There is no requirement as to the manner in which an employer should inform its employees about the termination of an employment contract. If it is done in writing, however, it is easier to confirm the date and details. For employees who work in a workplace with 30 employees or more and who have completed more than six months’ service, termination of the contract of employment must be in writing, citing a justified reason. Again, the employer is liable for observing the notice period and paying severance benefit to employees if applicable. In mass dismissals, however, there are different conditions. When the employer requires mass dismissal as a result of economic, technological, constitutional or similar requirements of the enterprise or business sector, it must inform the union representative, relevant district
office and Turkish Employment Agency of the dismissal at least 30 days in advance. This notification must include the reasons for dismissal, how many of the employees will be affected and when the dismissal will be effective.

XIII TRANSFER OF BUSINESS
In accordance with Article 6 of the Labour Law, when a business or a part thereof is transferred to another person based on a legal procedure, the labour contracts effective in the business or a part thereof on the date of transfer are transferred to the transferee with all rights and liabilities. The transferee is obliged to take into account the date employees originally commenced at the transferor with respect to rights that take the duration of service of the worker as their basis.

In a transfer, pursuant to the above provisions, the transferor and transferee are jointly liable for the debts incurred prior to the transfer, which must be settled on the date of transfer. The responsibility of the transferor for such liabilities is, however, limited to two years from the date of transfer. If one of the companies is subsequently terminated by a merger, participation or conversion, the provisions for joint liability are not applied.

Neither the transferor nor transferee can terminate the labour contract merely on the grounds of the transfer of the business or a part thereof, and the transfer does not constitute a justified ground for termination on the part of the worker. The termination rights of the transferor and transferee as a result of economic changes, technological changes to the work organisation and the immediate termination rights of worker and employers based on justified reasons are reserved.

European Union directives and European Court of Justice resolutions express the concept of economic unity in relation to the workplace (or part of it) subject to the handover. According to these guidelines, for a transaction to be considered a handover of a workplace (or part of it) leading to permanent legal consequences, the handover process must be executed by maintaining the structure of economic unity of the workplace (or part of it). If economic unity is not maintained, Article 6 of the Labour Law excludes the possibility of handover operations in any workplace (or part of it).

The Turkish Commercial Code contains provisions related to business relationships that are the result of a merger, division or conversion of trading companies. Any other transfer operations (e.g., through sale or rental) are not covered by the provisions of the Commercial Code.

XIV OUTLOOK
There is no agenda for 2019 related to labour law, or any planned or foreseeable regulations or trends in this field.
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 full of pitfalls. Specific statutes have been adopted since Ukraine became independent to deal with labour safety, remuneration, vacation, collective bargaining agreements, employment of population and employment of foreign nationals, but the replacement of the Labour Code is necessary to enable Ukrainian labour law to adapt to the needs of a market economy.

In Ukraine, labour disputes 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 the 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. The decision of the LDC can be appealed in a local court of general jurisdiction. Certain categories of labour disputes have to be directly considered by the courts (e.g., when there is no LDC in the company, wrongful dismissal cases). A new trend in Ukraine is to settle labour disputes through mediation or quasi-mediation, especially those related to compliance violations.

There are a number of government agencies responsible for supervising and controlling labour law compliance in Ukraine, including 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 the personal data protection area.

II YEAR IN REVIEW

In general, 2018 was quite modest in terms of developments in the employment law area. Largely, various state agencies (e.g., the State Labour Service, the State Fiscal Service) were issuing their official interpretations of the Ukrainian legislation concerning regulation of working time, combining jobs, employee compensation, social protection, employing foreign nationals, vacation, workplace health and safety, and other key employment law issues.
In 2018, Ukraine launched a simplified procedure for a court settlement of labour disputes, in particular reducing the term for hearing labour lawsuits to 60 days maximum. In addition, now the parties may be represented not only by licensed attorneys-at-law but also by employees themselves. Moreover, shareholders and other business owners may seek compensation for damage caused to an employer by a company manager in the commercial courts instead of the courts of general jurisdiction (as it was before).

On 18 July 2018, the Cabinet of Ministers of Ukraine abolished a discriminatory legal provision that required all labour books (official employment record documents) of employees of representative offices of foreign companies in Ukraine to be maintained by special departments of local government bodies instead of their employers.

Another major development affecting all employers is the Order of the Cabinet of Ministers of Ukraine No. 649-p dated 5 September 2018 on Measures Aimed at Unshadowing Relations in the Sphere of Employment of the Population. By this Order, the government instructed various Ukrainian state agencies, including the State Labour Service, State Fiscal Service, Pension Fund and National Police, to perform full audits of Ukrainian employers. The purpose of these audits is to identify undocumented employees (i.e., those employees who have been hired illegally as a means for the employer to pay less tax). These state audits may result in fines for an employer of approximately 111,690 hryvnas per each identified undocumented employee.

III SIGNIFICANT CASES

On 8 January 2018, the Supreme Court of Ukraine issued an important decision in Case No. 362/7161/15-ц clarifying that the reinstatement of an unlawfully dismissed employee to his or her previous job does not affect the employee's right to compensation for moral damages caused by the dismissal.

Significant clarification of the issues related to dismissing company officers as a result of termination of their authorities (e.g., revocation of the chairman of the board of an employer by the general meeting of shareholders) was given in the Resolution of the Supreme Court of Ukraine dated 16 January 2018 in Case No. 760/9269/15-ц. According to the Resolution, the above dismissal ground can be applied only with respect to the officers of joint-stock companies, limited liability companies and other business associations (i.e., not all employers may count on this dismissal ground).

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The employment relationship in Ukraine is established by an employment agreement between an employer and an employee. The employment agreement contains the terms of employment, including the title of the position, a description of the work to be performed by the employee, an obligation for the employee to observe internal labour rules, an obligation for the employer to ensure adequate working conditions and the salary amount for performance of employment duties. The Labour Code provides that employment agreements shall generally be concluded in writing and establishes some specific cases when the employment agreement must be in writing (e.g., with employees under 18 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 on a more frequent basis.
In general, most 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 agreements 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 their employment). It is also possible to enter into an employment agreement ‘until the completion of agreed-upon work’ when it is impossible to determine the period necessary to complete the limited scope of agreed-upon 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 personal reasons.

Ukrainian labour law also provides for a special form of employment agreement called an employment contract, that may be concluded either for a fixed term or for an indefinite period of time. The employment contract, unlike an ordinary employment agreement, contains the following features:

- it allows the employer to establish an employment relationship for a fixed period of time even where the nature and conditions of employment would not ordinarily warrant the conclusion of an employment agreement for a fixed term;
- it may contain reasons for the discharge of an employee in addition to the list of grounds provided in the Labour Code; and
- an employer and an employee may also agree in the employment contract on their additional rights, obligations and liabilities, conditions of remuneration apart from those established by law, provided that such additional terms do not diminish the employee’s rights guaranteed by law.

The use of employment contracts is limited to cases 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, paralegals).

A written employment agreement or contract can be concluded before or on the date of issuing a hiring order by the employer 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 on the hired employees. Failure by the employer to comply with the above statutory requirements may result in administrative liability (up to approximately €530).

In addition, the employer must enter the relevant record in the 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 for the employee, unless he or she belongs to 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, employees working based on the 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 above 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 his or her successful completion of probation. In this case, the terms and conditions of the probationary period must be stated in the hiring order and the employer can dismiss the 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 three-day advance dismissal notice to an employee on probation. On the other hand, the employee is not required to provide the employer with any advance notice of his or her intended departure.

### 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 these companies do not have a permanent establishment (PE) in Ukraine (as discussed below). Foreign companies may also use HR agencies to hire Ukrainians to avoid registration with the Ukrainian tax authorities, in which case these HR 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 amounts and social benefits will only be subject to Ukrainian personal income tax and military tax payable individually by the Ukrainian employee on an annual basis.

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 such 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 such 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 above is valid unless the 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 some 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 the source, unless such benefits are exempt (e.g., maternity leave compensation), as well as the unified social tax and the temporary military tax.

V RESTRICTIVE COVENANTS

A 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 maximum number of working hours of full-time employees cannot exceed 40 hours per week, unless a non-fixed working day (or week) is established 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 a double rate 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 on 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, among others, pregnant women and employees under 18 in night work.

ii Overtime

The general rule is that overtime is not allowed. The Labour Code provides an exhaustive list of exceptions 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 and employees who are also 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. 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 a double 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 for 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. There are, however, 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.

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 on the working permit issuance.

A working permit may be issued for a term of up to three years for: (1) seconded employees; (2) special categories of foreign employees, namely highly paid professionals with a salary of at least 50 statutory minimum salaries (160,000 hryvnas), shareholders or beneficiaries of Ukrainian legal entities, holders of diplomas from the world’s top-ranked universities, and creative and IT professionals; and (3) 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 the same term.

The employer shall enter into employment agreement (contract) with the foreign employee within 90 calendar days upon 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 salary of foreign employees working for public or charity organisations, as well as educational establishments, may not be less than five statutory minimum salaries (16,000 hryvnas) and the salary of all other categories of foreign employees may not be less than 10 statutory minimum salaries (32,000 hryvnas). The minimum salary requirements are not applicable to the special categories of foreign employees.
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. Such 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 the 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 payment to such foreign employee.

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 in 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 site, but the original hard copy should also be kept.

Ukrainian companies often issue other optional internal regulations (e.g., regarding discrimination, sexual harassment, personal data protection) in accordance with their global corporate policies. The Anti-Corruption Law provides for mandatory and optional compliance policies (depending of the employer), as well as establishes a job duty for 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 TRANSLATION

Under the Law on the Framework of the State Language Policy all companies operating in Ukraine can use Ukrainian (the state language), Russian or any other regional or minority
language, as well as any other language as their working language. The Law requires the official documents that certify a citizen’s identity and legal status (passport, labour book, university diplomas, birth and marriage certificates, etc.) to be issued in Ukrainian and one of the regional or minority languages of the citizen’s choice.

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 in case of 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 it is the official document or if it has 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.

There is a risk that the company’s employment-related documentation, if it only exists 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 the foreign language documents (e.g., employment agreement) to protect the rights and legitimate interests of the affected employee.

X EMPLOYEE REPRESENTATION

Ukrainian law provides for trade unions as the only representative bodies of employees at a company level. If there is no trade union established in a company, some of its functions may be performed by the 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 in 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 to establish 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 in a company, for instance, the amendment of the employment agreement or changing the payment terms of an employee who is a trade union member requires the consent of their 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 the employer to 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 related 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 the above issues.

Election procedures, the term of service of the trade union’s representatives, the frequency of trade union meetings and many other issues are regulated by the trade union’s charters.

XI DATA PROTECTION

i Requirements for registration

Under Ukrainian law, the main personal data includes 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 on 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 the new Ukrainian 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 new 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 up to 17,000 hryvnas for each violation and up to three years’ imprisonment for the 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, controllers are no longer required to register their databases containing personal data. If processing of the personal data creates a risk to the rights of the data subjects (risk data), the controller will have to notify the Ombudsman of such processing within 30 business days of the date of the processing. The types of data that constitute risk data are established by the Ombudsman. The risk data includes, but is not limited to, sensitive data (see subsection iii, below).

Considering that under the PDP Law, the 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 the employees’ consent for their data collecting, storing and other processing as well.

The company processing personal data is responsible for ensuring protection of the 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 (policies, regulations, orders, letters of consent, personal data protection clauses in the employment agreements (or contracts), etc.).
ii Cross-border data transfers

The law does not require registration or notification for the cross-border transfer of personal data, unless the data transferred falls into the category of risk data.

It is generally prohibited to transfer personal data to jurisdictions that do not ensure adequate protection of such data (these are all countries except for 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, namely: (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) collection and further processing of personal data is necessary for establishing, exercising or defending a legal claim (e.g., in case of 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, information on 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 the employers. It is advisable for the employer to enter into an agreement with a foreign data recipient requiring imposing an obligation 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 their data transfer, but only where the right to receive such notice was not waived by them at the time of obtaining their initial consent for data processing.

iii Sensitive data

Information related to race, ethnic origin, political, religious and ideological beliefs, political party and trade union membership, criminal prosecution and judgment in a criminal case, biometric and genetic data, as well as medical records and other data related to the health and intimate life of an individual is considered as sensitive data that, in general, cannot be requested and processed, except for in certain cases specifically permitted by law, including when such processing is required by law in the area of employment relationships. The sensitive data of an employee or candidate can be transferred to third parties, including those located abroad, only after the employer obtains consent from the data subject, unless he or she already consented to the transfer of 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 employee. In all instances such 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 the candidate.

The law clearly states which documents can be requested from a candidate or employee for each 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 (credit history, bank statements, etc.).

Personal data protection laws restrict background checks of candidates for a job. It is likely that the candidates’ express consent will be required to justify any collecting,
storing, using, transferring and other processing of the candidates’ personal data, except for information, documents, etc., the provision of which is expressly prescribed by the Labour Code and other applicable laws.

**XII DISCONTINUING EMPLOYMENT**

**i Dismissal**

Termination of an employment agreement at the employer’s initiative is difficult and the employee cannot be dismissed without cause. The employer may dismiss an employee 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 this case 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, as discussed in subsection ii, below. The consent of the company’s trade union is required for the dismissal of each member employee subject to dismissal on this ground (except for the company liquidation);

* b non-compliance by an employee with his or her position owing to inadequate qualification or a health condition interfering with the ability to perform employment duties;

* c systematic 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 such 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 such incapacity was caused by work-related illness or severe injury;

* f if an employee came to his or her workplace drunk or in a narcotic-induced or intoxicated state;

* g resumption of work of another employee who was previously occupying this position;

* h if an employee was found guilty of larceny of his or her employer’s property;

* i if an individual owner has been called up for the 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.

The trade union’s consent is required for dismissal of the trade union member employee 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 the company or its branch, or his or her deputy, chief accountant, his or her deputy and some 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 managing funds or commodities if such action results in the loss of trust in such employee;
d. immoral misconduct of the employee performing pedagogical functions that prevents such employee from further holding this position;
e. working under direct supervision of the close person in the meaning of the Anti-Corruption Law; and
f. termination of the authorities of a company officer.

The trade union’s consent is required for dismissal of the trade union member employee on grounds (c) and (d) above.

It is prohibited to dismiss:

a. employees during their sick leave or vacation (if initiated by the employer);
b. pregnant women, women with children under three, 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 reaching retirement age; or

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 one average monthly salary as a severance payment. The Labour Code also establishes a severance pay due to company officers dismissed because of the termination of their authorities in the amount of their six-monthly average salaries.

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 the 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 such a case, 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, who has long-term experience working at the company, who was disabled during work at the company or developed a work-related disease or who has three years left before reaching the pension age.

The Labour Code also entitles employees dismissed because of redundancy or other changes in the company (except for the company liquidation) to be rehired by the employer within one year of their dismissal if the employer has vacancies for employees with similar qualifications. During the rehiring, priority is given to the above-mentioned 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 the adopted 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 subject to redundancy have to be considered for employment in other available positions.

The State Employment Centre must be provided with at least two months' prior notice of the prospective mass lay-off, stating the grounds for the pending dismissal of the company's employees and the positions, qualifications and salary of each employee.

The categories of employees protected from dismissal, severance and other dismissal payments, and the possibility of the parties to enter into a settlement agreement are discussed in subsection i, above and apply equally to redundancies.

XIII TRANSFER OF BUSINESS

There is no special business transfer law in Ukraine. The general employee guarantees and protections stipulated in the Labour Code apply during 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 the employee dismissal, etc.).

The Labour Code expressly provides that in the event of a change of the company's ownership or a company's reorganisation, the employment agreements with its employees will remain in force. Employees of the seller are entitled to be automatically transferred to the buyer as a change of the target's ownership does not imply that the target ceases to be their employer.
XIV OUTLOOK

It is unlikely that there will be any significant developments in the employment law area in 2019. In general, until a new Labour Code is finally adopted, it is doubtful that Ukrainian employment laws will be dramatically amended. As a result, the State Service on Labour Issues and other state agencies will continue to play a significant role in employment law development, including by officially interpreting ambiguous or contentious legal provisions. The case law of the Supreme Court will continue to be important guidance for parties in employment relationships and their lawyers.
UNITED ARAB EMIRATES

Iain Black, Catherine Beckett and Anna Terrizzi

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 Abu Dhabi Global Market (ADGM), which have both enacted their own employment laws: DIFC Law No. (4) of 2005 as amended by Employment Law Amendment Law No. (3) of 2012 and the ADGM Employment Regulations 2015. 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 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 cannot be contracted out of.

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 Ministry of Human Resources and Emiratisation’s role 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 Committee at the Ministry of Human Resources and Emiratisation 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.

1 Iain Black and Catherine Beckett are partners, and Anna Terrizzi is an associate, at Dentons.
The courts in each emirate will 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 2018. The regulations issued in 2018 and over the past few years by the Minister of Human Resources and Emiratisation (see Section XIII) have focused on the employment of Emiratis in the UAE.

