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Employers' Counsel Worldwide

# FOR THE WORLD

EMPLOYMENT LAW GUIDE  
**GLOBAL EDITION 2026**

# INTRODUCTION

L&E GLOBAL PROUDLY PRESENTS  
THE LATEST EDITION OF OUR  
FLAGSHIP PUBLICATION:  
**EMPLOYMENT LAW GUIDE – THE  
GLOBAL EDITION**

In today's fast-evolving global workplace, access to reliable, practical and up-to-date employment law information is more essential than ever. L&E Global's Employment Law Guide continues to be the trusted first reference for HR professionals, corporate leaders and legal counsel operating across borders.

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# ABOUT US

L&E Global is the worldwide leader in cross-border labour and employment law. We unite top-ranked employment law firms with a shared commitment to excellence, collaboration and seamless client service across jurisdictions.

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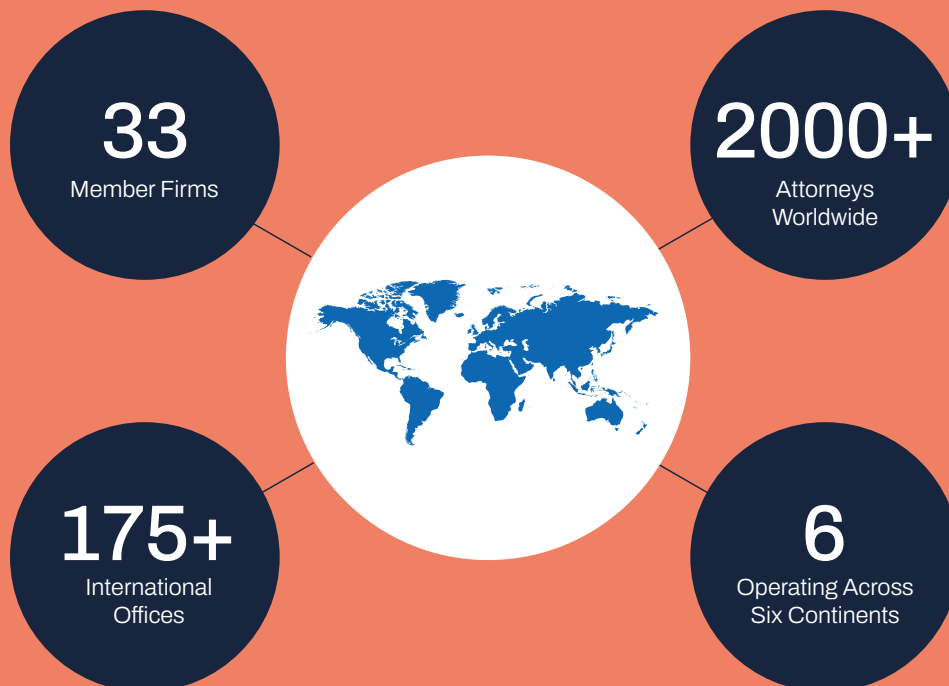
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## I. INTRODUCTION

Argentina's labour laws are remarkably comprehensive and regulate virtually all the terms and conditions of the employment relationship. Labour laws are public policy and are therefore mandatory. The employer is obligated to grant employees at least what is afforded to them under labour legislation. Hence, an employer can extend benefits on top of the standard provisions, but cannot agree to terms that are less favourable or otherwise detrimental to an employee, nor can an employee waive any known right or privilege established for his/her protection or benefit under the law.

### KEY POINTS

- Argentina's labour laws are pro-employee and have been designed to safeguard the rights of employees and workers, by instituting rules governing working conditions and working hours, providing for payment of salaries during illness, setting surcharges on salaries for overtime, establishing annual vacations and requiring the payment of severance compensation in the event of unfair dismissal (dismissal without justified cause).
- Labour law in Argentina is comprised of public order provisions and thus cannot be ruled out, or waived by any agreement, applicable law or jurisdictional clauses subsequently included in any agreements. Accordingly, Argentina's labour laws will apply – and the labour courts will have jurisdiction – with respect to any eventual labour claim filed with the courts related to work performed in Argentina.
- Employees are entitled to a 13th salary or statutory annual bonus, called "aguinaldo" or "sueldo anual complementario/SAC", which is payable in two semi-annual instalments, to be paid on 30 June and 18 December. Each instalment is equal to 50% of the highest monthly salary accrued during the corresponding semester.
- Employers must pay a compulsory life insurance for all employees.
- The employer can only change the terms and conditions of employment, provided
- that those changes are not unreasonable and do not either:
- modify the essential terms of the employment contract; or cause moral or material damage to the employee.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

If an employee is discriminated against because of race, religion, age, gender, disability or political or union activities, the employer can be ordered to compensate the employee for any damages caused. Labour law provides additional severance in case of discrimination dismissal, equal to an amount that ranges between 50% and 100% of the severance compensation and in some cases 13 monthly salaries. As far as labour conditions are concerned, the law obliges the employer to give the same benefits/salary to employees within the same category and seniority. Different conditions granted by the employer to the employees must be justified in objective parameters (seniority, job position, responsibilities and performance).

### PROTECTIONS AGAINST HARASSMENT

The employer is obliged to keep a safe working environment, including preventing and protecting employees against physical and psychological damages caused by discrimination. The employer could not only be ordered to protect an employee, but can also be held liable for any damages suffered by the employee due to discrimination.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Employers are obliged to provide reasonable access to disable employees, such as employees in wheelchairs.

### REMEDIES

Employees who are discriminated against can assert unequal treatment, claiming payment of salary variances or to be granted the same benefits. In case of termination due to discrimination, the employee is entitled to claim tort damages.

Additional severance is provided for dismissed employees recently married or pregnant. Union delegates cannot be dismissed while they hold office and for one year thereafter. In the case of dismissal, the union delegate may claim the reinstatement or consider himself/herself dismissed on a constructive basis and claim payment of

severance compensation plus pending salaries until the expiration of his period, plus damages compensation. Labour law provides additional severance in case of discrimination dismissal, equal to an amount that ranges between 50% and 100% of the severance compensation and in some cases 13 monthly salaries.

In the event of a dismissal of an employee who is ill, the employee can claim to be paid severance compensation, plus the pending salaries until the expiration of the paid sick certificate, plus damages.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

All employees are covered by a national retirement pension scheme, funded through mandatory contributions by both employer and employee. It is paid by the employee through withholdings of their gross salary and by the employer through fixed contributions, with each calculated as a percentage of the employee's salary. Employees are eligible for retirement and collect governmental pension when they reach retirement age (65 years for men and 60 years for women) and have made contributions to this system for 30 years. Employers can only compel employees to retire when they reach 70 years old, and have made contributions to this system for 30 years.

### HEALTHCARE AND INSURANCES

Healthcare schemes exist for all employees, entitling them to free medical treatment and hospital care. These are funded through employer contributions and employee withholdings, both a percentage of the employee's salary. Employers must obtain a mandatory insurance that covers the employee's death, illness or disability in connection to work. Employers must secure insurance contracts through authorised insurance companies. Such entities are obliged to provide financial and medical assistance to the injured employees. The employer must also provide mandatory life insurance for his employees, payable by the employer through monthly contributions. Keep in mind that applicable collective bargaining agreements might set forth other additional insurances.

### REQUIRED LEAVE

#### Holidays and Annual Leave

Employees are entitled to an annual paid vacation period. Vacations are compulsory and the employer must grant them between 1 October and 30 April, as follows:

- up to 5 years of service: 14 calendar days
- between 5 and 10 years of service: 21 calendar days
- between 10 and 20 years of service: 28 calendar days
- over 20 years of service: 35 calendar days

The parties may always agree to a longer period than the one provided by law, but may not agree on a shorter period. Collective Bargaining Agreements may provide longer periods.

National holidays must be observed, and the corresponding salary should be paid at twice (2x) the rate, whenever services are actually performed during those days.

#### Maternity and Paternity Leave

Female employees are entitled to 90 days' paid maternity leave. This is usually taken in the 45 days before giving birth and the 45 days afterwards. However, the employee can instead choose to take 10 days' leave before giving birth and 80 days' leave afterwards. Leave is paid by the social security system as a family allowance. Female employees can request additional unpaid leave between three and six months. While a newborn baby is breastfeeding, a female employee can take two, half-hour periods a day to feed her baby, for up to one year after the birth. Paternity leave is 2 days.

#### Sickness and Disability Leave

In the event of sickness leave or injury related to work, the employer must pay the employee's salary for the first fifteen days. After the fifteenth day, the working insurance company will pay the sick leave to the employee. In respect to accidents or illness not related to work, employees who have served for up to 5 years are entitled to 3 months of paid sick leave. If the employee has a family, the paid sick leave is 6 months. For those employees who have served for more than 5 years, the paid sick leave is 6 months and if the employee has a family, the paid sick leave is 12 months. These paid sick leaves, since they are not related to work, are not covered by any insurance nor by the government, and are paid by the employer. The employer is entitled to require the employee to submit to an examination by a medical doctor, appointed by the employer, to verify that the employee is actually ill and in no condition to work. Once the paid sick leave term has lapsed, in case the employee is not able to return to work, the employer is obliged to keep the employee on its payroll as in leave, but without paying any salary to him/her for up to twelve more months. If, during that term, the employee is found to have a permanent disability that prevents him from being able to perform the same work, the employer is obliged to give him work in accordance with his disability. If the employer can prove that he is not able to provide the employee with work in accordance with the employee's disability, the employer can terminate the employment by paying 50% of the severance compensation as provided in a dismissal without justified cause, and must pay 100% in case of total permanent disability.

### Other Required or Typically Provided Leave(s)

Argentina's labour laws also provide leaves of absence on the grounds of marriage (10 days), mourning (3 days) or educational examinations (2 days per exam and up to 10 days per year). Applicable collective bargaining agreements usually provide for other leaves or additional days of leave.

### Pensions: Mandatory and Typically Provided

Employees are entitled to collect a mandatory pension when they reach retirement age (65 years for men and 60 years for women) and have made contributions to this system for 30 years. Employers can only compel employees to retire when they reach 70 years old, and have made contributions to this system for 30 years.

### Other Required Or Typically Provided Benefits

Employees under a collective bargaining agreement for commercial activities, are entitled to a retirement insurance.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Written employment contracts are not required for permanent, full-time employment relationships that do not work remotely, because labour laws are mandatory, very comprehensive and rule almost every term of the employment relationship. Labour laws only require the employer to register the employee in the company labour books and before the tax authorities, pay social security and taxes in respect to all salaries payable to the employee, and prepare and deliver to the employee the correspondent salary slips on a monthly basis. Employers must also provide for mandatory life insurance as well as working accident insurance for all employees.

### FIXED-TERM/OPEN-ENDED CONTRACTS

For a fixed-term contract: a written employment contract must be executed; it requires an extraordinary need that duly justifies executing a fixed term contract; there is a maximum term of 5 years; once the agreed term ends, the employer must pay a severance compensation equivalent to 50% of a regular one; and a fixed term contract has no trial period, among other requirements. A temporary contract can be used when extraordinary and transitory production demands or requirements are foreseeable, although a specific term for the contract termination cannot be foreseen. The contract will also take place when the relationship begins and ends with the specific job execution or with the specific service for which the employee was hired to execute.

### TRIAL PERIOD

Trial periods can be up to 6 months for indefinite term contracts. Termination during the trial period can be decided without paying any compensation or severance payment liability to the employee (except that a prior notice of 15 days is required and the wages due).

### NOTICE PERIOD

Employers must give a prior written notice to the employee in the event of a termination of employment, absent a justified cause. Such prior notice must be given by the employer: (i) 15 days in advance, if the labour contract is under the trial period; (ii) 1 month in advance, if the employee has served for up to 5 years; and (iii) 2 months in advance, if the employee has served for more than 5 years. Employers have the option to not give such prior notice, in which case it must pay severance compensation in lieu of notice, equal to 15 days' salary, plus one or two monthly salaries, depending on each case. It is customary that employers opt to pay this compensation instead of giving prior notice.

The employee must also give 15 days' prior notice to the employer in the event that he plans to resign from his job, without detriment to his seniority.

### TELEWORKING CONTRACT

On 30 July 2020, the National Senate approved the Legal Regime of Teleworking Contract ("Teleworking Law"). This law guarantees minimum legal requirements for a teleworking contract and provides that specific regulations for each activity will be established through collective bargaining, complying with the principles of labour's public order.

Pursuant to the Teleworking Law, the working day must be agreed in advance and in writing, complying with legal and conventional limits in force. The law provides that the platforms and/or software used must not authorise the worker's connection outside of working hours. The teleworker will have the right to not be contacted and to disconnect from digital devices and/or ICTs during off-hours and leave periods.

The transfer from the on-site modality to the teleworking modality must be done with the employee's voluntary acceptance in writing, except in duly accredited cases of force majeure.

In the case where the worker performed tasks under an on-site modality and voluntarily agreed to provide tasks under the teleworking modality, he/she may revoke the consent given at any time during the employment relationship and without prior notice, and the employer is obliged to reinstate the worker in the establishment in which he/she had previously performed their work or at the closest establishment to the worker's home in which he/she could perform tasks, unless it would be impossible to comply with this obligation, for reasons which are legitimate and justified.



Regarding a worker who, from the beginning of the relationship, agreed to provide tasks under the teleworking modality, the eventual change to an on-site modality, will operate according to the guidelines established by collective bargaining for each activity.

The employer must provide the employee with the necessary equipment, including hardware and software, work tools and the support necessary to perform the tasks, as well as assume the costs of installation, maintenance and repair of such devices. The Teleworking Law contemplates the possibility that the teleworker will satisfy the essential working elements, and that the employer will compensate for the use of such tools which are owned by the worker, in which case, such compensation will operate according to the guidelines to be established by collective bargaining.

The control systems implemented to protect the employer's assets and information shall have union participation, in order to safeguard the teleworker's privacy and the privacy of his/her home.

In cases of transnational telework, the law governing the place of performance of the tasks, or the law of the employer's domicile, whichever is more favourable to the teleworker, shall apply.

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

There is no restriction regarding the employment of foreigners in Argentina. Requirements differ if the employee's nationality is from a country of Mercosur or affiliated to Mercosur (Uruguay, Paraguay, Brazil, Argentina, Colombia, Chile, Venezuela, Ecuador, Bolivia and Perú) or other countries. Employees who are not nationals of a country member of the Mercosur, or affiliated to Mercosur, are required to obtain a working visa to work under an employment relationship in Argentina. Employers must first register before a registry of employers that hires foreigners. In order to obtain a working visa, the employee should be registered as an employee of a local company in Argentina. All foreigners have to file a criminal records certificate, duly legalised from the country or countries where they have been living for the last 3 years, as well as from Argentina.

### **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

A foreign employer needs to establish a local entity to hire an employee, in order to register the employee before the local tax authorities and pay local taxes and social security obligations.

## **LIMITATIONS ON BACKGROUND CHECKS**

In Argentina, an employer cannot perform a criminal background check on an employee, either directly by the employer or by the use of a vendor. Only the employee can obtain the criminal background and then provide it to the employer. Also, the Criminal Records Registry will be confidential and may only provide reports to individuals who, by demonstrating the existence of a legitimate interest, request a criminal certification. Moreover, the certificate must be requested by the interested party personally or through his legal representative. In addition, the Argentine Data Protection Act establishes that personal data referring to criminal records can be processed only by the competent public authorities.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

Employers cannot include restrictions on applications that may entail any discrimination, such as gender, age, political or religious beliefs and/or marital status. Potential employees are not obliged to provide background information due to the fact that it is considered personal private information. The employer is obligated to conduct pre-employment medical examinations to determine if the employee is fit to work and to determine any prior health conditions at the beginning of the labour relationship.

## **VI. PAY EQUITY LAWS**

### **EXTENT OF PROTECTION**

Section 14 bis of the Argentine National Constitution, provides for the principle of equal salary for equal work. Additionally, Argentina has ratified the Equal Remuneration Convention C. 100 of the International Labour Organisation. The foregoing, in addition to Labour Law No. 20,744 as well as Anti-discrimination Law No. 23,592 and international treaties entered into by Argentina, prohibit discrimination.

Notwithstanding the above, different conditions (including salary variations) may be instated by the employer when it is justified by objective parameters (i.e., seniority, job position, responsibilities, tasks and performance).

### **REMEDIES**

A claim challenging equal pay practices is based on discrimination. In this respect, employees who are discriminated against can assert unequal treatment, claiming payment of salary variances, under the caveat of considering themselves dismissed on a constructive basis, further claiming –

- payment of mandatory severance compensation for dismissal without just cause;



- or, by demanding that the employer cease all discriminatory practices, the employee may be given equal pay – in addition to pursuing moral and material damages, which is possible under either situations.

## ENFORCEMENT/LITIGATION

Local case law has ruled in favour of employees who have claimed salary discrimination, when the employer could not produce conclusive evidence regarding the objective parameters for the different treatment (i.e., different salary compared to another employee performing the same tasks). In a recent case dated March 2020, a labour court ruled in favour of a female employee, who claimed to be underpaid in comparison to other employees in the same working category (approximately 50% of the salary of male employees in the same working category). The court found that the disparity between the parallel salaries was not justified.

## OTHER REQUIREMENTS

Employers are not required to take any action under pay discrimination such as reporting to governmental authorities, public disclosure of data or conducting pay analyses. However, employers must comply with positive actions with the constitutional principle of equal pay for equal work, in line with anti-discrimination laws, labour laws and international treaties.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

During the employment relationship, employees are obliged to respect in respect to employer's intellectual property, confidentiality and non-compete provisions. There are no specific laws about restrictive covenants after termination of employment. However, the Constitution provides freedom of work, which means that the employee may challenge any non-compete or non-solicitation provisions after termination of employment.

The employee is obliged by labour laws not to compete with the employer during the labour relationship. Labour Courts have ruled that non-compete provisions after termination are only permissible if they are limited in time (maximum 2 years, in exceptional cases can be exceeded) and compensated (at least 50% of monthly salary, approx.). Failure to follow these requirements will render a non-compete provision null and unenforceable.

The employee is bound during the labour relationship. After termination, it will be analysed

as a non-compete provision. Non-solicitation of employees is unenforceable in Argentina due to the employee's constitutional right of freedom to work.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Restrictive Covenants, such as non-compete or non-solicitation of customers, after termination of the labour relationship, must comply with specific requirements to be enforceable. The provision should be limited in time (maximum 2 years), compensation (at least 50% of monthly salary approx.) and the geographical and industry/company's scope must be clearly outlined.

## USE AND LIMITATIONS OF GARDEN LEAVE

Argentina's labour laws have no specific provision regarding garden leave. Employers cannot force employees to take garden leave (paid leave), since the employer is obliged to give work to the employee. However, the employee can accept the garden leave, in which case the employee must be paid his salary and benefits in full, as if he was working.

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

Employers can restrict employees' Internet use and/or social media use during working hours, instructing that it can only be used for labour purposes.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Employers can monitor, access and review only labour/corporate employees' electronic communications, provided that the employee is notified in advance (by signing a corporate policy in that respect) that the electronic communications are to be used only for working purposes and can be monitored and therefore, the employee should have no expectation of privacy.

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Provided that the employees have signed a copy of the company's policy for the use of social media and

provided that employer can prove the employee's breach and the damage to the employer, employees who do not follow the social media policy can be subject to disciplinary sanctions. Employees who divulge confidential information can also be subject to disciplinary sanctions or dismissed with justified cause, depending on the seriousness of the fault, their seniority and any prior sanctions of the employee.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

Employers can terminate employment at any time without justified cause, subject to payment of severance compensation provided by labour laws. Employees on a trial period, i.e. during the first three months of employment, are not entitled to severance compensation; exception made to prior notice (15 days). Termination of employment with justified cause does not entail payment of severance compensation.

The employer can dismiss an employee with justified cause in the event of the employee's failure to fulfil his obligations which, by their gravity, do not consent to the continuation of the relationship. Labour laws do not list specific breaches that justify dismissal and should be analysed on a case-by-case basis. The employer has the burden of proving the cause of dismissal.

An employee can also resign, in which case, no severance compensation is payable. The employee can consider himself dismissed on a constructive basis due to an employer's breach, the seriousness of which, does not lend itself to the continuation of the relationship, in which case a labour court will decide if the employee had a justified cause for constructive dismissal. Lastly, an employment relationship can terminate due to the fact that the employee retires at the time he/she is granted the governmental pension plan. No severance compensation is payable in that case.

### COLLECTIVE DISMISSALS

The company has to go through a mandatory conciliation procedure before the Ministry of Labour, prior to dismissing a certain minimum number of employees, provided in Law No. 24,013:

- when the company has less than 400 employees and the company will dismiss more than 15% of the total payroll;
- when the company has between 400 and 1,000 employees and the company will dismiss more than 10% of the total payroll;
- when the company has more than 1,000 employees and the company will dismiss more than 5% of the total payroll.

### INDIVIDUAL DISMISSALS

Employer can terminate employment at any time without justified cause, subject to payment of severance compensation. Union delegates are protected and therefore, cannot be dismissed during their term and for one year afterwards. In case of dismissal of pregnant, married or sick employees, among others, additional severance compensation is payable. Employers have to serve notice of termination in writing and through a notary public or certified letter for all dismissals. A resignation must be made in writing and the employee has to send a telegram from the official postal company (Correo Argentino).

### IS SEVERANCE PAY REQUIRED?

In case of termination of employment without justified cause, the employer must pay the employee mandatory severance compensation, as provided by law, within 4 days after serving notice of termination, as follows:

**Seniority compensation:** equivalent to the highest monthly salary for each year of employment or period exceeding 3 months, taking, as a basis, the highest monthly salary and the regular and ordinary salary accrued during the last working year. Such basis has a maximum ceiling amount provided by the applicable bargaining agreement (three times the average of all wages provided by such collective bargaining agreement) and a minimum cap amount (one gross monthly salary). The Supreme Court ruled that said ceiling must not imply a reduction of more than 33% of the highest monthly salary basis.

**Compensation in lieu of notice:** the employer must give a prior written notice to the employee in the event of a termination of employment absent justified cause. Such prior notice must be given by the employer: (i) 15 days in advance, if the labour contract is under the trial period; (ii) 1 month in advance, if the employee has served for up to 5 years; and (iii) 2 months in advance, if the employee has served for more than 5 years. If the employer does not give such prior notice, it must pay this severance compensation in lieu of notice, equal to 15 days' salary plus one or two monthly salaries (dependent upon each specific case). It is customary for employers opt to pay this compensation instead of giving prior notice.

**Pending days till the end of the month:** if the dismissal does not take place on the last day of the month, the employer must pay a compensation equal to the proportional salary for the pending days, to complete the entire month in which the dismissal took place.

**Compensation for unused vacations:** the employee is entitled to compensation equal to the vacation pay in proportion to the days effectively worked, for the year in which the dismissal took place.



**Statutory Annual Bonus:** the employee is entitled to the proportional amount of this 13th salary. The severance compensation is reduced by one-half if the labour relationship ends as a result of the employee's death. Additional severance (equal to 13 monthly salaries) must be paid in case of termination without justified cause of a pregnant employee (during pregnancy and up to 7.5 months after giving birth) or an employee who has been married (and is fired within 3 months prior to the marriage or 6 months after the marriage). If the employee is dismissed during his or her paid sick leave, the employee is entitled to claim the months remaining to complete the paid leave, as provided by law, plus moral damages.

## SEPARATION AGREEMENTS

No separation agreement is required. The advantages of a separation agreement should be analysed on a case-by-case basis, depending on the amount to be paid to the employee and the employer's exposure. Argentina's labour law provides that any labour settlement agreement shall only be valid if it is approved by a labour court or the Ministry of Labour. Any such agreement duly approved by a labour court or the Ministry of Labour is binding and final, having the effect of *res judicata*, not only with respect to any claim of severance compensation and salary differences, but also with respect to any possible claim for labour fines.

In principle the age of the employee does not make a difference, but when employees reach 70 years old and have 30 years of contributions to the social security system, the employer is entitled to demand that the employee begin the process to obtain retirement and the governmental pension plan. The employer must serve notice to the employee in these circumstances. The employer must also deliver the labour certificates to the employee in advance and verify that the employee is eligible for retirement.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The employee can challenge dismissal with justified cause, by claiming payment of severance compensation for dismissal without justified cause, plus interest and legal fees, in which case a labour court will decide if the employer had a justified cause for dismissal. The employer has the burden of proving the cause of dismissal.

The employee can also claim payment of severance differences, alleging that the severance compensation was not properly calculated, in which case a labour court will decide if the employer correctly paid the salaries and severance compensation, as well as properly registered the employee's labour relationship and salary.

The employee must go through a mandatory conciliation process prior to filing a court claim. Parties must attend hearings before a conciliator appointed by the Ministry of Labour, to explore a settlement.

## WHISTLEBLOWER LAWS

Argentine criminal laws provide reduction of penalties for whistleblowers in respect to crimes against the public administration (corruption and fraud against public administration) customs, criminal offenses, economic and financial crimes, drug trafficking, terrorism, human trafficking and money laundering, among others. These laws also provide a reduction of penalties to be imposed on companies for crimes committed by their employees or officers, provided that the company has set forth a compliance policy that includes, among others, the company's protection to whistleblowers against retaliation.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

In Argentina, there are currently trade unions and employers' associations that represent all types of activities. Employees have the right to organise themselves into unions. Affiliation to unions by employees is not mandatory. The employee is free to decide whether to affiliate or not to the union. The Government grants official recognition only to the most representative union and this is the only union that can represent the employees in collective bargaining agreements.

Management can organise their own union, separate from the union of non-management employees.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Argentina has ratified ILO Convention # 87, which establishes that workers and employers, without any distinction whatsoever, shall have the right to establish and join organisations of their own choosing. It also provides that workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom and to organise their administration and activities. It also sets forth that workers' and employers' organisations shall have the right to establish and join federations, confederations and any such organisation.

Section 14 bis of the Argentine Constitution, provides that the Government must guarantee free and democratic unions and that unions have the right to execute collective bargaining agreements, file conciliation procedures and call a strike.

Law No. 23,551 provides freedom of association rights to unions, the right to organise, meet, file petitions to the authorities, freedom of affiliation for workers, requirements for union delegates, minimum union delegates per company and protection of union delegates. It also provides that the union that has been granted official recognition by the government, is the only one that can represent the employees and engage in collective bargaining agreements.

Union delegates are protected by law. They cannot be demoted, sanctioned or suspended and the terms and conditions of employment may not be changed to their detriment, nor can they be dismissed without justified cause, while they serve as union delegates, and this, until one year after their term expires. In order for an employer to apply a disciplinary sanction, suspend or dismiss with justified cause a union delegate during the protection term, the employer must seek the prior authorisation of a labour court. The same protection is granted to employees who run as candidates for union delegates, but are not elected, and this, until 6 months after the election.

The main tasks of the union delegate are: (i) to represent and make petitions representing individual workers; (ii) to verify compliance of labour laws and collective bargaining agreements in respect to workers; (iii) to participate in any inspection carried out by the labour authorities; (iv) to organise and conduct meetings; and (v) to educate and instruct individual workers.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Labour laws also allow the existence of other unions that are not officially recognised as the most representative union (referred to as “simply registered unions” before the Ministry of Labour). As such, simple registered unions cannot represent employees in collective bargaining agreements, but they can represent employees in other collective claims and file petitions to the labour authorities alleging employer’s breaches of labour laws. The Supreme Court and labour courts have ruled that the union delegates of simply registered unions are also protected against demotion, sanctions, suspensions, modification of the terms and conditions of employment to their detriment, and dismissal without justified cause.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES’ RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

In case of a transfer of undertaking, employees are transferred as a matter of law. The consent of the employees is not necessary, and no notice is required. The new employer must maintain the employee’s work category, benefits, rights, salaries and seniority acquired with the prior employer, otherwise the terms of employment may be modified, but only for the benefit of the employee. All liabilities of the in-scope employees transfer automatically to the new employer.

The employee may consider himself dismissed on a constructive basis, by reason of the transfer, if the terms of employment are changed to the detriment of the employee or he suffers any damage due to the transfer.

In case the assignment of personnel does not entail a transfer of undertaking, the employee must give his prior written consent and the new employer must maintain the employee’s working conditions. All liabilities of the in-scope employees transfer automatically to the new employer, as in the transfer of undertaking.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The prior employer will be jointly liable with the new employer for any labour and social security debts arising out of the employment relationship, prior to the date of transfer. The new employer becomes solely liable for those debts generated after the transfer. There is no legal obligation to inform, consult or obtain the authorisation of trade union/ employee representatives or labour authorities.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employees are entitled to a minimum wage that is adjusted from time to time. As from August 2024, the minimum mandatory wage is AR \$ \$262,432.9316,875, currently equal to US\$ 270.

### SALARY

A minimum wage has been established and is adjusted at intervals. However, said minimum wage is generally exceeded by the basic salaries established in the collective bargaining agreements. Collective bargaining agreements are negotiated by unions with the chambers that represent employers of each industry. The provisions of a particular collective bargaining agreement are mandatory by



law and regulated by law. A particular collective bargaining agreement is applicable to all employees working in activities such as industrial, commerce, health and other sectors. In general, employees who work as managers, supervisors or in other hierarchy positions are excluded from the legal framework of the collective bargaining agreement. The consent of the employee is not necessary, since they are automatically included in the collective bargaining agreement just for working in a company under a particular agreement. Collective bargaining agreements usually provide benefits to employees on top of what is provided for under Argentine labour and employment laws.

## MAXIMUM WORKING WEEK

The normal working hours for employees and workers are limited to 8 per day or 48 per week. Night shift and unhealthy work provide reduced working hours.

## OVERTIME

Overtime is paid at a rate of 50% of the normal pay, unless it is worked on Saturdays after 1 P.M., Sundays and holidays, in which case it is paid at a rate of 100% of the normal pay. Applicable collective bargaining agreements may provide higher payments. Overtime must not exceed 3 hours per day, 30 hours a month and 200 hours a year. All employees are entitled to overtime pay, except corporate directors or corporate managers, registered as such before the Office of Corporations (Register of Commerce). Part-time employees cannot perform overtime work.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Employers are obliged to grant mandatory life insurance and working accident insurance to employees. Employers are also obliged to provide a healthy and safe workplace (both physical and psychological), in compliance with the labour authorities' instructions, as well as the working insurance instructions. Employers in certain industries, must provide employees with work clothes, working tools and protection equipment, and must have preventative measures in place to prevent accidents and perform regular medical examinations.

## COMPLAINT PROCEDURES

Employees may file a petition before the union and/or the labour authorities complaining about the breach of health and safety obligations by employer. The labour authorities may inspect the workplace at any time and order the employer to remedy any breach and impose fines.



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## I. INTRODUCTION

The Australian Constitution ("the Constitution") has had a major impact on labour regulation in Australia. For much of the 20th Century, there was a significant division of responsibility for labour matters between the Federal Government and the six States and two Territories. However, following the 2005 WorkChoices reforms, the responsibility for labour matters has shifted predominantly to Federal regulation.

The *Fair Work Act 2009* (Cth) is the primary legislative source of employment regulation in Australia. The Act contains employment standards and conditions, provisions for regulating collective bargaining and controlling industrial action, and protections against unfair and discriminatory dismissal.

The Australian Government has also established model laws to harmonise state-based work health and safety legislation across Australia. These laws aim to reduce the incidence of work-related death, injury and illness.

### KEY POINTS

Employee rights in Australia are protected and regulated in the following ways:

- Employment is always a contractual relationship, so terms and conditions of employment are derived from the employment contract, subject to any mandatory statutory minima. Employment contracts are comprised of express terms, and terms implied in fact or by law. An employment contract need not be in writing.
- The Fair Work Act mandates certain minimum employment standards in National Employment Standards, including entitlements to various forms of leave, controls on maximum weekly hours, notice of termination and redundancy pay.
- Modern Awards (instruments made by the Fair Work Commission, Australia's industrial tribunal) set out the minimum conditions of employment for specific industries or occupations, and include rates of pay for ordinary and overtime hours, and allowances.
- Federal and State anti-discrimination legislation provides employees with protection from discrimination, harassment, vilification and victimisation on certain grounds, including race, sex, age, and disability.
- Federal and State work health and safety legislation imposes obligations on all persons in workplaces to take reasonable care to avoid work-related death, injury and illness.

- State based workers' compensation legislation provides for compulsory basic insurance of employees who are injured at work.
- Superannuation Guarantee legislation requires employers to pay contributions to an approved superannuation fund for their employees. From 1 January 2024, new amendments to the Fair Work Act now give employees the right to superannuation contribution under the National Employment Standards of the Fair Work Act and employees have the option of commencing proceedings for unpaid superannuation contributions under the Fair Work Act, unless the Australian Taxation Office has already commenced action against the employer for the unpaid superannuation contribution.
- State-based legislation will also give some rights (for example, long service leave legislation).

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Discrimination is broadly defined as the treatment of an individual or group more favourably or less favourably than another individual or group, on the basis of a specified attribute. Discrimination can be direct or indirect. Behaviour prohibited by equal opportunity laws comprise four broad concepts:

- discrimination
- harassment
- vilification
- Victimisation

The legislation requires that the act of discrimination occurs "on the ground of" or "by reason of" a person's status, such as their sex or race. The aggrieved person must show that other persons in the same or similar circumstances were not subject to the less favourable treatment and that the reason for the less favourable treatment was the aggrieved person's sex, race or other attribute.

### PROTECTIONS AGAINST HARASSMENT

Both Federal and State discrimination legislation provide for a process by which complaints of harassment are made to an administrative body which will investigate the complaint and attempt to achieve a settlement between the parties. If the matter does not resolve the complainant may seek to have the complaint heard by a tribunal or court.

Pursuant to recent amendments to the *Fair Work Act*, employees can now also make a complaint to the Fair Work Commission about sexual harassment. The Commission can deal with those complaints by making a range of orders, including compensation to victims.

The *Fair Work Act*'s anti-bullying regime came into effect on 1 January 2014. Under this regime, any "worker" at a constitutionally covered business who reasonably believes that he or she has been bullied at work may apply to the Fair Work Commission to stop the bullying.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Under anti-discrimination legislation there is an obligation on employers to provide reasonable adjustments (or reasonable accommodation) for employees with disability. Although not expressly stated as an obligation to provide reasonable accommodations the effect of prohibition on indirect discrimination is to require employers to consider whether conditions and requirements or practices in the workplace which impact adversely on particular employees are reasonable in the circumstances.

## REMEDIES

The most common remedies are a declaration to the effect that unlawful discrimination has occurred and an award of damages to compensate the aggrieved person for the loss they have suffered as a result of the unlawful discrimination. Courts also have the power to grant injunctive relief (i.e. an order compelling or prohibiting certain conduct), order an apology, order that an employee be reinstated to their former position, order a retraction and vary the terms of an employment contract. It is unsettled whether the courts have the power to award exemplary or punitive damages that go beyond mere compensation. The present state of authority suggests that exemplary or punitive damages are not available. The time limit for lodging a complaint with the AHRC for breach of a federal anti-discrimination legislation is 24 months from when the conduct occurred.

# III. EMPLOYEE BENEFITS

## SOCIAL SECURITY

Social security refers to welfare payments provided by the Australian Federal Government. These payments generally fall under one of four pieces of legislation:

- *Social Security Act 1991* (Cth) ("the SSA") provides for payment to eligible people, certain pensions, benefits and allowances, such as the age pension, unemployment, carer allowance and payment, and disability pension.

- *New Tax System (Family Assistance) Act 1999* (Cth) provides for family tax benefits, maternity allowances and childcare benefits.
- *Student Assistance Act 1973* (Cth) provides for allowances and benefits for eligible groups of students and apprentices.
- *Paid Parental Leave Act 2010* (Cth) provides financial support to eligible working parents of newborn or recently adopted children.

The current Superannuation Guarantee rate is at 11.5% for the 2024/2025 financial year and is intended to increase by 0.5% so that it will be 12% from 1 July 2025. Employees can choose to make extra voluntary contributions to their superannuation funds and receive tax benefits for doing so. If you exceed your concessional contributions cap, the excess concessional contributions (ECC) are included in your assessable income. ECC are taxed at your marginal tax rate less a 15% tax offset to account for the contributions tax already paid by your super fund. That is, the amount of tax on the excess amount is reduced by 15%.

## HEALTHCARE AND INSURANCES

Employers are not obliged to provide health insurance for employees in Australia.

## REQUIRED LEAVE

### Holidays and Annual Leave

The NES entitles employees to be absent on certain public holidays and also preserves the right of an employer to make a reasonable request that an employee work on a holiday, as well as the employee's right to refuse upon reasonable grounds.

Under the NES, full-time employees are entitled to four weeks of paid annual leave (calculated by reference to the employee's base rate of pay) and part-time employees to a pro-rata amount. Certain shift workers are entitled to five weeks of paid annual leave. Annual leave accrues over a year according to the employee's ordinary hours of work (i.e. the hours set out in the relevant modern award or enterprise agreement). If the period during which an employee takes annual leave includes a public holiday, a period of another kind of leave (including sick leave, personal leave or community service leave, but not unpaid parental leave), that holiday or period of other leave is not counted as annual leave and therefore, if an employee falls ill during a period of annual leave, for the period that he qualifies for sick leave, he will have that amount of annual leave credited, and sick leave debited. In the four-yearly review of modern awards, the Fair Work Commission made decisions with respect to award provisions regarding: (i) cashing out of annual leave; (ii) electronic funds transfer and paid annual leave; (iii) granting annual leave in advance; and (iv) excessive annual leave.

## Parental Leave and Related Entitlements

Unpaid leave is provided for parents who are giving birth to, or are adopting, a child; up to 12 months' unpaid leave (or 24 months with the employer's consent) for employees with a minimum of 12 months continuous service. Firstly, some employers will have their own paid leave scheme, where longer serving employees will be granted paid leave for a period (usually, this is for a short period and not for the entire period of leave). This type of entitlement is purely contractual: in the absence of any agreement, there is no right to such leave. Secondly, there are limited entitlements to government funded leave. There is a Paid Parental Leave Scheme under the *Paid Parental Leave Act 2010* (Cth), which complements the *Fair Work Act*. The Scheme provides financial support to eligible working parents of newborn or recently adopted children. Following recent amendments, which came into effect on 1 July 2023, partnered couples can now claim up to 20 weeks' paid parental leave between them, based on the rate of the national minimum wage. Parents who are single at the time of their claim can access the full 20 weeks. This replaced the previous entitlement to 18 weeks of pay for the child's primary carer, plus 2 weeks' leave for working fathers and partners. The leave is also now flexible so that eligible employees can claim it in multiple blocks until the child turns two.

## Sickness and Disability Leave

Permanent employees are entitled to accrue 10 days of paid personal/carer's leave per year, and 2 days of compassionate leave per year (to spend time with a member of their immediate family or household who has sustained a life-threatening illness or injury, or after a death of a member of the employee's immediate family or household). The term 'personal/carer's leave' effectively covers both sick leave and carer's leave. Australian law also entitles casual employees to 2 days of unpaid carer's leave and 2 days of unpaid compassionate leave, but not personal or sick leave. Meanwhile, disability leave is not applicable in Australia.

An employee's entitlement accrues over each year of employment according to the number of ordinary hours worked; continues to accrue when an employee takes leave; and accumulates from year to year. In 2020, the High Court of Australia (by majority) clarified how personal/carer's leave accrues to permanent part-time employees who worked irregular and longer hours. The Court explained that a person employed to work 36 hours per week, over three 12-hour shifts, would accrue 72 hours of personal/carer's leave over the course of a single year (being the product of 36 hours and 52 weeks, divided by 26), and rejected the proposition that such a person would be able to accrue 120 hours of leave over the course of a single year (being the product of 12 hours and 10 days).

For all periods of personal/carer's leave or compassionate leave, an employee must give his or her employer notice. The employer is entitled to request evidence to prove the reason for the leave and a failure to provide this will cause the employee to lose his entitlement to the leave. As with parental leave, paid personal and carer's leave provisions stipulate that awards and agreements may include terms regarding the cashing out of such leave; any cashing out terms however, must require that the employee be left with a balance of at least 15 days' accrued leave after the cashing out. As with annual leave, the cashing out arrangement must be included in a separate written agreement. Under section 352 of the *Fair Work Act*, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations, unless the absence extends for longer than 3 months, or the total absences have been longer than 3 months in a 12-month period and the employee is not on paid personal/carer's leave.

## Other Required or Typically Provided Leave

**Community Service Leave:** employees are entitled to be absent from work for three main reasons (termed "eligible community service activities"): jury service; a "voluntary emergency management activity"; and any other activity in the nature of community service that the regulations prescribe. upon request from the employer, the employee must provide evidence of his or her engagement in the eligible community service activity.

**Long Service Leave:** the NES does not specifically provide for a long service leave entitlement; it merely provides that an employee is entitled to long service leave as stipulated in the applicable, pre- modernised award. In cases where there is no applicable award, an employee's entitlement will be derived from state and territory legislation, except where an industrial instrument modifies or excludes the legislative provisions.

**Domestic Violence Leave:** all employees, including part-time and casual, who are experiencing family domestic violence, or who are providing care or support to another member of their family/household who is experiencing domestic family violence are now entitled, under the NES, As of 1 February 2023, employees of non-small business employers (that is, more than 15 employees) can access 10 days of paid family and domestic violence leave in a 12-month period. Employees of small businesses can access the leave from 1 August 2023. This replaces the previous entitlement to 5 days of unpaid family and domestic violence leave in a 12-month period.

## ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)



## Age Pension

Under the *Social Security Act 1991* (Cth) a pension is paid to residents of Australia who have reached pension age and are assessed as not having adequate levels of income or assets that can be used to support themselves. From 1 July 2017 the qualifying age increased to 65 years and 6 months, to continue increasing by six months every two years for the following six years, reaching 67 years by 1 July 2023. The maximum basic rate paid for an individual is \$1002.50 per fortnight and \$755.70 for each person in a couple. Unlike pension payments of many other countries, in Australia, workers do not contribute to a pension or insurance within Australia, but the payment is available subject to means testing.

# IV. EMPLOYMENT CONTRACTS

## MINIMUM REQUIREMENTS

The most basic source of employment terms and conditions is the contract of employment. It can be in writing, for example, by letter of offer; it can be oral; or it can be evidenced by a course of conduct. A contractual term may not be enforceable if the terms in the contract are less favourable to an employee than the terms prescribed by legislation, awards, or other industrial instruments. Employment contracts in Australia are formed using the general principles of contract law. The question of whether a person who performs work for another is an employee as opposed to an independent contractor has significant implications for the nature of the obligations which exist between the parties. Australian courts have long struggled with the distinction between the two in difficult cases, and courts will examine the entire relationship. However, the Parliament of Australia has now specifically overturned these High Court decisions by introducing an amendment to the *Fair Work Act 2009* (Cth) ("Fair Work Act"). From 26 August 2024, when determining whether a worker is an employee, the courts will be required to determine the "real substance, practical reality, and true nature of the relationship".

## Sham Contracting

Under section 357 of the *Fair Work Act*, employers are liable for representing to an individual that they are under a "contract for services" (that is, that they have the status of a contractor) rather than a contract of employment.

## FIXED- TERM/OPEN- ENDED CONTRACTS

Employees employed under a fixed term or fixed task contract are not afforded all of the protections provided by the *Fair Work Act 2009* (Cth). Although they are generally entitled to the same wages,

penalties and leave as permanent employees, as employees who are employed "for a specified period of time" they are not entitled to notice periods and are generally, but not always, excluded from the unfair dismissal provisions of the *Fair Work Act 2009* (Cth). For example, a teacher, who had been engaged under a series of fixed-term contracts for several years, was eligible for protection from unfair dismissal. From 6 December 2023, the *Fair Work Act* has prohibited the use of fixed term contracts of longer than two years, except in a specified range of circumstances.

## Casual Employment

Employees who are engaged as casual employees are also not afforded all of the protections provided by the *Fair Work Act*. From 26 August 2024, a new test for determining whether an employee is truly a casual employee, will come into effect. The new test will be based on whether there is a work relationship characterised by "no firm advance commitment to ongoing and indefinite work" between the employer and the employee. The new section 15A of the *Fair Work Act* will set out how to determine whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work. The onus will now be on the casual employee to make a request to change their employment status (once certain thresholds are met, including that the employee has been employed for at least 6 months (or 12 months for small business employers)).

## TRIAL PERIOD

The *Fair Work Act 2009* (Cth) does not refer to probation periods. However, an employee must have worked for the employer for at least six months before he or she is entitled to make a claim for unfair dismissal, and 12 months if the employer is a small business. An employment contract can include a probation period exceeding this period, provided it is reasonable. However, an extended probation period does not affect the employee's statutory entitlements to protections from unfair dismissal and the contract should clearly specify the period of probation and how and when performance is to be reviewed.

## NOTICE PERIOD

Notice of termination of employment can arise under contract, be implied by law, or be set by statute.

### Notice under the Fair Work Act;

The Act sets a minimum period of notice that must be given, in writing, to an employee, on termination of employment. An exception is where termination is made on grounds of serious misconduct, but otherwise, if an employee's continuing service has been less than one year, one week of notice is sufficient. If the employee has worked between one and three years, two weeks' notice is required. Three

weeks' notice is required if the employer has worked between three and five years, and four weeks is required if the employer has worked more than five years. If an employee is over 45 years of age and has completed at least two years' continuous service with the employer, an additional week of notice must be given.

### **Notice under the Contract of Employment**

Contractual notice periods in excess of the legislative requirements are very common in Australia, with four weeks being the most common notice period for ordinary workers. Contractual notice periods cannot be less than the statutory notice, but can be substantially longer in some cases (particularly for senior employees).

### **Implied Notice**

Despite the minimum notice periods, employees who have no notice period specified in their contract of employment may be entitled to what is called in Australia "reasonable notice". This "reasonable" period of notice may be well in excess of the Fair Work Act standard and in excess of the common contractual period of four weeks, especially for employees with long periods of service and where equivalent jobs are in short supply. The Courts consider a number of factors in determining what amounts to "reasonable notice" in the circumstances, for example:

- evidence of industry practice or custom;
- the status or importance of the position;
- the size of the salary;
- the nature of the employment;
- the length of the employee's service in that position;
- the employee's age and educational qualifications;
- the professional standing of the employee;
- the employee's degree of job mobility;
- the expected length of time it would take the employee to find alternative employment;
- the likely period the employee would have continued, but for the dismissal, in the employment;
- whether the employee had given up a secure job to take up the position with the present employer;
- the employee's eligibility for superannuation benefits.

Whether the notice is reasonable is determined at the time the notice is given, and not at the time the contract is made. Decisions have awarded reasonable notice of 12 months in appropriate cases.

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

In order to legally work in Australia, a foreign employee must have a permanent or valid long-stay visa to work. All foreign workers are guaranteed the conditions of the NES in their employment, and

employers of foreign workers must abide by both workplace and immigration laws in their dealings.

There are a variety of ways in which Australian businesses can employ workers from non-Australian jurisdictions, but all require the employee to be the holder of one or other of a series of visas (there are exceptions for Australian Citizens, New Zealand citizens and Australian permanent residents, who have unlimited permission to work in Australia). Note that this area of law is complex and subject to regular change, and so while expert advice should always be sought, it is strongly suggested that any business contemplating employing non-Australian citizens in Australia should obtain current expert advice before taking any steps.

In very brief terms, an outside worker will require a valid visa. Visas come in a variety of forms, some permanent and some temporary. There are penalties applying to employers who breach the immigration laws (including in relevant cases, imprisonment and substantial fines).

Note that the employer has obligations regarding costs of compliance and obligations to check entitlement to work. The Government has an online checking system (Visa Entitlement Verification Online ("VEVO")) for visa holders and employers to use. All employers should regularly review the entitlements of their workers to work in Australia, carry out a regular audit, and ensure they meet the training benchmark for its Australian employees.

### **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

It is not necessary for foreign employers to establish or work through a local entity in order to hire an Australian employee. However, under the *Fair Work Act 2009* (Cth) a foreign corporation formed outside of Australia is a national system employer and is bound to observe the *Fair Work Act 2009* (Cth) in relation to employees who perform work in Australia. As a result, they have a responsibility to comply with the *Fair Work Act 2009* (Cth) in relation to their Australian employees. Foreign employers will also be required to provide the employee with a contract specifying their employment terms and conditions, as well as superannuation and "pay as you go" (PAYG) withholding tax payable to the Australian Taxation Office.

### **LIMITATIONS ON BACKGROUND CHECKS**

In Australia, there is no express prohibition on an employer conducting pre-employment checks. There are, however, two broad qualifications to this general position. The first is that the employer will generally need the consent of the job candidate concerned

to perform the relevant pre-employment checks. However, provided the purpose of the check is to objectively evaluate the candidate's qualifications and ability to perform the role, the candidate should provide his or her consent. The second qualification is that the employer will need to be wary of how it uses the information acquired from the relevant pre-employment checks. There is express protection for employees who believe they have been discriminated against based on their criminal history in Tasmania and the Northern Territory.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Under the *Fair Work Act 2009* (Cth), *Australian Human Rights Commission Act 1986* (Cth), and the State and Federal legislation dealing with sex, age, race and disability discrimination, recruiters and employers are prohibited from a range of discriminatory behaviour during the application and interview process, in relation to prospective employment. Job descriptions and advertisements must avoid using discriminatory language and avoid references to personal characteristics – such as age, race or sex – unless they are part of the genuine requirements of the job. While questions dealing with sensitive areas are not prohibited, employers will need to take care in asking questions because it will be difficult to assert that an answer to a question directed to an area of prohibited discrimination was not used in an adverse way against an unsuccessful candidate.

Due to recent amendments to the Fair Work Act on 7 January 2023, employers can be subject to penalties for job advertisements that offer less than minimum rates of pay. This amendment is retrospective, meaning that it applies to job advertisements before 7 January 2023 too.

If at any point during the advertisement, application, interview or intake process, a prospective employee believes that they have encountered discrimination, they are able to make a complaint to the Australian Human Rights Commission, Fair Work Commission or their State Anti-Discrimination Board to investigate.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Discrimination in compensation or benefits is prohibited under federal, state and territory legislation. For example, it is unlawful for an employer to discriminate on the grounds of sex relating to the terms and conditions of employment provided to employees, which relevantly includes, but is not limited to, employees' pay and related benefits in their employment. Furthermore, the Workplace Gender Equality Agency ("WGEA") collects information regarding identified "gender

equality indicators" from all non-public sector employers with 100 or more employees in their corporate structure, relating to: gender composition of the workforce; gender composition of governing bodies of relevant employers; equal remuneration between women and men; availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; and consultation with employees on issues concerning gender equality in the workplace; and sexual harassment on the ground of sex. The Fair Work Commission is empowered to make equal remuneration orders, requiring that certain employees be provided equal remuneration for work of equal or comparable value. Once an equal remuneration order has been made, it will take precedence over any modern award, enterprise agreement, Fair Work Commission order or other industrial instrument that is less favourable than the equal remuneration order.

### REMEDIES

Employees covered by workplace and anti-discrimination laws are entitled to lodge complaints with the relevant body in respect of any unlawful discrimination to which they are subjected. Should the relevant body fail to resolve the complaint by investigation or conciliation, the employee will, then, generally be entitled to proceed to have their complaint determined, either in court or in a tribunal. Should the Court or tribunal find that the employer has engaged in unlawful discrimination, the Court or tribunal may generally make "such orders as it thinks fit", including, for example: an order declaring the employer has committed unlawful discrimination and directing the employer not to repeat or continue such unlawful discrimination; an order requiring the employer to perform any reasonable act to redress any loss suffered by an applicant, which can include an apology and undertaking to train the workforce on gender equality; and an order requiring the employer to pay damages, including damages for past economic loss, future economic loss, and "hurt, distress and humiliation" suffered by the employee.

### ENFORCEMENT/LITIGATION

Predecessor bodies of the FWC have decided several landmark cases regarding the legal concept of "equal pay for equal work" – the First Equal Pay Case established the principle of "equal pay for equal work", but, notably, did not apply to work that was "essentially or usually performed by females but is work upon which male employees may also be employed"; and the Second Equal Pay Case extended the earlier principle established in the first case to "equal pay for work of equal value". The legal concepts established in these cases continue to have significance in the making of equal remuneration orders by the FWC (e.g., a majority of the FWC relied upon the "equal pay for work of equal



value” principle when it made an equal remuneration order that significantly increased pay rates in the women-dominated social, community and disability services sector). Pursuant to recent amendments to the Fair Work Act, there is now a requirement on the Fair Commission to consider the promotion of gender equality when performing its functions and exercising its powers. The amendments also now provide for the formation of Expert Panels when the Commission is required to consider equal remuneration and changes to award minimum wages that relate to gender pay equity, and award changes that relate to the Care and Community Sector. The Expert Panels are required to include members that have special knowledge and experience in these areas.

## OTHER REQUIREMENTS

Non-public sector employers with 100 or more employees in Australia are required to lodge reports in relation to the various gender equality targets to the WGEA. In 2022, the application of the Fair Work Act was extended to the Commonwealth public sector. In addition, employers must meet minimum standards under the *Workplace Gender Equality (Gender Equality Standards) Instrument 2023* (Cth). Under this instrument, employers with 500 or more staff must put in place policies or strategies to support each of the six gender equality indicators outlined above.

While the legislation places positive obligations on organisations to report, employers are not required to improve gender equality within their workplaces other than the minimum requirement to have policies or strategies in place to support at least one of the gender equality indicators. However, from early 2024, the gender pay gaps of employers with 100 or more workers will be published by the Workplace Gender Equality Agency, a measure that is intended to drive transparency and action towards closing the gender pay gap.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

- Restraints of trade are common clauses found in most senior employee employment contracts. In most State jurisdictions, restraints of trade are covered by the common law.
- New South Wales also has particular rules dealing with restraint of trade clauses, in the Restraints of Trade Act 1976 (NSW). Notably, a restraint of trade clause will need to be reasonable, determined by factors such as the period of time and geographical area. Also, invalid restraint of trade clauses can be “read down” by the Supreme Court of New South Wales, if the Court concludes that the clause is against public policy.

### Types of Restrictive Covenants

Generally, there are four categories of activities sought to be restrained in post-employment restraint clauses in Australia:

- undertaking / carrying on / being engaged in a business similar to the employer’s business;
- soliciting customers or clients of the employer;
- soliciting employees of the employer; and
- using or disclosing confidential information of the employer (note that courts have upheld significant periods of restraint, where the restraint is specifically designed to protect confidential information rather than protect against competition).

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

The courts are willing to enforce appropriate restraint of trade clauses, provided those clauses comply with the common law principles. (In New South Wales, the Restraints of Trade Act 1976 (NSW) makes a restraint valid as long as it is not against public interest, thus making it easier to enforce restraints than it may be in other jurisdictions).

An injunction provides the primary remedy for seeking to enforce a restraint of trade. An injunction may restrain the employee from certain action, which may include taking up employment with a competitor, using particular information of the employer, contacting clients of the employer or performing particular work.

### USE AND LIMITATIONS OF GARDEN LEAVE

Where the employer gives notice to an employee, but puts the employee on “garden leave” (which involves giving them no work to perform and effectively requiring them to stay at home or perform duties other than their normal duties), wages are paid in the usual manner throughout the notice period and the employment does not end until the expiry of that period.

The advantage of garden leave to an employer is that it removes a potentially damaging employee from the workplace but, unlike regular pay in lieu, prevents the employee from immediately going to work for a competitor because the employment contract remains on foot. The ability to put an employee on garden leave will, however, generally need to be provided in the contract of employment.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

The obligations of employers with respect to privacy are found within various federal, state and territory laws. In some respects, the law differs between the States and Territories.

### **CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?**

The general position is that an employer can monitor its employees' usage of work computers (in some states legislation requires specific notices and warnings to employees before allowing computer monitoring) and restrict the use of the Internet and social media during work hours. In certain circumstances, an employer may also be able to monitor its employees' conduct on social media outside of work hours, and rely on that conduct when considering appropriate disciplinary action. However, it is important for employers to implement a thorough and clear Internet and Social Media Policy if it intends to monitor, restrict, access and review employee usage.

### **EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION**

The ability of an employer to take disciplinary action based on internet usage and conduct on social media is typically addressed in the contract of employment, however, it is best for an employer to also have a detailed policy which deals with these matters so that employees are made aware of the employer's expectations. This should include the employer's expectations around internet and social media use, both during and outside of work hours. This becomes particularly important if an employee uses the Internet or social media to disparage the employer, or divulge its confidential information, and the employer wishes to rely on that conduct in taking disciplinary action.

There are, however, limitations on the extent to which an employee's conduct on social media could provide a valid reason for their termination. This will depend, in part, on the nature of the comments and statements made and the width of their publication. These kinds of issues are generally agitated in the context of statutory unfair dismissal applications, where the employer will need to establish a valid reason for dismissal, and a fair process.

## **IX. TERMINATION OF EMPLOYMENT CONTRACTS**

### **GROUND'S FOR TERMINATION**

For employees covered by the Fair Work Act 2009 (Cth) ("Fair Work Act"), the grounds for and process of termination in Australia are dealt with by the Fair Work Act, although there are exemptions which apply in relation to some dismissals. The common law, and the contract of employment will also be relevant for some employees.

The Fair Work Act provides that the grounds for dismissal can include capacity, performance, misconduct (including serious misconduct) and redundancy. In addition to a valid reason for dismissal, the dismissal must be fair, in that it is not "harsh, unjust or unreasonable". The Fair Work Act also provides that employees must not be dismissed on the basis of a protected attribute or as retaliation for exercising a workplace right.

### **COLLECTIVE DISMISSALS**

Collective dismissals are not applicable in Australia.

### **INDIVIDUAL DISMISSALS**

A dismissal that is capacity-related, or performance-related (but falling short of serious misconduct) requires the giving of notice, or payment in lieu of notice if the payment in lieu is allowed by the Fair Work Act or allowed by the contract itself. "Notice" refers to the period of time between notifying the employee that the employer wishes to dismiss them and the time when the contract comes to an end. Where payment is made in lieu of notice, the date of termination is the date on which the notice is given, and the moneys are paid to the employee.

Where the employer gives notice to an employee, but puts the employee on "garden leave", wages are paid in the usual manner throughout the notice period and the employment does not end until the expiry of that period.

Notice will be payable (or must be worked out) in all cases unless the employee is guilty of serious or gross misconduct.

Statutory minimum periods of notice are specified in the Fair Work Act. As noted above, the employment contract often provides an entitlement that is more generous than the statutory minimum period of notice. Where the contract does not specify a period of notice, the employee may be entitled to a period of "reasonable notice" which, for longstanding employees, may be more generous than the statutory minimum.

### **IS SEVERANCE PAY REQUIRED?**

Severance pay may be required if the employee has been made redundant and has an entitlement under the *Fair Work Act 2009*, an award, enterprise agreement or contract of employment.

## SEPARATION AGREEMENTS

Where an employee, whose employment has terminated (for whatever reason), receives a payment that is higher than the employee's minimum legal entitlements, it is almost always advisable to seek that a separation agreement (commonly known as a deed of release in Australia) be executed by the employee in exchange for that additional payment. The execution of the separation agreement will reduce (but not entirely remove) the overall degree of exposure of the employer from adverse legal consequences arising from the termination of employment.

## WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

A properly drafted Separation Agreement (which includes a release) will ensure that:

- the employee acknowledges that their termination package is in full satisfaction of any claims they may have against the employer; and
- the employee releases the employer from liability under any such claims.

The following terms are standard in a separation agreement:

- release and indemnity;
- non-disparagement obligations; and
- confidentiality obligations.

Each of the above terms can be drafted such that they are in favour of a particular party, or they can be mutual.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The common law action of "wrongful termination" is available to all employees. However, due to the cost of pursuing a claim in the civil courts, it is not often pursued. Those employees who are eligible to pursue a claim of "unfair dismissal" through the Fair Work Commission will generally choose that option, as it is a much cheaper and quicker course of action.

Damages for wrongful dismissal can, in some circumstances, be limited to the amount of notice provided in the employee's contract of employment or, if no period of notice is specified, "reasonable notice". There are some exceptions, which allow for greater damages to be awarded, depending on the circumstances. This is particularly so where, under the contract, the employee had a reasonable expectation of employment for a long period of time.

## WHISTLEBLOWER LAWS

Whistleblowers currently have protections under three legislative instruments at the Federal level: the Corporations Act 2001 (Cth); the Public Interest Disclosure Act 2013 (Cth) (disclosures in respect of

the Australian Public Service, statutory agencies, Commonwealth authorities, the Defence Force and contractors); and the Fair Work (Registered Organisations) Act 2009 (Cth) (disclosures about corruption or misconduct in unions and employer organisations). Whistleblowers can also rely on safeguards under the general protection provisions of the Fair Work Act, if their disclosure pertains to a complaint or inquiry related to their employment, and the protections against 'discriminatory conduct' for a 'prohibited reason' under the Work Health and Safety Model Laws.

To address criticisms that the existing laws, in particular the private sector whistleblower protections, are insufficiently broad to fully enable whistleblowers to come forward, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2019 (Cth) was passed in 2019. The Act expanded the whistleblower protections in the Corporations Act to provide greater protections for whistleblowers who report misconduct about companies and company officers.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Trade unions form the mainstay of employee representation in Australia. However, their influence and membership has significantly declined over the last three decades.

With that said, under the Fair Work Act, unions enjoy a powerful role in relation to workplace bargaining even if their capacity to organise strikes has been diminished. The preeminent trade union body in Australia is the Australian Council of Trade Unions ("ACTU"), which represents the interests of many unions that have membership in the ACTU.

There are several other significant union bodies in Australia and unionism has long been an important issue in workplace law. Australia's major political parties take a diametrically opposed approach to unions. The Labour party is seen as pro-union and is inclined to often legislate in favour of union influence, while the Liberal/National party (the "Coalition") regularly seek to undermine their role in the workplace.

Firmly pitted against the union movement is an array of employer associations, such as the Business Council of Australia and the Australian Chamber of Commerce and Industry. In the same way that unions have influenced Labour party policy, these



bodies often play a prominent part in the formulation of Coalition policy, and typically favour the interests of business over workers' rights.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Unions currently play a crucial role in Australian employment law. This primarily manifests in the process of enterprise bargaining where an employer will come together with its employees and their chosen union in order to negotiate conditions of employment specific to their company or industry. This can be a somewhat costly process, and unions provide financial backing and often legal services to the body of employees so as to obtain the best possible deal. However, enterprise bargaining is voluntary and depends to a large extent on the level of unionisation in a particular industry and the attitude of a given employer.

Unions also have the capacity to apply to the Fair Work Commission to undertake strike action in the course of bargaining for an enterprise agreement. Unions may not, however, organise and initiate strike action without first following the appropriate procedure set out in the industrial legislation.

Unions play a vital role in the discourse regarding employment law in Australia. The campaign by the ACTU against the Coalition's "WorkChoices" laws is a prime example. During the lead up to the 2007 Federal election, the ACTU ran an advertising campaign against the policy, which arguably became a deciding factor in ousting the Coalition from government. Unions remain a watchdog with regards to the ability of an incumbent government to modify laws governing industrial relations.

As noted, their influence is gradually receding due to rapidly declining membership and reduced public approval. Public approval of unions has been damaged in recent years as a consequence of a number of scandals involving the misuse of members funds by union officials. However, in June 2020 the Federal Government announced five 'working groups' tasked with finding ways to urgently stimulate the economy and regrow jobs as a result of the COVID-19 pandemic, each comprising of a balance of employer organisations and unions. Unions were also key participants in the Labour Government's Jobs Summit held in 2022.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Unions form the primary source of employee representation in Australia. However, given their rapidly declining membership base, isolated but significant examples of alternative employee representation are emerging.

Suncorp Group, which employs over 16,000 individuals with only 4% union membership, is

an exponent of a newer approach. Within the organisation is a body called Suncorp Group Employee Council, to which employees elect 25 councillors. These individuals then lobby management for employee rights issues. While its role is limited with regard to decision making within the Group, it has been effective in increasing employee voice and maintaining a more cooperative relationship between employees and management.

Australian medical manufacturer, Cochlear, has employed a similar model. After disagreements with the Australian Manufacturing Workers Union over enterprise bargaining agreements, the primary form of representation for workers became the internal Employee Consultative Committee, which occupied a similar role to the Suncorp Group Employee Council. The body has had limited influence over management and has rather focused on social aspects of life at the company.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The Fair Work Act sets out a range of provisions that deal with the rights of employees where their employment changes as a result of a transfer of business.

These provisions govern situations where a business is transferred from one employer (e.g., a company) to another. Typically, a transfer of business takes place when an employer buys or sells a business, and not merely when there is a sale of the shares in the business.

Section 22(5) of the Fair Work Act states that where a transfer of employment occurs, the transferred employee's service with their original employer will be counted as continuous service with their new employer. As such, any benefits acquired under the National Employment Standards (such as annual leave) will be retained through the transfer of business and the employee's service will remain continuous in the eyes of the law (even in circumstances where there has been a substantial period of inactivity).

However, should the new employer fail to recognise these accrued rights, section 91 of the Fair Work Act holds that the original employer must pay out all entitlements accrued under the National Employment Standards. This may only occur in the case of non-associated entities. The same entitlements exist in relation to redundancy in s 122.

In addition to the above, Part 2-8 of the Act outlines the rules for transfers of business in scenarios where the

original employees were covered by a modern award or enterprise agreement. Should the employees perform largely the same work following the transfer, and the businesses have sufficient connection to each other as outlined by section 311(3)-(6), then the workplace instrument that covered them will be transferred to the new employer.

It is worth noting that there are a number of complexities to this process. However, the underlying notion is to preserve the rights held under a bargained enterprise agreement where the work done is largely the same as it was under the previous employer. On this basis, the instrument is also transferred so as to cover the new employer as well.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

For the entitlements to successfully transfer with the employee, the employee must have their employment first terminated with the old employer. Then, within three months following the termination, the employee is reemployed by the incoming business owner.

The usual practice is for the new employer to issue, at the time of purchasing the business, a list that sets out those persons whom the business intends to reemploy.

It is also a requirement that the work performed by the transferring employee is the same or substantially the same as the work previously performed.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The National Employment Standards under the Fair Work Act 2009 constitute a safety net for employees within the federal system. The Standards are designed to complement the key industrial instruments under the Fair Work Act – being modern awards and enterprise agreements.

As well as legislating minimum standards, the Standards allow many issues to be addressed in awards and agreements. Modern awards provide for minimum wages, which explains their absence from the Standards.

The National Employment Standards establish minimum conditions in the following areas: maximum weekly hours of work; requests for flexible working arrangements; rights to convert from casual to permanent employment; parental leave and related entitlements; paid family and domestic violence leave; annual leave; personal / carer's leave and compassionate leave; community service leave; long

service leave; public holidays; workplace delegates' rights; notice of termination and redundancy pay; and the Fair Work Information Statement.

In addition to the Standards, the Fair Work Act provides that all employees must be paid at least monthly, and without any unauthorised deductions from their pay.

### SALARY

The current national minimum wage in Australia is \$24.10 per hour or \$915.90 per 38-hour week, effective from 1 July 2024. Modern award wages also increased by 3.75% from 1 July 2024.

All Australian employers must also pay superannuation under the Superannuation Guarantee (Administration) Act 1992 (Cth). Employers pay a percentage of the ordinary time earnings of their employees (including part-time and casual employees) who are aged over 18, and who are generally paid at least \$450 (before tax) a month, into a complying superannuation fund or retirement savings account.

The current Superannuation Guarantee rate is 11.5% from 1 July 2024, and will then increase by 0.5%, to 12%, on 1 July 2025.

### MAXIMUM WORKING WEEK

The National Employment Standards provide that full-time employees cannot be required to work more than 38-hours in a week, plus reasonable additional hours. What is considered "reasonable" is governed by a range of factors in the Fair Work Act. Further, hours can be averaged over periods set by awards, up to a maximum of 26 weeks.

### OVERTIME

Assessment of whether additional hours are "reasonable" involves factors which include the employee's remuneration, patterns of work in the industry, and the nature of the employee's role. As previously mentioned, all employees covered by an award, enterprise agreement or registered agreement may also be entitled to a higher pay rate and additional allowances when working on weekends, public holidays, overtime, early in the morning and/or late at night or in difficult or unpleasant circumstances.

In 2024, the Fair Work Act was amended to introduce "right to disconnect" provisions, which allows employees to reject contact with work outside their normal working hours provided it is reasonable to do so.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Historically, occupational, health and safety

laws have largely been a matter for each State and Territory. This split created difficulties for governments, businesses and individuals who operated in more than one State or Territory.

Accordingly, there has been a move towards the national harmonisation of occupational health and safety laws. The harmonisation scheme comprises template legislation agreed to in consultation between adopting States (the Model Work Health and Safety Act ("Model Laws")), regulations (the Model Work Health and Safety Regulations ("Model Regulations")) and the Model Codes of Practice ("Codes"). It is intended that each jurisdiction adopt the Model Act, Model Regulations and Codes. With the exception of Victoria, the Commonwealth and all other States and Territories have adopted the scheme.

Unfortunately, a number of the enacting States have departed from the original templates such that although the legislation operating in the different States and Territories is similar, it is not uniform. For example, while almost all Australian jurisdictions now have industrial manslaughter offences in force, the Commonwealth and South Australia are yet to pass such laws.

The scheme provides scope for some differences between jurisdictions. For example, under the scheme, each jurisdiction is responsible for enforcement and has its own occupational health and safety regulatory body.

The harmonised laws impose a primary duty of care on persons conducting a business or undertaking, in relation to the work being performed in that business or undertaking. This obligation reaches beyond employers, to a wider group of legal entities and individuals. The obligation also extends beyond employees to any person performing work.

The primary duty is to ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking. The primary duty is also to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. The primary duty of care also contains some expressly listed key obligations, for example, the provision and maintenance of a work environment that is without risks to health and safety.

The harmonised laws also impose health and safety duties on officers, workers and other persons at the workplace. Officers have a duty to exercise due diligence to ensure that the person conducting a business or undertaking complies with its duties or obligations. Workers and other persons at the workplace have the duty to take reasonable care for their own health and safety and the health and safety of others from their own actions, and to cooperate with the person conducting a business or undertaking to comply with the laws.



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### I. INTRODUCTION

Belgium has fairly extensive protective labour laws, as enacted by Parliament. Moreover, collective bargaining between the so-called 'social partners', i.e. the employers' organisations and the trade unions, plays a very important role in the shaping of the rules of labour law. Case law, in particular that of the Supreme Court and the Constitutional Court, can have considerable influence on the application of labour and employment law in practice. In Belgium, specialised labour courts deal with disputes in relation to employment relationships. Enforcement of labour law provisions may also be initiated by other authorities, including the labour inspectorate or tax and social security authorities. The Social Inspectorate also provides information to employers and workers, gives advice, arbitrates and verifies whether labour law and the various collective labour agreements are complied with.

#### KEY POINTS

- Collective bargaining agreements are entered into on national or industry level between the trade unions and employers' organisations or on company level between the trade unions and an individual employer. They include provisions with regard to wages and working conditions.
- Belgian labour law is characterised by stringent language regulations. All labour documents and labour-related communications with the employees must be conducted in either Dutch, French or German, depending on the location of the employer's operating unit. The sanction is the nullity (with the exception of the Brussels and German regions where the sanction is the replacement of the document).
- As a rule, termination of an employment contract is not subject to any prior administrative or court approval in Belgium. The calculation of notice periods is based on the seniority of the employee. Moreover, all employees have the right to ask for the concrete reasons which have led to dismissal.
- Well-being and anti-discrimination have an increased importance in Belgian labour relations.
- The Belgian labour market is characterised by a high insider-outsider effect (especially for migrant workers, older workers and people with disabilities) and low professional mobility because of high minimum wages and high levels of protection offered by labour law provisions and the social security system.

### II. ANTI-DISCRIMINATION LAWS

#### SUMMARY

The Belgian Constitution guarantees the equality of Belgian citizens and the equality between men and women. It also guarantees the exercise of the rights and freedoms for all Belgian citizens without any discrimination. This also covers the rights and freedoms of the ideological and philosophical minorities.

#### PROTECTIONS AGAINST HARASSMENT

The protected criteria are the following: a) General Act: Sensitive Criteria: age, sexual orientation, religious and philosophical conviction and handicap; and General Criteria: marital status, birth, wealth, political conviction, synodical conviction, language, current or future health condition, physical or genetic characteristics and social background. b) Gender Act: sex, including pregnancy, giving birth, maternity, breastfeeding, fatherhood, adoption, medically assisted reproduction (IVF), sex change and gender identity, gender expression and gender characteristics. c) Racism Act: nationality, a so-called race, colour of skin, social background and national or ethnic origin.

#### PROTECTIONS AGAINST DISCRIMINATION

A distinction, which should be regarded as discrimination, pursuant to the conditions set out above, could nevertheless be regarded as lawful if it is justified by one of the following motives: a) General grounds: For direct or indirect distinction, regarding all the criteria, except age and religious or philosophical conviction: 1) Measures of affirmative action, provided that certain conditions are met (for an extensive overview of the rules in this respect); 2) A distinction dictated by law which is in conformity with the Constitution, the law of the European Union and international law. b) Specific Grounds (for direct distinction): a) Age: (i) legitimate purpose of the policy in the field of employment, labour market or any other comparable legitimate purpose; and (ii) the means to achieve that purpose are appropriate and necessary; b) Religious or philosophical conviction: the nature of the activities or the context in which they are being performed constitute an essential, legitimate and justifiable professional requirement, given the nature of the organisation.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

According to Belgian legislation, employers are obliged to provide all reasonable accommodations that would allow a person with a disability to have access to a job, unless such measures would entail an unreasonable burden for the employer. Since the Belgian antidiscrimination legislation is predominantly a transposition of EU legislation, the case law of the ECJ is crucial for the determination of which accommodations can be deemed reasonable or not.

## REMEDIES

The employee (victim of discrimination) has a choice between compensation on a lump sum basis and compensation of the actual damage suffered. In the latter case, the employee has to prove the amount of the damage suffered.

## OTHER REQUIREMENTS

There is a well-defined procedure which has to be followed for installing an affirmative action through a collective bargaining agreement or an accession instrument. In any case, there should be an information and consultation procedure with the workers or with the workers' representatives. This instrument has not yet proved to be popular in practice. However, several other measures constituting affirmative actions are set out in acts and regulations in order to address specific discrimination towards women, disabled people, young employees and homosexuals. Furthermore, a law was voted on in 2012 to reduce the salary gap between men and women. The main idea is to make the salary gap more visible and transparent in order to allow the Social Partners to negotiate and decrease the gap. In view of this, certain measures have been taken (for example, the drafting of an analysis report on the remuneration structure at company level and a gender test for the functions' classification at industry level).

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

Unless stated otherwise by an international agreement, employees working in Belgium for an employer established in Belgium, or an operational office in Belgium, will in principle be subject to the Belgian social security scheme for salaried persons. It is impossible to deviate from the Belgian social security scheme by special agreement, which would be null and void by law. The Belgian social security system for employees covers: old-age and survivor's pensions; unemployment benefits; insurance for accidents at work; insurance for occupational diseases; family allowances; sickness and disability benefits; and annual vacation (only for blue-collar employees).

## HEALTHCARE AND INSURANCES

On top of the protective Belgian healthcare system, employees benefit on a regular basis from complementary insurances covering the costs of hospitalisation, medical treatments or ambulatory fees (those costs are sometimes even covered for the employee's family members).

## REQUIRED LEAVE

### Holidays and Annual Leave

Employees are entitled to remuneration for 10 official public holidays. If a public holiday falls on a Sunday or on a day on which the employee does not usually work, the employer must grant a replacement day.

The number of days of annual leave to which an employee is entitled for a given year, is determined in proportion to the number of days worked (and deemed to have worked e.g. where the employee was on maternity leave or sick leave) during the preceding calendar year, referred to as the 'holiday reference year'. Generally, for a full holiday reference year, employees have the right to between 20 and 24 days of annual leave, depending on whether their working regime includes five or six working days per week.

Employees who are starting their careers or who are restarting their activities after a long time off, are entitled to additional holidays after an introductory period of three months, so that they have the possibility to benefit from four weeks of holiday over one year. The employee will receive holiday pay that is equal to his/her regular salary. The holiday pay will be financed through a deduction from the double holiday pay of the next year.

Further, a Royal Decree of 8 February 2023 guarantees employees not losing their holidays due to illness, even if the cause occurred during the holiday period. In such case, the employee is allowed to take these holidays on a later date. He will be able to take the holidays lost due to illness within the 24 months of the holiday year. Furthermore, employees have the possibility to transfer untaken days of paid leave to the next calendar year if one of the following cases of suspension occur: accident at work, occupational disease, other accidents and illness, paternity leave consisting of converted maternity leave, prophylactic leave, birth leave, and foster care leave. An employee can also transfer untaken holidays to a new employer if they change jobs.

### Maternity and Paternity Leave

Women may take up to 15 weeks of maternity leave (with a possible extension of 2 weeks in case of multiple births). At least nine weeks must be taken after the birth and at least one week must be taken before the expected date of birth. Following the birth of a child, the father has a right to twenty days of paternity leave, three of which are fully paid by the employer and 17 days will be paid for by the social security system at 82 percent of the employee's

ceiled salary. This leave must be taken up within four months after the birth. Women receive maternity benefits whilst on maternity leave. This benefit, paid by the social security system, is equal to 82 percent of the employee's salary for the first 30 days and then drops to 75 percent of her salary (which will be capped). During this period, the employer is not obliged to make any payments to the employee. This leave must be taken within four months after the birth.

### **Sickness and Disability Leave**

It is important to note that there is no difference between sickness leave and disability leave in Belgium. In case of illness or private accident, the employee continues to receive his/her normal salary during a period of thirty calendar days. This is the so-called 'guaranteed salary'. To be entitled to the guaranteed salary, the employee needs to comply with some legal obligations, which includes, amongst other things, immediately informing his/her employer of his/her incapacity to work and presenting a medical certificate. Moreover, the employer may call upon an independent medical officer (the 'controlling officer') to verify an employee's incapacity for work.

An Act of 28 November 2022 has implemented an exception on the obligation to present a medical certificate for the first day of incapacity. Employees can only invoke this exception three times in a calendar year. Employees can make use of this exemption for both short absences of one day and also for the first day of a longer period of disability.

An employee who wants to make use of this statutory exemption is required to inform his employer about his address of residence during the first day of incapacity for work. The employee is not obliged to do so if this address corresponds to the usual place of residence known by the employer.

Corporations with less than 50 employees on the first of January of the calendar year in question may derogate from this exemption. The employer must make a mention of the derogation in the labour regulations or in a collective agreement.

During the first year of incapacity following the period covered by the guaranteed salary, the employee will receive sickness benefits from the Health Insurance Fund ('ziekenfonds - mutuelle'). As of the second year, the employee will be entitled to invalidity benefits if the Medical Board for Invalidity of the National Sickness and Invalidity Insurance has confirmed the invalidity (the level of incapacity for work must be at least 66%). These invalidity benefits amount to 65% (for an employee with at least one dependent), 55% (for a single employee) or 40% (for a cohabiting employee without dependents) of the employee's gross capped remuneration. The Health Insurance Fund also reimburses numerous medical and pharmaceutical costs.

In 2017 a new procedure came into force to reintegrate employees who have been absent from the workforce during a long period, because of illness (now included in the Code of the Well-being at Work). In short, the employee or the employer can request a reintegration procedure. In this procedure, the (medical) prevention advisor will investigate the rest capabilities of the employee, in order to see whether he/she can (gradually) return to the workplace, and if the workplace, or the work itself, should be adapted. The employer should investigate the recommendations of the prevention advisor, in order to evaluate if the necessary changes to the work or the workplace are possible or not.

However, until now in most cases the prevention advisor has concluded that the employees concerned were not able to be reintegrated, which often resulted in the end of the employment contract due to medical force majeure.

In 2022, the reintegration procedure was amended. The prevention advisor-occupational physician has the obligation to inform the incapacitated employee as soon as possible of the options in resuming work, including the possibility of requesting a pre-employment visit or initiate a reintegration process, with the purpose of facilitating return to work via adjustments to the work position and/or through modified or other work.

It is also possible to start a reintegration process even in the event of a work accident or occupational disease. However, the reintegration process can only be started when the temporary disability resulting from the accident at work or when occupational disease has come to an end in accordance with the legislation on accidents at work and occupational diseases.

A third change is the fact that the reintegration program now only provides three reintegration assessments instead of five. This adjustment simplifies the reintegration process.

Finally, it is important to note the decoupling of medical force-majeure from the reintegration process. An Act of 30 October 2022 amended Article 34 of the Employment Contracts Act. This article allows an employer, subject to following the strict procedure and only after an incapacity for work for at least nine months and if no reintegration process is ongoing, to dismiss an employee for medical force-majeure.

It is important to strictly follow the procedure in article 34 of the Labour Contracts Act. Medical force-majeure is only possible if the prevention advisor-occupational physician has decided to a definitive impossibility to work and there is no possibility to appeal and there was no demand for adapted or different work by the employee or if the employer can justify that adapted or different work is not possible or if the employee does not agree to the adapted or different work.



## ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

Employees have the right to be absent from work without loss of salary on the occasion of:

- certain family events (marriage, funeral, childbirth, adoption, holy communion, non-confessional youth celebration, etc.)
- for meeting civil duties (jury service, participation in the electoral process, etc.)
- appearance before a court.

The reasons for such short leave periods, as well as the duration of the allowed time-off (the day of the event, up to a couple of days) for each absence are provided for in the Royal Decree of 1963. Yet, more favourable provisions may be determined at an industry or company level.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The statutory retirement age in Belgium is officially 65. However, this age will increase to 66 by 2025 and to 67 by 2030.

Apart from the social security benefits (the “first pillar”), many employees are entitled to an additional pension insurance (the “second pillar”) paid by the employer as part of their salary package. Occasionally, the second pillar pension is organised on sectoral level. Some people also add to these two pillars, a private pension insurance scheme (the “third pillar”).

## OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

The following benefits are often granted to Belgian employees: collective bonus, warrants, stock options, profit sharing; company car, company bike or mobility budget; computer, tablet, smartphone, Internet connection ; travel and subsistence costs; family allowances and other kinds of allowances complementary to fringe benefits; meal vouchers; and eco-vouchers.