On 20 February 2018, the DIFC launched a consultation on a proposed new employment law applicable in the DIFC. The draft law proposed a number of changes to the existing DIFC employment regime, including the following:

a expanding the scope of the anti-discrimination provisions to include discrimination in respect of age, pregnancy and maternity, as well as clarifying the penalties applicable to those found to be in breach of the anti-discrimination provisions;

b introducing a concept of constructive dismissal; and

c the right to limited paternity leave and the statutory right to time off to attend antenatal appointments for expectant fathers.

The consultation closed in March 2018 but, at the time of writing, no new employment law has been issued in the DIFC.

III BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The Labour Law requires that employers and employees enter into a written contract. If the parties fail to enter into a written contract, 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, while 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 with detriment to 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.

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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 above 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. Such 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, as mentioned
above. Such 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 such independent contractor is established and licensed to perform such work in the UAE. The independent contractor should not, however, present itself as an employee of the foreign company. Establishing 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 Emiratisation. 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 Emiratisation.

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 some 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. As explained above, 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 Emiratisation 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 Emiratisation. As to judicial enforcement, local courts rarely order specific performance under contracts. There have been no recent cases where 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. Such 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
in practice the proper payment of the end of service gratuity, although 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 of 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 such 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.
If, however, 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 of 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
the employees from manipulation in 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 past
few years in the UAE 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 foreigners and in some emirates the number of foreigners amounts to 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 to Arab nationals and then to other nationalities. Nevertheless, demand is such that these requirements often are not implemented in practice.

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 has a section dedicated to disciplinary rules. Under the Labour Law it is not required that employers have their own disciplinary rules, and 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. The Order provides that any new disciplinary rules must be approved by the Ministry of Human Resources and Emiratisation before they come into effect. The disciplinary rules must be in Arabic (and, if necessary, in any other language) and must be fixed in an appropriate place. The law does not specify what an appropriate place is but it is understood that the same must be made available to employees. Notification of the disciplinary rules to the employee, or their incorporation in the employment contract, is not a legal requirement but is recommended as best practice.

VIII 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 the 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.
In the case of collective disputes, the Labour Law provides for a procedure to settle such disputes that 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.

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 a requirement for certifying or notarising translation 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  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 related to their employees, but it requires employers to maintain records and files related to each employee. This is in line with the absence in the Labour Law of provisions on the protection of privacy and personal rights of employees, and in general with the absence of a law devoted to data protection in the UAE. Apart from a DIFC law on data protection (which only applies within the DIFC), 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 and 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.

XI  DISCONTINUING EMPLOYMENT

i  Dismissal

In the UAE, an employer 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 was 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 in order 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 such reasons. In the case of foreign workers, employers must inform the immigration authorities of the termination, but not its 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 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 on an individual, rather than collective, basis.

XII 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, 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 the transfer of business is significant to employees’ status, the Labour Law does not require the consent of employees to the transfer but 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 impact each would have on the employees’ status.

i  Transfer of business with acquisition of the commercial licence (no change in the name of employer)

Examples of this transfer are buying the shares of a limited liability company or acquiring the parent company of a branch. In such case, employment contracts of employees remain in force and no consent is required to be obtained from the employees on the transfer unless the new owner wishes to make changes to their contracts, in which case it is mandatory to obtain the employees’ consent on an individual basis.

ii Transfer of business without acquisition of the commercial licence (name of employer is changed)

There are two possible options in this 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 old 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, on an individual basis, the work permit and employment visa of each employee after making the necessary changes to their employment contracts, 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.

XIII 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 discussed above.

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 over the past few years and face the challenges of the years to come. A new Labour Law must include, inter alia, provisions on: 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 of 2016 concerning the protection of wages (see Section V.iii). Further protection for employees came in the form of Ministerial Resolution No. 591 of 2016 concerning the commitment of establishments to provide accommodation to 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. Furthermore, 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 looking to work in the private sector was further strengthened with the promulgation of Ministerial Decree No. 212 of 2018 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 the following:

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 termination of UAE nationals.

In addition to the trends under the federal labour regime, the new DIFC Employment Law is expected to come into force in 2019, bringing with it some important changes to the employment regime applicable in the financial free zone (see Section II).
I INTRODUCTION

i The employment relationship
In the United Kingdom, the employment relationship is primarily an individual relationship between an employer and employee. The relationship is determined by a combination of the following: the underlying contract of employment between the employer and the employee; common law principles (such as the duty of care owed by an employer to an employee); and, most significantly, statutory rights and obligations, which cover, among other things, protection against dismissal, discrimination, minimum pay, working hours and holidays. As a common law jurisdiction, the interpretation of all these elements is largely a matter of case law.

There are also statutory (and to a lesser extent) common law provisions in respect of collective rights, such as those relating to industrial action, trade union rights recognition and even works councils. However, a decline in trade union membership together with the fact that statutory rights have predominantly focused on the individual, means that in the UK the employment relationship is far more focused on individual rather than collective rights: the role of employee representative bodies, although influential in the public sector and certain industries, is less of a factor than in many other European jurisdictions.

ii Jurisdiction to determine employment disputes
In the UK, specialist employment courts, known as employment tribunals, have exclusive jurisdiction to resolve most individual claims arising out of statutory employment rights. Employment tribunals only have very limited scope to hear employment disputes that do not relate to statutory claims. As such, many employment-related contractual disputes are resolved by general civil courts, including disputes about restrictive covenants and high-value bonus disputes.

There is also a specialist tribunal, the Central Arbitration Committee, responsible for resolving disputes about the recognition of trade unions and other employee representative bodies.

Finally, under UK law, there is scope for a company to seek to enjoin a strike and other forms of industrial action. Such action must be brought before general civil courts. The grounds for enjoining industrial action are generally based on a failure by a trade union to comply with procedural requirements (rather than any judicial determination on the merits of the dispute).
iii Key employment rights

In the UK, employees enjoy the following statutory employment rights (in addition to rights provided for in their contracts of employment).

Unfair dismissal

This is a statutory right not to be ‘unfairly dismissed’ (see further below).

Protection against discrimination because of protected characteristics

The Equality Act 2010 brought together and restated previous statutory provisions outlawing discrimination based on certain characteristics (protected characteristics). The protected characteristics are:

- age;
- nationality, race or colour;
- disability;
- gender reassignment;
- marital or civil partnership status;
- pregnancy and maternity;
- religion or belief;
- gender or gender identification; and
- sexual orientation.

Family-friendly rights

These include rights in respect of:

- paid adoption, maternity and paternity leave and shared parental leave for babies due or placed with them for adoption on or after 5 April 2015;
- parental leave (broadly an entitlement to up to 18 weeks’ unpaid time off per child); and
- rights to request flexible working.

Protection of atypical workers

Part-time, fixed-term and agency workers all have rights that prevent them being treated less favourably than full-time, permanent employees especially in respect of their rate of pay and the benefits to which they are entitled.

Pay, hours and holiday

Employees (and other workers) enjoy rights to minimum rates of pay (see further below). There are also statutes relating to the number of hours that can be worked, breaks between work and paid holiday entitlement (see further below).

Protection against whistle-blowing

Employees and other workers enjoy the right to be protected against both detriment and dismissal by reason of being whistle-blowers.

Collective rights

There are detailed statutory provisions pertaining to: the rights of trade unions to be recognised; the circumstances in which industrial action is lawful; and the rights to establish domestic
and European works councils (although little used). In addition, recognised trade unions have the rights to be informed and consulted, including in relation to collective redundancies, transfers falling under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) (see Section XIII) and certain changes to pension arrangements.

II YEAR IN REVIEW

Brexit has continued to dominate the headlines and Parliament’s attention. The UK gave formal notice to leave the EU on 29 March 2017. Last year we wrote in Section XIV that in 2018 we expected more clarity as to the type of relationship the UK will have with the EU and the impact that EU law will have on UK law, including any transitional arrangement and future trade deal. However, we are compelled to repeat this for 2019. At the time of writing, it is clear that no future trade deal will be struck in the immediate term, and it remains unclear if the UK will exit the EU on 29 March 2019, with the current withdrawal agreement (a document that sets out how the UK will exit the EU but does not include details as to the UK and EU’s continuing relationship) still to be agreed and Parliament divided on the approach to take to Brexit.

The legislation that had most impact in 2018 was the General Data Protection Regulation ((EU) 2016/679) (GDPR), which came into force in May (see Section XI). The UK’s Data Protection Act 2018 (DPA 2018), which repealed the prior legislation and supplements, incorporates the GDPR into UK law such that it will remain the law after Brexit. The GDPR brought about a range of changes that increase protections of individuals with respect to their data, including additional and broader data subject rights, such as rights of access to erasure and to portability. It has kept all businesses occupied in developing and implementing data protection compliance strategies to ensure their businesses are ready for dealing with the increased obligations set out under the GDPR. The attention that businesses have given to the legislation is also in part owing to the dramatic increase in the maximum applicable fine, which is now the higher of €20 million or 4 per cent of annual worldwide turnover. However, businesses also need to be mindful of individual and collection actions.

III SIGNIFICANT CASES

Personal data protection was a particular focus of 2018 because of the GDPR. One of the most important decisions in 2018 that caused concern for employers was that of Wm Morrison Supermarkets Plc v. Various Claimants. In this case an employee had misused personal data belonging to 100,000 of Morrisons’ employees. The actions of the employee were criminal as the employee intended to cause harm; however, Morrisons was held vicariously liable for the employee’s actions. In response to the arguments advanced by Morrisons, the Court of Appeal considered that Morrisons should have had insurance in place to cover the liability and found that there was an unbroken chain of events meaning that the supermarket chain could be held vicariously liable. The motive of the wrongdoer (here the employee wanted to damage Morrisons deliberately) did not have a bearing as to whether Morrisons could be

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2 [2018] EWCA Civ 2339.
held vicariously liable. We understand Morrisons intends to appeal to the Supreme Court. However, the case shows the beginnings of what could become increased class action claims, particularly as these are expressly permitted by the GDPR.

There were also cases concerning individuals working in the gig economy and whether individuals are truly self-employed or whether they are, in fact, workers (which means they would have working time rights and the right to holiday pay). Regarding the latter, various cases over the past few years have held that the individuals in question are in fact workers. The cases continued this year. In Pimlico Plumbers Ltd and Mullins v. Smith, the UK Supreme Court confirmed the judgment of the Employment Tribunal, the Employment Appeals Tribunal and the Court of Appeal, in which Mr Smith as a plumber was named a ‘worker’ within the meaning of Section 230(3) of the Employment Rights Act 1996 and Regulation 2(1) of the Working Time Regulations 1998, and had been in employment for the purposes of Section 83(2) of the Equality Act 2010. Mr Smith’s contract was the key element as there were tight controls over the administrative instructions of the control room regarding his job: he had to carry a Pimlico identity card, drive a Pimlico branded van and wear a Pimlico uniform. There were also strict terms as to when and how much Pimlico was obliged to pay him. Similarly, the prior decision in Addison Lee Ltd v. Mr C Gascoigne (that drivers were workers) was upheld. The current law does not adequately account for the multifarious flexible arrangements, and so it is expected that the forthcoming legislation will deal with this uncertainty (see Section XIV).

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Although there are no formal requirements for a signed contract of employment, there is a statutory requirement for many of the main terms of employment (such as the identity of the employer, pay, working hours, holiday, sick pay, pension, notice period, job title and place of work) to be provided to an employee in writing.

Given these requirements, most employees are employed under a written contract of employment that is signed by both the employer and employee.

The starting point for amending a contract of employment will be through the explicit consent of the parties to that contract, albeit that this does not need to be by way of a formal amendment to a written contract of employment. In some circumstances consent can be implied by conduct.

ii Probationary periods

Probationary periods are lawful and there are no express provisions limiting the length of a probationary period or extending a probationary period or providing for shorter notice periods during a probationary period (which commonly occurs where there is a contractual notice period). However, employers must provide employees with the statutory minimum period of notice at all times (which is one week up to the first year of service and thereafter increasing by one week per completed year of service up to a maximum of 12 weeks). In

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addition, in most cases, employees only have rights not to be ‘unfairly dismissed’ if they have at least two years’ continuous service, which will often mean that those on probation do not generally enjoy this right.

iii Establishing a presence

Absent industry-specific regulation to the contrary, an overseas company can hire employees or engage an independent contractor in the UK without being officially registered to carry on business, whether through an agency or another third party. Nonetheless, such hiring triggers certain obligations including in respect of corporate tax if the hiring of an individual creates a permanent establishment (PE) and payroll obligations (regardless of whether a PE is created), such as a requirement to make withholdings for income tax and social security which must be deducted at source.

The mere hiring of an individual (whether as an employee or a contractor) will not of itself create a PE. Rather, the key issue will be whether such an individual has, and habitually exercises in the UK, authority to do business on the company’s behalf and that individual is not of independent status acting in the ordinary course of its business. So for example, where an independent contractor genuinely does not have power to bind a company, this will be one factor (albeit not determinative) that militates against there being a PE. If there is a PE, then the relevant entity must file a corporate tax return annually and, will (broadly) be subject to corporation tax on its profits, to the extent that those profits are attributable to the company’s UK PE.

V RESTRICTIVE COVENANTS

During employment, an employer has broad powers to prevent an employee from working for anyone else, whether or not that other person is a competitor.

After the termination of employment, contractual provisions restraining the ability of employees to compete are enforceable provided that: they protect the legitimate interests of the business seeking protection (and in this context, ‘legitimate interests’ has been interpreted to mean customer connections, confidential information and the stability of the workforce); and they are no wider than reasonably necessary to protect those interests, particularly having regard to the scope of the restraint, the sufficiency of lesser restraints and the duration of the restraint.

When determining whether a restraint is enforceable, it will be judged at the time it was entered into (and not the time at which it is being enforced). Moreover, even if a restraint is enforceable in principle, the decision as to whether to grant injunctive relief to enforce it is a matter for the discretion of the court.

Significantly, there is no requirement for an employer to pay an employee in respect of a restrictive covenant. Indeed, even if an employer chooses to pay an employer in return for a period of restraint, this is not a factor that has an impact on the enforceability of the restraint.

In addition, where an employer has dismissed an employee in repudiatory breach of their contract of employment (such as a dismissal without giving notice in breach of contract or a constructive dismissal), any restrictive covenants will fall away.

It is common for contracts of employment, especially for more senior employees, to contain restrictive covenants ranging from provisions preventing the solicitation of employees and customers through to provisions preventing an employee competing.
It is also common for contracts to contain gardening leave provisions, which give employers a right to require that an employee does not carry out any work or have any contact with employees or clients for the duration of their notice period. Gardening leave provisions are generally enforceable, albeit that because the employment relationship continues during any period of gardening leave, in most cases, an employer is required to continue to pay an employee during that period, save where an employee refuses a reasonable request to come to work (see *Sunrise Brokers LLP v. Rodgers*).

**VI  WAGES**

**i  Working time**

The Working Time Regulations 1998 contain provisions limiting working hours and providing entitlements to rest breaks and holidays.

In broad terms, the legislation provides as follows:

*a* individuals should not work more than 48 hours per week unless an individual has opted out of this limit or is an autonomous decision maker (such as a senior executive);

*b* the normal working hours of a night worker should not exceed eight hours a day on average;

*c* no night worker doing work involving special hazards or heavy physical or mental strain should work more than eight hours in any day;

*d* workers should be given ‘adequate’ rest breaks where the pattern of work puts health and safety at risk, especially where work is monotonous;

*e* workers are entitled to the following rest periods:

1. 11 hours’ uninterrupted rest a day;
2. 24 hours’ uninterrupted rest a week (or 48 hours’ uninterrupted rest a fortnight); and
3. a rest break of 20 minutes when working more than six hours a day; and

*f* workers are entitled to 5.6 weeks’ paid holiday per year inclusive of public holidays (which equates to 28 day per year for a full-time worker).

**ii  Overtime**

There are no specific requirements pertaining to overtime. As such, subject to an employer complying with minimum wage legislation (which requires employers to pay employees the national living wage of £7.83 an hour for those aged 25 and over, and the following minimum wage rates: £7.38 an hour for those aged over 21, £5.90 an hour for those between 18 and 20, and £4.20 an hour for those under 18), an employee’s entitlement to overtime and the rate of overtime pay is a matter that is solely determined by their contract of employment. In addition, as noted above, the issue of whether overtime worked and commission paid should be included in holiday pay calculations is an area that has become increasingly complex following recent decisions.

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5 [2014] EWCA Civ 1373.
VII FOREIGN WORKERS

It is a criminal offence to employ an individual who is subject to immigration control and who has not been granted leave to enter or remain in the UK, or does not have permission to work in the UK. Employers should (before allowing a job applicant to start work) require the person to produce documentary evidence indicating that he or she has the right to work in the UK, and keep copies of the documents. If an employer knowingly employs someone who does not have permission to work in the UK, it could be prosecuted. The offences, sanctions and penalties have been widened and increased under the Immigration Act 2016.

Employers have a duty to conduct follow-up checks on employees whose employment began on or after 29 February 2008 where, at the time of recruitment, the employees in question have been granted only limited leave to remain and work in the UK. A follow-up check will normally be required when an employee’s permission to live and work in the UK expires.

Citizens of any country in the European Economic Area (EEA) and of Switzerland are currently entitled to work in the UK without special permission.

Non-EEA nationals generally require a licence before they are legally allowed to work in the UK. Since 2011, the UK Border Agency has imposed limits on the number of individuals who may enter the UK under the most common tier used by employers, based on a points system.

There are various changes to the immigration rules being put into force in light of Brexit.

VIII GLOBAL POLICIES

There is no requirement for employers to have particular policies in place, nor any prescribed form that such policies should take, with the exception that all employers with five or more employees are required to have a written health and safety policy. However, it is both normal and best practice for employers to have employee handbooks, which contain rules and policies on a broad range of issues, ranging from disciplinary and grievance procedures to equal opportunities.

The failure of an employer to have a policy on certain topics, such as outlawing discrimination and harassment or outlawing bribery and corruption, can create significant problems because it would be viewed as failure to have complied with duties that an employer owes to prevent such unlawful conduct.

In general, most provisions contained in handbooks are expressed to be non-contractual unless explicitly stated otherwise, even though they govern how issues are dealt with in the workplace. It is best practice for employers to make handbooks readily available (whether through the intranet or in hard-copy form) and to require employees to read handbooks and to provide evidence that they have done so and agreed to them (e.g., by sending an email confirming they have done so).

There is no requirement to file handbooks with any government authorities or to agree with any employee representative bodies.

IX TRANSLATION

There is no specific requirement for documents to be in any particular language under the laws of the United Kingdom.
X EMPLOYEE REPRESENTATION

There are no mandatory requirements for employers to have employee representative bodies in place. However, there are relatively complex procedures in places that require employers to recognise trade unions or to establish works councils (the latter has practically never been relied upon) if there is sufficient employee support for such representation.

Where employee representatives are in place, they have rights to be informed and consulted, including in relation to TUPE, where 20 or more employees are being made redundant and certain changes to pension arrangements.

Employee representatives also enjoy protection against being treated less favourably by reason of their status.

XI DATA PROTECTION

As set out in Section II, one of the biggest changes in 2018 was the implementation of the GDPR and DPA 2018.

Data protection law applies whenever a data controller processes personal data. A data controller is the person who determines the purposes for which, and the manner in which, any personal data is, or is likely to be, processed. The term ‘processing’ has a very broad meaning under the GDPR. It is intended to cover any conceivable operation of data, ranging from collecting, recording and holding of data, and the carrying out of any operation on that data through the data’s subsequent disclosure and eventual destruction.

i Personal data

Personal data is that which relates to a living individual who can be identified from the data; or from the data and other information that is in the possession of, or is likely to come into the possession of, the data controller.

ii Restrictions on processing and use

The processing of personal data must comply with seven key data protection principles as contained in the GDPR. These can be summarised as follows:

a. personal data must be processed fairly and lawfully, and transparently;
b. personal data must be collected only for specific, explicit and legitimate purposes;
c. personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed;
d. personal data must be accurate, and where necessary, kept up to date;
e. personal data shall not be kept for longer than is necessary for those purposes;
f. appropriate technical and organisational measures must be in place to protect against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and

g. organisations must take responsibility for complying with the data protection principles, and must have appropriate processes and records in place to demonstrate compliance.

The GDPR and DPA 2018 contain a number of exemptions from some or all of the data protection principles and other provisions, such as for processing concerning the detection of a crime or the assessment of taxation, or where information must be made public by law.
iii Registration

Data controllers must generally notify the UK Information Commissioner’s Office (ICO) by registering with it. The ICO then publishes its details in the register of data controllers, which is available online for inspection by the public. There are limited exceptions to the need to register including when the personal data is held for payroll purposes, for tax collection or for salary surveys. There is a fee involved with this registration of between £40 and £2,900, depending on the size of the business in terms of employee numbers and turnover.

iv Cross-border data transfers

If personal data is transferred outside the UK, there are restrictions. Transfers may be made to any country or territory:

a in respect of which the EU Commission has made a positive finding of adequacy;
b if adequate safeguards are put in place in the form of model contractual clauses as approved by the EU Commission, binding corporate rules or other contractual arrangements; or
c if the transfer is covered by the EU–US Privacy Shield.

Until October 2015, another option was for the US recipient of the data to sign up to the US Department of Commerce Safe Harbour scheme. However, in the decision of the European Court of Justice (ECJ) in Maximillian Schrems v. Data Protection Commissioner,6 the EU–US Safe Harbour framework was found to be invalid. The replacement for Safe Harbour, the EU–US Privacy Shield, came into force on 1 August 2016. The EU Commission has stated that the ‘new arrangement lives up to the requirements of [the ECJ in Schrems]’. It includes obligations on companies handling data, safeguards and transparency obligations on US government access, and protection of individual rights. However, it does not address all of the concerns raised by other notable interested parties, including the Article 29 Working Party (a group that contains representatives from each of the EU Member States’ data protection authorities). Nevertheless, an Irish privacy advocacy group, Digital Rights Ireland, has already filed a legal challenge against the Privacy Shield, asserting that it provides inadequate protections.

In addition, in relation to the standard contractual clauses and binding corporate rules, there are pending ECJ decisions that may impact the validity of these methods of transfer. With regard to the standard contractual clauses, Max Schrems, who brought the case that ultimately brought down Safe Harbour, is now challenging the standard contractual clauses on a similar basis. There has been a reference made on this from the Irish Data Protection Commissioner to the ECJ.

While this uncertainty remains, there is still no risk-free method for data transfers to the United States. In addition, depending on the type of Brexit deal, there may be additional steps required to transfer data to EU countries from the UK, and from the UK to other third countries.

v Special category personal data

Special category personal data (referred to under the prior legislation as sensitive personal data) is defined in the DPA 2018 as personal data consisting of information as to:

a racial or ethnic origin;

6 Case C-362/14, 6 October 2015.
Political opinions;
religious beliefs or beliefs of a similar nature;
membership of a trade union;
physical or mental health or condition;
sexual life;
the commission or alleged commission of any offence; or
genetic and biometric data.

There are also additional protections for criminal offence data. Special category personal data can only be processed (fairly and lawfully) if at least one of a number of additional conditions is satisfied, which include the following:

- the individual has given his or her explicit consent to the processing;
- the processing is necessary for the performance of the data controller’s obligations under employment or social security law;
- the processing is necessary to protect the vital interests of the data subject (where consent cannot be given by the data subject or cannot reasonably be obtained by the data controller) or of another person (where consent by the data subject has been unreasonably withheld). This is interpreted as a life-or-death circumstance;
- the processing is necessary for the purpose of legal proceedings, obtaining legal advice, establishing or defending legal rights, or for the administration of justice or the exercise of functions of a public nature; and
- the processing is carried out by a health professional and is necessary for medical purposes.

Background checks

Background checks and credit checks are permitted in the UK provided that the employer complies with the DPA 2018. An employer may ask a successful candidate for details of their criminal record but the candidate will only be required to provide the information in two scenarios, namely, if the conviction is unspent (i.e., if the statutory time since the conviction has occurred has not yet expired) or if the job falls within the Disclosure Barring Service’s list of regulated professions. This list includes: medics, lawyers, accountants, vets, chemists and opticians; those employed to uphold the law (such as judges and officers of the court, the police, prison officers and traffic wardens); certain regulated occupations (in particular, financial services); those who work with children, provide care services to vulnerable adults or who provide health services; and those whose work means they could pose a risk to national security.

DISCONTINUING EMPLOYMENT

Dismissal

A termination will be lawful if it is in accordance with both an employee’s contract of employment and statutory provisions protecting employees against dismissal.

As to contractual provisions, most contracts provide that an employer is entitled to dismiss an employee for any reason provided that an employer provides an employee with the notice of termination stipulated by the contract, or, where expressly permitted by the contract, the employer makes a payment in lieu of that period of notice.
As to statute, employees have a statutory right not to be ‘unfairly’ dismissed. The essence of the right is: (1) a dismissal has to be reasonable (the test being it cannot be something that a reasonable employer would not do); (2) it has to be for one of five potentially fair reasons (which are conduct, capability, redundancy, breach of a statutory restriction and the catch-all ‘some other substantial reason’); and (3) it must be carried out using fair procedures.

Where a dismissal is unfair, an employee is entitled to compensation based on: (1) a compensatory award (essentially damages for loss of earnings flowing from the unfair dismissal) that is capped at the greater of £83,682 or one year’s salary; (2) plus a basic award based on years of service, which is capped at £15,240. The cap on compensatory awards does not apply in certain circumstances, including where a dismissal is because of whistle-blowing, discrimination, raising health and safety issues or trade union membership or activities. Employees have no rights to be rehired (save in the case of redundancy – see subsection ii, below), and although reinstatement or re-engagement is a theoretical alternative remedy to damages, in reality, employees never seek this, nor is such remedy ordered by employment tribunals.

There are no obligations to notify any governmental or employee representative bodies about dismissals, except in the case of collective redundancies (see subsection ii, below).

It is common for employees and employers to enter into settlement agreements in connection with a dismissal under which an employer agrees to make a payment to an employee in return for an employee waiving their rights against the employer. Such agreements must meet certain conditions in order for an employee’s claim to be waived, including a requirement for an employee to have obtained independent legal advice as to the effect of the settlement agreement on their statutory employment rights.

ii Redundancies

Redundancy is a potentially fair reason for a termination. There is a redundancy situation where an employer has ceased (or intends to cease) to carry on the business for which the employee was employed, or if the requirements of the business for the employee to do work of a particular kind or in a particular place have ceased or diminished (or will cease or diminish).

For a redundancy to be fair an employer must identify an appropriate pool for selection, consult with the individuals in that pool, apply objective selection criteria to those in the pool and consider suitable alternative employment where appropriate.

When 20 or more redundancies are proposed within the same establishment within a period of 90 days, additional obligations exist.

An employer is required to consult with employee representatives ‘in good time’ before the first dismissal takes place (which must be a minimum of 30 days where there are fewer than 100 redundancies and 45 days where there are 100 or more redundancies). The obligation requires employers to provide specific information to employee representatives and consult with them in good faith with a view to reaching agreement.

In addition, employers must notify the Secretary of State about the redundancies. Notification must be received by the Secretary of State at least 45 days before the first dismissal, where the employer proposes to dismiss 100 or more employees within a 90-day period. Where fewer than 100 redundancies are proposed, the notification period is 30 days.
XIII TRANSFER OF BUSINESS

TUPE implements an EU directive that is designed to protect the employment rights of employees working in a business whose assets are transferred (rather than one that is sold by way of share sale).

The main impact of the legislation is that the contracts of employees working in the transferred business automatically transfer from the transferor (usually the seller of a business) to the transferee (usually the acquirer of the business). It is intended to protect conduct such as the transferee offering new terms and conditions of employment to the transferring employees that are less favourable than those they enjoyed while working for the transferor.

TUPE applies where there is either:

a business transfer, which is the transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity; or

b a change in service provider, for example a client engaging a contractor to do work on its behalf, reassigning such a contract or bringing the work in-house.

If TUPE applies, there are a number of key consequences:

a Anyone employed by the transferor in the ‘organised grouping of resources or employees’ immediately before the transfer automatically becomes the transferee’s employee on their existing terms of employment (including pay) and without a break in their period of employment. This includes employees who are dismissed before the transfer, but for a reason connected with it which is not an ‘economic, technical or organisational reason entailing changes in the workforce’ (often called an ETO reason).

b All rights, powers, duties and liabilities under the employment contracts pass to the transferee.

c Any changes to the employees’ terms will be void if the sole or principal reason for the change is either the transfer itself or a reason connected with a transfer, which is not an ETO reason.

d Any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself or a reason connected with the transfer that is not an ETO reason.

e Employees may refuse to transfer (known as objecting), but the effect is to terminate their employment without any right to compensation.

f Both parties must inform and, if they propose any ‘measures’, consult representatives of their own affected employees in relation to the transfer. If they fail to do so, an employment tribunal can award up to 13 weeks’ actual pay for each affected employee.

g The transferor must also provide the transferee with certain information about the transferring employees (employee liability information) not less than 28 days before the relevant transfer takes place.

Some of the above provisions are relaxed if the transferor is insolvent.

XIV OUTLOOK

Brexit was a prominent part of our review of 2018, and will continue to dominate the headlines in 2019. In addition, we expect to see the start of enforcement action under the GDPR and DPA 2018, which should provide an indication as to the level of fines that
will be imposed. We also expect to see employees in particular make more use of their data subject rights. We could also see increased individual and class actions given the language that permits them under the legislation as noted in Section III.

The government has announced legislation that will give employed parents a statutory right to two weeks' time off in case of the death of a child under the age of 18 (including a stillbirth after 24 weeks). The legislation will come into effect in 2020.

As noted in Section III, the gig economy remains a hot topic in the UK. As part of the consideration of the employment issues surrounding this topic and following 'Good work: the Taylor Review of Modern Working Practices' (the Taylor Review), which was published in July 2017, the government embarked upon four consultations in 2018. In December 2018, the government finally published its proposals on this topic, which focus on the protections for agency workers, zero-hours workers and other workers with atypical working arrangements. The key proposals include the following:

- Tax and employment frameworks for determining employment status will be aligned, in particular to provide further clarity on the employment status tests to reflect modern working relationships.
- Workers will have the right to request a more stable contract.
- The government will put in place measures to track both the quantity and quality of work.
- Employers will not be permitted to make deductions from staff tips.
- Workers will be entitled to receive a written statement of rights at the start of their engagement. This would cover sick leave eligibility, pay and details as to paid leave entitlements.
- Enforcement protections and penalties will increase, including a new single labour market enforcement agency.

There is no timetable for these reforms, but we would expect some movement on draft legislation during the course of 2019 given this announcement.
I INTRODUCTION

The employment relationship in the United States is governed by a number of overlapping federal, state and local laws. According to the United States Constitution, federal law is a higher authority than state or local law, and will often pre-empt state and local laws when such laws deal with the same subject. That said, in cases where state and local laws provide greater protection of employees’ rights, the greater of the federal, state and local protections will often apply.

These overlapping laws govern the creation of an employment relationship, the substance of that relationship and the termination of that relationship. Most of these laws, however, are prohibitory. For example, an employer may not make hiring or termination decisions based on an individual’s protected characteristic (e.g., age, race, gender, religion). But the law does not dictate whom the employer must hire. Most details regarding the terms and conditions of the employment relationship are left to private agreement between employer and employee. Without an unlawful motive (e.g., discrimination based on a protected category) or a contract providing for employment for a definite duration, the employment of non-unionised employees in the US is generally ‘at will’, which means that either the employer or the employee is at liberty to terminate the employment relationship at any time, with or without advance notice or cause. Certain exceptions exist, as discussed below.

Employment-related lawsuits can be brought in federal or state court. Certain employment contracts may require arbitration or mediation of disputes, while others (such as collective bargaining agreements (CBAs)) may specify detailed grievance mechanisms for the handling of employment disputes. A number of federal and state government agencies also regulate aspects of the employment relationship. For example, the National Labor Relations Board (NLRB) will hear and rule on cases that implicate laws related to collective bargaining and unions in the United States. The Equal Employment Opportunity Commission investigates complaints of discrimination on a federal level, while agencies such as New York State’s Division of Human Rights do the same on a state level. Many federal whistle-blowing laws are governed by the United States Department of Labor (DOL), which, like the NLRB, has its own set of judges (administrative law judges) and appeals process. In many cases, employees must first bring their claims to the appropriate governmental agency (and within a specific time frame) before attempting to file a lawsuit in court. Failure to do so can prevent the employee from having his or her complaint heard in court.

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II YEAR IN REVIEW

The main drivers of change in employment law throughout 2018 continued to be state and local legislatures, and federal agencies. The United States Congress, which was controlled by Republicans, passed no new national employment laws of note.

i Upcoming changes to the Fair Labor Standards Act overtime regulations

On 23 May 2016, under the administration of President Barack Obama, the DOL issued new overtime regulations intended to raise the minimum salary threshold required to qualify for certain exemptions from the minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA). The new minimum salary for exempt status was to more than double the minimum from US$455 a week to US$913 a week (US$47,476 annualised). The new rule was also to increase the threshold for exemption as a ‘highly compensated employee’ from US$100,000 to US$134,004 per year.