# IV. EMPLOYMENT CONTRACTS

## MINIMUM REQUIREMENTS

In principle, an employment contract may be written or verbal. However, some clauses should always be in writing (e.g. non-compete clauses). Uniquely characteristic to Belgium is that, when in written form, an employment contract must be drafted in French, Dutch or German, depending on the location of the employer's operating unit. If the operating unit where the employee works is located in the Flemish region, the employment contract must be drafted in Dutch. If this operating unit is in the Walloon region, the employment contract must be drafted in French

and if the location is in the German-speaking region, the contract must be in German. For the Brussels region, the employment contract must be either in French or Dutch depending on the language used by the employee. Yet, in the particular context of a cross-border employment contract, the European Court of Justice rendered a landmark decision stipulating that the principle of freedom of movement for employees requires the parties to be able to draft their contract not only in the official language of the Region of the workplace. Consequently, the Flemish Decree on the use of languages in social relations has, to a certain extent, been amended accordingly. This means that for employees who are employed in Flanders, next to the Dutch version, an English version of the contract can be added.

## FIXED-TERM/OPEN-ENDED CONTRACTS

The standard type of employment contract used in Belgium is the open-ended employment contract. Fixed term contracts are permitted, but a written contract must be produced by the commencement of the employment at the latest. Failing this, contracts for a fixed term are deemed to be open-ended contracts.

## TRIAL PERIOD

Trial periods have been suppressed since 2014 (except in relation to students, temporary workers and temporary agency workers).

## NOTICE PERIOD

An important Belgian labour law reform entered into force on 1 January 2014, aligning notice periods for blue- and white-collar employees. Notice periods depend on the seniority of the employee.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In principle, every non-EEA national working in Belgium must be in possession of a work permit, although some categories of workers are exempt from this requirement (e.g. students or spouses of EEA nationals). In 2019, Belgium introduced the single permit, which combines the work permit and the residence permit into one single procedure. The single permit has to be applied for in Belgium by the employer or an agent, and the employer must obtain prior authorization to employ the foreign worker. The necessary documents have to be sent to the competent department of the Region where the worker is posted (where he will carry out his work). The access to the single permit procedure is restricted to certain categories of workers, which are enshrined in the regional regulations. Most important for the majority of employers, are the

categories of highly skilled workers and managerial employees. This means that the employees have to fulfil certain conditions of higher education degrees and higher wages or they have to take up certain leading functions within the company. Employing a foreign employee on the Belgian territory, when he does not have a single permit is a serious crime, for which the employer can be punished with a fine or imprisonment of 6 months to 3 years.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

A foreign employer does not need to work through a local entity in order to hire employees in Belgium. However, there are a couple of registrations and formalities to be fulfilled by the foreign entity, including registration at the National Social Security Office (NSSO), registration at the Tax collector's office, conclusion of an industrial injuries insurance, and appoint an authorised officer to keep the required employment documents and receive official correspondence from the NSSO. In general, foreign employers join a Belgian pay roll agency, which can handle most of these requirements on behalf of the employer and will act as spokesperson with regard to the social security and tax authorities. Finally, bear in mind that the use of an 'employer of record' system is in principle not allowed, as the hiring out of employees is prohibited in Belgium (with certain exceptions).

## **LIMITATIONS ON BACKGROUND CHECKS**

Extensive background checks on employees are not common in Belgium. They should be limited to the strict necessity of assessing the applicant's professional skills relevant to the job offered. The most common background checks relate to education, experience (past employment records), criminal records for certain occupations (e.g. in the security sector), confirmation that the applicant has the appropriate permission to work in Belgium, health and medical checks (which are required by law for roles involving safety, vigilance jobs that come in contact with food, or the driving of motorized vehicles, cranes or hoists); and more and more commonly, social media checks, despite the potential that such searches can come into conflict with the right to privacy of the applicant. However, a lot will depend on the public status of the information.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

Employers are forbidden by law, or restricted by CBAs, from asking certain questions of applicants

or requiring them to undergo certain tests. As a rule, an employer can only ask questions to an applicant that are genuinely relevant, taking into consideration the nature and working conditions of the job offered (such as diplomas, previous jobs, etc.). The applicant has the right not to answer questions that are not relevant for the job or violate privacy and anti-discrimination laws. However, it is worth noting that applicants have an obligation to cooperate in good faith during the selection process. As a general rule, the employer may not ask questions about an applicant's credit/financial background, and any discrimination based on personal wealth is prohibited.

# **VI. PAY EQUITY LAWS**

## **EXTENT OF PROTECTION**

The principle of equal pay between male and female employees for equal work was rendered obligatory by Royal Decree, imposes equal pay for men and women for equal or equivalent work. The Belgian legislature took additional measures in order to fight against the wage gap between men and women. These measures include both the industry level (the CBAs and function classification systems at the industry level must be gender-neutral, which is checked by the Employment Ministry) as well as the company level. In this regard, Belgium adopted an Act on reducing the gender pay gap on 22 April 2012. According to this Act, differences in pay and labour costs between men and women should be outlined in the company's annual audit ('social balance'). These annual audits are transmitted to the National Bank in order for it to be publicly available. Moreover, the Act stipulates that every two years, companies with over fifty employees should establish a comparative analysis of the wage structure of female and male employees. If this analysis shows that women earn less than men, the company will be required to produce an action plan. Finally, if discrimination is suspected, women can turn to their company's mediator.

## **REMEDIES**

As stated above, if the publication of the social balance or the bi-annual report leads to the suspicion of pay discrimination against women, an internal mediator can be appointed by the employer (at the proposal of the works' council or, in absence, of the Committee for Prevention and Protection at Work). The mediator will establish whether there is indeed a pay differential and, if so, he will try to find a compromise with the employer. Next, it is also possible for women who are victims of pay discrimination to file a complaint against their employer, based on the anti-discrimination act relating to gender. In this case, the Belgian Institute for Equality between Men and Women may assist alleged victims before the courts.

## ENFORCEMENT/LITIGATION

According to Statbel, the Belgian unadjusted gender pay gap was 5% in 2022; this is one of the lowest percentages in the EU (EU-average: 12.7%). The unadjusted gender pay gap is defined as the difference between the average gross hourly earnings of men and women, expressed as a percentage of the average gross hourly earnings of men. It is called 'unadjusted' as it does not take into account all of the factors that influence the gender pay gap, such as differences in education, labour market experience or type of job.

## OTHER REQUIREMENTS

Next to the obligation to publish a bi-annual report and the possibility to take positive actions, the Act of 28 July 2011 inserted a quota of at least one third of the less represented sex for all members of the Board of Directors of autonomous public undertakings, listed companies and the National Lottery, which had to be fulfilled before specific deadlines. Failure to comply with these provisions may result in sanctions: nullity of the appointment or suspension of financial benefits. Parliament's evaluation of the impact of the law on the presence of women on boards of directors, is scheduled for the twelfth year following its entry into force, i.e. 2023.

Finally, the future transposition of the EU Pay Transparency Directive is expected to bring major changes to the legal rules regarding this topic.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

As a general rule, article 6 of the Employment Contracts Act stipulates that all clauses which are not compatible with the content of the said act, are null and void, insofar as such clauses limit the rights or aggravate the duties of the employee. The following restrictive covenants are recognised and may be enforceable under the law:

- Non-compete clauses;
- Non-solicitation of customers;
- Non-solicitation of employees.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

In case an employee violates the non-compete clause for example, the damage claim cannot be higher than the repayment of the indemnity awarded to the employee on top of indemnity equal to the same amount.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is not allowed under Belgian employment law, because it entails that the employee would not be allowed to perform his/her job, as this condition is deemed an essential element of every Belgian employment contract. A garden leave where the employee is exempt from performing his/her duties during the notice period, is only possible with the employee's explicit consent. The unilateral decision of an employer to send an employee on garden leave, would grant the employee the right to claim damages, or the contract could even be regarded as being terminated by the employer (constructive dismissal).

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

It is common practice to regulate employees' use of Internet and social media through provisions of an Internet Policy. This policy must however, be established respecting employees' privacy with regard to the control of electronic communications networks.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Subject to compliance with legal, regulatory and contractual provisions, employers are free to determine the conditions in which the employment contract is to be performed. Nowadays, it is undisputed that this includes the conditions of use of equipment made available to employees by the employer. Employers can therefore freely regulate the use of communication instruments within their company, particularly by prohibiting private use of the communication equipment available for use by the employees, by banning the access to certain websites (including social media sites) or by blocking this access by the use of filters. However, for the actual monitoring of the digital communication, the strict rules and procedure of CBA no. 81 have to be respected.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

An employee who disparages the employer via social media can be dismissed for serious cause when the



statutory requirements are met. However, as always in case of serious case, the precise circumstances and the possible aggravating or alleviating circumstances should be taken into account. Furthermore, it is advisable to adopt clear guidelines in the company with rules on who can speak on behalf of the company via social media, both for professional and personal accounts, and what types of information may be divulged. Recent case law accepts as evidence of serious grounds for dismissal, the information present on public profiles, as well as some private profiles, where the confidentiality parameters allow the access of posts to an important number of friends and / or colleagues.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

From 1 April 2014, all employees with more than six months of seniority have the right to be informed of the reason for their dismissal. If the employer fails to inform the employee of the reason for dismissal, the employee can require the employer to give an explanation. If no (timely) explanation is provided, the employer owes a lump-sum civil fine of two weeks of salary. The employee is entitled to dispute the reason for dismissal before the labour court.

### COLLECTIVE DISMISSALS

A collective dismissal or the closure of an undertaking triggers the prior information and consultation obligations towards the employees (either through the Works Council or, if there is none, the Trade Union Delegation, or, failing this, the employees in person). The intention to proceed with a collective dismissal or closure must also be communicated to the competent administration (the director of the sub-regional unemployment office). In principle, a collective dismissal gives rise to the payment of a special monthly compensation during a period of 4 months, in addition to any indemnity in lieu of notice.

In case of closure of an undertaking and if the conditions are met, the employees will be entitled to a closure indemnity equal to a fixed amount per year of seniority within the undertaking and per year exceeding the age of 45, with a maximum total of 7,759.05 € (figure in 2024). In the majority of cases, employers and trade union organisations establish a social plan granting additional compensation to the employees' concerned and other measures with a view towards reducing the consequences of the collective dismissal (e.g. early retirement schemes).

### INDIVIDUAL DISMISSALS

Employment contracts are generally terminated through serving a notice period or the payment

of an indemnity in lieu of notice. An employer does not require any authorisation to dismiss an employee (except for the dismissal of an employee representative or a prevention advisor, see below). As part of the recent Belgian labour law reform, notice periods for blue- and white-collar employees are now aligned for employment contracts taking effect from 1 January 2014, and depend only on the employee's seniority.

Either of the parties may terminate the employment contract for serious cause, irrespective of whether this employment contract had been entered into for a fixed term or for an indefinite term. 'Serious cause' is defined as a fault so serious that it renders any continuation of the working relationship immediately and definitively impossible. Where an employment contract is terminated for serious cause, no notice period needs to be observed nor does any compensation in lieu of notice have to be paid.

In case of a termination for serious cause, the employer needs to strictly observe the following formalities: he must dismiss the employee within three working days as of the day he became sufficiently aware of the serious facts and he must inform the employee, by registered mail, of the grounds of his/her dismissal at the same time or within another 3- working-day-period.

### IS SEVERANCE PAY REQUIRED?

An employer can choose to either terminate an employment contract with the granting of a notice period or to terminate the employment contract immediately with the payment of an indemnity in lieu of notice. A combination of both, where the serving of a notice period is followed by the payment of an indemnity for the remainder of the notice period is also possible. If the employment contract is terminated with the payment of an indemnity in lieu of notice, no formalities need to be complied with; this is contrary to a termination through serving a notice period.

### SEPARATION AGREEMENTS

It is common practice (especially for higher employees) that the parties to an employment contract would conclude a separation agreement stipulating, i.e. the amount of the indemnity in lieu and that the employee waives any other claim he may have.

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Employees can dispute: a) the length of the notice period served; b) the salary package used as a calculation base for the indemnity in lieu of notice; c) the fact that no (timely) motivation of the dismissal was given by the employer, although the employee asked for the reasons for his/her dismissal (indemnity of 2 weeks of salary); d) the reason for dismissal. If

the dismissal is deemed unjustified, meaning that it was “manifestly unreasonable”, the employer owes damages for an amount ranging from 3 to 17 weeks of remuneration; e) the dismissal for serious cause. If the claim is successful, the employee will be entitled to an indemnity in lieu of notice equal to the salary for the notice period that should have been served; f) the fact that the employer terminated the employment contract of an employee who enjoys special protection against dismissal, in violation of any rule with regard to the employee’s protected person’s status. If the court rules in favour of the employee, a special protection indemnity ranging from 3 or 6 months (in general) up to even 8 years of salary (maximum amount in case of a dismissal of a member of the Works Council or CPPW) will be due by the employer; and g) whether his/her dismissal was discriminatory. In that case, the employer risks to be sentenced to a supplementary indemnity of 6 months of salary.

## WHISTLEBLOWER LAWS

Since whistleblowing can involve the processing of personal data, it is subject to the provisions of the GDPR and the Act on the protection of privacy in relation to the processing of personal data. Also, protection must be provided for the whistleblower (against dismissal, discrimination, and harassment) and for the person against whom allegations have been made. The latter must be informed immediately and has the right to access, rectify, or delete the personal data concerning him/her.

Further, the EU Whistleblowing Protection Directive 2019/1937 was transposed by the Act of 28 November 2022 (for the private sector). The Act is applicable to companies with 50 or more employees and provides protection to a wide scope of persons, who have acquired information on breaches in a work-related context, irrespective of whether they are, factually, employees, self-employed or freelance. The Act demands the establishment by companies of over 50 workers, of an internal reporting procedure to deal with whistleblowing in order to prevent direct leaks to the public or press. In this way, companies would be obliged to confirm the receipt of a complaint within seven days and will have to give feedback to the reporter within three months. Next, there is also a possibility to externally report to a competent authority. The whistleblowing policy of the company should indicate this option and refer to the competent authorities.

Finally, reporting publicly (to, e.g., the media or online) is addressed as a possibility when the reporters have reasonable grounds to believe that there is an imminent or manifest danger to the public interest or a risk of irreversible damage. Interestingly enough, the Directive offers a protection for whistleblowers against any form of retaliation, including dismissal, negative evaluation, suspension, demotion, discrimination, etc.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES’ AND EMPLOYERS’ ASSOCIATIONS

The most important employers’ organisation in Belgium is the VBO/FEB (‘Verbond van Belgische Ondernemingen/Fédération des Entreprises de Belgique’). It is organised on a national scale and its members are the various employers’ organisations that are each active in a specific industry or sector. In addition, several regional employer organisations exist. By application of the constitutional freedom of association, employees have the right of decision whether or not to join a trade union. Any employer applying pressure to join or not to join a trade union will be liable to criminal sanctions. Closed shops and non-union shops are outlawed in Belgium.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Traditionally, unions choose not to organise themselves under a form that would entail a separate legal personality. As a result, they only exist as legal entities to perform specific acts that are assigned to them by law. Trade unions, but not their members, essentially enjoy immunity from responsibility. Representative unions have a place on the National Labour Council and the joint committees (committees at industry level where collective bargaining agreements are negotiated). The representative bodies that must be set up within the Belgian undertakings if the conditions are met, include:

- Works Council: a Works Council is a representative body at company level designed to foster information, consultation and collaboration between employer and employees.
- Committee for Prevention and Protection at Work (CPPW): the CPPW plays an advisory role in health and safety matters and is also closely involved in the recruitment of prevention officers.
- Trade Union Delegation: the Trade Union Delegation is a body representing union members within the undertaking whose competencies include matters relating to (i) industrial relations (supervision of the observing of employment legislation) and (ii) negotiations for concluding Collective Bargaining Agreements (CBAs) without affecting existing CBAs or other agreements concluded at other levels. They also have a crucial role to play in conflict resolution and mediation between parties.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

A “Community-scale undertaking” means an undertaking with at least 1 000 employees in the Member States and at least 150 employees in at least two different Member States. A Community-scale group is a group of undertakings meeting the following conditions:

- it has at least 1 000 employees in the Member States
- it consists of at least two undertakings belonging to the group, in different Member States, and
- at least one group undertaking has at least 150 employees in one Member State, and at least one other group undertaking has at least 150 employees in another Member State.

The procedure for setting up a European Works Council is to be initiated either on the initiative of the central management itself, or at the written request of the central management by at least 100 employees, or their representatives, employed in at least two establishments, or two undertakings, situated in at least two different Member States. Next, a special negotiation group will try to set up a European Works Council, but they can also decide to stop the negotiations. The special negotiation group will determine the main tasks and competences of the EWC.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES’ RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

If a business or a division of a business, forming an economic entity, is transferred to a new employer, so that there is a ‘going concern’ of the activity of the business (division) after the transfer, there is a transfer of undertaking.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Under Belgian law, the transferor and the transferee have an obligation to inform their respective employee representative bodies (i.e. the Works Council, or in the absence thereof, the Trade Union Delegation, or in the absence thereof the CPPW) about a proposed transfer (which includes a merger, concentration, take-over, closure or other important structural change negotiated by the company). The employees must be informed individually about the proposed transfer in case (i) there is only a Committee for Prevention and Protection at Work,

or (ii) there are no employee representative bodies within the undertaking.

The transferor and the transferee must also consult the employee representative bodies in particular with regard to the repercussions on the employment prospects for the personnel, the work organisation and the employment policy in general. The information and consultation process should take place before a decision on the planned transfer is made. Failure to comply with this obligation would render the employer liable to criminal sanctions.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

In Belgium, the terms and conditions of employment are not only embedded in laws, but also in collective bargaining agreements (CBA's). CBA's are entered into either on national or an industry level between the unions and employer organisations or on a company level between the trade unions and an individual employer.

### SALARY

In principle, minimum wages are fixed per sector of industry in collective bargaining agreements. Yet, these minimum wages may not be lower than the guaranteed average minimum monthly income, fixed by national CBA, which amounts to 2,070.48 EUR (figure in 2024). In addition to their monthly gross salary, employees are entitled to double holiday pay. Moreover, in most sectors of industry, the payment of an end-of-year premium is mandatory.

### MAXIMUM WORKING WEEK

The maximum average working time is 38 hours per week and 8 hours per day. However, the maximum working time per week may be lower in some sectors of industry on the basis of a collective bargaining agreement. There are several statutory exceptions to this rule. In case of shift work, it is for instance possible to work up to 11 hours per day and in case of continuous work even up to 12 hours. Under certain conditions, flexible working time schedules with a weekly working time exceeding 38 hours may be introduced, provided that the quarterly or yearly average remains at 38 hours per week. It is also very common to have a 40-hour work week, which is compensated with 12 compensation rest days per year (to bring the average back to 38 hours). Daily minimum working time is three hours, but statutory exceptions exist. Working at night, on Sundays and during public holidays is only allowed under strict legal conditions.



## OVERTIME

Overtime work is normally prohibited, although there are several exceptions to this rule. Where overtime is authorised, overtime pay is at least 1.5 times the employee's regular rate of pay, and twice his/her regular rate if the overtime is performed on a Sunday or a public holiday. Employees also benefit from paid rest periods in case of overtime. Rules relating to working hours and overtime pay do not apply to, amongst others, sales representatives, homeworkers and employees in a managerial role or a position of trust within the company.

Belgium also knows a system of voluntary overtime. The employee can agree to work 120 overtime hours (sector CBA's can increase this to 360 hours) per year, but the agreement only is valid for a renewable period of 6 months. This overtime should be compensated with overtime pay, but not with rest periods. As of 1 July 2023, employers and employees in all sectors will be able to make so-called "relance hours" or "additional voluntary overtime". This entails that employees can perform up to 120 voluntary overtime hours per calendar year, on top of the base quota of voluntary overtime. Contrary to the latter, relance hours do not give right to overtime pay, neither do they lead to compensatory rest. This system will be valid until the end of 2025 (unless if it will be prolonged).

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Every employer is obliged to establish an "Internal Service for Prevention and Protection at Work". This body assists the employer, the members of the hierarchical line and the employees with implementing the legal and regulatory provisions regarding the well-being of the employees and all prevention measures and activities. For this purpose, every employer has at least one 'prevention advisor', competent for safety at work (the 'Safety Prevention Advisor'), who is an employee of the undertaking and connected to an Internal Service. In companies employing less than twenty employees, the employer may exercise the function of Safety Prevention Advisor. Other specialised prevention advisors intervene in matters related to psychosocial risks at work (the 'Prevention Advisor-Psychosocial Risks') or occupational medicine (the 'Prevention Advisor-Occupational Physician').

The employer determines the means and the way to carry out the well-being policy as well as the competences and responsibilities of the persons in charge of applying the well-being policy. Furthermore, the employer is required to draw up a number of mandatory documents pertaining to health and safety rules, the most important of which include: a) Global Prevention Plan (in this 5-year plan the results of the company's risk analysis

and the prevention activities to be developed and adopted with regard to safety and health need to be programmed, taking into account the size of the company and the nature of the risks attached to the activities of the company); b) Yearly Action Plan (works out the Global Prevention Plan on a yearly basis); and c) Yearly report on the activities of the Internal Service.

## COMPLAINT PROCEDURES

An employee who is the victim of violence, harassment or sexual harassment at work may claim compensation for the material and moral damage suffered, which, at the choice of the victim, consists of the actual damage suffered and to be proved by the victim, or a lump sum corresponding to the gross salary for three months. The flat-rate compensation is increased to six months' gross salary in the event of discrimination, abuse of authority or serious offences.

Under Belgian law, the claimant of a moral or sexual harassment, or any witness formally intervening, is protected from retaliation measures. Except for reasons unrelated to the formal request, the employer may not terminate the employment relationship or take any prejudicial measure during or after the employment relationship, with the concerned employee, during the 12 months following the application of the formal request. The employee can claim a protection indemnity of 6 months of remuneration in case of violation. The burden of proving the reasons for dismissal and the justification of the modified working conditions rests with the employer.



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## I. INTRODUCTION

In Brazil, Labour Law is protective of employees. Some basic principles implicitly or expressly provided by Law will govern any employment relationship in Brazil. The most relevant principles are: (a) prevalence of facts: in the determination of labour consequences, the relevant facts surrounding an employment relationship will prevail over formal documents; (b) prohibition of detrimental changes: employers are prevented from making changes to employment terms and conditions that are detrimental to employees, whether or not the employee has previously consented with the change; and (c) joint liability (group of companies): companies belonging to a group of legal entities under the same control, direction or management are jointly liable for the obligations of any company belonging to such group with respect to employment relationships.

### KEY POINTS

- The most common practice is hiring workers as employees.
- Employment agreements in Brazil are usually for indefinite term; fixed term employment agreements are only allowed in specific situations.
- All companies and employees are mandatorily represented by Unions.
- Employments are at will, meaning that any party may terminate the employment agreement without cause upon mandatory prior notice and payment of the severance.
- Work permits must be requested whenever a foreigner wants to work in Brazil.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

The Federal Constitution prohibits any kind of discrimination, including distinction of salaries, duties and admission criteria due to gender, age, skin colour or marital status. The Constitution also prohibits any discriminatory acts with regards to distinction of salary and admission criteria of disabled employees. Furthermore, Law 9.029/1995 prohibits any kind of discriminatory practice which may limit the access or the maintenance of employment due to sex, origin, race, skin colour, marital status, family situation, disability, professional rehabilitation, and age, among others.

### PROTECTIONS AGAINST HARASSMENT

Employers are prohibited from discriminating against any candidate/employee during the hiring process and the employment relationship for any reason, including, but not limited to sex, origin, race, colour, marital status, family situation, disability, professional rehabilitation, and age.

An employer can adopt a non-discriminatory policy applicable to all employees with guidelines about conduct that should not be performed by employees. In addition, the employer may provide training to its managers and hierarchical superiors to avoid any discriminatory act or otherwise transmit an anti-discriminatory culture at the company.

Protection of personal intimacy of any Brazilian citizen is granted, in a broad scope, by the Federal Constitution, which (a) prohibits any kind of discrimination, (b) grants the protection and inviolability of any citizen's image, honour, intimacy and personal life and (c) sets forth that the noncompliance with such legal guarantees or the violation of their limits may be challenged, with the payment of indemnification due to moral harassment.

Notwithstanding, as far as Brazilian law is concerned, there are no express and specific provisions of law defining what is or what is not considered harassment in the workplace, but rather has been defined by the applicable case law.

Moral harassment can be defined as the repeated exposure of employees to humiliating and embarrassing situations during the working hours and while employees perform their duties. On the other hand, sexual harassment can be defined as the repeated exposure of employees to conduct from their superiors with libidinous and malicious connotations. Companies may establish their own policies related to moral and sexual harassment.

Since March 2023, all companies that mandatorily should have a CIPA (now called "Internal Committee for Accident Prevention and Harassment") are required to: (i) include rules regarding combat and prevention of sexual harassment and other forms of violence in the company's internal policies, with wide dissemination of its content to male and female employees; (ii) create procedures for receiving and following up on complaints (e.g., hotlines/report lines), for investigation of the facts, and, when appropriate, for applying disciplinary measures to those directly or indirectly responsible for acts of sexual harassment and other types of violence,

does not exclude the appropriate legal procedures that may be taken by the victim; (iii) add topics related to the prevention and combat of sexual harassment and other forms of violence in the activities and practices of CIPA; and (iv) perform, at least every 12 months, training, guidance, and awareness-raising actions for male and female employees at all hierarchical levels of the company on topics related to violence, harassment, equality, and diversity in the workplace, in accessible and appropriate formats that maximise the effectiveness of such actions.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

With regards to employees with disabilities, please note that Law 8.213/91 sets forth that every company with 100 or more employees is obligated to hire 2% to 5% of employees with disabilities or in the process of being rehabilitated according to the following proportionality: (a) up to 200 employees - 2%; (b) from 201 to 500 employees - 3%; (c) from 501 to 1000 employees - 4% and (d) over 1001 employees - 5%.

The law also establishes that the termination of an employee with disabilities or in the process of being rehabilitated is contingent on the hiring of another employee bearing similar conditions, in order to comply with the quota mentioned above.

Law 10.098/2000 established general rules and basic criteria to promote accessibility of people with disabilities in public and private buildings. Therefore, companies are required to adapt their workplace structure to enable employees with disabilities to work and have a place for them at the company.

With regards to an employee's religious practices, the Federal Constitution protects the freedom of religious belief. However, there is no specific provision under the law obligating the employer to accommodate the employee's religious practices.

## REMEDIES

Brazilian Labour Courts are ruling that discriminatory termination of employees may result in reinstatement and indemnification due to moral damages. For instance, Precedent 443 of the Superior Labour Court holds that the termination of an employee with HIV or any other serious disease is presumed to be discriminatory and invalid, and the employee is entitled to reinstatement.

### Other Requirements

In Brazil, companies must observe two quotas: (i) employees with disabilities and (ii) apprentices. There is no other specific legislation regarding diversity in the workplace. However, several companies are adopting internal policies and

affirmative actions that aim at increasing diversity in the workplace.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

Employers and workers must make compulsory contributions to the Brazilian Social Security Agency, which is in charge of managing a system designed to protect the employee in case of illness and retirement. With regards to healthcare, despite the fact that employers are not obliged to grant private healthcare to their employees, it is a very common practice.

The employer's contributions average twenty-seven percent (27%) of the employee's overall salary. Contributions may be higher than this average if the employees are subject to health hazardous working conditions. Companies in some specific industries are subject to a 1% or 2% social security contribution on top of their revenue instead of the employees' salary. The employer withholds the employee's individual contributions.

The individual contribution is proportional to the salary amount and is capped by the Federal Government, currently at approximately BRL 908.79 per month and adjusted on an annual basis. For different labour structures which are not employment, other mandatory social security schemes may apply.

### HEALTHCARE AND INSURANCES

The social security authority provides the following insurances to workers who have contributed to the system, which will depend on the number of contributions made and on the amounts involved in each contribution. The main insurances provided by the social security authority are: 1) death allowance; 2) accident allowance; 3) disease allowance; and 4) imprisonment allowance.

### REQUIRED LEAVE

#### Holidays and Annual Leave

Employees are entitled to be absent from work on public holidays as established by law to celebrate some special occasion (e.g. Christmas, Independence Day, etc.), being entitled to the regular remuneration for such days. Local (Municipal or State) holidays may also apply, depending on where the company is based. If the employer demands the employee to work on a holiday, the remuneration paid with respect to the worked holiday must be at least double the regular compensation. Applicable collective bargaining agreements may establish a higher rate for the holiday remuneration.

After each period of 12 months worked, employees are entitled to a 30 calendar-day paid vacation, which must be taken within the subsequent period



of 12 months, in the period that is most convenient to the employer. The Labour Reform allows the split of the vacation period, provided that the employee agrees. The vacation period can be taken in up to three periods, one of which cannot be less than 14 days and the others cannot be less than 5 days each. Moreover, the vacation period cannot start 2 days before a holiday or a weekend. Additionally, note that the employee may “sell” 1/3 of their vacation period. The vacation remuneration corresponds to the monthly salary plus 1/3 of the employee's monthly salary as vacation bonus.

### **Maternity and Paternity Leave**

All female employees are eligible for maternity benefits, including when adopting a child. The maternity benefit will be paid to the employee for a period of 120 days and is paid by INSS, the Brazilian social security agency. In practical terms, the employer pays the benefit to the employee and deducts the amount from the social security contributions due to the INSS. Male employees are entitled to 5 days of paid paternity leave. If the company is enrolled in a government program called “Empresa Cidadã”, the maternity leave may be extended to 180 days and the paternity leave to 20 days, provided some requirements established by the government program are observed.

### **Sickness and Accident Leave**

In the event of sickness (work-related or non-work-related) or accident at work, the employer will be responsible for the employee's salary during the first fifteen days of absence. After the fifteenth day of absence due to sickness/accident, the INSS will pay a sick/accident leave benefit to the employee. However, the benefit does not correspond to the actual salary, but rather to a specific INSS based calculation made over the last contributions and is capped at approximately BRL 7,786.02. The applicable CBA may establish additional payments/conditions that must be observed by the employer during the sickness/accident leave.

### **Disability Leave**

The same rules informed in the sickness/accident leave above applies to disability leave. In other words, whenever an employee is unable to work due to health issues, the employer will be responsible for the employee's salary during the first fifteen days of absence and the INSS will pay a sick/accident/disability leave benefit to the employee. The applicable CBA may establish additional payments/conditions that must be observed by the employer during the period.

### **Pensions: Mandatory and Typically Provided**

In November 2019, the Pension Reform changed several rules for retirement pension applicable to Brazilian citizens and defined transition rules applicable to those who were close to retirement.

According to the new rules, to be eligible to receive the retirement pension, male individuals must be at least 65 years old and have paid a minimum of 240 monthly contributions to INSS. Females must be at least 62 years old and have paid a minimum of 180 monthly contributions to INSS. In addition, retirement is no longer based solely on the length of service; nowadays individuals must have met the minimum age mentioned above to be eligible for the retirement pension.

There is also a special retirement for employees who have worked under unhealthy conditions; their contribution periods are shorter than the regular period. A company that has employees working under unhealthy conditions that entitle them to the special retirement, must pay additional social security contributions. The additional contribution is 6%, 9% or 12% of the employees' salary, depending on the level of the risk.

Disability pensions are also available to workers who have become disabled due to work related illness or accident. A Social Security medical expert must document such disability and the beneficiary must be subject to regular exams. The benefit payments end when the employee recovers their ability to work.

Apart from the aforementioned public retirement system, some companies provide their employees with a private pension plan, in which the amounts of the contributions from both parties (employers and employees), can be defined by the companies directly, subject to specific rules in Brazil as issued by the government agency Superintendência de Seguros Privados (SUSEP).

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

In Brazil, workers may be hired in several ways, but the most common practice is to hire workers as employees. An employment relation is characterised by the simultaneous presence of four requisites: (i) services rendered on a personal basis; (ii) on a permanent/habitual basis; (iii) with subordination (i.e., the services are rendered under the direction of a supervisor); and (iv) in view of remuneration in consideration for the services rendered. Whenever the requisites of employment relation are not present in a labour relation, the parties are free to structure it in a different way other than employment, such as: independent contractors/consultants, service providers/outourced workers, temporary workers, intern, non-employed officers, among others, provided that the specific rules and regulations regarding such other forms are complied with. The Labour Code is applicable solely for employees,

while the other work structures are governed by different statutes.

## **FIXED- TERM/OPEN- ENDED CONTRACTS**

Employment agreements in Brazil are usually for an indefinite term. As per the Labour Code, fixed-term employment agreements are only allowed: (a) for up to two years when: (1) the temporary nature of the service justifies a pre-established term, or (2) the business activities have a temporary nature. The fixed-term agreement may become an indefinite term employment agreement (if certain criteria is met). In addition, a new type of hiring was introduced – “intermittent work” – wherein the employee renders services with subordination, alternating between periods of provision of services and inactivity, but not on a habitual basis. The employee can work for any other employer during the inactivity periods.

## **TRIAL PERIOD**

The trial period, also called “probation period”, may be established for a period up to 90 days and may be renewed once if the limit of 90 days is observed, e.g., 45 days renewable for 45 days, or 30 days renewable for 60 days.

## **NOTICE PERIOD**

The notice period, also called “prior notice”, is only applicable in the event of termination of employment agreements for an indefinite term. In the event of termination of the employment agreement for an indefinite term, without cause and upon the employer’s initiative, the employer must provide the employee with a prior notice proportional to the length of service; minimum of 30 days if the employee has worked up to 1 year and 3 additional days for each year of service limited to 60 additional days (maximum of 90 days prior notice). In the case of a termination of employment agreements for an indefinite term, without cause and upon the employee’s initiative (resignation), the employee must provide a prior notice to the employer of 30 days or request to be released from working during the prior notice period. In the event of termination by mutual consent, the prior notice period will be reduced by half.

# **V. HIRING PRACTICES**

## **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

Whenever a foreigner is transferred to Brazil and/or retained by a Brazilian company to render services in Brazil, an appropriate work visa/permit must be requested in advance. If the foreigner will bring their dependents, it is necessary to apply for a residency permit based on family reunion. The proper visa depends on the activities that will be performed in Brazil. After the applicable

visa is selected, the Brazilian entity will have to comply with the applicable rules concerning the relationship to be maintained with the foreigners.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

A foreign employer needs to establish or work through a local entity to hire an employee in Brazil, because only local companies are able to comply with all labour rights and obligations, which include payment of labour and social security charges, as well as deduction of the applicable income tax.

## **LIMITATIONS ON BACKGROUND CHECKS**

There is no specific provision in Brazilian Labour Laws either prohibiting or authorising the employer to perform background checks on its prospective employees. However, protection of personal information pertaining to any Brazilian citizen is granted in a broad scope by the Federal Constitution, which grants protection and inviolability of any citizen’s intimacy and personal life. The Federal Constitution also prohibits any kind of discrimination. In addition, the law prohibits any discriminatory or restrictive measure for the admission of an employee or maintenance of employment based on sex, origin, race, colour, marital status, family situation or age. There are only a few exceptions to the general rule that justify some types of background checks (i.e. criminal check for bank employees). In view of the above, currently, as a general rule, Brazilian Labour Courts understand that some type of search that a company performs regarding its prospective employees’ information characterises discrimination, thus being illegal, and entitling the individuals to an indemnification for moral damages. Therefore, in order to evaluate the candidate’s background, and in order to make a hiring decision, the company should only use public information about the individual.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

With regards to the employment application and interview questions, the law prohibits any kind of discriminatory practice which may limit the access or the maintenance of employment due to sex, origin, race, colour, marital status, family situation, disability, professional rehabilitation, age, among others. Therefore, the employer must avoid questions like “Are you married?”, “Do you have any children?”, “What is your nationality/religion/marital status?”, among others that may be discriminatory on an employment application or during an

interview. With respect to women, the requirement of statements, examinations or similar measures related to sterilisation or state of pregnancy are considered discriminatory under the law, which also prohibits inducing or instigating birth control. In addition, the Brazilian General Data Protection Law, so-called “LGPD”, was enacted in August 2018 and has been in force since September 2020. Per the LGPD, personal and sensitive data can only be processed on an underlying lawful basis. Thus, companies will have to be careful not only with the personal and sensitive data of employees that is processed, but also the data of candidates (e.g. résumé, background checks, among others).

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

The Federal Constitution prohibits salary differences based on sex, age, colour or marital status. As mentioned above, such prohibition also applies to employees with disabilities. In addition, the Labour Code ensures that employees performing the same activity, with equal value, to the same employer, at the same facility, are entitled to the same remuneration, except if the difference in their length of service: (a) with the same employer is longer than 4 years and (b) at such position is longer than 2 years. In accordance with law, “equal value work” is the work performed with the same productivity and same technical perfection.

### REMEDIES

If a company does not comply with the equal pay rules mentioned above, the company may be subject to (a) inspection from the Ministry of Economy, which may subject the company to the payment of administrative penalties, (b) investigation by the Ministry of Labour Prosecution and/or (c) individual labour claims filed by employees or former employees, claiming payment of salary differences and indemnification for moral damages due to the discriminatory treatment.

### ENFORCEMENT/LITIGATION

Equal pay for equal work is a common request in labour claims in Brazil.

### OTHER REQUIREMENTS

On July 3, 2023, law 14.611/2023 was published, including the obligation for private companies with 100 or more employees to publish a biannual transparency report (on March and September of every year) on wage and remuneration criteria that also observes the limits of the General Data Protection Law (LGPD). Failure to present the transparency report may lead to an administrative fine of up to 3% of the company's payroll, capped at 100 Brazilian minimum monthly wages.

Additionally, it has established more severe legal and monetary consequences in the event of wage discrimination. Thus, in the event of wage discrimination, companies are subject to the following sanctions and fines:

- payment of salary differences to the employees discriminated against;
- employees may seek compensation for moral damage; and
- administrative fines of ten times the new salary owed to the employee that was subject to discrimination – the amount doubles for repeat offences.

The transparency report is prepared and published by the Ministry of Labour based on the information in the e-Social system and complementary information provided by the companies.

In case the Ministry of Labour finds that there are unequal salaries and remuneration criteria between women and men (after the analysis of the transparency report), the companies with 100 or more employees must draft and implement, within 90 days, an Action Plan to Mitigate Unequal Salaries and Remuneration Criteria between Women and Men, in specific conditions.

According to the law, the first batch of reports were issued and published in March 2024. The next report will be issued in September 2024.

Nevertheless, the methodology adopted by the Ministry of Labour to prepare the transparency report has been questioned by both companies and unions, resulting in favourable decisions that exempt companies from the requirement to publish the report.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The following restrictive covenants are recognised and may be enforceable under the law:

- Non-compete clauses;
- Non-solicitation of customers;
- Non-solicitation of employees.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

The parties may negotiate the restrictive covenants to be enforced after termination (i) at the beginning of the relationship - in the employment agreement or in a separate document; (ii) during the relationship; and (iii) at the end of the relationship. In the event of violation of the restrictive covenants, it is possible to file a judicial claim.



## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave in Brazil is not legally regulated, nor is it a common practice. The enforceability of a garden leave provision is quite easy to challenge in court.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

Brazilian Labour Courts recognise that the employer can restrict the personal use of the Internet and social media by the employees during the working hours, due to the employer's power of command.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

There is no specific provision in Brazil regarding this matter. However, it is advisable to include such a provision in an internal policy of the employer. If the employer restricts the use of the Internet and social media to professional use only, the employer is allowed to inspect such use, and if the employee is using the Internet/social media improperly, it could lead to disciplinary measures (in accordance with rulings by Brazilian Labour Courts).

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

There is also no specific provision in Brazil regarding this matter. However, Brazilian Labour Courts understand that the use of social media to disparage the employer or to divulge confidential information, may lead to disciplinary measures. Prior decisions by these courts on this issue held that this type of conduct could lead to termination with cause by the employer, and payment of an indemnification due to moral damages, by the employee to the employer.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUNDINGS FOR TERMINATION

In Brazil, employments are at will, meaning that any party may terminate the employment agreement without cause upon the mandatory prior notice

and payment of the severance. It is not necessary to mention any reason for termination, except if it is a termination with cause. Termination with cause is the most severe sanction for an employee and results in the reduction of the employee's severance entitlements. Also, the termination with cause is always an exemplary action before other employees. The employer should only terminate an employment with cause when the misconduct is foreseen by law and serious enough to justify such a severe sanction.

Fixed-term employment relationships may terminate exactly on the last day of such term or may end before it. If it terminates on the last day of such a term, the employee will be entitled to the severance payments set forth by law. However, if the termination occurs before the fixed-term, there are two alternatives regarding the severance that vary in accordance with the wording of the employment agreement: (a) the terminating party must pay the equivalent of 50% of the amount that would be due until the end of the agreement or (b) if there is a specific clause in the employment agreement mentioning that, upon early termination of the fixed-term employment agreement, the termination will be treated as a termination of an indefinite term employment agreement and the regular severance for termination of indefinite term employment agreements will be due.

### COLLECTIVE DISMISSALS

Labour legislation in Brazil is silent on the concept of mass termination (collective dismissal), i.e. how many employees constitute a mass termination. In accordance with the Brazilian Supreme Court precedent, for a mass termination to be valid, it needs to be preceded by the attempt of the company to reach a negotiation with the employees' union, under the penalty of it being considered null, with the reinstatement of the employees. This means that the company and the union do not need to reach an agreement, however it is necessary that the company at least tries it (showing some efforts).

### INDIVIDUAL DISMISSALS

Since employment agreements are at will, an employer can terminate an employment agreement at any time, provided that the notice period is granted. Some employees cannot be terminated without cause due to temporary job stability. That is the case of Union representatives, members of the Internal Committee for Accidents Prevention (CIPA), pregnant employees, employees that have work-related accidents, among other situations that may be set forth in the applicable collective bargaining agreement. Termination with cause and resignation are allowed even if an employee has temporary job stability.

A termination with or without cause or resignation should be communicated to the other party in writing. No prior communication or requests of

authorisation to the employees' union or Ministry of Labour are required to perform any type of termination. The Labour Reform introduced a new type of termination called "termination by mutual agreement" in which both parties decide to end the employment agreement.

### IS SEVERANCE PAY REQUIRED?

In Brazil, severance pay is mandatory, but the amount differs based on the type of termination, i.e. in case of resignation, termination by mutual agreement, without cause, and with cause in indefinite term/ fixed-term agreements.

### SEPARATION AGREEMENTS

Brazilian Labour Law does not require a separation agreement. However, it may be considered good practice in the event of termination of a high-level employee/worker, who would be entitled to a special severance package beyond the severance payments determined by Brazilian Labour Law, or by the contract executed between the parties.

However, the separation agreement is not binding, i.e., even though the employee/worker signs the agreement, they may claim additional rights before the Brazilian Labour Courts. Despite its unenforceability, any amounts paid in connection with the separation agreement, if properly identified, may be offset against future amounts sentenced in a judicial claim, if necessary. Additionally, the separation agreement has a moral effect upon the employee/worker and is very useful to avoid claims. If the employee/worker feels satisfied with the negotiation they will likely not file a claim after signing the separation agreement.

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

There is no specific provision about wrongful termination in Brazil. However, since the Brazilian Federal Constitution prohibits any type of discrimination, if an employee evidences that their termination has resulted from a discriminatory act, they may file a lawsuit against the company claiming reinstatement and moral damage indemnification.

### WHISTLEBLOWER LAWS

While there is no specific law regulating whistleblowing systems, the Brazilian Clean Company Act provides credits for companies that have implemented a compliance program. In this context, a whistleblowing channel is an important element of a compliance program. Internal policy should regulate it, establishing provisions about confidentiality, privacy and non-retaliation, among others. The Federal Constitution's principles such as the right of privacy and intimacy, the protection of image and reputation and non-discrimination

rights, should be complied with when implementing a whistleblowing program.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

All employers and employees are mandatorily represented by their respective union. The unions that will represent the employer and its employees are linked to the activities performed by the company in each city or state.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

Unions can negotiate on behalf of the employers and employees and execute collective bargaining agreements. Collective bargaining agreements are instruments executed between the unions representing employers and employees for purposes of establishing general and normative rules that govern the relationship of a given category of employers and employees. The terms and conditions negotiated by the unions are mandatory and cover the employers and employees of the category.

An employer may also negotiate a specific collective bargaining agreement, applicable to its employees, directly with the employees' union.

There are some matters that can only be implemented by means of a collective bargaining agreement such as an offsetting of a working hours system and profit/result sharing program.

Those public entities with more than 200 employees must elect an employees' representative to occupy a position and represent them on the Board of Directors. Such representative must be elected among the other employees, in an election with the participation of a member of the representative Union.

### OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Depending on the number of employees and the risk degree of the employer's facility activity, the employer must have an Internal Commission for Accident Avoidance ("CIPA"), composed of both employee and employer representatives. Individuals elected as employee representative members of CIPA (either as full or alternate members) may not be terminated from the date of their registration as candidates for such position up to 1 (one) year after the expiration of their one-year term-in-office.

Also, depending on the number of employees and the risk degree of the employer's facility activity, the employer must implement a Specialized Safety Engineering and Occupational Medicine ("SESMT"), which is a team of health and safety professionals hired by the employer.

## **XI. TRANSFER OF UNDERTAKINGS**

### **EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING**

Employee labour conditions must not be reduced or negatively impacted from a transfer of undertaking. Employers are prevented from making changes to employment terms and conditions that are detrimental to employees, whether or not the employee has previously consented to the change. Due to the concept of labour succession, the new owner of a company or business will be considered liable for all labour rights and liabilities. Brazilian Labour Courts have consolidated the concept that an acquisition of a company's control or a transfer of relevant parts of its assets to another company – when assets represent a business unit – characterise labour succession. Once the succession is characterised, the new owner is liable before the employees for any and all labour liabilities relating to the acquired business units or companies, even those connected with the period preceding the transfer of ownership.

### **REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES**

From a labour standpoint, there is no need to request any authorisation, from a union or other authority, in order to proceed with a takeover.

## **XII. WORKING CONDITIONS**

### **MINIMUM WORKING CONDITIONS**

Employees are entitled to the rights established by Federal Constitution, Brazilian labour legislation, including all regulations and supplementary rights set forth by the respective collective bargaining agreement. Individual employment agreements and internal policies may establish additional rights, which must always be greater than the rights established by law. Collective bargaining agreements should prevail over law, even when the conditions agreed are worse than the ones established by law, except as they relate to: (i)

health and safety rights, (ii) third party rights (i.e. social security contributions) and (iii) labour rights, among other conditions established by law.

### **SALARY**

The employee's salary must be paid in Brazilian currency. Compensation comprises not only the employee's fixed salary, but also any commissions, bonuses (Christmas or otherwise), fringe benefits, such as personal or family benefits and living expenses. Compensation, with some exceptions, must be paid at least monthly. Employees are entitled to receive a Christmas bonus corresponding to one monthly salary per year. Half of the Christmas bonus must be paid by the 30th of November, and the other half on or before the 20th of December. The national minimum wage (established by law) is currently BRL 1,412.00. Collective bargaining agreements may establish a "professional salary", a minimum wage for a specific category that must be higher than the national minimum wage.

### **MAXIMUM WORKING WEEK**

The regular working period cannot exceed 8 hours per day and 44 hours per week. One-hour break for rest and meal is mandatory for employees that work more than 6 hours per day. Employees are also entitled to a paid weekly rest period, preferably on Sundays. Some specific categories have a different work shift. For instance, regular bank employees and telemarketing operators can only work 6 hours per day, journalists and musicians can only work 5 hours per day, among others.

### **OVERTIME**

Compensation for overtime work must be at least 50% greater than the compensation for regular work.

The following employees are not subject to the limits on working hours under the Labour Code, do not have their working hours controlled, thus are not entitled to overtime payments: (a) employees who perform activities outside of the company's facilities and wherein those activities as such, are not compatible with defined working hours (called as "external" employees); (b) employees (such as managers) who occupy trust positions (called "cargos de confiança" in Portuguese); and (c) employees who work in a remote work system rendering services by production or task.

Per law, it is possible to negotiate with the Union that represents the employees, an agreement to determine that some positions which do not fit the exceptions above, should also not be subject to working hours control and not entitled to overtime payment. It will be necessary to show to the Union the reasons that justify the exemption condition to such additional positions. Furthermore, it is possible to negotiate an individual agreement about the matter with employees classified as "hipersuficiente" depending on the circumstances of the activities performed.





## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Employers are obliged to provide a healthy and safe workplace to employees and to comply with all mandatory regulations regarding healthy and safety matters. There are several regulations providing for strict rules concerning mandatory periodical medical examinations, medical examinations upon admission and termination, medical records, environmental risks prevention, creation and maintenance of an Internal Commission for Accident Prevention (CIPA), health-hazard and dangerous activities and the corresponding allowances and ergonomics, among others.

## COMPLAINT PROCEDURES

In Brazil, there is no legal provision regarding complaint procedures. Generally, all employees are entitled to file labour claims to request rights related to the employment relationship. Employees may file labour claims while working, or within two years as from the termination date, to claim rights related to the past five years, counted as of the filing date of the claim. Companies may establish their own internal policy related to complaint procedures, but it will not prevent the employees from filing claims directly without observing the internal policy.



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## I. INTRODUCTION

In Canada, the power to make laws is divided between the federal and provincial governments. Generally, for historic, constitutional reasons, provinces have jurisdiction over most employment matters, while the federal government has jurisdiction over employment only in respect of specific industries, such as airways, shipping and banks. Employment law in Canada is quite similar from province to province and is governed by both federal and provincial legislation as well as by the common law (judge-made law). Quebec is the notable exception to this rule, as Quebec operates under a civil law system based on a written “civil code” founded on France’s Napoleonic Code.

### KEY POINTS

- “Employment law” concerns the relationship between an individual and an employer, while “labour law” regulates the collective representation of employees by trade unions.
- There is no “at will” employment in Canada. Dismissed employees are entitled to notice of termination or pay in lieu of notice, unless employment was terminated “for cause”.
- Provincial employment standards legislation establishes minimum standards for wages, vacation, leaves, notice of termination and severance. However, the common law provides greater entitlements upon termination and can otherwise regulate the employment relationship.
- Employment contracts can be used to set out the terms of employment for non-union employees. Provided that the contract’s terms do not violate applicable statutory minimum requirements, the terms of the contract will displace the common law. As such, employers are encouraged to utilise written employment agreements, particularly with respect to entitlements upon termination.
- All jurisdictions have legislation prohibiting discriminatory practices and harassment in the workplace. Employers have significant positive obligations to ensure equality in the workplace.

## II. ANTI-DISCRIMINATION LAW

### SUMMARY

With respect to human rights, employers have an obligation to offer employment without discrimination and to guard against harassment based on prohibited grounds: race-related grounds,

creed, sex, disability, age, sexual orientation, marital status, and family status. Some Canadian jurisdictions also prohibit discrimination based on gender identity and expression, as well as discrimination based on criminal convictions that are unrelated to employment, or criminal convictions for which a pardon has been obtained. Most jurisdictions in Canada have some form of equal pay and/or pay equity legislation to ensure that wage parity exists between male and female workers. Such measures are intended to redress systemic discrimination. Although employers are prohibited from discriminating in employment, employers are generally not required to meet any particular quota for hiring historically disadvantaged groups. Employers do, however, increasingly face claims by prospective or current employees that they have been adversely affected by systemic discrimination. Many employers in Canada have recognised the benefits of employing a diverse workforce and have therefore voluntarily created goals or guidelines designed to increase diversity.

### PROTECTIONS AGAINST HARASSMENT

vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome, which includes sexual harassment and personal harassment. Employers are obligated to have policies in place to prevent and address harassment in the workplace. Increased awareness of social issues such as sexual harassment and anti-Black racism also continue to change the landscape of employment law in Canada.

Although Canadian jurisdictions have long had laws pertaining to discrimination and harassment, the number of claims now being made has increased significantly. This trend has led to a number of legal proceedings, including large class action lawsuits. Further, the continued trend toward workplace harassment legislation has dramatically increased the number of claims and investigations. Given that these claims are based on relatively new, untested legislation, the standards of conduct are still being developed by the litigation process, resulting in not only meritorious claims coming forward, but also a distinct trend of employees claiming harassment over what have traditionally been seen as normal management techniques and disciplinary measures, or simply in response to any critique of their work performance.

Also, human rights legislation prohibits making any threats of reprisal or taking any action to reprimand



against an employee for claiming or enforcing a human right. An employee therefore cannot be disciplined or otherwise penalised for making a complaint regarding discriminatory harassment, or for requesting accommodation based on a protected ground.

## **EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS**

Employers are required to accommodate employees to the point of undue hardship. Employees are entitled to be provided with reasonable accommodation that is necessary in the circumstances. A reasonable accommodation will be one that meets the employee's needs and does not impose undue burdens, financial or otherwise, on the employee.

## **REMEDIES**

Employees who have been subject to discrimination may file a human rights complaint or, in some cases, a civil action or grievance. Employees may seek compensation for any lost wages that resulted from an employer's discrimination and/or failure to accommodate to the point of undue hardship. Damages may also be awarded for the injury to an employee's dignity, feelings and self-respect that may have been caused by the employer's actions.

# **III. EMPLOYEE BENEFITS**

## **SOCIAL SECURITY**

There are a number of "social safety nets" in Canada. The most significant is the federal Employment Insurance system, which provides benefits in the event of a loss or interruption of employment. Canada's public health care system also greatly decreases the cost to employers of providing private medical insurance to employees, in comparison to countries without such systems. Participation in a government-run workers compensation program in each province is either mandatory or optional, depending on the type of work the employer is engaged in.

## **HEALTHCARE AND INSURANCES**

Citizens and landed immigrants have significant health care coverage, unemployment insurance coverage and pensions for retirement, generally covered by public funds and payroll taxes. Most basic health care services are covered by provincial health insurance however, prescription drugs are not covered under the plan.

Employment Insurance ("EI") provides income replacement benefits for Canadian employees who have lost their jobs through no fault of their own (EI is generally not available to employees who have been terminated for just cause). The current weekly benefit amount for a claimant is 55% of the average

weekly earnings from the previous calendar year to a maximum weekly benefit of \$573.00.

## **REQUIRED LEAVE**

### **Holidays and Annual Leave**

Employment standards legislation provides employees with a statutory entitlement to vacation and vacation pay for each year worked. In all provinces, employees are entitled to at least two weeks of vacation per year; in Saskatchewan, employees are entitled to three weeks per year. In many provinces this entitlement will increase with an employee's length of service.

Employees are also entitled to between 6 to 11 paid statutory holidays per year. If an employee is required to work a holiday, the employee is entitled to premium pay (typically time-and-one-half) as well as to holiday pay for that day.

### **Pregnancy and Parental Leave**

Pregnancy leave and parental leave are addressed under employment standards legislation in each province. EI is available for employees who are pregnant, have recently given birth, are adopting a child, or are caring for a newborn. Because EI benefits provide only a portion of an employee's regular wages, many employers offer "top up" benefits to employees for some portion of their leave.

### **Sickness and Disability Leave**

Many jurisdictions also provide a variety of leaves based on illness, disability, or the illness or disability of a family member. Employers are generally not required to pay employees for these leaves of absence. Specialised EI coverage is also available for employees who are unable to attend work because of illness because they have taken a compassionate care leave to care for a family member who is gravely ill with a significant risk of death, or a leave to care for a critically ill child, though employers are not required to pay employees during these types of leave.

### **Other Required or Typically Provided Leave(s)**

There is no federal workers' compensation system. If eligible for coverage, employees in the federal jurisdiction are covered by the provincial workers' compensation system where they are employed. Participation is compulsory for employers. This creates a trade-off system, whereby employees injured on the job receive coverage, and in return, lose the right to sue their employers with respect to the injury.

### **Pensions: Mandatory and Typically Provided**

Almost all individuals who work in Canada contribute to the Canada Pension Plan (CPP), which is a defined benefit plan. Employers are required by law to deduct and remit CPP contribution from employees' income. Employers are also required to make contributions to CPP on behalf of their employees. Employees may apply for and receive a



full CPP retirement pension at age 65. Alternatively, employees may receive a reduced pension at 60, or as late as 70 with an increase. Many employers and employees participate in workplace pension plans or group RRSP arrangements in order to supplement employees' CPP entitlements.

#### **Other Required or Typically Provided Benefits**

Some common benefits include private pension programs, as well as supplemented health benefits (which cover costs of items or care that are not covered by Canada's universal healthcare system such as prescription drugs or vision ware).

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

In order to be enforceable, an employment contract must fulfil the essential elements of a binding contract at common law, and must not contravene any applicable legislation. A binding contract must be formed by offer, acceptance and consideration. In the case of most employment contracts, the consideration is the exchange of remuneration for work. Courts have found that continued employment is generally not sufficient consideration, unless there is evidence that the employer intended to dismiss the employee if the post-hire agreement was not executed.

Employment contracts are subject to increasingly close scrutiny in Canada and will not be enforceable if they do not comply with minimum employment standards, occupational health and safety legislation and human rights legislation. An employee cannot waive or contract out of his or her minimum entitlements under the applicable employment standards legislation. Any ambiguity in an employment contract will generally be interpreted in the employee's favour.

### **FIXED- TERM/OPEN- ENDED CONTRACTS**

Most employment agreements are for an indefinite term. In the absence of an express agreement to the contrary, an employment contract for an indefinite term can only be terminated by the employer by the provision of reasonable notice at common law. In general, the statutory notice period is much shorter than the notice period at common law. Where an employment agreement stipulates that employment will be for a fixed term, the employee may not be entitled to notice of termination if his employment is terminated when the contractual term expires.

### **TRIAL PERIOD**

A probationary term will not be implied in an employment contract. If an employer wishes to hire

an employee on a probationary basis to determine their suitability for the position, this should be clearly set out in a written employment contract.

### **NOTICE PERIOD**

All employees must be provided with notice of termination or pay in lieu thereof in accordance with the applicable employment standards legislation. Unless the parties have expressly agreed otherwise, there is a legal presumption that an employee will also be entitled to reasonable notice period under common law, which is intended to approximate the length of time it would likely take an employee to obtain similar employment. The range of the notice period that may be awarded by a court generally may range from two or three months up to twenty-four months. In exceptional cases, a notice period exceeding twenty-four months may be awarded.

### **TELEWORKING CONTRACT**

Restrictive covenants in employment agreements – both non-compete and non-solicitation clauses – are presumptively invalid (and, in Ontario, non-compete clauses in non-executive employment agreements are prohibited by statute). An employer can, however, demonstrate that such a clause is reasonable in the circumstances if it protects a legitimate proprietary interest, if it is reasonable and unambiguous regarding its duration, geographic scope and types of activities it restrains, and if it does not violate public policy. Courts will strike down a restrictive covenant rather than read it narrowly. These clauses require careful drafting.

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

To be lawfully employed in Canada, one must be a citizen, a landed immigrant or have a work permit. No work permit is required for business visitors who come to Canada to meet with Canadian clients or assess business opportunities; however, a work permit will be required for foreign nationals who will be providing their services in Canada. Apart from senior executives, professionals and workers with specialised skill-sets, most foreign workers in Canada are employed in the domestic care or agriculture sectors. New legislation was introduced in 2022 to: rigorously assess the authenticity of employment offers, in order to minimise fraudulent offers and better protect foreign workers from exploitation and abuse; to bar employers from hiring temporary foreign workers when the employer has failed to meet its commitments regarding terms and conditions of employment; and temporary foreign workers can hold a temporary work permit for only four years at a time, though some workers are exempt from this limit. International students on a study permit can legally work up to 20 hours per

week without a work permit; this will increase to 24 hours per week in late 2024.

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

A foreign employer has several options when hiring a Canadian. One option is to hire the person as an independent contractor; however this means that the person is not technically an “employee” of the foreign company, and could work for other companies as well. Further, it can be difficult to impose the same duties (such as loyalty) on independent contractors. Finally, just calling someone a contractor does not make them one in the eyes of Canadian law. There are significant risks created by misclassification, making it a choice best taken only with great caution. Another option is for a foreign employer to work with a Professional Employer Organisation (PEO), Canadian companies that help ensure foreign employers comply with the applicable laws of Canada. It is also possible for a foreign entity to register with the applicable government agencies, so as to “do business” in Canada, which then allows them to employ workers. In other words, it is not essential that a foreign company create a separate Canadian affiliate or subsidiary. Finally, a foreign employer can create a corporation in Canada, which can then hire employees itself. This is the most common structure used by international employers of significant size.

## LIMITATIONS ON BACKGROUND CHECKS

Even when an individual has consented to a background check, the collection, use and disclosure of personal information must be reasonable under the circumstances, given the purpose for which it is being collected, used or disclosed. Employers must therefore have some justification for requesting that employees consent to a background check, criminal or otherwise. British Columbia and Quebec require that any criminal background check, and any decision relating thereto, must be directly relevant to the particular staff position at issue. At the other end of the spectrum, Alberta currently has no restriction on criminal background checks in its legislation at all. Other provinces are somewhere between these two extremes. For the foregoing reasons, employers generally should not conduct record checks until a conditional offer of employment has been made, and then only with employee’s consent (and, often, participation).

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Most employers seek to limit the amount of information sought at the application stage that could

unintentionally solicit disclosure of a characteristic that is protected. More in-depth questions will be appropriate when a conditional offer of employment is made. Additionally, in most Canadian jurisdictions, it is *prima facie* discrimination for an employer to refuse to hire someone because their relative works for the company. Also, employers are generally not permitted to test prospective employees for drug use, or to refuse to employ a person because of the results of a drug test. Pre-employment drug and alcohol testing is presumptively discriminatory on the basis of disability and/or perceived disability. Where a position is safety sensitive, drug or alcohol testing may be a valid requirement on the job, but is rarely permissible pre-employment.

# VI. PAY EQUITY LAWS

## EXTENT OF PROTECTION

Canada is a country that takes pride in the diversity of its population. Although generally not required, many major companies in Canada have made concerted efforts to increase the diversity of their workforce. Certain federally regulated workplaces are also governed by the Employment Equity Act, which identifies and defines four groups (women, aboriginal peoples, persons with disabilities and members of visible minorities) and helps ensure they have fair representation in the workforce. In addition, certain jurisdictions in Canada including Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Quebec also have pay equity legislation. Employees in jurisdictions without provincial pay equity legislation may seek equal pay protection under human rights legislation.

## REMEDIES

Complaint mechanisms for pay equity concerns are different in each jurisdiction. Generally, employees are able to make complaints to regulatory bodies alleging that an employer is not implementing or maintaining compensation practices that provide for pay equity. Such complaints are investigated in due course, and a decision is rendered which determines whether an employer is in compliance with the requisite statute. Employers who fail to cooperate during the investigatory stage may be subject to financial penalties. In jurisdictions without pay equity legislation, complaints may be made under human rights legislation.

## ENFORCEMENT/LITIGATION

Across Canada, pay equity commissions and human rights bodies hear and adjudicate pay equity complaints. Most recently, in 2018, the Supreme Court of Canada rendered a seminal decision on pay equity. In interpreting Quebec’s pay equity legislation, the Court recognised pay equity as a fundamental human right and expressly acknowledged the systemic nature of pay discrimination.

## OTHER REQUIREMENTS

Employers in each jurisdiction must meet different statutory compliance requirements. For example, in Ontario, all private sector employers with more than 10 employees must establish and maintain compensation practices that provide for pay equity in every establishment of the employer. In addition, such employers must also prepare and post a pay equity plan. Employers are encouraged to review reporting and compliance requirements in each jurisdiction in which they operate.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

In the employment context, restrictive covenants are most commonly found in employment contracts. Courts have held that restrictive covenants are presumptively unenforceable on the basis that they are considered a restraint of trade contrary to public policy. An employee whose position involves a significant authority and responsibility, may be a “fiduciary” and will thus have a common law obligation to refrain from competing with or soliciting the customers or employees of the employer, for a reasonable period of time after employment termination.

The following restrictive covenants are recognised and may be enforceable under the law:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

An employer who wishes to enforce a restrictive covenant will generally seek an injunction from a court due to the time-sensitive nature of the issue. Courts have generally recognised that the diversion of customers to a competitor may have irreversible consequences to a business. However, a court will not grant injunctive relief unless the applicant is able to demonstrate a strong prima facie case that the terms of the restrictive covenant is reasonable, and that the defendant is in fact engaging in activities that breach the restrictive covenant.

### USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is fairly uncommon in Canada, although some employers have begun to view garden leave as a viable alternative to restrictive covenants which are notoriously difficult to enforce. In the absence

of any contractual provision contemplating that an employer may remove some or all of an employee’s job duties, there is some risk that an employee placed on garden leave may claim that he or she has been constructively dismissed, and therefore entitled to treat the employment relationship as severed, and immediately begin seeking other employment.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

It is unlikely that an employer accessing publicly accessible information on the Internet could violate an employee’s privacy rights. However, privacy concerns may arise where an employee uses an employer-provided computer or cell phone for personal matters, particularly if such use is permitted or condoned by the employer. The relevant question in such instances is whether the employee had a reasonable expectation of privacy in the computer or cell phone’s contents.

Employers often have workplace policies that expressly advise employees that they will have no entitlement to privacy with respect to any activity engaged in on employer-provided technology. Employers may also have policies in place permitting the employer to monitor, search or otherwise police the use of employees’ computers or cell phones. The existence of a policy will not always be sufficient to establish that an employee had no reasonable expectation of privacy. The question of whether or not a reasonable expectation of privacy exists will depend on a consideration of all of the relevant circumstances. A balance must be struck by employers between the freedom of employees to use the internet on their own time, and their ability to damage an employer’s reputation or workplace relationships by doing so.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE’S ELECTRONIC COMMUNICATIONS?

Employers are entitled to restrict an employee’s use of Internet and social media during working hours. Employers may also place limits on the use of employer-provided technology outside of working hours. Like any workplace rule, an employer’s Internet and social media policy must be clear and well-publicised in order to be relied upon by the employer in issuing discipline.

### EMPLOYEE’S USE OF SOCIAL MEDIA TO DISPARAGE



## THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

It is not uncommon for employees to be disciplined or even discharged for just cause for publishing posts on social media that are insubordinate, critical of the employer, or breach employees' confidentiality obligations. Breaches of confidentiality by employees may be particularly serious for employers expected to safeguard the confidential information of patients or clients. Although employers are generally not entitled to discipline employees for off-duty conduct, this will not be the case where an employee's actions are significantly injurious to the interests of the employer, or infringe the rights of other employees. For example, many employees have been disciplined or discharged for engaging in "cyber-bullying" or online harassment of other employees.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

Employment can be terminated at any time if the employee is provided with appropriate notice of termination as well as any applicable legislative entitlements. However, if an employee engages in conduct that is incompatible with the fundamental terms of the employment contract, he or she may be dismissed without notice for "just cause". Although it is very difficult to establish just cause for dismissal, the types of activities that may constitute cause for dismissal include theft, workplace harassment, criminal activity, and significant dishonesty or fraud. Ontario has a higher statutory standard for a without-notice termination.

### COLLECTIVE DISMISSALS

Employers must provide notice to the appropriate provincial or federal official that a mass termination will occur, where 50 or more employees will be terminated at an employer's "establishment" within a four-week period. Unlike the standards applicable to individual terminations, where a mass termination will occur, the amount of notice employees will be entitled to, is based on the number of employees who have been or will be terminated.

### INDIVIDUAL DISMISSALS

Typically, statutory notice periods range from one to eight weeks of notice (or pay in lieu of notice), depending on an employee's length of service. The statutory minimums apply so long as an employee is not terminated for wilful misconduct. Employees under a fixed term contract are not entitled to reasonable notice but may be entitled to the entire balance of the remainder of the contract if terminated

without cause. Unlike statutory entitlements to notice, employees and employers are entitled to contract out of the common law notice periods. Common law notice period awards are often much longer than those required by statute (but would incorporate any statutorily mandated payments) and depending on an employee's position and length of service, up to 24 months may be awarded. Employers are also typically responsible for the payment of benefits and entrenched bonuses during the common law notice period.

### IS SEVERANCE PAY REQUIRED?

Employees are entitled to statutory notice of termination or pay in lieu thereof in all Canadian jurisdictions, unless they have been terminated for "just cause" or "willful misconduct". The statutory notice period is based on an employee's length of service, but does not exceed eight weeks in any jurisdiction. Mid-size to large employers operating in Ontario will be required to dispense severance pay to persons who were employed for at least five years (this requires a lump sum payment that is calculated as one week per year of service to a cap of six months).

### SEPARATION AGREEMENTS

Separation agreements are not required by law, but are often entered into at the time of dismissal in order to reduce the risk of litigation over an employee's legal entitlements. They may also provide an opportunity for an employer to obtain the protection of restrictive covenants that were not contained in an employment contract. In general, an older employee is entitled to a longer common law notice period than a younger, but otherwise similarly situated employee.

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

A dismissed employee who believes he was not provided with the appropriate notice of termination, is entitled to bring a complaint under employment standards legislation or file an action in court (in the case of a non-unionised employee). Consequently, some employees will bring a court action to sue for the difference between the amount of notice provided or paid under the applicable statute and the amount of notice that would be found to be due at common law. Most non-unionised employees do not have a right to reinstatement if they have been wrongfully dismissed. The reasonable notice period is designed to compensate employees for their loss of employment and is based, in part, on the amount of time it will likely take for the employee to find similar employment. Unionised employees must file a grievance under the collective agreement and proceed to arbitration.

### WHISTLEBLOWER LAWS

Canada makes it a criminal offence for an employer to retaliate (or threaten to retaliate) against an

employee in order to convince them “to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed”. There are also specific protections offered to employees under almost every employment-related statute, should they come forward with a valid complaint about their employer, or if they assert their statutory rights. It should also be noted that employees generally have a duty of loyalty to their employer. Depending on the facts of a situation, an employee may be in breach of that duty (which can be grounds for termination) if their “whistleblowing” is for political or other purposes, unrelated to asserting statutory rights.

## **X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS**

### **BRIEF DESCRIPTION OF EMPLOYEES’ AND EMPLOYERS’ ASSOCIATIONS**

Labour law in Canada is founded on the Wagner Model, originating in the United States in 1935, whereby strikes and lockouts are prohibited during the term of a collective agreement and, in return, management is required to negotiate with a recognised bargaining agent, typically a trade union. This model is intended to ensure industrial stability. There is a single bargaining agent for each bargaining unit. Most bargaining units cover all non-management employees, regardless of trade, and are limited to a single employer at a single location or within a specified geographical area. In other words, Canada does not have multi-union, multi-employer bargaining units; however, some sectors (notably in the construction industry and sometimes in health care) feature industry-wide bargaining.

### **RIGHTS AND IMPORTANCE OF TRADE UNIONS**

Once a union acquires bargaining rights it becomes the legally recognised exclusive agent of all employees in the bargaining unit that is determined to be appropriate for collective bargaining. This exclusive representative entitlement for a certified union applies to all employees whether or not an employee supported the union during an organising campaign and even holds true in situations when an employee actively opposed the union. The union’s legal status as agent is not affected by whether or not an employee chooses to be a member of the union. The only relevant consideration, once the union has acquired bargaining rights, is whether or not the employee falls within the bargaining unit for which the union has been recognised or certified as the

bargaining agent. In most jurisdictions, all employees in the bargaining unit are required to pay union dues, regardless of their membership in the union. The union has a duty to fairly represent all employees in the unit for which it holds bargaining rights.

### **OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES**

Some non-unionised workplaces may establish a joint management-employee board or committee to address workplace issues. This type of process is not mandated by law and is entirely voluntary for employers. Joint management-employee boards or committees are generally implemented by employers operating in industries that are largely unionised, in order to provide employees with some form of representation other than the representation of a trade union. Each organisation that elects to establish such a committee or board may determine its own rules and procedures, including the tasks and obligations of representatives on the committee or board; how many employee representatives will be on the committee; and how those representatives will be appointed or elected.

Some employers may be required under provincial health and safety legislation to establish a joint health and safety committee (JHSC). The mandate of a JHSC is to improve health and safety conditions in the workplace by raising awareness of health and safety issues, identifying safety risks in the workplace and recommending solutions to the employer.

## **XI. TRANSFER OF UNDERTAKINGS**

### **EMPLOYEES’ RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING**

Employers cannot defeat legitimate bargaining rights held by a union either by organising their affairs in an attempt to change their legal identity or by selling the affected business to a third party (whether or not that third party has any relationship with the vendor). Two or more legally distinguishable entities may be considered to be one employer for labour relations purposes and bind a third party to a pre-existing collective bargaining relationship. Also, a purchaser may be bound to the collective bargaining relationship of the vendor. Provincial employment standards legislation generally contain a “deemed continuity” provision (where a purchaser retains or hires the employees of a vendor company, the service of those employees may be deemed to be continuous for the purpose of calculating notice and severance, as well as other benefits linked to length of service under the law).

Employees of the vendor who are not employed by the purchaser are entitled to, at minimum, notice of termination under the applicable employment standards legislation. However, if the employee is offered employment by the purchaser, employment will be deemed to be continuous for the purposes of employment standards legislation. Therefore, employees will be given credit for their past service, which may impact on their entitlements upon termination, which generally increase according to an employee's length of service.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The liabilities of the vendor and purchaser depend on whether the transaction was a share purchase or an asset purchase. In a share purchase, the legal identity of the employer does not change, so there will be no change in the obligations and liabilities attached to the business. The purchaser will therefore acquire all obligations owed to employees, unless the parties have agreed otherwise under the agreement of purchase and sale. In an asset purchase, the legal identity of the employer changes, such that the employment relationship will be severed. The vendor employer will be liable for any notice of termination payable to severed employees. However, if an employee of the vendor is employed by the purchaser, his or her employment will be deemed to be continuous for the purposes of employment standards legislation in most provinces.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The specific obligations an employer owes to its employees will typically depend upon the jurisdiction in which it operates, be that federal, provincial or territorial and will, in general, comprise the various workplace statutes, including employment standards, health and safety legislation, human rights, pay equity and workers' compensation.

### SALARY

Employees must be paid an amount equal to or greater than the applicable minimum wage. Minimum wages in Canadian jurisdictions range from \$14.00 per hour to \$19.00 per hour. Where employees are paid a salary rather than an hourly wage, the employer must nevertheless ensure that employees' compensation is at least equal to the minimum wage in light of hours worked.

### MAXIMUM WORKING WEEK

Generally, the maximum daily and weekly figures are typically 8 hours per day and between 40 and

48 hours per week. In certain situations, these maximum hours of work may be exceeded, such as: where overtime is paid; where employees agree; or where there is an emergency situation. Specific provisions also exist in some jurisdictions, which permit employers to implement "compressed" four-day work weeks or "continental shifts" with 12-hour work-days. Finally, in some jurisdictions, certain sectors - such as public transit - may be governed by specific regulations on hours of work.

### OVERTIME

When an employee works in excess of a certain number of hours overtime pay is typically time-and-one-half. Overtime entitlements apply to both salaried and hourly employees. However, most jurisdictions specifically exclude certain employees from this entitlement, such as managerial or supervisory employees and certain types of professionals.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Occupational health and safety legislation exists in all jurisdictions and places an obligation on both employers and employees to minimise the risk of workplace accidents, through the exercise of "due diligence". Legislation also provides employees with certain rights designed to promote workplace safety, including the right to be informed of hazards and the right to refuse work that they reasonably believe is dangerous. Finally, in many Canadian jurisdictions, there are laws that require that employers assess the risk of, and develop programs to deal with, violence and harassment in the workplace.

### COMPLAINT PROCEDURES

Complaints can be made against employers by contacting the appropriate government ministry depending on the jurisdiction they are in. The complaint process is designed to be easy and accessible for employees who wish to report a health and safety issue. Once a complaint is made to the appropriate government agency, they will almost always conduct an investigation. Depending on the findings of the investigation, quasi-criminal (regulatory) charges can be laid against corporations, their directors, as well as supervisors/managers. In the case of significant worker injury or death, criminal prosecution is also possible.



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## I. INTRODUCTION

The Chilean Labour Statute contains several minimum rights granted to employees that must be honored by employers. Those minimums cannot be waived by employees. The most relevant minimum labour rights are: minimum legal wage (currently approx. US\$425); 15 working days' vacation per year; profit sharing; maximum 45 hours of work per week; severance; and social security contributions.

### KEY POINTS

- Chile's labour laws are established as a general system to protect employees.
- Terminations in Chile -both for cause and without cause- must be duly grounded in writing.
- Labour Courts normally rule looking for employees' protection.
- Labour Courts ponder the evidences according to the "rule of reason".

## II. ANTI-DISCRIMINATION LAW

### SUMMARY

The Constitution prohibits any form of discrimination and states that all persons are equal before the law. The Labour Code strictly prohibits acts of discrimination, including distinctions, exclusions or preferences based on race or ethnicity, nationality, socioeconomic status, language, political ideology or opinion, religion or beliefs, union membership or participation in union organisations, sexual orientation, gender identity, marital status, age, affiliation, personal appearance and illness or disability, which have the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation. Discrimination is also prohibited on the basis of HIV/AIDS, maternity, breastfeeding and the act of extracting breast milk (lactation).

### PROTECTIONS AGAINST HARASSMENT

The company's internal regulations must include a protocol and procedure for the prevention, investigation and punishment of sexual harassment, workplace harassment and violence at work. The main objective is to eradicate all forms of violence that may occur in the workplace, creating safe and respectful workplaces where integrity, respect and good treatment prevail among all people who are part of it. It is understood that:

1) Sexual harassment: occurs when a person makes, in an inappropriate manner and by any means, requests of a sexual nature that are not consented to by the person which is receiving them and that threaten or harm their work situation or employment opportunities.

2) Workplace harassment: understood as any behaviour that constitutes aggression or harassment by the employer or by one or more workers against another or other workers, by any means, whether it is manifested once or repeatedly, and that results in the affected worker or workers being undermined, mistreated or humiliated, or that threatens or harms their work situation or employment opportunities.

3) Violence at the work: when perpetrated by third parties outside the employment relationship, understood as those behaviours that affect workers while provisioning their services, by customers, suppliers or users, among others.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Public and private institutions employing 100 or more employees must dedicate 1% of their workforce to persons with disabilities. As of 1 April 2019, companies with 100 or more employees must comply with the law. This hiring quota can be met directly; by hiring people with disabilities or those assigned a disability pension, or through one of the alternative compliance modalities provided by the law. As of 1 April 2020, companies may only use alternative measures insofar as they have good reason to do so. Only reasons derived from the nature of the functions performed by the company, or the lack of persons interested in the offers of employment, will be considered as well-founded reasons for the application of alternative measures.

With the publication of Law No. 21,690, which amends the Labour Code on Worker Inclusion, the hiring quota for people with disabilities and/or disability pensioners was increased from 1% to 2% for those companies that are obliged to comply, i.e. with a staff of 100 or more employees. However, the Ministries of Labour, Social Development and Social Development and Family, and Finance, will issue a report certifying that 80% of the obligated companies have complied with the current 1% hiring requirement. Once certified, the increase to 2% will take effect on January 1 of the following year.

adaptations and measures to prevent harassment of workers with disabilities.

## REMEDIES

An employee, who is directly affected, or the union may denounce the violation of a fundamental right, such as sexual indemnity or non-discrimination, before the courts or the Department of Labour. In addition, the Labour Inspectorate must file a complaint before the competent court when it becomes aware of a violation of fundamental rights.

The fundamental objective of the Zamudio Law is to establish a judicial mechanism to effectively restore the rule of law, when an act of arbitrary discrimination is committed. Arbitrary discrimination is understood as any distinction, exclusion or restriction that lacks reasonable justification, made by agents of the State or individuals, and which causes deprives, disturbs, or threatens the legitimate exercise of fundamental rights.

The duty to investigate arises when a report of an act constituting sexual harassment, workplace harassment or workplace violence is filed. The complaint may be made in writing or verbally, in which case a report must be made.

If the complaint is filed before the employer, it must be informed to the complainant that the company may initiate an internal investigation or refer the complaint to the Labour Authority. In the first case, the employer must inform the Labour Authority of the initiation of an investigation, together with the safeguards adopted, within 3 days of receiving the complaint. If a referral is chosen or requested by the complainant, the complaint must be forwarded to the Labour Inspectorate within the same period.

Once the investigation is completed (within 30 days), a copy of the report with the conclusions will be sent to the Labour Inspectorate within the next two days. The Labour Inspectorate has 30 days to decide on the report. If this period expires without a pronouncement, the conclusions of the report will be considered valid.

The company must adopt the appropriate measures and sanctions within 15 days of receipt of the report with the relevant observations, or within 15 days of the expiry of the 30-day deadline set by the Labour Authority without the latter having issued a decision, informing both the complainant and the denounced party. In the case of an investigation into violence at work, the conclusions must include the corrective measures to be taken by the employer with respect to the cause of the violence.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

In 1980, the Chilean Social Security system transitioned from government-administrated

pension and healthcare systems, to contributions made to funds administered by private entities, subject to overall government control. Old-age pensions are financed exclusively by the employees through contributions that are accumulated in individual accounts. For these purposes, employees must contribute 10% of their monthly remuneration up to a maximum of 80,2 UF (US\$3,334). In addition, employees must contribute 7% of their monthly remuneration for medical care, also up to an 80,2 UF cap. Finally, employers must contribute between 1% and 1.5% of the employee's remuneration for disability and survival insurance (SIS). For purposes of labour and social security legislation, work may begin, as a general rule, at the age of 18 and retirement may occur at the age of 65 for men and at age 60 for women, with provisions for early retirement in certain cases. In Chile, retirement is not a legal cause for termination.

## HEALTHCARE AND INSURANCES

The Social Security system covers all employees, including independent employees. The latter are legally obliged to contribute to a mandatory insurance that covers old age, disability and survivorship insurance. In the case of foreign employees, as a general rule, they must also pay social security contributions; although certain exemptions may apply. Insurance for accidents or professional illness provides for medical and dental attention, hospitalisation and medicine, as well as indemnities (depending on the type of disabilities suffered) and related expenses. Unemployment insurance is financed on a tripartite basis, as the contributions are paid by the employer, the employee (2.4% and 0.6% of the employees' taxable remuneration up to a maximum of 120 UF, respectively) and the government. This insurance is mandatory for every employee hired after 1 October 2002, whereas it is discretionary for employees hired before said date. In the case of fixed-term contracts, the entire contribution (3%) is exclusively financed by the employer.