The regulations were due to take effect on 1 December 2016. However, on 22 November 2016, a federal judge in Texas preliminarily enjoined the new overtime rule on a nationwide basis, blocking it from taking effect on 1 December 2016. In its decision, the court noted that nothing in the FLSA indicates that Congress intended the DOL to define the exemptions with respect to a minimum salary level – only with respect to duties – and that, consequently, the new rule is ‘unlawful’.

On 31 August 2017, the Texas federal court granted the plaintiff’s motion for summary judgment and declared the regulations to be invalid, ending the case at the lower court level. The court’s reasoning was similar to its reasoning in the order granting the preliminary injunction. In October 2017, the DOL announced that it would appeal the Texas federal court’s ruling to the Fifth Circuit Court of Appeals.

Separately, on 26 July 2017, the DOL announced that it was seeking public comment regarding the overtime regulations, with the suggestion that it is likely to propose a new version of the regulations. On 7 November 2017, at the DOL’s unopposed request, the Fifth Circuit Court of Appeals announced that it would hold the DOL’s appeal in abeyance pending the outcome of the DOL’s revised regulations.

Now under the administration of President Donald Trump, the DOL has been less aggressive in raising wages. The comment period for a new proposed overtime rule ended in September 2017 and since then, the DOL has repeatedly delayed its announced deadline for releasing a final rule. In its Spring 2018 Regulatory Agenda, however, the DOL formally announced its intention to issue a Notice of Proposed Rulemaking in January 2019 ‘to determine what the salary level for exemption of executive, administrative, and professional employees should be’. The new rule would likely increase the minimum salary for exemption to something between US$30,000 and US$35,000, which is considerably lower than the level proposed by the Obama administration. It would also be significantly lower than some state law minimum salaries for exemption. For example, New York’s minimum salary for exempt executive and administrative employees increased to US$58,500 for large employers in New York City at the end of 2018.

ii NLRB proposes new rule to clarify joint-employment standard

For the past 30 years, the NLRB has held that two companies would only be considered joint employers if they shared or co-determined those matters governing the essential terms and conditions of employment, and actually exercised the right to control. In its 2015
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Browning-Ferris decision, the NLRB renounced this test and eliminated the requirement that the employer actually exercise control over the employees. Instead, the NLRB ruled that employers need only retain the contractual right to control, and that indirect control, such as through an intermediary, would be sufficient to find joint employment. In its 2017 Hy-Brand Industrial Contractors, Ltd decision, the NLRB reversed its position again and reverted to the old standard. However, in February 2018, the NLRB vacated its decision in Hy-Brand Industrial Contractors, Ltd based on allegations that one of the board members had a conflict of interest.

On 5 June 2018, the NLRB announced that it would soon start the rule-making process to clarify the current joint-employment standard. Writing in response to several United States senators who had questions about this announcement, Chairman John Ring stated that a majority of the board is ‘committed to engage in rulemaking’. On 14 September 2018, the NLRB published a notice of proposed rule-making (NPRM) regarding the standards for joint employment. Under the proposed rule, an employer may be found to be a joint employer of another employer’s employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment, and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship.

On 28 December 2018, the United States Court of Appeals for the District of Columbia Circuit issued a decision upholding in part and rejecting in part the Browning-Ferris standards for determining joint employment. In light of this federal appellate decision, in Browning-Ferris Industries of Cal, Inc v. NLRB, the NLRB extended the time for the public to submit comments regarding the NPRM to 28 January 2019.

### iii State and local legislatures passed several new laws affecting employers

Employers must also be aware of new statutes affecting employees in particular states and cities. In particular, several states and cities, including New York, Washington, Arizona, Rhode Island, Vermont and the District of Columbia, passed or enacted laws since 2017 providing paid leave for medical and family care reasons.

The New York Paid Family Leave Law (NYPFLL) became effective on 1 January 2018 and requires employers to provide eligible employees with partially paid, job-protected leave to care for a new child or for a family member with a serious medical condition, as well as when a family member is called to active military service. The amount of leave and the benefit amounts available under the NYPFLL will be phased in, which began in January 2018 with eight weeks of paid leave per year at a rate of 50 per cent of the individual’s average weekly wage (up to a designated cap), and will culminate in 2021 with a requirement to provide up to 12 weeks of paid leave per year at a rate of 67 per cent of the individual’s average weekly wage (again subject to a cap). Benefits under the NYPFLL are funded by employee contributions made through deductions from wages.

The Massachusetts Paid Family and Medical Leave Program will become effective on 1 July 2019 and will provide eligible employees with up to 20 weeks per year of paid medical leave for an employee’s own serious health condition, as well as 12 weeks per year of paid leave for family care purposes, including to care for a new child or for a family member with a serious medical condition, as well as when a family member is called to active military service. Employees taking leave under the law will receive up to 80 per cent of their average weekly wage (up to a designated cap). The programme will be funded by combined contributions from the employee and the employer.
The District of Columbia’s Paid Family Leave Act will become effective on 1 July 2020 and will provide eligible employees with up to eight weeks per year of paid parental leave to bond with a new child, as well as up to six weeks of paid medical leave to care for a family member with a serious medical condition, and two weeks of paid medical leave for an employee’s own serious health condition. Employees taking leave under the law will receive up to 90 per cent of their average weekly wage (up to a designated cap). The programme will be funded by contributions from the employer.

Another area in which state and city legislatures have been active is paid sick days. Rhode Island, Washington, Maryland, Michigan, New Jersey and the city of Duluth, Minnesota all passed or enacted paid sick leave laws that will provide eligible employees with paid time away from work for the employee’s own medical needs, to care for a covered family member with an illness, injury or need for medical treatment, and for other specific purposes under the respective laws. The Washington law became effective on 1 January 2018, the Rhode Island law became effective on 1 July 2018, and the New Jersey law became effective on 29 October 2018. The Michigan law will become effective on 1 April 2019 and the Duluth, Minnesota law will become effective on 1 January 2020.

In 2018, new laws restricting an employer’s ability to enquire into an applicant’s compensation history during the hiring process were passed or became effective in California, Connecticut, Delaware, Hawaii, Massachusetts, Oregon and Vermont, the cities of Philadelphia (Pennsylvania), New York City (New York) and San Francisco (California), and Puerto Rico. The laws generally make it unlawful for employers to enquire into job applicants’ wage and other compensation history during the hiring process, and also make it unlawful for employers to rely upon an applicant’s compensation history for the purpose of formulating salary, benefits and other compensation unless the applicant has voluntarily and without prompting disclosed such information.

In April 2017, a lawsuit was filed seeking to enjoin the implementation of the Philadelphia compensation history law based in part on an argument that the law violates employers’ right to free speech under the First Amendment of the United States Constitution. In response, the city of Philadelphia agreed to indefinitely delay implementation of the ordinance – previously scheduled to become effective on 23 May 2017 – pending resolution of the legal challenge. On 30 April 2018, a federal judge ruled that employers can ask job candidates to disclose their salary histories, but cannot use that information to determine their pay. At the time of writing, the decision is pending appeal before the United States Court of Appeals for the Third Circuit.

State governments have also continued the trend of ‘ban-the-box’ laws, which prohibit potential employers from enquiring about an applicant’s conviction history and permit such enquiries only after a conditional offer of employment has been made. Kansas, Michigan and Washington either passed or had ban-the-box laws become effective in 2018.

In February 2017, the District of Columbia enacted the Fair Credit in Employment Amendment Act, which amended the DC Human Rights Act to prohibit employers from discriminating against job applicants and current employees based on their credit information. Specifically, the law prohibits, with certain exceptions, employers in the District of Columbia from requiring an applicant or employee to submit credit information as a condition of employment, or from enquiring into, accepting or using a prospective or current employee’s or applicant’s credit information. The District of Columbia joined a number of states and cities, including California, Illinois, Maryland and New York City, that have enacted similar laws limiting the use of credit checks during the hiring process.
State and city legislatures have also been active with respect to amending and expanding equal pay laws. On 18 July 2018, California amended its pay equity law to require fair pay for men and women who perform ‘substantially similar work, when viewed as a composite of skill, effort and responsibility’. Similarly, the Massachusetts Equal Pay Act, which became effective on 1 July 2018, expands the definition of who can be compared for pay purposes and limits the considerations employers may use to justify pay differences between men and women. On 24 April 2018, New Jersey enacted the Diane B Allen Pay Equity Act, which, among other things, makes it an unlawful employment practice to pay employees of any protected class under the New Jersey Law Against Discrimination at a lesser rate than other employees who perform ‘substantially similar work’ unless the differential is based on a legitimate business reason. Significantly, unlike other pay equity laws, New Jersey’s statute prohibits pay disparity based on several protected classes, such as sexual orientation, gender identity or expression, age and disability (including pregnancy).

III SIGNIFICANT CASES

i Masterpiece Cakeshop, Inc v. Colorado Civil Rights Commission (decided 4 June 2018)

In *Masterpiece Cakeshop, Inc v. Colorado Civil Rights Commission*, the United States Supreme Court ruled that a baker’s free exercise clause rights under the United States Constitution were not properly considered by the Colorado Civil Rights Commission when it held that he was legally required to bake and sell a wedding cake for a same-sex couple.

David Mullins and Charlie Craig were legally married in Massachusetts but planned a celebration ceremony in Colorado, where same-sex marriage was not yet legal. The couple filed a charge with the Colorado Civil Rights Commission alleging sexual orientation discrimination after a local bakery owner refused to sell the couple a wedding cake based on the owner’s religious belief that marriage should be between a man and a woman. The Colorado Court of Appeals upheld an administrative law judge’s order requiring the cake shop to design and sell wedding cakes for same-sex marriages. Subsequently, the United States Supreme Court granted review of the case. The majority decision, written by now-retired Justice Anthony Kennedy and joined by Justices Elena Kagan and Stephen Breyer, concluded that the Commission demonstrated ‘clear and impermissible hostility towards the sincere religious beliefs motivating [the cake shop owner’s] objection’. In reaching its decision, the Supreme Court explained that ‘[i]n this context the baker likely found it difficult to find a line where the customers’ rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.’ Although the Supreme Court’s decision acknowledges that religious objections to same-sex marriages may be considered a legally protected view in some circumstances, the Supreme Court also explains how ‘such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law’. 
In *Janus v. AFSCME Council 31* (decided 27 June 2018), the United States Supreme Court held that it is a violation of the First Amendment of the United States Constitution to require public sector employees who are not members of a union to pay any union dues, even when a portion of those dues is attributable to the costs of collective bargaining on behalf of all employees.

Fair share fees – also known as agency shop fees or union dues – are paid by public sector employees who choose not to belong to a union but are still covered by a collective bargaining agreement. Such fees are used to finance the union’s efforts to collectively bargain, administer the collective bargaining agreement, arbitrate grievances and otherwise represent employees. In the 1977 *Abood v. Detroit Board of Education* decision, the Supreme Court upheld the legality of state laws requiring such payments in the public sector. Recently, however, there were several challenges to the constitutionality of agency fees based on the First Amendment of the Constitution.

Mark Janus, a child support specialist for the Illinois Department of Healthcare and Family Services, argued that requiring him to pay US$44 per month in agency shop fees to the American Federation of State, County and Municipal Employees (AFSCME) union violated his First Amendment rights. The Seventh Circuit Court of Appeals, which covers Illinois, Indiana and Wisconsin, rejected Janus’s argument because it did not have the authority to overrule *Abood*. Subsequently, the United States Supreme Court granted review of the case. The decision, written by Justice Samuel Alito, concluded that the First Amendment prohibited states and public sector unions from deducting agency shop fees from ‘nonconsenting’ employees. In reaching its decision, the Supreme Court explained how ‘compelling individuals to mouth support for views they find objectionable’ or to ‘subsidize the speech of other private speakers’ raises First Amendment concerns that must be examined under an ‘exacting scrutiny’ standard. Under this standard, the ‘compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less than restrictive of associational freedoms’. Finding that the justifications offered in *Abood* – labour peace and free riders – failed to satisfy this standard, the Supreme Court ruled that such fees must not be deducted unless the employee ‘affirmatively consents to pay’ and that such agreements must be freely given and shown by ‘clear and compelling’ evidence. Importantly, this ruling applies only to public sector unions, and therefore unions operating in the private sector may still collect agency fees from non-members.

**IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP**

**i Employment relationship**

In the US, the employer and employee are usually free to agree to a contract on terms chosen by them. Based on mutual consent, an employment contract is an agreement by which the employee gives the employer his or her labour or services at a predetermined price. These contracts can range from fixed and negotiated agreements to contracts that are implied under certain situations. Negotiated contracts are formed either orally or in writing. If the parties enter an oral contract of undefined duration, this will generally be considered an ‘at-will’ contract. An at-will employment relationship means that either party can terminate the employment relationship at any time and for any reason that is not unlawful.

When there is no express employment contract, a court may find that an implied contract was nevertheless formed. The court will look for certain indications that an employment contract was contemplated by looking at the conduct of the parties and the usual practices.
within the business in question. Many jurisdictions also look to the provisions of employee handbooks for implied contract terms. Generally, however, an employee without an express employment contract must prove the existence and terms of an implied contract. Moreover, an employer can generally avoid implied contract claims by using express disclaimers that state that the employment relationship is terminable at will.

The promises within the employment contract should be definite and certain as to essential terms, such as the identity of the parties, the nature and extent of the service, the location of the service and the compensation. However, if there are uncertain terms within an employment contract, courts will often uphold its enforceability if they can discern intent from the parties’ behaviour. The parties to an employment contract may modify it by mutual assent. Also, if the employment is at will, the employer will usually be able to unilaterally impose future changes on the conditions of employment, for example, by altering policies contained in an employee handbook.

ii  Probationary periods

Probationary periods are not required by statute, but are common in employment agreements and employee handbooks in the United States. During a probationary period, an employee’s performance is subject to more frequent review and the benefits made available to employees may be more limited. Even if an employee successfully completes a probationary period, however, employment typically remains at will unless the employee’s contract specifies otherwise, meaning that no notice is required to terminate the employment relationship.

iii  Establishing a presence

To hire employees and conduct business in the United States, foreign corporations must register with the national and state tax authorities. All businesses operating in the United States must pay federal, state, and in some cases, local taxes. When a corporation registers with the appropriate tax authorities, it receives a tax ID number or permit.

Depending on the size and nature of the corporation, the list of taxes imposed on it can be quite extensive. Also, depending on the size of the corporation there may be requirements for medical leave, continuation of employee benefits after termination, health and safety standards, and compensation for employees injured on the job.

A company that is not registered with the tax authorities may engage an independent contractor. However, federal and state taxation and labour authorities are rapidly increasing their enforcement activities against employers who misclassify workers as independent contractors rather than employees.

A company that is registered with the tax authorities will have certain withholding and deduction requirements under taxation laws at the federal, state and sometimes local level that must be followed.

V  RESTRICTIVE COVENANTS

Non-compete clauses that restrict an employee’s ability to compete with his or her former employer for a limited period following termination of employment are permissible in most US states. Some states take a negative stance towards these clauses, while others are much more permissive when it comes to their enforcement.

In California, for example, the legislature has stated: ‘Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that
California will, however, allow the limited use of non-compete clauses in the context of a sale or dissolution of a corporation, partnership or limited liability corporation. This approach emphasises the benefits of open competition and employee mobility while protecting the value of a business interest being sold to a buyer.

Almost all other states, including many of the states with a major international business presence such as Delaware, Illinois, New York and Texas, will enforce a non-compete agreement if it satisfies the particular state’s requirements of reasonableness. To be reasonable, a non-compete agreement generally must:

a. satisfy general contract law requirements (e.g., be the product of mutual agreement, supported by adequate consideration, free from duress);

b. have restrictions that are reasonably limited, both geographically and temporally;

c. advance a legitimate business interest of the party seeking to enforce the non-compete agreement; and

d. survive a balancing of both parties’ interests and consideration of the public interest.

The standards of reasonableness with respect to geographic and temporal restrictions vary depending on the state. In Delaware, courts will generally balance the harm to the former employee, the legitimate interests of the employer (e.g., the protection of goodwill, confidential information and trade secrets, but not merely a desire to stifle ordinary competition), and any harm to the public (e.g., preventing a medical specialist from serving a community where there is great need) in determining whether the reasonableness standard has been met. In New York, as in many states, courts state that they disfavour non-compete agreements but will often enforce narrowly tailored clauses that are necessary to protect legitimate business interests and which are reasonable in scope.

In general, non-compete agreements must be ancillary to another valid contract, for example, an employment agreement supported by adequate consideration. Jurisdictions differ on whether an offer of continued employment is sufficient consideration for the imposition of a non-compete agreement, or whether a beneficial change in the employment relationship (such as hiring, a promotion, or the provision of a bonus or other benefit) is required. Regardless of whether a post-employment non-compete agreement is entered into, employees may not compete with their employers while they are employed, as this is generally viewed as a breach of an implicit duty of loyalty that each employee owes their present employer.

VI WAGES

i. Working time

The federal FLSA does not impose maximum working hours for adults. It does, however, prohibit the employment of minors under 14 years of age. It also regulates the type and amount of work in which minors under the age of 18 can engage. States have similar laws, with some states specifying limits on working time, such as prohibiting employers from requiring work for seven consecutive days.

ii. Minimum wage and overtime

Federal and state laws require that employees receive a minimum hourly wage for each hour worked. In addition, the FLSA and many state laws require that employees be paid overtime for any time spent working over 40 hours in a working week. In general, an employee must
be paid one-and-a-half times his or her regular hourly rate of pay for all overtime hours worked. Overtime is calculated on a weekly basis, so that if an employee works 60 hours one week but only 20 hours the next week, the employer is still obligated to pay the employee for 20 hours of overtime worked during the 60-hour week. Some states have overtime laws that are more generous than federal law. For example, in California overtime is generally payable for all work exceeding eight hours in one day or exceeding 40 hours in a given week at one-and-a-half times the regular rate of pay. However, overtime pay in California becomes double the regular hourly rate of pay if an employee works more than 12 hours in a workday and for all hours worked in excess of eight hours on the seventh consecutive day of work in a working week.

Both federal and state laws provide for a range of exemptions from overtime requirements. Under federal law, the most common exemptions apply to certain employees who are:

- executives;
- administrators;
- professionals (e.g., doctors or attorneys);
- outside salespeople; and
- certain computer employees.

States may add categories to these exemptions (or subtract from them) with respect to state wage and hour laws. To determine whether an employee qualifies for an exemption, the employee generally must meet certain tests, such as a requirement that he or she be paid on a salary basis (with certain threshold requirements) and have specified ‘primary’ job duties. The employee’s job title does not determine whether an exemption applies to the employee.

VII FOREIGN WORKERS

A domestic company that wishes to employ a foreign worker must apply for a temporary work visa for that worker. This is not to be confused with employment-based immigration, where the foreign worker wishes to immigrate to the United States permanently as an employee. In those cases, the foreign worker must fit into one of a number of categories showing that he or she has highly unique skills, or the employer must obtain a labour certification from the USDOL by showing that the foreign worker is being offered a job that will not displace a US worker or have a negative effect on wages and working conditions of US workers.

One of the most common temporary work visas is for ‘specialty occupations’. A specialty occupation usually requires a certain level of experience or type of education. For the foreign worker to be able to accept an offer of employment in a specialty occupation he or she must also meet certain educational requirements or have extensive training or experience in the field.

Some non-immigrant visas also require the employer to obtain a certification of labour condition from the USDOL. In its application, the employer must assure the agency that it will pay proper wages and provide a working environment that is not detrimental to its workers.

Foreign workers generally must pay state and federal taxes. An individual’s ultimate federal tax liability will depend on the nature of any tax treaty between his or her home
country and the United States. A number of employee rights are built into the temporary visa programmes. These contain basic employment protections as well as protections unique to non-immigrant workers. These protections are announced and enforced by the USDOL.

VIII GLOBAL POLICIES

Employers of a certain size (depending on the particular legislation) must comply with non-discrimination laws. For example, employers who employ 15 or more employees are prohibited, under Title VII of the Civil Rights Act of 1964, from discriminating against employees and applicants on the basis of race, religion, colour, sex or national origin, and are likewise prohibited under the Americans with Disabilities Act from discriminating on the basis of an individual's mental or physical disability. Employers who employ 20 or more employees are prohibited from discriminating on the basis of age against employees aged 40 and older. Many states have laws of their own regarding discrimination that are more protective of employees than the federal requirements.

Independent contractors, on the other hand, generally do not enjoy the same protection as employees. Religious organisations, which enjoy a certain amount of protection from government infringement under the United States Constitution, are also exempted from some discrimination laws.

Federal law also establishes requirements regarding workplace health and safety. Employers covered by the Occupational Safety and Health Act of 1970 (OSHA) must ensure that their workplaces are free of serious health hazards, and they must follow the health and safety standards promulgated under OSHA. The USDOL may impose fines on employers that do not abide by OSHA's requirements. As in most areas of federal employment legislation, OSHA encourages the individual states to move beyond the minimum standard of protection under federal law. It encourages states to submit their own proposals for occupational health and safety. If a state does not submit a plan, the federal law overrides any state laws passed concerning issues covered by OSHA. If a state does submit a plan, and it is approved by the USDOL, the state may assert jurisdiction over the workplace health and safety issues covered under the state law or regulation.

Rules regarding company discipline or conduct are often contained in employee handbooks.

IX TRANSLATION

There is no general requirement under United States law that employment-related documents be translated into an employee's primary language, or that they be written in English. While English is by far the most common language used in business and legal transactions, there are no general federal laws requiring the use of a particular language in legal or contractual employment documents.

Federal and state courts in the United States (except in local courts in some US territories, such as Puerto Rico) conduct court business in English. There are no federal legal certifications required of translators who translate documents into English for use in the federal courts. However, there are some federal and state legal requirements that mandate translation of employment notices into employees' primary languages. An example is the regulation of the NLRB that requires a posting of unionisation-related rights in employers' workplaces, and also states that such posting must be in the employees' primary languages.
While it is not required, it is generally recommended that employment contracts and handbooks be translated into an employee's native language if the cost of translation will not be excessive. This is because employee contracts and handbooks are frequently used as evidence in employment-related lawsuits. If the employee can reasonably claim that he or she could not understand the employment agreement, offer letter, work rules or handbook, the usefulness of these materials in defence of the employer may be more limited.

X EMPLOYEE REPRESENTATION

The NLRA explicitly provides for self-organisation among employees and for collective bargaining between those employees and management. It also establishes certain 'unfair labor practices', which, if violated, could result in administrative sanctions before the NLRB.

Employees have the right to form labour organisations or unions (which, if approved by a majority of employees in a secret ballot, management must recognise and bargain with). The NLRA also allows them to engage in collective activities such as strikes and peaceful picketing in support of lawful bargaining objectives or to protest against alleged unfair labour practices. Managers cannot organise for collective bargaining purposes.

An appropriate bargaining or election unit typically contains employees with similar skills and levels of pay who work together in close physical proximity and perform the same functions. A union seeking to organise a group of employees must first file an election petition and show that they have substantial support among the proposed unit. Then, the NLRB conducts a preliminary investigation to ensure that the election would be within the NLRA's jurisdiction and comply with its regulations. If the parties agree on all relevant issues, such as the place and timing of the election, the definition of the bargaining unit, and who is eligible to vote, then the NLRB will approve that agreement and the election will be scheduled.

The election is usually held at the workplace and is monitored by the NLRB. Voters use a secret ballot, and either the union or the management may have observers to monitor the election and challenge potential voters. Apart from these challenges, a party can challenge the conduct of the election. In those cases, if the regional director of the NLRB finds valid objections, he or she will order a new election. If the employer's unfair labour practices have made it impossible to hold a fair election, however, the NLRB has sometimes ordered the employer to recognise and bargain with the union.

There are a number of statutory protections for unions and workers who wish to organise. For example, employers may not threaten employees with discipline or termination if they support a union. The employer likewise may not promise benefits to workers who vote against the union. The NLRA also prohibits discriminating against job applicants or employees on the basis of union affiliation, either in hiring, termination, discipline or the awarding of benefits.

Once the bargaining representative is determined, the two sides must meet to agree on a CBA that will govern the relationship between the represented employees and the employer. The CBA is a product of the parties’ own negotiations and there are no imposed terms. Both sides must, however, bargain in good faith. If one side can prove that the other is bargaining in bad faith (or is refusing to bargain), the NLRB or a court can impose unfair labour practice sanctions on an offending party.

Under the NLRA, the parties must bargain about wages, hours and certain other conditions of employment. This is the bare minimum and both sides must be open in their

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bargaining (including with respect to the exchange of information). Once the CBA has been agreed to, it must be set in writing and signed by all representatives. If the parties cannot reach an agreement despite bargaining in good faith, either side can declare an impasse.

XI DATA PROTECTION

The United States has no centralised data protection agency. There are federal laws regarding the protection of financial and medical data. Some states have their own data protection laws, which vary from state to state.

i Requirements for registration

There are no data processing registration requirements under United States law. For multinational companies operating in the United States, the EU–US Privacy Shield (which replaced the Safe Harbour scheme, which was invalidated in October 2015) provides a means by which companies can lawfully export data from the European Union to the United States, under certain conditions. The Privacy Shield allows a company that wants to transfer personal data from the European Union to the United States to do so by having its US counterpart notify the Department of Commerce that it has adopted the Privacy Shield Principles agreement. The Privacy Shield is a self-certification registry that must be confirmed annually to the US Department of Commerce.

ii Cross-border data transfers

Cross-border data transfers are not regulated under US law. The Privacy Shield (discussed in subsection i) provides a mechanism by which multinational companies can transfer data from the European Union to the United States in compliance with EU data protection laws.

iii Sensitive data

There is some protection of sensitive data in the United States. For example, the Health Insurance Portability and Accountability Act (HIPAA) seeks to protect the privacy of employees’ health information in the health insurance context. HIPAA also encourages healthcare providers and insurers to store and transfer health information electronically. The Americans with Disabilities Act also requires employers to maintain employees’ health information securely and confidentially, and to store such information separately from an employee’s general personnel or employment records.

The Fair Credit Reporting Act (FCRA) seeks to protect the privacy of consumers’ financial (and especially credit) information. To this end, the FCRA imposes obligations on consumer credit reporters to investigate and verify the accuracy of consumers’ credit information, at their request.

iv Background checks

The permissibility (or mandatory nature) of criminal and credit-related background checks generally varies by state and occupation. At the federal level, the FCRA creates procedural requirements for background checks performed on applicants or employees by third-party providers, which regulate both criminal history and credit-related background checks. Many states require a criminal background check for employees in certain occupations such as
those working in childcare, primary education, nursing, law enforcement and prison security. Some states authorise background checks either expressly or implicitly, but do not require employers to request them.

Increasingly, as noted above, states and localities are placing limits on an employer’s ability to use criminal records uncovered in a background check to disqualify an applicant, particularly where the job raises few concerns regarding security, safety or confidentiality, and on the timing for an employer to conduct a background check during the hiring process (ban-the-box laws). New York City passed such a law, dubbed the New York City Fair Chance Act, which took effect on 27 October 2015. As discussed in Section II.iii, Kansas, Michigan and Washington all passed or had ban-the-box laws take effect in 2018. Numerous other states and cities, including but not limited to Illinois, Massachusetts, New Jersey and the District of Columbia, and the cities of Chicago (Illinois), Philadelphia (Pennsylvania), Portland (Oregon), San Francisco (California) and Seattle (Washington), also have laws restricting the timing of criminal background checks in the hiring process or the use of criminal records in employment.

Additionally, a number of states and cities strictly limit or prohibit in most contexts an employer’s use of credit history to disqualify an applicant for employment, including California, Connecticut, Illinois, Maryland, the District of Columbia, and the cities of New York City and Philadelphia.

XII DISCONTINUING EMPLOYMENT

i Dismissal
At-will employees may generally be dismissed for any lawful reason or no reason at all. While the employment-at-will doctrine governs most employment relationships in the United States, there are many limitations on the doctrine. As mentioned above, employee handbooks and manuals can create an obligation to follow certain procedures for dismissal, which, if not followed, could give rise to a claim for breach of contract.

Oral contracts can also alter an otherwise at-will relationship. As long as the language and promises are specific enough, and there is an exchange of value within the contract, courts may uphold oral contracts that attempt to limit terminations only for good cause.

Contracts implied from the conduct of the parties can also limit the at-will doctrine. Many states look to the nature of the occupation, any prior course of dealing between the employer and employee, and any general customs within the industry to determine whether it was reasonable for an employee to think that he or she was being offered more job security than the at-will doctrine would supply.

Carefully written contracts can preclude or limit claims based on subsequent oral or implied contracts.

Union members who are subject to a CBA may only be dismissed under the terms of that CBA, and union members are virtually never employed at will. Most CBAs have a dispute or grievance mechanism, and the parties must work within that contractual framework. And most CBAs require the employer to show just cause before discharging or disciplining an employee.

ii Redundancies
Group lay-offs, plant or site closings, and reductions in force are governed by a federal law, the Worker Adjustment and Retraining Notification Act (WARN), which requires businesses
that employ 100 or more full-time employees to provide the affected employees (or their bargaining representatives) and certain state and local government entities with 60 days’ written notice before: (1) any shutdown of a site, or of one or more facilities or operating units at a single site, that results in an employment loss for 50 or more employees; or (2) a large-scale lay-off in the form of an employment loss during a 30-day period (or a 90-day period for lay-offs that occur for similar reasons as part of the same process) at a single site of either 33 per cent of that site’s workforce (if they number 50 or more) or a loss of 500 or more employees in total. Certain states, such as New York, have their own ‘mini-WARN’ laws that contain similar or more protective provisions.

XIII TRANSFER OF BUSINESS

The United States does not have a general transfer of undertakings law or business transfer law affecting mergers, acquisitions or outsourcing decisions by companies. However, some CBAs and other employment contracts may have provisions affecting business transfers. And some federal and state laws require advance notice in cases of large-scale lay-offs and plant closings.

In an asset sale where the purchaser wishes to retain employees of the selling business, it will be required to make individual offers of employment to the employees because their employment will not transfer automatically.

XIV OUTLOOK

Two years following the election of President Donald Trump, both the executive branch of the federal government and the Senate remain under Republican control. As a result of the midterm elections, the Democrats took back control of the House of Representatives. While it was anticipated at the start of the Trump administration that the centralisation of power in one party would create the possibility of federal legislation and rule-making that would favour businesses and employers, there has been little legislative or regulatory change on the federal level in terms of private employment. As a result, it is likely that there will continue to be an increase in state and local government activism on worker-protection issues such as minimum wage, pay equity and paid leave. As a general matter, employees will continue to be entitled to the greatest of the protections provided by federal, state and local law.
I INTRODUCTION

Employment and labour relationships in Venezuela are governed by the Constitution of the Bolivarian Republic of Venezuela (the Constitution), which establishes the fundamental rights applicable. These rights include the following:

- the right to work;
- the freedom to work in a job chosen by the employee;
- the right to be part of an union; and
- 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), which introduced important changes on relevant matters such as the following:

- retroactivity of seniority benefit;
- reduction of the workday;
- extension of the statute of limitations period;
- determination of illegal outsourcing and its prohibition;
- reinforcement of job stability;
- extension of the list of workers protected against dismissal;
- increase in the days of salary granted as a holiday bonus and profit sharing;
- extension of maternity and paternity leave; and
- 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. 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.

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Published (along with its Amendment No. 1) in Special Official Gazette No. 5,908 of 19 February 2009.

Published in Special Official Gazette No. 6,076 of 7 May 2012.

Labour Law, Article 26.

id., 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 in order to maintain themselves, and the Law reiterates and explains the constitutional duty of the state to maintain high levels of employment.

Moreover, the Labour Law recognises that treaties, pacts and conventions, including but not limited to those related 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). The ILO 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. 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 procedure in Venezuela for labour claims, depending on the worker’s labour stability. Labour stability encompasses the worker’s right to request reinstatement if he or she is unjustifiably dismissed. There are two types of stability: relative stability, which is generally known as job stability; and absolute and clear stability, known as a bar against dismissals. Claims related to the former are heard before the labour courts, while claims related to the latter are heard before the labour inspector office. Workers with clear and absolute stability must make their claims through an administrative procedure defined under the Labour Law. These workers are protected against unfair dismissal for union activities, prevention delegates’ activities, maternity or situations where the labour relationship is unjustifiably terminated.

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7. id.
8. For additional information, see the chapter on the International Labour Organization, in Volume IB, Part 5.
9. 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 related to collective and individual rights and interests.
10. Prevention delegates are workers elected as workers’ representatives to deal with safety and health matters at the workplace. The prevention delegates together with the company’s representatives manage the Safety and Health Committee.
temporarily suspended (e.g., sick leave, military service, permission to study). Workers 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.\textsuperscript{11}

The main administrative entities are the labour inspector offices, which are responsible for inspection and enforcement of compliance with the labour legislation; the Social Security Institute, which handles security and pension matters; and the National Institute for Prevention, Conditions and Health and Safety at the Workplace, 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).

\textbf{II \hspace{1cm} YEAR IN REVIEW}

As a result of exacerbated hyperinflation and devaluation of the local currency (bolivar), the minimum wage and the food benefit were reviewed and increased by the President almost on a bimonthly basis in 2018. The effects of the economic downturn have had a significant impact on the employment and labour environment, resulting in restructuring, downsizing, closures and employee cost reductions. Unfortunately, there are no official unemployment rates or statistics in Venezuela.

However, employers have been making important 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.