## REQUIRED LEAVE

### Holidays and Annual Leave

Employees who have worked for more than one year have the right to an annual paid vacation of 15 working days. The holiday must be continuous, but the excess over the 10 working days may be divided by mutual agreement. After working ten years, continuously or not, for the same or different employers, vacations are extended by one working day for every three years of service for his current employer. In case of employees who work in the 11th and 12th Regions of the country and the province of Palena, the basic vacation period is 20 days.

Sundays and days legally established as holidays shall be non-working days, except for activities authorised by law to be performed on those days.

Companies exempt from this prohibition must compensate their employees with a paid day off in exchange for worked Sundays or holidays. However, in certain activities, at least two rest days in the month must be granted on Sundays. When more than one paid day off is accumulated in one week, the parties may agree on a special distribution or on a special remuneration mechanism. In the latter case, remuneration for the compensated rest day has a surcharge that cannot be less than 50%.

### **Maternity and Paternity Leave**

Female employees are entitled to six weeks leave before (prenatal leave) and twelve weeks after (postnatal leave) the birth of a child, on full pay. This payment is made by the Social Security system and not by the employer. In addition, women cannot be dismissed during pregnancy and for a period of one year as from the end of the postnatal leave, other than with prior authorisation of a labour court. Additionally, to the referred postnatal leave, exists a supplementary permit that as a general rule, provides a 12 weeks' permit after the end of the postnatal dispensation of the mother, on full pay. Nevertheless, the mother entitled to this benefit may choose to return to her job in a part time schedule, in which case the parental permit and subsidy is extended to 18 weeks. In this case, the subsidy granted by the Social Security System is reduced to 50% of its salary and the employer must pay, at least, 50% of the remuneration set forth in the labour agreement and all variable remuneration to which she is entitled. Likewise, the mother may benefit the father of the child by granting him part of the parental leave. In this case, the subsidy will be paid according to the salary of the father.

The employee who has been entrusted by a court of law with the personal care of a child less than one year old, as a protection measure, shall also be entitled to such leave and subsidy allowance. This right shall be extended to the spouse or civil partner. Establishments with 20 or more female employees, regardless of their age or marital status, must provide a nursery service for children under 2 years old. Employers may contribute to an external nursery school to provide such service. While the women are feeding their babies, they must be granted one hour a day for this purpose.

### **Sickness and Disability Leave**

Chile provides a public and private medical system for employees including preventive and curative health care. The preventive medical service provides for periodic medical checks. When employees are found to suffer a specific illness, they are granted sick leave. During periods of sick leave the employer cannot terminate the labour contract without cause, but the medical system pays the salary starting on the fourth day of illness or the first day in case of leaves exceeding 10 days. A monthly cap applies. This system is funded through employees' contributions.

### **Other Required or Typically Provided Leave(s)**

In the event of the death of a child, every employee shall be entitled to 10 days of paid leave. In the event of the death of spouse or civil partner, shall be entitled to 7 calendar days of paid permit, in addition to the legal vacations to which the employee is entitled to. In this case, the employee shall also be entitled to labour protection or immunity for one month, as from the date of death, thus entailing that said employee cannot be fired unless a labour court has previously authorised such dismissal. However, regarding employees hired for a fixed-term or for a specific task or service, the labour privileges shall be afforded to them only during the effective term of the corresponding employment contract, if said term is less than one month, without requiring the court's authorisation. This allowance shall amount to seven business days in the event of death of a child during pregnancy. Finally, in the event of the employee's father, mother or sibling, the employee is entitled to four calendar days of paid leave, albeit without granting the benefit of said labour privileges or immunity.

In case of marriage or civil union, every employee shall be entitled to 5 continuous working days of paid leave, in addition to the annual holiday, which may be used, at the employee's option, on the day of the marriage and on the days immediately before or after the marriage.

### **Personal and family life conciliation**

Leave shall be granted to employees who have the personal care of a child under fourteen years of age or a young person under eighteen years of age with a disability or in a situation of severe or moderate dependency, during the leave period determined by the Ministry of Education in accordance with the calendar of the respective school year, in preference to other employees without such obligations.

Whenever the nature of the duties so permits, the employer shall offer the worker who, during the term of the employment relationship, has the personal care of a child under fourteen years of age or is responsible for the care of a person with disabilities or in a situation of severe or moderate dependency, regardless of the age of the person being cared for, without receiving remuneration for this activity, the possibility of performing all or part of his or her daily or weekly work in the form of telecommuting or teleworking.

The foregoing provision does not apply to employees who are authorised to represent the employer, such as managers, assistant managers, agents or attorneys.

### **Pensions: Mandatory and Typically Provided**

Indemnities are granted in the form of a pension to the injured employee or to his/her spouse and dependent children in case of death of the employee. The Employees' Compensation Fund is funded through a base contribution (made by the employer) of 0.90% of the employee's salary (with a cap of 80,2



UF per base salary), plus an additional payment, which must be borne by the employer exclusively, depending on the activity and level of risk of the company (additional rate from 0% to 3.4%).

#### **Other Required or Typically Provided Benefits**

Employers have no legal obligation to provide fringe benefits, other than benefits which may be voluntarily agreed in individual or collective contracts or agreements. Pension and sickness benefits are covered by the Social Security system. There is no legal obligation to provide catering facilities and meals.

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

Chilean legislation provides three categories of labour contracts: individual, collective and special contracts.

The minimum provisions that must be included in the individual labour contract, such as date and place of the contract, the identity of the parties, the position of the employee and job description, the place of work, the remuneration to be paid by the employer, the terms of payment (at maximum 1-month intervals), workday, the duration of employment and the benefits in cash or in kind to be provided by the employer.

Collective labour agreements are contracts executed between employers and employees with the purpose of establishing common labour conditions, remunerations or other benefits in kind or money, for a fixed period of time.

The law also provides for several other special labour contracts. Each of these contracts have their own characteristics and specifications, e.g. the apprenticeship contract which is restricted to individuals under 21 years of age; farm employees' contracts; contracts for employees on ships or at sea and temporary dock employees, and contracts for domestic help.

In Chile, it is common that large companies subcontract companies to perform specific tasks or render special services such as security and cleaning services, catering, etc.

### **FIXED- TERM/OPEN- ENDED CONTRACTS**

The parties may either agree on an indefinite contract or places limits on terms (to the completion of a particular job to be performed by the employee, or else agree on a fixed period of time). In this last case, the contract's term cannot exceed one year, or two years in the case of managers, professionals and technicians. However, local law allows term extension (which cannot surpass the overall time

previously mentioned). If the employee continues rendering services for the same employer after the contract term's expiration, it will automatically become indefinite.

Regarding contracts for a special job task, the employee undertakes to execute a specific and determined job or work (either material or intellectual). Therefore, its validity is limited to the work itself. It should be noted it provides that different tasks or stages of a specific work may not be individually considered as two different successive contracts for it will be legally presumed as indefinite. Also, any contract engaging permanent services will not be deemed as a contract for a specific job. Lastly, these employees are entitled to vacation and a special kind of termination severance if certain requirements are fulfilled.

### **TRIAL PERIOD**

The law does not provide for a trial period.

### **NOTICE PERIOD**

To terminate an employment contract for cause, the employer can produce an immediate termination, without notice requirements. Other terminations require 30 days' notice. Immediate terminations are allowed as well, if paying a severance in lieu of notice (1 month capped remuneration).

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

In companies with 25 or more employees, at least 85% of those hired must be Chilean citizens. To determine this ratio, the law excludes technicians. For these purposes the law deems the following persons as Chileans: (i) foreigners whose spouse or civil partner or whose children are Chilean, including widows or widowers of a Chilean spouse; and (ii) foreigners who have resided in the country for more than five years, not considering accidental absences.

**National Employees:** remunerations of employees are subject to a monthly Second Category Income tax, under a progressive tax scale to be deducted at source by the employer. This tax is payable by the company to the Treasury within the first 12 days of the month following that of the deduction. Currently, the tax brackets range from exemption to a 40% tax rate.

**Foreign Employees:** foreign employees rendering services in Chile and also domiciled or residing in Chile are likewise subject to the Second Category tax. As a general rule, foreigners neither domiciled nor residing in Chile and working in Chile are subject to a flat 35% Additional Income tax to be deducted by the company that employs them in Chile upon payment of the salary or fee, and the tax is payable

to the Treasury within the first 12 days of the month following that in which the tax was deducted.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

Foreign employers do not need to establish a local hiring entity. However, when services are rendered in Chile to a foreign employer under labour subordination, the latter must designate a representative in Chile (typically a payroll provider) to sign a local employment contract on its behalf, as well as to pay salaries and social security contributions.

## **LIMITATIONS ON BACKGROUND CHECKS**

In Chile, employers are not allowed to condition a hiring on economic records (exceptions apply) and cannot request pregnancy certificates nor HIV checks.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

Distinctions and preferences are forbidden if based on: race, color, gender, maternity, religion, politic opinion, language, social origin, nationality, gender identity, sexual orientation, or union affiliation. An application cannot be rejected because of any of the above conditions.

# **VI. PAY EQUITY LAWS**

## **EXTENT OF PROTECTION**

The Equal Pay Law establishes that companies shall comply with the principle of equal remuneration between men and women performing the same work, and objective differences in remuneration based on, among other reasons, capabilities, qualifications, suitability, responsibility or productivity, shall not be considered arbitrary. Differentiated remuneration may be agreed upon between one or more employees, in the event that any of the following situations arise:

- differences in the individual capacities of the employees;
- differences in the qualifications or objective evaluations of the personnel taken or performed by the company, based on, among other aspects, the fulfillment of objectives, the employee's productivity, attendance and punctuality;
- suitability for the position (e.g., those individuals who meet the necessary or optimal conditions for a given function or work);
- different levels of responsibility within the company's organisation, which will be expressly stated in the respective employment contracts;
- difference in the employee's productivity.

## **REMEDIES**

Any employee who considers that he/she has been or continues to be affected by events that threaten the equality of remuneration between men and women, has the right to petition, in writing, the head office, or the management, or the respective personnel unit directly, demanding equal remuneration.

## **ENFORCEMENT/LITIGATION**

In the event that wage discrimination is verified, not only will it result in a fine from the administrative authority, but also the judge presiding over the court proceedings will be able to take all measures necessary to correct any such irregularities. In reality and with respect to the procedure of the complaint, if the employee seeks relief from the Labour Department, an attorney will take over the case and pursue mediation. If this course of action fails to achieve a result, the case for labour protection will pass to the Labour Courts. Additionally, the employee is entitled to go directly to court.

## **OTHER REQUIREMENTS**

Employers are obliged to include in their internal regulations of order, hygiene and security the provisions and rights set forth in the Equal Pay Law, also adding, in detail, a channel of complaint (within the same company) for employees' claims in the event that such a wage gap is determined to be discriminatory in nature.

# **VII. RESTRICTIVE COVENANTS**

## **DEFINITION AND TYPES OF RESTRICTIVE COVENANTS**

Any type of agreement in an employment contract or obligation that either restricts the employee from taking some action or which requires the employee to abstain from a specific action, falls under the definition of a restrictive covenant. The following restrictive covenants can be included in the employment agreement, during the labour relationship and may be enforceable under the law:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees.

## **ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES**

In Chile, there are no labour rules expressly regulating restrictive covenants or prohibiting them. However, the Chilean Constitution explicitly protects the employee's freedom to work and the right to free choice. Nevertheless, non-compete clauses after labour termination have been accepted as

valid when they are provided for in writing; a form of compensation is paid to the employee; and their duration is reasonable. In practice however, enforceability is difficult.

## USE AND LIMITATIONS OF GARDEN LEAVE

An employee who is leaving a job, having resigned or otherwise had his employment terminated, is instructed to stay away from work during the notice period, while remaining on the payroll. Garden leave is not regulated in Chile. As a result, the parties could agree to such a scenario, but the employer however, cannot unilaterally impose it.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

There is no regulation in Chilean labour legislation that regulates the use of new technologies, much less social networks (e.g., Facebook, Twitter, Instagram or other platforms). Employers can nevertheless, regulate the use of technological tools provided for labour purposes.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Employers can include a provision in the Internal Work Rules, wherein any email sent by an employee within the framework of the employment relationship and through company-devices, will be automatically copied to a supervisor or to a server. However, the private communications of employees must be respected.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Employees using social media to divulge confidential information can be terminated for cause. Any particular situation must be considered on a case-by case-basis.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

## GROUNDINGS FOR TERMINATION

The Labour Code establishes provisions regarding the termination of the labour contract and employment stability. Accordingly, the labour contract may only be terminated by agreement of both employer and employee, by the employee's resignation, by the death of the employee, by the expiry of the fixed-term agreed upon in the contract, by the completion of the work for which the employee was hired, by an act of God or circumstances beyond the control of the parties (force majeure) and upon dismissal by the employer. As a general rule, in Chile an employer cannot terminate a labour contract at will. Employers must ground terminations on a company-related business need. Recently, courts have become more and more strict when considering if the invoked business grounds are enough to justify a termination.

### COLLECTIVE DISMISSALS

Currently, the Labour Code does not contemplate a procedure to regulate the collective dismissal of employees.

### INDIVIDUAL DISMISSALS

Terminations for cause: serious misconduct by the employee; carrying out activities prohibited in the work contract; and unjustified absences on the part of the employee who is in charge of an activity, task or machine, the abandonment or stoppage of which would cause a serious disruption in the progress of the work; amongst others.

Terminations grounded on business needs, including: the needs of the company, establishment or service; written eviction of the employer; and in the event the employer has been subjected, through a judicial resolution, to a bankruptcy proceeding for the liquidation of its assets.

### IS SEVERANCE PAY REQUIRED?

If the employer dismisses the employee based on the general grounds of "company/business needs" such as changes in economic conditions, downsizing of the company, or in case of termination at will (when permitted by law), the following severance compensation will be awarded to the employee:

1. severance compensation for years of services amounting to one month's remuneration for each year or fraction thereof in excess of six months spent in the service of the same employer, with a limit of 330 days' worth of remuneration; for the calculation purposes, the basic monthly remuneration cannot exceed a maximum of 90 UF (US\$3,435), the parties may waive the capped amount; and
2. if the dismissal notice is not given 30 days in advance, the employee will be entitled to receive a severance compensation equivalent to one month's remuneration (same cap applies). If the employer does not pay the above severance to the employee,



certain increases may apply, up to 150%. If the employee is dismissed for cause (serious breach of contract by the employee, material misconduct, etc.) the right to severance compensation shall not apply.

## SEPARATION AGREEMENTS

A settlement agreement is mandatory in Chile and must be made available to the employee within 10 working days of the employee's separation.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

If an employee challenges the cause of termination before the courts, severance can be increased from 30% to 100% depending on the invoked cause. Likewise, if a court establishes that a termination was discriminatory or intended to affect unionisation rights, additional compensation can be applied, from 6 to 11 monthly remunerations and, in some serious cases, employees can choose to be reinstated at work. If, at the time of dismissal, the social security contributions are not duly paid, the dismissal will not result in terminating the labour contract; the employer could be forced to pay the remuneration and other payments established in the labour contract to the employee, until these social security contributions are ultimately duly paid.

## WHISTLEBLOWER LAWS

In Chile, the legislation for the protection of whistleblowers is very restricted in contrast to the advanced regulations on the subject in comparative law. In addition, it does not include forms of reparation or compensation to the complainant for the reprisals suffered, or other protections unrelated to the protection of his/her labour situation.

Only Law No. 20.393 of 2009 establishing the criminal liability of legal entities for the crimes of money laundering, financing of terrorism and bribery are certain companies required to introduce procedures, albeit that are restricted to these areas. In the commission of any such crimes, the employer may be liable for the criminal acts committed by employees and dependents within the scope of their duties.

Law No. 21,595, published in August 2023, amends Law No. 20,393 and supplements the existing legislation on economic and environmental crimes. With regard to labour relations, this law considers crimes committed (i) in the exercise of an office, function or position in a company; or (ii) for the economic or other benefit of a company. If one of these conditions is met, we can find in this category environmental crimes, fraud, bribery, computer crimes, disloyal administration and behaviors related to compliance with labour legislation, within which we highlight:

1) Payment of remuneration lower than the legal minimum monthly income with serious abuse.

2) Failure to withhold and pay social security contributions, or declaring a taxable or gross income lower than the real one, without the employee's consent.

3) Disclosure of or consent to access to business secrets, as a result of a contractual or employment relationship with the company concerned or with another company that has provided services.

4) Economic or other benefits solicited or accepted by the director, administrator, agent or employee of a company to favor the award of a contract to one bidder over another.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The Chilean Constitution establishes the freedom of association and unionisation for everyone, which is why, in Chile, collective relations of employees are organised into unions; defined as any grouping of employees, more or less permanent, with a purpose of defending their collective professional interests.

Employers can also amalgamate, for example, through trade associations; defined as organisations of natural or legal persons, formed with the purpose of promoting the rationalisation, development and protection of the activities which are common to them by reason of their profession, trades or branch of production or services, and those related to such common activities, such as the National Chamber of Commerce.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

A union's fundamental purpose is to provide representation to the union members and to protect the employees.

The bylaws of the unions should establish the entities responsible for verifying the electoral procedures and the acts that must be carried out to express the collective will. In addition, the bylaws must establish the number of votes to which each member is entitled and must adopt measures to ensure respect for minorities. Furthermore, the bylaws must regulate the control mechanisms and the annual accounting, which the board of directors must submit to the assembly of members.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

**Health and Safety Committee:** mandatory in companies with more than 25 employees; must be composed of three representatives of the employer and three representatives of the employees, whose decisions are binding for the company. This committee serves to detect and evaluate the risks of accidents and occupational diseases that employees may suffer.

**Bipartite Training Committee:** mandatory in companies with 15 or more employees; must be composed of three representatives of the employer and three representatives of the employees. Its function is to evaluate and agree upon the occupational training program(s) of the company and to advise the company's management on training matters.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The Chilean Labour Code states that total or partial modifications relating to ownership and possession (actual, constructive or mere possession) of the company, will not affect the rights and obligations of employees arising from their individual contracts or collective agreements, which will maintain their continuity with the new employer. This so-called "legal continuity principle" must be considered on a case-by-case basis.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

No special requirements are necessary if the legal continuity principle applies.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employers have a general duty as follows: to have in place all necessary tools and conditions to efficiently protect the life and health of all employees rendering services in its facilities, as well as to avoid labour accidents or diseases. Employers must inform their employees of the possible risks that they could face in the workplace.

## SALARY

The law considers as remuneration the cash payments and cash-equivalent benefits in kind that the employee receives from the employer on account of the employment agreement. The remuneration includes base salary, overtime payment, commissions, profit sharing and bonuses. The amount of remuneration can be freely agreed between the employer and the employee. However, the law sets a minimum level, which in the case of the monthly base salary for employees working 45-hour weekly cannot be lower than one legal monthly minimum wage (CL\$326,500; US\$425 approximately), as from 1 September 2020.

If a company earns profits, it must share part of them with its personnel. The law stipulates that companies must distribute 30% of net profit to the employees, calculated in proportion to the employee's salary. The basis used to determine profits is the corporate taxable income (subject to certain adjustments) less 10% of net equity. However and in lieu of the above obligation, the employer may pay a bonus of 25% of the yearly salary, but the bonus in this case, regardless of the level of salary of the employee, cannot exceed 4.75 monthly minimum wages (at present CL\$1.550.875; US\$2,015).

### MAXIMUM WORKING WEEK

The normal workweek is limited to a maximum of 44 hours. This maximum must be worked in no less than five and no more than six consecutive days. The normal workday shall not exceed 10 hours.

Regarding the workers excluded from the limitation of working hours, the hypotheses in which the exemption is applicable are considerably limited. We see that the previously excluded figures are no longer be excluded and only apply to (i) workers who provide services as managers, administrators, attorneys with administrative powers and (ii) all those who work without immediate superior supervision due to the nature of the work performed.

Part-time jobs are subject to the same provisions applicable to regular jobs, with the following exceptions: i) the maximum profit-sharing payment can be reduced in accordance with the number of hours worked, and ii) the parties are able to agree on different alternatives for workweek distribution, thus allowing the employer to choose between said alternatives and select the one that will be used during the following week or period.

### OVERTIME

Overtime, which is defined as the time worked by the employee in excess of the legal or agreed workday. If shorter, shall be agreed only to take care of necessities or temporary situations of the company that, while not permanent in the company's productive activity, imply a greater work demand in a certain amount of time (but no more

than 2 overtime hours per day). Overtime must be paid with a 50% surcharge.

With the modification introduced by Law No. 21,561, the parties may agree to compensate overtime worked for additional leave, up to a maximum of 5 working days per year, to be used by the employee within 6 months following the cycle in which it originated, for which the employee must give 48 hours' notice to the employer.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Companies or establishments with more than 25 employees are obliged to create a Permanent Safety, Hygiene and Risk Prevention Committee, responsible for the adoption of all measures necessary to avoid work-related accidents and for recommending the proper use of the safety gear available.

## COMPLAINT PROCEDURES

Employees are allowed to file a claim internally, following the Internal Work Rules, or before the courts when suffering a labour accident or professional disease that could imply an employer's responsibility. There are specific rules and sanctions against retaliation as well, such as: labour fines; additional severance; and even allows for an affected employee to choose between severance or reinstatement at work, if he/she was terminated under serious discriminatory circumstances.



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## I. INTRODUCTION

Chinese labour law governs all the employment relationships established by various legal entities registered in China and individuals. Mandatory provisions in Chinese labour law usually precede the agreements reached by employers and employees. Also, written employment contracts for employment relationship are required by Chinese labour law.

Labour law generally refers to the rules and regulations governing employment relationships and other social relationships that are closely connected with employment relationships. Chinese labour law applies to all businesses, individual economic organisations, private non-profit entities, etc. in the People's Republic of China (the "PRC") and the individuals who have employment relationships with such entities and organisations. Employment relationships between government offices, public institutions and social groups and their employees are also governed by Chinese labour law. Employers and employees (except part-time employees) are required to establish employment relationships by entering into written employment contracts. However, even if the parties fail to execute valid written employment contracts, an employment relationship can still be deemed to exist if the parties act as if they are bound by such a contract.

### KEY POINTS

In China, employers must sign employment contracts in written form with full-time employees, and termination must be based on the grounds permitted by law.

- Employers must sign the employment contract with full-time employees, or the employer shall pay double the monthly wage to the employees, for up to 11 or 12 months.
- Probation periods shall not be longer than what is permitted by law and one employee can only have one probation period, otherwise the employer shall pay compensation to the employee for the exceeded probation period or the second probation period performed by the employee.
- Amending an employment contract (e.g. job title) must be agreed by both employer and employee in written form.
- Internal rules which may affect employees' personal interests must fulfil the consultation process, or they will not take effect (e.g. they will not apply to the employees).
- In China, termination must be based on the grounds permitted by law. Otherwise, the labour relationship may be reinstated, even after

termination (e.g. employers may be forced to re-hire terminated employees or pay double severance).

- Chinese severance pay practices are unique, in that a highly paid employee's severance is capped, which can result in a senior manager's severance being lower than that of a junior employee.
- Chinese employers cannot require employees to pay liquidated damages, except in limited situations involving non-competition and service-period duties.
- Employees are not entitled to organise labour strikes under Chinese law. However, employees will still engage in self-organised strikes; these strikes are not legally supported by trade unions.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

The anti-discrimination rules in China are relatively general and scattered, and there are only a limited number of cases in judicial practice to provide guidance.

### PROTECTIONS AGAINST HARASSMENT

An employer shall take measures like formulating rules prohibiting sexual harassment and publishing complaint telephone numbers and emails to prevent and stop sexual harassment.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Employer's obligation to provide reasonable accommodations mainly focuses on disabled employees.

### REMEDIES

Employees can defend their rights by filing a lawsuit with the cause of action "dispute over equal employment rights."

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

The social security in China includes basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and

maternity insurance. Employers in China shall contribute social security premiums and housing provident funds for their employees pursuant to the law.

## HEALTHCARE AND INSURANCES

Employers are required to contribute insurance premiums of basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and maternity insurance pursuant to national and local law. Employees shall contribute insurance premiums of basic pension insurance, basic medical insurance, and unemployment insurance. Both parties are required to contribute to the housing provident fund.

## REQUIRED LEAVE

Employees in China can have national holidays (11 days), annual leave(5-15 days), maternity leave, parental leave (5-15 days), and other statutory leaves.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

In China, mandatory and typically provided pensions refer to the basic pension insurance in the social insurance system.

# IV. EMPLOYMENT CONTRACTS

## MINIMUM REQUIREMENTS

A written employment contract is necessary to establish a full-time employment relationship. However, a part-time employee, who works no more than 24 cumulative hours per week and four hours, on average, per day, is subject to different requirements and may be employed under an oral contract.

## FIXED- TERM/OPEN- ENDED CONTRACTS

An employer can enter into a fixed-term contract with an employee, but the employer will be obligated to execute an open-ended contract upon the employee's request after the completion of two fixed terms or employee's ten years of service.

## TRIAL PERIOD

The length of trial period is stipulated by law and depends on the term of employment contract.

## NOTICE PERIOD

In China, an employee may unilaterally terminate his or her employment contract by giving a written notice 30 days in advance or 3 days in advance during probationary period. On the other hand, an employer may unilaterally terminate an employment

contract by giving a written notice 30 days in advance or providing one month's salary in lieu of notice in the following three circumstances:

- the employee, after exhausting the legally prescribed period of medical treatment for an illness or non-work-related injury, can perform neither his or her original work nor other work arranged for him or her by the employer;
- the employee is incompetent to carry out his or her work and remains so after receiving training or an adjustment of his or her work;
- a major change in the objective circumstances relied upon at the time of conclusion of the employment contract that renders the contract non-performable and, after consultations, the employer and the employee are unable to reach an agreement on amending the employment contract.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

A work permit and a residence permit for employment purpose are required for foreign employees to work in China legally.

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

A local entity is necessary for foreign employers to hire employees in China. They can incorporate subsidiary company to directly hire employees or establish a representative office to hire Chinese employees through a local HR agent.

## LIMITATIONS ON BACKGROUND CHECKS

The background check shall not infringe employees' privacy rights or equal employment rights. It is advisable to obtain the job applicant's consent for employers to conduct background checks.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

When interviewing prospective female candidates, employers are explicitly restricted from raising questions about marital status or pregnancy status.

# VI. PAY EQUITY LAWS

## EXTENT OF PROTECTION

China has general provisions on "equal pay for

equal work” and specified rules on dispatchment relationship, but there is no disclosing requirement.

## REMEDIES

An employee can file a labour arbitration or litigation to claim the difference in salary.

An employee may challenge equal pay practices by filing labour arbitration/litigation against the employer; the available remedy for such claims is to force the employer to make up the difference in salary. In addition to the judicial proceedings, employees may also apply to the trade union and request mediation for resolving the dispute with the employer regarding salary standards.

## ENFORCEMENT/LITIGATION

In judicial practice, there is few claims regarding equal pay for equal work being supported by courts due to employee's inadequate evidence.

In view of the judicial practice in China, most cases involving a claim seeking to remedy salary differences based on the principle of “equal pay for equal work” have not, generally, been supported by the courts, as it is extremely difficult for employees to prove that the employer has violated the principle of “equal pay for equal work”.

An employer usually defends and justifies certain employees, who are paid higher wages despite working in the same position as the (employee) petitioner, by pointing out their superior education, work experience, work skills, performance, etc. In addition, employers in China are not obliged to release information regarding an employee's salary, which functions as a practical barrier that prevents employees from initiating a claim based on equal pay.

## OTHER REQUIREMENTS

There are no other rules in the current PRC legal scheme that encourage employers to ensure equality in salary.

Except for the provisions mentioned above, there are no other rules in the current PRC legal scheme that would compel employers to take any positive action on equal pay.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Restrictive covenants including non-compete clause, non-solicitation, etc. are commonly used in practice.

In PRC Employment Contract Law, there is no express definition of restrictive covenants. Nevertheless, restrictive covenants are commonly

used in practice. For example, an employment contract and a separation agreement may include an obligation not to violate the conflict of interest policy, confidentiality obligation, non-disparagement obligation, non-solicitation obligation and non-compete obligation.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

The employee can be required to pay liquidated damages due to the violation of no-compete obligation. Regarding those non-solicitation clauses, the liquidated damages agreed upon are likely to be deemed invalid. Instead, employers are required to provide evidence of actual losses caused by such solicitation.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is not a legal concept under PRC employment laws but may be applied in practice in China.

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

Employers may formulate regulations regarding the use of electronic communication systems and no disparaging messages on social media. These regulations shall undergo the due procedures before coming into effect.

Employers in China may impose restrictions on employee's electronic communications. The restrictive requirements are usually phrased as i) the electronic communication systems including the computers, Internet systems, telephone, voice mail and email systems provided to employees by the employer, shall belong to the employer and only be used for work-related purposes; and ii) the employees shall not have a legitimate expectation of privacy protection in regard to the said electronic systems. The aforementioned restrictive requirements are often documented in the employer's internal policies and become binding on the employees after undergoing the due procedures.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

An employer can formulate internal policies regarding restriction on employees' use of electronic



communication systems to exclude their expectation of privacy protection regarding the said systems. Those policies shall undergo a consultation and publicity/informing process to be effective.

Under *PRC Employment Contract Law*, the employer could formulate its internal policies in accordance with law. If such policies involve the matters such as working hours, work discipline, etc., which have a direct impact on employees' immediate rights and interests, the said policies shall be discussed by the employee representative congress or all employees, and then determined by the employer after consultation with the labour union or employee representatives (the "Democratic Procedures").

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

An employer may formulate policy to require employees to refrain from leaving disparaging comments to the employer or divulging confidential information.

Similar to the restrictions on employees' usage of electronic communications, an employer may also formulate its social media policy to require its employees to refrain from making disparaging comments about the employer. The social media policy also needs to undergo the Democratic Procedures before it can (legally) be enforced.

In a recent case decided by the Beijing No. 3 Intermediate Court, the employee circulated multiple articles on the Internet about the employer. As a result, the employer terminated the employee for breaching the non-disparagement obligation as prescribed in the employee handbook. The Court determined that the employee's online articles were derogatory and aggressive and therefore it was legal for the employer to terminate the employment relationship, pursuant to its employee handbook.

However, the nature of the non-disparagement obligation conflicts with an employee's freedom of speech, to a certain extent. Sometimes, it is also difficult to objectively determine whether or not the employee's words are disparaging to the employer. Thus, employers in China are often advised to be cautious when disciplining employees for violating their non-disparagement obligation.

Regarding the confidential information, pursuant to *PRC Employment Contract Law*, confidentiality obligation could be agreed upon between the employer and employee in the employment contract. If the employee has divulged confidential information to any third party, the employer could claim any damage incurred thereof against the employee. In practice, for more effective regulation purposes, employers may specify the restrictions

regarding employee's use of social media and not divulging confidential information in their internal policies (e.g. explicitly stated in the employee handbook that employees are not allowed to comment on any affairs related to the employer in a public nature or on their own social media). The employer may, in accordance with internal policies, impose disciplinary measures on the employees if they use social media to disparage the employer or divulge confidential information.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

The statutory grounds for termination include termination by mutual agreement, termination by employee, termination by employer, and automatic termination.

PRC labour law generally favours employees and therefore contains many statutory provisions on termination of employment contracts that protect employees' rights and interests. The statutory grounds for termination are: termination by mutual agreement; termination by employee; termination by employer; and automatic termination.

### COLLECTIVE DISMISSALS

If an employer intends to reduce its workforce by 20 employees or 10% of total employee number and meets statutory grounds for collective dismissal, the employer shall undergo a due process required by laws and obtain a reporting receipt from the labour administrative authorities to conduct the collective dismissal's legitimately.

### INDIVIDUAL DISMISSALS

An employer may unilaterally terminate an employment contract immediately without paying statutory severance if an employee commits misconduct stipulated by laws. An employer may also terminate an employment contract by giving the employee 30 days' prior written notice or one month's salary in lieu of notice with paying statutory severance based on certain statutory grounds like incompetency.

### IS SEVERANCE PAY REQUIRED?

Under the *Employment Contract Law*, for mutual terminations proposed by the employer, unilateral terminations by the employer via notice under the Article 40 of the *Employment Contract Law*, redundancy terminations for economic reasons, unilateral terminations by the employee for the employer's fault or automatic terminations due to the employer's reasons, the employer is required to pay severance based on the employee's years of service.

## SEPARATION AGREEMENTS

A separation agreement would be considered best practice to reduce the risk of being sued for wrongful termination.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

An employee may initiate a labour arbitration to claim reinstatement of employment or compensation equal to double the statutory severance for a wrongful termination.

## WHISTLEBLOWER LAWS

Chinese legislation has not yet formulated an independent sector of laws to govern the rights and obligations of the whistleblower.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

In China, trade union is the main association of employees, and the All-China Federation of Trade Unions is a national-level organisation that reports directly to the Chinese Communist Party. Regarding the employers' association, the China Enterprise Confederation is the sole representative from China within the International Organisation of Employers.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Trade unions are responsible for safeguarding the legal rights and interests of employees. They can suggest, negotiate, or form collective contracts with employers.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

The employee congress and employee representatives' congress are the basic forms in China for enterprises' democratic management, and trade unions are the operating organ of them.

# XI. TRANSFER OF UNDERTAKINGS

## EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

When deciding a transfer of undertaking, an employer shall undergo a consultation process involving the trade union or employee representatives. In case of a transfer with the employer remaining unchanged or in a merger, the original employment contracts are likely to remain valid and the surviving party will continue to perform.

Under the *PRC Employment Contract Law*, when an employer decides major company matters that directly implicate the interests of employees, the employer should discuss such matters with the employee representative congress or its entire staff. It should only make a decision after consulting with the trade union or employee representatives. The consultation procedure is designed to give the trade union and employees a chance to express their opinions, but the employer has the authority to make the final decision.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Generally, employers are not obligated to pay severance under a change of shareholders or a merger without collective redundancy. In the event of the acquisition of assets, if the acquiring party wants to employ the employees of the target party, they may enter into a tri-party agreement together.

### Equity Deal

A change of shareholders and a merger would not affect the performance of employment contracts and therefore neither the transferor nor the acquiring party is obliged to pay severance to employees. However, in practice, employees often demand severance and even collectively oppose such transfer, because they misconstrue a change of shareholders as a termination of employment or they worry that their rights and interests will be impaired after the transfer. Therefore, to appease these employees, some acquiring parties may promise that they will not reduce employees' compensation or benefits after the transfer and may even undertake to refrain from collective layoffs for a certain period (such as two years) following the consummation of the transfer of undertaking.

### Asset Deal

In the event of the acquisition of assets, the acquiring party is not legally obliged to employ the employees of the target company, unless both the acquiring party and the employee agree to establish an employment relationship. If both the acquiring party and the employee agree on the transfer of employment, they may enter into a tri-party agreement together with the transferor to stipulate

that the transferor and the employee will terminate their employment contract and that the transferee and the employee will sign new employment contracts. This may raise the issue of severance. According to the Implementation Rules of *PRC Employment Contract Law*, the transferor may ask the acquiring party to assume the employees' seniority. In other words, any seniority of transferred employees may be carried over to the acquiring party after the acquisition and no severance is paid until the employee is actually terminated during the employment with the acquiring party. This option for the transferee to carry over the employees' seniority reduces immediate transaction costs for the transferor, and thus it is more common in practice.

When the employment contract between the acquiring party and the employee is finally terminated, the employee may be entitled to receive severance according to law. At that time, the continuous seniority with the transferee and the transferor will be combined together for severance calculation. However, some employees may firmly request severance even when they agree to transfer their employment relationship to the acquiring party. This makes the payment of severance difficult to avoid.

If the employee does not want to be transferred to the acquiring party or the acquiring party does not want to hire an employee, the transferor may terminate the employment contract with the employee by a mutual termination agreement. If the employee refuses to sign the mutual termination agreement, the transferor may offer to amend the employment contract for the reason that the objective situation has materially changed and then unilaterally terminate the employment contract, by giving the employee 30 days' prior written notice or one month's salary in lieu of notice, when the parties fail to reach an agreement on the amended employment contract.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

An employer shall comply with statutory working conditions including, but not limited to, remuneration, holidays, working hours, compensation for overtime work, contribution for social insurance, severance and working protection.

### SALARY

Employees' monthly salaries should not be less than the minimum monthly wage published by local governments.

### MAXIMUM WORKING WEEK

Under standard working hour system, employees work for 8 hours per day and 40 hours per week and shall be guaranteed at least one rest day each week. Employers

can also apply for flexible working hour system or comprehensive working hour system if needed.

There are three working hour systems designed for full-time employees in China. Under the standard working hours system, employees work for 8 hours per day and 40 hours per week and shall be guaranteed at least one rest day each week. The flexible and comprehensive working hour systems are usually applied to jobs that can be difficult to perform within a fixed working hours scheme. For employees under a flexible working hours system, PRC employment laws and regulations do not impose a limit on working hours, but require the employers to take appropriate measures to ensure that their employees are afforded time to rest.

### OVERTIME

Employers shall pay overtime compensation based on the statutory standard of 150% to 300% of employees' normal wages under the standard working hour system.

An employer may extend the working hours of an employee to accommodate changes in production or business operations, after consulting with the trade union and the employee concerned. Overtime should be limited to one hour per day. In special circumstances, the overtime should be capped at three hours per day, provided that the employee's health is not affected; total monthly overtime shall not exceed 36 hours. Employers are required to pay overtime compensation to employees under the standard working hours system, but employees under a flexible working hours system are not entitled to overtime compensation.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Employers must provide their employees with labour safety and hygiene conditions and necessary articles for labour protection in conformity with the regulations of the state and arrange for employees, whose work involves occupationally hazardous substances, to undertake regular occupational health checks.

### COMPLAINT PROCEDURES

Employees can complain or report to the competent work safety supervisory authority. Accordingly, the employer whose labour safety facilities and labour hygiene conditions do not comply with state regulations or who fails to provide necessary labour protection articles may be ordered to make corrections or be fined.



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# COLOMBIA

## I. INTRODUCTION

Colombian labour law is governed mainly by the Labour Code, which dates from 1950. The applicability of these rules is done (directly) through the law.

Colombian labour conditions are often determined by mandatory rules not subject to parties' modification, and most of these principles also have a constitutional hierarchy, together with the International Agreements or conventions that recognise human rights ratified by Colombia. The consequence of this situation is that employers cannot (even with the employee's approval) provide worse conditions than those recognised by the law, the constitution or an international agreement or convention, that recognises human rights ratified by Colombia.

Efforts have been made to increase flexibility to the Colombian labour market to align with globalized standards. Three main reforms to the labour rules have been made to accomplish this objective: the 50 Act of 1990, the 789 Act of 2002 and the 797 Act of 2003.

### KEY POINTS

- Employee-legislation in Colombia is divided (due to its importance) into a compilation of particular rules for each specialty: labour rules, social security, procedural rules and employment law.
- Even when employment contracts are generally regarded as indefinite term, Colombian labour law is flexible compared with other countries as it allows the use of flexible forms of employment without major restrictions.
- Colombian labour law provides high flexibility regarding dismissal. However, case law and affirmative action legislation have developed to provide greater protection to prevent possible discriminatory situations to specific population groups
- Foreigners are only allowed to work in Colombia through a work permit or with a residence permit if they are planning (or are currently) to stay permanently in the country.
- Constitutional actions ("Tutela") demanding immediate protection of fundamental rights is an important source for labour norms, as a result of the interpretation of the written labour rules.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Anti-discrimination laws in Colombia have been

developed mostly through case law, by reinforcing the protection for these special groups to other forms of employment. The protection extent is normally the prohibition of dismissal if the termination leads to a discriminatory ground or infringes upon a superior hierarchical right.

### PROTECTIONS AGAINST HARASSMENT

Since 2006, Colombian legislation provided a special scheme for protection against harassment in the workplace.

However, Law 2365 of 2024 introduces measures to prevent, address, and protect people against sexual harassment in the workplace and Colombia's education institutions. This new law defines sexual harassment as any act of pursuit, harassment, or behavior with a sexual, lewd, or lascivious intent. In the workplace, sexual harassment may arise in hierarchical or peer relationships, influenced by factors like age, gender, sexual orientation or identity, and social or economic status. A single occurrence of such behavior, whether it occurs in the workplace, or outside of it, can be considered workplace harassment. Protection against harassment requires employers not only to prevent sexual harassment but also to investigate and sanction it. The main obligations of employers regarding sexual harassment include developing and communicating a written internal policy that aligns with Internal work regulations, employment contracts, and reporting procedures and handling these complaints directly rather than through the labour co-existence committee, intended for workplace harassment cases.

Also, employees who filed a complaint as victims of harassment cannot be dismissed without a fair cause in the following six months after the formal complaint. This special protection also applies to the employees who served as witnesses in the process of harassment.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Colombian legislation does require the obligation for any undertaking to compliance with certain legal minimum standards, which may include the need to provide certain facilities for disabled persons, whether they are employees or visitors. In addition to this, the law requires the employer to comply with the competent authority's rehabilitation

report regarding employees with health disabilities, including any ergonomic or (special) workplace accommodation. From 2019 or 2022 (depending on the number of employees), employers will be obliged to provide special facilities inside the workplace for baby nursing employees.

Even while the Colombian Constitution recognises the freedom of religious belief, there is no a specific provision that obliges the employer to accommodate the workplace for the employee's religious practices. Nevertheless, the case law has recognized the possibility for the employee to excuse himself (be absent) from working on certain days for religious reasons.

## REMEDIES

Employers can implement any kind of unilateral internal policy that promotes anti-discriminatory rules for his employees, providers and/or contractors. In case an employee is found responsible for a discriminatory behaviour, it is usually possible to terminate the contract without a severance payment for the employee. In the specific case of harassment in the workplace, the 1010 Act of 2006 obliged the employer to create a special internal body to analyse the harassment complaints.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

Employers and employees must make compulsory contributions to the Colombian Social Security System, which protects employees from certain social risks. The Colombian system is compounded by the subsystems of healthcare, pension, labour risks and family allowance.

Employer's contributions to the social security system average thirty percent (30%) of the employee's contributory base income. The contribution percentage to the labour risks subsystem varies according to the level of risk the employee faces (the level of risk, and the activities framed in each, are defined by the law).

Employers who declare income tax in Colombia are entitled to an exoneration of their obligation to contribute to the social security subsystem in healthcare, family allowance and some other specific contributions, for their employees who earn up to ten (10) times the minimum wage. Such savings may lead to an employer's final contribution to the social security system as seventeen (17%) of the employee's contributory base income.

According to the pension reform (Law 2831 of 2024), starting in July 2025, the system will shift to a multiple-pillar model. The pillars include a solidarity pillar, a semi-contributory pillar, a contributory pillar, and a complementary voluntary savings pillar. Each pillar is targeted at a specific population group. However, all contributors will be required to

contribute to Colpensiones (the Colombian Public Pension Administrator) without exception. If a person earns over 2.3 times the minimum monthly wage, the excess must be contributed to a pension fund administrator under the individual savings component.

The employer is responsible for withholding and delivering his and the employee's contributions. Any kind of special information that needs to be provided to the system involving the employee's situation, such as sickness, paid or unpaid leave, maternity, retirement from the company, etc. must be provided by the employer, and it is the duty of the employee to provide information which may be of relevance to the system.

## HEALTHCARE AND INSURANCES

Healthcare is in general, guaranteed by the social security system contributions. The affiliates and contributors to this subsystem may access a bundle of services in money and in kind. The services in kind are defined in the Obligatory Plan of Healthcare. Despite the coverage of the healthcare subsystem, it is possible for employers to provide their employees (as a benefit) with private healthcare or to cover a proportion of its costs. This benefit does not exclude the obligation for the parties to contribute to the social security system.

## REQUIRED LEAVE

### Holidays and Annual Leave

**Public holidays:** Employees are entitled to be absent from work on the public holidays defined by the law and are entitled to their regular remuneration. While it is common for the municipalities to create other public holidays related to local festivities, private employers are not bound to such holidays. If, under any circumstance, the employer requires an employee to work on a public holiday, such work must be remunerated as if the employee worked on a Sunday or his weekly rest day.

**Vacation:** Every employee in Colombia, regardless of the type of employment contract or its length, is entitled to fifteen (15) working days of paid holidays for every period of 12 months of services. The employees in private companies who provide services to fight tuberculosis, and the application of X-rays are entitled to fifteen (15) working days of paid holidays for every six months of services. The employee may opt to enjoy his holidays in time or in money, without a paid leave, subject to limitations. For instance, the money option is limited to half of the annual mandatory period.

As a common practice, holidays are arranged by agreement between the employee and the employer. However, according to the legislation, the employer can unilaterally determine the period of holidays for his employees, with a notice of fifteen (15) days before the start of the paid leave. Holidays can be

accumulated for up to two (2) periods or four (4) periods in the case of trust employees, or foreigners whose family resides in a different place.

### Maternity and Paternity Leave

Female employees are entitled to at least eighteen (18) weeks of maternity leave, fully paid, including an adopted child (the paid leave can be higher in case of multiple or preterm birth); at least one week of maternity leave (and a maximum of 2 weeks) must be taken before the child's birth. This payment is entirely under the charge of the Healthcare subsystem as a benefit in money for the mother.

On the other hand, the father is entitled to eight (8) working days of paternity leave, fully paid, also entirely under the charge of the Healthcare subsystem. The father might subrogate the mother's maternity leave in case of her demise, abandonment of the mother (single parent) or sickness that makes her unable to take care of the child.

### Sickness and Disability Leave

In the event of sickness and/or accident of the employee that causes work incapacity, the incapacity must be certified by a licensed practitioner or the competent authority, normally chosen by the employee, that establishes, the days required for the employee to recover and return to work. The remuneration during sickness depends on the origin of the disease or accident:

- Professional sickness and/or work accident
- Regular sickness and/or regular accident

Even though after the third day of sickness leave all benefits in money are assumed by the social security system, the law requires that the work incapacities between day 3 and day 180 must be paid by the employer, granting the faculty to the employer for a reimbursement from the social security system. These same rules also apply to disability leave.

### Other Required Leave(s)

**Trade Union Leave:** trade unions are normally entitled to special paid leaves assumed by the employer, for some of their members to perform activities related to the organisation and accomplishment of the trade union interests. This paid leave(s), its rules for recognition, length and other special requirements are normally defined in the collective bargaining agreement.

**Voting Leave:** Employees are entitled to paid leave for purposes of voting in public elections (1/2 a day of paid leave) and for mandatory jury duty obligations (1 day of paid leave).

**Mourning Leave:** As defined by law, employees must be granted a period of 5 days of paid leave in case of the death of certain relatives as defined by law.

**Burial Leave:** Employers are obliged to grant the necessary leave for their employees to assist with the burial of their co-workers.

**Compassionate Leave:** While Colombian labour law mandates the obligation for employers to grant their employees with a paid compassionate leave, it does not define its scope or length. Employers are recommended to analyse the conditions to grant and the length of compassionate leave on a case-by-case basis.

### Other Typically Provided Leave(s)

**Employment Contract Suspension:** The employment contract can be suspended for specific causes, as defined by law. One such cause offers a general possibility for the parties to suspend the employment contract by mutual consent. This specific situation is commonly used by employers to grant their employees non-paid leave for personal reasons.

**Garden Leave:** This option is prohibited whenever the employee has to receive unilateral paid leave, per the employer's request, which may lead to discriminatory measures against the employee, or could potentially subject the employee to harassment.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Pensions are recognised under three different circumstances: Retirement, health disability, and survivorship. The social security system normally recognizes their amount before the affiliate achieves some specific requirements. The labour risks subsystem only recognises pensions in circumstance wherein the origin of said benefit is related to a work-related accident or disease.

**Retirement Pension:** Colombia currently has a private/public scheme for pensions, but the requirements for retirement pensions differ from those elected by the employee. In the public scheme, the requirements for an old age pension are related to age (62 for men and 57 for women) and a defined minimum amount of contributions (1300 weeks). No special pension plans for the private sector are allowed, as they were eliminated and prohibited under the Legislative Act 001 of 2005.

Employees who perform activities that are, by law, considered high-risk activities are entitled to more gracious conditions for accessing an old age pension, but that also means that the employer has an obligation to make additional contributions to the subsystem.

**Health disability Pension:** This is reserved for employees that suffer a permanent disability of more than 50% percent of his work capacity, evaluated by the competent authority. The total amount of the pension is assumed by the social security system.

Recognition of the old age pension or the invalidity pension is considered a fair cause to terminate



the employment contract, without the right of recognition of any severance pay.

### **Any Other Required or Typically Provided Benefits**

In addition to the monthly salary, the employer is mandated to recognise the following benefits in money for his employees:

- A 30-day allowance paid annually (or pro rata) divided into two payments as follows: 15 days in June and 15 days before the 20th of December
- A 30-day allowance (or pro rata) as a saving for the employee in case he is unemployed. This payment is not recognised directly by the employee, but to a specialised company which saves this amount and will only disburse it to the employee under circumstances defined in the law.
- A 12% interest rate (or pro rata) over the allowance mentioned in the last paragraph. This interest is recognised directly to the employee.
- A transport allowance paid monthly for employees who earn up to two (2) times the minimum wage. The amount of the allowance is defined, annually, by law.
- A pair of shoes and a working dress must be provided every 4 months for employees who earn up to two (2) times the minimum wage. The right to this benefit is only available to employees, under contract, after 3 months.

*In addition, the law establishes special benefits for certain economic sectors (i.e. the oil and mining sector).*

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

In Colombia, employment contracts are deemed as such if they reunite three conditions: (i) services are provided by the person directly; (ii) subordination from the employee towards the alleged employer; (iii) a payment as a retribution of the service provided. If these three conditions are met the relationship will be considered as an employment contract, disregarding the name or agreement the parties signed. Employment contracts can be either verbal and or written.

### **FIXED- TERM/OPEN- ENDED CONTRACTS**

In addition to the requirements stated before, fixed-term contracts are obliged to be in writing to be considered as such. Fixed- term contracts can be signed with any employee, whether the service provided can be considered permanent or temporary within the organisation. The labour code allowsthat the parties to freely determine the length of a fixed-term, but it cannot exceed

three (3) years. There is also no limitation for the possibility of successive fixed-term contracts or renewals. While the labour code does not establish the need to argue a cause to terminate the contract by the expiration date, the case law has prohibited the termination of the employment contract when the decision can be deemed to have resulted from discriminatory reasons or infringes upon a superior hierarchical right.

### **TRIAL PERIOD**

The trial period must be agreed in writing. Its length varies depending on the type of contract agreed by the parties but cannot exceed in any case two (2) months. For fixed-term contracts or definite period ones (i.e. employment contracts for completing a specific task or the occurrence of a specific event), the trial period cannot exceed a one-fifth part (1/5) of the term initially agreed. When considering the existence of successive employment contracts, the parties cannot agree to trial periods, but for the first contract.

### **NOTICE PERIOD**

Colombian legislation only provides, in general, the need for a period of notice by the employer in the event of terminate of a fixed-term contract by its expiration date. The employer is obliged to notify the employee of his decision to terminate the contract by its expiration date at least 30 days before the occurrence of the term agreed. In case the employer fails to comply with the period, the fixed-term contract will be renewed for the same term than the initially agreed. While the employee, according to the law, is also obliged to comply with a period of notice in the same terms as the employer, this rule is nowadays not enforceable.

In some specific cases, the legislation provides the need to comply with a particular period of notice to terminate the contract alleging a cause or "justa causa". For employees considered to be the subject of a special protection (i.e. disabled persons, pregnant employees, certain unionised employees) the employer needs to observe an 'a priori' control procedure to terminate the contract. Although this is not deemed to be a period of notice, it often requires the observation of a notification to the employee of the procedure that will be followed.

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

Every foreign person needs a special permit or 'VISA' to perform his services in Colombia. The types of visas that exist in Colombia so that foreigners can work are the following: The M type visa is for people who plan to live and work in Colombia temporarily and is valid for three years. The R type visa it's for

people whose plan is to establish themselves in Colombia permanently. The technical visa it's for foreign workers that provide specialized technical assistance for no more than 180 days in a 365-day/365-day period. The other type of visa is a digital nomad visa, this visa it's for individuals who are employed by companies that operate outside of Colombia to live in Colombia for up to two years.

To determine which category or special permit must be requested for the potential foreign employee, it is important to establish whether the service to be performed by the foreigner is temporary (short duration) or permanent (long duration).

### **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

Depending on the specific needs a temporary service agency might be an alternative. Otherwise, the employer must be established in Colombia in order to comply with obligations and payments to the social security system.

### **LIMITATIONS ON BACKGROUND CHECKS**

In Colombia, it is common for organisations to conduct background checks on new job applicants. These checks may include reviewing work experience, public disciplinary records (for public servants), and personal references. However, there are express prohibitions over background checks in the legislation include the following:

- HIV tests or conditions.
- Pregnancy test.
- Mandatory military service approval.
- Unionised condition.
- Diseases or disabilities.

In general, it must be said that any background check that might be considered discriminatory is prohibited unless an objective justification is proven. Also, data protection legislation (the Act 1581 of 2012) provides certain restrictions over the information potential and former employers can publish about candidates and former employees.

### **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

Employers are prohibited from asking any question that may be considered discriminatory. Any question or restriction on the application of a candidate regarding his age, sexual orientation, civil status, religious beliefs, political opinion, language, race, diseases, unionised condition or any other consideration that does not have any relation with the position to be performed, and

might lead to a discriminatory ground, must be avoided. In particular, employers are forbidden from asking potential candidates to perform HIV and/or pregnancy tests as a condition for the application, unless this condition is proving to be incompatible with the position the person applied for.

## **VI. PAY EQUITY LAWS**

### **EXTENT OF PROTECTION**

Colombia has a constitutional mandate for guaranteeing equal treatment and pay by protecting against unequal treatment based on gender, race, nationality, religion, opinion or political affiliation. The "equal remuneration for equal work" principle was first established in 1945, and was replaced with the "equal remuneration for work of equal value" principle. In addition, mechanisms to guarantee equal pay, labour integration between genders, and avoid any form of discrimination were also enacted. To comply with the regulation, every employer should follow the legal remuneration assessment factors when bargaining about salary with their employees and keep employee records with specific information such as job position, gender, duties, remuneration and type of agreement or contract.

### **REMEDIES**

Regarding special remedies or penalties for violating the equal pay principles, the employment regulation allows employees to file a special charge before the Ministry of Labour or claim the courts, based on pay or compensation discrimination. If the unequal pay is proven to provoke the demotivation or resignation of the employee, this would constitute grounds for labour harassment claims. In addition, and even though the employment regulation does not establish a particular remedy for violation of the "equal pay remuneration for work of equal value" principle, through individual complaints before the Courts or even the Ministry of Labour, or by the collective bargaining process, employees could compel the employer to act in accordance with the equal pay principle. Moreover, if the employee could claim and prove a breach of obligation by the employer regarding the record keeping before the Ministry of Labour, the employer might be fined up to 150 monthly minimum wages.

Finally, regarding special penalties for violating the equal pay regulation, the Colombian Criminal Code was modified to include the arbitrary limitation of any right based on racism or discrimination, as a new crime through Law 1482 of 2011, punishable by imprisonment for a term between 12 to 36 months, and a fine between 10 to 15 monthly minimum wages.

### **ENFORCEMENT/LITIGATION**

Despite the lack of a reporting obligation for employers, as well as the fact that most of the salary clauses are protected under confidentiality

agreements, a strong judicial precedent relating to equal pay claims has been established by the Supreme Court of Justice. According to the Court, the grounds to assign different salaries to employees in the same position should be based on the quality of the work, rather than on merely academic degrees or job seniority. Once the existence of work of equal value is evidenced in a claim, the employer must credit the existence of objective factors to justify payment differences. Furthermore, the equal pay principle could be protected through constitutional actions, as a transitory measure (called in Spanish “acciones de tutela”), and collective agreements.

## OTHER REQUIREMENTS

As mentioned before, every employer should keep employee records specially made for gender equality purposes, and present them to the Inspector of the Ministry of Labour for assessment while carrying out gender audit services, along with evidence of every practice or procedure implemented in order to guarantee equal pay. However, there is no obligation to periodically share this information with the authorities.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Provisions on restrictive covenants in Colombian labour law are scarce. The legislation only provides rules for non-compete clauses. Restrictive covenants are therefore allowed, under some general limitations. Any clause that may limit the employee's right to work (which includes his right to access new employment) is considered ineffective and cannot be enforced by a judge, even if the employee consented to the use of such a clause.

- **Non-compete clauses:** Colombian Labour Code expressly allows for the possibility of the employer to agree with his personnel, on a general prohibition to provide services in determined activities or the employer's competitors. This class of non-compete clauses are only allowed by law while the employment contract is ongoing. Non-compete clauses for employees that are meant to apply after the employment contract has ended, are invalid.
- **Non-solicitation of customers:** such a clause does not exist in Colombian labour law. However, restrictive covenants on non-solicitation of customers are often used for high-executive employees. Scholars have understood that these kinds of specific clauses are valid as long as they respond to a principle of proportionality and reasonability.
- **Non-solicitation of employees:** these types of restrictive covenants are not normally used

for employees in their employment contracts, but rather between companies in their commercial relationships to avoid possible acts of unfair competition. The applicability of these clauses between companies must attend criteria of proportionality and reasonability to avoid a possible violation of the right to work.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Restrictive covenants may be included in the employment contract (normally used for non-compete clauses) or in separate documents during the employment relationship or after it. A violation of a restrictive covenant during the employment contract can be subject to disciplinary measures from the employer and eventually the termination of the contract with a fair cause. The violation of a restrictive covenant, which intends to apply after the employment relationship ends, can be enforceable through a legal claim against the former employee.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave practice is allowed in Colombian labour law. The employer can restrict his employees from attending to work, but the obligation to pay their salary, as if it was a unilateral paid leave, remains. However, this possibility finds a limitation whenever the request from the employer for the employee to receive the unilateral paid leave may lead to a discriminatory measure or possible conduct of harassment against the employee.

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

Restrictions on the use of electronic devices and the internet for personal purposes in the workplace are allowed, with the understanding that such faculty is under the scope of the subordination power of the employer. The Constitutional Court considers that the legislation and the case law allow the employer to not only limit the use of social media and electronic devices in the workplace, but also to exercise control to verify this situation, in accordance with the principle of reasonability and proportionality. In addition to this, Act 1581 of 2012 establishes general restrictions for the use and administration of databases, including information regarding employees.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE



## EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The employer can monitor and access the employee's electronic communications or any other application as long as they are related to the employee's position or the electronic mail and/or application is provided by the employer as a working tool. Any control on the employee's electronic communications must attend to the principle of reasonability and proportionality, in order to avoid a possible breach of the employee's intimacy.

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

There is also no specific provision in Colombia regarding this matter. However, the case law has understood that while social media is part of the employee's intimacy circle, and therefore cannot be monitored by the employer, there are some actions that may cause harm to the employer through social media. The use of social media to disparage the employer or to divulge confidential information about the company may cause damages to his public image and his interests, which then allows him to initiate disciplinary measures as a consequence of this situation.

In any case, the divulgation of confidential information by the employee is considered by Colombian labour law as an express prohibition and can lead eventually to the possibility to terminate the employment contract by the employer, alleging a fair cause.

# IX. TERMINATION OF EMPLOYMENT CONTRACTS

## GROUND FOR TERMINATION

In Colombia, employment contracts may be terminated by any of the parties at any moment with immediate effects (as a period of notice is only needed for fixed-term contracts when ended by the expiration date) and without it being necessary to mention the reasons that led to the termination, unless a fair cause is alleged for the dismissal. Grounds for termination in Colombian legislation can be divided into three categories: (i) Legal grounds. (ii) Termination with a fair cause. (iii) Termination without a fair cause.

## COLLECTIVE DISMISSALS

The requirements for a collective dismissal, which in Colombia, applies to a dismissal that affects, in a period of six months, a number of employees equal to:

## NUMBERS OF EMPLOYEES - EMPLOYEES DISMISSED

| Number of Employees  | Employees Dismissed |
|----------------------|---------------------|
| Between 10 and 50    | 30%                 |
| Between 50 and 100   | 20%                 |
| Between 100 and 200  | 15%                 |
| Between 200 and 500  | 9%                  |
| Between 500 and 1000 | 7%                  |
| More than 1000       | 5%                  |

In companies with a total share of employees higher than 1000. The percentages mentioned above are only calculated when considering terminations without a fair cause, not those alleging a legal ground or a fair cause. For a company to proceed with a collective dismissal, it needs, beforehand, to receive authorisation from the Ministry of Labour.

## INDIVIDUAL DISMISSALS

Individual dismissals, unlike the collective dismissals, do not require a previous authorisation by any authority, as the employer is free to terminate the employment contract at any time. However, for the dismissal of an employee under some types of special protection, an authorisation from the labour inspectorate is needed (pregnant women, disabled employees). In the case of employees under special protection for their labour unionized condition, ("fuero sindical"), a previous authorization is required by the labour judge.

## IS SEVERANCE PAY REQUIRED?

Colombian Labour law does not require a separation agreement to terminate a contract. Nevertheless, it allows its application. These kinds of agreements are not only widespread in the labour market, but are generally recommended to terminate the contract of high executives and employees under special protection.

## SEPARATION AGREEMENTS

Colombian Labour law does not require a separation agreement to terminate a contract. Nevertheless, it allows its application. These kinds of agreements are not only widespread in the labour market, but are generally recommended to terminate the contract of high executives and employees under special protection.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Wrongful termination claims are analyzed by the judge as the competent authority. Wrongful termination based on a legal ground (i.e. alleging

the absence of a cause for the termination) leads to the recognition of the severance payment the employee would be entitled to if his contract would be terminated without a cause.

Wrongful termination based on the breach of a fundamental right (i.e. discrimination grounds and/or harassment) might lead to the reinstatement of the employee in the position he was in before being dismissed, or an equivalent one, plus the payment of the salaries and benefits for the period he remained dismissed, because of the employer's wrongful termination.

## WHISTLEBLOWER LAWS

Colombian labour law does not include any special provisions or protections for whistleblowers. However, employees who served as witnesses in a claim of harassment cannot be dismissed without a fair cause within six months after the formal complaint, as long as the claimant is effectively considered a victim of harassment.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The possibility for employers and employees to associate through trade unions and employers' associations is guaranteed as a constitutional right. While this allows for the existence of employees' and employers' organisations, employers' organisations are not very common, nor are they generally used for collective bargaining, but rather for economical and coordination purposes within an industry. Collective bargaining is reserved for employers (individually considered) and trade unions.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

While it is not mandatory to be a member or constitute a trade union in Colombia, trade unions may negotiate, on behalf of their affiliates, to begin a collective bargaining. This process can only be initiated by the trade union; employers cannot call for a collective bargaining process. The result of this negotiation between trade union and an employer is a collective bargaining agreement. Labour procedural rules allow trade unions to present claims on behalf of their members whenever they consider the existence of a breach of the collective bargaining agreement.

The right to strike is recognised as a constitutional right and its exercise must be made in accordance with democratic principles. Limitations on the right

to strike apply to essential public services, as defined by law (i.e. public utilities sector).

Trade unions are the traditional vehicle for employees to be part of the employer's decision-making practice, which is achieved through a collective bargaining process. Therefore, even when the tasks and obligations of the Executive Board are not indicated in the regulation, they should be established in the Union Bylaws with the aim of realising that purpose: acting on behalf of the interest of unionised workers before the employer.

With respect to the Complaints Committee, the main purpose is filing complaints with the employer on behalf of the unions and the employees, either as joint or single petitions. Employees do not have any restriction on being part of the Board of Directors of the company. In any case, the employer and their representatives will preserve the managerial power over the employees.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

The 1295 Decree of 1994 established the obligation for every employer to constitute a health and safety committee, wherein the number of members varies according to the number of employees of the Company. Its composition is by an equal number of employer's representatives and employees' representatives.

The 1010 Act of 2006 established a mandatory harassment committee to address possible conducts considered as such, and to develop activities to improve the working environment for all employees. The number of members of this body varies according to the number of employees of the company. Its composition is by an equal number of employer's representatives and employees' representatives.

# XI. TRANSFER OF UNDERTAKINGS

## EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

In case of a transfer of undertaking, the employment contract is not terminated, suspended or modified if there are no substantial changes in the activities of the new employer. Therefore, the employees have the right for their contract to remain with the same conditions, salary, working time, benefits and the seniority they were entitled to before the transfer took place.

As the transferred is liable for all labour rights of the predecessor, the employee can claim the labour rights that he was entitled to before the transfer took place, from either his previous employer or the new one.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Colombian labour law does not provide any special requirement from a labour point of view, for a transfer of undertaking to take place. The parties to the transfer can agree to any modifications of their own relations, as long as these agreements do not affect the labour rights of the employees.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Owing to the public policy nature of labour standards and social norms, these are mandatory, and the parties cannot agree to terms that would circumvent, contradict or otherwise be in opposition to the rights guaranteed by such policies. Nor may an employee renounce a labour right granted by law, but the employer is allowed to provide the employee with benefits and rights that are more favorable than those established by law.

### SALARY

The statutory minimum wage for employees who work the maximum working time for 2018 is \$1.300.000 COP with a mandatory transport allowance of \$162.000 COP (mandatory for employees who earn up to 2 times the minimum wage).

Compensation regarded as salary comprises not only the employee's agreed fixed and/or variable salary, but any payment which is recognized as retribution for the services the employee provides to the employer. The salary can be either in kind or cash, but the salary in kind cannot exceed 30% of the total salary agreed. The salary can also be agreed on any legal currency. For employees who earn a salary equivalent to at least ten (10) times the minimum wage or more, an "integrated" salary can be agreed upon. The agreement must be in writing.

### MAXIMUM WORKING WEEK

The ordinary working time cannot exceed 46 hours per week, with the employee being entitled to a mandatory rest day, normally on Sunday. However, the law allows for the parties to agree that the daily working time can be distributed between 4 and 00 hours per day ensuring the maximum working week (46 hours). The daily working time must be distributed in at least two parts, with a rest period between both of them. This rest period between both sections is not considered part of the daily working time.

### OVERTIME

Overtime hourly work compensation rate is 25% over regular hour payment. The following employees

are not entitled to overtime work compensation: (i) employees who earn an "integrated" salary (only possible for employees who earn more than ten times the minimum wage) and (ii) employees with trust positions (However, they are entitled to receive Night hours and Sundays overtime payments). Employees who work night hours (from 09:00 PM to 06:00 AM) are entitled to a special overcharge of 35% over their regular hourly compensation, disregarding other special compensations like overtime compensation. Work on Sundays and/or public holidays must be paid with an overcharge of 75% of the regular compensation.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The employer is expressly obliged to provide employees with a safe workplace and the necessary and adequate elements and tools to prevent work accidents and professional diseases. Since 2014, every employer or contracting party must implement the "Safety and Health at Work Management System" to ensure the enforcement of all health and safety at work legislation, the improvement of the work environment and conditions, and the control of any hazard or danger in the workplace. This system includes not only the employees of a company, but also its contractors and subcontractors.

### COMPLAINT PROCEDURES

Colombian labour law does not provide any special protection specifically for employees who present a formal complaint against their employer for failing to comply with the Health and Safety legislation. However, if the employee, as a result of their complaint, becomes a victim of discriminatory or harassing behaviour, they may resort to the workplace harassment policy. This policy offers protection against any acts of harassment or discrimination that may arise as retaliation for the complaint made, ensuring the employee's right to a safe and non-hostile work environment.



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# CZECH REPUBLIC

HAVEL & PARTNERS

CONNECTED THROUGH SUCCESS

## I. INTRODUCTION

There are numerous laws governing employment relationships in the Czech Republic. The main one is the Labour Code, which establishes the rights and obligations of the employment relationships' participants. The Labour Code is quite strict when it comes to key points in employment relationships, mainly establishment and termination. The Czech employment laws can be in general described as quite protective of the employee, as the employee is considered the weaker party in the relationship. Equal treatment and restriction of any type of discrimination are considered the main principles of the Labour Code.

### KEY POINTS

- Termination of employment is only possible due to the reasons stated in the Labour Code and statutory notice period is 2 months (longer period can be agreed).
- The law and the labour courts usually tend to protect employees.
- The written form with a handwritten signature is generally required for the most important documents.
- What was agreed in the employment contract or other type of agreement cannot be unilaterally changed by the employer.
- The employees are entitled to numerous paid leaves and allowances arising from the Labour Code (sick leave, maternity/paternity leave, wedding leave, etc. and overtime allowance, allowance for work on weekends and public holidays, etc.).
- Minimum annual leave is 4 weeks, but 5 weeks is currently market standard.
- Trade unions might be established if there are more than 3 employees in the company and Trade union representatives are protected (mainly from termination).

## II. ANTI-DISCRIMINATION LA

### SUMMARY

The following characteristics are considered protected grounds for discrimination purposes: sex, sexual orientation, racial or ethnic origin, nationality,

citizenship, social origin, family line, language, health state, age, religion or belief, property, marital and family status and relationship or liabilities to a family, political or other opinions, membership and activity in political parties or political movements, trade unions or organisations.

### PROTECTIONS AGAINST HARASSMENT

Harassment means undesirable behaviour related to discrimination grounds which: (a) has the intention or effect of diminishing the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment; or (b) may legitimately be perceived as a condition of a decision affecting the exercise of rights and obligations arising from legal relationships. Sexual harassment means conduct as defined in the previous sentence that is sexual in nature. Harassment is considered a type of discrimination, thus the protection to employees is provided as in the case of discrimination.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

There is no law regarding such employer's obligations, but under the Labour Code, the employer must provide a suitable room for a breastfeeding mother in the workplace.

### REMEDIES

In the case of personal interference, the employee has the right, according to Anti-discrimination law, to demand: i) that the discrimination be stopped; ii) that the consequences of the discriminatory interference be eliminated; and iii) that he/she be given adequate satisfaction.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

The basic employee's benefits can be as follows:

- additional annual leave (beyond the statutory 4 weeks);
- bonuses;
- meal allowances;
- sick days;

- higher severance payment when terminating employment on the grounds of restructuring or due to occupational injury/disease.

The employer is obligated to provide payments to the employee's social security. The amount is set by law according to the amount of the employee's salary. Based on paid social security, an employee can obtain financial support, e.g. during temporary incapacity for work, maternity leave/taking care of a child or disabled person.

## HEALTHCARE AND INSURANCES

The employer is obliged to provide payments to the employee's health care insurance as well. The payment is paid to the employee's health care insurance company who provides free health care for medical services set by law at contracted medical facilities.

## REQUIRED LEAVE

### Maternity and Paternity Leave

In connection with the birth and care of a new-born child, a female employee may become entitled to maternity leave for a period of 28 weeks; if she gives birth to two or more children at the same time, she shall be entitled to maternity leave for a period of 37 weeks. The female employee shall normally take maternity leave from the beginning of the sixth week before the expected date of childbirth, but not earlier than the beginning of the eighth week before that date. During maternity leave, the female employee may be entitled to a so-called 'maternity benefit' in accordance with the Sickness Insurance Act. The amount of the maternity benefit per calendar day shall be 70% of the daily assessment base.

Under the Sickness Insurance Act, a male employee may be entitled to 2 weeks of paternity leave, which must normally be taken within the first 6 weeks after the birth of his offspring. During paternity leave, the male employee may be entitled to a so-called 'paternity benefit' in accordance with the Sickness Insurance Act. The amount of the paternity benefit per calendar day shall be 70% of the daily assessment base.

### Parental Leave and Nursing Benefit

A female employee or a male employee may request the employer to take parental leave to the extent chosen and up to a maximum of 3 years of age of the child, subject to the statutory conditions. During parental leave, the employee who personally daily and duly cares for the youngest child in the family for a full calendar month may be entitled to a so-called "parental benefit" of up to CZK 300,000 or up to CZK 450,000 in the case of multiple births. The parental benefit is usually provided to the employee as monthly payments during the three-year period of the parental leave until the entire sum is used up. A bill to increase the benefit to CZK 350,000 or CZK 525,000 in the case of giving birth to more than one child is now being passed through the legislative process.

The employer may excuse, if all conditions are met, the employee's absence from work for 9 days, or 16 days (in the case of a lone employee, unless otherwise specified), for the care of a child under 10 years of age due to illness or injury, the care of another individual whose health condition requires necessary treatment due to illness or injury, and the care of a child under 10 years of age in selected cases. During the nursing period, the employee may be entitled to a so-called 'nursing benefit' in accordance with the Sickness Insurance Act. The amount of the nursing benefit per calendar day may be 60% of the daily assessment base.

### Sickness and Disability Leave

An employee who has been declared temporarily incapable for work or who has been ordered to be quarantined (the "TIW") and who, on the start date of the TIW, meets the conditions for entitlement to a sickness benefit, may become entitled to salary compensation from the employer for the first 14 calendar days of the TIW in the amount of 60% of the average reduced earnings. If the TIW lasts longer than 14 calendar days, the employee may become entitled to a so-called 'sickness benefit' under the Sickness Insurance Act. Extra sickness leave (so-called Sick days) which will not require a doctor's confirmation can be provided by the employer as a voluntary benefit to employees and can be concluded in the employment agreement or the employer's internal regulation.

### Other Required or Typically Provided Leave(s)

Leave must be granted for various other reasons such as: examination or treatment performed at a health care facility, wedding, funeral, moving for work, discharge of public office, performance of civic duties (e.g., activities of witnesses, interpreters, certified experts), discharge of office of a member of the trade union organisation's body, employee's activity as a blood donor, etc. The Labour Code and other laws set the length and compensation in the event of the above-mentioned leaves.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The employer's payment of social security also contains the payment of pension insurance. Besides statutory pension insurance, certain employers provide contributions to the employee's private pension or life insurance as a discretionary benefit. Such contributions are very common in practice.

### Any Other Required or Typically Provided Benefits

The following benefits are often granted to employees: i) financial bonuses; ii) company car/cell phone for private use; iii) contributions to the employee's private pension/life insurance; and iv) sport/cultural vouchers.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

A valid employment contract must be concluded in writing and must include: i) the type of work (job title) that the employee will perform for the employer; ii) the place or places of work where the employee will perform the work; and iii) the date of commencement of employment. The contract must be drafted in a language which the employee understands, but it is recommended to draft it in a bilingual version.

### FIXED- TERM/OPEN- ENDED CONTRACTS

The employment contract may be concluded for a definite or indefinite period of time. The duration of a fixed term contract may not exceed three years from the date of commencement of the first employment relationship for a fixed term and may be repeated or extended only twice (i.e., a total of no more than nine years). However, this restriction is likely to be partially removed by the amendment to the Labour Code currently under debate.

### TRIAL PERIOD

A trial period is not a mandatory requirement and must be always agreed between the parties in writing (usually in the employment contract) prior to the commencement day, otherwise it will be invalid. The maximum duration of the trial period is 3 months for standard employees and 6 months for managerial employees; however, in case of a fixed term employment contract, the trial period may not exceed half of the agreed term of employment. The agreed trial period may not be subsequently extended. The employment may be terminated immediately without any notice period during the trial period.

### NOTICE PERIOD

Where notice of termination has been given, the employment relationship will come to an end upon the expiry of the notice period. The notice period must be the same for both parties and shall be at least two months. Under the Labour Code, the notice period shall start to run on the first day of the calendar month following delivery of the notice and come to an end upon the expiry of the last day of the relevant calendar month.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

EU citizens as well as EEA and Swiss citizens do not need any visas/permits to travel and work in the Czech Republic as they have free access

to the Czech labour market. Free access to the Czech labour market is currently also provided to all Ukrainian citizens granted temporary protection (temporary protection has been repeatedly extended and is now valid until 31 March 2025).

Prior to applying for work permits a labour market test must be completed in some cases. In practice, this means that the employer must notify the Labour Office about the vacant position, which is then published on the Labour Office's website for 30 days (in some specified cases 10) and potential applicants may apply for the position. However, there is no legal requirement to actually hire any of these applicants even if they would be suitable for the position, which renders the labour market test a formality only. The employer should ensure that all foreign national employees hold valid immigration work permits, as it is their responsibility to conduct this verification.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

In general, the Labour Code defines the term employer very broadly and does not require the form of the employer's entity. However, other laws (e.g., the Business Corporations Act, tax laws) set rules for a foreign legal entity that they can start business in the Czech Republic only on the day of registration in the Commercial Register. A foreign company can choose to establish permanent operations in the Czech Republic by creating a branch or by establishing a business company.

### LIMITATIONS ON BACKGROUND CHECKS

The employer may only seek information that is directly connected with the work to be performed by the candidate and the law specifically prohibits requesting certain types of personal information. Hence comprehensive backgrounds checks are not typical in the Czech Republic – recruiters usually check only information provided directly by the candidate (CV) and look through publicly available information (e.g., provided by the candidate on social sites like LinkedIn, Facebook, etc.) or try to gather information about the employee from past employers (reference letters, etc.).

The employer may also not obtain this information through third parties; hence backgrounds check providers e.g., as in the US, are not common in the Czech Republic.

Criminal records cannot be requested unless a substantive reason exists due to the nature of the work that is to be performed and provided or when another act states the condition of a clear criminal record. It is appropriate for some employers to ask



for such requirement or information. For instance, in case an employee will be handling large amount of cash, the employer may ask for their criminal record as it is justified by the potential risk of fraud.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

An employer must treat employees equally and avoid discrimination during the entire employment relationship, even during the hiring process. As such, the recruiter should avoid asking questions that could imply discrimination against the candidate. In addition, the Labour Code specifically says that the employer may not seek/request information from the employee/candidate that is not directly related to the performance of work and the employment relationship. Questions that are permitted and routinely asked usually include the candidates' identity, education (including asking for diplomas, certificates, etc.) or employment history.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

According to the Labour Code, employees are entitled to the same salary for the same work or for work of the same value. When determining the remuneration for the work performed, each employer is also obliged to ensure that the remuneration from the agreement is provided in the amount corresponding to the complexity, responsibility and effort of the work, according to the difficulty of the working conditions, according to the work performance and the work results achieved. The employer may establish different conditions when justified by objective parameters like seniority, responsibilities, tasks and performance. The Czech Republic also ratified Convention C. 100 of the International Labour Organisation known as the Equal Remuneration Convention.

### REMEDIES

If the employee feels that the right to equal treatment and the prohibition of discrimination have been violated, the employee can seek redress directly from the employer. If the remedy is not sufficient or the employer does not comply with the request for remedy, the employee can file a complaint with the relevant labour inspectorate or file a lawsuit in court. The employee can also file a lawsuit directly in court.

### ENFORCEMENT/LITIGATION

The Constitutional Court concluded that if, according to the Labour Code, equal pay is due for the same work, employers are obliged not to make differences in remuneration between employees operating in individual regions, if these employees perform the same job. However, claims for equal pay for equal work are not as common as claims for invalid termination

of employment. In the Czech Republic there are no specialised labour courts, but every court has a special senate focused on labour litigation.

## OTHER REQUIREMENTS

In Czech Republic, there is currently no obligation for employers to publicise the remuneration of their employees. However, the European Parliament has adopted a directive that will lead to ensuring transparency in the remuneration of women and men on the national level.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Restrictive covenants are types of contractual arrangements between an employee and an employer. The content of such an agreement is the employee's refraining from certain activities, which may be financially compensated by the employer. The best known and most frequently used in the Czech Republic is the non-compete clause. Other arrangements used in the Czech Republic are non-disclosure agreements, a non-solicitation clause and a garden leave clause.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

If the employee violates the obligation from the non-compete clause, the employee must pay a contractual penalty if it was agreed in the agreement on the non-compete clause. By paying the contractual penalty, the obligation from the non-compete clause ceases. Payment of the contractual penalty can be enforced in court.

Unfortunately, due to the complete absence of legal regulation of non-solicitation agreements, it is still a fundamental question what the possible real enforceability of the clause is, and whether the clause would be recognised by the court as valid in the event of a lawsuit.

### USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is a situation in which an employee no longer comes to the workplace and does not perform work during the notice period, although he/she is paid for this time. The institute is usually used to prevent an employee from using sensitive information when they leave their current employer, especially when they are very likely to join a competitor.

In practice, it is most often agreed upon in connection with termination of employment. Although the

Czech legal system does not explicitly regulate this institute, “garden leave” is possible. In this case, the employee is entitled to salary compensation in the amount of his/her average (monthly) earnings for the duration of the obstacles at work.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

Without the employer’s consent, employees may not use the employer’s means of production and other means necessary for the performance of work, including computers and telecommunication technology, for their personal needs. The employer is authorised to check compliance with the prohibition in an appropriate way.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE’S ELECTRONIC COMMUNICATIONS?

Without a serious cause consisting in the employer’s nature of activity, the employer may not encroach upon employees’ privacy at workplaces and in the employer’s common premises. Where there is a serious cause on the employer’s side consistent with the nature of his/her activity which justifies the introduction of surveillance (monitoring), the employer shall directly inform the employees of the scope and methods of its implementation.

### EMPLOYEE’S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

When an employee shares the employer’s confidential information, it can be considered a breach of the employee’s duties. Depending on the seriousness of such breach, it can lead to termination of employment with the employee and for entitlement to damages as well. A detailed employer’s internal regulation can be adopted or an agreement with the employee can be concluded to specify the employee’s duties in regard to confidential information.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

In the Czech Republic, an employee can be dismissed

based mainly on i) agreement; ii) notice; and iii) immediate termination. Immediate termination is considered an exceptional method of termination of employment and the employee may be terminated immediately (i.e. without the termination period – usually two months) only if: i) the employee has been validly convicted of an intentional criminal offence and sentenced to imprisonment for a term exceeding one year, or if the employee has been validly convicted of an intentional criminal offence committed in the performance of working tasks or in direct relationship to the performance of working tasks and sentenced to imprisonment for a term of at least six months; and ii) if the employee has breached a duty arising out of the legal regulations applicable to the work performed by the employee in an especially serious manner.

### COLLECTIVE DISMISSALS

The collective dismissal requirements are triggered in circumstances where the employer intends to terminate:

- 10 employees, for an employer employing from 20 to 100 employees, or
- 10 per cent of the employees, for an employer employing from 101 to 300 employees, or
- 30 employees, for an employer employing more than 300 employees.

The terminated employees are entitled to statutory severance payment. After the pay out of the last salary and the severance payment, the termination of employment can be considered complete.

### INDIVIDUAL DISMISSALS

The details of the process depend on the reason for termination. However, in general, should the employee be unilaterally terminated, the employer must have a statutory reason to do so and also relevant evidence (e.g. medical report, warning letters, written notice of his/her poor performance, employer’s decision on cancelling the job position, etc.). The employer must notify and consult about the termination (by a termination notice and/or immediate termination) with any trade union (no consent is required). Only in the case of the termination of a member of a body of the trade union must prior consent to terminate be obtained (and eventually can be replaced by the consent of the court if the trade union refuses to give such consent).

### IS SEVERANCE PAY REQUIRED?

The calculation of termination (severance) pay depends on the reason for termination, duration of the employment and average earnings of the particular employee in the last calendar quarter. In case the employee is terminated due to organisational reasons, i.e.: i) if the employer or part thereof is being dissolved; ii) if the employer or part thereof is being relocated; and iii) if the employee becomes redundant – the employee is entitled to severance payment in the amount of: i) one month’s average

earnings, if the employment did not last more than one year; ii) two times the employee's monthly average earnings, if the employment lasted more than one year but less than two years; and iii) three times the employee's monthly average earnings, if the employment lasted more than two years.

## SEPARATION AGREEMENTS

If the employer and employee agree on the termination, the employment relationship will terminate on the agreed date. An agreement on the termination of an employment relationship must be in writing and each contracting party must receive one copy of the agreement.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Nullity of termination of an employment relationship by notice, by immediate dismissal or resignation, by notice during the trial period or by agreement may be claimed both by the employer and the employee before the competent court within two months of the date when the employment relationship in question ought to have come to an end as a result of such termination. If the court decides that the termination is not valid, the employee may have the right to salary compensation of the period when he/she did not perform work while he/she could perform work, because the employment was not validly terminated. The court may also grant the employee the costs of court proceedings.

## WHISTLEBLOWER LAWS

The Whistleblower Protection Act came into effect in the Czech Republic in August 2023. Employers of more than 50 employees are now obliged to establish an internal reporting system, the form of which the law remains silent on. This means that employers may choose how to ensure the receipt, assessment, and resolution of reports by their employees and other persons (e.g., job applicants). The law also provides protection for whistleblowers, including confidentiality of their identity, protection against retaliation, and many others.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Under Czech law, everyone enjoys the right to freely associate with others to protect one's economic and social interests. Employees also have the right

to organise in unions. The affiliation of employees to unions is not mandatory. The employee is free to decide whether to join the union. Employees in management can also become members of a trade union. Employers' organisations represent employers' representatives. They act both in "tripartite negotiations" (government, unions, employers) and as one of the contracting parties when concluding collective agreements of a higher level. The reason for the establishment of an employer organisation is primarily to defend the business and economic interests of its members more effectively.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

There are many topics which should be consulted with the Trade Union according to the Labour Code. The employer requires the trade union's consent for: i) a notice or immediate cancellation of employment of a member of a trade union body during their office term or during the period of one year after its termination. Such a notice or immediate cancellation may be invalid without such consent. Consent is presumed to have been granted if the union did not refuse to grant it within 15 days from the date on which it was requested by the employer. In case the union refuses to give consent, the employer can apply to the Court for consent; ii) issuance of and changes to the internal working regulations; and iii) issuance of a schedule for taking holiday (in practice this usually does not apply as employees often schedule their holiday time on their own). Trade unions can enter into collective agreements. Collective agreements are binding not only for unionised employees, but also for all other employees of employers for whom a collective agreement was negotiated.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

There can be 3 to 15 members of a work council and a maximum of 1 health and safety representative for each 10 employees, and they have to be elected by the employees. Every employee has the right to appoint his/her preferred candidate. The employer shall announce the elections on the basis of a written proposal signed by at least one third of the employer's employees in an employment law relationship not later than three months from the date of delivery of the proposal. Further, the elections are organised by an election committee established for this purpose (3-9 employees). The term of office of the elected employees is 3 years. The same applies to health and safety representatives.

The work council helps with employees' right to information and consultation. Through the representative for health and safety, the right to information and consultation is ensured, but only in the field of safety and health protection at work and the representatives' participation in solving health and safety issues. Works council members



and health and safety representatives have limited rights compared to a trade union, e.g. they may not enter into a collective bargaining agreement. Such representatives also have less protection than the members of the body of a trade union.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

Rights and obligations arising from labour relations may only be transferred in cases laid down in the Labour Code or some other statutory provisions. Where activities, or part thereof, or tasks, or part thereof, are transferred from one employer to another employer, the rights and obligations arising from labour relations are transferred to the full extent to the new employer (the Labour Code sets forth other detailed conditions for the transfer). The rights and obligations of the hitherto employer towards employees whose labour relationships were terminated by the date of the said transfer shall remain unaffected unless other statutory provisions stipulate otherwise.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Before the effective date of transfer of rights and obligations (arising from labour relations) from the hitherto employer to another employer, both parties shall be obliged to inform thereof, sufficiently in advance (however no later than 30 days before the transfer of said rights and obligations to the transferee) the trade union organisation and the works council and consult them, with a view to reaching agreement, on:

- the determined or proposed date of transfer;
- the reasons for such transfer;
- legal, economic and social implications for the employees;
- envisaged measures relating to the employees.

Where neither a trade union organisation nor a works council operates at the enterprise (undertaking) of the employer, the transferor and the transferee shall inform the employees, who will be directly affected by the transfer latest 30 days before the effective date of the transfer of the rights and obligations to another employer.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Under Czech law, employees are eligible for certain minimum entitlements, including, but not limited to, i) Minimum salary set by law; ii) Maximum shift length; iii) Maximum length of overtime work; etc. Certain groups of employees enjoy more favourable working conditions. For instance, pregnant employees cannot work overtime; minor employees cannot work at night and cannot work overtime, among other restrictions.

### SALARY

Employee's salary may not be lower than the minimum set by law (for this purpose, the salary shall not include any premium payment for overtime, work on public holidays, night work, work in an arduous working environment and for work on Saturdays and/or on Sundays).

### MAXIMUM WORKING WEEK

The maximum standard weekly working hours shall be 40 hours per week. The length of a shift may not exceed 12 hours. The employer shall distribute working hours in such a way so that employee has a minimum rest period of 12 hours between the end of one shift and the start of a subsequent shift within 24 consecutive hours.

### OVERTIME

The employee may also be required to work overtime up to 150 hours/year. Where there is an express agreement with the employee (usually included in the employment contract), the employer may require a greater number of overtime hours – up to approximately 416 hours/year. For overtime work, the employees are entitled to their salary and extra pay in the amount of at least 25% of their average earnings or compensatory time-off within the scope of overtime instead (if agreed with the employee).

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

In general, the employer is obliged to ensure a safe workplace for its employees. The employer is obliged to ensure a safe work environment and in this respect the employees should be provided with the following: i) Occupational Health and Safety training – at the commencement/at the end of employment (or if there is any significant change of the employment or workplace conditions), and regularly during the employment; ii) Fire Protection training – would usually be carried out together with the above-mentioned Occupational Health and Safety training; and iii) Driver's training – should

the employees drive a car for the purposes of their employment driver's training should be provided. The training must be repeated periodically.

## COMPLAINT PROCEDURES

Regarding the investigations of health violations (injuries) the employer must investigate every injury that occurred in the workplace (regardless of whether the injury occurred in connection with work performance or not) and keep a book recording all injuries. The employer should also seek the cause of the injury and adopt corresponding preventive measures. Some of the injuries also must be notified to certain authorities (Labour Inspectorate, Police, etc.). There are no other regulations regarding investigations of other breaches (e.g. safety) so it is recommended good practice for a company to adopt internal regulations.



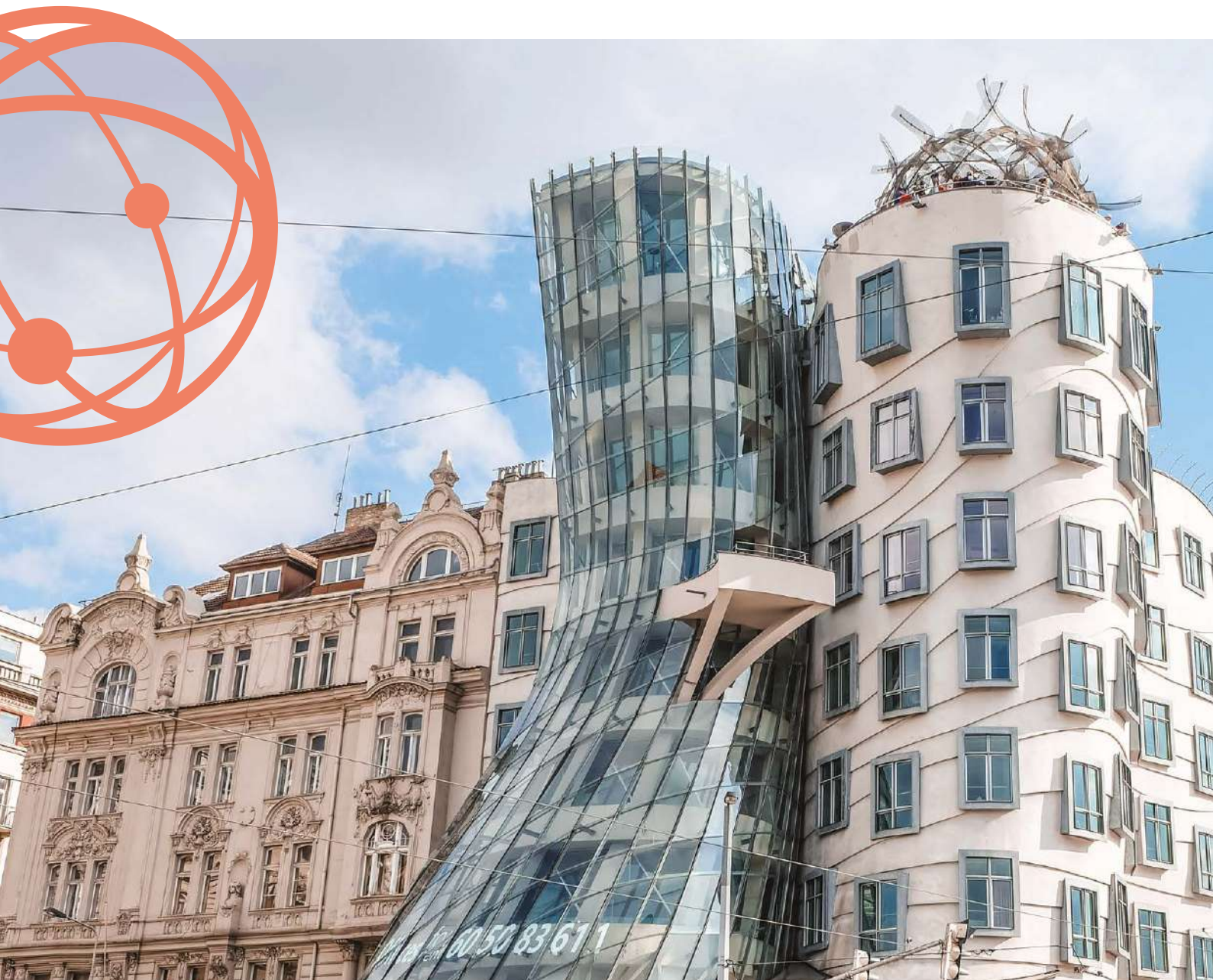
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## I. INTRODUCTION

In France, employment law affords employees a good level of protection. Nevertheless, this legal environment is constantly changing because of government reforms and case law evolution. Recent trends relate to pension reform, new law on whistleblowers' protection, quotas on women in senior management, employee information requirements upon hiring and most recently holiday entitlements during non-work related sick leave. This being said, over the past years, many efforts have been done to simplify French employment law to allow both flexibility and security to the employers especially with respect to staff representative structures. Also, significant efforts to secure dismissals have been made.

### KEY POINTS

- All non-EU citizens need a work permit to work.
- Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights under the law, regardless of any provision to the contrary in their employment contract.
- Usually, employees work 35 hours per week. Only hours worked at the request of the employee's superior will be regarded as overtime.
- Indefinite-term contracts: there must be real and serious grounds for dismissal (two types of valid grounds: personal grounds and economic grounds).
- Severance payments are only awarded if the employee has the minimum length of service in accordance with the relevant CBA provisions.

## II. ANTI-DISCRIMINATION L

### SUMMARY

According to the French Labour Code, it is forbidden to punish or dismiss employees, or exclude potential employees from the recruitment process (for a job, a training position or an internship), or cause them to endure direct or indirect discriminatory measures with respect to remuneration, incentive schemes, share distribution, training or redeployment programs, posting, qualification, classification, career development, mobility or contract renewal, on the basis of their nationality, ethnic or racial origin, gender, sexual orientation, morals, name, age, marital status, religious beliefs, political opinions,

trade union activities, physical appearance, medical condition and/or disability.

### PROTECTIONS AGAINST HARASSMENT

In France, harassment is prohibited by national law and takes the form of both sexual and moral harassment.

Moral harassment is defined as repeated conduct which is designed to or which leads to a deterioration of the employee's conditions of work liable to harm his rights and his dignity, to damage his physical or mental health or compromise his career prospects.

Sexual harassment is defined as repeated statements or acts or pressure that are repeated or not of a sexual nature that violate a person's dignity because of their humiliating or degrading content or because they generate an intimidating, hostile or offensive environment, as well as pressure with the perceived or real aim of obtaining sexual favours for a person's own benefit or the benefit of a third party.

Sexual and moral harassment are both punishable by two years of imprisonment and a fine of EUR 30,000 (three years of imprisonment and a fine of EUR 45,000, where sexual harassment is committed by a hierarchical superior). In France, where harassment is perpetrated by an employee, both the employer and the employee are liable.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Under the current legislation, private companies and public offices with more than 20 employees must have workers with disabilities account for 6% of their total workforce. Employers are provided with three options to meet this target: (i) hiring disabled workers as employees, (ii) subcontracting workers from the sheltered sector, (iii) paying a contribution fee to AGEFIPH, which is an organisation dedicated to furthering professional inclusion of the disabled in the private sector.

### REMEDIES

Employers can initiate a non-judicial in-house inquiry if a victim of harassment brings to their attention, or if they suspect, an incident of discrimination, as they must guarantee a working environment free of such practices.

The right of alert of the employees' representatives in case of violations of human rights and freedoms



in the workplace entitles the representative to file an emergency petition for injunctive relief before the Labour court and applies to cases of discrimination.

Since 2004, a special body has been created that has an essential role in the fight against discrimination: the Defender of Rights. Any discrimination case, direct or indirect, prohibited by statute, law, or by an international convention to which France is a party, can be brought before the Defender of Rights. Its main task is to ensure the efficacy of the legal mechanisms prohibiting discrimination. Legal actions may also be brought before the Labour Court directly, by employees who allege discrimination.

### Other Requirements

Until recently, French labour law did not recognise quotas. However, this changed in 2021 with the “Rixain” law, which states that from 2027, at least 30% of the senior management positions (“postes de direction”) in big companies should be held by women, to reach 40% threshold from 2030 and onwards.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

French social protection is organised into four levels: 1. **Social Security** provides coverage for: i) illness, maternity, paternity, disability and death; ii) occupational accidents and diseases; iii) old-age benefits; and iv) family allowances. It is composed of various schemes involving the insured according to their professional activities, chiefly:

- the general scheme: it includes workers, students, recipients of certain benefits, and residents;
- special schemes: they cover employees who are not in the general scheme (e.g. civil servants, SNCF and EDF-GDF agents...);
- the schemes for non-agricultural employees: they separately cover the artisans, merchants or manufacturers and liberal professions to the pension insurance, the “sickness” risk is subject to joint management;
- the agricultural scheme: it ensures the welfare of farmers and farm employees. This social security system does not depend on the Ministry of Social Affairs, but on the Ministry of Agriculture.

2. **Complementary Plans** contribute supplementary coverage to the risks afforded by Social Security. Some are mandatory (supplementary pension for private sector employees) and others optional (mutual health organisations, insurance companies, pension funds).

3. **UNEDIC** (National Employment Union Industry and Commerce) administers the unemployment insurance programme.

4. **State Welfare** provides support to the poorest.

### Required Contributions

Social Security is mainly financed through:

- Social Security contributions;

- CSG (“Generalised Social Contribution”) – a specialised tax; and
- various other taxes collected by Social Security (e.g. “forfait social” tax; gross VAT on tobacco, pharmaceuticals, alcohol, health products; tax on company cars, tax on land motor vehicles; tax on salaries; etc.).

### HEALTHCARE AND INSURANCES

French law provides for a basic minimum indemnity and protection of employees. Quite often, collective bargaining agreements provide for additional protection or allowances.

### REQUIRED LEAVE

#### Holidays and Annual Leave

Employees are entitled to a minimum of five weeks’ paid holiday a year. In addition, there are approximately ten public holidays every year. The law and CBAs grant additional paid leave for employees who have reached a specific length of service and for family related events. Autonomous executives also benefit from additional days off.

Every employee is entitled to paid vacations by his employer, regardless of his age, seniority or type of contract (indefinite-term or fixed-term). The duration of paid vacations varies according to the acquired rights (legally 2.5 days of paid vacation per month, unless more favourable collective bargaining agreement provisions apply). The vacation dates are subject to the agreement of the employer.

Under the influence of the European Union law and following on from the Cour de cassation rulings of September 13, 2023, the French legislator has extended in April 2024 paid leave entitlements for employees on sick leave.

Every employee on sick leave earns paid leave entitlement, regardless of the duration of their sick leave, and those who have not been able to exercise their right to paid leave, due to their absence from work now, benefit from carry-over periods for earned but unused paid leave.

#### Maternity and Paternity Leave

The pregnant employee benefits from a maternity leave during the period, which is around the expected date of childbirth (there is a prenatal leave and postnatal leave). Its duration is variable, depending on the number of unborn children or already at charge (from 16 to 46 weeks). The Social Security Daily Allowance varies in function of the salary (from EUR 10.24 to EUR 100.36).

#### Sickness Leave

Where the employee is out of work for sickness, subject to compliance with certain formalities (notably for the employee to submit, within 48 hours, the sick slip to the Social Security office and

the employer) and satisfies the requirements, the employee is entitled to receive a daily allowance during his leave, after a three-day waiting period. This allowance will be directly paid to the employer in case of subrogation. The daily allowance paid for sick leave is 50% of the basic daily wage (on average, the Social Security Daily Indemnity is of EUR 43.40). After 30 days of sick leave, the daily allowance is increased to 66.66% of the basic daily wage, if the employee has at least three children. After 3 months, the daily allowance will be re-evaluated.

### Disability Leave

If an employee's work capacity and income have been reduced by at least 2/3, as a result of an accident or a non- occupational disease, the employee will be considered as an 'invalid' and he/she can obtain the payment of a pension disability to compensate for lost wages, by filing a demand before the CPAM (French Health Insurance).

If the accident or illness is work-related, the employee may receive, under certain conditions, a permanent disability pension.

The employee should be affiliated to the Social Security for at least 12 months on the 1st day of the month during which occurred the interruption of work followed by disability, or the recognition of disability status resulting from bodily premature wear.

In addition to the qualifying affiliation period, the employee should either have contributed on a salary at least equal to 2,030 times the minimum wage schedule during the 12 calendar months preceding the work interruption, or have worked at least 600 hours during the 12 months preceding the interruption of work or recognition of disability status.

Invalids are classified into 3 categories, depending on their level of disability, by the medical officer of the primary health insurance fund (CPAM):

- 1st category: invalid who is capable of remunerated employment;
- 2nd category: invalid who is absolutely unable to perform any occupation;
- 3rd category: invalid who is absolutely unable to exercise a profession and is compelled to resort to the assistance of another person to perform ordinary activities of life.

The amount of the disability pension received will depend on the category the person is in. Also, the category that has been determined is not definitive and may evolve.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The French retirement pension system of employees is structured into three components; the first two, the Basic retirement pension and the Complementary retirement pension are mandatory, hence, contributions are imposed on employees

and employers, while the third, Additional pension (when implemented by the employee, it is primarily of savings products such as life insurance, the popular retirement savings plan (PERP) or "Madelin contracts" for non- salaried workers) is optional.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Employment contracts are generally not required to be written, but certain forms of employment contract should be in writing (notably fixed-term contracts, part-time contracts and temporary employment contracts). Oral fixed-term contracts are unequivocally deemed to be indefinite-term contracts and oral part-time contracts are deemed full-time contracts.

### FIXED- TERM/OPEN- ENDED CONTRACTS

The indefinite-term contract is the typical form of employment relationship. As a rule, the validity of an indefinite-term contract is not subject to conditions regarding the content and form of the agreement. In that respect, French case law has held that a pay slip may be sufficient to formalise an indefinite-term contract.

A fixed-term employment contract is an employment contract entered into for a defined duration, set in advance by the parties. This kind of employment contract is very specific, notably as neither party may terminate it prior to its end, except in the event of an amicable separation, serious misconduct ("faute grave"), force majeure or if the employee finds alternative employment under an indefinite-term contract.

### TRIAL PERIOD

Rather than entering into the contract immediately, parties to the employment contract may agree to provide for a probationary period, which can only be renewed once and under condition, during which either party may terminate the employment contract without any formality. If both parties are satisfied at the end of the probationary period, the employment contract becomes definitive. The probationary period is governed by statute. The legislature has introduced a maximum length for the probationary period and a minimum notice period, which varies according to the categories of employees concerned. The trial period that may be mentioned in fixed-term contracts is fixed by the Labour Code according to the duration of the contract.

### NOTICE PERIOD

Except for specific exceptions (e.g. dismissals for serious or gross misconduct), the parties should

observe and cannot waive the required notice periods before an indefinite-term contract is terminated. The length of the notice period is generally determined by the national CBA. Employees who are dismissed or made redundant are entitled to payment in lieu of notice if they are not required to perform their notice period.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

The employer must ensure that the employee to be hired is authorised to work in France:

- where the employee is already in France, the employer will have to check that the employee has a valid residence permit allowing him to work in France, and keep a copy thereof;
- where the employee is not yet established in France, the employer should undergo a three-step process “of introducing a foreign worker in France” –
  - obtain from the French unemployment agency (“France Travail”) a document certifying that there are no workers available to fill jobs in the country;
  - file to the labour authorities (i.e. the Territorial Unit of DREETS) an application package;
  - inform the French Immigration Office (the Ofii) of the entry in France of an immigrant and pay the Ofii a fee.

An employer must ensure the validity of the work permit of the foreign employee he wants to hire (the work permit must be authenticated), by submitting a declaration of employment (by email or by post) to the Prefecture of the place of employment, at least 2 working days before the hire. Nationals of most countries of the European Union have the right to work freely in France, without a specific work permit. The only document required for their job is an identity card or passport to prove their nationality.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

It is not necessary to establish a local French entity in order to hire an employee. However, the foreign entity and the employee will have to be registered with the French social security office of Strasbourg, which is uniquely competent for such matters.

### LIMITATIONS ON BACKGROUND CHECKS

Background checks in France are limited to the strictly necessary verifications of a candidate's qualifications, experiences, and references. Criminal background checks are limited to certain professions that entail

security responsibilities or that involve working with children or sensitive information or materials. Credit background checks do not exist in France.

### RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

The employer can only collect information about candidates, which facilitates the assessment of their professional skills with regard to the position that is offered. These professional skills must be directly required for the position. This right to collect information should be balanced with the respect of the candidate's privacy.

Employers should run candidate selection tools (i.e. “recruitment methods or techniques of job applicants”) before the Works Council, for information.

Finally, all information collected on the professional background of a candidate from former colleagues, employees, clients, suppliers, etc. is legal as long as it is not unbeknownst to the candidate.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Whether it is a question of salary, qualification or classification, no employee may be the object of direct or indirect discriminatory measures because of age, sex, marital status, pregnancy, trade union or mutualist activities, political opinions, religious beliefs, origin, morals, sexual orientation, gender identity, genetic characteristics, particular vulnerability resulting from his or her apparent or known economic situation, physical appearance, his surname, place of residence, bank address, actual or supposed membership or non-membership of an ethnic group, alleged race, nationality, state of health, loss of autonomy, handicap, ability to express himself in a language other than French or normal exercise of the right to strike. Union discrimination is also prohibited. In addition, there may be no discrimination against an employee who has suffered, or refused to suffer, sexual or moral harassment or who has reported or testified to one of these acts. However, this does not prevent differences in treatment that meet an essential and decisive professional requirement, provided that the objective is legitimate and the requirement is proportionate. Differences in treatment based on age are permitted as are measures taken in favour of disabled persons, persons residing in certain geographical areas or persons who are vulnerable because of their economic situation, when they are intended to promote equal treatment.

### REMEDIES

The primary remedy is the payment of backpay. Any provision contained, in particular, in an employment



contract or collective agreement which, for the same work or work of equal value, entails lower remuneration for one or more workers of either sex than for workers of the other sex, is null and void. The higher remuneration is then automatically granted to the injured employee. When discrimination is linked to one of the prohibited grounds, the employer is liable for a fine of up to EUR 45,000 and three years in prison. The fine may be increased to EUR 22,500 for legal entities. Failure to respect equal pay for men and women is punishable by a fine (5th class contravention), applied as many times as there are employees paid under illegal conditions. This fine is doubled in the event of a repeat offence within one year. If the action is brought not on the basis of the specific text relating to equal pay, but on the basis of the general principle of professional equality between men and women, the employer is liable for a fine of EUR 3,750 and a maximum imprisonment of one year. Companies that have not (among others) implemented, as of 31 December of the year preceding the year in which the public-contract award procedure is launched, may not bid for public contracts.

## ENFORCEMENT/LITIGATION

Equality is assessed with regard to work of equal value, which requires a comparable set of professional knowledge, abilities derived from experience, responsibilities and physical or psychological burden. The work of male handlers loading and unloading trucks and the work of female workers sorting mushrooms is thus of equal value. For example, an HR manager, who contested the disparity in her compensation with that of her male colleagues, won her case, because the tasks performed, the hierarchical level, the classification, the responsibilities and the importance of the tasks to the company were comparable and since the demands of the positions represented a similar psychological burden. Differences in remuneration are possible if they are justified by objective elements, in particular the requirement of additional work demanded of men. For example, certain bonuses, linked in particular to the presence of children, may be reserved for women, especially in order to remedy de facto inequalities affecting a woman's opportunities or in application of provisions relating to the protection of pregnancy and maternity, paternity or adoption leave, and breastfeeding. An increase in professional experience or skills, in line with the requirements of the position and the responsibilities actually exercised, may justify better pay.

## OTHER REQUIREMENTS

In the absence of a union delegate or an industry agreement, it is up to the employer to take measures to achieve the objectives of professional. Failure to do so exposes the company to a financial penalty. Companies with at least 50 employees are required to calculate and publish a professional equality index, the purpose of which is, based on regulatory

indicators, to measure the pay gap between women and men. The result obtained by the company must be published annually, no later than 1 March of the current year, on the company's website, if it exists. The employer has a period of 3 years to correct any discrepancies observed. If, at the end of the three-year period, the results are still below 75, the employer may be subject to a financial penalty set at a maximum of 1% of the remuneration, subject to social security contributions paid during the calendar year preceding the end of the period.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Post-termination restrictive covenants are fairly common in French employment contracts, especially for senior employees or those with access to confidential information, senior responsibilities or contact with the clientele. In principle, restrictive covenants must be justified by the nature of the duties to be performed and proportionate to the aim that is pursued.

The following restrictive covenants are recognised and may be enforceable under the law:

- Non-compete clauses;
- Non-solicitation of customers;
- Non-solicitation of employees.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Under French law, restrictive covenants can be enforced in different ways depending on the situation:

- if the employee breaches the restrictive covenant, the former employer can issue a claim before the Labour Court in order to obtain an injunction to stop the employee from carrying out the activity. The former employer may also claim damages for the loss sustained. Instead of claiming damages, the employer may request the application of a penalty clause, if one is contained in the employment contract.
- if the employer breaches the restrictive covenant or if the clause is void, the employee may claim damages, if he has observed the provisions of the clause.
- if an employer knowingly hires an employee subject to a non-compete clause, the former employer has grounds for claiming damages against the employer breaching the non-compete undertaking.

## USE AND LIMITATIONS OF GARDEN LEAVE

The notion of “garden leave” as such does not exist under French law. Upon termination of employment, the employer may release the employee from working during all or part of the notice period and pay him an indemnity in lieu of notice, or alternatively require the employee to work until the end of the notice period.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

Employers can set out the general conditions of use and restrict access to the Internet in the workplace, but they have to be cautious, as all employees have a right to privacy, even at the workplace during working time. For example, the employer may access the employees’ professional emails under very restrictive conditions. Besides, employees benefit from the freedom of speech principle, within the company and outside of it, which can only be restricted for legitimate grounds.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE’S ELECTRONIC COMMUNICATIONS?

No specific French employment law provisions currently address issues raised by employees’ social media use. However, a company’s Works Council, if any, must be informed and consulted prior to the implementation of any means aimed at monitoring or controlling the employees’ activities.

### EMPLOYEE’S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Employers may limit the use of social networks by requiring that employees do not disclose confidential information or trade secrets by implementing an obligation of confidentiality or codes of conduct.

Concerning denigration, the issue regarding whether comments made on Facebook are public or private was considered by the French Supreme Court. From this case law, a comment on a social media may be considered private or public depending on the privacy settings of the relevant account. The more accessible a comment is, the more likely it will be deemed public and punishable, as the case may be.

Under restrictive circumstances, it may be permissible for the employer to prove the failure to comply with obligations arising from the employment contract by producing evidence from employees’ private social media accounts.

This case law has paved the way for a jurisprudential trend allowing evidence obtained illegally to be produced in civil trials from both sides by virtue of the right to evidence (Cass. Plenary Assembly, 22 Dec. 2023, n°20-20.648). Under certain conditions, clandestine recordings, messages from a private group, etc. can now be declared admissible by judges.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

In the case of an indefinite-term employment contract, there should be real and serious grounds for dismissal. There are two types of valid grounds: personal grounds and economic grounds.

### COLLECTIVE DISMISSALS

The redeployment efforts of a collective dismissal should be carried out throughout the group in France. The employer should offer individual and precise offers to the targeted employees. In case of failure to comply with these rules, the dismissal may be considered unfair by the Labour Courts.

### INDIVIDUAL DISMISSALS

The employee may request additional information on their dismissal within 15 days of receipt of the dismissal letter. The employee may dispute the grounds for dismissal before a Labour Court.

### IS SEVERANCE PAY REQUIRED?

The employee made redundant will receive a dismissal indemnity calculated based on the employee’s years of service, as well as any accrued and untaken paid vacation.

### SEPARATION AGREEMENTS

The legislator imposes that a separation agreement, other than a dismissal or resignation, should be done through a specific procedure called the “*rupture conventionnelle*” (mutually agreed termination), which is subject to specific regulations and conditions. Hence, the “*rupture conventionnelle*” is the only method to terminate an employment contract by mutual agreement.

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

When seeking remedies, the employee may request before the Labour Courts: the nullity of the dismissal (only possible where a text provides for a nullity, such as harassment or discrimination): as appropriate, reinstatement within the company or compensation of unfair dismissal; damages for unfair dismissal

(e.g. insufficient economic grounds or insufficient redeployment efforts in a redundancy, or gross misconduct not demonstrated): these damages are now set out in a binding grid containing minimum and maximum amounts, based on the employee's length of service; damages for irregularity of the dismissal (i.e. the dismissal procedure was not correctly followed): damages equal to a 1-month salary maximum in the event that the dismissal is considered as grounded; and damages for any additional demonstrated prejudice.

## **X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS**

### **BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS**

The French trade union movement is one of the weakest in Europe in terms of headcount. Only 8% of employees are members of a trade union. Currently, the representative trade unions at national and interbranch level are the CGT, CFDT, CGT-FO, CFTC and the CFE-CGC (i.e. the trade union dedicated to managers and executives). The largest employers' federations in France are the MEDEF ("Movement of the French Companies"), which totals more than 750,000 member firms and the CGPME ("French small and medium sized employers' organisation"), which represents the interests of 1,675,000 SMEs, registered in France.

### **RIGHTS AND IMPORTANCE OF TRADE UNIONS**

The most important prerogative of trade unions is the role they have in negotiating and concluding collective agreements with the employers' organisations. It used to be a monopoly, but the Macron reform introduced other ways to negotiate collective agreements. This exclusive right explains the paradox of the French industrial relations system: a low unionisation rate around 8% and a very high rate of collective bargaining coverage, close to 98% of employees due to the extension's mechanism of collective agreements and compulsory negotiations. In principle, managers and executives have the opportunity to join the trade union of their choice. However, the CFE-CGC (The French Confederation of Management and the General Confederation of Executives), which is one of the five major French trade union confederations, gathers 140,000 members and organises unions specifically for professional employees in management or executive positions. If need be, the CFE-CGC is considered as representative only for executive employees and managers. Consequently, the CFE-CGC is entitled to negotiate a collective agreement that covers all categories of staff but cannot sign it on its own.

## **OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES**

Currently, other types of employee representative bodies in France include the Works Council, Workers' Delegates, and Health and Safety Committee; these are now combined into the Social and Economic Committee: the CSE. It will also be possible, subject to the existence of a collective agreement, instead of a CSE, to implement a "conseil d'entreprise". This body would basically have the same prerogatives as the CSE but would, in addition, be able to enter into and revise collective agreements, instead of trade union delegates, which would no longer exist.

## **XI. TRANSFER OF UNDERTAKINGS**

### **EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING**

In France, an employee cannot object to a transfer of undertaking as the transfer is operated automatically. A refusal could constitute grounds for dismissal for disciplinary reasons. The automatic transfer concerns any kind of employment contract (fixed-term contracts, trial period contracts, suspended contracts for illness, etc.). Employees who enjoy a protected status (e.g. employee representatives) will also see their contracts automatically transferred, with their representative role intact; however, when the transfer concerns only part of a business (a partial activity transfer), their transfer should be authorised by the Labour Inspector.

The contracts will be transferred in their totality (seniority, remuneration, position, non-competition, etc.), as well as unilateral commitments and practices, such as payment of a 13th month premium. The applicable collective bargaining agreement will continue to apply for a maximum period of 15 months, in the event that the company to which the employee is transferred applies a different collective bargaining agreement.

Employees will continue to benefit from any existing profit sharing agreement unless the change in legal status of the employer makes the implementation impossible for the transferee. In that event, open negotiations should be conducted in good faith to reach a profit sharing agreement, with an obligation to reach an agreement.

Regarding pension rights, the transfer will have no impact on the social security system. However, the transfer of undertaking could require a harmonisation of the complementary system (managed by AGIRC/ARRCO pension funds). The rules of harmonisation depend on how the undertaking is transferred (merger, sale, etc.).



## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The employer who fails to respect this information obligation risks a fine of up to 2% of the amount of the sale. The successor has the obligation to maintain the transferred employees work contract and working relationship (i.e. company agreements, company benefits, etc.). Any modification will entail the agreement of the employee or a negotiation with the employee's representatives, as the case may be.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights under the law, regardless of any contrary language in their employment agreement. These minimum working conditions are set forth in the French Labour Code and the applicable Collective Agreement, among other sources.

### SALARY

As of 1 January 2024, the minimum gross monthly wage is EUR 1,766.92 (about USD 1,940) for a 35-hour workweek. All employees who are employed under an ordinary employment contract (either indefinite or fixed-term) are entitled to the minimum wage. CBAs also frequently provide higher minimum wages.

### MAXIMUM WORKING WEEK

Usually, employees work 35 hours a week. However, employers can agree on a longer workweek with their employees. In that case, any work over 35 hours a week is payable as overtime (although there is no entitlement to additional days off).

### OVERTIME

Only hours worked in excess of the statutory weekly working hours at the request of the employee's superior will be regarded as overtime. However, the employer has the duty to ensure that employees do not exceed the daily and weekly limits. Those who work overtime are entitled to compensatory payment involving a surcharge (which is generally 25% for the first 8 hours put in during the week, then 50%), and which cannot be less than 10%, of the employee's standard pay. Each overtime hour may either be paid or compensated with compensatory rest, i.e. every hour of overtime worked gives rise to either 1 hour of pay or 1 hour of rest, plus the relevant surcharge.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The employer's safety obligation is not limited to the prevention of occupational accidents and diseases. It is much broader and covers all risks to which the employee may be exposed at work, including psychosocial risks. This is a more stringent best endeavors obligation.

Professional risk prevention measures should be sought, employees should receive information and training about these risks, and the employer should be compliant with certain specific rules in the arrangement and use of premises to ensure the health and safety of the employee. For example, premises should be clean and clear of clutter, facilities and technical and safety devices maintained and checked regularly, the employees should have protection against smoking and loud noises, sufficient light, etc.

The employer should assess potential risks in a document called a single document occupational risk assessment (DUERP), including: 1) the choice of manufacturing processes, work equipment, the chemical substances or preparations; 2) the development or redevelopment of workplaces or facilities; 3) defining workstations; and 4) the impact of inequalities between women and men.

Mandatory for any business, this document includes: i) an inventory of the risks identified in each of the business units of work; ii) the classification of these risks; and iii) proposals for actions to be implemented.

The DUERP should be updated once a year, at a minimum.

### COMPLAINT PROCEDURES

The new Sapin II law expands extra-territorial reach for French prosecutors. The law applies fully to corruption by French companies overseas and foreign companies who have a presence in France. It should also be noted that the Sapin II law expressly provides for the possibility for employees to appeal to the Labour Court, by way of summary judgment, in the event of termination of the employment contract following the notification of an alert within the meaning set out by the law.



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# GERMANY

## I. INTRODUCTION

German employment law is divided into two areas: individual employment law and collective employment law. Individual employment law concerns relations between the individual employee and the employer, while collective employment law regulates the collective representation and organisation of employees as well as the rights and obligations of employees' representatives.

German employment law is not consolidated into a single labour code: the main sources are Federal legislation, case law, collective bargaining agreements, works council agreements and individual employment contracts.

### KEY POINTS

- Employees who are not from the EU/EEA require a residence title for the purpose of taking up employment.
- A statutory minimum wage of 12.41 EUR (2023/2024) per hour currently applies to all employees in all sectors of business. Aside from the statutory minimum wage, there are special regulations and collective bargaining agreements within certain sectors.
- Overtime pay is not expressly regulated by law, but is subject to the employment agreement, collective bargaining agreements and works council agreements.
- Trade union representatives support employees and works councils, but do not have participation rights within a company.
- Due to the high level of protection against dismissal, it is reasonably common for employment to be terminated by a separation agreement.
- Severance payments are paid if a number of conditions are fulfilled.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

The law provides comprehensive protection against discrimination (direct or indirect) on the basis of race and ethnic origin, gender, religion or belief, disability, age or sexual orientation. No discrimination may occur with respect to the conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity is and at all hierarchical levels, including promotion. Moreover, all employment

and working conditions, including pay, must be free from discrimination.

### PROTECTIONS AGAINST HARASSMENT

The law further protects the employee against discriminatory behaviour and harassment (violating a person's dignity and creating a hostile environment), especially sexual harassment.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

In accordance with the law, the employer has several organisational obligations to protect his employees from discrimination at the workplace. The employer is required to take the necessary safeguarding measures, point out inadmissible discrimination and protect employees against discrimination from another employee or any third person.

Additionally, the employer needs to establish a complaints body for victims of discrimination for pursuing their complaints. The employer must also train its employees in an appropriate manner in order not to discriminate against any other employees.

### REMEDIES

An employee who was discriminated against has the opportunity to register his/her grievances with the company's complaints body, if the discrimination relates to the employment relationship. Furthermore, the employee is entitled to directly pursue all remedies (damages, compensation, etc.) available to him/her under a claim of discrimination.

#### Other Requirements

In order to increase the number of women in management positions, a gender quota of 30 percent has been in force since 2016, for new supervisory board positions in companies which are listed or are subject to co-determination on board level.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

In Germany, employees belong to the national social security system by law. The statutory social security system is regulated in the Social Security Codes. It covers the following principal areas: health insurance, unemployment insurance, nursing care insurance, pension and accident insurance.

All salary payments are subject to tax and social security contributions (pension, unemployment, health and nursing care insurance). These must be withheld from an employee's salary by the employer and paid to the respective institutions.

In general, the employer and the employee each pay half of the social security contributions, and employers must pay their share in addition to the salary, based on the employee's gross salary with certain maximum amounts applying. Contributions to the employee accident insurance are made solely by employers.

## HEALTHCARE AND INSURANCES

The employee can choose between different statutory health insurances. Only employees with an income exceeding the annual remuneration thresholds (69,300 EUR in 2024) are exempt. They can become members of private health insurances. In both cases, the contributions are shared equally by the employer and the employee.

## REQUIRED LEAVE

### Holidays and Annual Leave

The number of public holidays vary from one federal state to another across Germany; although the minimum is 10 (e.g. Berlin, Lower Saxony) there may be as many as 12 public holidays (Bavaria, Saarland).

Every employee is entitled to annual leave of 20 days, based on a 5-day-week. This means that an employee can claim an annual leave of four weeks in a calendar year. However, most employers grant a longer annual leave; depending on the industrial sector, between 25 days and 30 days.

### Maternity and Paternity Leave

Female employees are entitled to paid maternity leave, which is the time period 6 weeks before and 8 weeks after giving birth. The maternity leave after the birth has been extended to 12 weeks in case of multiple births, premature births and disabled children. Payments to the employee during this period are made partly by the statutory health insurance provider and partly by the employer.

After the birth of a child, both male and female employees are entitled to a maximum of three years' parental leave per child. During this period, the employer is not obliged to make any payments to the employee. Employees, however, have a statutory right to work part-time (from 15 up to 32 hours per week; for children born before 1 September 2021 up to 30 hours per week) during parental leave, unless urgent business reasons prevent such part-time work. After expiry of the parental leave, the employee returns to their previous position.

Under the Maternity Protection Act, pregnant employees as well as apprentices, interns and students undertaking a mandatory internship,

enjoy special protection against dismissal during pregnancy and for four months after birth.

The employer is obligated to carry out a risk assessment not only for work performed by pregnant employees, but for all work conducted within the company. Necessary measures to protect pregnant employees must be implemented immediately after the employer was made aware of a pregnancy, and the employee must be offered an opportunity to discuss (further) adjustments to her working conditions.

According to a draft of the so-called Family Start Time Act, the non-birthing partner is to have a legal entitlement to 10 days of paid leave from work obligations after the birth of a child. This aims to achieve a shared, "partnership" distribution of tasks between the parents in the first few days after the child's birth. This is planned for 2024 or 2025.

### Sickness and Disability Leave

After four weeks of employment, the employee is entitled to continued payment by the employer in case of sickness, for a duration of six weeks. The regular payment, which the employee would have earned without sick leave, needs to be paid by the employer. In small companies with less than 30 employees, the employer may participate in an apportionment procedure, which allows for a repayment of sick pay. Generally, the statutory sickness allowances are paid in the amount of 70 % of the regular remuneration for a period of 78 weeks.

Since December 7, 2023, patients have been able to obtain sick notes by phone to relieve doctor's offices. The main requirements for this are:

- It must not involve severe symptoms.
- The patient must be generally known to the practice.
- The determination of incapacity for work must not be possible via a video consultation.
- An initial certificate issued by phone can last for a maximum of five calendar days.

Additionally, since December 18, 2023, parents of sick children can request a medical certificate from the pediatrician's office for up to 5 days over the phone.

The entitlement to children's sickness benefit or days off has increased to 15 working days per child and parent (up from the previous 10) or 30 working days for single parents (up from the previous 20). After six months of employment, a severely disabled employee may claim additional vacation in the amount of five working days, based on a 5-day-week.

### Other Required or Typically Provided Leave(s)

Any leave, other than the abovementioned statutory leaves (e.g. compassionate leaves, leave when moving) is subject to individual negotiations or is typically part of collective bargaining agreements/works council agreements.



## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The public retirement insurance system, company pension plans and private individual retirement investments are the three pillars of the German pension system. The public retirement insurance has always been “pay-as-you-go”, with the current pensions of the retired paid from the current premiums of the not yet retired. In view of demographic changes, pension payment levels are becoming difficult to maintain. Company pension plans have traditionally been designed to supplement statutory retirement insurance. Though company pension plans are not compulsory, they cover about three-fifths of the working population. The third pillar, individual retirement investments, is becoming more important and is subsidised by the government. Retirement used to begin at age 65 but is now gradually being increased to age 67.

### Other Required or Typically Provided Benefits

Different types of bonus payments and other benefits exist, all of which have to be negotiated individually or are typically part of collective bargaining agreements/works council agreements, such as a company car, car allowances, gym memberships, group accident insurances, “job ticket”, child care arrangements or allowances, or additional allowance for sick pay.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Employment contracts generally do not require written form in order to be valid. The newly introduced German Verification Act (NachwG), which implements the EU Directive on transparent and predictable working conditions (EU 2019/1152), provides for a verification and documentation obligation on the part of the employer since 1 August 2022. This means that the essential terms and conditions of employment must be set out in writing, signed by a representative of the employer (wet ink) and provided to the employee. Violations do not result in the invalidity of the employment contract but can be penalised with a fine of up to EUR 2,000.00 per case.

It is expected that the law will be amended in 2024 or 2025 to relieve the burden on companies. The amendment will make text form sufficient under the NachwG and for fixed-term contracts up to the standard retirement age. Text form includes e-mail and electronic signing.

### FIXED- TERM/OPEN- ENDED CONTRACTS

As a general rule, the employment contract is entered into for an unlimited period. A fixed-term contract is possible, provided the term is agreed upon in writing before the employment commences. A fixed-term contract ends automatically without written notice at the end of its term. A fixed-term employment relationship must be justified by objective grounds, some of which are set forth in statutory law (e.g. temporary increase in work volume, substitution of an employee during parental leave). If no objective grounds exist, fixed-term employment is limited to a maximum duration of two years, provided that no previous employment contract with the same employer existed. If the parties continue the employment after the expiration of the fixed-term contract, the agreement is deemed to be concluded for an indefinite period.

### TRIAL PERIOD

The employer and employee may agree upon a trial period, which is limited by law to a maximum duration of six months. Since 1 August 2022, Section 15 paragraph 3 of the German Act on Part-Time Work and Fixed-Term Contracts requires that a trial period agreed in a fixed-term employment contract has to be in reasonable proportion to the duration of the fixed-term contract and the type of work. Therefore, a six-month trial period may be unreasonable in this constellation. The notice period within the trial period is two weeks, unless otherwise agreed. The Dismissal Protection Act does not apply during the first six months of employment, regardless of whether the parties agreed upon a trial period.

### NOTICE PERIOD

The length of the notice period for the employer depends on the employee's length of service, ranging from 4 weeks for employees with less than 2 years' seniority, to 7 months for employees with more than 20 years' seniority. Unless otherwise stated in the employment contract, the extended statutory notice periods are only applicable to terminations by the employer, whereas the employee may terminate the employment with a notice period of four weeks to the 15th or the end of a calendar month. Most employment contracts align the notice periods for employees with the extended periods applicable to employers. Collective agreements may specify longer or shorter notice periods, whereas individual contracts of employment may only specify longer notice periods.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In principle, every employee who would like to work in Germany requires a residence title and a work permit before entering Germany. This does not apply to persons who are: 1) of German nationality;

2) a European Union national; 3) a national of a European Economic Area (EEA) member state (Iceland, Liechtenstein, Norway); or 4) a national of Switzerland. Since 1 March 2020, the general conditions for the immigration of skilled workers from third countries (countries outside the EU/EEA) have been pressed forward. As a result of the changes in the German Residence Act, the so called “job market test” is no longer required if an employment contract can be presented. In addition, skilled workers from third countries can now immigrate to Germany for a limited period of time to look for a job, provided they can prove they have the necessary German language skills and can secure their living.

### **Facilitations for Skilled Worker Immigration**

In implementing European requirements, the national legislator has expanded immigration opportunities for skilled workers. Since November 2023, several legal changes have been in effect, aimed at reducing bureaucratic hurdles in recruiting skilled workers. Notably, any degree is now sufficient to engage in any qualified employment.

Further legislative changes came into effect in March and June 2024. Individuals with at least two years of professional experience and a state-recognized professional qualification in their country of origin can work in Germany without the need for a lengthy recognition process of their qualification in Germany. Facilitations also apply to the implementation of qualification measures in Germany.

Additionally, the introduction of the so-called Opportunity Card is new. Using a points system, a simplified mechanism for the entry of qualified third-country nationals for job search purposes is being established.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

No. The employer will, however, be obliged under the statutory social security system to appoint a contact person in Germany, which can be an employee.

## **LIMITATIONS ON BACKGROUND CHECKS**

There are no specific statutory regulations on the legitimacy of background checks carried out by a private employer. However, there is complex case law on the question of which information an employer may legitimately request from a job applicant during the course of a job interview, which can be considered as a benchmark for the legitimacy of background checks, using other sources than the applicant. In essence, employers may only request such information that has a direct relation to the applicant's future tasks and responsibilities

in the particular job in question. The protection of data privacy of the applicant is of special interest during the hiring process. Personal data may only be processed for employment-related purposes where necessary for hiring decisions or, after hiring, for carrying out or terminating the employment contract.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

The employer has a significant interest in receiving as much information as possible about the future employee; however, the employer is only entitled to ask for information, which is necessary for entering into the employment relationship, e.g. qualifications that are required for employment. Questions concerning pregnancy, age, race/ethnic origin, sexual identity, religion, trade union affiliation or severe disability are generally not allowed in a job interview. The law to abolish unequal and unjustified treatment of employees based on certain criteria: race and ethnic origin, gender, religion or belief, disability, age or sexual orientation is of special significance during the hiring process; specifically as it restricts job advertisements and applicant selection (e.g. an advertisement for a “young team member” might indicate discrimination based on age). To avoid possible discrimination issues the employer should always base the rejection of an applicant on objective hiring criteria, such as job profile and required qualifications rather than on personal characteristics of the applicant. Furthermore, during the period of claims for damages due to discrimination, the employer should be able to prove his selection process and therefore should keep all documents.

# **VI. PAY EQUITY LAWS**

## **EXTENT OF PROTECTION**

To support gender equality regarding remuneration, the statutory minimum wage applies to all employees in all sectors of business and therefore, provides minimum equal payment. Additionally, the Remuneration Transparency Act provides an individual right to information on remuneration. This right is granted to all employees working in establishments with more than 200 employees. However, the Act does not provide regulations on how to enforce claims for equal payment based on such information.

In May 2020, the highest labour court in Germany ruled that freelancers may also have the right to information on remuneration, if the freelancer qualifies as an employee in accordance with aspects of equal treatment. Whether this is the case, must be assessed on the basis of the circumstances of each individual situation.

## REMEDIES

The employee may, if necessary, challenge the remuneration based on the general principles of discrimination law and/or the general principle of equal treatment in order to have the perceived disadvantage reviewed in court and, if necessary, corrected.

Moreover, the employee may also assert claims for damages or remuneration to compensate for the disadvantages sustained as a result of their unequal treatment.

It is possible that the employee may rely on a presumption of proof due to the information received, on grounds of the Remuneration Transparency Act.

Any employer who fails to comply with the applicable statutory minimum wage, may be fined pursuant to the German Minimum Wage Act.

## ENFORCEMENT/LITIGATION

All available relief measures, procedures and tangible employment actions are provided by the Minimum Wage Act. In the vast majority of cases, employees are unable to prove a violation of the principles of non-discrimination and equal treatment. Consequently, there is a notable absence (to date) of any meaningful litigation having to do with equal pay premised on the Remuneration Transparency Act. However, as the Act is a fairly recent addition to German labour law, the legal consequences (an uptick in new litigation) may take time to materialise.

## OTHER REQUIREMENTS

An employer located outside of Germany is required to register certain information, in writing, with the relevant customs authority, if it employs workers in specific business sectors – including, but not limited to the construction, catering and hotel or facility cleaning sectors.

Employers with more than 500 employees and which are obliged to provide a management report pursuant to the German Commercial Act, are required to include a detailed report on equality and equal pay every three/five years, which is to be published in the Federal Gazette.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Under German law, the freedom to include restrictive covenants in an employment agreement is limited by statutory law. If the justified scope of the post-contractual restrictive covenant is exceeded, the employee may choose whether to adhere to the legitimate part of the restrictive covenant and to be compensated or whether to ignore the restrictive

covenant overall, without being compensated. Therefore, the content of restrictive covenants must be drafted very carefully.

The following restrictive covenants are recognised and may be enforceable under the law:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees (also called non-poaching covenants).

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

If the restrictive covenant is agreed upon lawfully, it can be enforced by the labour courts. There is a possibility of obtaining injunctive relief, whereby the employee can be forced to stop any competing activities. Furthermore, the employer is not obligated to pay any compensation during the time of violation of the restrictive covenant. The employee has to compensate the employer for any damages which result from the violation of the restrictive covenant. However, in most cases, it will be difficult for the employer to demonstrate and prove the amount of the damages. The parties also have the opportunity to agree upon a contractual penalty for each violation. This has the advantage that the damages incurred by the employer do not need to be demonstrated, as the amount of the contractual penalty is realised upon any violation.

## USE AND LIMITATIONS OF GARDEN LEAVE

The employee has a right to work for the employer and therefore cannot be released unilaterally by the employer without a justified reason (criminal acts of the employee, concerns of the employer regarding the protection of its business and trade secrets or any competing acts of the employee). In practice, employees are nevertheless often released from their duty to work after a termination notice until the end of the applicable notice period. During such release, the contractual remuneration of the employee needs to be paid. The employer is, however, entitled to offset any outstanding vacation against the release. Generally, during the time of release the employee may not perform any competing activities as the employment relationship is still ongoing, and the statutory non-compete still applies. However, in case of an irrevocable release, the employer should explicitly state that the non-compete shall continue to exist. In theory, employees can challenge garden leave through an interim injunction, but in practice this rarely occurs.

# VIII. SOCIAL MEDIA AND DATA PRIVACY



## RESTRICTIONS IN THE WORKPLACE

The employer is entitled to decide whether or not and to which extent the employees may use the company Internet, telephone or e-mail system for private matters, within or outside of the working hours. Without permission, the employee is generally not entitled to use the Internet for private matters. The Federal Labour Court held that even without an explicit prohibition, employees may not assume that the employer will tolerate private use. If the employee violates the prohibition of private use of work equipment, the employer is entitled to issue a warning and even to terminate the employment contract, depending on the circumstances.

In practice, many employers permit the private use of Internet to a reasonable extent. However, even in case of permission, the use of the Internet for private matters should be restricted regarding the content and the time of use. We strongly recommend prohibiting the private use of the employee's company e-mail address, as otherwise monitoring or accessing the employee's company e-mail account may be very difficult, or may be a criminal offence, even where the employer has a legitimate interest in such access (e.g. when the employee is off sick, on vacation, has left the company, etc.).

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The employer's rights in this respect depend greatly on whether private use is allowed or not. If the employer has prohibited the private use, the content of an employee's electronic communications can be subject to monitoring activities by the employer, unless such communications are obviously private. If the private use is allowed or tolerated, the employer may be qualified as a provider of telecommunication systems, such being subject to stricter laws, including criminal prosecution for accessing or ordering third parties to access employees' communications beyond what is necessary for security reasons. As long as this question has not been answered by a German court, we recommend not monitoring the use of an employee's electronic communications.

To be able to control the usage, the private use of Internet and e-mail should be made subject to the consent of the employee. In case the private use has been prohibited, the employer may spot check whether this prohibition is being observed. The employees will have to be made aware of these controls, and certain procedures and steps have to be complied with.

The key principle of the Federal Data Protection Act and the General Data Protection Regulation (GDPR)

is that processing of personal data is prohibited unless expressly permitted by law, a works agreement or a collective bargaining agreement.

Furthermore, it is still possible for an employee to give his/her consent to the specific data processing. Consent given under prior law will only remain valid insofar as such consent meets the requirements of the current regulations. In particular, the consent has to be separate from other terms, and the employer has to inform the employee about the purpose of the data processing, as well as the right to revoke the consent with future effect and must be done in text form. In general, employers have to make sure that no 24/7 monitoring will occur. Monitoring of the employees requires an overall balance of interest between the privacy rights of the employee and the business needs of the employer.

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

The employee is obligated not to violate the justified interests of the employer, even during their free time. This means that the employee is not entitled to disparage the employer towards any third person or on social media. Furthermore, the employee is obliged to settle any disputes with the employer internally, before leaking out internal information, especially to the media. In addition, under the law the employee is obliged to keep business and trade secrets confidential. Such confidentiality obligation has effect during the employment relation and also after its termination. If the employee violates this obligation, the employer is entitled to claim damages and, if appropriate, to terminate employment. Under certain circumstances violations may even be a criminal offence.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUNDINGS FOR TERMINATION

Under German law, the employment relationship can be terminated by mutual consent, by expiry of a fixed-term contract or by notice given by one of the two parties. As to the general protection, the freedom of the employer to dismiss an employee is substantially restricted by the Dismissal Protection Act ("DPA"), which applies if: 1) a business establishment has generally more than ten employees; and 2) the employee has worked in the same company or business establishment for six months without interruption.

## COLLECTIVE DISMISSALS

Dismissals by reason of redundancy are considered ordinary dismissals under the DPA. In addition, specific rules apply if the dismissals form part of a so-called mass redundancy of a certain scale; e.g. prior notice must be given to the competent employment agency and a violation of this formality will result in dismissals being void. In case of a so-called operational change of business (e.g. closure of the business), collective dismissals may, in addition, require the negotiation of a social plan and the attempt to negotiate a reconciliation of interests with the works council, if the undertaking employs more than 20 employees. Certain reprieves exist during the first four years of a company's existence.

## INDIVIDUAL DISMISSALS

If the DPA applies, a termination is only legally effective if it is "socially justified". A termination is justified only if it is based on reasons related to i) the person; ii) the conduct of the employee; or iii) urgent operational requirements which preclude the continued employment of the employee in the undertaking.

Notice must be given in writing (wet ink signature) and signed by a duly authorised representative of the employer, in order to be legally effective. All other forms of notice (i.e., those given orally or by e-mail or fax) are void. Terminations without information/hearing of the works council (if in place) or the representative body for severely disabled persons (if in place and in case of a termination of a severely disabled person) are also void.

## IS SEVERANCE PAY REQUIRED?

Severance payments are paid at the end of employment in the following cases: 1) the employment agreement provides for a contractual severance payment (which is very unusual); 2) the parties agree upon a severance payment (in or out of court) to settle a termination dispute; 3) the court dissolves the employment against payment of severance if it finds that despite the invalidity of the termination, continued employment would be intolerable either for the employer or the employee; or 4) a social plan concluded with the works council in connection with a collective redundancy provides for severance payments.

## SEPARATION AGREEMENTS

Due to the high standards of protection against dismissal, it is not uncommon for the employment to be terminated by contract between the employer and employee, i.e. a separation agreement. This may occur at any time with or without severance payment. The provisions on protection against unfair dismissal do not apply in such cases. The employer will generally offer a severance payment to induce the employee to accept the termination by agreement.

With respect to age discrimination, particularly regulations in social plans compensating for

disadvantages to older employees, need to be drafted with due care. The age of an employee may also have an impact on negotiations, as older employees may find it more difficult to find new employment and therefore typically ask for higher severance amounts.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

As there is generally no statutory entitlement to severance payments in Germany, the employee can only claim reinstatement. The burden of proof regarding the validity of the termination is on the employer, and in practice it is often difficult to establish the social justification for the dismissal. If the termination is deemed invalid, the employee returns to their position. In practice, most dismissal protection proceedings are settled in exchange for a severance payment.

## WHISTLEBLOWER LAWS

In the past, there has been no general legislation covering whistleblowing in Germany. The Whistle-blower Protection Act, which is based on the EU Whistle-blower Directive 2019/1937, recently implemented general rules regarding whistle-blowers.

Whistle-blowers can use reporting units set up specifically for this purpose to report violations of national and European law that occur in connection with their employment relationship. Employers with more than 50 employees must set up internal reporting units for this purpose. The internal reporting units can be operated by the employer itself. Trained personnel should handle incoming reports. The group of persons who may become aware of the reports should be kept as small as possible for data protection reasons. Alternatively, the internal reporting unit can also be provided by external service providers. Independent of the internal reporting units, employees can also contact the external reporting unit at the Federal Office of Justice.

If a report is received, the reporting unit has seven days to acknowledge receipt of the report. It examines the validity of the allegation and the extent to which it falls within its factual scope. In doing so, the whistle-blower may be consulted for further information. If there are indications and/or evidence of the violation, internal investigations may be conducted or be forwarded to the competent authorities. The whistle-blower is notified of the further course of proceedings within a three-month period. The reporting unit is obliged to follow up every report in this way. It should also do so in cases of anonymous reports, although the legislator has refrained from imposing an obligation to process anonymous reports.

In the past, whistle-blowers did not enjoy any special protection. Under the new HinSchG, a

prohibition of discrimination against whistle-blowers must be observed. As a consequence, employers always bear the burden of proof that a reprisal (e.g. dismissal) of a whistle-blower has not occurred as a result of the whistle-blower's report.

Furthermore, in certain business sectors, special legal provisions exist, such as e.g. in the financial services sector. The Trade Secrets Act, implementing the European Directive on the Protection of Trade Secrets, has legally defined the term "trade secret" for the first time, focusing primarily on objective measures (with newly enhanced requirements) for the protection of sensitive trade secrets. Trade secrets will only be safeguarded if the owner has taken "confidentiality measures appropriate for the circumstances".

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

In general, the main function of trade unions is to conclude collective bargaining agreements. Trade union representatives also support employees or the works council (e.g. by giving legal advice and representing employees before the court), but do not have participation rights within a company. Employers' associations are mostly organised by industrial sectors as well as by region, with national and state boards. They are generally the counterpart of trade unions when negotiating and concluding collective bargaining agreements.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

Trade unions can conclude collective bargaining agreements with either a single employer or an employers' association. Although the unionisation rate in Germany is low, with about 20 percent of the employees organised, the collective bargaining coverage is usually around 80 percent. In the event that several collective bargaining agreements apply in one establishment, the agreement concluded with the union that has the highest number of members among the employees in the establishment shall prevail. Smaller unions also represented in the establishment are only entitled to assume this same agreement for their members, so that only one collective bargaining agreement will be in place in an establishment. The Federal Constitutional Court held that these legal principles are only "largely" in line with the German constitution. Therefore, the German legislator implemented a regulation in 2018, according to which the agreement concluded with

the smaller union shall also apply, if the interests of the respective union were not taken into account, seriously and effectively, at the time the agreement was reached with the union that has the highest number of members among the establishment's employees. However, this new regulation has been criticised by organised labour as insufficient to protect smaller unions.

The main representation of employees in Germany is guaranteed by the works council. A works council however, is only established upon the initiative of the employees or a union, which is represented in the company. The works council represents all employees of a business site, except executive employees, and has initiative, participation and co-determination rights in personnel matters (recruitment, transfers, dismissal), social matters (working time, remuneration schemes, use of IT systems) and economic matters (operational changes). Furthermore, the works council can conclude works council agreements with the employer on matters such as, e.g. working conditions and remuneration schemes. Works council agreements have an immediate and binding effect on the individual employment in the same manner as statutory law.

At the end of June 2024, the Bundestag passed an amendment to the law on the remuneration of works councils. The prohibition of discrimination and preferential treatment of works council members will to be specified in law, along with adjustments to works council remuneration, such as minimum remuneration.

### OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

In stock corporations, partnerships limited by shares and limited liability companies with more than 500 employees, one third of the members of the **supervisory board** must consist of employee representatives who are directly elected by the employees.

If a business site has at least 5 employees, who are below the age of 18 or are trainees below 25 years of age, a **representation body for young employees and trainees** can be established.

Furthermore, in companies with more than 100 employees, an **economic committee** will be established, if a works council exists,

In companies with more than 10 executives, an **executive committee** can be established; the committee is comparable to a works council, but with limited rights and possibilities.

In any company with more than 5 disabled persons or disabled persons with equivalent status on a long-term basis, a **representation body for disabled employees** can be established to support the integration of severely disabled persons, to



represent their interests as well as to advise and help them.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

All of the transferor's employees automatically transfer to the transferee, with the terms and conditions of their employment contracts and their seniority remaining intact. Prior to the transfer, each affected employee must be informed in writing about the transfer, its reasons, the background, the social and legal consequences and any further measures planned by the transferee.

The employee is entitled to object to the transfer of employment within one month from receiving a correct and complete information letter, without giving reasons for their objection. If the information letter is not in line with legal requirements, the right to object may only be forfeited years after the transfer. In case of an objection, the employment will continue with the transferor. If the transferor is no longer in the position to offer a job to the employee, a dismissal for operational reasons may be socially justified.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The transferee is bound by all rights and obligations resulting from the employment contracts in existence at the time of the transfer and is also liable for pension commitments made by the transferor to the employees affected. However, the transferee is not obliged to treat the employees transferred and its other employees equally. A dismissal is invalid if the dismissal is based on the transfer.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The terms and conditions of employment (such as maximum working hours, minimum paid vacation and sick leave) are regulated by statutes, collective bargaining agreements and works council agreements. The individual employment agreement cannot deviate from these provisions to the detriment of the employee. The rights of employees who are only temporarily sent to work in Germany are generally determined by foreign employment law.

### SALARY

A statutory minimum wage of 12.00 EUR per hour applies to all employees in all sectors of business. Employees under 18, trainees and interns are exempted from the regulation. Violations by employers of the obligation to pay minimum wages can result in fines of up to EUR 500,000. The minimum wage shall increase to 12.41 EUR per hour as of 1 January 2024 and to 12.82 per hour as of 1 January 2025. Aside from the statutory minimum wage, there are special regulations and collective bargaining agreements within certain sectors, e.g. the construction sector. Most of these regulations contain a minimum wage above 12.00 EUR per hour. The maximum monthly remuneration for mini jobs increased to EUR 520.00 due to the increase of the minimum wage to EUR 12.00. The Vocational Training Act provides a statutory minimum salary of 620 EUR monthly in the first year of training. Additionally, the monthly minimum salary increases by 18 % in the second year of training, up to 40 % in the fourth year of training.

### MAXIMUM WORKING WEEK

The statutory maximum working time is 8 hours per day from Monday to Saturday. Working on Sundays and public holidays is generally forbidden, unless explicitly permitted by statutory law. The statutory maximum weekly working time is 48 hours. The regular daily working time may be extended up to 10 hours, provided that on average 8 hours per working day are not exceeded within a reference period of 6 months or 24 weeks. An uninterrupted rest period of 11 hours after daily work must be guaranteed. There are no opting-out provisions under German law.

### OVERTIME

For regular employees, it is not possible to deem any overtime compensated by the regular remuneration. However, it is possible to contractually agree that overtime of 10 – 20 % of the regular working time shall be deemed as compensated by the regular remuneration. For board members and managing directors, any overtime worked is generally covered by their normal salary.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

As the employer has the organisational control of its premises, and the employees are exposed to dangers of the workplace, the employer is obliged to provide a healthy and safe workplace. The employer therefore is obliged to set up and maintain all rooms, devices and equipment and to organise the work in a way that the employees are protected against any possible harm. However, the regulations on a healthy and safe workplace depend on the type of industry sector and on the degree of danger faced in the specific workplace. Fulfilment of the applicable



health and safety regulations are monitored by the administrative authorities.

## COMPLAINT PROCEDURES

If the employer does not fulfil the rules of occupational safety, the employees are entitled to refuse to work at the workplace without losing their claim to remuneration. Furthermore, the employee is entitled to demand that health and safety regulations are observed and may claim compensation for any damages. Also, the works council and the German administrative authorities may insist on the fulfilment of applicable health and safety regulations.



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## I. INTRODUCTION

In December 2024, Hungary had roughly 9.5 million inhabitants. The employment rate of the inhabitants between the ages of 15 and 64 was 75.1 %, and the unemployment rate was 4.4%.

Hungarian labour law aligns with European standards, requiring only minimal content for employment contracts to be valid. In international comparison, Hungarian labour law is still pro-employee, but the legislation has included several flexible, pro-employer elements in the last decade.

### KEY POINTS

- Contracts are generally indefinite, but fixed-term contracts are permitted with some safeguards.
- The primary source of labour regulations is statutory law. Still, case law, particularly that of the Supreme Court, significantly impacts applying labour and employment law in practice.
- Collective bargaining plays a limited role, and the number of collective agreements remains low (today, only about 18 % of employees are covered by collective agreements).
- Statutory minimum wages are set by government decree, with different levels applying to those with at least secondary education.
- Family-related leave entitlements in Hungary are generally longer than in most EU countries, and employees enjoy relatively strong protection under labour law.
- Working-time regulations are strict and protective for employees.
- Job security is relatively high; employers must provide detailed reasoning when terminating employment.
- There is a general cap on claims for lost income in unlawful employer termination cases set at 12 months of salary. Since the introduction of this cap in 2013, the number of employment-related legal disputes has decreased by approximately 50%.
- Non-EU and non-EEA citizens require residence permits to be employed in Hungary. Obtaining a residence permit involves a complex process, with conditions varying by citizenship, type of activity, qualification, and special status of the employer. Employers must demonstrate efforts to fill the position locally before hiring third-country citizens.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Hungary's anti-discrimination laws are rooted in the Fundamental Law and detailed in the Equal Treatment Act, which applies across all legal areas, including labour law. Employers must ensure equal treatment throughout employment, including hiring and termination. The Labour Code also addresses equal pay.

### PROTECTIONS AGAINST HARASSMENT

The Equal Treatment Act offers broad protection, including an open-ended list of protected characteristics such as family status, social origin, and employment type. It covers direct and indirect discrimination, harassment, segregation, and retaliation. Exceptions are allowed if justified by the job's nature or organisational ethos.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Harassment is defined as behaviour violating human dignity, connected to protected characteristics, and creating a hostile environment. Employers are liable for failing to address harassment. Victims can file complaints with authorities, and employers must protect employees from psychosocial risks.

### REMEDIES

Employers must provide reasonable accommodations for employees with disabilities, adjusting work environments and tools. Financial support is available for these adaptations. The recruitment process must also be accessible to individuals with disabilities.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

Hungary's social security system provides coverage for sickness, maternity, pensions, workplace accidents, unemployment, and family support. All employees and self-employed individuals must contribute, with employers paying a 13% social contribution tax and employees facing deductions totalling 33.5% of their gross wages. The system consists of five branches: pensions, healthcare, unemployment insurance, family support, and social assistance. Social insurance coverage is automatic upon employment, with employers responsible for registration.



## HEALTHCARE AND INSURANCES

Hungary has a single, compulsory health insurance system, funded through employer and employee contributions. Those making contributions receive full benefits, while non-contributors such as minors, pensioners, and low-income individuals qualify for non-cash healthcare services. Employers must declare employees to the tax authority, which tracks insurance rights. Unemployment insurance is also contribution-based, offering support through active and passive labour market programs.

## REQUIRED LEAVE

Employees are entitled to at least 20 days of annual leave, increasing with age and family responsibilities. Employers schedule vacations but must allow employees to take at least seven days of their choice. Leave generally cannot be carried over except in limited cases. Hungary also recognises 11 public holidays per year.

Maternity leave lasts 24 consecutive weeks, with two weeks mandatory covered by the national social security system. Paternity leave provides 10 working days, partially paid by the employer and reimbursed by the state. Parental leave grants 44 working days.

until the child turns three, provided the employee has at least one year of service. Sick leave entitles employees to 15 days per year, paid at 70% of their absence allowance.

Unpaid leave is available for childcare until the child turns three or, in cases of severe disability, until the child turns 10. Employers cannot dismiss employees during maternity, parental, or sick leave. Annual leave continues to accrue during these absences.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Hungary operates a state-funded pay-as-you-go pension system, covering employees, unemployed individuals, and those receiving certain childcare benefits. Women may retire early with full benefits after 40 years of eligibility. Pensioners in the private sector can work without income restrictions, while public sector pensioners may face limitations. Survivors' benefits support widows, orphans, and dependent parents.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Employment contracts in Hungary must be in writing and specify at least the base salary and job position. If not detailed, the Labour Code applies, assuming a permanent, full-time contract.

Only employees can challenge the lack of a written contract within 30 days of starting work.

## FIXED-TERM/OPEN-ENDED CONTRACTS

Contracts can be indefinite or fixed-term, with fixed-term contracts not exceeding five years. For third-country nationals, fixed-term contracts typically last one to three years. Terminating fixed-term contracts is more complex than indefinite-term contracts.

## TRIAL PERIOD

The maximum trial period is three months, with proportional reductions for shorter contracts. Executives may have longer trial periods by agreement. Both parties can terminate without notice during this period.

## NOTICE PERIOD

Employees must provide a 30-day notice, extendable up to six months by agreement. Employers' notice periods increase with service length, up to 90 days after 20 years. Employers must release employees from work for at least half of the notice period during ordinary terminations. Specific conditions apply to terminations following certain leaves.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

EEA nationals can work freely, but third-country nationals face strict regulations. Since 2024, work permits have been split into two categories: guest worker permits (for lower-skilled roles, with limited rights and a 35,000-person annual cap in 2025) and highly skilled worker permits. Currently, only Georgia, Armenia, and the Philippines qualify as sending countries for guest workers, though this may expand. Employers must report labour shortages before hiring third-country nationals unless the job falls under an exemption. Work permits last up to two years, but refugees, permanent residents, and those with EU free movement rights do not require one.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers can hire in Hungary without a local entity, but tax and permanent establishment risks should be assessed. While parties can choose governing law under Rome I Regulation, Hungarian mandatory labour laws may still apply. Posted workers are subject to EU rules, and if an employer has a local presence, Hungarian industrial relations laws must be followed.

## LIMITATIONS ON BACKGROUND CHECKS

Employers cannot conduct background checks without an employee's prior consent, unless required by law for specific roles. Data requests must be job-related and necessary for employment. Social media screening is allowed, but only if disclosed in advance. Automated decision-making affecting employment status is strictly regulated. Criminal record checks are highly restricted and only permitted for sensitive roles (e.g., working with minors, handling classified information, or hazardous materials). Unlawful background checks can lead to data protection fines or civil lawsuits for violating employee rights.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Employers must avoid discriminatory questions about private life, family status, religion, or political beliefs. Some exceptions apply if the question serves a legitimate job-related purpose (e.g., physical fitness for certain roles). Salary history questions will be banned under the 2026 EU pay transparency directive. Job postings must clearly identify the employer, and recruitment agencies must inform applicants where their CVs are sent. Data protection rules require employers to disclose the purpose and duration of candidate data processing.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Hungarian law requires equal treatment in remuneration, considering factors like work nature, quality, conditions, qualifications, effort, experience, responsibility, and market conditions. Wages include all monetary and in-kind benefits provided by the employer.

### REMEDIES

Individual remedies for wage disparities due to unequal treatment can only be pursued through court proceedings. Compensation for wage differences can be claimed retroactively for up to three years.

### ENFORCEMENT/LITIGATION

There are few cases related to equal pay violations, largely due to claimants' limited ability to assert their rights. Since 2013, only a few cases have reached the Supreme Court, focusing on equal work rather than work of equal value.

### OTHER REQUIREMENTS

Currently, there are no transparency or affirmative action obligations for employers. However, this will change with the implementation of the EU Pay Transparency Directive, which will introduce new requirements.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Hungarian law permits employers to impose restrictions on employees both during and after their employment, provided that these restrictions comply with legal requirements and, where applicable, are accompanied by compensation.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Non-compete agreements are enforceable before labour courts, but their validity depends on the employer fulfilling its obligation to pay the agreed compensation. If the employer fails to provide the required payment, the employee is no longer bound by the restriction. If the employee breaches the non-compete clause, they forfeit their right to compensation, and the employer may reclaim any payments already made or withhold future payments. In addition to these remedies, the employer may claim damages for losses caused by a breach of the non-compete agreement.

### USE AND LIMITATIONS OF GARDEN LEAVE

Hungarian law does not formally recognise garden leave as a distinct legal concept, but similar mechanisms exist. Employers terminating an employee for organisational reasons must release them from work for at least half of the notice period. In any case of termination, employers may choose to fully release the employee from work for the entire notice period, thereby restricting their access to sensitive company information while still maintaining the employment relationship. These obligations are often explicitly included in termination or separation agreements when the employer chooses to release the employee from work.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

Employers can set policies restricting internet usage for personal purposes during working hours. These policies can limit time spent online or block specific websites. These policies should be clearly outlined in employment contracts or workplace policies.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Employers can monitor employee behaviour related to the employment relationship, including internet usage, but it must not violate human dignity or privacy. Employees must be informed in advance about the technical tools used for monitoring, and employers must comply with data protection regulations.

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

### Disparage the Employer

The Hungarian Labour Code broadly prohibits actions that jeopardise the employer's legitimate economic interests and extends the "loyalty" obligation beyond working hours, prohibiting behaviours that directly jeopardizes the employer's reputation, legitimate economic interests, or the purpose of the employment relationship, in which context, the employee's job role and position within the organisational hierarchy are important factors.

The Labour Code specifically addresses the right to freedom of expression, stating that it cannot be exercised in a manner that severely damages or endangers the employer's reputation, legitimate economic, or organisational interests. Additionally, the clause of the Labour Code, which limits personal rights, applies when restricting employees' freedom of expression.

Freedom of expression in the workplace is subject to stronger limitations. For example, statements aimed solely at damaging the employer's reputation, business standing, or market and commercial perception, using destructive language, causing other legal harms, or openly criticizing, questioning, or undermining the values or value-based beliefs represented by the employer are not protected. In any other cases suppressing the freedom of expression is prohibited according to the Labour Code as it is considered as abuse of power.

### Divulge Confidential Information

Employees are obligated to keep business secrets confidential and cannot share information acquired through their work that could harm their employer or others. This confidentiality does not apply to public data or legally required disclosures. According to the Hungarian Act on Protection of Business Secrets (Act LIV of 2018), a business secret is a fact, information, other data, or compilation thereof that is associated with economic activities, kept confidential — either in its entirety or as a sum of its elements that

are not generally known or easily accessible to persons engaged in the relevant economic activity. Consequently, it has economic value. The holder of the secret takes reasonable steps to maintain its confidentiality, as generally expected in the given situation. Sharing such information with third parties, like clients or colleagues, that could cause harm is considered a breach of duties.

### Consequences to employees

The employers can terminate the employment contract without a notice if the other party acts in a manner which wilfully or by gross negligence breaches their primary employment obligations or otherwise demonstrates a behaviour that makes the continuance of the employment impossible. Employees are liable to damages as well, with no cap in case of gross misconduct or wilful activity.

### General guidelines and business practices

According to the relevant case-law, using a colleague's computer for personal purposes, such as browsing non- work-related websites, can be considered a violation of duties that may justify termination. In particular, actions that are detrimental to the employer's reputation or financial interests, including improper use of company resources or actions that could harm the company's image, may be grounds for dismissal. This includes situations where an employee's conduct — such as posting content on social media while representing the employer — could be viewed as tarnishing the employer's business reputation, even if the employee is acting outside of working hours.

In such cases, the employer's right to protect its legitimate economic interests and reputation outweighs the employee's freedom of expression, especially when the employee's actions endanger or severely harm the company's standing in the market or with clients.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

Employment contracts can be terminated based on clear, truthful, and justified grounds. Employers can dismiss employees with notice due to misconduct, incapacity, or organisational reasons, with the latter being the least scrutinised by courts. Fixed-term contracts can be ended early without cause, but the employer must compensate the employee for the remaining term, capped at 12 months. Termination without notice is allowed in cases of serious misconduct or gross negligence, provided it is exercised within 15 days of discovery.



## COLLECTIVE DISMISSALS

A collective dismissal occurs when a significant number of employees are terminated within 30 days for operational reasons. Employers must notify the works council 15 days before making a final decision and inform labour authorities at least 30 days before issuing termination notices. Employees affected must receive notice at least 30 days before termination. Failure to comply with these procedures can result in wrongful termination claims, requiring compensation of up to 12 months' salary, and labour authority fines of up to €1,700 for reporting failures.

## INDIVIDUAL DISMISSALS

Employees on maternity leave, parental leave, military reserve service, or undergoing assisted reproduction treatment are protected from dismissal. Those within five years of retirement or with a child under three can only be dismissed if no suitable alternative position is available. If an employee believes they were dismissed unfairly for exercising legal rights, they may request written justification, which the employer must provide within 15 days.

## IS SEVERANCE PAY REQUIRED?

In case of an employee not on leave of absence or maternity leave and has a child under the age of 3 (in case of male employees only if he takes care of a child alone), the employment may only be terminated with notice on the grounds of

- the employee's incompetence or reasons associated with the employer's operations if the employer does not have a vacant position that matches the employee's competencies, qualifications, or experience or if the employee refuses to work in such a position offered to them;
- if the employee acts in a manner which wilfully or by gross negligence breaches their primary employment obligations or otherwise demonstrates a behaviour that makes the continuance of the employment impossible

The same termination protection rules apply to employees within 5 years before retirement.

Employees on rehabilitation aid can also only be terminated for unsuitability due to medical reasons if the employer is unable to employ them in the original position and cannot offer the employee a position suitable for their medical condition or if the employee refused such an offered position without good reason.

## SEPARATION AGREEMENTS

Employees dismissed with notice are entitled to severance pay if they have at least three years of service, starting at one month's salary and increasing to six months after 25 years. Employees within five years of retirement receive additional compensation. No severance is payable in cases of misconduct, incapacity unrelated to health, or

for pensioners. Employers and employees may negotiate a higher severance package.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Separation agreements are commonly used to prevent disputes, often in exchange for higher compensation. Such agreements are legally binding and difficult to challenge unless the employee can prove coercion or deception. The Labour Code does not regulate these agreements in detail, allowing employers flexibility in structuring terms.