\textbf{III \hspace{1cm} SIGNIFICANT CASES}

\textbf{i \hspace{1cm} Decision No. 756 of the SCC (17 October 2018) in the case A Irani v. Sherkate}

This case concerned payment of labour benefits in a foreign currency, taking into account the exchange rate of the date of payment. The plaintiff stated that the payment of labour benefits was established in foreign currency (Brazilian real) by the parties and pursuant to Venezuelan legislation, payment should be ordered at the exchange rate of the time of actual payment.

During the past 20 years of case law, when there has been a case in which the plaintiff received her or his remuneration in 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 worker.

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 at the time of payment.

\textsuperscript{11} Published in Official Gazette No. 37,504 of 13 August 2002.
ii Decision No. 658 of the SCC (18 October 2018) in the case Alimentación Balanceada Alibal CA

This case concerned the reinstatement procedure and evidentiary stage. The SCC ordered all the labour inspector offices in the country to guarantee due procedure when enforcing reinstatement orders and payment of unpaid salaries pursuant to Article 425 of the Labour Law. Officers must obey the constitutional warranties of the right to defence and due process, and the minutes recorded during the reinstatement decision must establish all the arguments for defence, and be signed by the parties and the officer. The labour inspector offices must also only open the evidentiary stage when it is useful and necessary to understand (and potentially solve) the case, and not just when the employment relationship cannot be evidenced.

iii Decision No. 787 of the SCC (29 October 2018) in the case G López and others v. Purina

This case concerned clauses of CBAs regulating the granting and sale of the employer’s products to the workers. The plaintiffs argued that the employer had not complied with Clause 39 of the CBA, which required it to sell 50 bags of pet food to each worker employed since January 2014, and had therefore discriminated them.

The defendant argued that it had been fulfilling its obligation considering that it has to comply with rules on specific portion sizes; the price of the sale must be distributor price; the amount of product cannot be accumulated monthly; and the worker cannot resell the product.

The company had the workers registered with the Integral System of Food Processing Control (the System), although the System does not issue a mobilisation product guide for each worker. The System registers the workers, but it does not approve the granting of the product.

The STJ ruled that the employer was compliant with the CBA, and could not issue the mobilisation guide, which has to be issued by the System, otherwise the employer would be subject to sanctions by the government.

The STJ requested that the government review the contractual clauses in CBAs regarding sale of products to the workers, the purpose of which is to resell the product, in order to protect national security and sovereignty.

iv Decision No. 1,112 of the Administrative-Political Chamber of the STJ (1 November 2018) in the case M Matos v. INIA

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 of Prevention Condition and Safety and Health at the Work Place).

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 order 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.
IV BASICS OF ENTERING 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.

Where an employment agreement is in writing, it must contain the following:

a full name, identity card, 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, regarding contracts for fixed terms;
g work or tasks to be performed, regarding contracts for specific work;
h length of the workday;
i salary stipulated or the manner for calculating it, and the form and place of payment, as well as the 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 among the parties; and
n other specifications set forth in the Regulations to the repealed Organic Labour Law.12

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 employment agreements for a fixed term when it is required by the nature of the service; when it is required provisionally and legally to substitute one employee for another; when it is required for Venezuelan workers rendering services abroad; and whenever the 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 expiration, unless there are special reasons

12 Published in Official Gazette No. 38,426 of 28 April 2006.
that justify the extensions, excluding the intent of continuing the labour relationship.\textsuperscript{13} A special reason is defined as the continuation of the circumstance that justified the original fixed-term agreement.\textsuperscript{14}

The Labour Law also allows for the execution of employment agreements that relate to specific types of work, usually used within the construction industry.

\textbf{ii Probationary periods}

There is no specific regulation of a probationary period. However, pursuant to the Labour Law, a worker’s job stability is established after one month of service. Therefore, the first 30 days of the employment relationship are deemed as a probation period. During that time, either party may terminate the employment relationship. The STJ has held that probation periods cannot be included in fixed-term employment agreements.

\textbf{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 the employees’ nationality.\textsuperscript{15} This statute also applies to those services rendered outside Venezuela under a contract entered into in Venezuela.\textsuperscript{16} Additionally, in the event of rendering services in Venezuela, employees have 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.\textsuperscript{17} 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 in order to register their employees, and withhold and pay the relevant tax payroll contributions and special contributions to the proper authorities. Registration allows the company to obtain a labour identification number and a tax identification number.

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.

\begin{itemize}
  \item \textsuperscript{13} id.
  \item \textsuperscript{14} Regulations to the repealed Organic Labour Law, Article 26.
  \item \textsuperscript{15} Labour Law, Article 3.
  \item \textsuperscript{16} id., Articles 3 and 65.
  \item \textsuperscript{17} 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.
\end{itemize}
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 in order to distort, ignore or obstruct the application of the labour legislation. The contracting of personnel through third parties should not be deemed outsourcing, however, as long as the contracting has not been made with the intention of simulating or defrauding the 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.

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), 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.

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: any location or fixed place of business, or any centre of activity, where it fully or partially carries on its activity; a seat of management, branch, office, factory, workshop, facility, warehouse, store or other establishment; or construction, installation or assembly projects, lasting for more than six months; or agencies or representatives authorised to contract on its behalf;

\[ b \] the taxpayer performs activities in Venezuela related to mining or hydrocarbon exploration, or agrarian, agricultural, forestry or livestock exploitation, or any other

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18 Labour Law, Article 47.
19 id., 49.
20 Published in Official Gazette No. 6,210 of 30 December 2015.
 extraction of natural resources; performs professional or artistic activities; or 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; 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
the taxpayer establishes a fixed base in the country through which individuals who are foreign residents render independent professional services.21

Pursuant to the Tax Law, income paid in consideration for services that are executed, used or benefited from 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,22 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.23

Among other requirements, the Regulations establish that a restrictive covenant must be agreed to at the beginning of the employment relationship.24

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.

VI WAGES

i Working time

The ordinary work period may not exceed five days a week. Consequently, workers are entitled to two continuous paid days of rest per week, except in the case of continuous work schedules.25

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21 Income Tax Law, Article 7, third paragraph.
22 Regulations to the repealed Organic Labour Law, Article 26.
23 id., 168.
24 id., 26.
25 Labour Law, Article 173.
The duration of the work period is 40 daytime hours per week, and in the event of a mixed day, which includes at least four hours of night shift, the period is shortened to 37.5 hours per week. The weekly limit of night time is 35 hours. Any extension of the night shift in daytime hours shall be deemed as night-time hours.26

In addition, the Labour Law provides that the following will not be subject to the limits established for daily and weekly hours: upper-management employees; inspection or surveillance workers, carrying out tasks that do not require a continuous effort; workers who perform work that merely requires their presence, or discontinuous or intermittent work requiring long periods of inaction; and schedules set by CBAs between employers and workers.27

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 worker must enjoy two consecutive paid days of rest every week.28

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 over eight weeks; and for a six-day working week, the worker is granted an additional day of holiday in that year, with payment of salary but without having an impact on the holiday bonus.29

Rest periods taken during the workday cannot exceed one hour, and employees are prohibited from working for more than five continuous hours.30 The workers’ right to leave the place where their services are provided during the rest and meal periods is established. If workers 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.31

ii  Overtime

The daily workday is limited to 10 hours, including overtime. 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.32

Overtime work must be compensated with a 50 per cent surcharge on the employee’s salary.33

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.34
VII FOREIGN WORKERS

In order 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 the workers (including management staff, employees and labourers) at the service of an employer must be Venezuelan. Further, the compensation of foreign workers cannot exceed 20 per cent of the total payroll compensation.35

As previously stated, foreign employees 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 are deemed a serious violation of the obligations imposed by 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 were informed of the obligations set forth in the internal policies for the latter to prevail.

IX TRANSLATION

The Constitution clearly provides that Spanish is Venezuela’s official language. In addition, the Labour Law establishes that the official language in Venezuela is Spanish, and when, by reasons of technology, it is necessary to use a different language, it must also include a Spanish translation.36

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 and Spanish-speaking employees, documents must be distributed in Spanish.

35 id., 27.
36 id., 14.


X EMPLOYEE REPRESENTATION

Labour unions are organised in the following ways, based on a common employer, occupation, industry or economic sector:

a Company unions are composed of the workers of a single enterprise, including operations located in different towns and regions. Twenty or more workers are required to form a company union.

b Trade unions are composed of workers 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. Forty or more workers are required to form a trade union.

c Industrial unions are composed of workers who are employed by several employers in the same industrial field, even though they work in different professions or trades. Forty or more workers are required to form an industrial union.

d Sectoral unions are composed of the workers of several employers in the same commercial, agricultural, production or service branch, even though their professions and trades differ. Forty or more workers are required to form a sectoral union.

Unions also may be organised by independent workers, that is, workers who are not bound to any employer by an individual employment agreement or relationship. Formation of these unions requires 40 or more workers.

Labour unions may be local, state, regional or national in their geographic scope. If they are regional or national, 150 or more workers are required to form the union.

Once a union has been registered before the 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. The board performs its duties for the period of time set forth in the by-laws, which cannot exceed three years.

In order 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.

Where workers are not represented by a labour union, a group of workers could attempt to negotiate collectively by delivering a proposed collective agreement to the labour inspector office of the corresponding jurisdiction.

37 See id., Article 371.
38 id.
39 id., Article 376.
40 id., Article 371.
41 id., Article 377.
42 id., Article 371.
43 id., Article 378.
44 id., Article 371.
45 id., Article 378.
46 id., Article 418.
47 id., Article 379.
48 id.
49 Labour Law, Articles 399–410.
50 id., Article 401.
51 See Labour Law Regulations, Article 140.
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 ends.\textsuperscript{52} This prohibition is limited to protecting directors in the following proportions:

\begin{itemize}
  \item \textit{a} up to seven directors when the company employs fewer than 150 workers;
  \item \textit{b} up to nine directors when the company employs between 150 and 1,000 workers; and
  \item \textit{c} up to 12 directors when the company employs more than 1,000 workers.
\end{itemize}

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 the prohibition against dismissal, from the date of their election until three months after the expiration of their term.\textsuperscript{53}

The Labour Law contains provisions concerning the representation of workers in company management (co-management) in the form of councils of workers. The Constitutional Law of the Productive Councils of Female and Male Workers (the Workers’ Councils Act)\textsuperscript{54} regulates the establishment, organisation and functioning of the productive councils of female and male workers (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, in order to guarantee the productive development of the nation.

The purpose of the Workers’ Councils Act is to:

\begin{itemize}
  \item \textit{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;
  \item \textit{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;
  \item \textit{c} protect and safeguard productive activities from public, private, mixed and communal work entities, to guarantee timely access to goods and services; and
  \item \textit{d} strengthen the central role of the working class by promoting its participation in economic activity.\textsuperscript{55}
\end{itemize}

Each entity must have at least one workers’ council. The workers’ councils will be made up of three, five or seven elected workers, of which at least one must be a woman, one must be aged between 15 and 35 years, and one who is a member of the militia. One person can fulfil these three criteria.\textsuperscript{56} The elected members of the workers’ council shall enjoy a bar against dismissal\textsuperscript{57} from the moment of their election, up to six months after the expiration of their two-year term, and they may be re-elected.\textsuperscript{58}

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, different from those of trade unions, and will be ruled by special laws to be enacted.\textsuperscript{59}

\section*{XI \hspace{1em} DATA PROTECTION}

\subsection*{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. There is the right to private life and privacy stated in the Constitution, which affords every person the right to protect his or her own private life from others.\textsuperscript{60}

The Constitution protects personal information through \textit{habeas data}\textsuperscript{61} in the following ways: 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; every person has the right to be informed of the purpose for data collection and use; and every person has the right to request the competent courts to update, rectify or destroy the data, if they are erroneous or could affect in an illegitimate manner the person’s rights.

A decision of 14 March 2001\textsuperscript{62} of the Constitutional Chamber of the STJ stated that the guarantee of \textit{habeas data} established in the Constitution is not applicable to employment files; unreliable information obtained from another person; or 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 such data relates to the worker's medical records. The Law on Prevention, Conditions, and Health and Safety at the Workplace\textsuperscript{63} establishes the employer’s obligation to keep employees’ health information confidential, and restricted to medical personnel and the corresponding health authorities, except when employees give their authorisation.\textsuperscript{64} In fact, it establishes serious sanctions for breach of confidentiality or privacy of the employees’ health information, in the form of a fine of between 76 and 100 tax units,\textsuperscript{65} or shutdown of the entity for up to 48 hours.\textsuperscript{66} Therefore, data or information regarding an employee’s medical records should not be shared with third parties unless the employee gives consent.

\textsuperscript{59} See id., Article 498.

\textsuperscript{60} Constitution Article 60.

\textsuperscript{61} id., Article 28. This Article is not applicable to the confidentiality of journalistic information’s sources and other professions determined by law.

\textsuperscript{62} Constitutional injunction filed by \textit{Inaca v. Director de Drogas y Cosméticos del Ministerio de Sanidad y Asistencia Social}.

\textsuperscript{63} Published in Official Gazette No. 38,236 of 26 July 2005.

\textsuperscript{64} Law on Prevention Conditions and Health and Safety at the Workplace, Article 53(11).

\textsuperscript{65} As of 11 September 2018, the value of the tax unit is 17 bolivars (Official Gazette No. 41,479).

\textsuperscript{66} id., 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 for cases where the workers’ medical records are involved, employers do not have to request the workers’ 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 the workers’ 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 related to a person’s private life, which includes a person’s financial situation, correspondence, customs, way of life or personal mishaps.

Venezuelan legislation considers workers’ medical information sensitive and, therefore, it establishes the employers’ obligation to keep this information confidential (see subsection i, above).

Moreover, the Law on Prevention, Conditions, and Health and Safety at the Workplace establishes the employer’s obligation to take all appropriate measures to guarantee the privacy of the 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 candidate for employment or a current employee. 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. Additionally, there is an implicit prohibition to pursue 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, in order to collaborate 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 Law prohibits financial institutions from disclosing credit or debit card holders’ personal financial information to any company or institution, unless such persons authorise them to do so. This authorisation is revocable.

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.

67  Labour Law, Article 21.
68  Published in Official Gazette No. 39,021 of 22 September 2008.
69  Credit Card Law, Article 62.
XII DISCONTINUING EMPLOYMENT

i Dismissal

Pursuant to the Bar Against Dismissal Law, no worker can be dismissed without just cause previously authorised by the labour inspector office.

In fact, the Labour Law has been structured to guarantee the source of employment, and prevent a lockout or reduction of personnel. The Ministry of Labour is able to intervene in a company’s operations to guarantee its activity whenever there is a risk that: a source of employment will be closed; there will be a reduction of personnel; or there will be changes in labour conditions. Moreover, if an employer illegally closes the company or starts a lockout, and fails to comply with the Ministry of Labour’s order to resume operations, the Ministry may take over the company’s operations so as to protect the rights of the workers. Failure to resume operations may also result in imprisonment of 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 services, no worker may be dismissed without there being just cause for doing so.

In order to justifiably dismiss workers covered by the Bar Against Dismissal Law, the employer must obtain authorisation from the competent labour inspector office, through a dismissal qualifying procedure, which must be initiated before the labour inspector in the terms provided in the Labour Law. The dismissal must be based on the reasons for justified dismissal set forth in the Labour Law, which include:

a dishonest or immoral behaviour while on the job;
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 of 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.

If the worker is unjustifiably dismissed by the employer, he or she has one month to request reinstatement and payment of unpaid salary and labour benefits before the labour inspector office.

The employer’s failure to comply with the prior request to dismiss the workers will give the latter the right to request their reinstatement, unpaid salaries and labour benefits.

70 Published in Special Official Gazette No. 6,207 of 28 December 2015.
71 Bar against Dismissal Law, Article 3.
72 Labour Law, Article 422.
73 id., Article 79.
74 id., Article 425.
Failure to comply with a reinstatement order may trigger six to 15 months of imprisonment when breaching an order to reinstate a worker protected by the Bar Against Dismissal Law or trade union rights.

ii Redundancies

The general rule under the Labour Law is that no worker 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 (job stability – see Section I). However, since 2002, workers are protected with a special bar against dismissal that has been extended to 28 December 2020. As long as the special bar against dismissal is in force, employers cannot freely dismiss workers without just cause and without previously obtaining authorisation from the labour inspector office.

When an employer wishes to lay off a substantial number of workers, the matter must be treated as a collective dispute even if the employer cites technical or economic reasons to support the decision. 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 workers. Notice of the employer’s request for such a procedure must be provided to the respective labour union, or in the absence of a union, to the workers themselves. If the parties do not reach an agreement through the collective dispute procedure, the matter will be submitted for arbitration.

As with any other collective dispute, workers are protected by the Bar Against Dismissal. Also, a request to reduce personnel will not be allowed while the workers are exercising their rights to organise and negotiate collectively.