## WHISTLEBLOWER LAWS

Employees may seek compensation for unlawful termination, with damages capped at 12 months' salary. Reinstatement is granted only in cases of discrimination, breach of equal treatment rules, or terminations of protected employees. If reinstated, the 12-month cap does not apply, and employees receive full lost earnings.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Although Hungary has ratified key ILO conventions, trade union membership remains low, with fewer than 10% of employees unionised and collective bargaining covering around 20% of the workforce. Trade unions operate as associations, with rights varying based on their representation within a company. Employers' associations are primarily organised by industry, but their operations are not regulated under the Labour Code. Collective bargaining mostly takes place at the enterprise level, where only one collective agreement per employer is permitted, requiring unions to cooperate.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

The Labour Code assigns trade unions a limited role. Only unions with an official representative at the employer's site have legal rights, including representing members, accessing the workplace, using employer-provided facilities, and requesting information. They may express opinions on employer decisions and initiate consultations, which temporarily suspend implementation for seven days. Union officials receive a reduction in working hours proportional to membership size, with one hour per month for every two members. A collective

agreement can only be concluded if at least 10% of employees at the workplace are unionised.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Union members cannot face discrimination based on membership, but only elected union officials receive legal protection from employer actions such as termination or transfer. This protection requires prior approval from the union's superior body and applies only to a limited number of officials based on workforce size, ranging from one for employers with up to 500 employees to a maximum of five for those with over 4,000 employees.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

When an undertaking is transferred, the successor employer must retain all employees under their existing working conditions. Neither the predecessor nor the successor employer can terminate employment solely due to the transfer, and employee consent is not required. Hungarian labour law does not grant employees the right to object to the transfer. However, if the transfer results in significant and unfavourable changes to working conditions, employees may resign with justified notice within 30 days and receive the same entitlements as if they had been dismissed by the employer, including an extended notice period and severance pay.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

All rights and obligations related to employment, including study agreements and non-compete clauses, transfer automatically to the successor employer. The successor must notify employees in writing within 15 days of the transfer, detailing the transfer and any changes to working conditions. Both the predecessor and successor employers share joint liability for employee claims arising before the transfer for up to one year.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

In Hungary, employment contracts must include basic terms, but detailed conditions are often

provided in an employer's information notice. This notice must be given within seven days of employment start and includes details such as job duties, work hours, and compensation methods. Labour laws are categorised into binding, relative discretionary, and bilaterally dispositive rules, with most allowing deviation in favour of the employee.

### SALARY

Salaries in Hungary are typically time-based, with a statutory minimum wage that varies based on qualifications. As of 2025, the minimum wage is HUF 290,800 for unskilled jobs and HUF 348,800 for skilled positions. Salaries must be paid monthly in Hungarian Forint unless the work is performed abroad. Mandatory allowances include Sunday, public holiday, shift work, and night work supplements.

### MAXIMUM WORKING WEEK

The standard working week in Hungary is 40 hours, with regular hours from Monday to Friday. Employers can extend hours up to 48 per week using a reference period. Flexible working arrangements are possible for certain roles, eliminating overtime tracking.

### OVERTIME

Overtime is limited to 250 hours annually, extendable to 300 hours via collective agreement or 400 hours with individual agreements. Protected employees, such as minors, are exempt from overtime.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Hungarian law emphasises employers' responsibility to provide safe working conditions. Employers must conduct risk assessments, implement safety measures, and provide occupational health services. Workplace accidents must be reported and investigated, with strict penalties for non-compliance. Employees are protected from retaliation for reporting safety concerns.

### COMPLAINT PROCEDURES

Employers have strict obligations regarding workplace accidents, occupational diseases, and cases of increased exposure. Any workplace accident resulting in more than three days of incapacity for work must be reported, investigated, and recorded. Similarly, occupational diseases and exposure cases must be addressed following the same procedures. Even for accidents that do not cause incapacity, employers must investigate and document the circumstances.

Employers must notify occupational health service providers at the start of an investigation. In the case of serious accidents, the occupational health service physician is required to participate in the



investigation, and the employer must immediately inform the occupational safety authority.

Employees who are dissatisfied with the employer's handling of accident reporting or investigation or who dispute the employer's assessment of injury severity can file a complaint with the occupational safety authority. The authority will then initiate an official investigation. It can also independently conduct inspections without an accident occurring.

Employers who fail to comply with health and safety requirements and endanger employees' health, safety, or lives are subject to occupational safety fines. The amount of these fines is determined based on factors such as the number of violations,

potential consequences, the number of affected employees, the employer's net revenue, and the severity of the violation. Payment of fines in instalments may be permitted upon request, and decisions of the occupational safety authority are subject to judicial review.



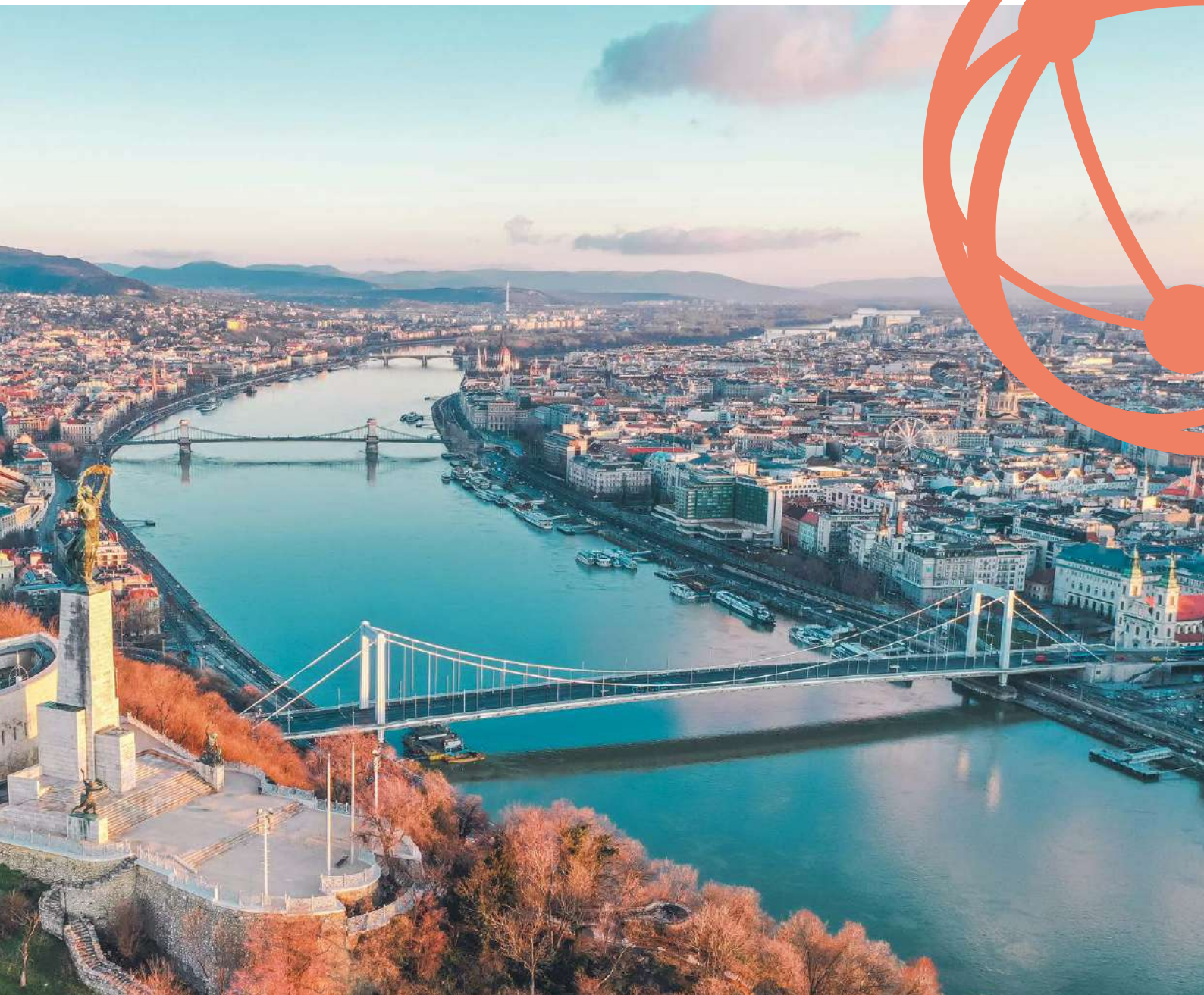
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## I. INTRODUCTION

The Constitution of India ("Constitution") is the cornerstone of individual rights and liberties, and provides the basic framework within which all laws in India, including laws relating to labour and employment, must operate. The Constitution guarantees certain fundamental rights to individuals such as the right to life, privacy, equality before the law and prohibition of discrimination in public education and employment on the basis of religion, race, gender, caste, health conditions, and other legally protected status. The Constitution recognises the 'right to livelihood' as an integral part of the fundamental right to life.

In addition to fundamental rights, the Constitution also envisages certain 'directive principles' which serve as a guide to the legislature towards fulfilling social and economic goals. Given India's history, social justice has always been at the forefront of a number of Indian legislations and reforms, specifically labour and employment laws. It is important to note that several labour laws in India have been framed from a worker emancipation perspective – including those relating to factories, mines, plantations, shops and commercial establishments, as well as those relating to payment of wages, regulation of trade unions, provision of social security, industrial safety and hygiene.

However, given changing economic requirements in recent times, the Indian Government has been increasingly conscious of the needs of businesses as well. In the recent times, the Indian Government has already brought in certain significant changes in labour laws with the aim of improving the ease of doing business in India. Further, there are several other big- ticket reforms in the pipeline, which we hope will see the light of day in the near future.

### KEY POINTS

Labour and employment laws are listed under the Concurrent List in the Constitution, which means that the Union Parliament (federal legislature) and State Legislatures have co-equal powers to enact laws relating to all labour and employment matters in India. Typically, the Union Parliament enacts a Central law, while the States formulate the rules thereunder. Additionally, States often enact standalone legislations as well.

One of the central principles of Indian labour and employment law is that they distinguish between employees who are defined as 'workmen' and those who are in managerial / supervisory / administrative

roles ('non-workmen'). Most of the legislations regulate the service conditions of workmen, which are therefore, subject to far greater statutory protections. The service conditions of non-workmen are typically governed by the terms of the relevant employment contracts and the internal policies of the organisation. Determining whether a particular employee is a workman or not, has to be undertaken on a case-by-case basis.

India does not recognise employment-at-will. Further, in terms of the Indian Contract Act, 1872 ("**Contract Act**"), which is the principal legislation governing contracts in India, agreements that restrain trade, business or one's profession are void – this could have an impact on the enforceability of employment bonds, and on non-compete and non-solicit covenants in employment contracts. However, there are certain exceptions to it which is evaluated on a case-by-case basis.

Trade unions are typically restricted to the more traditional forms of business, such as the manufacturing sector; however, in recent times there has been some unionisation in the Information Technology ("**IT**") sector and other sectors as well. The Trade Unions Act, 1926 ("**Trade Unions Act**") provides for registration of a trade union and the rights and liabilities of a registered trade union.

The Industrial Disputes Act, 1947 ("**ID Act**") is the key legislation that governs industrial relations in India. The ID Act aims at securing industrial peace and harmony by providing the process for settlement of industrial disputes arising between 2 or more employers; between employers and workmen; and disputes among workmen.

The Equal Remuneration Act, 1976 ("**ERA**"), mandates the payment of equal remuneration to male and female workers who undertake similar tasks. The Contract Labour (Regulation and Abolition) Act, 1970 ("**CLRA**") is another major legislation that pertains to regulating contract labour in India.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

In the context of private sector employment, India currently does not have a comprehensive legislation that addresses workplace discrimination, except in relation to sexual harassment and in the context of persons with disabilities and with HIV, and in the

context of protection of transgender persons from discrimination under the Transgender Act. It is also pertinent to note here that the ID Act prohibits commission of certain 'unfair labour practices', which include: discrimination against any workman for filing charges or testifying against an employer in any inquiry or proceeding relating to any industrial dispute or discriminating against workmen by reason of their being members of a trade union and/or showing favoritism or partiality to one set of workers regardless of merit.

## PROTECTIONS AGAINST HARASSMENT

India currently does not have a single comprehensive legislation on discriminatory practices at the workplace; instead, there are various laws that prohibit certain kinds of discriminatory practices and protect the interests of vulnerable communities such as workmen, women, persons with HIV and AIDS, persons with disabilities, transgender persons and members of certain socially backward classes. For instance, with respect to women, the ERA stipulates that male and female employees who perform similar tasks must be paid equal wages, and also mandates that employers are prohibited from discriminating against women in matters of recruitment, promotions and transfers.

Establishments are prohibited from discriminating against any transgender person with respect to matters related to the employment of such persons. The Transgender Act also requires an establishment to designate a complaint officer who would be responsible for the redressal of complaints pertaining to violations of the Act. The Transgender Act also requires an employer to provide the necessary facilities to transgender persons.

Every employer is required to constitute an Internal Complaints Committee ("ICC") that will inquire into sexual harassment complaints. Cases of general harassment (provided they are not criminal offences) are typically governed by the establishment's internal policies; typically, the internal policies clearly stipulate the conduct that would amount to harassment, the manner of conducting an internal inquiry and nature of disciplinary action that would be undertaken, depending on the seriousness of the conduct.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Employers are required to ensure compliance with certain accessibility standards, such as: (i) the 'Harmonised Guidelines and Space Standards for Barrier Free Built Environment for Persons With Disabilities and Elderly Persons'; (ii) standards for Bus Body Code for transportation system; and (iii) website standards, amongst others. Also, every establishment engaged in healthcare services and

those where there is a significant risk of occupational exposure to HIV, is required to ensure a safe working environment.

## REMEDIES

In case of non-compliance by employers, penalties extend to monetary fines, imprisonment and even cancellation of any Government registration for carrying out their business.

# III. EMPLOYEE BENEFITS

## SOCIAL SECURITY

The key legislation governing employees' benefits in India include:

**Employees' State Insurance Act, 1948:** benefits extend to establishments where 10 or more employees are engaged (subject to any State rules), and to all employees earning less than INR 21,000 (~USD 286) per month.

**Employees' Provident Fund and Miscellaneous Provisions Act, 1952:** benefits extend to establishments where there are 20 or more employees. Employees earning less than INR 15,000 per month (~USD 204) have to compulsorily contribute to schemes under this Act, whereas those earning above this limit may opt out, subject to certain conditions. In light of the COVID-19 crisis, the Government of India temporarily reduced the rate of contribution from 12% to 10% for the months of May, June and July 2020 (for both employer and employees), to decrease the financial liability of the employer and also to increase the take home salary of the employees.

**Payment of Gratuity Act, 1972:** this Act contemplates payment of gratuity to all employees (workmen and non-workmen alike) engaged in establishments (factories, shops and other commercial enterprises) in which 10 or more persons are employed; if he/she has rendered continuous service for not less than 5 years (except in the case of death or disability) under superannuation, retirement or resignation, or death or disablement due to accident or disease; the gratuity is calculated at 15 days' wages multiplied by the number of years of service).

## HEALTHCARE AND INSURANCES

The main legislation applicable to the private sector contemplates medical benefits for employees in contingencies such as sickness, maternity, disablement, and death due to employment injury and provides medical care to insured persons and their families. Employers are further required to pay compensation in cases of death/disablement of employees owing to injuries sustained at the workplace. The Government also launched an ambitious universal health scheme to ensure that the poor and vulnerable populations are provided

health insurance coverage up to INR 5 lakh (~ USD 6818) per family, per year, for secondary and tertiary hospitalisation. In addition, most large employers in the private sector provide medical insurance benefits to their employees and their immediate dependents, and bear the costs in this regard.

## REQUIRED LEAVE

### Holidays and Annual Leave

Provisions relating to holidays and leave are mainly prescribed in the State specific S&E Acts (for shops and commercial establishments) and under the FA Act (for factories).

The FA Act and some of the S&E Acts state that establishments shall remain closed on at least 1 day of every week (this is typically Sunday). However, the S&E Acts of certain States (e.g., Maharashtra, Karnataka and Tamil Nadu) contemplate that some establishments may remain open on all days of the week, subject to them allowing every worker a weekly holiday of at least 24 consecutive hours (and other conditions being satisfied).

Across India, there are certain national holidays namely: Republic Day (26th January); Independence Day (15th August); and the birth anniversary of Mahatma Gandhi (2nd October). In addition to these, every employee would be entitled to other holidays, as may be declared by the concerned State Governments. In case an employee is required to work on any of these holidays, he/she is typically entitled to twice the wages and also a compensatory off day.

The S&E Acts prescribe different privilege leave/earned leave requirements, and in some States, employees may avail privilege leave only after being in service for a certain period (such as 3 months or 1 year). The S&E Acts also allow unutilised privilege/earned leave to be carried forward at the end of the year (subject to a limit), and also contemplate that any unutilised leave may be encashed at the time of separation from employment.

### Maternity and Paternity Leave

With respect to maternity leave, female employees who have been in service for 80 days are entitled to paid maternity leave of 26 weeks. In case of a miscarriage or medical termination of pregnancy, female employees are entitled to leave with wages for a period of 6 weeks, immediately following the day of the miscarriage or medical termination of pregnancy. Leave requirements are also specified for women having undergone tubectomy operations, or in case of any illness arising out of pregnancy, premature birth, delivery, miscarriage or medical termination of pregnancy or tubectomy operation.

There is no separate category of paternity leave recognised under Indian law. However, some corporate and public sector departments provide paternity leave to their employees, as prescribed in the concerned leave policy/rules.

### Sickness and Disability Leave

Typically, sick leave cannot be carried forward or encashed and is not subject to any minimum service requirements. However, in certain States like Gujarat, Andhra Pradesh and Telangana employees could be eligible to encash their sick leave at the time of their discharge from employment. No specific category of disability leave is recognised in India.

### Any Other Required or Typically Provided Leave(s)

Some of the S&E Acts also recognise casual leave, which can be availed by employees in unforeseen situations, subject to the approval of an organisation. This category of leave is also not typically carried forward or encashed.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Employees who fall within the purview of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 will be entitled to a monthly pension, as per the rules of the Pension Scheme. Other than that, employees in the public sector will be entitled to such pension(s) as prescribed in their service rules.

### Other Required Or Typically Provided Benefits

In addition to the above, various employers provide other benefits to employees (which also have certain tax benefits) such as food coupons, a conveyance allowance and reimbursement of mobile phone and Internet expenses. There are also specific benefit programs and labour welfare funds prescribed for certain sectors.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

While the current labour laws in India do not strictly require that an employment contract be in writing, it is predominant market practice (with very rare exceptions) to have all terms and conditions of employment agreed and signed by both parties. A few States however, have specific legislation that necessitate a written contract in order to establish an employer-employee relationship. From the perspective of certainty and enforceability, it is strongly recommended that all employment contracts be in writing, whether as a simple appointment letter or a fully detailed contract, setting out relevant terms and conditions agreed to between the employer and employee.



## **FIXED- TERM/OPEN- ENDED CONTRACTS**

Fixed-term employment contracts are permitted in India, as long as the employer is employing the person for a short-term requirement. The Government has recently stated that fixed-term contracts will be permitted across sectors; earlier, they were expressly permitted only in the apparel manufacturing sector. However, it is unlikely that employers will be able to convert existing permanent positions into fixed-term employment positions.

## **TRIAL PERIOD**

The general market trend in India is to have a probation period between 3 and 6 months, especially in the technology and services sectors. During the probation period, the employer will usually have the right to terminate the employment without providing any notice (subject to certain conditions). Terms with respect to an employee's probation period should be adequately captured in his/her employment agreement/appointment letter.

## **NOTICE PERIOD**

Workmen who have undertaken at least 1 year of continuous service are entitled to a notice period of 1 month, or equivalent wages in lieu thereof. In addition, the employer would be required to pay 'retrenchment compensation' to the workman, which is calculated at the rate of 15 days' wages for every completed year of service. Given that India does not recognise the employment at-will doctrine, judicial precedents have held that termination of employment without providing any prior notice would render the contract of employment as an 'unconscionable bargain', and hence illegal.

# **V. HIRING PRACTICES**

## **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

Once foreign companies set up an entity in India, they often prefer to appoint employees from their home country or headquarters for the management and control of the Indian business. This is done mainly for the convenience of co-ordination with the parent company in terms of decision-making, financial management and other business matters. This movement of employees could be undertaken by way of secondment or transfer. There are three broad considerations that must be kept in mind, in either of the approaches: i) income tax issues; ii) social security contributions; and iii) visa considerations.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

Foreign employers may often have requirements wherein they might need to engage a sales person, representative or agent in India, even though they may not have a place of business in India. Also, the foreign employer may not intend to immediately generate any revenue in India. In such a scenario, the foreign employer need not mandatorily set up a local entity in India. There are various methods through which the foreign employer may engage/hire representatives or an agent in India depending on the exact business requirements.

## **LIMITATIONS ON BACKGROUND CHECKS**

Employers are increasingly conducting background checks to guard against inaccurate resums, overstated work experience and any employee behavioral issues. Typically, employers issue an offer letter, conduct background checks, and expressly state that the person's employment with the organisation is contingent upon his/her clearing the background checks, and vetting of educational and job qualifications. However, the permission of the concerned employee would be required to conduct a background verification. The governing legislation on data protection has to do with any company collecting, using, or disclosing any personal information of an employee/prospective employee, which will require such person's consent. The employer's compliance requirements under the Personal Data Protection Bill, 2019, which is likely to come into effect in 2021, will need to be examined for purposes of conducting background checks on employees.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

Indian labour and employment laws are largely silent as to the process of selection and hiring of employees in the private sector. In any case, as market practice, most employers in India conduct at least basic (education, job history) background verification of prospective employees in accordance with the IT Rules and/or ask prospective candidates to disclose specific information as a condition precedent to the employment relationship.

# **VI. PAY EQUITY LAWS**

## **EXTENT OF PROTECTION**

In India, the Equal Remuneration Act, 1976 or the ERA mandates the payment of equal remuneration to male and female workers undertaking similar tasks

or work of a similar nature. The ERA also provides for the prevention of discrimination on grounds of sex against women in matters connected with respect to employment, such as recruitment, promotion, etc. This legislation not only provides women with a right to demand equal pay, but also holds employers accountable for any violation of the ERA.

While the ERA extends protective provisions in favor of women, the Code on Wages has taken a gender-neutral approach and prohibits discrimination on the grounds of gender in matters relating to wages. The principle of 'equal pay for equal work' has also been enumerated under Article 39 (d) of the Indian Constitution, which requires the State to strive for securing equal pay for equal work, for both men and women.

## REMEDIES

An employee has the right to file a complaint with the concerned labour authorities with respect to contravention of such provisions on the part of the employer, or for claims that arise out of non-payment of wages, at equal rates, to men and women. The appropriate labour authority, after verifying the merits of the case, may initiate an inquiry into this matter and take the appropriate action. Further, employers are required to maintain registers which should contain the particulars of the remuneration of its employees. The appointed inspector has the right, at any point in time, to inspect the register if there is any suspicion of a violation on the part of the employer, or if a complaint has been filed by an employee, alleging violations.

## ENFORCEMENT/LITIGATION

Over the years, the principle of equal pay for equal work has evolved through judicial precedents. Indian Courts have held that discrimination based on gender only arises when men and women perform the same work or work of a similar nature. For differences in educational qualifications or for those relating to responsibility, reliability or confidentiality, the principle of equal pay for equal work would not apply.

The constitutional principle of 'equal pay for equal work' has been upheld by Indian Courts with respect to temporary employees' vis-à-vis permanent employees in the government sector, where temporary employees performing similar duties and functions as permanent employees, are entitled to draw wages at par with similarly placed permanent employees. The principle is required to be applied in all cases where the same work is being performed, irrespective of the class of employees.

## OTHER REQUIREMENTS

At this stage, there are no other legal requirements that exist in India.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Companies in the 'knowledge industry' place high value on their intellectual and human capital. Key employees who develop the intellectual property of the company, and those who have close interactions with customers and suppliers (such as sales staff), are critical to the growth and development of the company, and on many occasions, the company may be reliant on the personal attributes and market knowledge of such employees in order to improve its market base. Therefore, companies look to protect their business interests by prescribing certain restrictions. The following restrictive covenants are recognised and may be enforceable under the law:

- non-compete clauses;
- non-solicitation of customers and suppliers; and
- non-solicitation of employees.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Any contract which restrains trade, business or profession of any kind will be void. In light of this, any restrictive covenant that extends beyond the tenure of employment will not be looked upon favourably by Indian Courts (but in any case, are often incorporated into employment contracts as a deterrent measure). However, there are certain principles laid down by India's judiciary that enable employers to protect their legitimate business interests: i) employers can contractually restrict their employees from misusing or disclosing the employer's trade secrets or confidential business information and practices (and the enforceability concerns with respect to restrictive covenants as outlined above, will typically not apply in these instances). Similarly, where the employee has a motive to cheat or cause irreparable harm to the employer, a restrictive covenant beyond the term of employment would be enforceable; and ii) non-solicitation clauses may be valid if reasonable restrictions (such as distance, time limit and location) regarding non-usage of trade secrets and goodwill are imposed on former employees, depending on their designation and access to confidential information. Courts have also held that merely approaching customers of a previous employer would not amount to 'solicitation' until orders are placed by customers based on such approach.

## USE AND LIMITATIONS OF GARDEN LEAVE

The concept of 'garden leave' is becoming common in India. Typically, garden leave involves a situation

wherein an employee gives notice or is given notice of termination, and during such notice period is directed to stay away from work and/or the office premises, whilst continuing to receive his normal remuneration. Courts have held that while it is not possible to stop an employee from leaving, he can be restricted from joining a competitor during the term of employment (i.e. during the garden leave period). However, the garden leave provision should not be unreasonable and should typically not extend to inappropriately long periods of time.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

India is also in the process of framing a comprehensive legislation on data protection, which would certainly have an impact on the employer's right to monitor and review employees' electronic communications.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The employer's rights in this respect depend greatly on whether private use is allowed or not. If the employer has in terms of the IT Rules, employers can access, review and monitor an employee's official electronic data (i.e. work-related data) subject to obtaining his/her consent, as clearly stipulated in the concerned employment contract / appointment letter and internal policy / employee's handbook. Employers would also have to formulate a privacy policy and upload the same on its website and the intranet. This privacy policy would detail all its obligations regarding collecting, storing, and processing of employees' personal information.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

While there are no specific laws that govern employees' use of social media, any disparagement of employers and/or any divulging of confidential information would attract consequences under existing civil and criminal laws that govern defamation, breach of contract, divulging trade secrets and infringing intellectual property. Further, keeping in mind the rapidly evolving regulatory framework in relation to technology laws and data protection, employers are also defining policies that would affect their employees' participation on social media during work hours. Several companies,

especially technology and outsourcing companies, have installed firewalls that prevent employees from accessing social media sites at the workplace, whereas several other companies have defined social media usage policies that educate employees on the implications of misuse of social media (especially given that employers could be held vicariously liable for any actions of employees in this regard).

In addition, employers can include strong provisions in their employment contracts / appointment letters for protection of confidential information, trade secrets, intellectual property, and other proprietary information. Indian Courts, typically, take claims of confidentiality breaches and disclosure of sensitive information very seriously; it is an established principle under Indian jurisprudence that an employer has full and exclusive ownership of the information that the employee comes in contact with during the course of employment, including any and all information contained in the employee's official email accounts. Also, employers can, subject to obtaining employee consent, monitor employees' activities on social media during work hours for the reasons outlined above.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUNDINGS FOR TERMINATION

India recognises the following modes of employment termination: expiry of a fixed-term contract/mutual separation; resignation by an employee; retirement or superannuation; layoffs (termination due to transfer of business/closure of an undertaking/organisational restructuring; and termination by employer for 'cause'.

### COLLECTIVE DISMISSALS

A collective dismissal is only permitted in certain circumstances. For workmen: retrenchment is defined as termination of services for any reason whatsoever, other than as punishment inflicted by way of disciplinary action; layoff is defined as the failure, refusal or inability of an employer to employ workmen, on account of shortage of power, raw materials, break-down of machinery, natural calamity or any other reason beyond an employer's control.

### INDIVIDUAL DISMISSALS

Any dismissal of an individual workman would also be considered 'retrenchment' requiring the employer to provide prior notice of termination of either 1 month or 3 months, or equivalent wages in lieu thereof. In addition, 'retrenchment compensation' would have to be paid at the rate of 15 days' wages for every completed year of service. However, employees



dismissed for misconduct (provided the employer conducts an inquiry beforehand) no prior notice of termination or retrenchment compensation would be required. For employees other than workmen, as India does not recognise at-will employment, termination of employment without providing any prior notice (or equivalent pay) would typically render the employment contract as an illegal, 'unconscionable bargain'.

### IS SEVERANCE PAY REQUIRED?

Yes, a severance payment would have to be made by the employer; the quantum of the amount and procedures to be followed would be different (e.g. voluntary resignation versus termination initiated by employer).

### SEPARATION AGREEMENTS

While a separation agreement is not mandatory under the law, it is increasingly being followed by Indian companies, especially in cases of contentious separations / separation of senior executives.

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The remedies available for employees include: reinstatement of employment; back pay; loss of wages and earning capacity; and all other expenses. Workmen can approach the labour department and the industrial tribunal as such.

### WHISTLEBLOWER LAWS

Currently, legislation in India concerning whistleblowers mainly pertains to listed companies and the public sector. Companies listed on a recognised stock exchange in India have to devise an effective whistleblowing mechanism that enables stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices. Certain categories of companies are also required to constitute a 'vigil mechanism' for their directors and employees to report genuine concerns or grievances. The Whistleblowers Protection Act, 2014 (which has not yet seen the light of day, with further controversial amendments being proposed) mainly governs alleged corruption and misuse of power by public servants and seeks to protect persons who expose alleged wrongdoings in government bodies, projects and offices. It is also important to note that the giving of a bribe by any person (including the private sector) to a public servant for an improper performance of public duty, has now been made an offence (penalties extend to fines and imprisonment), whereas previously, only the receipt of a bribe by a public servant was covered.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

At least 10% of the workmen or 100 workmen at the establishment (whichever is less, subject however to a minimum of 7) must be members of the trade union at the time of making an application for registration. The registration of a trade union must be distinguished from the process of 'recognition' of a trade union, which is the process through which an employer agrees to negotiate with representatives of a trade union on aspects such as working conditions, wages, etc. on behalf of a particular group of workers. Refusal by an employer to collectively bargain in good faith with a recognised trade union (and vice versa) qualifies as an 'unfair labour practice', subjecting the employer to consequences that include imprisonment and monetary penalties.

Establishments with 100 or more workmen have to constitute a 'works committee' and those with 20 or more workmen have to set up a grievance redressal committee to address individual employee grievances. However, if the establishment already has a grievance redressal mechanism in place for its workmen, it may not establish a separate grievance redressal committee. There are other committees that have to be set up as per State rules (e.g. in Gujarat, a 'joint management council' has to be formed in industrial establishments that employ 500 or more workmen).

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

Though trade unions, works committees and grievance redressal committees are all envisaged to ensure greater participation of workmen in the running of an establishment, there are subtle differences in relation to each of their terms of reference. Trade Unions are the principal collective bargaining agents and can enter into settlement agreements with employers. Trade unions play a major role in negotiating better work conditions for employees, reducing instances of industrial disputes and settling existing disputes as well. They can also assist in the recruitment and selection of workers and help them adjust better to the organisational structure and hierarchy.

A works committee on the other hand, aims at pre-empting industrial disputes, smoothening working relationships and addressing any differences by way of direct negotiations between employer and workmen representatives. A works committee functions as a recommendatory body that addresses, at the first instance, problems arising in the day to day functioning of the industrial establishment. A grievance committee looks into individual employee grievances - unlike the other two committees which are concerned with employer- employee relations as a whole.

Trade unionisation in India is entrenched primarily in the traditional manufacturing sectors, though the IT sector has recently seen some unionisation as well, in addition to certain other committees that may be required (either by the State or due to the nature of the industry).

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

In every factory where a hazardous process takes place or where hazardous substances are used or handled, the occupier shall set up a 'safety committee' consisting of an equal number of representatives of workers and the management to promote co-operation in maintaining proper safety and health at work, and to periodically review the specific measures taken in this regard. Also, in factories where there are 250 or more employees, a canteen is required to be provided by the employer, which is then to be managed by a committee that would also have representatives of workmen. Furthermore, safety committees are required to be set up in mines where there are 100 or more persons employed.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

There are specific provisions that protect 'workmen' in cases of transfer of business undertakings. These however do not extend to non-workmen; in such cases, the terms of the employment contract and/or the internal policies of the company would have to be examined. Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, every workman who has been in continuous service with that undertaking for not less than 1 year, would be entitled to one month's notice, or payment in lieu thereof, and to compensation calculated at the rate of 15 days' wages for every completed year of service.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The requirements mentioned above relate to the obligations of the old employer (i.e. one whose business undertaking is being transferred). However, if for instance, the services of the employee are not 'interrupted' on account of the transfer or alternatively, the employees resign and join the new employer, then the successor entity would have to ensure that the salary and benefits that the employees were entitled to under the old employer (such as provident fund, employee state insurance, gratuity) will continue to be paid. Specifically, the liability of the successor entity will apply, where the predecessor has defaulted in remitting provident fund and state insurance contributions, prior to the date of the transfer of the undertaking.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Requirements in this regard are principally concerned with working hours, overtime, intervals of rest, provision of basic amenities such as drinking water, toilets, first aid facilities as well as work timings, leave, overtime and holidays, and also with respect to the health, safety and welfare of workers.

### SALARY

The term 'wages' is used under labour/employment laws to refer to any and all remuneration and emoluments earned by an employee (excluding certain allowances and bonuses) whereas the term 'salary' is used under income tax law to denote the total taxable income received by an employee. It is important to note that currently, different labour laws have dissimilar definitions of wages. However, the same is likely to be remedied under the Code of Wages, which provides for a uniform definition of wages, which would then have to be closely examined. Basic wages are defined as all payments which are earned by an employee in accordance with the terms of the employment contract, but does not include: i) the cash value of any food concession; ii) any dearness allowance (i.e. cash payments paid on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance; and iii) any presents made by the employer.

### MAXIMUM WORKING WEEK

As a general principle, employees cannot be required to work in any establishment for more than 9 hours a day or 48 hours a week, without attracting



overtime payments. In order to overcome the economic crisis in times of pandemic, certain States have increased the permissible limits of working hours for employees, subject to certain conditions and restrictions.

## OVERTIME

An employee working 'overtime' becomes entitled to wages at the rate of twice his/her ordinary rate of wages and could also be entitled to a compensatory time off.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

An employer's health and safety obligations towards its employees are far more extensive in the manufacturing sector and in certain other sectors such as mines and building and construction. The various State-specific S&E Acts have special provisions with respect to ensuring safety of women who work during night shifts. Employers in such cases are required to ensure that adequate security and transport facilities are provided (at their own cost) to female employees. Given changing economic requirements in recent times, especially in light of the ongoing COVID-19 pandemic, the Indian Government has been increasingly conscious of the needs of businesses as well. In the last 6 months, the Indian Government has already brought in certain significant changes in labour laws with the aim of improving the ease of doing business in India. Further, there are several other big-ticket reforms in the pipeline, which we hope will see the light of day in the near future.

## COMPLAINT PROCEDURES

Employees are required to frame grievance redressal mechanisms to address individual worker complaints.



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## I. INTRODUCTION

Employment law in Indonesia is primarily governed by Law No. 13 of 2003 on Manpower, as most recently amended by Law No. 6 of 2023 on ratification of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation ("Manpower Law") and its implementing regulations (i.e., Government Regulations and Ministry of Manpower Regulations). This regulation establishes the fundamental principles of employment relations, including the one that requires every employment to be based on an employment contract, equality of opportunity, prohibition of discrimination, fair wages, and protection of worker welfare.

While the specialised Industrial Relation Court is the court assessing and ruling industrial disputes in Indonesia, Law No. 2 of 2004 on Settlement of Industrial Relation Disputes ("IRC Law") encompasses the procedure of industrial relation disputes.

### KEY POINTS

- **Legal Framework:** Employment in Indonesia is primarily governed under Manpower Law and its implementing regulations, including several Government and Ministerial Regulations.
- **Employment Contracts:** Indonesian law recognizes two principal forms of employment; Fixed-Term Employment (*Perjanjian Kerja Waktu Tertentu* or "PKWT") and Indefinite-Term Employment (*Perjanjian Kerja Waktu Tidak Tertentu* or "PKWTT").
- **Wages and Minimum Standards:** Wage structures are regionally determined through provincial minimum wage (*Upah Minimum Provinsi* or "UMP") and regency/city minimum wage formulas (*Upah Minimum Kabupaten/Kota* or "UMK").
- **Social Security and Worker Protection:** All employees must be enrolled in national social security programs administered by the social security agency (*Badan Penyelenggara Jaminan Sosial* or "BPJS").
- **Termination of Employment:** Termination must be based on lawful grounds. Severance pay, long service pay, and compensation entitlements are regulated under Government Regulation No. 35 of 2021 on Fixed-Term Employment, Outsourcing, Working Hours, and Termination of Employment ("GR 35/2021"), with specific calculation formulas based on the length of service and cause of termination.
- **Industrial Relations and Dispute Resolution:** Employment disputes are settled through

bipartite negotiation, tripartite mediation with the Manpower Office, before filing a manpower lawsuit to the Industrial Relations Court as stipulated in IRC Law.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Indonesia has ratified the International Labour Organisation ("ILO") Convention No. 111 on Discrimination in Respect of Employment and Occupation through Law No. 21 of 1999 ("Law 21/1999"), thereby reinforcing its commitment to the principles of equality and non-discrimination in the workplace. Pursuant to this ratification, Indonesia recognizes and prohibits any distinction, exclusion, or preference on the basis of race, skin-colour, sex, religion, political opinion, national extraction, or social origin that results in nullifying or impairing equality of opportunity or treatment in employment or occupation.

Moreover, every manpower shall have equal opportunity without discrimination to obtain employment (Article 5 of Manpower Law). The elucidation of this article further clarifies that every individual has the right to obtain a decent livelihood and employment without discrimination based on gender, ethnicity, race, religion, political affiliation, or disability status, provided that such employment aligns with their interests and capabilities. Every worker/labourer shall have the right to receive equal treatment without discrimination from the employer (Article 6 of Manpower Law). The elucidation reinforces this by requiring employers to ensure equality in granting workers' rights and obligations, irrespective of gender, ethnicity, race, religion, skin colour, or political affiliation.

Together, Articles 5 and 6 of Manpower Law establish the foundational framework for anti-discrimination principles in Indonesia's labour system, ensuring that all workers are treated fairly and equally. Employers are, therefore, obligated to maintain an inclusive and non-discriminatory work environment, consistent with Indonesia's broader commitment to human rights and decent work standards.

Recently, MoM reaffirmed the prohibition of discrimination, particularly in the employee recruitment process, through Circular Letter No. M/6/HK.04/V/2025. The Circular emphasises that employers cannot engage in any form of

discrimination on any basis during the recruitment process. Furthermore, the stipulation of age requirements may only be applied under specific circumstances, namely: (a) for positions whose nature or characteristics objectively affect an individual's ability to perform the job; and/or (b) provided that such requirements do not result in the loss or reduction of employment opportunities for applicants.

## PROTECTIONS AGAINST HARASSMENT

While Indonesian employment laws do not explicitly regulate harassment in the workplace, the Indonesian Criminal Code (Kitab Undang-Undang Hukum Pidana or “**KUHP**”) imposes criminal sanctions for acts of sexual harassment or indecent conduct committed by individuals in positions of authority. The offense is punishable by imprisonment for up to 7 years and applies to:

Any official who commits an indecent act with a subordinate or with a person whose care or supervision has been entrusted to them; and Any administrator, doctor, teacher, employee, supervisor, or attendant in a prison, state workplace, educational institution, orphanage, hospital, mental health facility, or social institution who commits an indecent act with a person admitted to such facility. (Article 294 paragraph (2) of KUHP)

Furthermore, the new **KUHP**, which will be effective in 2026, strengthens this provision by increasing the maximum penalty to 12 years of imprisonment for the same circumstances described above. (Article 418 paragraph (2) of New KUHP)

In addition, Law No. 12 of 2022 on the Crime of Sexual Violence (Tindak Pidana Kekerasan Seksual or “**TPKS**”) (“**Law 12/2022**” or “**TPKS Law**”) establishes a comprehensive legal framework to prevent, address, and punish various forms of sexual violence. Under this law, criminal acts include, among others, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation, and other comparable forms of sexual violence.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Under Article 80 of Manpower Law, employers are expressly required to provide employees with sufficient opportunity to perform the religious obligations mandated by their faith. In practice, this obligation may include allowing prayer breaks, adjusting work schedules during religious observances (such as Ramadan), or providing suitable facilities for worship within the workplace.

In addition, Indonesia recognizes limited affirmative action obligations. Article 53 of Law No. 8 of 2016 on Persons with Disabilities (“**Law No. 8/2016**”) mandates

that employers allocate, at least, 1% of their total employees for persons with disabilities. Employers are also obliged to provide reasonable accommodation to support disabled persons to participate in employment (Article 50 paragraph 2 Law No. 8/2016).

## REMEDIES

Individuals subjected to discrimination, harassment, or related retaliation have access to multiple avenues of redress, including:

- Administrative sanctions up to revocation of business license;
- Criminal remedies, under TPKS Law and Indonesian Criminal Code in the form of imprisonment.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

As per Article 15 of Law No. 24 of 2011 on Social Security and Article 13 of Presidential Regulation No. 82 of 2018 on Social Security, all employers are obligated to register themselves and their employees as participants in the (i) Indonesian Employment Social Security Program (Badan Penyelenggara Jaminan Sosial Ketenagakerjaan or “**BPJS Ketenagakerjaan**”) and (ii) Health Social Security Program (BPJS Kesehatan or “**BPJS Kesehatan**”), as well as pay for the associated premiums.

### HEALTHCARE AND INSURANCES

Employees' healthcare insurance is covered by BPJS Kesehatan, which includes medical examination, treatment, and consultation, non-specialist medical procedures including operative or non-operative measures, medicinal services, as well as hospitalisation (Article 47 of Presidential Regulation No. 82 of 2018 on Social Security (“PR 82/2018”)).

### REQUIRED LEAVE

Employees are entitled to paid leave and are permitted to take a paid-leave of up to 12 days after having worked continuously for 12 months (Article 79 paragraph 2 of Manpower Law).

#### Holidays and Annual Leave

All national holidays are days on which employees should be required to take leave; this is exempted in specific sectors, such as the service sector. Employers that have their employees work on national holidays must provide the overtime pay.

As mentioned in the required leave stipulations, some employers may practically provide 12 days of leave to be taken at any time freely every year (including the employees' first year of working at the company).

#### Maternity and Paternity Leave

Indonesian Employment Law requires that female employees be entitled to maternity leave for, at

least, 3 months, with the possibility of an additional 3 months in cases of maternal or newborn child health complications, supported by a doctor's note (Article 4 paragraph 3 of Law No. 4 of 2024 on Welfare of Mothers and Children During the First One Thousand Days of Life (**Maternity Leave Law**)).

Male employees are permitted to take leave to accompany their wives during pregnancy, miscarriage, childbirth, and postpartum, or due to any health issues or passing associated with their wife or newborn child for 2 to 3 days (Article 6 of Maternity Leave Law)

Employees on paternity or maternity leave are entitled to the paid leave. However, female employees are entitled to their full salary for the first 4 months, followed by 75% of their salary for each of the following month (Article 5 paragraph 1 of Maternity Leave Law).

### Sickness and Disability Leave

An employee is permitted to take sick leave for as long as required, provided it is supported by a doctor's note. An employer is not permitted to terminate an employee on sick leave unless their sick leave has exceeded 12 months (Article 93 paragraph 2, point a, and Article 153A of Manpower Law). An employee on sick leave is entitled to his/her full wages for the first 4 months, 75% for the second set of 4 months, 50% for the third set of 4 months, and 25% for any months after until the termination of their employment (Article 93 paragraph 3 of Manpower Law).

Disability leave is considered under Indonesian Employment Law to be the same as sick leave.

### Other Required or Typically Provided Leave(s)

Other categories of paid leave under Indonesian employment law include:

- the employee is getting married, having a wedding, being circumcised, or baptizing a child, giving birth or having a miscarriage, or attending the death of the husband, wife, child, son/daughter-in-law, parent, parent-in-law, or family member in the same household;
- the employee is fulfilling his/her obligations to the state;
- the employee is performing religious duties;
- the employee is carrying out trade union duties with the employer's approval; and
- the employee is carrying out educational assignments assigned by the company.

(Article 93 paragraph 2 of Manpower Law)

### PENSIONS: MANDATORY AND TYPICALLY PROVIDED

All employers are required to enter their workers into the Indonesian Manpower Social Security Program known as BPJS Ketenagakerjaan, which will be used

to pay out any pension benefits when the employee enters the pension age, provided that the premiums have been paid for, at least, 15 years (Articles 4 and 16 of Presidential Regulation No. 45 of 2015 on Implementation of the Pension Guarantee Program ("PR 45/2015")). The pension age is currently set at 65 years, where the employees may choose to receive their pension up to 3 years after that (Article 15 of PR 45/2015).

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Based on Article 54 paragraph (1) of Manpower Law, an employment contract must, at least, contain the following elements:

- Company's name, address, and type of business;
- Employee's name, gender, age, and address;
- Job title or type of work;
- Work location;
- Wages and method of payment;
- Rights and obligations of both company and employee;
- Start and duration of the Employment Contract;
- Place and date the Employment Contract is made; and
- Signatures of the company's authorised representative and the employee.

Furthermore, the provisions under points (v) and (vi) shall not contradict the company regulation, collective labour agreement, or other regulations. The employment contract must also be executed in at least 2 copies, each bearing equal legal force, with one copy retained by the employee and the other one by the employer (Article 54 paragraphs (2) – (3) of the Manpower Law).

### FIXED- TERM/OPEN- ENDED CONTRACTS

Indonesian Employment Law recognizes fixed-term (PKWT) and open-ended employment contracts (PKWTT) as definite or indefinite employment contracts, respectively, with the criteria for each type defined as follows:

**PKWT:** An employment contract on a temporary or definite period basis to perform certain tasks or projects with a limited scope, including:

- one-time nature work (i.e., construction workers, set designers, etc.);
- expected to be completed in a short period (i.e., warehouse packer, customer support, etc.);
- seasonal (i.e., retail, barista, etc.);
- related to new products or activities that are still in trial or exploratory (i.e., product testers, market researchers, etc.); or



- non-permanent (i.e., freelance writers, couriers, maintenance crew, etc.).  
(Article 59 of Manpower Law and Article 5 GR 35/2021) (Minimum Requirements)

Accordingly, since a PKWT must be made in writing, it must comply with the Minimum Requirements.

The maximum limit of PKWT period is 5 years, including any extensions (Article 8 of GR 35/2021). PKWT must also be registered with the Manpower Office within 3 days after its execution if registered online, or within 7 days if registered offline.

**PKWTT:** An employment contract on a permanent or indefinite time basis. A PKWTT is only applicable for Indonesian citizens, and foreign citizens cannot be employed under a PKWTT.

A PKWTT may be made in either written or verbal format. If a PKWTT is made verbally, the employer is required, pursuant to Article 63 of the Manpower Law, to issue an appointment letter to the employee, which must include:

- Name and address of the employee;
- Start date;
- Job title or type of work; and
- Wages

#### (Appointment Letter Requirements)

If a PKWTT is made in writing, it must fulfil the Minimum Requirements as described above.

## TRIAL PERIOD

Pursuant to Article 60 of the Manpower Law and Article 12 of GR 35/2021, the probationary/trial period is applicable only to PKWTT employees and must be expressly stipulated in the employment contract. The duration of the probation period may not exceed 3 months. During this period, employers are strictly prohibited from paying employees less than the applicable minimum wage, as employees on probation are legally recognized as regular employees, and therefore, entitled to the same minimum wage protection.

## NOTICE PERIOD

Prior to the resignation date, an employee must submit a written resignation letter, at least, 30 days in advance, not be bound by a service commitment, and continue performing their duties until the effective resignation date (Article 36 point i of GR 35/2021). An employee who fulfils the foregoing requirements is entitled to compensation of rights (*uang penggantian hak*), which includes payment for unused annual leave, reimbursement of travel expenses, and any separation pay as stipulated in their employment agreement, if applicable (Articles 40 paragraph (4) and 50 of GR 35/2021). Conversely, employees who do not submit 30-day notices will not be eligible to receive such compensation.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

**Requirements for Foreign Employees:** The utilisation of foreign employees/workers (*Tenaga Kerja Asing* or “TKA”) in Indonesia is strictly regulated and subject to various obligations and requirements under the Manpower Law, along with its implementing regulations.

**Types of Employment Contracts:** As stipulated under Article 42 paragraph 4 of the Manpower Law and Article 4 paragraph 1 of GR 34/2021, TKA in Indonesia cannot be employed under a PKWTT, but only under a PKWT.

Please note that a PKWT is limited to a maximum period of five years, whether through a single contract or through extensions (Article 56 paragraph ... of the Manpower Law). Therefore, the duration of a TKA's work in Indonesia must take this time limit into account to comply with the applicable regulations and to align with the validity period of the Foreign Workers Utilisation Plan (*Rencana Penggunaan Tenaga Kerja Asing* or “RPTKA”).

**RPTKA:** According to Article 42 paragraph 1 of Manpower Law, an employer must submit an RPTKA to MoM prior to employing a TKAs. To obtain a validation of RPTKA, the employer shall submit a written application to MoM, which must, at least, include:

- the employer's identity;
- the rationale for hiring TKA;
- the TKA's role or position within the company's organisational structure;
- the number of TKA;
- their employment duration;
- details of local counterpart employees for the knowledge transfer; and
- the annual work plan for TKA deployment.

Other required documents include:

- the employer's corporate documents;
- a draft of the TKA's Employment Contract;
- an organisational structure chart;
- a statement confirming that the TKA will provide the job training and transfer knowledge to the local employee;
- a statement confirming the employer will provide the Indonesian language training; and
- the TKA's personal information/data.  
(Article 12 of GR 34/2021).

It is important to note that RPTKA validation serves as a recommendation for TKAs to obtain the work visa and stay permit in Indonesia (Article 14 paragraph 6 of GR 34/2021). Furthermore, an RPTKA is not required for foreigners that are working in Indonesia

as shareholders in Indonesian companies, diplomats, or foreigners employed for (i) production activities that have been suspended due to emergencies, (ii) vocational training, (iii) technology-based startups, (iv) business visits, and (v) research activities for a specific period (*Article 30 of GR 34/2021*).

**Visa Requirements for TKA:** A TKA is required to obtain the applicable Work Visa during the period of his/her work in Indonesia, which in most cases, would be a Limited Stay Visa (*Izin Tinggal Terbatas* or “**ITAS**”). Prior to applying for an ITAS, the RPTKA must be approved by MoM, which then recommends the issuance of ITAS through the TKA Online system. RPTKA will be used as part of the application process to obtain ITAS as per *Article 21 of MoM Reg. 8/2021*.

A foreigner who will be employed in Indonesia must file a request for an ITAS Visa to the Directorate General of Immigration (“**DGoI**”) and provide the following documents:

- The original Passport, valid for, at least, the next six months;
- Proof of guarantee from a guarantor who is the foreigner's employer;
- Proof of sufficient living expenses for him/herself and/or his/her family while working in the Indonesian territory;
- Recent colour photographs; and
- Any other documents that are used to explain the purpose of the foreigner's visit, including the aforementioned MoM's approval on RPTKA.

(*Article 34 paragraph 1 of Ministry of Law and Human Rights (“MoL”) Regulation No. 22 of 2023 on Visas and Stay Permits (“MoL Reg. 22/2023”)*)

Foreigners occupying shareholder positions in Indonesia, aside from the above requirements (excluding MoM approval and RPTKA), are required to provide (i) evidence of a shareholding of, at least, IDR 10 billion in an Indonesian company, including the relevant evidence of MoL approval letter, (ii) MoL approval letter on the establishment for the company, and (iii) the Indonesian company's bank statements of the last two months (*Article 38 paragraph 2 of MoL. Reg 22/2023*).

Upon entering Indonesia, the foreigners' ITAS Visa for their employment in Indonesia will be converted into ITAS, which are valid for up to 2 years (*Article 105 paragraph 1 of MoL. Reg 22/2023*). The foreigners who will become shareholders in Indonesia will have ITAS valid for a period ranging from 2 to 10 years. ITAS with the applicable lengthened periods of 5 and 10 years are considered as the “golden visas.” Applying for a golden visa will require the foreigner to make additional commitments for further investments in Indonesia (*Articles 39, 40, and 105 paragraph 5 of MoL. Reg 22/2023*).

**Qualifications of TKA:** TKAs must have the required competencies for the specific positions they will hold, as determined by MoM after receiving inputs from the relevant ministries/agencies (*Article 4 paragraph 2 of GR 34/2021*).

Pursuant to *Article 4 of MoM Reg. 8/2021*, every employed TKA must:

- be educated and qualified in accordance with the position to be occupied;
- have the competency and work experience of, at least, five years in accordance with the qualifications of the position to be occupied; and
- transfer his/her expertise to the TKA Understudy Workers.

Furthermore, there are no legal restrictions or maximum quotas on the number of TKAs that a company may hire. However, companies are required to prioritise the employment of Indonesian workers (*Article 2 paragraph 1 of GR 34/2021*).

**Positions Prohibited for TKAs:** Under *Article 42 paragraph 5 of the Manpower Law* and *Article 11 paragraph 1 of GR 34/2021*, TKAs are prohibited from occupying positions related to human capital/resources, industrial relations, or other personnel/HR functions.

In addition, TKAs are not permitted to hold multiple positions within the same company (*Article 10 of GR 34/2021*). However, they may hold multiple positions in different companies, provided the positions are limited to those in:

- the Board of Directors (“**BoD**”);
- the Board of Commissioners (“**BoC**”);
- the vocational education and training sector;
- the digital economy sector; or
- the oil-and-gas sector working for contractors under cooperation contracts.

(*Article 5 paragraph 1 of GR 34/2021 and Article 5 paragraph 1 of MoM Reg. 8/2021*).

Please note that the prohibition to hold positions in the HR or personnel-related functions still apply.

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Under the Manpower Law, an “Employer” is defined as an individual or a corporate (legal or non-legal) entity that employs employees by paying wages or other compensations (*Article 1(4) of Manpower Law*). As such, a foreign employer does not necessarily need to establish a company in Indonesia to the extent the employment arrangement complies with the Manpower Law.

Many businesses prefer to establish a foreign investment company or engage in the business by acquiring or cooperate with an existing local company, particularly when the employees will physically perform the work in Indonesia. This is because certain administrative and tax obligations (such as income tax withholding, social security registration, and RPTKA requirements) can only be fulfilled through an Indonesian corporate entity.

## LIMITATIONS ON BACKGROUND CHECKS

Under Indonesian Employment Law, employers may conduct certain types of background checks that require the applicant's consent, such as:

**a. Medical Examinations:** Employers may require job applicants to undergo a medical examination as part of the recruitment process, provided that such a requirement is applied equally to all applicants. Under Article 2 paragraph 1 of Minister of Manpower and Transmigration ("MoMT") Regulation No. PER.02/MEN/1980 of 1980 on Medical Examinations of Employees in the Implementation of Occupational Safety ("MoM Reg. 2/1980"), medical examinations aim to ensure that applicants are in optimal health, free from communicable diseases that may endanger other workers, and physically fit for the type of work to be performed. This helps guarantee the safety and health of all employees. Applicants are required to provide written consent for both the medical examination and disclosure of its results to the employer. Employers are entitled to reject applicants who refuse to undergo the examination or do not consent to the disclosure of the results.

**b. Drug and Alcohol Testing:** Drug and alcohol testing may only be conducted under limited circumstances, such as in jobs where working under the influence of drugs or alcohol may pose health and safety risks or cause serious business losses to the employer. Applicants must give their consent before such tests are conducted.

For employees, drug and alcohol testing may only be carried out if there is a legitimate reason, and if the testing is necessary, proportionate, and conducted with the employee's consent. All testing costs must be borne by the company, and the results must be kept confidential by the employer, in accordance with Article 6 paragraphs 1 and 2 of MoMT Regulation No. PER.11/MEN/VI/2005 of 2005 on Prevention and Control of Drug, Psychotropic, and Other Addictive Substance, Abuse and Illicit Trafficking in the Workplace ("MoM Reg. 11/2005").

**c. Criminal Record Checks:** Employers may request criminal record information in the form of a Police Clearance Certificate (*Surat Keterangan Catatan Kepolisian* or "SKCK") from job applicants. Pursuant

to Article 2 paragraph 1 in conjunction with Article 3 and Article 1 paragraph 1 of Indonesian National Police ("Indonesian Police") Regulation No. 6 of 2023 on Issuance of Police Clearance Certificates ("Indonesian Police Reg. 6/2023"), applicants must voluntarily apply to the Indonesian National Police (Polri) to obtain an SKCK for employment purposes. Accordingly, employers may not unilaterally access the criminal records of job applicants.

However, based on Law No. 27 of 2022 on Personal Data Protection ("PDP Law"), the above data are regarded as specific data that requires further attention for the employer as a data controller and processor. The employers are required to obtain the applicant's prior consent in writing or recorded, both electronic or non-electronic, before gathering such data. The consent must clearly state the purpose, be presented in a format that is easily accessible and understandable, and use simple and clear language (provided in local language) (*Article 22 of PDP Law*). In practice, employers generally prepare a privacy notice that outlines the purposes of personal data processing and the rights of data subjects before the applicant uploads such data.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Indonesia does not specifically regulate the types of questions that are restricted or prohibited during the job application or interview process. However, employers are required to limit their questions to matters relevant to assessing the applicant's competence and qualifications, such as work experience, education, and skills.

Discriminatory questions are not permitted, as every worker has the right to obtain employment and a decent livelihood without discrimination based on gender, ethnicity, race, religion, political orientation, and is entitled to equal treatment, including for persons with disabilities, as stipulated under Article 5 of the Manpower Law.

To implement the principle of non-discrimination in the recruitment process, MoM has issued MoM Circular Letter No. M/6/HK.04/V/2025 concerning Prohibition of Discrimination in the Recruitment Process of Workers ("MoM Circular Letter 6/2025"). MoM Circular Letter 6/2025 prohibits the age limitation requirements for any job recruitment process:

- for positions or roles whose nature or characteristics materially affect a person's ability to perform the job; and/or
- provided it would not result in the loss or reduction of a person's opportunity to obtain employment.

This provision also applies to workers with



disabilities, as stipulated under Point 4 of MoM Circular Letter 6/2025.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

In principle, every worker has the right to receive fair and equal treatment without discrimination from the employer. In other words, employers are obliged to grant rights (such as wages, benefits, and others) and determine work obligations equally, without distinction based on gender, ethnicity, race, religion, skin colour, or political views (*Article 6 of the Manpower Law*). Furthermore, every worker has the right to a decent livelihood, equal treatment in wage systems without discrimination, and equal pay for work of equal value (*Article 2 of GR 36/2021*). Therefore, employers are prohibited from setting different wage levels between employees based on factors such as gender, origin, religion, race, skin colour, or political opinion.

The principles of wage equality and non-discrimination under the Manpower Law and its implementing regulations are rooted in Indonesia's ratification of ILO Convention No. 100 of 1951 on Equal Remuneration for Men and Women Workers for Work of Equal Value ("**ILO Conv. 100**") through Law No. 80 of 1957 on Ratification of ILO Conv. 100 ("**Law 80/1957**"). As stipulated in Article 1 of ILO Conv. 100, the term "remuneration" covers ordinary, basic, or minimum wages or salaries, and all other additional income paid directly or indirectly, in cash or in kind, by the employer to the worker as compensation for work performed. Such remuneration must be provided equally to male and female workers for work of equal value, without discrimination. If there are differences in wage levels between employees, such differences must be based on objective factors, such as the results of objective job evaluations of the work to be performed (*Article 3 paragraph 3 of ILO Conv. 100*).

The principle of wage equality not only emphasizes fair treatment between male and female workers but also requires employers to pay wages in accordance with the applicable minimum wage, either UMP or UMK as described in **Section IV Number 2. Working Conditions – Salary**, to ensure a decent standard of living for every worker. This is consistent with Article 88E paragraph (2) of the Manpower Law, which stipulates that employers are prohibited from paying employees' wages below the applicable minimum wage.

### REMEDIES

The remedies available to workers who experience wage discrimination by their employers are as follows:

**a. Administrative Sanctions:** The central or regional government may impose administrative sanctions on employers who engage in wage discrimination among their employees. The administrative sanction in the form of warnings up to the business license revocation. (*Article 6 and Article 190 paragraph 1 of the Manpower Law*)

**b. Industrial Relations Dispute Proceedings:** As regulated under Article 2 (a) and Article 1 paragraph 2 of IRC Law, one type of industrial relations dispute (*Perselisihan Hubungan Industrial* or "**PHI**") is a right dispute, i.e., a dispute arising from the non-fulfilment of rights, which include salary matters. Therefore, if a worker believes that the wage they receive is discriminatory, the worker may pursue the PHI dispute resolution mechanism as provided under IRC Law.

**c. Criminal Sanctions:** As previously outlined, one of the fundamental rights of workers is to receive fair remuneration, where wage determination among employees must not be discriminatory. In other words, employers are obliged to pay wages in accordance with the agreed terms, without any discriminatory treatment among workers, and such wages must not be lower than the applicable minimum wage (UMP or UMK) (*Article 88A paragraph 3 and Article 88E paragraph 1 of Manpower Law*). Should an employer fail to pay wages as agreed and/or pay wages below the minimum wage, each of such violations may subject the employer to criminal sanctions of imprisonment for 1 up to 4 years, and/or a fine ranging from IDR 100 to 400 million (*Article 185 paragraph (1) of the Manpower Law*).

### ENFORCEMENT/LITIGATION

Please bear in mind that employers are prohibited from paying wages below the UMP/UMK, as such actions are subject to criminal sanctions. An example of the enforcement of these criminal sanctions can be seen in Supreme Court Decision No. 678 K/Pid. Sus/2013, where Sugiono, a Director of PT Inti Buana Nusantara, was found guilty of paying employee wages below the Pontianak City UMK for 2009 and failing to register 17 of his employees in the Workers' Social Security Program. The Supreme Court ruled that such conduct violated Article 90 paragraph (1) in conjunction with Article 185 paragraph (1) of Manpower Law, and Article 4 paragraph (1) in conjunction with Article 29 paragraph (1) of Jamsostek Law. The employer was sentenced to 1 year imprisonment with a probation period of 1 year and 6 months, and was required to pay the wage shortfall and register his employees in the social security program.

### OTHER REQUIREMENTS

The employers are implicitly required to disclose their salaries to their employees to the regulator.

It could be evidenced by the requirements to submit PKWT to MoM once it has been signed by the parties. Moreover, the CR and CLA need to be approved by MoM during the preparation to ensure that any terms and conditions, including salary calculation, comply with the regulation.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Restrictive covenants refer to any clause in an employment contract that may bind an individual to certain restrictions, making them unable to conduct certain actions during or after their employment period. Please note that Indonesian Law is silent on the types of restrictive covenants in employment agreements and contracts. In practice, restrictive covenants that maintain confidentiality are regularly implemented and applicable if both parties (employer and employee) agree to the terms. Indonesia generally follows a “freedom of contract” principle, where any clause is legal and binding as long as it is explicitly agreed to upon signing, provided that they are not contrary to the law.

#### Non-compete clauses

Non-compete clauses are, implicitly, illegal under Indonesian Employment Law, as every employee is regarded as having the right to equal opportunity of employment to choose, obtain, or change jobs, and earn a decent income within or outside of Indonesia (*Article 31 of Manpower Law*). Therefore, non-compete clauses directly oppose this clause, as they restrict the freedom and mobility of an ex-employee to obtain employment opportunities upon after being terminated by their previous company.

#### Non-solicitation of customers

Non-solicitation of customers prohibits ex-employees from soliciting customers of their ex-employers after their termination. The definition of such behaviour and its duration should be defined clearly in the employment contract, as Indonesian Employment Law is silent on their implementation.

#### Non-solicitation of employees

Non-solicitation of employees follows the same terms defined above, but are usually used in more specific contexts, such as towards ex-employees at managerial positions that may attempt to “poach” talents from their previous workplace.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Because Indonesian Law is silent on restrictive covenants, any attempts to enforce restrictive

covenants and obtain remedies due to any breaches are restricted to penalty clauses specified in the employment contract. Because Indonesia’s Employment Law and the IRC do not recognize breaches of restrictive covenants as rights that can be claimed by an employer, any attempted enforcement must be through filing a civil lawsuit through the Indonesian Civil Court for breach of contract. This is also in consideration that the restrictive covenants are usually regulated in a mutual agreement or termination acceptance letter upon the termination of employment, instead of in the employment contract, CR, or CLA.

### USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave refers to a practice where an employee is instructed to refrain from working while still earning their salary, usually given upon the employee’s resignation or termination. Indonesian Manpower Law is silent on garden leave provisions, and such matters must be clearly stated in the employment contract. In practice, preceding any garden leave procedure, the employer submits a Notice of Termination to the employee, at least, 14 days before the effective termination date (or 7 days if the employee is still in probation) (*Article 37 of GR 35/2021*). Due to the above consideration, any garden leaves an employee may enjoy should be preceded by a Notice of Termination.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

In Indonesia, there is no statutory guaranteeing employees an unrestricted right to access the Internet or social media during working hours. Employers are permitted to impose reasonable restrictions on non-business Internet and social media use through CR, CLA, Employment Contract, or Internal Policies.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE’S ELECTRONIC COMMUNICATIONS?

Under Article 16 of PDP Law, activities such as monitoring, accessing, and reviewing employee communications may qualify as personal data processing. Therefore, employers must establish a valid legal basis provided under Article 20 of PDP Law, such as:

- Contractual necessity – where monitoring is required to enforce provisions of the employment

contract (i.e. preventing misuse of corporate systems or confidential data);

- Legitimate interest – where the employer seeks to protect corporate reputation, system security, or prevent misconduct, as long as the monitoring remains proportionate and necessary;
- Consent – where employees provide explicit consent, typically through signed acknowledgment in an CR, CLA, employment contract, or IT policy.

In practice, Indonesian employers commonly monitor company-owned systems (e.g. corporate email, shared drives, and Internet access logs) rather than personal accounts.

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

When an employee disparages, insults, or defames the employer through social media or even disclose confidential information, such conduct may constitute misconduct or breach of contract, depending on the clauses set out in CR, CLA, employment contract, or internal policies. Violations can result in disciplinary actions, including warnings, suspension, or termination, depending on the gravity of the conduct and the company's disciplinary procedures.

# IX. TERMINATION OF EMPLOYMENT CONTRACTS

## GROUND FOR TERMINATION

**Termination of Employment:** The Manpower Law provides that an Employment Contract will terminate upon the occurrence of any of the following events:

- the worker passes away;
- the employment contract term expires;
- the agreed work has been completed;
- a final and binding court decision and/or decision from an industrial relations dispute settlement institution is issued; or
- the occurrence of certain conditions specified in the Employment Contract, CR, or CLA.

*(Article 61 paragraph 1 of the Manpower Law).*

The above grounds apply to both PKWT and PKWT employees.

Please note that Manpower Law provides a specific allowed ground for terminating PKWTT employees, as follows:

- corporate actions (e.g., mergers, consolidations, acquisitions, or spin-offs) where the employee refuses to continue employment;

- efficiency measures due to financial losses, whether or not accompanied by business closure;
- continuous losses for two consecutive years;
- force majeure;
- suspension of debt payment obligations;
- bankruptcy;
- termination initiated by the employee due to employer's conduct;
- decision by an industrial relations dispute settlement institution;
- employee resignation;
- employee's absence from work for five consecutive days despite being duly summoned twice in writing;
- violations of the Employment Contract, CR, or CLA;
- detention for six months or more due to alleged criminal activity;
- prolonged illness or disability due to a workplace accident preventing the employee from working after the stipulated period;
- retirement; and
- death of the employee.

*(Article 154A Manpower Law)*

Although these termination grounds are legally permitted, employers are still required to exhaust all efforts to avoid termination. Any actions for termination must first be informed by the employer to the employee, or with their labour union if the employee is a union member *(Article 151 of the Manpower Law)*.

### Prohibited Grounds for Termination of Employment:

Under Article 153 paragraph 1 of the Manpower Law, employers cannot terminate an employment on the following grounds:

- the employee is unable to work due to illness, as certified by a doctor, for a period not exceeding 12 consecutive months;
- the employee is unable to work due to fulfilling state obligations in accordance with statutory provisions;
- the employee is performing religious duties;
- marriage;
- pregnancy, childbirth, miscarriage, or breastfeeding;
- having family or marital ties with another employee within the same company;
- establishing, becoming a member, or serving as an official of a labour union, or engaging in union activities outside working hours, or during working hours with the employer's consent or as regulated under the Employment Contract, CR, or CLA;
- filing a criminal complaint against the employer;
- differences in ideology, religion, political orientation, ethnicity, skin colour, social group, gender, physical condition, or marital status; and
- permanent disability, illness due to a workplace accident, or occupational disease with an undetermined recovery period according to a medical certificate.



Any termination carried out on the above grounds is null and void by law, and the employer must reemploy the employee (*Article 153 paragraph 2 of the Manpower Law*).

## COLLECTIVE DISMISSALS

In principle, there is no distinction between mass termination and individual termination in Indonesia. But in practice, mass termination occurs due to the employer's business circumstances, including:

- merger, consolidation, acquisition, or spin-off by the employer (where employees do not agree to continue their employment), or if the employer is unwilling to retain the employees;
- efficiency measures implemented by the company, whether or not they are followed by business closure due to losses or loss prevention;
- the employer permanently closes its business due to continuous losses over a two-year period;
- the employer permanently closes its business due to force majeure;
- the employer is under a Suspension of Payment status; and
- the employer is declared bankrupt.

(*Article 36 points a to f of Government Regulation No. 35 of 2021*).

The provisions and rights associated with termination under Indonesian Employment Law must be abided to per individual employee terminated, and are not reduced by the business circumstances above.

## IS SEVERANCE PAY REQUIRED?

Except in a redundancy scenario (where, as above, an employee may have sufficient service to be entitlement to a statutory redundancy payment), there is no statutory requirement to pay an ex-gratia severance payment to an employee on termination of employment (howsoever caused).

### Severance Pay

| Service Period | Payment/ monthly salary |
|----------------|-------------------------|
| <1 year        | 1                       |
| 1-2 years      | 2                       |
| 2-3 years      | 3                       |
| 3-4 years      | 4                       |
| 4-5 years      | 5                       |
| 5-6 years      | 6                       |
| 6-7 years      | 7                       |
| 7-8 years      | 8                       |
| > 8 years      | 9                       |

### Service Pay

| Service Period | Payment/ monthly salary |
|----------------|-------------------------|
| 3-6 years      | 2                       |
| 6-9 years      | 3                       |
| 9-12 years     | 4                       |
| 12-15 years    | 5                       |
| 15-18 years    | 6                       |
| 18-21 years    | 7                       |
| 21-24 years    | 8                       |
| >24 years      | 10                      |

### Compensation Pay

The components of compensation pay include:

- annual leave that has not been taken;
- travel expenses to the employee's hometown; and
- other compensations as determined in the Employment Contract, CR, or CLA

### (Severance Package)

(*Article 40 of GR 35/2021*).

Employees under a PKWT are not entitled to Severance Package above, but are eligible to receive compensation upon the expiration of the PKWT term. Additionally, if either party terminates the PKWT before its expiry, the terminating party must give indemnity fees to the other party in an amount equivalent to the employee's wages for the remaining period of the agreement (*Article 61A and Article 62 of the Manpower Law*).

## SEPARATION AGREEMENTS

### Is a Separation Agreement required or considered best practice?

The short answer is yes. If an employer terminates an employment agreement, the employer must issue a written notice of termination to the employee no later than 14 days before the effective termination date (or 7 days if the employee is still under probation). The notice must include the reason for termination, as well as details of compensation and other entitlements arising from the termination. Once the employee receives the notice and does not object to the termination, the employer must report the termination to the Manpower Office (*Article 37 dan 38 of GR 35/2021*) ("**Notice of Termination**").

In practice, if the employee accepts the termination, this is usually formalised in a Termination Acceptance Letter and/or Mutual Agreement between the employer and the employee. Subsequently, the letter or agreement must be registered with the relevant Manpower Office. If the employee rejects the Notice of Termination, the employee must submit a written rejection with reasons no later than 7 working days after receiving the notice. In case

of disagreement, the dispute shall first be resolved through the industrial relations dispute mechanism.

However, the employer may terminate the employee for urgent misconduct as stipulated in the employment contract, CR, or CLA, without prior notice or the need to execute a mutual agreement. Such urgent misconduct may include, among others, cases where the employee:

- commits fraud, theft, or embezzlement of company assets;
- provides false information that causes loss to the company;
- is intoxicated, consumes, or distributes narcotics, psychotropics, or addictive substances at the workplace;
- commits immoral acts or gambling in the workplace;
- assaults, mistreats, threatens, or intimidates co-workers or the employer;
- incites co-workers or the employer to commit unlawful acts;
- intentionally or negligently damages or endangers company property, resulting in loss;
- intentionally or negligently endangers co-workers or the employer in the workplace;
- discloses company secrets unless for state purposes; or
- commits any act in the workplace subject to imprisonment of 5 years or more.

(Article 52 paragraph 2 of GR 35/2021).

These examples generally constitute acts with potential criminal implications. However, the list is illustrative, and employers retain the discretion to determine other forms of urgent misconduct under their internal policies.

### **What are the standard provisions of a Separation Agreement?**

In issuing the Notice of Termination, the minimum contents are as follows:

- The notice must be made in writing by the employer and delivered to the employee and/or labour union no later than 14 working days before the intended effective termination date;
- It must state a valid reason for termination;
- It must include the employee's identity, position, division, and employment agreement;
- It must contain a proposed severance package calculated in accordance with the Manpower Law and GR 35/2021, including the payment date;
- It must contain a clear statement requiring the employee to provide a written response of acceptance or rejection within a specified period or no later than 7 days before the effective termination date;
- It must be written in Bahasa Indonesia and/or in a bilingual format (Bahasa Indonesia and English);
- It must be signed by an authorised company representative, such as a director with labour

management authority (who must be an Indonesian citizen); and

- It must be dated and affixed with the company's official stamp.

After the Termination Notice is delivered, the affected employee must respond within the prescribed timeframe. The Termination Acceptance Letter must:

- be properly signed, dated, and indicate the city where it was signed;
- clearly state acceptance of the proposed termination terms;
- include the employee's identity, position, division, and employment agreement; and
- be addressed to the authorised company representative.

(Directorate General of Advocacy for Industrial Relations and Workers Social Security Letter No. 4/303/HL.00.03./III/2022 Tahun 2022 on Notification and Reporting Documents on Termination of Employee ("DGoAIR Letter 4/2022"))

Once the Termination Acceptance Letter is received, the employer must submit the Termination Notice, Termination Acceptance Letter, mutual agreement (if any), and a cover letter reporting the termination to the local Manpower Office. Upon receipt of the complete documentation, the Manpower Office will issue a Receipt of Termination Report.

### **Does the age of the employee make a difference?**

As previously explained, one of the grounds for termination of employment is the employee's retirement. However, retirement does not require any special provisions that distinguish it from other termination grounds. Pursuant to Article 56 of GR 35/2021, an employee who reaches the retirement age is entitled to:

- Severance Pay amounting to 1,75 times the standard Severance Package;
- Service Pay equivalent to 1 (one) time the standard Severance Package; and
- Compensation in accordance with the Severance Package.

For illustration, if an employee earns a monthly wage of IDR 15,000,000 (including the base salary and allowances) and has 22 years of service, the severance pay would amount to 9 months' wage multiplied by 1.75, resulting in IDR 236,250,000, while the service pay would be 8 months' wage multiplied by 1, resulting in IDR 120,000,000. Accordingly, the total retirement compensation payable to the employee would be IDR 356,250,000, comprising both severance pay and service pay.

### **Are there additional provisions to consider?**

There are additional provisions to be considered if the termination report is used to apply for benefits

under the Job Loss Security program. In such cases, the termination report must be submitted to the local manpower office at the city level corresponding to (i) the location where the employee works, (ii) the location where the employment contract was signed, or (iii) the company's domicile (*Point 6 of the DGoAIR Letter 4/2022*). In short, the employer must ensure the termination report is filed with the correct local manpower office to avoid delays or rejection of the report, which may affect the employee's eligibility to receive Job Loss Security benefits.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

If an employee rejects the termination letter, they must submit their reasons for rejection within 7 working days. Disagreement on a matter in the termination letter shall be first resolved through bipartite negotiations and tripartite mediation (with the manpower officer as mediator). If no agreement is reached, the parties shall proceed to the industrial relations dispute resolution mechanism in accordance with IRC Law.

IRC Law regulates that industrial relations disputes in Indonesia are resolved through a three-tier mechanism, as follows:

- bipartite negotiations between the employer and the employee or labour union;
- mediation at the local manpower office (tripartite process); and
- judicial proceedings before the Industrial Relations Court, which has special jurisdiction to examine and adjudicate industrial relations disputes.

Parties may file a cassation appeal to the Supreme Court against a decision of the Industrial Relations Court. If no cassation is filed, or once the Supreme Court issues its ruling, the decision becomes final and legally binding on both parties.

## WHISTLEBLOWER LAWS

In Indonesia, there are no specific regulations that expressly govern whistleblowers in the field of employment. In practice, whistleblowing mechanisms are typically regulated through a company's internal policies.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Labour unions can be established by employees (that may have different employers), and become legally recognized upon fulfilling the conditions of (i) having reached a membership count of 10 and (ii) already submitting a letter to the local Manpower Office for their domicile containing information regarding their name, their bylaws, and their membership including their management (*Article 5 and 18 of Law No. 21 of 2000 on Labour/Trade Unions ("Union Law")*). Employers may also create their own employer organisations (*Article 105 of Manpower Law*).

Both labour/trade unions and employer organisations must ensure that they establish partnerships, develop businesses, expand employment opportunities, and provide welfare to the workers/labourers in an open, democratic, and equitable manner (*Article 102 paragraph 3 of Manpower Law*).

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Labour/trade unions are permitted to represent the employees during industrial relation disputes with the employers, or before the relevant labour institutions. These unions may also conduct other activities as efforts to improve the welfare of employees (*Article 25, paragraph 1 of Union Law*). Moreover, an employer is required to sign a CLA with a trade/labour union that represents, at least, 50% of the employer's employees.

## TYPES OF REPRESENTATION

### Number of Representatives

There must be, at least, 10 members in a labour/trade union. However, employer organisations have no membership requirements.

### Appointment of Representatives

Any appointment of representatives of the labour/trade unions or employer organisations must follow their bylaws and be done so in a manner that is democratic. Additionally, such representatives cannot hold an important position within the company (HR, Corporate Secretary, managerial level, etc.) that may give rise to a conflict of interest (*Articles 3, 8, and 15 of Union Law*). Indonesian Employment Law is otherwise silent in how such bylaws should be construed and how the election process should be conducted, but specifies that the bylaws must contain clauses on:



- membership and management;
- financial sources and accountability; and
- provisions for amendments to the articles of association and/or bylaws.

(Article 11 of Union Law)

Indonesian Manpower Law does not specify any rules for the appointment of representatives of employer organisations.

### Tasks and Obligations of Representatives

Representatives are obligated to manage the finances of the trade/labour union as well as the financial/asset records. They must also ensure that the funds of the union are separated from theirs or the members' (Article 32 and 34 of Union Law). In practice, any other tasks and obligations would be specified in the union's bylaws.

Indonesian Manpower Law does not specify any tasks and obligations for the representatives of employer organisations.

### Employees' Representation in Management

Because there may be conflicts of interest as per Article 15 of Union Law, it is not advisable for management-level employees of a company (HR, Corporate Secretary, managerial level, etc.) to be part of labour/trade unions in Indonesia.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Indonesian Manpower Law also recognizes collectives of labour/trade unions known as federations, and collectives of federations known as confederations. A federation can be founded by having, at least, 5 labour/trade unions, while a confederation can be founded by having, at least, 3 federations (Article 6 and 7 of Union Law).

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

Generally, the transfer of employee is recognized by Manpower Law, based on Article 61 paragraph (3) of Manpower Law. In the event of a transfer of employee, the rights of the existing employees shall be assumed by the new employer **unless** otherwise determined by the employee's transfer agreement **without** abridging the employee's rights. This shall include employees that are employed under PKWTT and PKWT.

In executing the employee transfer, the existing employment relationship between the current employer and the employee must be terminated. Or, these employees can tender their resignation before they enter into a new employment agreement with the new employer.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The predecessor and successor need to enter into an employee transfer agreement as a basis for the transfer of the employee, and regulate the rights and obligations of both parties on the transferred employee. In many cases, the predecessor needs to terminate the employment of the employee to be transferred, and provide the compensation and/or severance package before such transferred employee enters into a new employment agreement with the new employer.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employers practically establish a Company Regulation ("CR") or Collective Labour Agreement ("CLA") if they intend to regulate particular terms and conditions that are not mentioned in the individual employment agreement. An employer who employs, at least, 10 employees is required to establish a CR, which becomes effective after being approved by MoM or an authorised official. However, if a company already has a CLA in place, the preparation of a CR is not required (Article 108 of Manpower Law).

The CR is prepared and remains the responsibility of the employer, taking into account input from employee representatives or labour union (Article 109 and Article 110 of Manpower Law).

As stipulated under Article 2 of MoM 28/2014, a CR must, at least, include:

- rights and obligations of the employer;
- rights and obligations of the employee;
- terms and conditions of employment;
- company code of conduct;
- the validity period of the CR; and
- any further conditions as regulated by the Manpower Law.

(CR Minimum Requirements).

Provisions in the CR must not conflict with the applicable laws and regulations. In case of any inconsistency, the prevailing laws and regulations

shall apply. The CR is valid for not more than 2 years and must be renewed upon expiration (*Article 111 paragraph 1 and 2 of the Manpower Law*).

Regarding the CLA, labour unions may negotiate with an employer or several employers to establish a CLA through mutual deliberation. The CLA must be made in writing, using Latin letters and the Indonesian language, and only one CLA may be applied within a company to cover all employees (*Article 116 paragraphs 1 and 2 in conjunction with Article 118 of the Manpower Law*). If the negotiation fails, the dispute shall be resolved through the industrial relations dispute settlement procedure (*Article 117 of the Manpower Law*).

A CLA is valid for a maximum period of 2 years and may be extended for up to 1 year based on a written agreement between the employer and the union (*Article 123 paragraphs 1 and 2 of the Manpower Law*). A CLA must, at least, contain:

- rights and obligations of the employer;
  - rights and obligations of the union and the worker/labourer;
  - validity period and effective date of the CLA; and
  - signatures of the parties to the CLA.
- (CLA Minimum Requirements)** (*Article 124 paragraph 1 of the Manpower Law*).

Additionally, a CLA becomes effective on the date of signing unless stated otherwise in the CLA. Once signed, the CLA must be registered by the employer with the relevant manpower office (*Article 132 of the Manpower Law*).

In the CR or CLA, it is also necessary to regulate working hours, wages, and occupational health and safety, as further discussed below.

## SALARY

Pursuant to Article 7 paragraph 1 of GR 36/2021, an employee's wage consists of one of the following components:

- **wages without allowances;**
- **basic wage and fixed allowances** (the basic wage shall be, at least, 75% of the total);
- **basic wage, fixed allowances, and non-fixed allowances** (the basic wage shall be, at least, 75% of the total basic wage and fixed allowances); or
- **basic wage and non-fixed allowances.**

The components of wages above can be stipulated in the employment contract, CR, or CLA (*Article 7 paragraph 4 of GR 36/2021*).

In Indonesia, each province sets its own Provincial Minimum Wage (UMP) or City Minimum Wage (UMK) guidelines. The determination of UMP and UMK are based on economic conditions and the cost of decent living for the average individual in that area (*Article 88C paragraph 4 of the Manpower*

*Law in conjunction with Article 6 paragraph 1 of GR 36/2021*). Accordingly, the employer must comply with the relevant UMP or UMK where the business is located. (*Article 88E paragraph 2 of the Manpower Law and Article 23 paragraph of GR 36/2021*)

## MAXIMUM WORKING WEEK

Pursuant to Article 77 paragraph 1 of the Manpower Law, normal working hours in Indonesia are limited to 40 hours per week, with the following arrangements:

- 8 hours per day for a 5-day workweek; or
- 7 hours per day for a 6-day workweek.

An employee is considered to be working part-time if their working hours are less than 7 hours per day and 35 hours per week. Wages for part-time employees may be calculated on an hourly basis (*Article 16 paragraph 1 of GR 36/2021*).

In addition, employees are entitled to a minimum rest break of 30 minutes after working for 4 consecutive hours, and this rest period is separated from the working hours (*Article 79 paragraph 2 of the Manpower Law*). Therefore, employers are typically required to provide approximately 1 hour of daily rest time as the standard rest period for employees in Indonesia who work 8 hours or more.

## OVERTIME

Under Article 78 paragraph 1 of the Manpower Law and Article 26 paragraph 1 and Article 28 paragraph 1 of GR 35/2021, the maximum allowable overtime is 4 hours per day, and 18 hours per week. Overtime work may only be performed upon the employer's instruction and with the employee's consent, in writing or through digital means. Employees who work overtime are entitled to receive overtime pay, and employers must provide adequate rest periods and a meal containing, at least, 1,400 calories if overtime work lasts for 4 hours or more (*Article 29 paragraph 1 of GR 35/2021*).

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The Manpower Law requires employers to ensure occupational safety and health (*Keselamatan dan Kesehatan Kerja* or "K3") to achieve optimal work productivity. This obligation is fulfilled through preventive measures against workplace accidents and occupational diseases, controlling potential hazards in the work environment, promoting health, and providing medical and rehabilitation services for employees (*Article 86 paragraphs 1 and 2 of the Manpower Law*). In addition, companies are required to implement a K3 Management System (*Sistem Manajemen K3* or "SMK3") that is integrated in the company's overall management system to control



work-related risks and create a safe, efficient, and productive workplace (*Article 87 paragraph 1 of the Manpower Law*).

However, as stipulated under Article 5 paragraph 2 of GR No. 50 of 2012 on the Implementation of SMK3 ("**GR 50/2012**"), the obligation to implement SMK3 applies only to companies that:

- Employ, at least, 100 employees; or
- have high safety risks.

Furthermore, pursuant to Article 1 paragraph 1 and Article 9 paragraph 1 of Law No. 1 of 1970 on Occupational Safety ("**Occupational Safety Law**"), every safety leader ("**Leader**") is required to provide new employees with information on:

- workplace conditions and potential hazards;
- security systems and required protective equipment;
- personal protective equipment to be used; and
- safe working procedures and behaviour.

(**Training Requirements**).

Accordingly, the Leader may only allow employees to start working after ensuring that they fully understand all Training Requirements. The leader must also conduct regular training sessions on accident prevention, fire response, K3 improvements, and first aid.

## COMPLAINT PROCEDURES

In principle, employees have the right to refuse to perform work that does not comply with K3 standards or lacks proper personal protective equipment (*Article 12 points d and e of Occupational Safety Law*).

Moreover, employers must be supported by adequate K3 human resources, facilities, and infrastructure to implement K3 plans. These K3 supports include the establishment of operational/work procedures, information systems, reporting mechanisms to the government, and proper documentation (*Article 10 paragraphs 2- and 4-point c of GR No. 50 of 2012 on Implementation of SMK3 ["GR 50/2012"]*).

### Protection from Retaliation

Employers are required to provide protection to workers, which includes ensuring their welfare, safety, and physical and mental health. Violations of this obligation may result in criminal sanctions in the form of imprisonment for 1 month to 4 years and/or a fine ranging from IDR 10 million to IDR 400 million (*Article 35 paragraph ... and Article 186 paragraph 1 of the Manpower Law*). Accordingly, if an employer fails to implement K3 measures, such as not providing personal protective equipment, resulting in serious injury or death of a worker, the employer may be subject to criminal prosecution for such negligence.

In addition, employers cannot terminate employees who suffer permanent disabilities or illnesses caused by work accidents, or occupational diseases where the recovery period cannot yet be determined based on the medical certificate. If an employer, nonetheless, proceeds with termination on such grounds, the termination is deemed null and void by law, and the employer is obliged to re-employ the employee (*Article 153 paragraphs 1 point j and paragraph 2 of the Manpower Law*).



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## I. INTRODUCTION

This guide is intended to be a brief overview of employment laws in the Republic of Ireland and is not intended to apply in a specific situation. Legal advice should be obtained before taking any action based on the information provided.

Employment law in Ireland is governed by common law, an extensive statutory framework (some of which has its origins in European Union law) and a range of fundamental rights protected by the Constitution of Ireland.

In Ireland, the core documentation governing the employment relationship in practice is (i) a written contract of employment (which is common at all levels and across all sectors) and (ii) an employee handbook containing company/HR policies (which is typically provided to employees in conjunction with the contract of employment).

### KEY POINTS

Probationary periods in the private sector cannot exceed 6 months, save for exceptional circumstances such as where it is 'in the interest of the employee' or where an employee is absent during the probationary period.

Employees in Ireland have a wide range of protections under applicable legislation including protection from unfair or discriminatory dismissal, protection from penalisation or dismissal on the grounds of having made a 'protected disclosure' (i.e. a whistleblowing complaint) and protection against unlawful deductions of wages by an employer.

Irish law places significant emphasis on fair procedures being afforded to employees (e.g. right to know the case against him/her, a right to reply, a right to a fair and impartial hearing), particularly in the context of conduct-related dismissals.

Statutory employment law claims and disputes are dealt with through statutory forums (namely, the Workplace Relations Commission ("WRC") or the Labour Court (on appeal)), which sit outside the civil courts system in Ireland.

The forms of statutory leave available to parents include maternity leave, adoptive leave, paternity leave, parent's leave and parental leave. There is no obligation on the employer to pay employees during these leave periods but a State benefit is available in most cases.

Trade union membership in Ireland is relatively low (particularly amongst multinationals). Unions are

generally more prevalent in the public sector than in the private sector.

European and local level works councils are provided for under statute but, in practice, works councils are rare in Ireland.

The Irish government enacted Pensions Auto-Enrolment legislation in July 2024 with the first contributions set to begin in January 2025.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

In Ireland, the Employment Equality Acts aim to protect individuals from certain kinds of discrimination, harassment and sexual harassment that can happen in the workplace. Victimisation that occurs as a result of an employee asking about his/her legal rights or where an employee makes a complaint may also be protected under other pieces of legislation in Ireland, including the Protected Disclosures Acts (which legislation protects whistle-blowers who raise concerns about potential wrongdoings in their workplace from dismissal, penalisation or other sanction by their employer).

### PROTECTIONS AGAINST HARASSMENT

Harassment is defined by the Employment Equality Acts as any form of unwanted conduct related to any of the nine protected grounds which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

The Employment Equality Acts protect employees from employment-related harassment by the employer, co-workers, clients, customers or other business contacts of the employer (including anyone the employer could reasonably expect the worker to come into contact with). The protection of the Employment Equality Acts extends to situations where the employee does not have the relevant characteristic related to the discriminatory ground, but the perpetrator believes that he/she has that characteristic and harasses on that basis.

Many forms of behaviour, including spoken words, gestures or the display/circulation of words, pictures or other material, may constitute harassment. A single incident may constitute harassment. The

intention of the perpetrator is irrelevant. It is a subjective test as to how the victim felt.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Employers in Ireland are obliged by the Employment Equality Acts to provide 'reasonable accommodation' for persons with disabilities, subject to that accommodation not imposing a disproportionate burden on the employer and taking into account financial and other costs, the scale and financial resources of the employer's business and the possibility of obtaining public funding or other assistance. What constitutes 'reasonable accommodation' will depend on the circumstances and is assessed on a case-by-case basis.

## REMEDIES

Claims for discriminatory treatment (on any of the nine protected grounds), discriminatory dismissal (on any of the nine protected grounds), victimisation, harassment and sexual harassment are heard by the WRC or the Labour Court (on appeal). Depending on the claim, the WRC or the Labour Court (on appeal) can award redress in the form of compensation (subject to a maximum of 2 years' gross remuneration), reinstatement, re-engagement or order the employer to take a specified course of action. There is no minimum service required for an employee to bring any of these claims. In gender discrimination cases, a claim may be made directly to the Circuit Court which can, in theory, award unlimited compensation in such cases.

### Other Requirements

In general, there are no recruitment or diversity quotas that require employers to recruit from any particular groups. In terms of "positive action", an employer is not prohibited by the Employment Equality Acts from maintaining or adopting measures that are not required under the legislation with a view to ensuring full equality in practice between men and women in the workplace.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

Ireland has a comprehensive social welfare/security system, funded through general government revenues and employer/employee contributions (i.e. Pay Related Social Insurance ("PRSI")). The system provides a range of social insurance payments/benefits including the State pension, maternity leave benefit, adoptive leave benefit, paternity leave benefit, etc., subject to the employee having sufficient PRSI contributions. Other payments available from the State include means-tested payments (which are designed for people who do not have sufficient PRSI contributions to qualify for

the equivalent social-insurance based payment e.g. Jobseeker's Allowance) and universal payments (e.g. Child Benefit) which are paid regardless of a person's income or social insurance record. Employers are obliged to deduct income tax, Universal Social Charge and PRSI at source from an employee's wages and remit such deductions to the Revenue Commissioners of Ireland under the Pay As You Earn ("PAYE") system.

## HEALTHCARE AND INSURANCES

While many employers in Ireland put in place employers' liability insurance to protect against liability for injury, illness, disease or death of any employee, employers' liability insurance is not compulsory/mandated by law. Employers in Ireland can and do provide a range of employee benefits such as life insurance, private health insurance, pensions, permanent health insurance, sick pay, a company car, car allowance, share option / incentive schemes, etc.

## REQUIRED LEAVE

### Holidays and Annual Leave

In a leave year, an employee has a statutory minimum (paid) annual leave entitlement of: i) 4 working weeks where he or she works at least 1,365 hours (unless it is a leave year in which he/she changes employment); ii) 1/3 of a working week for each month in which he/she works at least 117 hours; or iii) 8% of the hours worked, subject to a maximum of 4 working weeks. The employee shall be entitled to use whichever method gives them the greater entitlement. Employers can and do often provide more than the statutory minimum to employees. In addition, employees are entitled to paid leave days for statutory public / bank holidays. There are currently 10 public holidays in Ireland and, while Good Friday is not a public holiday, many employers treat it as such.

### Maternity and Paternity Leave

Female employees, and transgender men who obtain a gender recognition certificate and subsequently give birth, are entitled to take maternity leave of up to 42 weeks (26 weeks 'ordinary maternity leave' and 16 weeks 'additional maternity leave') provided the employer is given at least four weeks' notice of the commencement of such leave. The maternity leave must include at least two weeks leave before the date of the birth and at least four weeks leave after the birth. An employer is not obliged to pay the employee during maternity leave, but the employee may qualify for maternity benefit from the State during ordinary maternity leave only. While an employee is also entitled to take up to 16 weeks' additional maternity leave, no State maternity benefit is available.

Employees who are fathers, or partners in same sex relationships who have newly adopted a child, are statutorily entitled to take 2 consecutive weeks' unpaid paternity leave to be taken within 26 weeks

of the child's birth (or date of adoption placement). There is no obligation on an employer to pay an employee on paternity leave. An employee may be entitled to a social welfare benefit from the State, provided they have sufficient PRSI contributions.

### **Sickness and Disability Leave**

Since 1 January 2024, employees who have at least 13 continuous weeks' service with their employer are entitled to up to 5 days statutory sick leave per calendar year. Statutory sick leave is paid at a rate of 70% of normal pay, subject to a daily maximum of €110. A medical certificate from a registered medical practitioner is required for each day of sick leave. The number of statutory sick leave days is expected to increase to seven days in 2025 and to 10 days in 2026. While there is no specific concept of 'disability leave' in Irish law, employees who have a disability may take sick leave and avail of SSP and/or company sick pay.

### **Other Required or Typically Provided Leave(s)**

**Parental Leave:** Each parent is entitled to 26 weeks' parental leave in respect of a natural child, adopted child or child in respect of who the employee acts in loco parentis. This leave must be taken before the child reaches 12 years of age.

**Parent's Leave:** Employees who are a 'relevant parent' (e.g., a parent or adopting parent of a child or a spouse, civil partner or cohabitant of the parent of the child or a spouse or civil partner of the adopting parent of the child) are entitled to 9 weeks' parent's leave (where the child is born or adopted on or after 1 July 2022) or 5 weeks' parent's leave (where the child is born or adopted on or after 1 November 2019 but before 1 August 2024). Parent's leave must be taken within the first 2 years of the child's birth or adoption. Parent's leave increased from 7 to 9 weeks on 1 August 2024.

**Carer's Leave:** Employees (with at least 12 months' continuous service with an employer) are entitled to leave for a period of 104 weeks in order to care for someone in need of full-time care and attention. This leave may also, on one occasion only, apply to extend their leave for a further 104 weeks where two beneficiaries of care are residing together.

**Adoptive Leave:** An adopting parent or sole adopter is entitled to 24 weeks' adoptive leave. Employees are also entitled to additional unpaid adoptive leave for a further 16 weeks with no social welfare payments payable.

**Force Majeure:** An employee may leave work when his or her immediate presence is indispensable due to the injury or illness of certain close relatives, including a person with whom the employee is in a relationship of domestic dependency. This leave is subject to a maximum of 3 days in any 1 year or 5 days in any 3-year period and is paid by the employer.

**Health and Safety Leave:** Female employees who are pregnant or breastfeeding may be entitled to health and safety leave in certain limited circumstances (i.e. where a risk in the workplace is identified in a risk assessment that cannot be removed and there is no suitable alternative employment available).

**Jury Service Leave:** Employees must be given paid time off for jury service and without loss of any other employment rights.

**Compassionate/Bereavement Leave:** While there is no statutory entitlement to this leave, employers in Ireland typically permit employees to take this type of leave.

**Career Break/Study Leave:** While there is no statutory entitlement to this leave, employers in Ireland can and do facilitate career breaks / study leave and put in place parameters around this either on a case-by-case basis or by way of a policy.

**Leave for Medical Care Purposes:** Employees are able to take up to 5 days unpaid leave (in any period of 12 consecutive months) for medical care purposes to provide care or support to a broad range of specified persons (e.g. a child, spouse/civil partner, cohabitant, parent or grandparent, brother or sister or a person who resides in the same household as the employee, where any of those persons is in need of significant care or support for a serious medical reason).

**Domestic Violence Leave:** Employees are able to take up to 5 days paid leave (in any period of 12 consecutive months) where they, or a 'relevant person' (i.e. the employee's spouse, civil partner, cohabitant, or a person with whom they are in an intimate relationship, a minor child or other dependent person), have experienced, or are experiencing, domestic violence. The purpose of the leave is to enable the person to take certain actions or avail of relevant services/assistance regarding the domestic violence. There is no service requirement needed to avail of this leave. An employee is entitled to be paid their normal salary by their employer while on statutory domestic violence leave.

## **PENSIONS: MANDATORY AND TYPICALLY PROVIDED**

There is currently no legal obligation on an employer in Ireland to provide an occupational pension scheme for employees. Where an employer does not operate a pension scheme or where employees will not have access to such a scheme within six months of joining service, an employer must facilitate access to a Personal Retirement Savings Account ("PRSA"). There is no obligation on an employer to make contributions to a PRSA.

The Automatic Enrolment Retirement Savings System Act 2024 was enacted in July 2024. All employees who are not already in an occupational



pension scheme, aged between 23-60 and earning over €20,000 will be automatically enrolled in a pension scheme. Contribution rates will be introduced gradually over the course of a 10-year period beginning in 2025, with the employer and employee contributions starting at 1.5% increasing in 3-year intervals by 1.5%. Contributions to the pensions auto-enrolment scheme will begin in January 2025. The scheme will operate on an “opt-out” rather than an “opt-in” basis.

### **Other Required or Typically Provided Benefits**

Employers in Ireland can and do provide a range of employee benefits such as life insurance, private health insurance, pensions, permanent health insurance, sick pay, a company car, car allowance, share option / incentive schemes, etc. However, there is no legal obligation to provide any such benefits (with the exception of statutory sick pay and pensions).

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

Every employee in Ireland has an employment contract (whether it is express or implied). In practice, most employers in Ireland comply with the statutory requirements above by providing an employment contract at the outset of the employment relationship that contains the mandatory information together with more comprehensive terms and conditions covering matters such as post-termination restrictions, data protection, confidentiality and intellectual property. Many employees in Ireland are employed on a full-time basis under contracts of indefinite duration (although they may be terminated on notice). Other common categories of employee include fixed-term employees, part-time employees and agency workers, all of whom have certain protections, rights and entitlements under Irish law. ‘Zero-hours contracts’ are generally prohibited by law in Ireland except where the work is (a) done in an emergency situation; (b) done to cover routine absences on a short-term basis; or (c) of a casual nature.

### **FIXED- TERM/OPEN- ENDED CONTRACTS**

A fixed-term worker is defined as a person who enters into an employment contract directly with an employer, where the end of the contract is determined by an objective condition e.g. completion of a particular task, the occurrence of a particular event or arriving at a specific date. The maximum duration for which a fixed-term employee can be employed on successive fixed-term contracts is four years, unless there are objective grounds justifying the renewal of the fixed-term contract. A fixed-

term worker has certain rights and entitlements under Irish law including a statutory entitlement to be treated no less favourably than comparable permanent employees unless such treatment can be objectively justified (i.e. based on considerations other than the status of the employee as a fixed-term employee) and involves the achievement of a legitimate objective of the employer, with such difference in treatment being appropriate and necessary for that objective.

### **TRIAL PERIOD**

In the public sector, a probationary period must not exceed 12 months. In the private sector, a probationary period must not exceed 6 months save in exceptional circumstances. Where the probationary period is, on an exceptional basis, to be longer than six months, it cannot exceed 12 months and must “be in the interest of the employee”. There is currently no further guidance on what is envisaged as being in the interest of the employee.

### **NOTICE PERIOD**

When an employer wishes to terminate an employment relationship, there are statutory minimum notice requirements to be served by the employer on all employees with more than 13 weeks’ continuous service. The employment contract can provide for longer notice periods. When an employee wishes to terminate an employment relationship, the statutory minimum notice requirement is one week unless the employment contract provides for a longer notice period. An employer can pay an employee in lieu of notice where the contract provides for it or where an employee consents to it.

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

Any EEA (i.e. the EU Member States plus Norway, Iceland and Liechtenstein), Swiss or UK national does not require an employment permit to work in Ireland. For non-EEA nationals (other than Swiss and UK nationals), different types of employment permits are available in Ireland. The main types of employment permit are: General Employment Permit, Critical Skills Employment Permit and Intra-Company Transfer Employment Permit. The relevant permit required in each case will depend on the circumstances. Some non-EEA nationals will also require a visa to enter Ireland, in addition to an employment permit, depending on their nationality.

### **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

In general, no, a foreign employer is not required to establish, or work through, a local entity in order to hire an employee in Ireland. However, a local entity (or branch of a foreign entity) must register with the Companies Registration Office in Ireland and the Revenue Commissioners of Ireland in order to hire a non-EEA national on an employment permit.

## LIMITATIONS ON BACKGROUND CHECKS

In Ireland, there is a general prohibition on employers vetting individuals for criminal convictions and offences except for very limited activities and then criminal checks may only be carried out by An Garda Síochána, which is the Irish police force ("AGS"). Irish law only permits employers to seek criminal personal data by making a vetting request to the National Vetting Bureau in the AGS where the prospective employees will work with children or vulnerable adults or for the Irish State. The only other lawful route available to organisations to process criminal data is to request a completed self-disclosure form from the data subject for relevant criminal history. It is not feasible to carry out other forms of background checks such as credit checks because this information is not publicly available on any database or by any state body. Similarly, bankruptcy information is also not made publicly available on any database and would require a "hand search" of hardcopy documents at the relevant office of the Irish High Court.

Any social media searches must be necessary and relevant to the performance of the job for privacy law reasons. As the carrying out of any background checks involves the processing of personal data, the employee has a right to be informed of the specific checks under data protection law. The privacy notice the employer provided to employees would need to cover the purposes and legal basis the employer relies on to carry out any background checks.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

The Employment Equality Acts 1998 – 2021 prohibit employers in Ireland from discriminating against an employee or prospective employee in relation to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. Employers must ensure that recruitment processes, job advertisements, interview questions, job application forms, etc. are free from discrimination on any of the nine protected grounds/characteristics under the Employment Equality Acts. An employer has a statutory obligation to reasonably accommodate an employee or prospective employee with a disability.

# VI. PAY EQUITY LAWS

## EXTENT OF PROTECTION

Irish law on equal pay has its origins in EU law, where 'equal pay for equal work' is one of the EU's founding principles enshrined in the Treaties. The Employment Equality Acts prohibit direct and indirect pay discrimination on any of the nine protected grounds under the Employment Equality Acts. Indirect pay discrimination can be objectively justified, but direct discrimination generally cannot be.

## REMEDIES

Equal pay claims (on both the gender and non-gender grounds) are investigated at first instance by the WRC or by the Labour Court (on appeal). For equal pay claims on the gender ground only, a claimant may in the alternative bring their claim to the Circuit Court.

A claim to the WRC or the Circuit Court for equal pay must be made within 6 years of the disparity in pay. The WRC (or the Labour Court, on appeal) may provide for up to 3 years' arrears of remuneration, an order for equal remuneration from the date of the referral and/or an order a specified course of action. A determination of the Labour Court may be appealed by either party to the High Court on a point of law.

The Circuit Court may provide for up to six years arrears of remuneration, an order for equal remuneration from the date of referral and/or an order a specified course of action. In gender discrimination cases, a claim may be made directly to the Circuit Court which can, in theory, award unlimited compensation in such cases. The WRC or the Circuit Court may order interest on compensation in gender cases.

A complainant in an equal pay claim has the right to seek material information from an employer e.g. about the remuneration of comparable employees in order to decide whether or not to pursue a claim or to assist with the effective presentation of a claim.

In 2022, the Irish Human Rights and Equality Commission published a 'Code of Practice on Equal Pay', which was the first of its kind in Ireland to address the topic of equal pay. It contains guidance on how to eliminate pay inequality and resolve pay disputes. While the code is not legally binding and does not impose legal obligations on employers, it is admissible as evidence before the civil courts, the WRC and the Labour Court.

## ENFORCEMENT/LITIGATION

In general, equal pay claims have not arisen with any considerable frequency in Ireland in relation to the nine protected grounds (other than perhaps the age ground, where there has been some litigation on the issue of equal pay and seniority and severance pay).

## OTHER REQUIREMENTS

Employers with 150+ employees (on the relevant 'snapshot date' in June of the reporting year) must publish gender pay gap reports within six months of the relevant 'snapshot date'. The reporting obligation, which was required for the first time in 2022, will be extended to employers with 50+ employees by 2025. While there are no financial penalties for non-compliance nor can employees be awarded compensation for any breaches of the gender pay gap reporting obligations, employees can bring a claim before the WRC against their employer for failure to comply with their legal obligations. The WRC may order the employer to take a specified course of action to comply with its legal obligations. This creates a reputational risk for the employer.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The following restrictive covenants are recognised and may be enforceable under the law:

- Non-compete clauses;
- Non-solicitation of customers;
- Non-solicitation of employees.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Generally speaking, restrictive covenants are difficult to enforce in Ireland and they are generally deemed to be void as a restraint of trade. A restrictive covenant will only be enforceable where the employer has a legitimate interest to protect (e.g. customers, goodwill, confidential information) and if the restriction is reasonable in terms of its intended duration, geographical scope and the scope of the product or service. A covenant which is overly broad or unspecific may be deemed unenforceable. In such circumstances, a court will not rewrite a clause but may deem it void in its entirety. Restrictive covenants are typically enforced by way of an injunction (which is an equitable remedy, granted at the discretion of the court). As an alternative or additional remedy, an employer may bring a claim for damages or a claim against the new employer for inducing a breach of contract.

### USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave arises where an employee, having resigned or given notice of termination of employment, is instructed by the employer not to perform their regular duties, contact customers/clients or attend the workplace for some (or all) of

the notice period. During garden leave, an employee receives their full salary and benefits and remains an employee of the company (until the end of their notice period). The net effect of garden leave, from an employer's perspective, is that the employee is effectively 'out of the market' while on garden leave and does not have access to clients/customers, colleagues and confidential information. The goal, from an employer's perspective is that the employee is kept out of the market long enough that any confidential information they may have goes 'stale'/out of date, or the employee's successor can establish themselves (and retain customers, clients, etc.). Garden leave can be a particularly helpful tool for an employer who wishes to prevent a senior executive with a long notice period from immediately joining a competitor or starting their own business. Ideally, the employment contract should contain an express provision permitting an employer to place an employee on garden leave and the provision should also outline the powers of the employer/duties of the employee during garden leave.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

An employer can restrict an employee's access on a workplace device to the internet and social media during work hours where the employer puts in place appropriate policies.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Blanket monitoring of employee's electronic communications does not comply with Irish data protection law. Employees enjoy a reasonable expectation of privacy at work. Any monitoring of individuals must be limited in purpose and duration to comply with the GDPR principles of purpose limitation and data minimisation. Before it monitors its employees' electronic communications, an employer must first establish the legal basis under Article 6(1) of the GDPR that it relies on to carry out such monitoring. An organisation should carry out a balancing exercise before conducting any monitoring which should form part of its data protection impact assessment because monitoring is a high-risk activity in data protection terms. A data protection impact assessment (DPIA) should ascertain whether the proposed monitoring can be justified as a proportionate measure and what impact the processing would have on the employee exercising their fundamental rights.



## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

There is no statutory law or relevant guidelines in place in Ireland relating to the divulging of confidential information by employees. This issue is dealt with via the employment contract which typically includes an obligation on the employee not to disclose any confidential information belonging to its employer or a third party that the employee receives in the course of their employment. Such a clause will also typically place a restriction on the employee's use of such confidential information, for example prohibiting sharing any confidential information on social media unless the employer directly instructs / authorises the employee to do so. If an employment contract does not contain a confidentiality clause expressly prohibiting the employee from disclosing the organisation's confidential information, the employer can instead rely on its rights under the common law tort of breach of confidence. The remedies that are available for breach of confidence include injunctive relief, damages, delivery up and destruction.

In relation to any act prohibiting the employee from disparaging the employer, if such a prohibition is placed on an employee, it is typically as a contractual obligation under the employment contract or a policy to which the employee is subject. A contractual or policy obligation may restrict the employee from posting negative opinions about their employer on social media where this is harmful to the reputation of the employer. However, such a restriction must be balanced against the employee's competing right to express their views. Article 40.6.1 of the Constitution of Ireland protects the rights of individuals to freely express their convictions and opinions. Since freedom of expression is protected as a fundamental right in the Constitution, an employer must balance the competing rights of an employee's expression and its good name when limiting its employees' right to use social media or any other media to express negative opinions about the employer. If such a restriction is included in an employment contract or policy, its terms should not be too broad so as to not infringe the employee's right to expression and therefore be unenforceable.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUNDINGS FOR TERMINATION

In Ireland, an employer can, at common law, terminate an employment contract without cause, provided that it is done in accordance with the

terms of the contract. The dismissal of an employee shall be deemed unfair unless, having regard to all the circumstances, there was substantial grounds justifying it.

### COLLECTIVE DISMISSALS

In Ireland, a 'collective redundancy' is where, in a period of 30 consecutive days, an employer dismisses: i) at least 5 employees in an 'establishment' normally employing 21-49 employees; ii) at least 10 employees in an 'establishment' normally employing 50-99 employees; iii) 10% of employees in an 'establishment' normally employing 100-299 employees; or iv) at least 30 employees in an 'establishment' normally employing 300+ employees.

### INDIVIDUAL DISMISSALS

The dismissal of an employee shall be deemed unfair unless, having regard to all the circumstances, there was substantial grounds justifying it. Even where there is a fair reason for the dismissal per the law (e.g. conduct, redundancy), the employer must show that it followed a fair and reasonable process/procedure prior to implementing the dismissal (e.g. warnings given, conducting a fair and proper investigation into the matter, etc.).

### IS SEVERANCE PAY REQUIRED?

Except in a redundancy scenario (where, as above, an employee may have sufficient service to be entitled to a statutory redundancy payment), there is no statutory requirement to pay an ex-gratia severance payment to an employee on termination of employment (howsoever caused).

### SEPARATION AGREEMENTS

A settlement/separation agreement is typically entered into by an employer and an employee to settle a dispute and/or to waive any claims that an employee could potentially bring against the employer. In exchange for settling the dispute and/or waiving the right to bring claims, the employee receives consideration (e.g. an ex-gratia severance payment).

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

If an employee believes that they have been wrongfully dismissed, they may bring a claim for breach of contract before the civil courts and seek an award of damages. If an employee believes that they have been unfairly dismissed, they may bring a claim for unfair dismissal to the WRC provided the employee has the requisite service with the employer. The WRC can award redress in the form of compensation (subject to a maximum of 2 years' gross remuneration), reinstatement or re-engagement.

## WHISTLEBLOWER LAWS

Ireland has an extensive statutory protected disclosures/whistleblowing framework. Where an employee makes a disclosure of relevant information that came to their attention in a work-related context, they can avail of the protections under the Protected Disclosures Acts (i.e. protection from dismissal by reason of having made a protected disclosure and protection from penalisation (actual or threatened) (e.g. suspension, discrimination, demotion, transfer of duties, withholding a promotion and conducting a negative performance assessment) provided they have a reasonable belief that they are disclosing relevant information that tends to show a 'relevant wrongdoing'.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

While employees in Ireland have a right of association/are entitled to join a trade union, there is no corresponding obligation on an employer to recognise or to negotiate with any such trade union in relation to employees' terms and conditions of employment. Employers in Ireland are also not obliged to engage in collective bargaining per se.

In the absence of a trade union, staff association, etc., employee representative bodies are typically established for certain specific purposes e.g. for the purposes of an employer complying with their statutory information and consultation obligations under TUPE or, separately, in the context of a collective redundancy.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

While there is no statutory obligation to recognise trade unions in Ireland, trade unions can and do pursue recognition as a valid 'trade dispute' and potentially force an employer, by way of industrial action, to recognise and negotiate with the union. The degree to which a trade union may embark on industrial action (either to obtain recognition from the employer or for any other reason) is regulated mainly by the Industrial Relations Act 1990.

An employer is said to 'recognise' a trade union where the employer accepts that it has acquired a certain status within the company and where the union may have certain rights for negotiating terms and conditions of employment, and representation rights. Provisions for the registration of trade unions

and the granting of a licence (which authorises negotiation on terms and conditions of employment) are prescribed in statute.

Trade unions generally seek to protect the rights and interests of its members, provide information to members, provide protection to members on employment issues/basic employment rights, represent/give advice to members in the context of disciplinary or grievance matters, and negotiate with the employer for better pay and working conditions through collective bargaining.

The action that employers can take against employees as a result of trade union activity, trade union membership, a strike or other industrial action is limited. For example, it is considered an automatic unfair dismissal under the UDA if an employee is dismissed on the grounds of trade union activity or membership.

### Number of Representatives

While the number of employee representatives (colloquially referred to as 'shop stewards') is generally a matter for the trade union's rules or the union/management agreement, guidance published by the WRC in Ireland indicates that the number of employee representatives should be reasonable having regard to the size of the undertaking or establishment concerned, the number of trade union members employed and the structure of the trade union organisation within the undertaking or establishment.

### Appointment of Representatives

There is no specific legal framework for trade union elections but, where an employer recognises a trade union, the union's own constitution would usually include a framework for the appointment of representatives. Guidance published by the WRC in Ireland indicates that the representatives should normally have a minimum of one year's service in the undertaking or establishment concerned.

### Tasks and Obligations of Representatives

Guidance published by the WRC in Ireland sets out the principal duties and responsibilities of employee representatives. These include (i) representing members fairly and effectively in relation to matters arising within the undertaking or establishment in which they work and which concern employment and conditions of employment; (ii) participating in negotiation and grievance procedures as provided for in employer/trade union agreements or in accordance with recognised custom and practice in the undertaking or establishment in which they work; and (iii) acting in accordance with existing laws and regulations, the rules of the union and good industrial relations practice; liaising with and seeking advice and assistance from the appropriate full-time trade union official.

### Employees' Representation in Management

There are no separate employee representation requirements for management.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

The Transnational Information and Consultation of Employees Act 1996 (as amended) applies to European Works Councils ("EWC") operating in Ireland. The Employees (Provision of Information and Consultation) Act 2006 does not require an employer to establish a works council. However, it does require undertakings with more than 50 employees to enter into a written agreement with employees/employee representatives setting down formal procedures for informing and consulting with the employees. This obligation will only apply where a written request is made by 10% of employees (but not less than 15 or more than 100 employees) to the employer or to the Labour Court to enter into negotiations to establish information and consultation arrangements.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 ("TUPE") provide that on a transfer of a business which constitutes a "transfer" of "an undertaking", employees wholly or fully engaged in that transferring business automatically transfer to the acquiring entity (the transferee). This may arise on the sale of the assets of a business, the lease of a business or the contracting out of specific services. TUPE does not generally apply to share sales.

Where TUPE applies, all rights and obligations arising from contracts of employment (with the exception of certain pension rights), and any rights under collective agreements, are automatically transferred to the transferee.

As set out in more detail below, where TUPE applies, the transferor and transferee are required to conduct a statutory information and consultation process with employee representatives not later than 30 days before the transfer is carried out or otherwise in good time before the transfer is carried out.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Where TUPE applies, both the transferor and transferee are obliged to inform 'employee representatives' (e.g., a trade union, staff association, etc.) of their respective employees affected by the transfer.

If either the transferor or the transferee envisages any measures in relation to their employees as a result of the TUPE transfer, the employees' representatives must be consulted, where reasonably practicable, not later than 30 days before the transfer occurs and, in any event in good time before the transfer about such measures, with a view to reaching agreement. There is however no requirement to reach an agreement.

If no employee representatives exist within the organisation, the transferor and transferee are required to put in place a procedure under which their respective employees can elect one or more representatives from amongst their number for the purposes of consultation.

Under Irish law, a dismissal is automatically unfair where the sole or principal reason for an employee's dismissal is the TUPE transfer – e.g., if the transferee does not want certain employees or requests the transferor to dismiss a certain number of employees. This is the case whether the terminations occur before or after the transfer. Employees may be made redundant later – as long as it is not related to the transfer and there is a genuine redundancy situation.

It may be legally possible to dismiss employees under TUPE if an 'ETO' (economic, technical or organisational reason) reason exists e.g., where there are genuine redundancies such as a reduced need for a role or as a result of a change arising from the transfer.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employees have certain entitlements regarding their minimum working conditions under a wide range of statutes in Ireland including i) the right to receive a written statement of certain key terms and conditions of employment; ii) the right to receive the national minimum wage; iii) a restriction on weekly working hours; iv) the right to statutory minimum annual leave and public holidays; and v) the right to various forms of family and other leave.

### SALARY

The current National Minimum Wage rate for employees aged 20 and over, is €12.70 per hour. Lower rates are payable to employees under the age of 18 (currently €8.89), where an employee is aged 18 (currently €10.16) or aged 19 (currently €11.43). Minimum wage can consist of basic salary, shift premiums, commissions and productivity related bonuses. Where an employer provides food or accommodation, an amount of money in respect of these conditions can be included when calculating the employee's minimum wage.



## MAXIMUM WORKING WEEK

With limited exceptions, an employee may not work more than a maximum average of 48 working hours in each period of seven days. This average is calculated over a reference period of four months, which may be increased to a period of six months in certain limited circumstances. Employees cannot generally opt-out of the 48-hour average working week. The legislation contains a limited exception for senior or specialist employees who determine their own hours of work. The contracts of such employees should include specific reference to this exception.

## OVERTIME

There is no set rate of pay regarding overtime in Ireland but, where overtime is required, at least the national minimum wage rate above must be paid. The contract of employment normally sets out any applicable overtime rate. Overtime rates may also be governed by collective agreements approved by the Labour Court.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

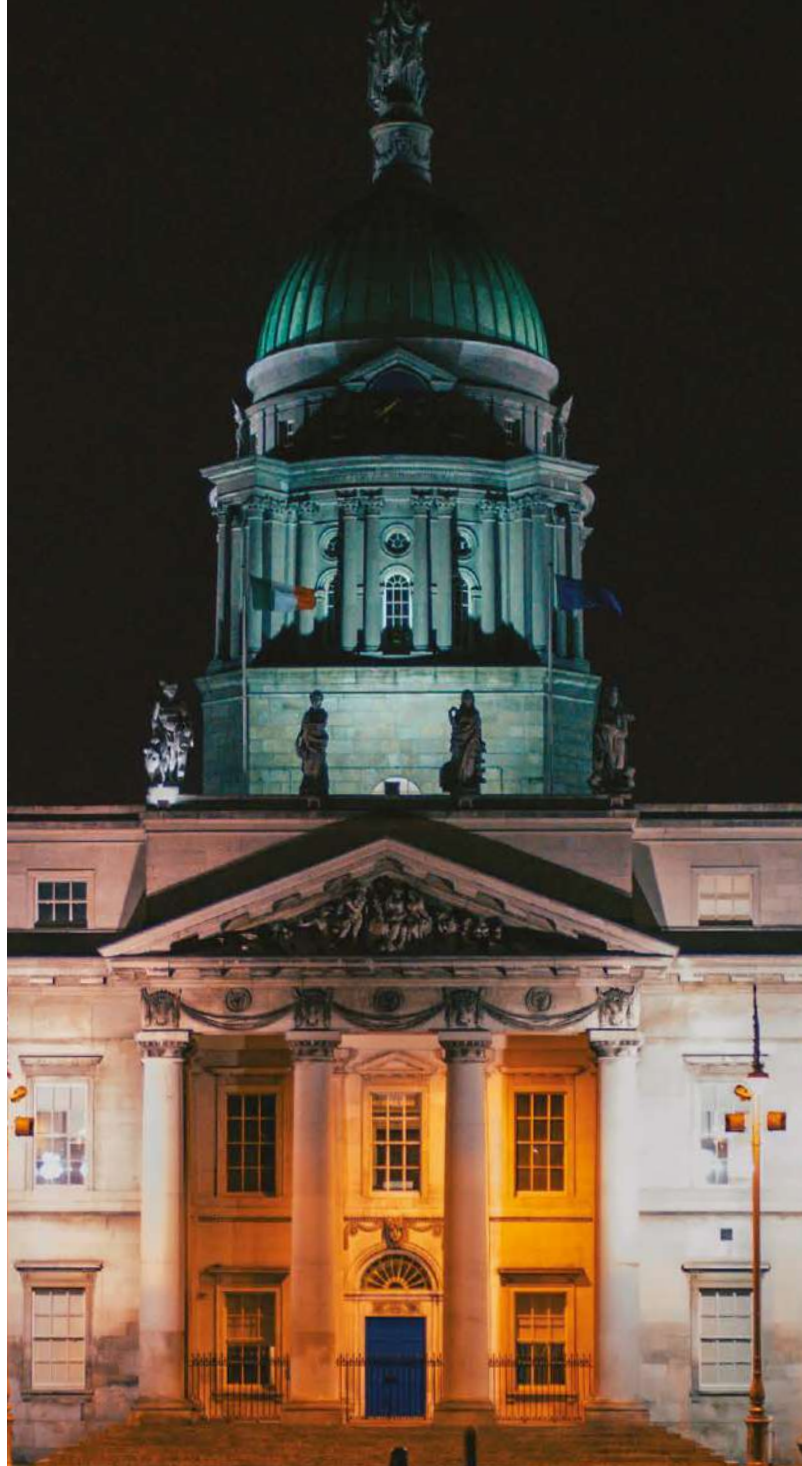
Employers have a general common law duty to an employee to take reasonable care for his/her safety. This includes obligations to provide a safe workplace, a safe system of work, and safe plant, machinery and equipment in so far as is reasonably practicable.

## COMPLAINT PROCEDURES

All complaints about workplace safety, health and welfare issues should be raised with the employer/health and safety officer in the first instance. In the absence of a satisfactory response or the employer does not address the issue, a complaint can be made by the employee to the Health and Safety Authority.

### Protection from Retaliation

Under the Safety, Health and Welfare at Work Act 2005-2014, an employer cannot dismiss, penalise (i.e. suspend, demote, transfer of duties, intimidate, etc.) or threaten to penalise an employee for making a complaint about health, safety or welfare at work. If an employee is dismissed by reason of having made a health and safety complaint, he/she can seek recourse under either the Unfair Dismissals Acts or the Safety, Health and Welfare at Work Act 2005-2014, but not both pieces of legislation. The Protected Disclosures Act also provides protection for workers who have made a 'protected disclosure' described as a 'relevant wrongdoing' (which includes, among other things, an issue regarding health and safety at work). The legislation provides protection from dismissal, penalisation or threats of penalisation by reason of having made a protected disclosure.



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## I. INTRODUCTION

The Italian employment law grants to employees relatively high standards of rights, in line with the values and principles enshrined in the Constitutional Chart. Such enhanced protection, indeed, is the core of the dual system characterizing Employment Law which discerns between the categories of subordinate work and self-employment: this bipartition has traditionally demarcated the scope of application of the legal safeguards established in Italian Labour Law to workers employed through an employment agreement, rather than self-employed individuals (even if – currently – as a result of various legislative interventions – such as Law 22 May 2017, no. 81 – the Italian legal framework is being enriched with provisions aimed at ensuring increasingly effective protection for this peculiar category of workers as well).

As already pointed out, the rights of employees find their *raison d'être* directly in the Italian Constitution: it is only sufficient to consider the employees' right to receive, pursuant to Section 36 of the Constitution, a salary "proportionate to the quantity and quality of work and in any case sufficient to ensure for (the worker) and his family a free and dignified existence", to adequate social security and protection from any kind of risk that can affect employees' capacity to work (Section 38) rather than the right to strike (Section 40). In addition to the above, it is worth mentioning – moreover – that Section 39 envisages the freedom of trade union association and the right to collective bargaining. In particular, trade unions are considered unincorporated associations that do not need any authorization or any registration to be recognized: they are governed by their by-laws, which do not need to be checked by any authority. This principle was also made effective regarding the workplace through the approval of the Workers' Statute (Law no. 300 of May 20, 1970).

Title III of the Statute (Sections 19-27) contains a number of measures intended to support trade union activity at the workplace, including the right to establish, at the initiative of workers, company's trade union representatives (RSA) in every production unit employing more than 15 employees (Section 35 Workers' Statute). Having said that, the trade unions have always been considered important actors in the context of industrial relations. Indeed, they must necessarily be consulted in the area of relevant business activities (e.g. in case of transfer of a business or in the scope of collective dismissals).

Above all, however, the most guaranteeing protection that has always characterized the

Italian Employment Law system is that relating to dismissals. As a matter of fact, except for few residual hypotheses (e.g. at will dismissal during the probationary period), a termination served by the employer, in order to be considered valid, must always be supported by a justification, a reason. Lacking such grounds, the dismissal so disposed is considered unjustified and, therefore, null and void.

In this respect the reinstatement – introduced into the Italian legal system through Section 18 of Law 300/1970 in all cases of unlawful dismissal (that involved workers employed by entrepreneurs or non-entrepreneurs, who exceeded specific size thresholds: i.e. 15 employees in a single B.U. or 60 employees nationwide considered) – represented the most effective and traditional form of protection granted to the employees. Such measure, specifically, consists in the employer's obligation to readmit the worker to the same position he/she occupied before the unfair dismissal. Nevertheless, it was argued by some scholars and political figures that such discipline created a sort of inertia within the Italian Labour Market: thus, in order to develop foreign investment, it was starting to be deemed as pressing the necessity to promote greater flexibility in exiting the labour market and thus facilitate layoffs.

As a matter of fact, in the aftermath of the global economic recession occurred in 2008, labour market flexibility has emerged as a priority among the structural reforms set out by the Italian legislators. Therefore, following a hiatus in the reformation process, the "Fornero Law" (Law no. 92/2012) clearly manifested the two-fold purpose of, not only, narrowing the labour market segmentation between workers with permanent contracts and those with fixed-term or parasubordinate agreements, but also to undermine the effectiveness of Section 18 of the Worker Statute, reducing therefore workers' protections in case of dismissals regarded as invalid by the Courts. Notwithstanding the above, the examined law weakened the previous regulation without eliminate it: for a considerable set of hypothesis, as a matter of fact, the obligation to reinstate the dismissed employee in the event that the termination is considered unfair, has been maintained.

The final phase of this reform process coincides with the so-called Jobs Act, which has allowed greater flexibility to the employers by providing them with different measures, including the (i) "progressive" protection against unfair dismissals and the (ii) opportunity, upon certain terms, to demote the employees, contributing to bringing Italian Employment Law provisions more into alignment with



international benchmarks and flexicurity principles. In particular, the provisions included within the Jobs Act do not provide for the obligation of employees' reinstatement in case of invalid termination (unless it involves orally communicated or discrimination-based layoffs). Instead, when an invalid termination occurs, the employers are obligated to compensate their workers only with an indemnification (from 6 up to 36 months salary due to the Labour Judge's discretion based on several factors). These new rules, however, apply only to new permanent hires as of March 7, 2015, while the existing old type of permanent contracts remains protected by the retention of existing rights.

However, despite all these reforms it is possible to detect some degree of resistance on part of the case law to adapt to such changes, always persisting interpretations aimed at limiting the impact of these new reforms and attempting to give again importance and centrality to the reinstatement protection.

## KEY POINTS

- For every industrial sector, a National Collective Bargaining Agreement (hereafter, also referred to as "NCBA") regulates the employment relationship.
- Italian employment laws and the several provisions contained within the NCBA's may only be amended by employers in a way that is more favorable to their workers.
- Companies with more than 15 employees are covered under the scope of application of the Workers' Statute.
- Reinstatement is any longer the exclusive recourse in cases of unjustified dismissal.
- The collective dismissal procedure must be triggered if at least 5 dismissals for economic reasons are issued by a given company with more than 15 employees within a time frame of 120 days. Moreover, in this respect, Law 30 December 2021, no. 234, introduced a more complex procedure of prior information and consultation, both at the trade union and political/ministerial level, aimed at "ensuring the preservation of the employment and production fabric" in the event of closure and permanent cessation of production activities entailing at least 50 terminations in a productive unit/office for employers who in the previous year employed an average of at least 250 workers.
- Executives must be considered in the calculation that causes the collective dismissal to be triggered.
- The need to provide reasons in order to enter into a fixed-term contract has been reintroduced for such contracts provided they exceed a 12 months duration.

## II. ANTI-DISCRIMINATION LAWS

## SUMMARY

Discrimination is prohibited either in form of direct or indirect discrimination. Direct discrimination occurs when a person is treated less favorably because of one of the protected characteristics. Indirect discrimination occurs, conversely, when an apparently neutral provision, criterion, practice, agreement or conduct would have a disparate impact on "protected" categories of employees.

## PROTECTIONS AGAINST HARASSMENT

Harassment based on racial or ethnic origin, religion or personal beliefs, disability, age and sexual orientation and sexual harassment are very serious infractions of the employment obligations when they take place within the scope of administration and management of the company, regardless of who is actually perpetrating harassment, and as long as the employer is aware of it and has not adopted the measures necessary to stop it. Under Italian law it is not permitted to harass a person, violate its dignity or to create a hostile, degrading, humiliating or offensive environment because of a person's a protected characteristic. Sexual harassment is also prohibited. Companies are allowed to establish policies and procedures in employee handbooks that may cover also issues such as prevention of harassments and codes of conduct. Both companies and employees are bounded by the handbooks as they are part of the internal regulations of the company.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Generally speaking, under Italian law there is no legal requirement for the employer to make accommodations to employees due to their protected characteristic. This means that employers are not obliged, for example, to change their internal rules or their organisation to allow employees to profess their religious beliefs or provide other accommodations hereof (for example, allowing time-off for praying or grant them with leaves of absence over the days in which religious celebrations take place). However, to ensure compliance with the principle of equal treatment of persons with disabilities, Section 3 of Legislative Decree no. 216 of July 9, 2003, states that employers are required to make reasonable accommodations in the workplace to ensure full equality of people with disabilities with other workers. Also, according to Law no. 68 of 12 March 1999, there is a statutory requirement to occupy a certain number of disabled people. Private and public employers with at least fifteen employees are compelled to hire a number of disabled people.

## REMEDIES

An employee may file a claim for discrimination before



the Labour Court. The Court may order the employer to stop the discriminatory conduct, to remove the effect of the unlawful conduct and order a plan to avoid future discrimination. The Court can also award damages. There is no minimum or maximum amount of damages established by legislation: the amount is determined at the discretion of the Labour Judge. There is also a Commission for Equal Treatment that has the power to promote anti-discriminatory practices. It can monitor employers, and in the case of discriminatory conduct, it can ask the employer to arrange a plan to remove the discrimination. It can represent the employee in court and bring proceedings against the employer in cases of collective discrimination.

### III. EMPLOYEE BENEFITS

#### SOCIAL SECURITY

In order to benefit from the pension system, employees are required to provide social security authorities (**INPS – National Social Security Authority**) with social security contributions. Employers make contributions to the social security authorities for the sector of business in which the company operates. Contribution amounts are around 30% of the employee's monthly gross salary. In addition, the employer withholds approximately 9% of the employee's monthly gross salary for social security contributions. Payment of contributions is mandatory, and the parties cannot make any agreements to the contrary. The maximum salary threshold (determined year by year by INPS) beyond which social security contributions are no longer due exists only for workers registered for the first time with INPS after 1 January 1996, or employees registered with INPS prior to 1996 who elect to take a pension under the contribution system.

#### HEALTHCARE AND INSURANCES

The duty of the employer to safeguard workers derives from Sections 32, 35, 38 and 41 of the Italian Constitution and from Section 2087 of the Italian Civil Code. The employer is required to adopt all measures which, in light of the specific type of business activity performed, past experience, and techniques used, are necessary to safeguard the psychological and physical integrity of the employees.

#### REQUIRED LEAVE

##### Holidays and Annual Leave

Section 36 of the Italian Constitution and Section 2109 of the Italian Civil Code provide for the employees' right to annual paid vacation. The employee cannot waive this right. Legislative Decree no. 66 of 8 April 2003 states that the minimum length of paid vacation is four weeks per year. The applicable NCBA may provide for a longer vacation period.

The four-week period must be used for almost two consecutive weeks during the year of time accrued, and the other two weeks (or the remaining higher period provided by the applicable NCBA) must be used within the eighteen months starting from the end of the accrued year. Payment by the employer of the relevant indemnity in lieu of the accrued holidays is not allowed unless the employment relationship terminates. Under Italian law, employees are also entitled to 11 days of bank holidays.

#### Maternity and Parental Leave

##### Maternity Leave

A mother has the right to paid leaves of absence in order to attend pre-birth tests or medical examinations. There is a ban on working during the two months prior to the expected date of confinement (this period may be longer in cases of serious complications in the pregnancy, or in case the working activity is performed in environmental conditions deemed to be harmful to the pregnant worker), and for three months after the actual date of the confinement. During this period, the mother is entitled to an INPS indemnity equal to 80% of the salary. Some NCBA's require the employer to pay the remaining 20% of salary. The law provides flexibility in the application of the above-mentioned term. Indeed the employee (mother) has the right of abstention from work starting from the month preceding the expected date of birth provided under certification of lack of any prejudice to the health and safety of the mother or the child issued by a doctor of the National Health Service or other relevant doctors. Furthermore, Law no. 145 of 30 December 2018 provides that, with the above-mentioned certification, the employee (mother) has the possibility to abstain from the work for the whole period of five months following the date of the birth.

##### Paternity Leave

According to Legislative Decree no. 105 of 30 June 2022, the working father (also adopting father), from 2 months prior to the presumed date of birth and within 5 months thereafter, shall abstain from work for a period of 10 working days, also on a non-continuous basis. The leave is also applicable, within the same time frame, in case of perinatal death of the child. During the maternity, the working father is also entitled to compulsory abstention from work as an alternative to the mother in the following situations: (1) if she does not benefit from it; (2) if she dies or she is affected by a serious illness; (3) if she abandons the new-born baby; or (4) if the father has exclusive custody of the new-born baby. During this period, which is called alternative paternity leave, the father – as well as provided for the mother – is entitled to an indemnity equal to 80% of the salary.

##### Parental Leave

Each parent, during the child's first twelve years of life, is entitled to parental leave. The overall

period of parental leave to which parents, jointly considered, are entitled cannot exceed ten months (save the case in which the father abstains from work, uninterruptedly or fractionally, for at least three months: in this case, the joint maximum leave is increased to eleven months). If there is only one parent, he/she is entitled to a maximum period of 10 months of parental leave. During this period, until the child is twelve-years-old, the mother and the father are entitled, for three months each, to an indemnity equal to 30% of the salary, raised, alternatively among parents until the child is six-years-old, for the duration of up to one month at the rate of 80%. Additionally, they are entitled to a further three months granted with the same indemnity of 30% to be enjoyed alternatively.

### Sickness and Disability Leave

According to Italian Labour Law, in case of sickness the employee is entitled to keep his/her job position for a certain period of time that varies accordingly to the applicable NCBA, and it generally lasts one hundred and eighty days in the space of one year (the 'periodo di comparto'). This period is a suspension of the employee's contractual obligation to carry out his/her working activity.

Disabled employees may take paid leave of two hours or more per day, for a maximum total leave of three days per month. INPS pays an indemnity to such employees. A complicated system of paid and/or unpaid permits is provided by law for the relatives who assist disabled people.

### Any Other Required or Typically Provided Leave

**Bereavement Leave:** Ministerial Decree no. 278 of 21 July 2000 entitles the employee paid leave when the employee certifies the death of one of his/her family members. This leave may be granted for a maximum period of three days per year. Employees also have the right to leave for the death of a wife or husband, child, or other relatives up to the second degree.

**Family Leave:** Family leave is available when one of the employee's family members has a serious infirmity or illness, and the employee documents the need to assist the family member. This leave can be used continuously or in part for not more than two years for the whole period of the working relationship. The applicable NCBA may provide additional leave.

**Marriage Leave:** Any employee, except during the trial period, is entitled to a special paid leave in case of marriage. Duration of the leave is fifteen days for white-collar employees and eight days for blue-collar employees. Almost all the applicable NCBAs provide for fifteen days of paid vacation. The employee can elect to take compensation in lieu of marriage leave. Marriage leave is compensated at the employee's regular rate of pay.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

As of 1 January 2012, the only applicable system of calculation of pension is the contributions system (i.e., based on the contributions actually paid by the employee over his/her entire working life). In addition, the length of service pension has been repealed and substituted by a so-called anticipated pension (requiring forty-one years and ten months of contributions for women and forty-two years and ten months of contributions for men). The requirements to obtain an old age pension are as follows: i) the employee must be 67 years of age (men and women); these age requirements are yearly increased based on the life expectancy; ii) the employee has paid contributions for at least twenty years; iii) employment terminates.

Starting from 1 January 2022, 'quota 100' has been replaced with 'quota 102'. The requirements to obtain the pension under the above provisions are as follows: i) the employee must be 64 years of age (men and women); ii) the employee has paid contributions for at least thirty-eight years; iii) employment terminates.

On an experimental basis starting from 1 January 2023, "quota 103" has been introduced replacing "quota 102" (pursuant to Section 14.1 of Law Decree no. 4 of 28 Jan. 2019, as introduced by section 1, para. 283 of Law no. 197 of 29 December 2022). The requirements to obtain the pension under the above provisions are as follows: i) the employee must be 62 years of age (men and women); ii) the employee has paid contributions for at least forty-one years; iii) employment terminates.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Public and private employers must notify the employee - alternatively through the delivery of the individual employment contract drawn up in writing or the copy of the notice of commencement of the employment relationship - accurate information at the time of the initiation of the employment relationship and prior to the start of the employment activity.

Additional information (such as the collective agreement, including the plant level agreement, applied to the employment relationship with an indication of the parties who signed it) can be provided to the employee within one month from the start of the working performance. In addition, the Decree Law no. 48 issued on 4 May 2023 (not yet converted into law) has provided that certain information (including the length of the probationary period, if any, and the right to receive training provided by the employer) may be communicated

to the employee simply by indicating the regulatory reference or the collective agreement, including the company's collective agreement, which governs such matters. Finally, hand delivery of the text of the NCBA is no longer compulsory: the employer may also satisfy information issues by publishing and making available to the employee on the (company) website, the national, territorial or company collective agreements as well as any company regulations applicable to the employment relationship.

## **FIXED- TERM/OPEN- ENDED CONTRACTS**

The open-ended contract is the usual form of employment. Alongside this kind of employment contract, there are alternative more flexible forms of contract, such as the fixed-term agreement.

Recently, Section 24 of Decree-Law No. 48 of 4 May 2023, entitled "Discipline of fixed-term employment contracts", has substantially amended the regulation of fixed-term employment contracts. In particular, the new discipline extends the range of reasons that may ground the fixed-term contracts lasting at least 12 months but not exceeding 24 months. These are: i) the one established by collective bargaining agreements (at national, territorial or company level); ii) technical, organisational and production reasons individuated by the employer and employee in the individual contract, in the absence of regulation by collective bargaining agreements (this faculty is granted only until 30 April 2024); and iii) other employees' substitute needs (as, moreover, already provided for in the previous wording of the law).

## **TRIAL PERIOD**

Employment contracts may provide for a probationary period – the so called "trial period" – so that each party may evaluate whether they wish to finalize an effective employment relationship. The length of such period is determined by the applicable NCBA and varies depending on the qualification assigned to the interested employee (executive, middle-manager, white-collar or blue-collar). In this regard, the Legislative Decree no. 104 of 27 June 2022 has established with respect to the length of the probationary period that, where provided, it cannot exceed 6 months in any case.

## **NOTICE PERIOD**

Following the termination of an employment contract executed for an indefinite duration, unless resolved for "just cause" (i.e., a reason – as defined by Section 2119 of the Italian Civil Code– that does not allow the employment relationship to proceed not even on a temporary basis) both the employer and his/her former worker are eligible for a notice period, whose time duration depends strictly on the employee's length of service and professional level acquired and as determined by the NCBA adopted by the company.

# **V. HIRING PRACTICES**

## **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

The immigration system in Italy varies depending on whether the worker is an EU citizen or not. As a matter of fact, EU nationals are entitled to work in Italy without any work or residence permit: there are no numerical thresholds, and the employees are not subject to any peculiar immigration procedure. Instead, according to Legislative Decree no. 286 of 25 July 1998, nationals of non-EU countries who wish to work legally in Italy require both a residence permit and a work permit. Every year, to this extent, a special decree establishes the maximum number of non-EU citizens who may enter into contracts of employment in Italy. Nevertheless, such discipline of annual quotas does not operate for the hiring of workers intended to perform certain special activities (such as, translators and interpreters; journalists; university professors) or for particularly skilled workers.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

No, it does not. The foreign company wishing to hire an employee in Italy, without having to establish itself in one of the corporate forms provided by the relevant legislation, has at its disposal the possibility of operating with a representative office, intended as a regular office, which performs purely promotional and advertising, information gathering, scientific or market research functions. The representative office must perform an auxiliary or preparatory activity to the penetration of the company into the target market: such structure does not allow for production or sales activities that could qualify it as a permanent establishment.

## **LIMITATIONS ON BACKGROUND CHECKS**

The so-called Workers' Statute, prevents the employer from investigating – also through third parties – the political, religious or trade union opinions of a prospective employee, as well as facts or circumstances that are not relevant to assess his/her professional aptitudes (such as, nationality, age, sexual orientation etc.). Thus, the mentioned provision prohibits any investigation aimed at collecting information that may then trigger discriminatory conducts: therefore, any investigation about such aspects of the employees' life shall always be prohibited, as well as any investigation of facts that cannot be objectively used to evaluate the employees' skills, competence, experience, and suitability with the specific duties to be carried out eventually.



## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

In Italy there is no specific regulation on interviewing for a job position outside the public administration nor specific regulation on hiring procedures. The relevant questions, however, have to be maintained within the scope of investigation highlighted above, avoiding any form of discrimination. As a matter of fact, by way of mere example, the employers are prevented from asking any kind of questions regarding sexual orientation, gender identity, etc of the potential worker. The employer however could ask to the prospective employee to bring references from his/her former employers.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

The Workers' Statute explicitly prohibits employment discrimination based on gender. It is also established that hiring, job definition and promotion must be in accordance with regulations that are equally applicable to employees of both sexes.

Legislative Decree no. 145 of 30 May 2005 implemented the European Directive no. 73/2002 – then repealed by Directive no. 54/2006 – and modified the Law no. 125 of 10 April 1991, subsequently replaced by Legislative Decree no. 198 of 11 April 2006 which has been amended by Law no. 162 of 5 November 2021 by enlarging the rights of equal access to the job market, professional education and training, and equal working conditions. More recently, Directive no. 970/2023, the so-called Pay Transparency Directive, introduced new requirements in terms of gender and pay equality that the Member States shall transpose by 7 June 2026.

The new regulation has mainly two purposes: on one hand, to contrast the gender pay gap, and on the other, to encourage the adoption of measures that encourage the participation of women in the labour market.

### REMEDIES

Section 28 of the Legislative Decree no. 198 of 11 April 2006 clearly states that job classification systems and salary shall be determined by adopting common criteria for men and women and be tailored to eliminate discrimination. To challenge possible unfair practices, the employee may file a claim before the Labour Court, also with the assistance of the Councillor for Equal Treatment. The burden of proof usually lies with the party who files the claim. However, for the cases of discrimination based on gender, the Italian law envisages a partial reversal of the burden of proof. In particular, it is provided that, if the employee provides presumptive elements of discrimination, the burden of proof on the non-

existence of discrimination lies with the employer, thus giving rise to a conditional inversion.

## ENFORCEMENT/LITIGATION

In our jurisdiction litigation concerning specific matter of equal pay still represents a marginal practice. Indeed, litigations triggered by discrimination concerning violations of equal pay practices are still rather uncommon in Italy.

In general, discriminations in Italy are more likely to be challenged by employees in occasion of dismissal and this trend may be connected to the fact that among the cases whereby the employer may be ordered to reinstate the employees are included also the case when the Labour Court considers the dismissal unlawful for discriminatory grounds.

## OTHER REQUIREMENTS

Among the measures to reduce gender gap at workplace, employers with more than fifty employees are required to file a report every two years about male/female equal treatments (Legislative Decree no. 198 of 11 April 2006, section 46 as amended by Law no. 162 of 5 November 2021).

Starting from 1 January 2022, the Italian law has introduced the “certification of gender equality” which is a document aimed at certifying the policies and concrete measures adopted by employers to reduce the gender gap in relation to growth opportunities in the company, the equal pay for equal tasks, policies for the management of gender differences and maternity protection (Legislative Decree no. 198 of 11 April 2006, section 46 bis). In addition, the law has set up a permanent technical committee on gender certification for companies at the Department for Equal Opportunities of the Presidency of the Council of Ministers.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Under Italian law, employment relationships are governed by the general principle of good faith, according to which the employer and the employee each have a duty to carry out their obligations with respect to this principle.

The following restrictive covenants are recognised and may be enforceable under the law:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees.

**Non-compete clauses:** According to the provisions set forth by Section 2125 of the Italian Civil Code, post-employment non-compete covenants

may only be deemed valid and enforceable if they:

- are agreed in writing;
- grant consideration to the employee;
- narrowly define the prohibited activities and limit the geographical scope of the restrictions;
- have a clearly specified term not exceeding three years (five years for executives).

**Non-solicitation of customers:** There is no legal regulation of non-solicitation of customer restraints. It is simply a matter of enforcing a contractual undertaking. It is therefore important that the non-solicitation clause is clearly drafted and is specific on which customers are within the scope of the restraint. Indeed, if the clause is excessive it will not be struck out by the courts as its content was agreed by the parties.

**Non-solicitation of employees:** There is no legal regulation of non-solicitation of employee restraints and therefore no requirement to pay any compensation for them. As per the non-solicitation of customers ones, also for this kind of covenant it is simply a matter of enforcing a contractual undertaking. Equally, it is therefore important that the non-entice away of employees' covenant is clearly drafted and is specific on which employees are within the scope of the restraint.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

The normal remedy to enforce a restrictive covenant is by way of a judicial urgency proceeding aimed at obtaining a preliminary injunction. It is also possible for the non-compete covenant to include a clause to the effect, if the restrictive covenant is wholly or partly breached, the employee must repay any compensation already paid to him for the non-compete. Furthermore, in case of breach of a valid and enforceable non-compete covenant, the employer has also the right to request compensation for the damages suffered, to the extent it can prove its losses caused by the employee's breach of the restrictive covenant; frequently, the damages are predetermined in a 'liquidated damages clause' contained in the covenant.

## USE AND LIMITATIONS OF GARDEN LEAVE

Under Italian labour law, garden leave does not exist. However, the parties can mutually agree a sort of "garden leave" as a term in a settlement agreement. Specifically, within the framework of such an agreement, the parties could agree that the employee will stay on the company payroll for a certain period and that during such a period of "leave" he/she will not be permitted to work or enter the office or will not be allowed to access emails and IT systems and/or other company items. If the

parties mutually agree a "garden leave", the employee being still employed by the previous employer would be subject to the duty of loyalty under Section 2105 of the Italian Civil Code until termination of employment. If the employee breaches this duty, although from a purely theoretical perspective, the Court could issue an injunction to stop the activity performed in competition with the employer during this period. However, in practice it is more likely that the employer would terminate the employment for "good reason". As explained above, the employer has no unilateral right to put an employee on garden leave as according to the general principles of Italian labour law, the employee not only has the right to receive his/her contractual remuneration but also to perform his/her work and activities. Including a garden leave clause in the employment contract in Italy will have no effect.

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

'Guidelines applying to the use of e-mails and the internet in the employment context' of the Italian Privacy Authority state that the employer can issue internal policies, codes of conduct or guidelines on the use of internet and e-mails by using clear-cut, non-generic wording, which shall be adequately publicized and updated regularly. In addition to drafting and circulating internal policy document detailing the appropriate use of IT devices and the relevant controls, if any, the employer has the duty to always inform data subjects about their data treatment in pursuance of section 13 of the GDPR. To reduce the risk of internet use for purposes other than discharging labour tasks, the employer may take measures by having regard to the peculiarities of the specific professional requirements, specifying the categories of websites that are regarded as related/unrelated to the work performed, configuring systems and/or deploying filters to prevent certain operations from being performed (e.g., blocking access to certain sites, or limiting downloading of files or software that are a certain size or data type).

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Under the current legal framework, the instruments and equipment that are potentially able also to monitor employees are permitted only to the extent they are required for organisational, productive or safety reasons or for the safeguard of the company assets and provided that their use is agreed with the work council/most representative trade unions

or authorised by the Labour Office depending on the specific case. Such rules do not apply (thus no agreement or authorization is needed) to the instruments/equipment which are used by the employees for performing the activity (e.g., laptop, mobile and e-mail) and to devices which are used by the employer to register the employees' accesses and attendance at the workplace. In addition, as confirmed by the Supreme Court in June 2024, data and information collected through such instruments/equipment can be used for all purposes related to the employment relationship provided that the employees have been adequately informed on how instruments must be used and how controls can be carried out, in compliance with data protection legislation.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

As the use of social media has become nearly a part of our life, there is indeed an increasing number of labour proceedings triggered by employees' dismissals due to their comments on such platforms. If an employee posts a negative comment on the company, his/her colleagues, the company's products or its customers, there is the risk that such conduct may lead to disciplinary consequences, including the termination of the employment relationship by the employer, depending on the seriousness of the misconduct. Indeed, the relevant assessment shall be carried out on a case-by-case basis, thus considering the specific circumstances characterizing each case. Criteria to be taken into consideration by the Labour Courts when carrying out such an assessment include, but are not limited to, the existence of a company policy which has been breached by the employee, the fact that the employee's profile on social media is public or private (i.e., the comments by the employee may only be read by those individuals who qualify as his/her "friends"), whether the employee's conduct could damage or not the employer's brand. Another criterion which has to be taken into account is the freedom of expression under section 21 of the Italian Constitution: indeed, based on case-law, employees are entitled to criticize the employer as a right associated with their freedom of expression, to the extent that either certain requirements are met, either "substantial" (the criticism relies on founded grounds as this is true) or "formal" (modalities used by employees are not as such as to unfoundedly damage the respectability of the employer, offend his honour or cause any damage whatsoever to this). Due to the absence of a statutory regulations governing the use of social media by employees and considering its increasing importance, many clients - especially multinational companies - have implemented company policies regulating its use, which may help when taking disciplinary measures against an employee.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUNDINGS FOR TERMINATION

Italian labour law requires the termination of the employment contract to be justified on specific reasons. Such reasons may be classified into the following main categories:

**Just Cause:** which occurs in case of gross misconduct by the employee which does not allow the continuation of the employment relationship, not even on a provisional basis.

**Subjective justified reasons:** which occurs whenever the employee breaches a contractual obligation, or the employee negligently performs his/her duties, but the behaviour is not serious enough to ground a dismissal for just cause.

**Objective justified reasons:** which concern technical, production-related and organisational reasons which have to be proved by the employer. These kinds of reasons are objective, and they concern the activity of the employer. They may be due to technological renewal or to the need of rationalising a production system or the work organisation.

### COLLECTIVE DISMISSALS

A collective dismissal occurs when at least 5 dismissals are served by the employer in a business unit or in more business units located in the same province and in a period of 120 days, due to reduction, transformation or ceasing of activity. The Law applies also to executives ("Dirigenti").

Effective as of 1 January 2022, a special and additional information and consultation procedure has been provided for employers with an average of at least 250 employees in the year preceding the year in which they intend to close "an office, a factory, a branch, or a functionally autonomous department located in the national territory", with definitive cessation of the relevant activity, resulting in at least 50 redundancies. The special procedure must be implemented 180 days before the statutory one (the time limit has been extended from 90 to 180 days by law no. 175 of 17 November 2022).

### INDIVIDUAL DISMISSALS

Individual dismissals shall be served in writing and specific procedures shall be followed depending on the type of dismissal to be served.

- **Dismissals grounded on objective justified reasons:** In case of dismissal grounded on objective reasons, the employer must communicate in advance its intention to proceed with individual



dismissal to the Labour Office of the employee's workplace copying the same employee and explaining the reasons for the termination.

- **Disciplinary dismissals:** In case the dismissal is grounded on a just cause or on subjective justified reasons, the employer must follow the specific procedure set forth by Section 7 of the Workers' Statute. The employer must first provide the employee with a written description of the objectionable behaviour or conduct.

## IS SEVERANCE PAY REQUIRED?

Section 2120 of the Italian Civil Code provides for the payment of a deferred form of remuneration, the severance indemnity (Trattamento di Fine Rapporto – TFR). The TFR must be paid to employees whenever an employment agreement is terminated, regardless of the reason for the termination. The amount of the TFR varies depending on the employee's salary and length of service. It is equal to about 7.4% of the total amount of salary received during the entire relationship.

## SEPARATION AGREEMENTS

When an employment relationship is terminated, the parties may agree to enter into a full and final separation agreement providing the waiver by the parties to raise any claim for any right arising from or connected with the employment relationship and its termination.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The sanction for unlawful individual dismissal varies depending on the reasons grounding the dismissal served, employee's qualification and date of hiring as well as the size of the employer.

## WHISTLEBLOWER LAWS

The European Parliament and the Council adopted the EU Directive no. 1937/2019 on the 'protection of persons who report breaches of Union law' which provided that Member States should adopt internal law regulations whereby employers of the private sector which are staffed with fifty or more employees, regardless of the sector in which they operate, must establish internal channels and procedures for reporting and following up on reports.

The long-awaited Legislative Decree implementing Directive (EU) 2019/1937 on the protection of persons reporting infringements of Union law, including in the private sector, has finally been issued on 10 March 2023. The Decree no. 24 of 10 March 2023 — is big news for several reasons. First of all, it is intended to be the regulatory point of reference both for the public and private sectors. Secondly, its scope covers a wide area of violations of national and European law that are such as to

harm the public interest or the integrity of the public administration or private entity.

The most important profile to highlight, however, is the fact that the adoption of whistleblowing procedures has now become mandatory for certain companies (while before, in the private sector, it was optional, except for certain 'big' publicly listed companies).

For what concerns the protection for the whistle-blower, it is extended by granting it not only to whistle-blowers in the strict sense but also to so-called facilitators (i.e., persons who assist a whistle-blower in the reporting process, operating within the same working environment and whose assistance is to be kept confidential) and other persons – better specified in the Decree – close for various reasons to the whistle-blower himself. From an objective standpoint, extensive protection is provided for the whistle-blower against retaliation, expressly listing some cases that fall under it (i.e., dismissal, suspension or equivalent measures; downgrading or non-promotion; change of duties, change of place of work, reduction of salary, change of working hours, etc.).

In the event of disputes concerning retaliation against the whistle-blower, a legal presumption in favour of the whistle-blower is set out. Even in the case of a claim for damages made by the whistle-blower, the damage is presumed to be a consequence of the whistleblowing. It shall be evidenced that the obligations set forth by the described discipline entered in force starting from 15 July 2023 and for companies of the private sector employing less than 250 employees the discipline entered in force starting from 17 December 2023.

In this respect, on 16 June 2023 the ANAC issued a detailed Guideline with the aim to provide practical instructions for employers in order to be compliant with the new whistleblowing regulation.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The Italian Constitution provides the freedom to set up or to join a trade union association. The trade unions are assigned with active role in the discipline of the employment relationship and in the industrial relations. All employees are entitled to join a trade union association which may establish both externally and internally to the company (RSA and RSU). Likewise, employers are entitled to establish and join trade unions' associations for and of employers. Accordingly, trade unions are considered

unincorporated associations that do not need any authorization or any registration to be recognized. The trade unions associations are governed by their bylaws, which do not need to be checked by any authority. The union structure is based on a dual organisational line: vertical (Categories, which usually are distinguished by the sector in which the employees that belong to such category operate) and horizontal (Confederations, which collect the unions of the same categories in different territories). The major Italian employees' trade union organisations are the General Federation of Italian Trade Unions (CGIL), Federation of Italian Workers Trade Unions (CISL) and the Italian Work Union (UIL). The most representative employers' organisations in Italy are divided into three big economic sectors: industrial, trade and agribusiness.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Trade Unions are assigned with the fundamental task of representing collective interests. In this respect, Trade unions associations constitute principal actors in industrial relations and are assigned with the delicate role of negotiation and execution of the NCBA which provides the detailed discipline to be applied to employment relationships. In addition, Trade Unions are entitled to be informed and consulted before the company implements decisions involving a restructuring of the workforce by means of a partial restructuring or the shutdown of the business. This right to notice and consultation occurs, for instance, before a collective dismissal, a transfer of an undertaking and any plan to implement measures alternative to the dismissals, and in other cases provided for by the applicable NCBA. RSA and RSU representative are granted with specific rights. If the company is willing to transfer the staff representative from one place of work to another, it has to obtain the consent of the trade unions, as provided by Section 22 of the Workers' Statute. If the company decides to transfer the representative without going through this procedure, the measure shall be deemed unfair. Moreover, the staff representatives are granted with special protection also in case of dismissal (pursuant to Section 18 of Workers Statute and also pursuant to certain NCBA). Further protection for staff representative is also granted by Sections 23 and 24, which entitle the representatives to leave, with or without pay, to carry out labour related activity, even outside the company.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Within the Italian legal system there are other Employees representatives' bodies:

- **European Employees' Committee:** such body is set up in all European community-sized company or group of companies, with the purpose of informing and consulting employees on the

company's economic development and on major transnational decisions affecting labour relations.

- **Employees' Committee in European Company (SE).** In case it is established a SE (which is a type of corporation company which carries out its activities in several European countries by applying a single set of regulations), formation and consultation procedures of the employees at transnational level should nevertheless be ensured in all cases of creation of an SE. In this respect, the involvement of the employees may be achieved also by the establishment of a special SE Committee.
- **Employees' representative for health and safety in the workplace (so-called "RLS"):** such body is responsible for monitoring the correct application of rules for the prevention of workplace accidents and illness and for promoting the implementation of all appropriate measures to protect the health and physical integrity of the employees within the company's organisation. Such body may also be established and appointed at territorial level (so-called "RLST") and at production site level (so-called "RLSSP").

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The rules governing the transfer of business are set forth in Section 2112 of the Italian Civil Code which has been integrated by Section 47 of Law no. 428 of 29 December 1990. Moreover, the Legislative Decree no. 276 of 10 September 2003 (Section 32) amended Section 2112 of the Italian Civil Code specifying that the rules on the transfer of business also apply where a transfer involves a separate and self-contained undertaking. The Italian law on transfer of undertaking is intended to give workers occupational stability and preserve their acquired rights. A change of employer due to the transfer of the business does not give the employer the right to terminate or worsen the employment relationship. Pursuant to Section 2112, par. 4 of the Italian Civil Code, an employee whose working conditions undergo a substantial change in the three months following the business transfer may resign for just cause (and thus entitled to payment of indemnity in lieu of notice).

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The Italian law consents to the subjective changing of the employer but in presence of determined conditions in defence of the workers' rights. As a matter of fact, it should be noted that Section 2112 of the Italian Civil Code provides a joint and several liability of both the

transferor and transferee to warrant workers' credits fulfilment at the time of the transfer, and that the buying company shall apply the terms and conditions set forth in the NCBA applied by the transferring company, provided that more favourable terms and conditions are not substituted. In addition, in the case of business transfer within companies with more than 15 employees, Section 47 of Law No. 428/1990 obliges both the seller and the buyer to implement a Union procedure prior to of the transfer.

The transferor and the transferee must provide the employees' representative bodies (i.e., staff representatives – so called RSA or RSU, if any, and the relevant trade unions which executed the NCBA applicable to the transferor and the transferee) with a written notice of the transfer: in the event that there are no employees' representative bodies, such notice shall be delivered to the 'comparatively more representative' trade unions.

The written notice of the transfer must be served at least twenty-five days before completion or in any case within the reaching of a foregoing binding agreement between the parties.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

In Italy, the relevant provisions enshrined within an employment contract are established by the law and also by the applicable NCBA, which, in particular, provides for the terms and conditions of the employment relationship, including but not limited to: categories and respective job descriptions; minimum salary; job retention rights during sick leave; increases in salary due to length of service; notice period in case of dismissal and resignation; night work; leaves of absence; holidays and so on.

### SALARY

The salary is normally corresponded at the end of the working month, as determined by the company's policies or by the NCBA. To this extent, the employer is responsible for deducting all social security contributions and withholding taxes. The Italian legislation specifically envisages that the remuneration attributed to the employees must be indicated in a pay slip (provided by the employer or by a third party on behalf of the employer) detailing the period of actual service to which the remuneration relates to, the total amount and value of any overtime hours that may have been worked together with all the elements that constitute the sum eventually paid, as well as all deductions conducted in compliance with the relevant legislation. In addition, Italian law provides for an additional fixed item of remuneration, the so-called annual thirteenth monthly salary, which is paid once a year during the Christmas holidays. Its amount

usually corresponds to one month's remuneration. Moreover, some NCBAs or even the individual agreements may establish a further payment of a fourteenth instalment, corresponded in July.

### MAXIMUM WORKING WEEK

Limits on working hours are set forth by the law and the NCBAs. The Legislative Decree no. 66 of 8 April 2003 applies to all sectors of business, both public and private, except for a few categories (such as civil aviation staff, the police and the armed forces). Normal working hours are forty hours per week. The NCBAs may, however, determine fewer hours referring to the normal working hours. The maximum duration of the working week is predetermined by the NCBAs: nevertheless, the average weekly working time may not surpass 48 hours, including overtime. Average working hours shall be computed over a 4-month period; in this regard, the relevant NCBA could extend such period on the grounds of objective, technical or organisational circumstances.

### OVERTIME

Work performed in excess of the normal weekly working hours established by the law or by the applicable NCBA is to be deemed as overtime work and it must be remunerated accordingly. Section 5 of the Legislative Decree no. 66/2003 states that, as a general rule, the NCBA covers the conditions for overtime work and that, in lack of such provisions, overtime work is allowed only upon previous agreement between the employer and the employee, for a period not exceeding 250 hours per year. Ultimately, the Italian legislation provides that overtime is paid with an extra remuneration as determined by the NCBA applied by the company. The NCBA may establishes that alternatively – or in addition to this extra remuneration – employees receive compensatory rest time.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The employer has to assess risks; identify protective and preventive measures; prepare a plan for the improvement of safety at the workplace; and appoint the individual who is responsible to perform the Prevention and Protection Service.

### COMPLAINT PROCEDURES

Employers must notify to INAIL (National Institute for the Prevention of Accidents at Work) of each injury or accident at work implying a prognosis longer than three days.



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## I. INTRODUCTION

Japanese employment laws mainly cover employer-employee relationships. These laws apply to all employees working in Japan regardless of their nationality. However, board members as defined under the Company Act (2005) as well as independent contractors are not categorised as employees subject to Japanese employment laws, in principle, and therefore are not protected under Japanese employment laws.