In the case of a mass lay-off, the Ministry of Labour is authorised to stop or suspend the action by means of a special resolution in order 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 workers equal to or greater than the following:

a 10 per cent of the workers of a company that employs more than 100 persons;
b 20 per cent of the workers of a company that employs more than 50 persons; or
c 10 workers of a company that employs fewer than 50 persons.

The Labour Law provides that the study is to be made over three months, or longer if the circumstances so warrant. In fact, as indicated below, the labour inspector must take into account a period of at least six months to conduct his or her study.

75 Presidential Decree on Special Bar Against Dismissals No. 3,708 published in Special Official Gazette No. 6,419 of 28 December 2018.
76 Labour Law, Article 95.
77 id.
78 id., Articles 472–485.
79 id., Articles 492–496.
80 id., Article 419.
81 id., Article 95.
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 interest 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. 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 in order to determine: the number of workers added to the payroll over the previous six months; and the number of dismissals during the same period, identifying the workers dismissed.

The procedure stated in the Labour Law is followed and after conclusion of the evidentiary stage, the labour inspector must prepare a report for the Ministry of Labour, which specifies: (1) the number of workers on the employer’s payroll; and (2) the number of workers 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-workers 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. The recommended circumstances for requesting 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, the workers are protected by the bar against dismissals; the union to which the affected workers belong must be notified, where applicable; and if no agreement is reached between the employer and its workers, 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 substitute for each delegation is appointed to process the dismissal procedure. The conciliation board’s purpose is to achieve unanimous agreement in regard to: the workers that will be affected by the reduction of personnel; the term within which the reduction of personnel will be accomplished; and the indemnities that could correspond to the affected workers. The

82 See Ruling No. 85 of the Constitutional Chamber of the STJ 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).

83 Labour Law, Article 40-45.

84 Regulations to the repealed Labour Law, Article 46.
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:\textsuperscript{85}

\begin{itemize}
\item[a] amendment of the job conditions contained in the applicable CBA;
\item[b] collective suspension of work for no more than 60 days, during which time the workers will be exonerated from rendering their services and the employer from paying them for their services, with a view to overcoming the alleged economic crisis; or
\item[c] the initiation of a recapitalising and reactivation process for the company, with the participation of the workers, 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.
\end{itemize}

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. The settlement executed before the competent authority has the legal effect of \textit{res judicata}, precluding an employee from bringing any further claim against the employer.\textsuperscript{86}

\section*{XIII. 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.\textsuperscript{87} 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.\textsuperscript{88}

An employer successorship does not alter existing employment relationships. The new employer must recognise the seniority, as well as other benefits and terms of employment, of all workers who continue to work in the company.\textsuperscript{89}

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.\textsuperscript{90} In the 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.\textsuperscript{91}

\begin{flushright}
\textsuperscript{85} Regulations to the repealed Labour Law, Article 46.
\textsuperscript{86} Labour Law, Article 19.
\textsuperscript{87} id., Article 66.
\textsuperscript{88} id.
\textsuperscript{89} id.
\textsuperscript{90} id., Article 68.
\textsuperscript{91} id.
\end{flushright}
In order for an employer successorship to be valid, written notification must be given to the workers. Written notice of the employer successorship should also be provided to the labour inspector and the union to which the workers belong.\(^{92}\)

If a worker does not accept the employer successorship because it conflicts with his or her interests, the employment relationship may be terminated at the worker's request, and the worker will be entitled to worker benefits and indemnities as if it were a case of unjustified dismissal.\(^{93}\)

If, with the purpose of employer successorship, an employer pays termination benefits and indemnities to a worker who nevertheless continues performing services for the company, the payment is considered an advance on the amount that would be owed to the worker on termination of the employment relationship.\(^{94}\)

XIV 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.

\(^{92}\) id., Article 69.
\(^{93}\) id.
\(^{94}\) id., Article 70.
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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 the amendments to South African immigration legislation in May 2014, where she advised various business chambers and professional bodies on their submissions to government. She previously served on a panel of specialist advisers to the Minister of Home Affairs.

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Emilia advises and represents clients in court on civil, commercial, employment and EU law matters. She specialises in civil law, employment law, data protection, private international law and EU law. She also provides expertise in data protection compliance with a special focus on employment law aspects.

Emilia regularly speaks at seminars and conferences and publishes in the areas of her expertise. She joined Loyens & Loeff in October 2015, and is a member of the Luxembourg Bar and of the European Law Institute.

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.

JENYFER GARCÍA-SOTO
Ferraiuoli LLC
Ms Jenyfer García-Soto is a member of Ferraiuoli’s labour and employment and litigation departments. She chaired the litigation department, and created and developed internal
processes, as well as hiring, training and supervising lawyers and staff for the lending, collections and foreclosure litigation practice. Her significant contributions allowed the firm to continue to grow and diversify. Since 2002, Jenyfer has had a solid litigation practice in state and federal courts, gaining experience through numerous trial and injunction proceedings. Her areas of expertise include distribution and franchising, defence of unjust dismissal and employment discrimination claims, including sexual harassment, disability and gender discrimination. Jenyfer also has extensive experience with contractual and corporate governance disputes, real estate, health and energy. She works closely with experts, such as economists and accountants, to develop and implement litigation strategies to prosecute and defend claims of economic loss and economic and moral damages. Jenyfer aims to identify and develop strategic and practical solutions in all situations. Her combined experience in commercial, corporate and employment matters makes her a valuable adviser and advocate for small and medium-sized businesses. Larger enterprises also benefit from her experience managing complex large-scale matters.

GEORGE Z GEORGIOU
George Z Georgiou & Associates LLC

George Z Georgiou is the managing partner of George Z Georgiou & Associates LLC. He is also an associate tenant of Littleton Chambers London. He studied law at the University of Bristol, UK and was called to the Bar of England and Wales by the Honourable Society of the Inner Temple. Upon his return to Cyprus, he was called to the Cyprus Bar and became a member of the Chartered Institute of Arbitrators. He is also a member of the Royal Institute of Chartered Surveyors, the Cyprus Arbitration and Mediation Centre, and the London Court of International Arbitration. George Z Georgiou is on the board of directors of the European Employment Lawyers Association and the board of national correspondents for the European Employment Law Cases journal. He practises in all fields of civil law and is considered an expert on Cypriot employment, pensions and corporate immigration law. He regularly lectures in English and Greek on these subjects. Finally, George Z Georgiou & Associates LLC is the sole Cypriot member of Ius Laboris – the Global Human Resources Lawyers Alliance and the Global Advertising Lawyers Alliance.

ORTLY 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 over 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 ACC 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. The department combines the experience and expertise normally found in a leading ‘boutique’ law firm with the capabilities of a major full-service international law firm.

KATHERINE GONZÁLEZ-VALENTÍN
Ferraiuoli LLC
Ms González-Valentín is a capital partner at Ferraiuoli LLC and director of the labour and employment department. With over 20 years of experience representing management and as a former Assistant US Attorney, Ms González-Valentín has a solid background 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 had extensive experience 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 in and outside Puerto Rico and her many years of actively lecturing and providing training to companies, management and attorneys on a myriad of employment law and civil practice topics at the local level and the continental United States.

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.

MICHELLE A GYVES
Proskauer Rose LLP
Michelle Gyves is an associate in the employment law department and a member of the international labour and employment group at Proskauer Rose.

Ms Gyves provides strategic advice and counselling to domestic and multinational employers on a wide range of employment law and human resources matters, including hiring and termination, compensation and benefits, and global mobility. She has assisted clients with multi-country audits of employment laws and practices, ensuring their compliance in a wide range of areas, including data privacy, disability and leave laws, and working time regulations.
Ms Gyves also advises employers with regard to labour and employment issues and conducts human resources due diligence in connection with both domestic and cross-border corporate merger and acquisition transactions.

Ms Gyves received a JD, cum laude, from Harvard Law School and a BA with highest distinction in political science and economics from the University of North Carolina at Chapel Hill, where she was elected to Phi Beta Kappa.

Ms Gyves is admitted to practise in New York. She is a member of the international law section of the American Bar Association, where she sits on the international employment committee.

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, HR 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.

JUNE HARDACRE
MinterEllisonRuddWatts

June is a senior associate in the employment department at MinterEllisonRuddWatts and has been with the firm since January 2017. June has broad experience in all aspects of both New Zealand and English employment law. She regularly advises clients on executive appointments and terminations; restraints of trade and protection of confidential information; performance and disciplinary processes; restructuring, redundancy and outsourcing programmes; industrial relations and collective bargaining matters, including litigation of such disputes; and data protection and employee privacy issues and disputes. June is also instructed by clients to advise on and lead employee investigations regarding acceptable conduct, bullying and harassment.

June regularly attends mediation for her clients and has been involved in litigation at all levels of the New Zealand court system. June has significant experience in acting for both private and listed companies in the financial services, transport, manufacturing, and pharmaceutical and healthcare sectors.

June practised at a magic circle firm in London for several years, and at another top-tier New Zealand law firm prior to that.

STUART HARRISON
ENSafica

Stuart Harrison is a director at ENSafica 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 also 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, 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 Littler 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 as well as 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 subsequently joined 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 speciality are labour and employment, and corporate.

ANNEMARTH HIEBENDAAL
*Rutgers & Posch*

Annemarth is specialised in employment law in the widest sense. She advises both national and international clients. In her practice, she acts for both employers and employees, utilising 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 the chance of 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.

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.

IFEDAYO IROCHE  
*Perchstone & Graeys*

Ifedayo was called to the Nigerian Bar in 2008 and started her career in a reputable law firm, where she was exposed to intellectual property, company secretarial responsibilities, and legal drafting and review, alongside requisite administrative duties. She joined the firm as an associate in 2010 and now holds the position of Head of Chambers (Lagos office). While capitalising on her previous work experience with diverse organisations, Ifedayo has further explored the corporate commercial world by assisting and advising clients (including start-ups) in their corporate restructuring, regulatory and industrial compliance, labour relations, legal advisory services, document and agreement draft and review, and corporate commercial services.

Ifedayo co-leads the firm’s employment, corporate commercial and regulatory compliance groups and has particular experience in corporate restructurings, regulatory compliance, labour relations and corporate commercial advisory. Her skills in research and development have been greatly harnessed alongside her editorial and writing skills, as a member of the editorial team of the firm’s quarterly newsletter.

With excellent qualifications and a strong desire to excel, Ifedayo’s unique ideas and fresh energy are evidenced in her results and every project she is a part of. She holds a master’s degree in law from the University of Lagos and is a member of the Association of Professional Negotiators and Mediators. She has further interests in multiple areas of law, which she hopes to break into.

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 the above areas of law, with over 20 years of 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. Most recently, she was recognised among the leading labour law lawyers by Best Lawyers International 2019 and The Legal 500 2018. She is also recommended as one of the best employment law lawyers in Ukraine by Chambers Europe 2018, Ukrainian Law Firms 2018 and Client’s Choice: Top 100 Lawyers in Ukraine 2017.

Svitlana is a certified mediator, with over 10 years’ experience of 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 is a member 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, Svitlana 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 for 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 in international private law. She obtained her LLM in international legal studies from Georgetown University Law Center (Washington, DC). Svitlana is a published author of a monograph and over 100 articles and commentaries in the United Kingdom, the United States, Ukraine, Turkey, India and Canada, and is a frequent speaker on various legal issues (in Ukraine and abroad).

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 in 2004–2005. She was a visiting professor of the University of Tokyo School of Law in 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 governmental agencies.

ARIELLE E KOBETZ
Proskauer Rose LLP
Arielle E Kobetz is an associate in the labour and employment law department, and a member of the employment counselling and training group, resident in the New York City office. Arielle’s practice focuses on providing clients with strategies and counselling related to a variety of workplace-related disputes, including employee terminations and discipline,
leave and accommodation requests, and general employee relations matters. She also counsels clients on developing, implementing and enforcing personnel policies and procedures, and reviewing and revising employee handbooks under federal, state and local law.

Arielle is a frequent contributor to Proskauer’s *Law and the Workplace* blog. Before joining Proskauer, Arielle was a law clerk at the New York City Human Resources Administration, Employment Law Unit.

**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 an associate 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.

**FOLABI KUTI**
*Perchstone & Graeys*

Folabi 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 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 department 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.

**VILMA TOSHIE KUTOMI**
*Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados*

Vilma Toshie Kutomi has over 30 years’ experience in the labour, employment, executive compensation and immigration fields.
Ms Kutomi’s labour law practice has included union negotiations in several types of collective bargaining agreements, and litigation (strike, collective actions), arising from closing down or downsizing of operations; transfer of employees; working hours; salary adjustments; harassment issues; and offshore work for different sectors (banks and traditional industries).

Ms Kutomi’s experience includes consultancy (employment agreements and amendments; compensation (including executive compensation); inbound and outbound transfer of work (expatriation); bonus plans; stock options; profit sharing plans; legal; contractual and collective bargaining agreement benefits; company policy analysis and drafting of documents; compliance policies including FCPA; working hours; allowances; outsourcing of activities; etc.) and litigation defending employers in relation to claims filed by individuals before the labour authorities, whether in the administrative or legal spheres.

Regarding immigration issues, Ms Kutomi has advised companies in different sectors with regard to analysis of compensation, and benefits related to work visas and international treaties.

Ms Kutomi is a frequent speaker at universities and legal education forums, and has published several articles in the printed media as well as in legal industry publications on labour and employment law trends.

She has been consistently recognised as one of Brazil’s leading labour and employment lawyers by Análise Editorial and other legal industry publications. She is a member of the corporate labour law committee of the Brazilian Bar Association, São Paulo chapter.

She is the published author of the Bermuda chapter of Carter-Ruck on Libel and Privacy (6th ed 2010), Reed Elsevier (UK) Ltd.

**INGE DE LAAT**
*Rutgers & Posch*

As managing partner, Inge oversees the daily management of Rutgers & Posch. Inge specialises in employment law. She advises on collective and individual dismissal cases, remuneration policy, privacy issues, and mergers and acquisitions. Inge has considerable experience in healthcare, employment law, and in related areas such as privacy. Inge also has years of international experience, including remuneration policy, and legislation and regulations regarding bonuses in different countries.

**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.
LI WANCHUN

*TSMP Law Corporation*

Wanchun is an 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, including matters concerning fraud, trusts and equity, and international trade. A Chinese national, Wanchun also advises on a number of corporate and restructuring matters concerning Chinese corporates and transactions.

IAN LIM

*TSMP Law Corporation*

Ian 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*, as well as the Employment Contracts chapter of *Law Relating to Specific Contracts in Singapore*.

Ian serves as chairman on the Civil Practice Committee of the Law Society of Singapore, and is an appointed referee of the small claims tribunals in the state courts as well as a fellow of the Singapore Institute of Arbitrators (FSI Arb). 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. He was promoted to partner in April 2017, less than eight years out of university. Lütken is specialised in employment law, company law and litigation, and assists clients in all business law areas, 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.

MARÍA JUDITH (NANI) MARCHAND-SÁNCHEZ

*Ferraiuoli LLC*

Ms Marchand is a founding partner of Ferraiuoli LLC and a capital partner with over 25 years of experience 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. She has been authorised by the Supreme Court of Puerto Rico to provide continuous legal education (CLE) 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.

PATRICIA M MARVEZ-VALIENTE
Ferraiuoli LLC

Ms 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, pharmaceutical and manufacturing. Ms Marvez' 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 terminations, 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.

KELLY MCMULLON
Proskauer Rose LLP

Kelly McMullen is an associate in the labour and employment law department in London and a member of the international labour and employment group, and the privacy and cybersecurity group.

Kelly assists clients in a wide range of contentious and non-contentious labour and employment law matters, including claims for unfair dismissal, discrimination and whistle-blowing in a variety of sectors such as financial services, retail and information technology.

Kelly provides general day-to-day counselling and advice, in all areas of employment-related issues (including hiring, terminations, grievances, redundancies), as well as the employment aspects of transactions and all aspects of data privacy compliance in the UK. She is also a co-author of Proskauer on Privacy and speaks on data privacy matters at in-house external conferences and webinars.
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.

CAROLA MÖLLER

_Krogerus_

Carola Möller focuses on employment law and dispute resolution. She regularly advises clients on all aspects of employment law, including day-to-day advice, employment and executive agreements, as well as terminations and reorganisations. She also assists clients in matters related to data protection and privacy issues with a particular focus on human resources data and employment issues. She also represents clients before general courts and arbitration tribunals, especially in employment-related matters. She heads the firm’s employment and benefits practice.

ALEJANDRO ALFONSO E NAVARRO

_Villaraza & Angangco_

Al 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.

DOMINGOS ANTONIO FORTUNATO NETTO

_Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados_

Domingos has experience in representing management and individuals in the area of employment litigation. He advises clients in disputes involving reduction of employee work hours, expat-related issues, offshore work, employee benefit plans, as well as labour and employment aspects of corporate transactions, including mergers and acquisitions. Domingos works very closely with his clients to understand their businesses and to offer them employment-related strategic planning.