### KEY POINTS

- Japanese employment laws mainly cover employer-employee relationships. Board members and independent contractors are, in principle, not categorised as employees.
- There is no “at will” employment in Japan. Japanese law requires that termination of regular employment shall be considered objectively, deemed reasonable, and appropriate upon social convention, which is read rigidly in light of Japanese judicial precedent.
- In principle, overtime work, work on statutory public holidays and late-night work require extra allowances in addition to normal wages. Employees in managerial and supervisory positions as defined under the Labour Standards Act are exempt from the abovementioned overtime regulations; however, the late-night work allowance is still applicable.
- Japanese law provides various protections against discriminative treatments not only by reason of nationality, creed, social status or gender, but also due to the association with union activities, or taking child care or nursing care leave. There is also a prohibition against unreasonable differences between full-time permanent employees and non-regular employees. Furthermore, employers are faced with the need to strengthen their protections against harassment in line with recent legislative amendments obliging employers to enhance their whistleblower systems.
- Dominant majority unions in Japan are deemed as enterprise unions. The unionisation rate in Japan has been considerably and continuously declining.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Japanese laws prohibit discrimination with respect to wages, working hours or working conditions, by reason of nationality, creed or social status.

Furthermore, an employer shall not engage in discriminatory treatment between men and women with respect to wages.

It is also unlawful for employers to directly discriminate against workers on the basis of gender in relation to the allocation of duties, training, benefits, occupational functioning and status, and dismissal. The law further prohibits the discriminatory treatment of any employee who applied for, or utilised, child care or nursing care leave and other measures. Japanese law also prohibits i) discrimination based on age for hiring (although some exceptions for setting age requirements are permissible); ii) any disadvantageous treatment of employees for activities pertaining to their involvement with labour unions; iii) indirect discrimination on the basis of gender, e.g. acts or practices that have the effect of inadvertently placing women at a distinct disadvantage, compared to men, though certain exceptions apply.

However, an employer is not required to grant the same conditions to all employees. Therefore, disparate treatment of male and female employees (e.g. gender differences) could be considered impartial (non-discriminatory) if there are justifiable reasons for doing so.

### PROTECTIONS AGAINST HARASSMENT

Sexual harassment can be defined as: (i) any disadvantages in the employee's working conditions (such as dismissal, demotion or salary cuts) by reason of their response to sexual speech and behaviour at the workplace; or (ii) any harm in their working environment by reason of exposure to sexual speech and behaviour.

The Equal Opportunity Act requires employers to introduce measures to prevent sexual harassment, including a mandate to clarify the relevant policy and inform and educate their employees on such policies. Furthermore, employers must establish consultation desks to respond to complaints from employees; facilitating a prompt and appropriate investigation that can be carried out effectively upon learning of incidents of sexual harassment; instituting measures to protect the privacy of both the accuser and the accused; and prohibiting the dismissal or mistreatment of workers who consult or cooperate with a sexual harassment-related investigation.

The recent amendment of the Equal Opportunity Act, which came into force in June 2020, strengthens

such measures and compels employers to try and cooperate with other companies (e.g. through interviews and/or investigations) in cases where an employee of the company has sexually harassed employees of the other company, in order to enhance the effectiveness of the other company's employment measures and prevent potential sexual harassment incidents stemming from the interaction between companies and their employees.

Power harassment can be defined as damaging behavior, which takes advantage of a superior position in a working relationship. The recent amendments on the Act on Comprehensive Promotion of Labour Policies (1966), which came into force in June 2020, requires employers to introduce measures to prevent power harassment. Employers must establish consultation procedures to prevent power harassment. The law also prohibits the dismissal or mistreatment of workers who make a complaint regarding power harassment.

Furthermore, any employer that does not abide by the recommendations for improvement discussed above can be publicly named.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The Act on the Promotion of Employment of Persons with Disabilities obliges employers with 43.5 employees or more, to hire employees with disabilities and to increase the representation of its employees with disabilities to reach at least 2.3% of their workforce. This representation percentage of employees with disabilities is due to increase to 2.5% in April 2024 and to 2.7% in July 2026. Employers subject to this obligation will be expanded to those with 40 employees or more in April 2024 and those with 37.5 employees or more in July 2026. Employers who do not achieve the statutory employment rate for disabilities shall be subject to a payment of certain levies, in proportion to the difference between their actual employment rate and the statutory employment rate.

Furthermore, the Act on the Promotion of Employment of Persons with Disabilities prohibits discriminatory treatment on the basis of disability. The Act also requires employers to provide reasonable accommodations. Employers are obliged to make best efforts with regards to these prohibitions and obligations. Further details are provided under the relevant guidelines. Reasonable accommodations as required under the Act, is defined as necessary and appropriate modifications and adjustments that do not impose a disproportionate or undue burden (which is largely equivalent to the definition of reasonable accommodations as provided by the Convention on the Rights of Persons with Disabilities). If a person with a disability expresses an intention to remove social barriers, the employer is

required to undertake the appropriate consideration (i.e. a positive action of change or adjustment) with regards to providing services and/or accepting him/her as an employee, albeit depending on the circumstances as well as the individual disability characteristics of the employee, and to the extent that there is no disproportionate or undue burden imposed against the employer. An employer is also required to establish a consultation system to respond to disabled employees and to protect the privacy of a consulter. An employer is further prohibited from the dismissal or mistreatment of employees who request a consultation for accommodations.

There are no mandatory obligations imposed on employers to provide accommodations with regard to religious practices.

## REMEDIES

An employee may bring a discrimination claim against the employer by filing a civil lawsuit before the appropriate court, or through a petition for proceedings before the appropriate labour tribunal. The employee is entitled to seek a declaratory judgment determining that the discriminatory treatment is null and void, or an order of compensation of damages due to the discriminatory treatment. An employee may also make a request for administrative mediation at the prefectural labour bureau, with regards to the discriminatory treatment. It is also possible for an employee to report an employer's equal pay practice to the appropriate Labour Standards Inspection Office, which may commence an investigation and possibly a criminal prosecution, depending on the discrimination claim. In practice, however, a criminal prosecution is extremely rare.

Furthermore, the directors of Prefectural Labour Offices can provide employers with advice, guidance and recommendations with regard to the discriminatory treatment. The directors can also require employers to provide reports on issues covered by the Equal Opportunity Act.

### Other Requirements

Japanese law does not impose any (generally) applicable laws or regulations that require an employer to disclose, report on, or take positive action in order to ensure equality. However, there is a requirement for employers to employ a certain number of workers with disabilities and to report their workforce statistics to the government, annually.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

There are two separate systems concerning social security in Japan. Both of these systems are run by

the Japanese government. The systems are: (i) the social insurance schemes (i.e. the employee pension insurance and the employee health insurance), and (ii) the labour insurance schemes (i.e. the workers' accident compensation insurance and the unemployment insurance).

## HEALTHCARE AND INSURANCES

Social insurance schemes are designed to secure the life of workers by paying income-based contributions in the case of old age, disability or death. An employer that is a corporation, or one that is a sole proprietor hiring five or more employees, has a legal obligation to provide its employees with the employee pension insurance and the employee health insurance. Furthermore, all employers are obliged to provide employees with the workers' accident compensation insurance and the unemployment insurance. The benefits of the social insurance and labour insurance schemes are covered by the mandatory contributions paid by workers and employers. A worker employed in Japan will be insured, regardless of whether or not the worker is a Japanese national.

## REQUIRED LEAVE

### Holidays and Annual Leave

While the statutory holidays must be granted once every week or four times every four weeks, it is common practice to provide holidays in addition thereto (e.g. Saturdays, Sundays, national public holidays).

Employers must grant paid annual leave to employees who have been employed continuously for 6 months or more. The employee must have attended work for at least 80% of the scheduled working days in the previous fiscal year to receive the paid annual leave. The statutory minimum number of days of paid annual leave depends on the employee's length of continuous service:

- 6 months of service = 10 days of paid annual leave
- 1 year and 6 months = 11 days
- 2 years and 6 months = 12 days
- 3 years and 6 months = 14 days
- 4 years and 6 months = 16 days
- 5 years and 6 months = 18 days
- 6 years and 6 months or more = 20 days

The unused paid annual leave can be carried forward to the next year. Generally, paid annual leave may be taken in full day units. However, employers may allow the employees to take leave in half day units. It is also allowed to grant paid annual leave on an hourly basis by executing the labour-management agreement with such a provision. However, the total amount of days of such paid annual leave is limited to no more than 5 days. Furthermore, employers are obliged to ensure the use by their employees of at least 5 days of paid annual leave per year.

## Maternity and Parental Leave

### Maternity Leave

A pregnant employee can take up to six weeks (or 14 weeks in the case of multiple fetuses) of maternity leave before childbirth, and eight weeks after childbirth. Furthermore, employers shall not have a woman work within 8 weeks after childbirth. However, in the case where such a woman has so requested to work; provided, that 6 weeks have passed since childbirth, and the work activities to be performed are such that a doctor has approved as having no adverse effect on her, then there is nothing preventing an employer from having the woman return to work.

In addition, an employee (regardless of gender) who has been employed for at least one year or more, is entitled to take child care leave for a child aged less than one year (or until the child becomes one year and two months old, one and a half years old, or two years old). This is subject to certain conditions respectively, and does not include certain employees, such as those with fixed-term employment that would not continue after the child turns one and a half years old. Moreover, the employer is not obliged to pay the employee during maternity leave and child care leave.

### Sickness and Disability Leave

While there is no legislation concerning sick or disability leave arising from employment, many employers implement their own rules regarding sick leave and/or payment during periods of sickness. The employer may settle the term of sick leave where an employee is suspended. Furthermore, this may become a cause for automatic termination if the employee does not recover before the term of sick leave expires. As to employee's injury, sickness and disability due to employment, the Industrial Accident Compensation Insurance Act covers a large part of the compensation.

## Other Required or Typically Provided Leave(s)

### Nursing Care Leave

An employee who has been employed for at least one year or more and is nursing a family member who requires nursing, is entitled to take nursing care leave for 93 days in total per family member. This does not include certain employees, such as those under fixed-term employment arrangements, whose employment would come to end within 6 months and 93 days after the scheduled commencement date of nursing care leave. Furthermore, the employer is not obliged to pay the employee during nursing care leave.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

There are no mandatory pensions provided to employees in Japan. However, in practice, a number



of companies have voluntarily structured a variety of pension schemes including, but not limited to (i) defined payment plans, (ii) defined contribution plans, and (iii) decrease/eliminate existing pension plans.

Furthermore, there are no statutory benefits available to employees in Japan. However, in practice, a number of companies have started adopting a variety of incentive plans including, but not limited to, performance bonuses, share options, profit sharing schemes and employee stock ownership plans.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

While an employment contract may be in written or verbal form, when concluding an employment contract, the following conditions must be clearly provided in written form:

- term of employment;
- place of employment and job description;
- start and finish time, overtime work, rest period, days off, leave and change in shifts;
- determination, calculation and payment of wages (except retirement allowances and special wages); and
- resignation and exit policies and procedures (including grounds for dismissal).

### FIXED- TERM/OPEN- ENDED CONTRACTS

Generally, the maximum duration of a fixed-term employment contract is three years. However, there is an exception for employees who possess expert knowledge, skills or experience, or who are 60 years of age or older, in which case the maximum term of the employment contract is five years.

A similar exception exists for employees who possess expert knowledge, skills or experience, or who are continuously employed after the mandatory retirement age, subject to approval by a Director General of the relevant Labour Bureau.

In the situation where a fixed-term employment contract with the same employer has been repeatedly renewed, and its total contract term exceeds five years, the employee is entitled to apply for conversion of his/her fixed-term employment into an indefinite term, from the day following the date of expiration of the fixed-term employment contract, and the employer is deemed to accept the application. In addition, the total contract term may be reset by setting certain cooling-off periods (e.g. six months for a one year contract).

### TRIAL PERIOD

In Japan, it is common practice to set a probationary period of three to six months for new hires, effective from the hiring date. While there are no legal requirements regarding the length of the probationary period, a probationary period is presumed void if it is unreasonably long, as this goes against public order and morals. The probationary period may also be further unilaterally extended in accordance with the work rules and/or the employment contract. In practice, however, probationary periods are transient in nature, temporarily allowing employers to review an employee's qualities and abilities before the employee is able to transition into a regular employment. Consequently, an employer is expected to decide whether to accept or reject the employee as a regular employee after the probationary period has concluded.

An extension of the probationary period is only permitted if there is a reasonable and compelling need for the employer to continue to evaluate an employee's qualities and abilities. Accordingly, an employer will face a significantly greater hurdle when the company tries to terminate an employee's employment during the extended probationary period, compared to a termination after the expiration of the initial probationary period.

### NOTICE PERIOD

Advance notice of termination must be provided at least 30 days prior to dismissal. An employer may also provide a payment in lieu of such notice, which corresponds to 30 days or more of the salary amount. Notice periods can also be shortened by the number of days for which the payment in lieu of notice has been made. The advance notice period is not applicable when the employer dismisses an employee under the probationary period, within fourteen days after the date of the commencement of the probationary period.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Foreign employees who wish to apply for a long-term visa should first obtain a Certificate of Eligibility ('COE'). A COE is a document issued by the Ministry of Justice in Japan. In order to obtain the COE, a sponsor in Japan is required. Sponsors can be employers, schools or relatives. The sponsor in Japan must contact the appropriate local immigration office in order to apply for the COE. Once the COE has been issued, the foreign employee is then able to apply for a visa before the Japanese embassy or consulate in the country where the foreign employee resides. The COE should be submitted to an immigration inspector with a valid visa for landing permission at the port of entry, within three

months from the date of issue. Once living in Japan, the foreign employee must notify the local city ward office of his/her place of residence.

Long-term visas can be provided for any type of work visa designated by Japanese law, for which the permitted standard period of stay in Japan is five years, three years, one year, or three months. A foreign employee who is currently working for an organisation outside Japan and will subsequently be transferred to that organisation's Japanese office for a limited period, may be eligible for a work visa as an intra-company transferee.

A foreign employee is prohibited from engaging in activity outside the scope permitted in their work visa. However, performing activities outside the scope of their work visa is permissible subject to approval granted by the Minister of Justice.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

A foreign employer does not need to work through a local entity in order to hire an employee in Japan, as far as the service engaged by the representative office to which the employee belongs, is limited to certain preparatory and auxiliary activities (e.g. market survey, information gathering, purchase of goods and advertisements). If a foreign employer commences any direct business or operation, which could be subject to taxation in Japan (e.g. contract execution or sales activities), the foreign employer would need to establish a local entity. Otherwise, the representative office would likely be considered as a permanent establishment. Regardless of whether or not a local entity is established in Japan, a foreign employer is obliged to provide its employees, hired and working in Japan, with social insurance and employment insurance.

### LIMITATIONS ON BACKGROUND CHECKS

There is no statutory limitation on background checks in Japan. However, due to the sensitive nature of data gathered, certain information requires careful handling. Further, sensitive personal information such as race, creed, social status, medical history, criminal record, and the fact of having suffered damage by a crime must not be collected, in principle, unless an applicant's consent is obtained. Also, an employer is prohibited from acquiring information which may become a cause for social discrimination, including, but not limited to, information pertaining to race, ethnic group, social status, family origin, domicile or birthplace, creed, personal beliefs, or history of union membership. In practice, for the purpose of lawfully searching an individual's background, informed consent from each

individual employee or prospective employee, and specifying the purpose of and the items subject to said background check, is typically utilised. It is also common practice to ask for a declaration of criminal records and to require a medical examination.

### RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

The guidelines advise that an employer should refrain from asking questions of an applicant or requesting information which would lead to social discrimination.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Recent legislative amendments have introduced the requirement for workers to receive fair and equal treatment irrespective of their job status. The amendments have resulted in a requirement for reasonable equal treatment of regular employees (i.e. full-time permanent employees) and for non-regular employees (which includes fixed-term contract employees, part-time employees, and dispatch employees).

With regards to part-time/fixed-term employees, an employer is prohibited from differentiating the base salary, bonus and other benefits in such a manner that there exists an unreasonable difference between part-time/fixed-term employees and regular employees. The reasonableness is determined based on: (i) the content of the assignments and the level of responsibility thereof; (ii) the scope of possible changes of such duties and the position; and (iii) other relevant factors, as may be deemed appropriate in light of the nature of such treatment.

An employer is prohibited from discriminating against part-time/fixed-term employees, as compared to regular employees, with regards to their duties and their positions, for the sole reason of being categorised as part-time/fixed-term employees. An employer is required to provide opportunities to utilise welfare facilities that are available to its regular employees, and designated under the government ordinance, to its part-time/fixed-term employees. An employer is obliged to explain to its part-time/fixed-term employees the contents and reasons for any differential treatment compared to its regular employees. An employer is further prohibited from any disadvantageous treatment of an employee who requests such an explanation.

With regards to dispatch employees, the dispatching company is obliged to ensure the equal or balanced treatment of dispatched workers, wherein the non-dispatched workers are treated equally or as a result of satisfying the requisite conditions, affording fair and equal treatment protections, in accordance

with the provisions established under a labour-management agreement. The dispatching company is obliged to explain to the dispatch employees the contents of treatment and working conditions at the time of hiring and the commencement of the dispatch. Furthermore, the dispatching company is also required to explain to the dispatch employees the contents and reasons for differential treatment with the equivalent employees at the recipient company. The dispatching company is further prohibited from any disadvantageous treatment of an employee who requests such an explanation.

The guidelines corresponding to the amended Act, set out the basic criteria for salaries and benefits, education, training and welfare entitlements, together with concrete examples of reasonable and unreasonable treatment, differentiating between regular and non-regular employees.

## REMEDIES

A non-regular employee may bring a claim against the employer by filing a civil lawsuit before the appropriate court, or through a petition for proceedings before the appropriate labour tribunal.

The amended Act developed administrative Alternative Dispute Resolution (administrative ADR) mechanisms to cover situations of equal treatment of non-regular employees (part-time/fixed-term employees and dispatch employees), in order to provide assistance to non-regular employees to settle disputes in a prompt and efficient manner, and without the involvement of court proceedings.

The amended Act does not impose statutory sanctions or penalties with regards to non-compliance of equal treatment of non-regular employees. The amended Act only provides for the administrative advice, guidance and/or recommendations.

## ENFORCEMENT/LITIGATION

To date, we do not have any noteworthy enforcement pronouncements or ongoing litigation relating to the equal pay practices which came into force in April 2020, to report.

## OTHER REQUIREMENTS

Japanese law does not impose upon employers, any mandatory obligations to undertake positive actions with respect to pay discrimination, gender equality or equal pay.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Restrictive covenants are not legally defined

under Japanese law. However, such covenants are allowed as concomitant obligations under the principle of good faith arising from the employment contract during the term of employment, and even after termination of the employment contract. Generally, restrictive covenants have to be valid to the extent necessary and reasonable, as provided for in the work rules and regulations or the specific employment contract.

During the term of employment, an employee is prohibited from competing with his/her employer.

It is possible to compel an employee to refrain from soliciting customers and former employees after termination of the employment contract, by providing such a clause in the work rules or the specific agreement.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Under Japanese law, there are two types of court actions that are possible against a breach of the non-compete clauses and non-solicitation obligations after termination: (i) demanding an injunction and (ii) filing a claim for damages. With regards to an injunction demand, the plaintiff is required to prove that the company's business profits, in actuality, have already been infringed or are in serious danger of being infringed. With regards to a claim for damages, the plaintiff is required to prove the occurrence of actual damages, as well as a causal connection between the breach and the actual damages caused.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is a tool by which an employer can prevent departing employees from performing their regular duties. Typically, the employee will be prevented from attending the workplace, but will still receive full pay. This has the effect of restricting the employee's access to customers, clients, staff and information, and hampers their ability to work for a competitor. If an employer wishes to put an employee on garden leave there must, in most circumstances, be an express clause in the employment contract permitting the employer to do so. Otherwise, the employer could be violating the employee's implied right to work and therefore be in breach of contract.

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

An employer can restrict the employee's use of



Internet and/or social media in the workplace during working hours. This is because employees are obliged to devote themselves fully to their duties at the workplace, during working hours.

## **CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?**

Work email accounts and computer systems in the workplace belong to the employer and may therefore be monitored, accessed and reviewed by the employer under Japanese law. However, such access, if permitted, is possible only so far as the following conditions are met before such access is sought: (i) the employer expressly discloses the purpose of monitoring to the employees in question in advance; (ii) the employer provides the employees in question with the relevant and applicable company rules; (iii) the employer identifies the person responsible for implementing the monitoring; and (iv) draws the company rules stipulating the implementation of monitoring and announces them to the employees. The monitoring shall be subject to an audit in order to confirm that it is properly implemented as monitoring, accessing and reviewing the employees' electronic communications would be regarded as an acquisition of the employees' personal information.

## **EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION**

When an employee disparages the employer or divulges confidential information via social media, the possible remedies available to the employer include a request to the employee or the website administrator, to have the content removed as expeditiously as possible; and then consider whether to take legal and/or disciplinary action(s) against the employee for such conduct.

# **IX. TERMINATION OF EMPLOYMENT CONTRACTS**

## **GROUND FOR TERMINATION**

Japanese law requires that the termination of a regular employment relationship shall be considered objectively, deemed reasonable and appropriate upon social convention, which is read rigidly in light of Japanese judicial precedent. Typical grounds for termination include the following: (i) an employee's inability to provide labour due to injury, disability, illness or permanent damage, significantly poor

performance, or loss of the trust relationship due to material fraud in an application for employment; (ii) breach of work responsibilities and duties, orders, or workplace disciplines, policies and internal rules; and (iii) loss of job responsibility, redundancy due to business downsizing, economic reasons, or corporate dissolution. All grounds for dismissal shall be set out in the work rules or in the employment contract.

Termination due to economic reasons such as redundancies is rigorously restricted in Japan.

With respect to an employment contract with an indefinite term, the termination due to redundancy is considered to be a last resort under Japanese labour law, and is only permitted where employers have no choice but to terminate the employment of their employees.

With regards to fixed-term employment contracts, an employer may not dismiss employees until the expiration of the employment term thereof, without "unavoidable reasons", which are read narrowly.

Furthermore, an employer shall not dismiss an employee during a period of absence from work for medical treatment with respect to work-related injuries or illness. Also, an employer shall not dismiss an employee within 30 days thereafter. In addition, an employer shall not dismiss any woman during a period of absence from work before and after childbirth, nor within 30 days thereafter.

## **COLLECTIVE DISMISSALS**

Not applicable under Japanese law.

## **INDIVIDUAL DISMISSALS**

Under Japanese law, all dismissals are deemed individual dismissals.

## **IS SEVERANCE PAY REQUIRED?**

Under Japanese law, there is no statutory obligation to pay severance allowance upon termination, except in circumstances when payment is in lieu of notice.

## **SEPARATION AGREEMENTS**

Generally, any employment contract may be terminated upon agreement between an employer and employee. Since dismissals are severely restricted in Japan, soliciting voluntary retirement is a common practice used to reach an agreement with an employee, terminating his/her employment contract.

Furthermore, in the case of redundancy, the conditions surrounding the application for voluntary retirement should be fair and reasonable. In other words, issues would arise if the targeted employees had no choice but to apply for voluntary retirement and/or if such conditions could be deemed to be targeting only specific employees.

Theoretically, the age of the employee does not make a substantial difference. In practice however, age could play a significant role, since separation agreements are subject to employer-employee negotiations.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

An employee may bring a claim for a decision confirming his/her position as an employee, by filing a petition before the labour tribunal for the commencement of labour tribunal proceedings. An employee may also bring an action before the courts, with a request for provisional injunction(s) or by filing a claim/dispute for litigation. If a dismissal is found to be null and void, the employee may return to the company. Generally, an employee may also demand payment of the employee's withheld wages or salary for the period since the date of dismissal up to the time of judgment, with interest. A claim seeking reversal of a dismissal is not barred by the statute of limitation. However, in general, a five-year statute of limitation period applies to claims for wages, retirement allowances and other labour-related entitlements.

## WHISTLEBLOWER LAWS

The *Whistleblower Protection Act* protects whistleblowers who come forward with information regarding criminal activity in the workplace relevant to life, body, property, and other interests of citizens that has occurred or is about to occur. Consequently, employers are required to appoint an appropriate point of contact within the company, who is to be located either within the premises of a particular workplace, or at an outside location where the relevant administrative organ of the company operates, to receive and respond to any of the abovementioned concerns as may be raised by an employee whose intentions are lawful and trustworthy. An employer is prohibited from any disadvantageous treatment of the whistleblower on the basis of such whistleblowing. Furthermore, under the *Whistleblower Protection Act*, a dismissal of the whistleblower on such grounds will be declared null and void. Recent amendments, which came into effect in June 2022, expanded the protection of whistleblowers. Major changes include the following: (i) employers' obligation to establish a system necessary to properly respond to whistleblowing (although employers with 300 employees or less are only obliged to make efforts to do so); (2) confidentiality obligations imposed on persons engaged in internal investigations; (3) expansion of situations in which dismissal on the basis of whistleblowing is invalid; (4) expanded scope of whistleblowers to be protected for employees within one year of resignation; (5) expanded scope of reporting contents to be protected; and (6) exemption of whistleblower's

liability for damages in addition to prohibition of disadvantageous treatment. This has led to an increase in whistleblowing in practice, especially of harassment.

## X. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

An employer who regularly employs 10 or more employees per workplace is required to prepare the work rules in accordance with the *Labour Standards Act*. The work rules must contain pertinent details relating directly and significantly to the working conditions. The employer's work rules are to be submitted to the competent Labour Standards Inspection Office. An employment contract stipulating any working conditions that fail to meet the standards established by the work rules will be deemed invalid, and the conventional directives will supplant the nullified elements of the agreement. An employer may not change the work rules in any way that would disadvantage its employees, without obtaining the employees' prior consent, unless such modifications to the work rules is considered reasonable.

### SALARY

The term 'wages' refers to any kind of payment made from an employer to its employees as remuneration for their work (e.g. wage, salary, allowance and bonus). Wages must be paid in full directly to the employee and in the appropriately designated currency. An employee's wages, other than extraordinary wages and bonuses, are paid periodically (at least once a month on a specifically designated date).

### MAXIMUM WORKING WEEK

Generally, the statutory working hours are 8 hours per day and 40 hours per week. Statutory holidays must be granted once every week or four times every four weeks. Designated working hours may be further decided within the statutory working hours.

### OVERTIME

The *Labour Standards Act* provides a principal limit on the number of overtime hours employees can work as a general rule (e.g. not more than 45 hours per month and 360 hours per year), and recent legislative amendments have introduced a legal cap on the total number of overtime hours employees are permitted to work.

In addition to the normal wage, overtime work, work performed on statutory holidays and late-night work (between 10 p.m. and 5 a.m.) require extra allowances. Compensation for overtime work of up to 60 hours per month must be at least 25% of the normal hourly wage and overtime work that





exceeds 60 hours per month must be at least 50% of the normal hourly wage. The statutory holiday allowance must be at least 35% of the normal hourly wage, while the late-night work allowance must be at least 25% of the normal hourly wage. Employees in managerial and supervisory positions as defined under the Labour Standards Act are exempt from the abovementioned overtime regulations; however, the late-night work allowance is still applicable.

Employers are obliged to accurately track their employees' working hours by utilising methods indicated in the ministry ordinance for the purpose of curbing excessive working hours as well as assisting employers in monitoring the health of their employees. These methods include implementing the 'clock-in/clock-out' method of recording time via employees' ID cards and/or recording the time employees log in and out of their work computers.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The Labour Contract Act has acknowledged in its written policy an employer's obligation to take necessary care to ensure the physical and mental health and safety of its employees. The Industrial Safety and Health Act, in conjunction with the Labour Standards Act, mandates employers to secure the safety and health of employees in the workplace, as well as to facilitate the establishment of a comfortable working environment, by promoting comprehensive and systematic countermeasures concerning the prevention of industrial accidents, taking measures for the establishment of standards for hazard prevention, clarifying the safety and health management responsibility, and the promotion of voluntary activities with a view to averting industrial accidents.

## COMPLAINT PROCEDURES

No specific administrative complaint procedures are provided for under Japanese law with regard to health and safety in the workplace. Nonetheless, the Labour Standards Inspection Offices accept complaints concerning health and safety in the workplace. However, in practice, they will not proceed to the enforcement stage unless they find an infringement of the Labour Standards Act and the Industrial Safety and Health Act.

## WHITSLEBLOWER LAWS

There is no specific law regulating whistleblowing systems in Japan.



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## I. INTRODUCTION

Mexican Labour Law grew out of an armed revolution that concluded with the adoption of the current Federal Constitution in 1917. Article 123 of the Federal Constitution, entitled “Labour and Social Welfare”, expressly recognises and protects the basic inalienable rights of employees. This was the first constitutional recognition of labour rights in world history. Thereafter, in 1931, the first Federal Labour Law was enacted to regulate employer-employee relations nationwide, later replaced by the 1970 Federal Labour Law, which improved working conditions for employees. The 1970 Law was, for all practical purposes, the federal government’s “political reward” to workers’ organisations for not supporting the 1968 student movement.

In September 2012, the President of Mexico, Felipe Calderon, introduced a bill to amend the Mexican Federal Labour Law, which after much debate before both the House of Representatives and the Senate, was approved by the Congress on 13 November 2012 and enacted by the President of Mexico on 30 November 2012 becoming effective on 1 December 2012. The reform amends and includes important provisions to the Mexican Federal Labour Law (herein after the “FLL”), which has extensive implications for employers with operations in Mexico.

In April 2016, President Enrique Peña Nieto sent to the Senate a bill to substantially amend the Constitution on labour justice. The bill proposed discontinuing the Conciliation and Arbitration Labour Boards, which have been the agencies in charge of labour justice, and their replacement by federal labour courts belonging to the federal judicial branch and by local labour courts belonging to the local judicial branch. This initiative was discussed and approved by both the Senate and the Chamber of Representatives and was sent to the local congresses for their approval. The proposed constitutional reform was approved by 17 local congresses.

On 24 February 2017, the bill amending several provisions of Sections 107 and 123 of the Mexican Constitution was published in the Official Gazette and became effective on 24 February 2018. As a result of this constitutional reform, Labour Justice will be provided by labour courts belonging to the Federal or Local Judicial Branch, which will give them more Independence in relation to the Executive Branches. This reform created a decentralised organism, independent of the Federal Administration and similar bodies in the States, which will be in charge, in the federal jurisdiction, of substantiating

a mandatory pre-trial instance for the parties, which aims to fasten labour proceedings. Also, this organism will be in charge of the registration of union and collective bargaining agreements. This Constitutional Reform necessarily involves adjustments to the Regulatory Law, especially on procedural labour matters.

On 1 July 2018, Mexico had federal and local elections for several political positions, including the President, State Governors and Majors, among others. Andrés Manuel López Obrador (AMLO), candidate of the National Regeneration Movement (MORENA, by its acronym in Spanish) won the Presidential election with 53% of the votes. For the first time in modern history, Mexico will be governed by a leftist President. MORENA, with its ideology based on social equality and egalitarianism, also won the majority of both Chambers of the Congress. As a result, MORENA unveiled a highly ambitious, multi-faceted labour and employment reform agenda for the next six years:

**Young people:** Empower young people by providing them universal access to education and granting economic scholarships to all students.

**Minimum wage:** Increasing the minimum daily wage. This topic has been addressed during TPP and NAFTA’s negotiations by the governments of the U.S. and Canada.

**Outsourcing:** This topic has been regulated by the Mexican tax and labour authorities in the past to avoid violations to labour rights and tax fraud. Therefore, MORENA has proposed to regulate this further to guarantee labour rights to all employees.

**Collective Bargaining Agreements:** There has been international pressure to abolish the practice of executing non-active collective bargaining agreements CBAs. Mexico ratified the Convention 98 of the International Labour Organisation (ILO) to guarantee the right to collective bargaining, as well as to apply ILO Convention 87 regarding freedom of association.

**New Union Confederations:** During AMLO’s administration it is probable that there will be new Union Confederations, led by Napoleón Gómez Urrutia, leader of the Mining Union, who has been in exile in Canada since 2006. He was registered as MORENA’s elected Senator on 27 August 2018.

**Labour Ministry:** AMLO appointed Luisa María Alcalde as Labour Secretary. She is in charge of implementing the Constitutional reform and the application of Conventions 87 and 98 of the ILO.

**Constitutional amendment to reform the FLL:** The reform to the Mexican Federal Labour Law (herein after the “FLL”), came into effect on 1 May 2019. The

amendment did include pro-employees and pro-union provisions in order to create a better system.

It is important to mention that this amendment arose as part of Mexico's obligations after the signing of the United States Mexico Canada Agreement (USMCA) that came into effect on 1 July 2020. In this sense, there was a necessity to make substantial changes in labour and union matters in order to adapt to the terms of the agreement.

The three main pillars of the 2019 amendment to the FLL are:

- A new Labour Justice system: The parties are now obliged to attend the Conciliation Center before filing for trial; if no agreement is reached the Labour Justice will now be provided by labour courts belonging to the Federal or Local Judicial Branch. The new procedure is governed by the principles of orality, immediacy, continuity, concentration and publicity.
- Union democracy: A new democratic procedure came into effect to guarantee the unionised employees their right to a personal, free, secret and direct vote for choosing their union leaders, as well as knowing about and approving their collective bargaining agreements.
- The kick off for the Federal Conciliation and Labour Registry Center: Beside the conciliation part, this Center will keep the records of unions and collective agreements at the national level. Moreover, it will ensure that union rights and the collective interests of employees are respected, through free and democratic processes.

## KEY POINTS

- Employers dealing with operations in Mexico should be aware that labour relations are highly regulated in our country and that Mexican employees generally have greater rights than their American counterparts.
- Job stability principle. Any individual employment relationship is subject to the principle of 'job stability', that is, subject to the employee's right to keep his job as long as the employment relationship so requires. If the employment relationship is for an indefinite term, the employee cannot be laid off without cause. In other words, there is no employment-at-will in Mexico.
- Duration of the employment contract. The Mexican Federal Labour Law assumes, as a general principle, that an employment agreement has been executed for an indefinite term, unless the nature or the particular type of service to be provided calls for an employment agreement for a specific job or term, or if the parties agree to execute an employment agreement for initial training or subject to a probationary period.
- Restrictive Covenants or Non-Competes. In the strictest sense, non-compete agreements are void under Mexican law; specifically, under Article 5 of the Mexican Constitution. Notwithstanding

the foregoing, pursuant to an opinion issued by a Circuit Court, Covenants not to compete are fully enforceable provided they are limited in time, geographical scope, clients and activity, products and services, and consideration is paid in exchange.

- Although strictly ruled, the FLL currently allows for the subcontracting of specialised services or 'outsourcing'. This type of work must comply with the following conditions: (a) It cannot cover the totality of the activities, whether equal or similar in whole, undertaken at the work centre; (b) It is justified due to its specialised character; (c) It cannot include tasks equal or similar to the ones carried out by the customer's workers. If any or all of these conditions are not met, the customer will be deemed to be the employer for purposes and effects under the Law, including as it applies to obligations related to social security. It is important to mention that on 12 November 2020, AMLO issued an amendment proposal for the FLL, to entirely prohibit the subcontracting of services or 'outsourcing'. This proposal to eliminate outsourcing is now pending the approval and ratification of the Mexican Congress. It is very likely that the amendment will enter into force before 2021, and those who continue subcontracting employees could face an imputation for tax fraud.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

In Mexico, anti-discrimination laws in labour and employment matters are not extensively developed. Individuals in Mexico have protected characteristics including ethnic or national origin, gender, age, disability, social or economic condition, health, pregnancy, language, religion, political opinions, sexual preferences, marital status or any other that impedes or nullifies the recognition or exercise of rights and real equality of opportunities among individuals. The Federal Law to Prevent and Eliminate Discrimination prohibits any discriminatory practice that infringes on the principle of equal opportunity. The federal government's interpretation of this law must be consistent with international treaties on discrimination to which Mexico is a part of and has ratified.

### PROTECTIONS AGAINST HARASSMENT

The General Law for the Equity of Men and Women aims to regulate and guarantee gender equality. It sets up the guidelines and mechanisms for the fulfilment of equality in the public and private sector, by encouraging women's empowerment. Federal and state criminal codes have established harassment as an offence. The FLL however, does not specifically

regulate sex discrimination aside from general discrimination. Among the several prohibitions that the FLL imposes on employers, is toleration of sexual harassment within the workplace. An employee may be dismissed without liability for the employer if it incurs sexual harassment in the workplace.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

In August 2009 law stipulated that those with a physical handicap must be included in society on equal grounds. Nonetheless, the FLL does not provide anything specific regarding disability discrimination, except that it falls into the general discrimination prohibited by the FLL. Despite the above mentioned, in order to promote equity and diversity within the workplace, the FLL establishes the obligation for employers with more than fifty employees to have appropriate facilities for the performance of the services of employees with disability.

## REMEDIES

Employer's who violate any of the anti-discrimination provisions shall be subject to a fine of 250 up to 5,000 times the UMA. Federal laws in Mexico state that an individual must be indemnified in cash for "moral damages" when the individual is affected in its feelings, affections, beliefs, honour, reputation, private life, shape and physical appearance. Also, it should be considered that a "moral damage" exists when a person's freedom or physical or psychological integrity is violated or diminished.

Employees who seek to file a complaint before the Labour Tribunals should comply with the Mandatory Pre-Conciliatory stage as an indispensable requirement to fulfil.

Also, due to the ratification of the USMCA there is an alternative dispute resolution mechanism known as Rapid Response Mechanisms which could be activated if there is any sort of discrimination and/or violation to employees' freedom of association or collective bargaining.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

The social security system in Mexico is governed by the Social Security Law (LSS). The Mexican Social Security Institute (IMSS) (a quasi-official entity, under tripartite (government-worker-employer) management, whose executive director is appointed by the President) is responsible for administering social security programs.

The social security system is financed from contributions by employees, employers, and the

government. The contributions are based on salary levels. However, employees do not make contributions if they earn the monthly minimum wage in their geographic area. The maximum salary amount used to calculate social security contributions is 25 times the monthly minimum wage in Mexico City.

Within this minimum/maximum range, employee contributions are 2.00 per cent of earnings for retirement benefits, plus 3.15 per cent of earnings for disability and survivor benefits. For employers, the contribution rate is 5.15 per cent of covered payroll for retirement benefits. Government contributions amount to 7.43 per cent of covered earnings, plus an average flat rate of MXN\$4.07 (depending on salary range) for each day a worker contributes for retirement benefits, and .125 per cent of covered earnings for disability and survivor benefits.

## HEALTHCARE AND INSURANCES

The social security system protects employees in the following matters: 1) Occupational accidents and illness (old-age, retirement, and survivor pensions; disability; sickness; medical benefits; maternity; and day care for children of insured employees) and 2) Social services.

## REQUIRED LEAVE

### Holidays and Annual Leave

The FLL provides for 9 mandatory holidays. Workers who are required to work on a mandatory holiday are entitled to double pay in addition to their regular pay. Workers are entitled to 6 vacation days after being employed for one year, and to 2 additional days for each subsequent year, up to a maximum of 12 days. As of the fifth year, the worker is entitled to 14 workdays' vacation; for each additional group of five years, two more vacation days are added. Employers must pay workers a vacation premium equivalent to 25 per cent of the salary earned during the vacation days. Vacations must be taken on the date indicated by the employer, within 6 months following the worker's anniversary with the employer.

### Maternity and Paternity Leave

Working mothers are entitled to forty-two days after childbirth as maternity leave, with the IMSS paying them 100% of their registered salary. Statutory maternity leave may be extended as necessary if work is not possible because of the pregnancy or the delivery. During the maternity leave, the employee receives her regular salary. During the nursing period of 6 months, the new mother is entitled to two additional thirty-minute rest periods per day to feed the child, in an adequate and hygienic place set aside by the employer.

When returning from maternity leave, the employee is entitled to reinstatement, provided that not more



than one year has passed since the date of delivery. Maternity leave is included in the length of service. Moreover, working mothers may request the employer transfer up to four weeks of pregnancy leave in order to enjoy them after childbirth. Male employees are entitled to enjoy a paid paternity leave of five days when the child is born or in case of adoption, as of the placement of the child.

### **Sickness and Disability Leave**

An employee is entitled to sick leave depending on the type of illness and degree of disability. The IMSS, not the employer, pays the employee's income during the leave. There is no mandatory unpaid medical leave of absence in Mexico. If the employee needs an unpaid medical leave of absence due to a condition not recognised by the IMSS, then the employer has the discretion to grant the leave.

The FLL provides leave due to: Occupational Injuries: defined as any accident or disease to which the employees are exposed in the course of their employment, or any consequences thereof; Industrial Accident: defined as any organic injury, functional disturbance (whether immediate or subsequent) or death, occurring suddenly in the course of the employment or as a result thereof (i.e., the place where or the time when the accident occurs is related to the employment); or Occupational Diseases: defined as any pathological condition arising out of the continued action of a cause that has its origin or motive in the employment or in the environment in which the employee is obliged to render his services.

## **PENSIONS: MANDATORY AND TYPICALLY PROVIDED**

**Disability Benefits:** for disability benefits, the IMSS retains responsibility for the management and collection of contributions, but private insurance companies provide benefits. Workers who were first covered by the social security system prior to 1 July 1997 are eligible for a disability pension if they are assessed with a permanent 50 per cent reduction in normal earning capacity and have at least 150 weeks of contributions. Other workers are eligible for a disability pension if they are assessed with a permanent loss of at least 75 per cent of normal earning capacity and have at least 150 weeks of social security contributions, or if they are assessed with a loss of 50–74 per cent of normal earning capacity and have at least 250 weeks of contributions.

Disability pension benefits are equal to 35 per cent of the worker's average adjusted earnings during the last 500 weeks of contributions. In addition, 15 per cent of the worker's pension is paid for a wife or partner, and 10 per cent is paid for each child younger than age 16 (age 25 if a student, no age limit if disabled). If there is no wife, partner, or child, 10 per cent is paid for each dependent parent. A

worker who requires the constant attendance of others to perform daily functions is also eligible to receive a constant attendance allowance of up to 20 per cent of the pension amount.

**Retirement Benefits:** the current pension system in Mexico is a fully funded defined contribution system based on three pillars: i) a minimum guaranteed pension for low-income workers; ii) mandatory individual savings accounts with competitive mutual fund management; and iii) voluntary savings. Normal retirement benefits are available to both men and women who have reached age 65 and who have at least 1,250 weeks of social security contributions. An early retirement benefit is available at age 60.

### **Other Required or Typically Provided Benefits**

**Survivor Benefits:** survivor benefits are payable provided that the deceased worker was a pensioner and made at least 150 weeks of contributions at the time of death. Survivor benefits are payable to a surviving widow or a permanently and totally disabled widower in an amount equal to 50 per cent of the pension that would have been paid to the worker. Each surviving child under age 16 receives a benefit equal to 20 per cent of the worker's pension, or 30 per cent if the child is an orphan. If there is no eligible spouse or child, a benefit equal to 20 per cent of the worker's pension is paid to each person. Survivor benefits may not exceed 100 per cent of the pension that would have been paid to the worker. Upon the death of a covered worker, the social security system pays a funeral benefit to the family equal to two months of the worker's salary.

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

Written employment agreements are necessary and mandatory to stipulate the terms and conditions of the employment. Employment agreements cannot contain an employee's acceptance to waive the necessary legal grounds for justified dismissal on the part of the employer and the minimum mandatory benefits prescribed by Federal Labour Law.

### **FIXED- TERM/OPEN- ENDED CONTRACTS**

Any individual employment relationship is subject to the principle of 'job stability', that is, subject to the employee's right to keep his job as long as the employment relationship so requires. The FLL assumes, as a general principle, that an employment agreement has been executed for an indefinite term, unless the nature or the particular type of service to be provided calls for an employment agreement for a specific job or term, or if the parties agree to

execute an employment agreement for initial training or subject to a probationary period. The FLL provides that employment agreements for an indefinite term are for continuous work, but the parties may agree that the services be provided for a fixed term and for periodic work with a discontinuous character in cases where the services are required to be provided during a season, or are not required for an entire week, month or year.

## TRIAL PERIOD

The initial training employment relationship is the relationship whereby the employee agrees to provide its subordinated personal services, under the control and supervision of the employer, in order to acquire the necessary knowledge and skills to perform the services for which he is hired. This agreement must establish a training period of 3 months, as a general rule, and 6 months, for executive positions.

Employment agreements executed for an indefinite term or for a specific job or term of more than 180 days, may be subject to a probationary period of 30 days, or up to 180 days for executive positions, in order to verify that the employee has the necessary knowledge and skills to perform the services for which he has been hired.

## NOTICE PERIOD

There is no notice period under the FLL. However, the employer must notify the worker in writing of the cause or causes for dismissal. Notice may be delivered directly by the employer at the moment the dismissal takes place or communicated to the Labour Court within 5 work days, in which case the employer must provide the employee's last domicile registered in its files so the Labour Court notifies the employee in person. If neither is done, the dismissal will be considered unjustified. Failure to execute a dismissal within one month after the employer knew about the event that gave rise to the cause for dismissal will invalidate the action.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

The FLL allows for the employment of foreign nationals in Mexico, declaring in Article 7, "in every enterprise or establishment, the employer shall employ at least 90 per cent of Mexican employees." This same provision states that with regard to categories of technicians and professionals, "the employees shall be Mexicans unless there are none in that particular specialty, in which case the employer may employ foreign employees temporarily, in a ratio not to exceed 10 per cent of those employed in that specialty." There are two additional conditions in Article 7: (1) employers and foreign employees

have a joint obligation to train Mexican employees in the specialty of the foreign employees; and (2) physicians working in enterprises must be Mexicans. The provisions of Article 7 of the FLL do not apply to directors, administrators, or general managers of enterprises. The FLL's limited authorisation for foreign nationals to work in Mexico is also subject to the requirements of the Migration Law, in force as of 25 May 2011. The Migration Law establishes the following types of immigration status for foreign nationals in Mexico:

- visitors;
- temporary residence;
- temporary residence with work permission; and
- permanent residence.

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers that do not have a presence in Mexico must be aware of the applicable legislative and regulatory requirements before hiring an employee to perform in Mexico, including the rights, obligations protection of employees; tax implications; and the importance of accurately identifying the specific activities that the individual will carry out during his/her stay in Mexico in order to determine the appropriate visa.

## LIMITATIONS ON BACKGROUND CHECKS

There is no express impediment or restriction for employers to request a criminal record (criminal records may only be requested to certain type of employees) certificate or carry out background checks (i. e. credit) under Mexican legislation. On the other hand, the Mexican Federal Law on the Protection of Personal Data Held by Private Parties (the "Data Privacy Law") governs the legitimate, controlled and informed treatment of personal data to guarantee the individual's privacy and their entitlement to decide who, why and for which purposes their personal data may be processed (informational self-determination). There is a reasonable expectation of privacy in every data processing, being understood as the confidence that any person deposits in another regarding the personal data provided. According to the Data Privacy Law, criminal and financial/economic data is considered confidential information; any violation to this duty can entail civil and/or criminal liability. Moreover, financial/economic data is deemed as 'sensitive data' under the law and requires express consent from the 'data owner' (in the case at hand, the employee). One main obligation that employers must observe when gathering employees' or incumbents' personal data is delivering a Privacy Notice to each of them upon acknowledgement of

receipt, containing the purposes of data processing and express authorisation for the processing of sensitive data by the 'data owner' (the employee).

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

In general terms, the employer has the freedom to ask the questions it considers convenient to a candidate in all phases of the recruitment process; in other words, there is almost no limitation to the scope of such questions from a legal standpoint. However, company policy and international guidelines might require global corporations to adhere to stricter procedures in the recruitment, interview and screening processes.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

The main protection given to employees regarding equal pay is provided by the Mexican Constitution, in both sections, A and B. Section A, applicable to all non-governmental employees, establishes in its subsection VII that for equal work, an equal pay must be paid, without taking into account either gender or nationality. Section B, applicable for governmental employees, determines in its subsection V that equal pay must be paid for equal work, without taking into account the gender of the employee. Consequently, article 86 of the Federal Labour Law establishes that when two employees carry on the same job and have the same category, working day and conditions, equal pay is due.

### REMEDIES

An employee who discovers that he has received a lower pay, despite performing the same work, under similar conditions and with comparable results, can initiate a litigation seeking an "income equalisation". These cases will be carried out in the local or Federal Labour Courts, depending on the company's objects and activities. It is important to mention that as from 18 November 2020, the Labour Amendment will start to be applied in several states (others in October 2021 and all of them by May 2022); therefore, the employee will have to participate in a mandatory conciliation before a trial is started. This will give the employee an opportunity to have a dialogue with the company's representatives in order to solve the issue prior to litigation.

### ENFORCEMENT/LITIGATION

There has not been any significant litigation concerning equal pay practices in Mexico, but there are a few cases involving claims for equal pay and government employees claiming, "income equalization". However, the majority of these cases have failed to achieve anything beneficial for

the employees, due to the fact that courts have established that the burden falls on the employee to prove that it actually developed parallel skills, performed corresponding activities, had the same working days/hours, and that the conditions were similar in terms of efficiency, based on the quantity and quality of the work product, but still earned less than a colleague performing the same work (for more money). This, however, can be very difficult for employees to actually prove. Consequently, in most cases, the courts have denied the employee's claims for income equalization, with the result that the employee's circumstances remain stagnant; the employee will thus have to maintain his/her current salary, benefits and job category.

### OTHER REQUIREMENTS

Finally, there is an Official Standard (NMX-R-025-SCFI-2015) regarding standards for Labour equality and non-discrimination, however this official standard is not actually binding, rather it sets certain guidelines for workplaces in Mexico and allows employers to receive a certification if they comply with all guidelines. The Official Standard has established that companies ought to have a wage list to set minimum and maximum salaries for different categories, as well as defined criteria and requirements for each salary and for salary raises, which would ensure that the identical salaries are paid for the same work. Employers in compliance with this Norm have essentially fulfilled their obligations under the pay equity laws which apply in Mexico.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Although Mexican legislation does not provide for a specific concept of restrictive covenants, they may be defined as any contract, covenant, or agreement having as scope the restriction, loss or irrevocable sacrifice of the personal freedom.

Mexican law does not expressly prohibit clauses or covenants of this nature during the employment relationship. Execution of restrictive covenants has become more common in Mexico as a means to protect the employer's confidential information and trade secrets, as well as to ensure the companies' right to loyal competition.

The following restrictive covenants are recognised and may be enforceable under the law:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees.



## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

In principle, restrictive covenants are only “enforceable” during the employment relationship as a cause for termination and without liability to the employer. From a Labour standpoint, post-employment restrictive covenants are null and void under Mexican legislation and therefore, unenforceable; the only possibility for “enforcement” is before the Civil Courts. If the non-compete and non-solicitation agreement is declared null and void, both parties are able to retrieve their prior status, meaning the employee will be requested to pay back any and all moneys received for performance of the obligations established in the agreement. The employer could also exercise a civil action claiming damages derived from such infringement or even take criminal action if the employee had access to confidential information and/or trade secrets while performing his duties. Note that an injunction to prevent someone from rendering services or working in a certain field or activity cannot be issued because, as mentioned above, Article 5 of the Mexican Constitution and 4 of the FLL bar such relief.

## USE AND LIMITATIONS OF GARDEN LEAVE

Mexican legislation does not provide for garden leave.

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

In Mexico, there is no comprehensive legislation on social media; however, the Data Privacy Law and its secondary regulations, among other laws, apply to the processing of personal data that is carried out within social media platforms (including job advertisements), as well as to the processing of personal data that is obtained from social media. Processing is understood as the collection, use, disclosure or storage of personal data by any means. All processing of personal data must observe the principles of legality, consent, information, data quality, purpose specification, loyalty, proportionality and accountability. Despite major reform in 2012, the FLL does not specifically address access to or use of the Internet and social media. According to the FLL, the employer has the obligation to provide employees with the work tools necessary for the performance of their duties. The FLL further states that the employee may not use work tools for anything other than their intended use.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE’S ELECTRONIC COMMUNICATIONS?

According to the FLL, employees should be committed to perform their jobs with the utmost diligence and efficiency, as well as to safeguard those working tools provided by the employer to ease the accomplishment of their duties, which are not intended for personal use. Thus, employees may have access to social media if the employer so allows, either during their work shift or out of it. Breach of the foregoing may lead to justified termination of employment. Depending on the nature of the job, access to social media may be necessary. The employer may have access to the employees’ communications by these means with supervision purposes and only if agreed in writing with the employees. According to the most recent opinions issued by the Supreme Court of Justice, the right to privacy of private communications includes social media.

## EMPLOYEE’S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Employees have a duty of loyalty towards the employer, which means that employees must refrain from carrying out actions that may harm company’s reputation, other employees, or the company in general. The contrary may give grounds for termination with cause. Employers can, at their sole discretion, stipulate their requirements for employment. One such requirement could be the execution of a confidentiality agreement in addition to the employment agreement. The confidentiality agreement could include an obligation not to use, reveal, publish or in any other way disclose the industrial secrets and confidential information of the employer to its past, present, or potential clients.

# IX. TERMINATION OF EMPLOYMENT CONTRACTS

## GROUNDINGS FOR TERMINATION

An employer may dismiss an employee only where the latter gives cause for dismissal. Under Mexican Labour law, “integrity at work” is mandatory behaviour for the employee. An employee is deemed to act with integrity when the work is carried out with intense effort, care, and attention, in the agreed-upon time, place, and manner. “Lack of integrity” is a generic cause for dismissal. Additionally, Article 47 of the FLL specifies particular kinds of conduct that are causes for dismissal.

## COLLECTIVE DISMISSALS

According to the FLL, there must be a legally permitted cause of termination that substantiates the collective dismissal. The severance payment and the subsequent procedure will be determined depending on the cause. The first step is to determine whether the company has unionised employees and confidential employees. If it does, the working conditions of the union employees are governed by the CBA. Therefore, both the termination of the union employees and the CBA must be negotiated with the Union.

## INDIVIDUAL DISMISSALS

An employer may dismiss an employee only where the latter gives cause for dismissal. Concerning the termination of individual employment relations with union employees, the FLL sets forth a formula to calculate the amount of severance to be paid to each employee. The employer also has the obligation to pay a seniority premium to each employee being terminated. This premium is equal to twelve days of salary for each year of service rendered, with a cap at the equivalent of two times the minimum daily salary. Mandatory fringe benefits must be paid in arrears at the time of termination.

## IS SEVERANCE PAY REQUIRED?

The termination payment is calculated depending upon the cause of termination.

**Voluntary resignation:** The employer must pay all benefits due, including sales incentives, on a prorated basis up to the termination date. If the employee has at least fifteen years of seniority, he is also entitled to a seniority premium of twelve days' salary for each year of service, capped at twice the minimum daily salary in force.

**Termination with cause:** The employer must pay all benefits due, including commissions, on a prorated basis until the date of termination, and the seniority premium of twelve days of salary for each year of service (but with a cap of twice the minimum daily salary per the terms above).

**Termination without cause:** Employees who are terminated without cause are entitled to the following lump sum severance: (1) three months of the employee's daily aggregate salary, plus; (2) twenty days of the employee's daily aggregate salary for each year of service; (3) a seniority premium of twelve days' salary for each year of service (but with a cap of twice the minimum daily salary in the same terms as explained before); and (4) benefits due.

## SEPARATION AGREEMENTS

According to Article 53, Section I of the FLL, the mutual consent of the parties is a cause for termination of the employment relationship with no responsibility for either the employer or the employee, and therefore, is subject to the will of the parties.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

According to the FLL, employees who have been wrongfully terminated can file a complaint before the Labour Court for: (a) constitutional severance consisting of three months of aggregate salary; or (b) reinstatement to the same position it held, plus back wages (which is the salary the employee is not earning during the Labour proceedings capped to one year, if the litigation is not concluded after twelve months, the plaintiff will be entitled to request 2% monthly interest over a fifteen-month salary base).

## WHISTLEBLOWER LAWS

In Mexico, there is no specific statutory protection for employees who alert or provide information about possible breaches of the law or good corporate governance policies.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Article 356 of the FLL defines a union as "the association of employees or employers for the study, advancement, and defence of their respective interests." It follows from this definition that Labour unions may not include both employees and management members.

Labour unions can be organised as follows:

- trade unions, encompassing employees of the same profession, skill, or specialty;
  - enterprise unions, encompassing employees employed in the same enterprise;
  - industrial unions, encompassing employees who work in two or more enterprises in the same industry;
  - national industry-wide unions, formed by employees employed in the same industry but who are located in two or more states (including the Federal District) and various trades; and
- multi-craft unions, established in municipalities that do not have 20 or more employees of the same profession, trade, or specialty.

Similarly, there are different types of employers' unions or associations, as follows: those formed by employers in one locality who are engaged in one or more activities; and national associations, comprising employers in several states.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Even though the official political party (the 'Institutional Revolutionary Party' or 'PRI') has changed to MORENA, trade unions are still a substantial and important player in the political organisation of Mexico. They strongly influence the Mexican Congress and have introduced and supported most of the social legislation. Trade unions in Mexico have representatives on all the bodies responsible for the election of members of state and the federal labour courts.

Pursuant to the FLL a union has to prove the support of at least, 30 % of the non-exempt work-force to be granted the Representativity Certificate, also, this application should be public in order to allow other labour unions, the right to prove, that they also have the support of 30% of the work-force.

In cases where more than one union has applied for the Representativity Certificate, and there has not been an instance in which one of the unions obtained the minimum support of at least 30% of employees' participation then, per the Federal Conciliation and Registration Centre criteria the voting should be repeated. If the participation is of more than 30% then, the union that obtains the 30% of the votes is granted the Representativity Certificate.

The Union that is granted the Representativity Certificate will have the legal right to file before the Labour Courts, a call to strike, to claim the execution of a new CBA with the Company. The next step would be to negotiate a new CBA; and once an agreement is reached, the new CBA and its terms will have to be approved by 50% + 1 of the employees through personal, free, direct, and secret vote. Finally, the CBA must be registered before the Federal Conciliation and Registration Centre. The Representativity Certificate granted to the Union has a validity of 6 months, provided a strike is not started by the Union in relation with the CBA negotiation process, after which, any Union may undergo the certification procedure. A Labour union may lose its right to represent employees in a collective agreement if Federal Conciliation and Registration Centre determines that it no longer represents a majority of the employees, and, in such cases, another union acquires that right.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

The organisation of mixed commissions to fulfil certain social and economic functions can be established in the collective bargaining agreements; the resolutions of said commissions will be executed by the courts when declared mandatory by the parties involved.

Employees also have the right to designate representatives to be part of the mixed commissions

(safety and health, profit-sharing, training, productivity and development, and the like), for which they need not be unionised.

The FLL also provides the right to employees to create coalitions, which are temporary accords for the protection of their mutual interests. These possibilities generate the potential that groups of employees could pursue claims collectively before the authorities, although in practice, these actions hardly ever occur, at least at the present time.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

In connection with the sale of a business or transfer of undertaking, the FLL generally requires the acquiring entity to retain the selling entity's employees, as well as to assume existing benefit liabilities, regardless of whether the benefits are privately sponsored (e.g., company-sponsored medical insurance) or legally mandated (e.g., paid vacation and vacation premium). This is known as a substitution of employer. As a corollary of this retention obligation, the acquiring entity must recognize the employees' length of service, so as to ensure that changes in the legal structure or the ownership of the employer do not undermine the employees' vested rights. If the sale of a business in Mexico is structured as a stock purchase or a merger agreement that does not affect the seller's corporate entity, a substitution of employer does not come into play. In these cases, the buyer automatically becomes the employer of the seller's employees. When the buyer or substitute employer, assumes the employees' terms and conditions of employment in effect prior to the substitution, the FLL does not require consent from, or consultation with, the employees. For a substitution of employer to apply, pre-substitution terms and conditions of employment – as established in the individual employment contract or collective agreement – must remain unaltered. If the substitute employer unilaterally implements detrimental changes to existing employment conditions, the employee can rescind the employment relationship and claims statutory severance. During the first six months following an employer substitution, both employers remain jointly liable for Labour claims.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

In order to consummate the transfer of workers through an employer substitution and properly allocate



responsibility for labour liabilities associated with the asset sale transaction, both the seller and the buyer are required to comply with important procedural formalities and a host of administrative tasks.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The FLL provides for the following minimum benefits, which may not be waived whatsoever: Social Security Benefits: all employees must be registered with and contribute; Profit Sharing: employees are entitled to share in the employer's profits, currently fixed at 10% of the company's gross, pre-tax income; Paid Mandatory Holidays: employees must be paid for government holidays; Vacation Premium: employees are paid an extra 25% of the salary to which they are entitled during their vacation period; and Christmas Bonus: employees have the right to a bonus of at least fifteen days of their daily base salary, which must be paid by no later than 20 December of each year.

### SALARY

As of January 2024, the minimum general salary in the Northern Border Zone is MXN\$374.891 (approximately US\$18.76) per day, and the minimum general salary in the rest of the country is MXN\$248.93 (approximately US 12.46 per day). Salary includes cash payments for wages, plus bonuses, housing provided by the employer, premiums, commissions, in-kind benefits, and "any other amount or benefit that is given to the worker for its work" – it does not include profit-sharing payments.

### MAXIMUM WORKING WEEK

The principle of a 48-hour workweek, which presupposes one complete day of rest with full pay, is officially the law of the land. However, in some employment relationships, such as in government service, the banking sector, and in much of the private sector, a 40-hour workweek has been established. The arrangement of the 40 hours of work may be over five and one-half days or any other equivalent arrangement.

In the course of the year 2023 a proposal was presented that seeks to reduce the working hours, it is about reducing the working day to 5 days a week, thus going from 48 to 40 hours, in order to guarantee at least two days of rest per week for workers.

### OVERTIME

It is incumbent on the employer to maintain records of the effective length of the workday should the worker claim to have worked overtime. Section XI of Article 123 of the Constitution limits overtime to 3 hours per day and provides that it may not

be performed on more than 3 consecutive days. However, pursuant to a binding opinion issued by the Supreme Court of Justice, overtime must be calculated and paid on a weekly basis; this means it should not exceed 9 hours a week.

Furthermore, overtime must be paid at twice the hourly rate of pay. Article 68 of the FLL establishes that if overtime extends beyond 9 hours per week, the overtime beyond 9 hours must be paid at triple the hourly rate. Persons under 16 years of age and pregnant or nursing mothers, if it endangers the worker or the child's life, are not permitted to engage in overtime work.

On June 7, 2024, a decree was published in the Official Gazette of the Federation, introducing significant amendments to the General Law to Prevent, Punish, and Eradicate Crimes related to Human Trafficking and to Protect and Assist Victims of these Crimes. Specially Article 21 in its section IV, which now categorizes labour exploitation as a punishable crime.

Additionally, it is established that labour exploitation exists when a person obtains, directly or indirectly, unjustifiable benefits, whether economic or otherwise, unlawfully, through the labour of others, subjecting the individual to practices that violate their dignity.

In this line of thought, the governing verb (essential element) required for labour exploitation to occur is the subjugation of the employee by the employer to work extraordinary hours beyond what is legally allowed, against the employee's will, in order to obtain an illegal economic benefit.

As a result of the above, we consider that the crime provided in Section IV of Article 21 of the Anti-Trafficking Law is constituted when the employer, with intent, recruits, entices, transports, transfers, retains, delivers, receives, or shelters one or more workers, whether directly or indirectly and unlawfully, and subjects them to work overtime beyond the limits set by labour legislation.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

According to the FLL, companies with over 100 employees are required to have a preventive program for safety and hygiene; companies with fewer employees must provide the Ministry of Labour and Social Welfare (STPS, by its acronym in Spanish) with a list of their safety and hygiene obligations. Companies not in compliance could be given up to a year's grace upon submission of a written plan detailing how they plan to come into compliance. Independent private sector units, such as insurance companies, may certify compliance with workplace standards, following authorisation

by the STPS, forestalling the need for inspections. Under the FLL, employees have the right to perform their duties in a safe workplace. It is also the employee's right and obligation to require the employer to form a Joint Committee for Health and Safety within the workplace consisting of the same number of employee and employer representatives. Similarly, employees have the right to refuse to perform dangerous work. Finally, many technical rules regarding occupational safety and health are set out in workplace safety standards known as Official Mexican Standards (NOMs, by their acronym in Spanish). These Standards are mandatory, and the Secretary has the authority to enforce their compliance. The most recent one is the NOM-035 on psychosocial risk factors at work, identification, analysis and prevention.

From 23 October 2020, all employers are obliged to prevent work-related stress by constantly evaluating the organisational environment; applying control measures, such as the practice of medical examinations and records.

## COMPLAINT PROCEDURES

Failure to adhere to the provisions of the FLL on health and safety matters will subject the employer to sanctions consisting of fines that may range from 50 to 5,000 times the Unity of Measure and Update (UMA), per violation and per employee affected, regardless of the sanctions of a different nature that may be imposed in accordance with other legal proceedings.



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## I. INTRODUCTION

Dutch employment law is elaborate and relatively complex. It is divided into individual and collective law and is closely related to social security law. The following text will report the latest developments in Dutch employment law.

### KEY POINTS

- Employment law is not consolidated into a single code.
- Employees have a strong legal position.
- Preventive dismissal assessment.
- Relatively lengthy period of salary payment during illness.
- New Dutch employment law as of 1 January 2020: the Balanced Labour Market Act.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

According to the Dutch Equal Treatment Act (in Dutch: Algemene wet gelijke behandeling), discrimination on the following grounds is explicitly prohibited: religion, personal beliefs, political opinion, race, sex, nationality, hetero- or homosexual orientation and civil status. In addition, in specific employment laws, discrimination on the following grounds is explicitly prohibited: age, sex, handicap and chronic disease, temporary/permanent employment contracts and working hours (part-time/full-time).

### PROTECTIONS AGAINST HARASSMENT

The Dutch Equal Treatment Act prohibits harassment and sexual harassment. The Working Conditions Act contains an obligation for employers to prevent harassment from occurring at the workplace. If the employer fails to do so, administrative fines can be given, and the employer can be held liable for damages resulting from discriminating behaviour of the employer.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The Dutch government encourages companies to hire disabled persons. As an incentive, the government may grant financial benefits. If an employee is disabled, his/her workplace should still be safe and accessible. The employer is responsible

for this. If the workplace needs to be adapted, the employer can ask the Work Placement Branch of the Employee Insurance Agency for financial compensation to carry out such measures.

All employees should be able to fulfil their religious duties. To an extent, the employer cannot interfere with this (e.g., the employer is not obligated to provide his employees with a prayer room. There are no specific laws about this subject in the Netherlands.

### REMEDIES

In employment relationships in the Netherlands, discrimination claims are not that prominent. In practice, the employer and employee as well as Dutch Courts tend to search for reasonable, pragmatic, and practical solutions.

An employee can ask the Netherlands Institute for Human Rights (in Dutch: College voor de Rechten van de Mens) for an opinion about discrimination. The Institute can give a (non-binding) opinion and advice, but the Institute will not award a financial compensation. An employee is not obliged to ask an opinion of the Institute before going to Court. The Court is not obliged to follow the opinion of the Institute, but the opinion of the Institute can play an important role because of the expertise of the Institute.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

Social security in the Netherlands can be subdivided into social insurance benefits and social welfare benefits, depending on the source of the funding. Social insurance is funded from the contributions paid by employees. This system is compulsory. All employees are automatically insured and pay a contribution. Social welfare benefits are financed from central governmental funds.

Dutch law requires employers to make certain withholdings from the employee's salary for income tax purposes and the employee's national insurance contributions. An employer is furthermore required to pay certain social security premiums for its employees.

### HEALTHCARE AND INSURANCES

In the Netherlands, there is no obligation for the employer to provide for a healthcare insurance policy.



## REQUIRED LEAVE

### Annual Leave

Employees are entitled to a statutory minimum number of vacation days equivalent to four times the weekly working hours. For example, an employee with a full-time workweek of 40 hours is statutorily entitled to a minimum of 20 vacation days per year.

Since 1 January 2012, vacation days will lapse if they are not taken within six months after the year in which they were accrued, unless the employee was not reasonably able to take them, but the scheme applies only in respect to the statutory minimum of vacation days. In addition, ill employees will be entitled to accrue the same full number of vacation days as employees who are not ill. Vacation days should not be deducted from the employee's leave balance, allowing them to be taken at a later time. An exception to this policy occurs if the employee consents to have the employer deduct the vacation days. This situation may arise if an employee, despite being ill, wishes to proceed with a scheduled vacation and is able to enjoy it. In such cases, it is crucial that the employee explicitly and clearly agrees to the deduction of their vacation days.

### Holidays and Annual leave

Pursuant to Article 7:634 of the Dutch Civil Code, employees are entitled to a statutory minimum number of vacation days equivalent to four times the weekly working hours. For example, an employee with a full-time workweek of 40 hours is statutorily entitled to a minimum of 20 vacation days per year.

Accrued holiday days have to be taken within six months after the end of the year in which they were accrued, otherwise they will lapse. Exceptions are made if the employee were not able to take the leave within the required time period due to circumstances beyond their control, or if the employer did not notify the employee that unused leave would lapse. This applies to the statutory minimum holiday entitlement. In addition, ill employees will be entitled to accrue the same full number of vacation days as employees who are not ill.

In general, the vacation period is fixed according to the employee's wishes. If compelling business reasons would not allow the employee to take vacation during that specific period, the employer should inform the employee (in writing) within two weeks after the employee's request (in writing), in default of which the period is fixed according to the employee's wishes.

In addition to vacation days, employees are entitled to a holiday allowance, which, in general, equals 8% of the annual salary, as far as the annual salary does not exceed three times the annual equivalent of the minimum wage.

### Maternity Leave

Female employees have the right to (at least) 16

weeks of maternity leave. During this maternity leave, the Employee Insurance Agency will pay 100% of the daily wage, not to exceed the maximum daily wage.

The maximum daily wage in the Netherlands is currently EUR 282.95.

### Birth Leave

Partners will have five days of birth leave at full pay after the birth of their child (based on full-time employment). Partners can choose to take this leave immediately after the birth of their child, or to spread the leave over the first four weeks after the birth.

Furthermore, partners can take additional birth leave for up to 5 weeks. First, the partner must take the 5 days of birth leave (based on full-time employment). During this leave, the employee is entitled to 70% of his or her salary (increased up to the maximum daily wages). The additional birth leave must be taken within 6 months of the child's birth (on or after 1 July 2020).

### Parental Leave

An employee with a child under eight years old in his or her care, is entitled to parental leave. The employee can take at most 26 times his/her number of weekly contractual hours as parental leave. The right of parental leave ends when the child becomes eight years old. Parental leave is unpaid leave, and no holiday entitlements will be built up during the hours of parental leave.

An employee is entitled to nine weeks of partly paid parental leave. The parental leave must be taken within the first year of the baby's life and can be split. The employee receives 70% of his salary during this parental leave. The other 17 weeks of the 26 weeks of parental leave remain unpaid. The aforementioned applies to both parents. However, partners of the parent who gave birth, must take the 5 days of birth leave (based on full-time employment).

During the partly paid parental leave, the employee is entitled to 70% of his or her salary (increased up to the maximum daily wages). The partly paid parental leave must be taken within one year after the child's birth.

### Sickness Leave

Employers are obliged to continue to pay the salaries of sick employees for the first two years of illness. The employer is obliged to pay 70% of the employee's salary. The salary paid by the employer during the first year of sickness cannot be less than the minimum wage. For the second year, the minimum wage limit does not apply. The 70% is not calculated on the amount of salary that exceeds the maximum daily wage. Most employees in the Netherlands are bound to a diverging clause laid down in either an individual employment contract or a Collective Labour Agreement (such clauses are often more favourable to the employee).

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

In general, an employer is not obliged to provide pension benefits to an employee unless it has promised the employee that it would provide for a pension scheme, or if a Collective Labour Agreement or government initiative requires so. If the employer has offered a pension scheme to one of the employees, it is obliged to offer the same pension scheme to all other employees.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

An employment contract under Dutch law may be concluded orally or in writing. Pursuant to Article 7:655 of the Dutch Civil Code, however, the employer will, nonetheless, need to inform the employee in writing with respect to the following (among others) terms and conditions:

- the name and residence of the parties
- the place where the work is to be carried out and if this is not fixed, the mention that the employee will work in various places
- the position and a job description
- the hiring date
- if there is a probationary period: the duration and conditions
- if the employment contract is for a fixed period of time: the time period
- If the employment contract is entered into for an indefinite period
- the vacation rights or the method of calculating vacation rights
- the right to other paid leave, or the method of calculating this right
- the duration of the notice periods to be observed by the parties or the method of calculating these periods
- the salary including the specific elements, the payment intervals, the method of payment and, if the remuneration depends on the results of the work to be performed, the amount of work to be performed per day or per week, the price per item and the time that will be involved in performing the work
- the customary number of working hours per day or per week
- If the employee will participate in a pension scheme
- the conditions and payment for working overtime
- if the customary numbers or working hours per day or per week are unpredictable: the mention that the working hours are adjustable, the number of guaranteed hours and the payment for work on top of those guaranteed hours and the days and hours on which the employee can be obliged to work
- the employee's pension rights (if applicable)
- if the employment contract is a temporary

employment agency contract, and if so the identity of the user undertaking

- if the employment contract is an on-call contract
- the Collective Labour Agreement (if applicable)
- the right to training offered by the employer (if applicable)

### FIXED- TERM/OPEN- ENDED CONTRACTS

An employment contract can be agreed upon for a fixed period of time (fixed-term contract) or for an unspecified period of time (open-ended/permanent contract). If the identity of the employment has not changed (for example, with respect to the work to be performed, salary and secondary employment conditions), a fixed-term employment contract that follows an open-ended employment contract (that has not terminated in a way as provided by Article 7:677 paragraph 4 of the Dutch Civil Code) will become an open-ended employment contract by operation of law.

Pursuant to Article 7:668a of the Dutch Civil Code, a fixed-term employment contract will automatically convert into an open-ended employment contract if:

- a chain of temporary employment contracts covers 36 months or more; or
- a chain of three fixed-term employment contracts is continued.

A chain is a series of fixed-term employment contracts that succeed each other with no more than six months in between. This rule is also applicable to employment contracts between an employee and various employers that must reasonably be deemed to be each other's successors with regard to the work performed.

It is also possible to shorten the interval period of six months to three months in a Collective Labour Agreement if the nature of the activity so requires. This applies specifically to activities that can be performed for a maximum of nine months per year and cannot be consecutively carried out by the same employee for a period exceeding nine months per year. For instance, seasonal labour.

### Notification obligation

One month before the termination of a fixed-term employment contract of six months or longer, an employer must notify the employee whether the employment contract will be extended or not (in Dutch: aanzegverplichting). If so, the employer must also inform the employee about the terms and conditions for extension. If the employer does not inform the employee, the employee has a right to claim salary during the period in which the employer is in violation (up to a maximum of one monthly salary). For fixed-term employment contracts shorter than six months or contracts with no fixed end date, such as for the length of a specific project, this notification is not required.

## TRIAL PERIOD

A probationary period must be laid down in writing. In case of an open-ended employment contract, an employment contract for an indefinite period of time or an employment contract fixed for a period of two or more years, the maximum probationary period is two months. In employment contracts for a fixed-term of more than 6 months, but less than two years, the maximum probationary period is one month. It is not possible to agree upon a probationary period in an employment contract that has a term of six months or less.

The probationary period for both the employer and the employee should be equal. A probationary period is not valid if the employee involved is already employed at the employer but at a different position and will be carrying out more or less the same work that he/she has done elsewhere within the company. A probationary period conflicting with the law is null and void.

## NOTICE PERIOD

Dutch law provides for the following statutory notice periods for an employer:

- fewer than 5 years of service: 1 month
- more than 5 years, but fewer than 10 years of service: 2 months
- 10 or more years of service, but fewer than 15 years of service: 3 months
- 15 or more years of service: 4 months

The employee must take into account a notice period of one month. A longer notice period may be agreed upon if it is laid down in writing. In that case, the notice period the employer has to observe must be twice the notice period the employee has to observe.

The notice period may be reduced under a Collective Labour Agreement. Please note that any variance should be within statutory limitations, in default of which the statutory notice period is applicable. Unless agreed otherwise, the notice period starts running at the beginning of the month following the month in which notice is given.

In case the employee has reached the retirement age during his or her employment, the applicable notice period for the employer is one month.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

### Employment permit

If an employer wants to hire a foreign employee in a legal manner, several requirements have to be met. First, the foreign employee has to be in the possession of a residence permit. Secondly, the employer is obliged to obtain an employment

permit. This permit is valid for a maximum period of one year. Employees with Dutch nationality and employees from one of the countries of the European Economic Area and Switzerland are exempt from these rules, as well as some specific groups of people. For example, skilled and highly educated foreign nationals, but also other categories such as students and artists.

### The employment relationship

When an employee works in the Netherlands, Dutch law does not necessarily govern the employment relationship. A foreign employee could remain in the employment of his foreign employer based on his foreign employment contract with a choice of law in favour of the laws of the foreign country and then, be seconded to the Netherlands. In other words, the employer is not obliged to offer employees from another country a Dutch employment contract when they are transferred to the Netherlands. Employees can continue to work based on their current foreign employment contract.

The Netherlands is a party to the (EU) Convention on the Law applicable to Contractual Obligations/Rome I Regulation. This Convention/Regulation is applicable to international employment law issues. It states that regardless of the governing law of the employment contract, the parties are entitled to the protection afforded by the compulsory regulations that would apply if no applicable law had been chosen. The more an employee is legally or socio-economically integrated in the Netherlands, the sooner a Court will decide that the employment contract is linked to the Netherlands. As a result of which, Dutch law would be applicable. The Posting of Workers Directive (in Dutch: Detacheringsrichtlijn) and the Terms of Employment (Cross-border Work) Act must also be taken into account.

In case of an international employment relationship, the Dutch tax authorities grant special tax benefits to foreign employees who are temporarily assigned to a Dutch subsidiary or branch from abroad, e.g., employees who reside in the Netherlands or employees who are recruited by a Dutch employer. Since 1 January 2024, this regulation has been scaled back and the following schedule applies:

- the first 20 months exemption on 30% of the salary
- the next 20 months exemption on 20% of the salary
- the last 20 months exemption on 10% of the salary

This tightening does not affect employees who are already using the 30% ruling prior to 1 January 2024. In general, an addendum should be added to the employment contract declaring the applicability of the 30% ruling in respect of the agreed wages. The main conditions related to the 30% ruling pertain to:

- if the employee has a specific expertise, which is almost not available in the Netherlands
- the employee has obtained a valid individual decision of the Tax and Customs Administration



- in a period of 24 months before the employment in the Netherlands commenced, the employee must have lived at least 16 months more than 150 km in a straight line from the Dutch border

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers can hire employees in the Netherlands either through a local entity or a foreign entity. Before deciding on how to structure their business in the Netherlands, foreign employers are advised to consider the tax consequences.

## LIMITATIONS ON BACKGROUND CHECKS

During the pre-employment phase, only personal data specifically required for the position that the applicant applied for can be screened. Standard screening procedures are normally not allowed in the Netherlands. In the pre-employment phase, no extraordinary personal data of the candidates may be screened. This is only allowed if there are exceptional requirements for the vacancy that make this type of screening necessary.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

The employer can only ask about an applicant's health situation if a medical examination is required for the job by law. Of course, it is prohibited to discriminate against applicants on the grounds of – among others – gender, race, age, civil status, religion, and so on. Every company is required to comply with the regulations outlined in the General Data Protection Regulation (in Dutch: AV G). If the employer fails to do so, fines can be given by the Dutch Data Protection Authority.

The Recruitment Code of the Dutch Association for Personnel Management and Organisational Development (in Dutch: Nederlandse Vereniging voor Personeelsmanagement & Organisatieontwikkeling, abbreviated to: NVP) contains basic rules that employers should observe during the recruitment and selection process. The purpose of this code is to provide a standard for a transparent and fair recruitment and selection procedure. This Code is not binding, but employees can derive protection from these rules. The Code, for example, prohibits the requirement of a photo of the applicant prior to the applicant being invited to an interview.

# VI. PAY EQUITY LAWS

## EXTENT OF PROTECTION

Currently, offering unequal pay for work of equal value is a violation of (i) articles 7:646, 7:648 and 7:649 of the Dutch Civil Code, (ii) the Equal Treatment for Men and Women Act (in Dutch: “Wet gelijke behandeling van mannen en vrouwen”) and (iii) the General Equal Treatment Act (in Dutch: “Algemene wet gelijke behandeling”).

A legislative proposal on equal pay for women and men (in Dutch: “Wet gelijke beloning van mannen en vrouwen”) is pending in the House of Representatives. According to the explanatory memorandum, there is still a significant pay gap in the Netherlands. The Act is intended as an additional measure to be incorporated into the Dutch Equal Treatment Act. It is currently unclear when or if this legislation will come into effect or advance to further stages of review.

## REMEDIES

Under existing legislation, the presumption of evidence to demonstrate unequal pay rests with the employee. It is up to the individual employee to demonstrate whether he/she may unjustifiably earn less than a colleague performing the same work. However, it can be difficult for the employee to acquire the relevant facts and figures. If the employer refuses to provide actionable data or impedes efforts to adjust salaries to achieve pay equity, the employee can initiate a procedure with the Courts.

Should the abovementioned Act enter into force, the burden of proof will shift from the employee to the employer. This will be structured according to a certification system. Large companies (with more than 250 employees) must obtain a certificate showing that they pay women and men equally, meaning that women and men in the same position and with the same working hours, receive equal pay. The certification will be granted by an independent body. If a company has more than 50 employees, they are required to provide access to anonymised records of the wages of employees who perform work of equal value within the enterprise, or in the absence thereof, work of nearly equal value, upon the request of an employee.

Lastly, individuals who suspect that they are not being paid an equal wage can file a complaint with the Netherlands Institute for Human Rights. Before an employee can submit a complaint to the Institute, he/she must first approach the employer with the complaint. The employer then has two months to act on the complaint. In cases where the employee works for a company that has not installed a procedure for complaints, the employee can immediately approach the Netherlands Institute for Human Rights.

## ENFORCEMENT/LITIGATION

The employee can submit a discrimination complaint to the Netherlands Institute for Human Rights. It is also possible to request an official opinion on the complaint from the Institute. In that case, a

procedure for such complaints will be launched. This is only possible in discrimination cases. The Netherlands Institute for Human Rights assesses whether the discrimination complaint is justified on the basis of the legislation on equal treatment. Bear in mind, however, that the judgements of the Institute are not legally binding.