NICHOLAS NGO

_TSMP Law Corporation_

Nicholas 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. His experience includes shareholder, 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 _Getting the Deal Through: Labour & Employment_ with Ian Lim.
CHISOM OBIOKOYE
Perchstone & Graeys

Chisom Obiokoye is a graduate of the University of Benin, Benin City, Nigeria, 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 Court of Appeal. Additionally, Chisom is a member of the firm’s editorial team and contributes to the monthly and quarterly newsletters, which continue to stimulate readers globally.

DANIEL ORNSTEIN
Proskauer Rose LLP

Daniel Ornstein leads Proskauer’s London employment team and is a co-head of their international labour and employment group. He has over 15 years of experience dealing with a broad range of UK and international employment issues. Dan is a go-to adviser for clients who rely on his sophisticated advice both on day-to-day matters and high-stakes situations on a broad range of domestic and cross-border employment issues, ranging from advisory work to litigation. Dan is ranked in Chambers UK, which describes him as ‘incredibly analytical’, ‘incredibly intelligent and an excellent sounding board’ and someone who ‘displays both empathy and an assured knowledge of the best way to treat cases’. He is also recognised in Chambers Global, The Legal 500 UK and Who's Who Legal: Management Labour & Employment Lawyers. Dan is a graduate of Wadham College, Oxford University.

ROCH PAŁUBICKI
Soltyński Kawecki & Szlęzak

Roch Pałubicki, attorney-at-law, is a 2001 graduate of the Adam Mickiewicz University Law School in Poznań. Mr Pałubicki is a partner in charge of the employment law department of the Soltyński Kawecki & Szležak law firm, where he has worked since 2000. During his 18 years of practice at the firm he has gained expertise within various aspects of Polish and European employment and social security laws with a particular focus on employee incentives, management contracts, employment aspects of M&A transactions (including transfer of employees), working time and non-competition. He has taken part in the implementation of hundreds of employee and management shareholding programmes. Mr Palubicki participates in conducting and resolving collective disputes, including as a member of the Social Arbitration Panel. He also advises clients in collective and individual redundancies and has supervised major projects related to company closures. Over the past
several years Mr Pałubicki has gained a unique experience in negotiations with trade unions, works councils and other employee representatives. He represents clients in employment and social security litigation. Mr Pałubicki speaks fluent English.

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/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 Court and the Labour Appeal Court. Brian has also acted as a judge of the Labour Court 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
Vieira de Almeida
Tiago 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, and has been assisting the human resources departments of clients of the firm on a daily basis 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.
RASHEL ANN C POMOY
Villaraza & Angangco
Rashel 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 has a degree in philosophy from the same university where she graduated magna cum laude.

ANNA PRAXITELOUS
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Anna Praxitelous is a lawyer at George Z Georgiou & Associates LLC. She studied law at the Democritus University of Thrace, Greece, and was called to the Cyprus and Nicosia Bar in 2010.

JUAN CARLOS PRÓ-RÍSQUEZ
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Juan Carlos 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 in 1990 and received his LLM from the Southern Methodist University in Texas in 1994. He completed his doctorate of laws with the highest honours at the Central University of Venezuela in 2008. He has been head professor of labour and employment law at the Central University of Venezuela since 2009.

Juan Carlos is a partner at Dentons and has a strong background in negotiating and drafting individual employment contracts and labour settlements, as well as in distribution contracts, labour and employment planning, consultancy agreements and expatriate transfers. Juan Carlos has also been involved in labour and employment matters, and has extensive experience negotiating collective bargaining agreements on behalf of employers.

Juan Carlos has acted as lead counsel implementing codes of conduct and conducting ethics compliance investigations in Latin America, as well as on employment litigation in Venezuela and on the coordination of expatriate litigation and the hiring and transferring of expatriates in Latin America. He has also represented multinationals in occupational health and safety claims, and counselled them on tax planning for the effective use of employee stock options. He has also rendered assistance to clients in compliance and investigation matters.

Juan Carlos is considered a Star Individual by Chambers Latin America (2013–2019) and has received the Best Lawyer award for labour and employment by Best Lawyers. He has also been recognised by 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.
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Andrea Cecilie Rakvaag is an associate in the employment department in Stavanger. Andrea has a master’s degree in law from the University of Tromsø, where she specialised in employment law.
   Andrea assists clients in a wide range of contentious and non-contentious employment and labour law matters. She assists clients both in an advisory capacity, as well as in employment law negotiations and legal proceedings.
   Andrea has a particular focus on general day-to-day employment and labour law issues, as well as workforce reductions and employment law in transactions (including TUPE).

OLGA K RANKIN
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Ms 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 (2003) 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.
   She 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 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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Stacey is a senior associate in MinterEllison’s Sydney office. She is dual qualified in the United Kingdom and Australia. Stacey provides the full range of employment, human resources and industrial law advice. She practised in the United Kingdom for six years before relocating to Sydney and has extensive experience of ‘project managing’ employment matters that involve multi-jurisdictional aspects, including international assignments and secondments.
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Paul Romatet is an associate in the labour and employment law department, resident in the Paris office and a member of the firm’s international labour group. Mr Romatet joined Proskauer in 2012.

He advises employers on their labour and employment issues, often in the context of individual litigations, drafts contracts of employment and leads termination procedures. He is also experienced in collective employment issues involving union law and employee representative institutions. His practice also encompasses assisting his clients in matters of social security law and social protection.

Mr Romatet graduated from the University of Paris II, Panthéon-Assas and holds a law degree in common law. He is a teaching assistant in social protection law at the University of Paris I, Panthéon-Sorbonne.

Mr Romatet is admitted to the Paris Bar and speaks French and English.

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Dirk Jan 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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Martin Šafar is a founding and managing partner at Law Firm Šafar & Partners, Ltd. He counsels clients on a wide range of employment and labour law, as well as other matters. He also practises in the areas of company disputes, commercial litigation and contracts. Martin also specialises in insolvency cases.

Together with his partners he counsels some of the most important companies in Slovenia. His clients hold him in high regard for his litigation skills. He regularly represents companies in courts in all kinds of civil law matters. He is a member of the Bar Association of Slovenia and can represent his clients at every level of the court system, including the Supreme Court.

Martin Šafar studied law at the University of Ljubljana where he graduated *cum laude* and is continuing his studies at a doctoral level. He is fluent in English, Croatian and Serbian; he also understands and speaks German and French. He is also a qualified mediator. Martin Šafar is listed in *Chambers and Partners* as a recognised practitioner for employment law in Slovenia.
VESNA ŠAFAR
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Vesna Šafar is a founding and managing partner at Law Firm Šafar & Partners, Ltd. She has almost 40 years of experience in the field of labour and employment law, which are her major areas of specialisation. She worked as a labour and social court judge for more than 15 years before becoming a lawyer in 1991.

Her experience with employment and labour law matters includes extensive trial advocacy in cases involving unfair dismissal, discrimination, strikes and restraint of employees. Vesna Šafar advises public and private companies on all aspects of labour and employment law and is highly regarded for her work in connection with the employment aspects of corporate restructurings and reorganisations, acquisitions and redundancies. She also advises on mass dismissals, collective bargaining, employee and executive terminations, litigation and contracts. Her key competence lies in negotiating with works councils and legal and trade unions advisers. She has experience with negotiations of collective agreements and the representation of employers in the event of strikes.

Vesna Šafar is listed in Chambers and Partners as a senior statesman for employment law in Slovenia. She is an experienced lecturer and often speaks at various conferences and seminars. She is also a qualified mediator.

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Hideaki Saito is an associate 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 (BJELL). He is admitted to practise in both Japan and the state of New York. His areas of speciality are labour and employment, and taxation.

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Mila Selak graduated from the faculty of law, University of Zagreb, in 2009 and passed the Bar exam with the Ministry of Justice of the Republic of Croatia in 2012.

Mila joined Ostermann Law Office in June 2011. She became a partner in Ostermann & Partners LLP in February 2014.

Mila practises in areas of commercial, corporate and M&A, and acts for clients in dispute resolution. She has advised domestic and international clients on a wide range of commercial transactions, including acquisitions, disposals, capital raisings and joint ventures, for which she drafted numerous comprehensive compliance and due diligence programmes. She also regularly advises clients in construction, consumer, retail and TMT sectors.

Mila has extensive experience in providing legal advice with respect to various employment law issues, dealing with both Croatian and EU legislation. Among other things, Mila drafts employment contracts, manager contracts, dismissals and working regulations, and represents clients in employment-related dispute resolution.

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GILLIAN SERVICE
MinterEllisonRuddWatts

Leading the Auckland employment team, Gillian is an internationally recognised employment law specialist with a pragmatic approach that is highly valued by clients. Gillian is passionate about the future of work and the challenges organisations face both locally and globally.

Gillian specialises in risk management in business arising from people. She is regularly sought as a thought leader on the future of work and complex pieces of legislation, such as the Holidays Act and strategic Industrial Relations advice. Gillian advises on all aspects of risk management relevant to the full breadth of employment law issues, including: protection of confidential information and restraints of trade; worker status, contingent workforces and flexible working models; industrial relations; health and safety including bullying, harassment and well-being; privacy; regulatory issues; human rights and discrimination.

Gillian has practised employment law in top-tier law firms in Scotland, England and New Zealand.

INDRA SETIAWAN
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Mr Indra Setiawan joined ABNR in 2003 and became a partner on 1 January 2016. He graduated from the faculty of law of the University of Indonesia, majoring in Indonesian Civil Law. In ABNR, he specialises in Indonesian employment law and has advised clients on various employment matters. He has extensive experience in employment dispute matters and cases, and has represented clients before Indonesian industrial relations courts. In addition to his employment practice, over the years he has developed expertise in other areas of practice, which include corporate and commercial law, foreign investment, mergers and acquisitions, plantation, pharmaceutical, and immigration. From 2013 to 2014, he was seconded to one of the largest law firms in South Korea.

JULIANA M SNELLING
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Ms 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 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 2018 writes: ‘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.’ The 2017 edition of this publication stated: ‘Juliana Snelling is one of the foremost employment lawyers in Bermuda and is recognised as a formidable litigator and disputes expert.’
In 2015, Juliana won a ‘Best of Bermuda Award’ in The Bermudian magazine for being Bermuda’s Most Tenacious Lawyer. In 2012, she was the winner of The Bermudian’s Services Award for legal services for being the ‘go-to’ lawyer for employment and immigration representation.

The preceding year, Juliana was recognised by the Bermuda government’s Department of Human Affairs as one of the 100 Women/100 Vision honourees, an award that highlights the achievements of 100 women in Bermuda who have had a positive impact on the island in the business sector.


She is the founder of two voluntary community action initiatives: the Grateful Bread (2017), which feeds and donates to the needy in Bermuda each month at a social celebration, bringing together persons of all races and backgrounds to help heal divisions in Bermuda society; and SPS.bm (Support Public Schools, Bermuda), which liaises the private sector with public-school classrooms to purchase school supplies and provide cultural experiences to help enhance the classroom experience and equalise opportunity.

FILIP SODULSKI
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Filip Sodulski, attorney-at-law, is a graduate of the Łódź University Law School. He joined Soltyśiński Kawecki & Szlezak in 2016. Mr Sodulski assists clients in all aspects of labour law, including transfers of employees, collective redundancies, employers’ internal regulations and policies, harassment and discrimination matters. He has an extensive practice counselling employers on establishing and terminating employment relationships with executives. He also represents clients in employment and social security cases. Mr Sodulski is fluent in English.

UELI SOMMER
Walder Wyss Ltd

Ueli Sommer is a partner of 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 schemes. 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.

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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 career on the judiciary career path, but in 2000 she began working as a legal associate in employment law at MAQS Law Firm. In 2009, she became a joint owner of Wesslau Söderqvist. Jessica now has also almost 20 years’ experience of providing advice on every aspect of labour and employment law.

**İLAYDA ŞÜKRÜOĞLU**  
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İlayda Şükrüoğlu is a partner at BaykanIdea Law Offices. She attended Pendik High School and the Faculty of Law, Istanbul University (2010 to 2015). She attended a seminar organised by the University of Zagreb about the European Convention on Human Rights in August 2018. She has worked for international companies as a counsel and was part of Professor Kerim Atamer’s work group focusing on maritime law for four months in 2015.

**CAROLINE SYLVESTER**  
*Clemens*

Caroline Sylvester is an attorney in the employment, corporate immigration and data protection law department at Clemens, which is a substantial full-service firm by Danish standards.

Caroline advises a variety of Danish and multinational clients on all aspects of the employment law. Among her specialities are termination of employee contracts, employee disputes, restrictive covenants and multi-jurisdictional employment matters.

Caroline also has a lot of experience with 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 specialities, 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.
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Yasmine Tarasewicz is a partner in the Paris office of Proskauer Rose LLP and is co-head of the French and EU employment group.

Mrs Tarasewicz has been practising for more than two decades with a principal focus on French and European labour law and litigation for French and international clients. Her practice centres on collective issues with an emphasis on the employment law aspects of major reorganisations. She also appears before all the relevant courts in matters such as wrongful dismissals, collective lay-offs and litigation against unions or works councils.

*Chambers Europe* notes that Ms Tarasewicz ‘is hailed by sources for her “eloquence, strong personality and superstar profile”’, and that she is widely acclaimed for her abilities and exceptional work on collective employee issues arising out of complex restructurings, as well as for her work on discrimination cases’. A recent edition of *The Legal 500 EMEA* states that ‘Proskauer Rose LLP’s reputation is directly linked to the expertise and track record of practice head Yasmine Tarasewicz, who is “very impressive and really helpful in assisting clients to find their way through French employment law”’.

She is established as an opinion leader. As one of France’s leading experts in this field, she lectures and writes extensively. Her opinion and comments are sought by many experts and journalists and she hosts regular committees during which experts and clients can discuss practical employment issues.

Ms Tarasewicz is admitted to the Paris Bar and speaks French and English.

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Anna 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.

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Keisuke Tomida is an associate at Dai-ichi Fuyo Law Office. He graduated from Keio University in 2007 and Keio University Law School in 2009. He mainly provides legal services in labour and employment.

RAFAEL VALLEJO
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Rafael Vallejo has been a member of Gonzalez Calvillo’s employment practice group since 2009 and became partner on 1 January 2016. He is a lawyer with ample experience in all kinds of labour and employment matters, with a noteworthy business-oriented style. He has acted as counsel to multinational and Mexican corporations in numerous labour restructurings, employment terminations of senior management personnel, individual and collective labour negotiations and litigation, as well as in labour and employment due diligence procedures and audits of international labour organisations such as the Fair Labour Association.
He holds a master of laws degree from Duke University School of Law at Durham, NC and obtained a JD degree from the Ibero-American University in 2003. He also completed postgraduate studies in labour law at the National Autonomous University of Mexico and in business law at the Free School of Law. Mr Vallejo is member of the steering committee of the International Forum on Employment Law.

CHRIS VAN OLМEN

*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 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 vice chair 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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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 also 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.

GORDON WILLIAMS

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Gordon is a partner based in MinterEllison’s Sydney office. He is dual qualified in the United Kingdom and Australia.

Gordon provides strategic advice about employment, human resources and industrial relations issues in diverse workplaces, and in the context of the wider corporate environment. Gordon advises his national and international clients on employment and HR change management issues generally, and as a result of major corporate transactions (on both the buy and sell side, as well as mergers and outsourceings). He also has market leading expertise in employee benefit arrangements and related corporate governance issues.
THOMAS WINZER

*Gleiss Lutz*

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 of Gleiss Lutz’s labour and employment group since 2009.

YING LI

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Ying Li is a partner in the Beijing and Hong Kong offices of Proskauer Rose LLP. Having been based in China and Hong Kong for over 20 years at leading international law firms, Ying’s practice focuses on labour and employment, China-related cross-border mergers and acquisitions, private equity, overseas public and private financing, and outbound investments of Chinese enterprises.

Ying regularly counsels multinational companies on entering the Chinese market; structures complex investments and acquisitions in China involving joint ventures, wholly foreign-owned enterprises, partnerships and licensing; and advises them on regulatory and compliance issues. Ying also specialises in Chinese labour and employment law. He frequently advises clients on various Chinese labour and employment issues, such as employment contracts, restrictive covenants, benefits and incentive plans, social welfare, labour disputes, lay-off and termination, restructuring and collective bargaining.

Ying graduated from Peking University Law School with LLB and LLM degrees and Harvard Law School with a JD degree. Formerly a law professor at Renmin University of China Law School and a visiting scholar at Harvard Law School, Ying is a frequent speaker on legal and regulatory developments related to labour and employment, mergers and acquisitions and corporate finance in China, and is quoted extensively by the Chinese and international press.
Appendix 2

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