## OTHER REQUIREMENTS

In addition to the certification, the employer must provide information in the annual report on the extent of the differences in pay between female and male employees. This will only apply if the Act on equal pay for women and men is formally adopted. Per the proposed Act, the Minister of Social Affairs and Employment is given the legal task to inform the Dutch parliament, every two years, as to the developments concerning the pay gap in the Netherlands, what the expectations are, and which policies are being developed in this area to reduce the pay gap.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

A restrictive covenant is a clause included in the (signed) employment contract that prohibits the employee from engaging in certain activities for a specified period of time. The clauses must be written down in a language the employee understands. Examples of restrictive covenants are:

- a non-compete clause;
- a non-solicitation clause;
- a non-disclosure clause;
- a study costs clause and
- an external activities clause.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

A restrictive covenant can be enforced in Court if an employee does not comply with the restrictions, which follow from contract. In Court, it will first be decided whether the restrictive covenant in the employment contract is valid, and secondly, whether the employee breached it.

The clause is valid if the prohibition is limited to what is reasonably necessary to protect the employer's business interests. Typically, a duration of one year is considered reasonable. Limitations as to territory and nature of activity depend on the branch in which the employer operates and the area where the employee lives.

If it is decided that the employee did not comply with a validly agreed restrictive covenant, the employer can request the Court to issue a ban and

to impose a penalty. The employer can also claim damages from the employee for not complying with what they agreed upon.

An employee can also go to Court and ask to partially void a restrictive covenant.

## USE AND LIMITATIONS OF GARDEN LEAVE

Basically, garden leave is not an acknowledged concept under Dutch law. Unilaterally releasing an employee of his/her duties without the employee's consent, is prohibited. If an employee does not agree to a release, the employer can suspend the employee. However, the employer should be able to substantiate the reason behind the suspension and if a fair reason is not in place, the employee can claim reinstatement (even in Court). The main question is what a "good employer" would do in a comparable situation. If a good employer would have never reasonably given a release/suspension in this situation, it would be unlawful for the employer to do so.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

The employer can restrict the use of Internet and social media during working hours by a guideline/code of conduct that states the rules concerning such usage. The employer must inform the employees about the email and Internet policy within the company.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The employer is allowed to check whether the company's Internet and email rules are being followed, but the surveillance of any private use of the Internet during work cannot conflict with the employee's fundamental right of privacy, and the employer is obligated to provide advance notice of his intent to use such equipment for investigation purposes. Following the EU Regulation on privacy that entered into effect on 25 May 2018, employers must decide what level of privacy is required in each situation.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Based on the Dutch Civil Code, good employment practices and Dutch case law, the employee is not

allowed to disclose confidential information about the company, to insult the employer and to denounce the employer. In Dutch employment law, a severe insult of the employer or his/her family members, as well as divulging confidential information about the company may result in an urgent reason for dismissal.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

A fixed-term employment contract or a contract for a specific project ends by operation of law upon expiration of the term or completion of the project. Since 1 July 2015, an employer is obliged to notify the employee at least one month before the end of a fixed-term contract of six months or longer, as to whether the employment contract will be extended. The employer is also required to inform an employee who has a fixed-term contract about vacancies with an open-ended employment contract.

### COLLECTIVE DISMISSALS

If an employer wants to dismiss 20 employees or more within a term of three months within one of the working areas of the Employee Insurance Agency, he must notify and consult the relevant trade unions and notify the Employee Insurance Agency of its intention to do so. If the employer fails to comply with its obligation under this Act, the employee has a right to nullify the termination of his/her employment contract.

### INDIVIDUAL DISMISSALS

An open-ended employment contract can be terminated in the following ways:

- the employer gives notice after receiving permission from a governmental organisation. Since 2015, there is a possibility of appeal against a decision of the Employee Insurance Agency;
- the employee consents after the employer has given notice, without the abovementioned permission. However, there is a reflection period of 14 days, during which the employee can withdraw his/her consent. The employer has to point out the reflection period within two days after the employee has given his/her consent. If the employer fails to do so, the reflection period will be extended to 21 days;
- termination by decision of the Court, by filing a petition for dissolution in case of:
  - frequent and disruptive absence due to illness;
  - unsuitability for the position/under-performance (other than because of illness);
  - culpable acts or omissions of the employee;
  - refusal to work due to a serious

conscientious objection;

- impaired working relationship as a result of which the employer cannot reasonably be required to continue the working relationship;

- a new ground for dismissal called the "cumulation ground" was introduced, which allows an employer to combine different grounds for dismissal, whereas these other grounds are, by themselves, insufficient to justify a dismissal. The cumulation ground can only be applied for the dismissal motives mentioned above and cannot be employed for dismissals on the grounds of (i) business economics or (ii) due to long-term incapacity for work. In case an employment is terminated on the basis of a cumulated dismissal, the Court can grant an extra severance, equal to a maximum of half of the transition payment, in addition to the statutory transition payment that the employee is ordinarily entitled to receive. Since 1 July 2015, there is a possibility to appeal against the Court's judgment;

- other reasons and/or circumstances (by way of an exception).

- mutual consent (no notice period needs to be observed, although it is usual to do so);
- immediate dismissal for urgent cause;
- employee elects to resign, with due observance of the applicable notice period.

### IS SEVERANCE PAY REQUIRED?

Employees are entitled to a transition payment (in Dutch: transitievergoeding) from the first day of employment, as well as during probationary periods. An employee will receive a third of the monthly salary per calendar year. The transition payment is capped at EUR 94.000 gross – or if the employee is entitled to a higher annual salary – then one annual salary. The transition payment is not due if the employee terminates the employment contract, unless this termination is a result of seriously culpable actions on behalf of the employer.

It is possible for employers to apply for a compensation for the transition payment if they dismiss an employee on the grounds of long-term occupational disability (after two years of sickness).

Moreover, in the event of a closure of a business by the employer for reasons of illness or pension, the employer will now be compensated. Employers must satisfy a number of narrowly circumscribed conditions in order to qualify for compensation. It is important to note that this option is only available to small-business employers (with less than 25 employees) who owe a transition payment incurred during a period of six months prior to the consent of the Employee Insurance Agency or termination of an employment contract.



For calculating the duration of an employment contract, one or more employment contracts between the same parties (or successors) that have followed each other with intervals lasting no longer than six months, will be counted together.

### **Exceptions to entitlement of the transition payment**

There are a number of exceptions regarding the transition payment, the most important of which are set out below. The statutory transition payment will not be due if the employee is younger than 18 and the average working hours did not exceed 12 hours per week. The transition payment will also not be payable if the employment contract ends as a result of the employee reaching the pensionable age, or another age at which the employee is entitled to a pension. Furthermore, the transition payment will not be paid if the employment is terminated or otherwise ceases to continue as a result of a grave culpable act or omission, on the part of the employee (e.g., a legally valid summary dismissal). In the latter case, the Court may also grant the transition payment, in whole or in part, if the absence of any payment, regardless of the amount, would be considered unacceptable according to the criteria of reasonableness and fairness.

### **Fair dismissal payment**

In addition to the statutory transitional payment, the Court may also award a fair dismissal payment in case of seriously culpable acts and omissions on the part of the employer. Fair compensation may be awarded by the court in cases of serious culpable conduct by the employer, wrongful termination, violation of prohibitions on termination, causing medical problems, or non-renewal of an employment contract for prohibited discriminatory grounds (such as pregnancy or chronic illness). The amount of compensation depends on the severity of the situation and may include lost wages and future years of service.

### **Additional decisions and regulations**

Employers can deduct certain costs from the transitional payment under specific conditions. These include outplacement or training expenses and costs incurred during a longer notice period where the employee is exempt from work. The costs must be related to the dismissal and agreed upon with the employee. Additionally, if the employer incurred costs to improve the employee's employability within or outside the organisation, they can also be deducted (with the employee's consent). However, costs aimed at improving performance in the current job or relating to reintegration or redeployment obligations cannot be deducted.

The following conditions apply for costs to be deducted from the severance pay (Not all requirements apply to some dual programs):

- The employer has specified the costs and informed the employee accordingly.
- The employee agrees in writing in advance to deduct the costs from the transitional compensation.
- The employer has incurred the costs itself.
- The costs have been incurred for the employee's benefit.
- Wage costs may not be deducted. This is different if the employee and the employer agree on a longer notice period and you are exempt from work during this period.
- The costs are in reasonable proportion to the purpose for which they were incurred.
- The costs will be deducted from that part of the transitional compensation accrued during the period in which the costs were incurred or hereafter.
- The employer cannot elsewhere claim the costs.
- The costs cannot be recovered from the employee through, for example, a study expenses clause.

## **SEPARATION AGREEMENTS**

Separation agreements are used when the employment contract will be terminated with mutual consent (the so-called settlement agreement). A settlement agreement is not a legal requirement, but is considered best practice, as an employee is also able to apply for unemployment benefits after concluding a (legally correct) settlement agreement.

## **REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION**

After concluding a settlement agreement, the employee has a reflection period of 14 days. During that period the employee can withdraw the given consent at any time, without having to give an explanation. When this period is over, it is still possible under Dutch law to void a contract. A contract is voidable if for example, one of the parties misused the circumstances that the other party was in while signing the settlement agreement, or if a party was misled into signing the contract by the other party (with a 3 year time limit for invoking a voidable settlement agreement).

## **WHISTLEBLOWER LAWS**

The Whistleblower Protection Act partially come into effect on 18 February 2023, replacing the House for Whistleblower Act. Initially, this only applied to large employers with more than 250 employees. Since 17 December 2023, medium-sized employers in the private sector with 50-429 employees are required to update their whistleblowing procedures to comply with the Whistleblower Protection Act. The current obligations are as follows:

**1. Internal reporting procedure:** Employers with at least fifty employees are required to establish an internal reporting procedure. This procedure must outline the circumstances under which a suspicion

of misconduct can be reported, specify who reports can be made to, and describe how these reports will be handled. The procedure must also include an acknowledgement of receipt within seven days and a reasonable timeframe of up to three months for the evaluation and follow-up of the report.

**2. Extended protection:** The law provides protection to a broader group of individuals than before, including independent workers, (sub) contractors, shareholders, job applicants, suppliers, and volunteers. This means that not only employees but also others engaged in work-related activities are safeguarded against retaliation.

**3. Reversed burden of proof:** In cases of retaliation against the whistleblower, it is presumed that the retaliation is related to the report unless the employer can prove otherwise.

**4. Confidentiality obligation:** A confidentiality obligation applies to all individuals involved in a report or the investigation of suspected misconduct. This includes protecting the identities of both the whistleblower and the person whom the misconduct is alleged.

**5. External reporting procedure:** Authorities are required to establish an external reporting procedure within their jurisdiction. This allows whistleblowers to report misconduct outside their own organisation.

**6. Reporting register:** Employers are required to maintain a register of all incoming reports. This helps in monitoring and following up on reported misconduct.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Only in case of a collective dismissal, or if provided by a Collective Labour Agreement, the employer is obliged to inform the trade unions when it reports its intention to implement the dismissal to the Employee Insurance Agency. The dismissal can be reported to the trade unions by sending them a copy of the written notification to the Employee Insurance Agency (provided that any applicable Collective Labour Agreement does not oblige the employer to inform the trade unions at an earlier stage).

As set out under section VIII. part 2. above, after the report has been made, there is a one-month waiting period. No waiting period applies if the report is accompanied by a statement of the trade unions confirming that they were consulted and that they agree with the termination of the contracts.

Frequently, a social plan (e.g., termination packages) is negotiated. There is no legal obligation for the

employer to negotiate the content of a social plan with the trade unions. Nevertheless, a social plan often forms an important part of the negotiations with the trade unions, as they will base their support on the content of that plan. If the employer and the trade unions conclude a social plan, a Court will usually award the employee a severance amount in accordance with that social plan, unless application would be clearly unfair to the employee.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

Trade unions play important roles in case of collective dismissals, strikes and collective bargaining. Trade unions can also represent the individual interests of employees. Contrary to the Works Council, there is no statutory number of members and everyone can become a member of a trade union.

Trade unions are involved in collective dismissals, strikes and collective bargaining.

Members of a trade union can also be represented in case of an individual dismissal.

Dutch law does not provide rules about the tasks and obligations of representatives of trade unions.

All employees (including managers) can become members of a trade union. Please note that an employer cannot terminate an employment contract of an employee because of his/her membership of a trade union. However, the employee is obliged to act in accordance with rules regarding the concept of "good employeehip".

An employee may not interrupt the business of an employer unreasonably, because of trade union work and such activities may only be performed during office hours if the employer provided consent beforehand.

### OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

According to the Dutch Works Council Act, an entrepreneur maintaining an enterprise in which, as a rule, at least 50 employees work, is obliged to establish a works council for the purposes of consultation with and representation of the employees employed by the enterprise.

The obligation to establish a works council may also result from a provision to this effect in a Collective Labour Agreement. The number of works council members is calculated as follows:

- 50 employees: 3 members
- 50-100 employees: 5 members
- 100-200 employees: 7 members
- 200-400 employees: 9 members
- 400-600 employees: 11 members
- 600-1.000 employees: 13 members
- 1.000-2.000 employees: 15 members

- 2.000+ employees: 2 more members, up to a maximum of 25 members, for every 1.000 employees beyond the initial 2.000

If the employer gives permission, the works council can determine another number of members in its regulations. Employees can stand for election for the works council if they have been in service for at least one year. The election of the members of the works council is executed by a secret written vote on the basis of one or more lists of candidates. An employee is allowed to vote if he/she has been in service for at least six months.

The works council is entitled to receive all information, which it reasonably needs to properly perform its duties.

The employer is obliged to request the advice of its works council in advance, in case of an intended decision regarding, among others:

- transfer of control of the company or a part thereof;
- establishment, take-over or relinquishment of control of another company, or entering into or making a major modification to or severing a permanent co-operative venture with another company, including entering into or effecting major changes of or severing of an important financial participation on the account of or for the benefit of another company;
- termination of the operations of a company or a major part thereof;
- major reductions or expansions or other changes to the company;
- major changes in the organisational structure of the company or in the allocation of powers within the company.

The advice must be requested within a reasonable time frame to allow the works council to have a say in the decision that is to be taken.

If the works council refuses to give its consent, the employer can ask the Cantonal Court to give consent. The Cantonal Court will only give consent if the decision of the works council is unreasonable or if the intended decision of the entrepreneur is necessary because of compelling business interests. If any decision is taken without the consent of the works council or the Cantonal Court, that decision is void if the works council invokes the nullity of the decision within one month after being informed about the decision, or in absence of being informed, within one month after the decision was implemented and the work council was aware of that. The works council can ask the Cantonal Court to oblige the employer not to execute the decision. The employer can ask the Cantonal Court to declare that the works council wrongly invoked nullity of the decision.

Should the employer's decision deviate from the advice given by the works council, the employer must give a full account of the reasons why (in writing). There is no right of appeal.

In principle, every employee (including managers) can stand for election for the works council if the employee has been in service for at least 12 months. Only the executive director is excluded from election.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

Upon the transfer of a business, the rights and obligations of the employer and that business under the existing employment contracts with the employees will be automatically (by operation of law) transferred to the acquirer of the business. A prohibition of termination is applicable in case the reason of such termination is the transfer of undertaking. The employer has to consult the works council (or other employee representative body) about a proposed decision regarding the transfer of activities. The employer has to provide the works council or employee representative body with information on the grounds of the intended decision, the consequences for the employees, and the intended measures to be taken. The employer also has to inform the individual employees about the transfer of an undertaking and the consequences thereof for the employee.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

For one year after the transfer of the business, the seller and the acquirer are jointly and severally liable for the fulfilment of the obligations under the employment contracts insofar as these obligations are accrued before the transfer.

In principle, the buyer has to continue to apply the pension scheme of the seller. There are three exceptions: 1) if the buyer has its own pension scheme which he offers to the transferring employees; 2) if the buyer has to apply a mandatory sectoral pension scheme; 3) if a Collective Labour Agreement deviates from the pension scheme.

If an employee explicitly objects to the transfer, the employee will not enter into the employment of the transferee. The employment contract of the employee will thus end by operation of law at the time of the transfer.



## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Promoting health, safety and wellness in the workplace is the responsibility of both the employer and his employees. The employer has to establish a working conditions policy within the company.

### SALARY

In principle, employer and employee are free to agree to the wages to which an employee shall be entitled. However, the Act on Minimum Wages and Minimum Holiday Allowances (in Dutch: Wet minimumloon en minimumvakantiebijslag) contains certain minimum wages and minimum holiday allowances, which are normally adjusted each year. The minimum hourly wage from age 21 on 1 July 2024 is EUR 13.68. There used to be a fixed minimum wage on a monthly, weekly or daily basis, but this has been abolished since 1 January 2024. This means that for each pay period since then, the total wage must be at least the statutory hourly wage multiplied by the number of hours worked. A collective labour agreement, if applicable, may also contain salary scales that are binding on individual employees.

### MAXIMUM WORKING WEEK

In general, an employee is only allowed to work a maximum of 12 hours per day, for a maximum of 60 hours per week. Over a period of 4 weeks the maximum number of working hours is 55 per week. Over a period of 16 weeks the maximum number of working hours is 48 hours per week. The Working Hours Decree provides exceptions and additional measures for certain industries (inter alia, the care sector).

### OVERTIME

There is no specific Dutch legislation on compensation for working overtime. Whether overtime will have to be compensated should follow from what was agreed to in the employment contract, supplemented by the employee handbook or established in a Collective Labour Agreement (if applicable). Even supposing that these prescribed sources are altogether silent with regards to compensating employees for overtime services rendered, it is still possible that the employer is obliged to do so. Considering the high probability that in a labour dispute, the Courts are likely to decide that the employer should compensate an employee for working overtime because this is what may be expected from a "good employer" in the same circumstances. When working overtime, the Working Hours Act must be observed. Overtime pay can be provided in the form of either cash compensation or additional time off. However, the actual hourly wage in a pay period may never be less

than the statutory minimum hourly wage, except if a collective bargaining agreement provides so. The actual hourly wage is calculated by dividing the pay per period by the number of hours actually worked in that particular pay period.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Following the Working Conditions Act, the employer is obliged to provide a healthy and safe work environment for its employees. The specific rules for employer and employee to ensure a healthy and safe workplace are further laid down in the Working Conditions Decree (in Dutch: Arbeidsomstandighedenbesluit).

Employers are obliged to make a Risk Inventory and Evaluation (RI&E), which mentions all the risks in the working environment, and the preventive measures that are taken, or will be taken, to minimise those risks.

This also includes an RI&E concerning sexual harassment. Employers are also obliged to enter into a service agreement with a certified occupational health and safety service agency.

### COMPLAINT PROCEDURES

In principle, employees should first discuss any complaints with their employer. Employers are advised to have a proper complaint procedure in place. In case the company has a works council, employees may also report health and safety related matters to the works council. In addition, employees have the right to address health and safety related matters with the company's occupational health and safety service agency. Employers have the obligation to inform their employees about that possibility. In the last instance, employees may report violations of health and safety regulations with the Social Affairs and Employment Inspectorate.



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## I. INTRODUCTION

Norwegian labour law generally refers to the rules and regulations governing individual and collective relationships between employers and employees. Norwegian employment law is quite employee-friendly compared to the USA and many European countries. Employers must comply with the requirements of the Working Environment Act (WEA), which is the main employment legislation. The WEA regulates matters such as employment, whistleblowing, requirements for work environment, working hours, rights to leave, protection against discrimination, termination of employment, rights of employees in case of a transfer by undertaking and rules regarding disputes concerning termination of employment. It is not possible to waive the rules by agreement in advance, to the detriment of the employee. The WEA applies to all employees including employees in leading positions and managerial positions. To a great extent, the WEA cannot be deviated from for employees working in Norway for foreign employers. Self-employed workers are not subject to the WEA.

### KEY POINTS

- The Working Environment Act is mandatory, and the employee may not, in advance, renounce his or her rights as provided by the law.
- Collective agreements are quite common, and an employer/confederation for enterprises and a trade union may, where specifically stated in the WEA, enter into collective agreements that deviate from provisions in the WEA.
- The main rule is that an employment shall be indefinite/fixed. The opportunity to enter into temporary employment contracts is limited and rather strictly regulated.
- The employer may only terminate the employment contract if it is objectively justified. The employer has the burden of proof regarding the grounds for termination.
- There is no statutory right to severance pay upon terminating an employment contract. Severance pay is however quite common, and must be assessed on a case-by-case basis.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

The law regulates gender equality and anti-discrimination rules related to gender, pregnancy,

leave related to birth and adoption, caring tasks, ethnicity, religion, belief, disability, sexual orientation, gender identity and gender expression, age and a combination of these grounds. The regulations regarding anti-discrimination apply to all aspects of an employment relationship and areas of society and set out protections against both direct and indirect discrimination, and also extends to include rules applicable to hiring processes. A vacant position cannot be announced as vacant for only one gender and the announcement cannot give the impression that the employer expects, or prefers, one gender over the other for the position.

In addition, the law stipulates rules on the employer's duty to actively carry out work on gender equality, which includes: the employer's duty to disclose an annual statement on the undertaking's work on gender equality, preferably in the undertaking's annual report. Employers should further note that the authorities have the right to access information on the undertakings work on gender equality. Preferential treatment is legal if it is reasonable that it will promote gender equality or contribute to prevent discrimination due to pregnancy and leaves related to child birth and adoption, work in the home, ethnicity, religious views or beliefs, functional disabilities, sexual orientation and gender expression, age or a combinations of these mentioned grounds. Such preferential treatment is only legal if there is a reasonable relationship between the aim of such treatment and how invasive the preferential treatment is for those who then will be put in a less favorable position.

### PROTECTIONS AGAINST HARASSMENT

The Norwegian Labour Inspection Authority defines harassment as cases where an employee is subjected to negative actions, over time, by one or more persons. For example, unwanted sexual attention, leaving someone out, taking away his or her work tasks or hurtful teasing. According to case law, employees are not often granted compensation on the grounds of being harassed in the workplace. The reason for this is that case law stipulates an objective norm for what qualifies as harassment, and the individual's own assessment of whether or not he or she has been harassed is not decisive in determining whether harassment has taken place. Furthermore, the employee must be able to prove that he has been harassed, which can be difficult. If the court finds that harassment has taken place, the employee may claim compensation for economic losses. However, claims for tort are rarely granted, as the court rarely finds that the employer has acted

with intent or culpable negligence when it did not put an end to the harassment.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Employers should ask the employee what they expect of accommodation to practice their religion, and be clear about which expectations may be met. Fundamental issues related to religion in the workplace should be implemented in the company's HSE procedures. Employers are obliged to give due consideration and attention to the individual, in the planning and organisation of occupational activities, but an employee usually cannot refuse to perform a task because of their religion. Disabled persons are entitled to suitable individual accommodation of workplaces and tasks to ensure they can obtain or retain employment, access to training and other skills development as well as perform and have the opportunity to progress in the work on an equal basis with others. This right applies, provided that it does not involve undue burden for the employer.

## REMEDIES

Two independent administrative agencies enforce the anti-discrimination rules, the Equality and Anti-discrimination Ombud and the Equality Tribunal. The Ombud makes no binding statements. The rulings of the Equality Tribunal are administratively binding. Workers or applicants subjected to unlawful discrimination may be entitled to compensation for both economic and non-economic loss. Violation of anti-discrimination policies can also result in criminal sanctions.

# III. EMPLOYEE BENEFITS

## SOCIAL SECURITY

Persons who work or are residents in Norway are, as a rule, obliged to be members of and to pay contributions to the Social Security Scheme. Employers have to pay social security contributions on wages and other remuneration that the employers have to report. The obligation to pay employer's social security contributions does not follow the membership of the employee and can apply even if the employer is not engaged in activity in Norway and even if the employee is not liable to pay taxes in Norway. The employer's social security contributions are stipulated as a percentage of the reported amount. The contributions are differentiated, with rates that vary between different geographical zones. Employees' social security contributions are stipulated as a percentage of personal income.

## HEALTHCARE AND INSURANCES

The National Insurance Scheme covers a range of benefits including sick pay, work assessment

allowance, disability pension, unemployment benefits, retirement pensions, survivor's pension, occupational injury benefits, healthcare allowance, benefits to single parents and benefits during pregnancy, birth, adoption and parental leave.

## REQUIRED LEAVE

### Holidays and Annual Leave

Minimum holiday rights for employees are outlined in the Holiday Act, which grants an employee a minimum right of 25 working days of holiday leave per year. The term "working days" includes Saturdays. Employees over 60 years of age are entitled to an additional 6 working days of holiday leave. The holiday year runs from 1 January to 31 December. Many collective agreements grant extended holiday rights. Five weeks of holiday is now quite common in Norway. As a general rule, an employee is entitled to 18 consecutive working days of holiday leave during the period 1 June and 30 September. An employee is also entitled to take the remaining seven working days of holiday leave together.

Holiday pay is earned the year before it is paid (the holiday year). Holiday pay is 10,2 percent of the wages paid during the earning year. The amount is normally 12 percent if an employee is entitled to five weeks' holiday under an individual or collective agreement. For employees over 60 years of age who are entitled to an additional week, the holiday pay is either 12,5 or 14,3 percent, depending on whether the employee is entitled to five or six weeks of holiday. There are 10 (ten) public non-working days per year in Norway.

### Maternity and Paternity Leave

Maternity leave, including compensation, lasts for a maximum of 59 weeks. 3 weeks before the birth and the first 6 weeks after birth are reserved for the mother, and are compulsory. 15 weeks are reserved for the father. The employees have the right to compensation during maternity and paternity leave. The compensation is either 80 percent of the salary for 59 weeks or 100 percent for 49 weeks. In addition, parents have the right to take a leave of absence for an additional year without compensation.

### Sickness and Disability Leave

When an employee has a right to leave due to sickness, he also has a right to sick pay (the salary is fully compensated), which is customarily split between the employer and the National Insurance Scheme. The employee is protected against dismissal on the grounds of sickness leave, during the first 12 months after the beginning of the period of absence due to such reasons.

In principle, disability leave is not a concept recognised under the laws of Norway.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Retirement pensions are divided into three levels:



**Level 1:** retirement pensions from the National Insurance Scheme ensure an income in old age. Drawing from a retirement pension can begin the month after a person turns 62, as long as sufficient pension rights have been accumulated. A person who is retired can work as much as he or she wants without their pension being reduced. They accumulate rights to a retirement pension when they work or otherwise have a pensionable income before turning 75. The pension rights are adjusted in accordance with the general life expectancy of the population.

**Level 2:** employers must provide mandatory occupational pensions in addition to retirement pensions.; at least 2 percent of an employee's gross income is paid into pension funds.

**Level 3:** private savings, irrespective of employment and the Norwegian pension scheme.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

The employment contract is required to be in writing and must contain certain elements pertinent to the employment. In case the work is performed periodically, the employment contract shall stipulate or provide the basis for calculation, when the work is performed.

### FIXED- TERM/OPEN- ENDED CONTRACTS

The main rule is fixed employment. Temporary employment engagements shall not exceed 15% of the total number of employees in the undertaking, of course it is always permissible to enter into such engagement with at least one employee in the company.

### TRIAL PERIOD

An employment contract may include a "trial period" for a maximum of six months. To be valid, the trial period must be regulated in the written employment contract. During the trial period, the threshold for a legal dismissal with a notice period due to circumstances related to the employee is considered to be somewhat lower. The notice period within the trial period cannot be shorter than 14 days, and runs from day to day.

### NOTICE PERIOD

During the trial period, the notice period is only 14 days. The employment contract may provide for a shorter or a longer notice period. Notice of termination given during the trial period runs from the date the employee received the notice.

It is common for employment contracts to have a mutual notice period of three months. The notice period may also be agreed upon through

collective agreements. If an employment contract is terminated after at least ten years of continuous employment with the same employer, the notice period is prolonged to at least four months if it takes place after the employee has reached 50 years of age, at least five months after the age of 55, and at least six months after the age of 60.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Foreign employees from outside the EEA/EFTA area, including self-employed individuals, must hold a residence permit, which may be obtained at the Foreign Service Mission or the Norwegian Directorate of Immigration, that entails the right to work in Norway. There are different types of permits depending on whether someone is a skilled worker, an unskilled worker (such as seasonal workers and seafarers aboard foreign ships), a specialist, a student, a researcher, etc. A residence permit may be obtained at the Foreign Service Mission or the Norwegian Directorate of Immigration.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

When a foreign employer wants to hire an employee in Norway, there is no requirement to establish or work through a local legal entity in Norway. However, all foreign enterprises that will operate business activities in Norway are required to register with the Norwegian Register of Business Enterprises. An enterprise is considered a foreign enterprise in Norwegian law if the company does not have its main office in Norway or on the Norwegian continent. The employer also has to register with the various government agencies.

### LIMITATIONS ON BACKGROUND CHECKS

Background checks may include verification of information given by the candidate, or more thorough investigations for mapping personal characteristics. It is common to check education, professional experience, business interests, credit, identity, address and references, as well as performing a media search. It is less common to check work permits, "CV-holes", alcohol or drug issues, salary, medical history, and the reason for termination of the former employment. The employer usually has an extensive right to verify the information given by the candidate.

The employer may not gather information with regards to family life, religious point of view, ethnicity, functional disability, and sexual orientation (unless

such information is of fundamental importance for the performance of the work required in the position). In spite of these prohibitions, such data may be gathered if the information is of fundamental importance for the performance of the work required in the position. The employer may have a legal basis to review publicly-available information about a candidate on social media, in order to be able to assess specific risks regarding the candidate for a particular function, but only if it is necessary for the job and the candidate is correctly informed (for example, in the text of the job advert).

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

When the employer conducts an interview with the candidate, the employer cannot ask for information concerning sexual orientation, their views on political issues or whether they are members of trade unions. Nor may the employer obtain such information through background checks. The employer cannot ask for certificate of good conduct. The only exception is if the law regulating that particular position or profession requires that the candidate has a certificate of good conduct. Furthermore, information about whether or not the candidate has a clean record is considered as sensitive personal data.

The employer can only obtain a credit report of the candidate, if the vacant position is high-ranking and entails great economic responsibility. In addition, credit reports may only be obtained for candidates selected in the final rounds of the recruitment process. The employer may only ask for information regarding the candidate's health to the extent that the tasks involved with the position have special health requirements. It is however prohibited to ask general questions about the risk for future health problems.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

The Gender Equality and Anti-Discrimination Act declares that women and men shall receive equal pay for work of equal value. The rule applies to all sorts of remuneration, such as bonus and overtime payments. Discrimination in compensation based on grounds other than discrimination on gender, is regulated by the general prohibition against discrimination.

An employee who suspects discrimination in pay-setting, may demand that the employer provide written confirmation of the pay level and the criteria for the setting of the pay for the person or persons with whom the worker is making a comparison.

## REMEDIES

An employee challenging an equal pay practice may file a claim with the Norwegian Anti-Discrimination Tribunal. The Tribunal handles the cases on the basis of written statements from the parties. The Tribunal may decide that the illegal practice comes to an end and/or decide that the employee is entitled to compensation for the unlawful practice. The decision of the Tribunal may be subject to legal proceedings for the ordinary courts.

## ENFORCEMENT/LITIGATION

There has not been significant litigation or enforcement concerning equal pay practices in Norway.

## OTHER REQUIREMENTS

There are several requirements related to the employer's active equality efforts. All employers shall, in their operations, make active, targeted and systematic efforts to promote equality, prevent discrimination on the basis of gender, including equal pay. Employers with more than 50 employees, shall issue a statement on the actual status of gender equality in the undertaking and what the undertaking is doing to comply with the activity duty. The statement shall be issued in the annual report or another document available to the general public. Further, employees of an undertaking and their representatives, the Anti-Discrimination Tribunal, the Equality and Anti-Discrimination Ombudsman and researchers, shall have a right to disclosure of documentation relating to equality work.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The Working Environment Act differs between three different types of restrictive covenants, each enforceable under the law:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

The employer has the right to invoke enforcement of the restrictive covenants to safeguard the employer's particular need for protection. For example, if a non-compete clause is invoked, the employer shall pay the employee compensation equivalent to 100 per cent of the employee's salary up to eight times the National Insurance basic amount, and thereafter a minimum of 70 per cent of the employee's salary in

excess of eight times the National Insurance basic amount. The compensation shall be calculated on the basis of salary earned during the twelve months immediately prior to the date of notice or summary dismissal. The compensation may be limited to twelve times the National Insurance basic amount.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave describes the practice whereby an employee leaving a job is instructed to stay away from work during the notice period. If an employee has resigned, or otherwise had their employment terminated, a period of at least one month's notice shall be applicable to either party, unless otherwise agreed to in writing, or laid down in a collective pay agreement. This means that the employee has a right to remain in his position during the notice period. Note that the notice period is calculated from the 1st in the upcoming month, after the date of the termination. An exception from this rule applies if the employment relationship is terminated when the employee is on a probationary period. If so, the notice period may only be 14 days, counting from the day of the termination. The employer and the employee may agree to disregard the period of notice.

More challenging, are cases where the employer unilaterally wishes to deprive the employee of his right to work during this period. If the right to remain in the position is to be limited by the use of garden leave, the employer has to have "particularly weighty reasons", which depends on an overall evaluation of the interests of the parties; of particular importance is whether the employee's right to remain in the position may result in considerable damage. The employee is nonetheless entitled to the same pay and contractual benefits during the garden leave. The employer cannot legally predetermine the use of garden leave. The use of garden leave has to be determined in connection with the situation at the time of the termination of the employment.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

The employer is free to restrict the employee's use of Internet and social media, as long as the restriction is not against any agreements between the employee and the employer, or against any statutes of the company. In addition, the restriction must have an objectively justified reason. It is not common to restrict the employee's Internet use in general, since the Internet is necessary for most work. However, it is quite common that the use of social media can be restricted.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The employer's right to monitor, access and review the employee's electronic communications is restricted to the employee's e-mail account given by the employer for work related purposes, the employee's personal areas in the company's data network, and other electronic equipment the employer has provided for the employee to use in his or her work. The restrictions apply to both current and past employees in the company.

The employer may only access information from such mentioned places when it is necessary to ensure the daily management or other legitimate interests of the undertaking, or when the employer has a justified reason to suspect the employee's misuse of his or her work e-mail account, or other work related electronic equipment, which constitutes a severe breach of the employee's duties in the employment relationship, or that may constitute a reason for dismissal of the employee without a notice period, or termination with a notice period. The employer may not monitor the employee's use of electronic equipment, hereby the Internet use, unless the aim of such monitoring is to either administrate the undertaking's computer network, or to look for, or investigate, security issues in the network.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Whether the employee is free to disparage the employer in social media is a question of whether or not his/her claims fall under freedom of speech. The freedom of speech is regulated in the Norwegian constitution. The freedom of speech gives the right to communicate anything that is not prohibited by any other laws – such as the employee's obligation to be loyal to his employer and not say or do anything that is untrue or will harm the employer in an unfair way.

The employee is, in general, free to use social media outside working hours as he or she pleases, and the employer cannot set any restrictions as such. On the other hand, the employee is obligated not to reveal any confidential information that belongs to the company, and this includes using social media to reveal this kind of information. The revelation of confidential information might constitute a breach of contract that may result in termination of the employment. If the breach of confidentiality has caused a financial loss, it may carry liability for damages. Unauthorised revelation of trade secrets is also a legal offence.



# IX. TERMINATION OF EMPLOYMENT CONTRACTS

## GROUNDINGS FOR TERMINATION

Grounds for termination include: i) dismissal of an employee due to business related reasons; ii) dismissal of an employee due to reasons related to the individual employee; iii) collective dismissal based on objective grounds; iv) resignation by the employee; v) expiration of the contract term or end of the specific job; and vi) employer's death, retirement or permanent illness.

## COLLECTIVE DISMISSALS

Terminations based on economic, technical, organisational or productivity grounds are deemed collective when at least 10 employees have been given notice of dismissal within a period of 30 days. Other forms of termination that are not warranted by reasons related to the individual employee shall be included in the calculation, provided that at least 5 employees are made redundant.

When an employer considers dismissing a number of employees at the same time, the employer must follow a strict procedure; the most important regulations are found in the Working Environment Act. The employer must hold information and discussion meetings with the employees' representatives and inform NAV (the Norwegian Labour and Welfare Administration) about the mass redundancy. The employer must define the selection group and criteria for the selection of employees, which may receive notice of termination. After the employees are informed, individual meetings must be held with the employees who might be dismissed.

## INDIVIDUAL DISMISSALS

A dismissal must be objectively justified due to circumstances relating to the operation of the business, the employer or the employee. This applies to both individual and collective dismissals. Before making a decision regarding dismissal with notice, the employer shall discuss the matter with the employee and an elected representative of the employee, unless the employee himself does not desire this. The notice of termination itself needs to be in writing and shall fulfil certain minimum requirements. In case of severe breach of obligation, either party can also terminate the employment for cause with immediate effect without observing a notice period. Among the valid reasons for immediate termination are crimes against the employer.

## IS SEVERANCE PAY REQUIRED?

There is no statutory right to severance pay in Norway. The only payment that the employee is entitled to is ordinary salary payment and additional contractual benefits during the period of notice

in accordance with the terms of employment. Many undertakings are immediately bound by different collective agreements to offer employees severance pay. In addition, employers who are not bound by any collective agreement may choose to offer some kind of severance package including, for instance, job-training, education, release from the duty to work, severance pay, etc. The right to such benefits is normally conditional upon the employee entering into a termination agreement whereby the employee, inter alia, waives the right to institute legal proceedings pursuant to the Employment Act. Termination agreements may be entered into before the employee receives notice or after notice is given.

## SEPARATION AGREEMENTS

It is not required for the parties to enter into a settlement agreement. However, to obtain clarity between the parties, it is considered best practice.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

An employee is entitled to a negotiation meeting with the employer, but only if the employee has been notified within two weeks after the dismissal. The employee can accept or challenge the termination decision. If the employee challenges the notice of termination, the employee will be entitled to remain in his or her position until a court has settled the case, provided that the employee has finished his or her trial period. This, in worst-case scenario, may take two to three years. During this period, the employee has the right to keep working as usual and to keep receiving a salary as usual.

## WHISTLEBLOWER LAWS

The Working Environment Act regulates the employee's right to notify the employer, public authorities, the media or others in whistleblowing cases. An employee has a right to notify of censurable conditions at the employer's undertaking. The same applies to workers hired from temporary-work agencies. The employee shall proceed responsibly when making such notification, notwithstanding the right to notify in accordance with the duty to notify or the undertaking's routines for notification. The same applies to notification to supervisory authorities or other public authorities. Retaliation against an employee who makes such a notification is prohibited. The same applies for workers hired from temporary-work agencies. The prohibition applies for both employers and hirers. Anyone who has been subject to unlawful retaliation may claim compensation without regard to the fault of the employer or hirer.

On 1 January 2020, new rules on whistleblowing at the workplace came into effect. The changes in the relevant chapter in the Working Environment Act mainly contribute to clarification on current law, but also include some material changes. Among

the changes, the personnel sphere covered by the whistleblowing regulations is expanded to include students and prisoners among others, when these persons are performing work. Further the employer's obligation to follow-up a notification on censurable conditions is now stipulated in the law. In addition, the notion of censurable conditions, in which is the scope of the rules, is exemplified in the law so as the prohibition of retaliation is defined in the law. For employers in the day-to-day work, an important practical change is related to the requirement to the undertakings notification procedures.

## **X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS**

### **BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS**

The two main unions are the LO (Norwegian Federation of Trade Unions), representing employees, and the NHO (Confederation of Norwegian Business and Industry), representing employers. Both unions are umbrella organisations and consist of a number of smaller unions. The affiliated unions to LO are often vertically organised, including both blue and white collar workers, and cover both the private and the public sectors. They are actively involved in both political and judicial issues and have become powerful actors in Norwegian community and social life.

### **RIGHTS AND IMPORTANCE OF TRADE UNIONS**

The rights of trade unions are regulated in the Labour Disputes Act. Generally, trade unions have a right to enter into collective agreements. Collective bargaining agreements between employees and employers organisations are usually negotiated every other year. LO and NHO are involved in most of the collective bargaining agreements entered into in Norway and have developed the so-called Main Agreement. The Main Agreement is a framework agreement that contains the general rights and basic rules in the workplace. The Main Agreement is incorporated into the first part of all collective bargaining agreements entered into by affiliated organisations.

The Main Agreement obliges the parties to maintain industrial peace for the duration of the collective bargaining agreement, known as "the peace period". This means that measures such as strikes and lockouts, etc., may not be employed during labour conflicts until the collective bargaining agreement has expired. Such action shall only be performed during the negotiations. Disputes about the validity or content of collective bargaining agreements and disputes arising out of the collective bargaining agreements are heard by a separate tribunal, the Labour Court.

Employees have the right to participate in the management of the workplace. They are also entitled to representation on the board of directors.

### **OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES**

Safety representatives shall be elected at all undertakings subject to the Working Environment Act. Furthermore, undertakings that regularly employ at least 50 employees, shall have a working environment committee, wherein the employer, the employees and the occupational health service are represented. The working environment committee shall make efforts to establish a fully satisfactory working environment in the undertaking. The committee shall participate in planning safety and environmental work and shall follow up on questions relating to the safety, health and welfare of the employees.

## **XI. TRANSFER OF UNDERTAKINGS**

### **EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING**

The rights and obligations of the former employer ensuing from the contract of employment or employment relationships in force on the date of transfer shall be transferred to the new employer. The new employer is also bound by any collective pay agreement that was binding upon the former employer. This does not apply if the new employer, within 3 weeks after the date of transfer, declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have, however, the right to retain the individual working conditions that follow from a collective pay agreement that was binding upon the former employer. This shall apply until the collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.

The employee's right to earn further entitlement to retirement pension, survivor's pension and disability pension in accordance with a collective service pension scheme shall also be transferred to the new employer. The new employer may, however, decide to make existing pension schemes applicable to the transferred employees.

An employee may oppose the transfer of the employment to the new employer. An employee who objects to the employment transfer must notify the former employer of this within the time limit specified in the information given to the employees (see below). The period may not be shorter than 14 days after the information is given.

Employees who have been employed for a total of 12 months over the last 2 years before the date of

transfer, and who object to the transfer of employment, have the right to new employment with the previous employer for one year from the date of transfer, unless the employee is not qualified for the position. The right to new employment lapses if the employee has not accepted an offer of employment in a suitable position within 14 days after receiving the offer.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The previous employer and the new employer are obliged to discuss the transfer of the undertaking with the employees' elected representatives as early as possible. This information shall include reasons for the transfer, date or proposed date of the transfer, the legal, economic and social implications for the employees, changes in circumstances relating to collective pay agreements, measures planned in relation to the employees, rights of reservation and preference and the time limit for exercising such rights. The same information shall also be given to the affected employees as early as possible. Most collective agreements also contain regulations in regard to information and discussion.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employers and employees are free to negotiate the terms and conditions of their employment relationship. The Working Environment Act lays down the minimum requirements for the work environment, the workplace, working hours, employment contracts, employment protection, dismissal, redundancy and summary dismissal.

### SALARY

There are no statutory regulations concerning minimum wages. However, wage levels and minimum wages are generally laid down in collective bargaining agreements. For some specific sectors, the salaries laid down in the collective agreements also apply to employers in the sector without the collective agreement (e.g., construction, cleaning, shipbuilding and seafood production); such agreements are only generally applicable as to pay and working conditions; the objective is to prevent lower pay and working conditions for foreign workers, than that which is otherwise common in Norway.

### MAXIMUM WORKING WEEK

In general, the maximum normal working hours shall not exceed nine hours in twenty-four hours and forty hours in seven days. For certain groups, such as shift workers, the normal working hours shall be less. Upon agreement between the employer and the employee, the maximum normal working hours

can be calculated as an average over a maximum of fifty-two weeks, but with a limit of ten ordinary hours of work per twenty-four hours, and forty-eight hours per seven days. Employees also have the right to flexible working hours. However, these rules shall not apply to employees in leading positions or employees in particular independent positions.

### OVERTIME

Overtime is only permitted when there is an exceptional and time-limited need for it. Overtime cannot exceed 10 hours in 7 days, 25 hours in 4 consecutive weeks, and 200 hours during a period of 52 weeks (this limit may be extended). As a rule, the total working hours shall not exceed 13 hours in 24 hours and 48 hours in 7 days. For overtime work, the employee shall receive extra pay (at least 40 percent more than what the employee makes during a regular working hour) in addition to what he receives for corresponding work during ordinary working hours. These rules shall not apply to employees in leading positions or employees in particular independent positions.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

In order for the employer to maintain a healthy and safe workplace, there are several requirements for both the physical working environment and the psychosocial working environment. The workplace shall, among others, be equipped and arranged in such a way as to avoid adverse physical strain on the employees. When it comes to the psychosocial working environment, the work shall be arranged in a way that ensures the employees' integrity and dignity. The employer shall ensure that the employees are not subject to harassment or other improper conduct. Furthermore, the employer shall, as far as possible, protect the employees against violence, threats and undesirable strain as a result of contact with other persons.

### COMPLAINT PROCEDURES

If an employee believes that the working environment is in violation of the requirements as prescribed by law, the employee has the right to notify censurable conditions at the undertaking. The Labour Inspection Authority supervises the employer's obligation to ensure that the employees have the possibility to notify censurable conditions in the undertaking and may review the employer's assessment on whether it is necessary to carry out such measures. In such cases, the Labour Inspection Authority may consider the allegations and follow up with inspection, orders or report the case to the police if deemed necessary.



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## I. INTRODUCTION

The labour legislation in Peru regulates the conditions, benefits, rights and obligations inherent to an employment contract. However, it is important to specify that there are certain sectors that, depending on the nature of the activity or the conditions under which it is carried out, are subject to special labour regimes, such as mining, ports, civil construction, among others.

However, it should be noted that said legislation will be applicable whenever we are faced with a labour relationship, for which the concurrence of three (3) essential elements must be verified:

- (a) Personal provision of services.
- (b) Remuneration paid in favour of the employee.
- (c) Relationship of subordination, by which the employer is the one who directs, regulates and sanctions the activity of the worker (for example, through the establishment of a work schedule, own guidelines for the performance of their functions, application of sanctions, among others).

In Peru, labour law is based on principles, which can be defined as maximally universal practical-normative statements that are at the top of the normative legal order, being the most important in Peruvian Labour Law:

- Protective Principle: seeks to compensate for the existing inequality, between the worker and the employee.
- Principle in dubio pro operator: in case of doubt a rule is interpreted in favour of the worker.
- Principle of inalienability of rights: its objective is to prohibit the worker from renouncing his labour rights recognised by the Constitution and current laws to his own detriment.

Labour rights in Peru are set forth in its Constitution; the Law of Productivity and Labour Competitiveness; the Procedural Labour Law; the Law on Collective Labour Relations; the Law on Days of Work, Hours, and Overtime; and the Regulations on Safety and Health in the Workplace; as well as in sector-specific legislation and ratified international conventions.

Peru's Constitution expressly guarantees that work, in its various modalities, is the object of priority attention of the State, which especially protects the working mother, minor and disabled. It also sets forth that the Peruvian State promotes conditions for social and economic progress, especially through policies to promote productive employment and education for work. No labour relationship can limit the exercise of constitutional rights or ignore or reduce the dignity of the worker.

In addition, it guarantees freedom of association and provides for collective bargaining and the right to strike. It also addresses forced labour, discrimination, protections for women and children in the workplace, minimum wages, working hours, and protection from arbitrary dismissal.

Peru's Law of Productivity and Labour Competitiveness of 1997 seeks to improve worker skills and training, increase workers' earning capacity, consolidate regulations on employment contracts, and strengthen existing social benefits. The law regulates work contracts, employee training, domestic service work, and programs to redirect business activities towards more productive markets in the urban and rural sectors.

The Procedural Labour Law of 2010 governs the procedures for labour court proceedings, as well as procedures for arbitration.

## KEY POINTS

- In Peru, the first obligation that the employer has with his worker is to formalize the employment relationship through the signing of the respective employment contract, which establishes the general conditions of the contract. Otherwise, it will be considered as an indefinite term relationship.
- The maximum legal working day is eight hours a day or 48 hours a week. In addition, at least 24 consecutive hours of rest each week, which will preferably be granted on Sunday.
- The worker is entitled to receive, in the months of July and December, a bonus for National Holidays and Christmas, which will be equivalent to the remuneration regularly received by the worker.
- The employer must deposit in a banking institution, at the worker's choice, in the months of May and November, 1/6 of the computable remuneration received by the worker during the months of April and October.
- The worker is entitled to 30 calendar days of vacation rest for each full year of service. The amount of vacation pay is equivalent to what the worker would have received if he continued working.
- If the worker has children under 18 years of age or of legal age who are pursuing higher or university studies, with a maximum of six years after reaching the age of majority, he has the right to receive the family allowance, equivalent to 10 % of the current minimum living wage.
- If the employer generates profits and has more than 20 workers, the employee has the right to participate in the distribution of profits, which

will be made: 50% based on the days actually worked and the other 50% on depending on the remuneration of each worker. Profit sharing has a limit of 18 monthly remuneration and is distributed considering percentages legally established.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

The Constitution of Peru establishes that no one should be discriminated against for reasons of origin, race, sex, language, religion, opinion, economic condition or any other reason. Employers are prohibited from discriminating against any candidate/employee during the hiring process and employment relationship for any reason, including but not limited to sex, origin, race, colour, marital status, family status, disability, professional rehabilitation and age. Employers should avoid any practice, such as requesting non-pregnancy certificates from women or health certificates from employees and, in general, any practice that may imply a distinction between two or more people applying for the same job.

### PROTECTIONS AGAINST HARASSMENT

In Peru, the “Law on the Prevention and Punishment of Sexual Harassment” is intended to prevent and punish sexual harassment produced in relationships of authority or dependency, whatever the legal form of this relationship. Likewise, when it occurs between people regardless of hierarchy, status, grade, position, function, remuneration level or similar.

### EMPLOYER’S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The employment quota that private companies and public entities must meet; With respect to private companies that have more than fifty workers, they must comply with a proportion of no less than 3% and with respect to public entities, they are obliged to hire people with disabilities in a proportion of no less than 5%.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

The employees are insured by the Public Social Insurance in Health (EsSalud). The employer pays the contribution (9% of the monthly salary).

There are two retirement systems and employees are free to choose either one of the two systems. One system is administered by the Government, under

which the employer (on behalf of its employees) must pay mandatory contributions to the Oficina de Normalización Previsional (Pension Fund Office). Under this system the employee must contribute 13% of his remuneration. The other system is the Sistema Privado de Pensiones (Private Pensions System), under which employees contribute approximately 13% of their remuneration to a private Pension Fund Administrator (AFP) selected by each worker.

### HEALTHCARE AND INSURANCES

Every worker who has served the company for four years has the right to contract, by the employer, a life insurance policy whose coverage is as follows:

1. Due to the natural death of the worker, the insurance company will pay the worker's beneficiaries sixteen (16) insurable remunerations that are established based on the average amount received by the worker in the last quarter prior to death.
2. For the death of the worker as a result of an accident, the beneficiaries will be paid thirty-two (32) insurable monthly remunerations received by the worker on the date prior to the accident.
3. For total or permanent disability of the worker caused by an accident, thirty-two (32) monthly insurable remunerations received by him on the previous date of the accident will be paid. In this case, said insured capital will be paid directly to the worker or, due to his impediment, to his spouse, curator or special agent.

### REQUIRED LEAVE

#### Holidays and Annual Leave

Workers have the right to paid rest on public holidays:

- New Year (1 January)
- Holy Thursday and Good Friday (movable)
- Labour Day (1 May)
- Battle of Arica and Flag Day (June 7)
- Saint Peter and Saint Paul (29 June)
- Commemoration of the heroic sacrifice of Captain FAP José Abelardo Quiñones Gonzales (July 23).
- National Holidays (28 and 29 July)
- Battle of Junín (6 August)
- Saint Rose of Lima (30 August)
- Naval combat of Angamos (8 October)
- All Saints (1 November)
- Immaculate Conception (8 December)
- Battle of Ayacucho (9 December)
- Christmas (25 December)

Workers have the right to receive remuneration for the non-working holiday (ordinarily corresponding to a working day).

#### Maternity and Paternity Leave

It is the right of the pregnant worker to enjoy 49 days of prenatal rest and 49 days of post-natal rest. Postnatal rest is extended for thirty (30) additional calendar days in cases of multiple birth

or birth of disabled children. In the latter case, the disability is accredited with the presentation of the corresponding certificate issued by the health professional duly authorised. The enjoyment of prenatal rest may be deferred, partially or totally, and accumulated by the post-natal, at the decision of the pregnant worker. Such a decision must be communicated to the employer at least two months in advance to the expected date of delivery.

Likewise, it is necessary to point out that through Law No. 27591, the licence for breastfeeding, through which the working mother, at the end of the period postnatal, the employee has the right to one hour a day to fulfil the right to breastfeed, until her child is one year old. In the case of multiple births, breastfeeding leave will be increased by one more hour per day.

Male workers have the right to be granted 10 days paid leave on the birth of their children. It is 20 when it is childbirth multiple or premature and 30 in case of birth with terminal congenital disease or severe disability or in case of serious complications in the mother's health. The worker must notify the employer, not less than 15 calendar days in advance, regarding the probable date of delivery.

### **Sickness and Disability Leave**

Temporary disability leave is granted when, due to illness or accident, the worker is unable to diligently perform his work during a period due to a medical prescription.

These workers have paid rest for up to 20 calendar days in case of accidents or illness. If it exceeds 20 days (up to a maximum of 11 months and 10 days), the employee is entitled to temporary disability leave. In this case, the company must pay the disability subsidy, which is then reimbursed by EsSalud.

## **PENSIONS: MANDATORY AND TYPICALLY PROVIDED**

There are two retirement systems, one the National Pension System (SNP) managed by the Pension Standardisation Office (ONP) and the Private Pension System (SPP) administered by the Pension Fund Administrators (AFP). In order to retire from the SNP, the worker must have contributed for at least 20 years to said fund and meet 65 years of age, taking into account these two requirements generate the right to retire in that system. If the worker belongs to the SPP, besides having 65 years, his individual fund administered by the AFP should be enough to obtain a retirement pension. When a worker enters the company, the employer delivers an information brochure so he can choose either SNP or SPP, unless he is registered in any of those systems.

# **IV. EMPLOYMENT CONTRACTS**

## **MINIMUM REQUIREMENTS**

The contract is an act that is based on the will of the contracting parties. The Political Constitution in its article 62 establishes the freedom of contracting, providing that the resolution of contracts does not proceed by Law, but rather that it is resolved in the jurisdictional venue or through arbitration, as agreed in the instrument. The employment contract, specifically, is governed by Legislative Decree N° 728 Labour Productivity and Competitiveness Law (LPCL), which in its Titles I and II establishes the rules covering hiring mechanisms for an indefinite term as a rule and for a fixed or determined term as an exception. The exercise of this right is based on the will and at the same time on legality because, although the object of the contract can be freely agreed upon, moreover, inalienable aspects that the Law and the Constitution establish cannot be agreed voluntarily.

## **FIXED- TERM/OPEN- ENDED CONTRACTS**

The general rule within the Labour Regime of private activity is the hiring of personnel for an indefinite period, however, due to the nature of the service to be provided, the law has exceptionally provided for fixed-term hiring, that is, temporary contracts. or subject to modality. The law allows hiring fixed-term workers if justified by the temporary nature of the service to be provided. To enter into a fixed- term contract, it is necessary to prove that the service to be provided by the worker is, by its nature, of a temporary nature, whether it is ordinary or complementary work. This must be specified in the contract, specifying the facts that support the temporary contract and be in a position to document them.

If the employee decides to dispense with the services of a worker hired for a fixed term before the expiration date agreed in the contract without there being "just cause" for it, he must pay as compensation one and a half ordinary monthly remuneration for each month stopped working until the contract expiration. The maximum limit is twelve monthly remunerations in accordance with current legislation. On the other hand, fixed-term employment contracts will be considered indefinite, with the consequent modification of the rapid regime, in the following cases: i) if the worker continues to work after the expiration date of the stipulated term, or of their extensions if they exceed the maximum limit; and, ii) when the worker demonstrates the existence of simulation or fraud of the rules that regulate fixed- term contracts.



## TRIAL PERIOD

The trial period is three months, after the trial period, he reaches the protection against arbitrary dismissal applicable to his contract. The extension of the period proceeds when a longer period of training or adaptation is required, justified by the nature of the work or the degree of responsibility and with a maximum term of up to 6 months in the case of qualified or “trusted” workers and up to 1 year in the case of management personnel.

## NOTICE PERIOD

In Peru, when the worker decides to terminate employment, he or she can request exemption from notice of 30 calendar days prior to the termination date, to which the employer may or may not exempt him or her, and must respond in writing within the following 3 days. If the period of 3 days to respond passes without the employer responding, and the worker has requested exemption from notice, said exemption is understood to be tacitly granted and the termination occurs on the fourth day after receiving the letter of resignation. In case of expiration of the contract, an advance term is not necessary, since the parties know the date of its termination, at the time of signing it.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

The hiring of foreign workers is regulated by Legislative Decree 689, Law on the Hiring of Foreigners (hereinafter, the Law) and its regulations, approved by Supreme Decree 014-92-TR. Added to this regulation is the Immigration Law, approved by Legislative Decree 1350, which determines the migratory status of workers.

In Peru, foreign personnel may start providing services once the employment contract has been presented and the qualifying immigration status has been obtained. The loss of immigration status automatically terminates the contract.

Employers cannot hire more than 20% of foreign workers, according to the company's total workforce; Likewise, the remuneration of foreign personnel must not exceed 30% of the remuneration that the company pays to national workers.

There are special cases that are regulated in the country and grant facilities for the hiring of foreign workers. Thus, Peru has signed international agreements that allow the flow of workers between nations. Below we describe the two main agreements that should be considered and read before hiring foreign workers.

The agreement signed with the Kingdom of Spain is the only labour reciprocity or dual nationality

agreement recognized by the MTPE. In this sense, it is the only mechanism to facilitate the hiring of foreign personnel.

Peru, along with Bolivia, Ecuador and Colombia, is part of the Andean Community of Nations. Thus, Decision 545, Andean Labour Migration Instrument, aimed at regulating Andean labour migration, favouring the free movement of workers. According to this rule, “Andean Migrant Worker” will be foreign nationals from Bolivia, Ecuador and Colombia who move to Peru to work.

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Not necessarily, since Peruvian Law permits to agree that the employment relationship will be ruled by foreign employer's own regulation. However, a local entity will be needed if parties decide to apply Peruvian labour regulations.

## LIMITATIONS ON BACKGROUND CHECKS

In accordance with article 5 of the Personal Data Law (Law N° 29733), the general rule is that the worker's consent is required for the processing of their information, this is applicable in all cases, and thus, the worker may provide the information voluntarily. Said rule applies for instance for police and criminal records.

# VI. PAY EQUITY LAWS

## EXTENT OF PROTECTION

Law N° 30709 prohibits remunerative discrimination between men and women by means of positions, functions and salaries that prevent the execution of the principle of equal remuneration for labour equity. The rule requires workers to have a table of categories and functions, which will serve to verify that workers receive remuneration established according to their abilities and objective criteria, which will help avoid discriminatory situations when doing the same job. The company must prepare a Salary Policy on remuneration categories in accordance with objective criteria. In the absence of objective criteria, the existence of salary discrimination will be considered.

## REMEDIES

If a company does not comply with the equal remuneration regulations, the company may be subject to i) Inspection by the Ministry of Labour, initiated ex officio or by worker complaint; and ii) From the judiciary, through a labour process filed by a worker who requests homologation of remuneration with someone who occupies a similar position.

## ENFORCEMENT/LITIGATION

If the worker is not satisfied with the labour practices of his employer, he can resort to the Labour Administrative Authority, through the National Superintendence of Labour Inspection - SUNAFIL, even if he carries out an inspection of the company in order to establish that it has not incurred in any action that or lack that is deserving of sanction. On the other hand, the employee could initiate a lawsuit requesting the homologation of position or remuneration.

## OTHER REQUIREMENTS

The employer must comply with informing its workers about the salary or remuneration policy that it implements, as well as about the performance evaluation criteria or any other type that affect their remuneration. To do this, they may hold individual or collective informative meetings or send written communications detailing the applicable policy. This information must be provided at the time of the worker's entry, when there is a change in the occupational category to which the worker belongs and when there is a change in the remuneration regime that applies to him in accordance with the remuneration policy.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The following restrictive covenants are recognised and may be enforceable under the law:

- Non-compete clauses;
- Non-solicitation of customers;
- Non-solicitation of employees.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

In the event of a violation of the restrictive covenants, it is possible to file a lawsuit. In our opinion, the Labour Courts are not competent to hear disputes on post-employment restrictive covenants. The only possibility of execution, therefore, is before the civil courts. The employer may also exercise a civil action claiming the damages derived from said infringement, or even take criminal action if the employee had access to confidential information or trade secrets in the performance of his duties.

### USE AND LIMITATIONS OF GARDEN LEAVE

In Peru, the concept of 'Garden Leave' does not exist.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

In the first place, we must indicate that there is no specific labour regulation about the individual. The Personal Data Protection Law (No. 29733) establishes that "the communications, telecommunications, computer systems or their instruments when they are of a private nature or private use, only can be open seized, intercepted or intervened by reasoned order of the judge or with the authorisation of its holder". Further, it is generally considered as just causes for dismissal, the breach by the worker of his work obligations in breach of good labour faith, non-compliance with the internal work regulations and improper use of goods or services employer's own. So, in internal regulations, the employer can establish guidelines for proper use of the Internet.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Although there is no labour regulation in this regard, pursuant to our Courts the employer can access said telephone records, as long as it is explicitly stated in internal regulations accepted by the worker or written agreements with the worker, that the phones to which he has access as communication tools work must be used for strictly labour and occasional purposes and reasonably for personal purposes.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

The freedom of expression, which the worker exercises through social networks, this supposes the power that he has to communicate in a public or private place, in his home, work, his ideas or opinions. The employee is entitled to exercise this freedom through social networks. However, the indicated right is not absolute, so exercising it cannot affect the honourability, image or good reputation of a third party. In this case to the company. On the other hand, the right to privacy, also recognised in our Constitution, and whose ownership is undoubtedly held by the worker, is based on the desire that the owner's information not be disclosed, however, we consider that when said information is published for a number of people to see, the effect of said right would be lost. In this sense, we can conclude that by making "posts" on a social network (public), these would no longer be protected by the right to privacy and could be subject to disciplinary sanctions by the employer.

# IX. TERMINATION OF EMPLOYMENT CONTRACTS

## GROUNDS FOR TERMINATION

According to the Peruvian Labour Legislation in the Single Ordered Text of Legislative Decree N° 728, Labour Productivity and Competitiveness Law (Supreme Decree N° 003-97-TR) it indicates the causes of termination of the employment contract:

Article 16. The following are the causes of termination of the employment contract:

- a) The death of the worker or the employer if he is a natural person
- b) The resignation or voluntary retirement of the worker
- c) The completion of the work or service, the fulfilment of the resolutive condition and the expiration of the term in contracts legally entered into under the modality
- d) Mutual disagreement between worker and employer
- e) Absolute permanent disability
- f) Retirement
- g) Dismissal, in the cases and manner permitted by law
- h) Termination of the employment relationship for objective reasons, in the cases and manner permitted by this Law

## COLLECTIVE DISMISSALS

The collective dismissal for objective reasons or reduction of personnel can materialise at the initiative of the employer due to any situation of the company, duly supported and accredited, that deserves the approval of the Labour Administrative Authority.

## INDIVIDUAL DISMISSALS

The Law states that “just cause” may be related to the capacity or conduct of the worker and that the demonstration of the cause corresponds to the employer within the judicial process that the worker could file to challenge his dismissal.

## IS SEVERANCE PAY REQUIRED?

Dismissal without just cause, lawful or proven, may give rise to retributive measures in favour of the worker, such as compensation for arbitrary dismissal, in accordance with the following guidelines:

- If the employment contract is for an indefinite term, severance pay is equivalent to one and a half remuneration per full year of service (or the proportional part);
- If the employment contract is subject to modality (fixed-term), the compensation will be one and a half remuneration for each month left to work until the expiration of the contract (or the proportional part).

In both cases, compensation will be capped at twelve (12) payments. Said sum is exempt from social contributions and fifth category income tax.

Likewise, it should be noted that the base remuneration for calculating compensation for dismissal, whether for an indefinite or fixed-term worker, is that received by the worker at the time of dismissal. The variable or imprecise concepts (overtime, commissions) are integrated into the calculation base by dividing their sum by six, provided that they have been received for at least 3 months during the last semester of work.

Alternatively, employees could sue the employer to be reinstated at work and paid a compensation for damages arisen from dismissal. Notice that such reinstatement is not possible whether the employee holds a position of trust. In this case, company could terminate the employee due to a loss of confidence. Regarding this cause of termination, the Supreme Court stated that if an employee who began his labour relationship with the company occupying a position of trust is terminated arguing a loss of confidence, he will not be entitled to the severance payment. But if he was promoted to a position of trust having occupied a previous ordinary position, he will be entitled to indefinite term employees severance payment in case of an arbitrary dismissal.

Notice that, since this cause was established by the Supreme Court, as long as the Court does not modify its criteria, or it is modified by any law or legislative decree, employers could dismiss workers for loss of trust, having, in principle, to expect that, if such dismissals are judicially questioned, the Labour judges will respect such criteria and declare the lawsuits unfounded.

## SEPARATION AGREEMENTS

The employment relationship with a worker may be terminated by mutual agreement between the worker and his employer, provided that the agreement to terminate the employment relationship is in writing.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The right of the worker to request judicial protection in case of being dissatisfied with the termination of the employment relationship is possible as mentioned before.

## WHISTLEBLOWER LAWS

In Peru, the worker can denounce the company that carries out bad practices against its workers through the National Superintendence of Labour Inspection – SUNAFIL. It is not necessary for the worker to identify himself, since the complaint can be anonymous.



# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

In this regard, we must point out that unions find full recognition and development in article 28 of our Political Constitution of the State, stating:

Article 28. "The State recognizes the rights to unionize, collective bargaining and strike. Caution its democratic exercise:

1. Guarantees freedom of association.
2. It encourages collective bargaining and promotes forms of peaceful resolution of labour conflicts. The collective agreement has a binding force in the scope of the agreement.
3. Regulates the right to strike so that it is exercised in harmony with the social interest. Point out its exceptions and limitations.

Freedom of association and the right to organize have been interpreted in accordance with the Fourth Final and Transitory Provision of the Constitution and Article V of the Preliminary Title of the Constitutional Procedural Code, they impose the state obligation to adopt the necessary and appropriate measures to guarantee workers and employers the free exercise of unionization and prevent any act of discrimination tending to undermine freedom of association. But in the same way, the scope of action of the workers' unions has been regulated, which not because they constitute a force that seeks to balance the difference in powers between employers and workers are exempt from the rules and duties that they must comply with as workers.

Unionization is free and voluntary. Employment cannot be conditioned by the worker's decision to join or not to join the company's union, or to withdraw from the union. A worker cannot be obliged to form part or prevented from forming part of a union. The State and employers, including both State and employer representatives, should refrain from participating in any act that may somehow force, restrict or impair in any way the workers' right to unionize and participate in any manner whatsoever in the creation, administration or maintenance of unions.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

### Collective Bargaining

Collective bargaining refers to the negotiations held between the employer and the union in order to reach a collective agreement establishing economic

benefits, work conditions, productivity levels, and other aspects that facilitate the labour relationship.

### Parts of the Process

Collective bargaining includes direct negotiations, conciliation or mediation, and arbitration. However, it can come to an end at any such stage. If collective bargaining ends after holding direct negotiations or a conciliation meeting, then the agreement is called collective agreement. However, if the negotiation ends after an arbitration process, then it will be called an arbitration award.

### Collective Agreement

When an agreement is reached, either by direct negotiation or through conciliation meetings, the collective agreement will be signed and will go into effect on the day following the expiration of the previous agreement.

### Term of the Collective Agreement

The minimum term of the collective agreement is one (1) year. The parties can agree on longer terms for the whole agreement or a part of it. Upon expiration of the agreed term, the agreement will continue in effect as long as it is not modified by a subsequent collective agreement.

### Strike

Strike is the collective suspension of work agreed upon on a majority basis by the workers. It is voluntarily and peacefully performed by the workers, with the consequent abandonment of the workplace. Consequently, workers are not allowed to:

1. Resort to any form of violence, either against people and/or company assets.
2. Remain inside the workplace during the strike. In this sense, workers must necessarily abandon the workplace.
3. Prevent or hinder access to the workplace.
4. Perform any irregular form of strike, like suddenly bringing work to a halt, bringing operations to a halt in a strategic company area or section, work without zest, work at a slow rate, deliberately reduce performance, etc.

### Inadmissibility of the Strike

The strike will be declared "inadmissible" if any of the requirements mentioned in the prior section is not fulfilled. The Labour Authority will check the fulfilment of the legal requirements. Notwithstanding, the company can provide the Labour Authority with written notice of any deficiency it may detect.

### Illegality of the Strike

The strike will be declared "illegal" when it is held in spite of having been declared "inadmissible"; if it results in violent acts against property or people; if it is irregularly performed; if the workers abandon "indispensable services"; or, if it is not stopped after service of a notice of a resolution or an arbitration award ending the conflict.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

As can be seen, the functions of the union are limited both to the representation of its members in their interests both collectively and individually -if the worker allows or requests it- and to the promotion of its members through savings mechanisms and cultural, educational training.

In summary, the functions of the union must be directed to action in favour of its members, its scope of action is focused only on promoting progress and the protection of the professional and economic rights of its members through, for example, negotiation collective.

As has already been mentioned, union organisations fulfil, in principle, a balancing function, seeking to compensate for the asymmetry of power between the individual worker and the employer, improving the position of workers in an obviously unequal situation.

The assembly is the maximum organ of the union. In the trade unions it is constituted directly by its members. In others, as well as those whose members work in different locations, it can be formed through delegates whose decision powers will be granted beforehand or subsequently ratified by the bases.

The duties of the general assembly are:

1. To elect the board of directors.
2. Modify the statute.
3. Agree on the merger or absorption with other similar trade union organisations, or their dissolution.
4. Agree on affiliation or disaffiliation to federations and confederations, and to international trade union organisations.
5. Agree on the direct or indirect disposal of assets of the union assets.
6. Decide on the expulsion of any affiliate or the imposition of disciplinary sanctions.
7. Any others that indicate the legal norms or the statute.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

In order to implement the business reorganisation and transfer of personnel between group companies, we must comment that there are two options: i) Transfer the staff with liquidation of social benefits: resignation or mutual agreement; and ii) Transfer staff without settlement of social benefits: transfer of staff.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

A Transfer Agreement must be signed between each worker and both companies on the date of the incorporation of the first to his new employer.

It is convenient to send the following communications to the Administrative Labour Authority: From both companies informing that all labour liabilities in charge of the first relative to the transferred workers will be assumed from the corresponding date by the second, attaching a copy of the transfer agreements.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The Minimum Vital Remuneration or minimum salary is the minimum amount that a worker must receive under a full working day. Likewise, it constitutes the calculation basis for various contributions, labour benefits and other concepts according to our current labour regulations.

Workers that have worked four (4) years for the same employer are entitled to perceive a fully paid life insurance policy. It is taken also for the benefit of the worker's wife and relatives. Other minimum conditions:

- Compensation for Time of Services (CTS)
- Legal Bonuses
- Vacation
- Family Allowance

### SALARY

Remuneration is what the worker receives as consideration for the services performed, it can be granted in money or in kind, if it is freely available.

On December 28th 2024, Supreme Decree N° 006-2024-TR was published, through which the minimum vital remuneration of workers in private activity that must be received in our country was to PEN 1,130 since January 1, 2025.

### MAXIMUM WORKING WEEK

Working Hours are limited to 8 hours a day or 48 a week. Some workers are not subject to the fulfilment of this maximum working time, e.g. managerial personnel, confidence personnel, and workers whose activities are no subject to immediate supervision (work outside the company premises).

### OVERTIME

For workers subject to the maximum working time described previously, overtime is remunerated at a



rate of 1.25 for the first 2 hours and at 1.35 for the additional hours. Work on the rest day, and holidays, is remunerated with a surcharge of 100%.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Law N° 29783 and Supreme Decree 005-2012-TR establish that every company must implement an Occupational Health and Safety Management System, and that it is responsible for the economic, legal and any other implications that derive from an accident or illness suffered by the worker in the performance of his work or as a result of it.

The Occupational Health and Safety Management System is based on a Baseline Study and a Risk Map of the workplace. Among other obligations included in said system, and which are in force to date, are:

- a) Have the following records:
  - Record of work accidents, occupational diseases, dangerous incidents and other incidents, which must include the investigation and corrective measures
  - Record of occupational medical examinations
  - Record of the monitoring of physical, chemical, biological, psychosocial agents and disergonomic risk factors
  - Record of internal occupational health and safety inspections
  - Registration of health and safety statistics
  - Registration of safety or emergency equipment
  - Registration of induction, training, training and emergency drills
  - Audit log
- b) Give notice to the Ministry of Labour -according to the approved formats- of fatal and non-fatal accidents, dangerous incidents and other incidents, and occupational diseases.
- c) Train personnel in matters of safety and health at work.
- d) Translate into Spanish the instructions and other protection measures for machines, equipment, substances, products or work tools.
- e) Have proof or a copy of the Complementary Work Risk Insurance Policy for intermediation and subcontracting personnel.

Companies with 20 or more workers must set up an Occupational Health and Safety Committee, while those with fewer than 20 workers must appoint an Occupational Health and Safety Supervisor. Also, those companies with 20 or more workers must have an Internal Regulation on Safety and Health at Work.

## COMPLAINT PROCEDURES

Employees could file a claim with the union representatives or labour authorities to complain about the employer's failure to comply with health and safety obligations. Labour authorities can inspect the workplace at any time and order the employer to remedy any non-compliance, impose fines and close

establishments. Employees can file labour claims while working, or after the termination date, demanding rights related to the employment contract.

### Protection from Retaliation

There is no Law on this matter, but any unlawful act against a worker could be seen as an act of workplace harassment. Please note that if the employer wishes to terminate the employment relationship with a worker, he will need to prove a just cause.



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## I. INTRODUCTION

The Constitution is the basic and paramount law in the Philippines to which all other laws, including the Philippine Labour Code and employment statutes, must conform. The Constitution prescribes a balanced treatment of labour and capital. It recognises the right of labour to its just share in the fruits of production in one hand, and on the other, the right of enterprises to reasonable returns on investments and to expansion and growth, while acknowledging the indispensable role of the private sector and encouraging private enterprise.

The legal landscape of Philippine labour and employment is molded primarily by the Philippine Labour Code, special labour legislations, Supreme Court decisions, and administrative rules and regulations. These govern the relationship of labour and capital in all aspects including labour standards, labour relations, pre-employment, and post-employment matters.

### KEY POINTS

The following are the central principles of labour laws and jurisprudence in the Philippines:

- The relationship between capital and labour is not merely contractual. It is so impressed with public interest so that labour contracts must yield to the Philippine Labour Code and other regulations by the State. In other words, labour contracts are no ordinary private contracts; rather, these are imbued with public interest and a proper subject matter of police power measures.
- Labour is a constitutionally protected social class due to the perceived inequality between capital and labour. The presumption is that the employer and the employee are on unequal footing so the State has the responsibility to protect the employee. Hence, the aim of labour laws is to strike a balance between rights and responsibilities of the two, or as jurisprudence put it, the “equalization of social and economic forces.”
- In labour cases, the quantum of proof necessary is substantial evidence, or such amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.
- When the evidence in labour cases is in equipoise, doubt is resolved in favour of the employee.
- The Constitution guarantees the employee's right to security of tenure, which means that the employer shall not terminate the services of an employee except for a just cause or when authorised by law.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

In the process of hiring, the employer's qualification standards, employment tests or other selection criteria must not be discriminatory in the sense that they are job-related for the position in question and are consistent with business necessity.

Meanwhile, in case of dismissal, employers cannot terminate employees on the sole ground of their sex or disability, as such amounts to discrimination and violation of employees' security of tenure. Employees may only be terminated on just and authorised causes as set forth in the Labour Code.

### PROTECTIONS AGAINST HARASSMENT

The Anti-Sexual Harassment Act of 1995 makes employers duty-bound to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment in the workplace. Under such law, the employer or head of office shall be solitarily liable for damages arising from the acts of sexual harassment committed in the employment if the employer or head of office is informed of such acts by the offended party and no immediate action is taken thereon.

Meanwhile, Safe Spaces Act (Republic Act No. 11313) prohibits gender-based sexual harassment in the workplace and imposes upon employers the duty to prevent, deter, or punish such acts.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Under the Magna Carta for Disabled Persons, reasonable accommodations include:

- Improvement of existing facilities used by employees in order to render these readily accessible to and usable by disabled persons; and
- Modification of work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or company policies, rules and regulations, the provision of auxiliary aids and services, and other similar accommodations for disabled persons.

## REMEDIES

The penalties imposed under the Labour Code for the violations of its provisions such as commission of discriminatory practices constitute imprisonment, fine, or both, with the fine ranging from USD 20 to 200.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

In the Philippines, the Social Security Program is composed of package of benefits in the event of death, disability, sickness, maternity, old age and unemployment. The monthly contribution rate is currently at 14% of the employee's monthly salary credit with the 9.5% thereof being contributed by the employer.

### HEALTHCARE AND INSURANCES

There is in force a compulsory health insurance program of the government, the National Health Insurance Program, established to provide universal health insurance coverage and ensure affordable, acceptable, available and accessible health care services for all citizens of the Philippines. For 2024, the monthly premium rate was raised to 5% of the employee's monthly basic salary.

### REQUIRED LEAVE

Philippine laws require employers to provide paid leaves to their employees such as service incentive leave, maternity leave, paternity leave, parental leave for solo parents, gynaecological leave, and leave under the Violence Against Women and their Children Act.

### PENSIONS: MANDATORY AND TYPICALLY PROVIDED

All employees in the private sector, regardless of their job title, rank, or how they are paid, have the right to receive retirement benefits. These benefits are given when they reach the age of 65 for compulsory retirement, or at the age of 60 or older for optional retirement, but not beyond 65. The amount of retirement pay that employees are entitled to is calculated based on one-half month of salary for each year of service. If an employee has served for at least six months in a given year, it is considered as a whole year.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

An employment contract is consensual and voluntary. It only requires mutuality of consent

between the parties. Generally, employment contracts do not need to be in writing, except when the law or rules require. For instance, an employment contract between a contractor/subcontractor and its employees must be in writing pursuant to an administrative rule currently in force.

Although the employer and the employee are given the widest latitude possible in the crafting of their contract, such right is not absolute. Their stipulations, clauses, terms, and conditions should not be contrary to law, morals, good customs, public order, or public policy. Parenthetically, labour laws are considered written in every contract, thus, stipulations in violation thereof are considered null.

### FIXED- TERM/OPEN- ENDED CONTRACTS

Fixed-term contracts are legally permitted in the Philippines, provided the fixed period of employment was agreed upon knowingly and voluntarily by the parties, without any force, duress or improper pressure being brought to bear upon the employee and absent any other circumstances vitiating his consent, or where it satisfactorily appears that the employer and employee dealt with each other on more or less equal terms with no moral dominance whatever being exercised by the former over the latter. However, in cases where periods are imposed to prevent an employee from acquiring security of tenure, such contracts are disregarded for being contrary to public policy and morals.

### TRIAL PERIOD

Under Philippine law, probationary periods are allowed for the employer to determine if the employee is qualified for possible inclusion in the regular force. Within such period, the employer tests and observes the conduct of the employee before permanent hiring. Probationary employment generally does not exceed six (6) months from the date the employee started working. The services of an employee who has been engaged on a probationary basis may be terminated for just or authorised causes or when he fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of his engagement. Employers must be aware that under the Labour Code, an employee who is allowed to work after a probationary period shall be considered a regular employee and shall be entitled to all the standards and protections granted to such status by law.

### NOTICE PERIOD

Notice requirements depend on which party initiates the termination of the employment contract.

In case the termination is initiated by the employee, the Labour Code requires employees to give their employers a notice at least one (1) month before the effective date of their resignation. If no such notice

was given, the employer may hold the employee liable for damages.

Meanwhile, dismissal of regular employees by the employer requires the observance of procedural due process which varies depending on whether the ground for termination is a just or an authorised cause.

For just causes, the law mandates the observance of the twin-notice rule and the employee's opportunity to be heard and to defend himself.

For authorised causes, the employer should serve a written notice to the affected employees and to the Department of Labour and Employment (DOLE) at least one (1) month before the intended date of termination. The said notice gives DOLE the opportunity to ascertain the veracity of the alleged authorised cause.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Any foreigner seeking admission to the Philippines for employment purposes and any domestic or foreign employer who desires to engage a foreigner for employment in the Philippines shall obtain an employment permit (known as Alien Employment Permit or AEP) from the Department of Labour and Employment. The AEP may be issued only 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 foreigner is desired.

In addition to the AEP, existing rules and regulations also require foreigners to obtain a work visa. Pending issuance of the AEP, or if the foreigner has already been issued with a valid AEP but the application for a work visa is still awaiting approval, a Provisional Permit to Work may be obtained to allow the foreigner to engage in work pursuant to an employment arrangement.

Furthermore, foreigners are likewise required to secure their Taxpayer Identification Number. This is because foreigners, whether resident or not, are taxable on income derived from sources within the Philippines.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Yes, a foreign employer needs to establish local presence or work with local entity in order to hire an employee. The Secretary of Labour and Employment has visitatorial and enforcement powers over the premises of the employer any time of the

day or night to determine any violation of the Labour Code. Such power presupposes the existence of local establishment that is not only within but also subject to Philippine jurisdiction.

Note, however, that foreign employers may directly enter into agreements with independent contractors in the Philippines. Such agreements are not governed by the restrictions, prohibitions, and minimum standards of the Labour Code as no employer-employee relationship exists.

### LIMITATIONS ON BACKGROUND CHECKS

Employers are granted by law with the right to regulate all aspects of employment including pre-employment background checks. However, such must not defeat the rights of the employee. Under the Data Privacy Act of 2012, an employee's personal information may be collected and processed for specified and legitimate purposes and with the employee's consent. In this regard, it is customary practice for the employers in the Philippines to require the submission of police clearance or clearance from the National Bureau of Investigation during the hiring process.

### RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Employment laws in the Philippines prohibit discriminatory practices such as requiring the declaration of age or birth date during the application process, requiring as a condition of employment that a woman shall not get married, and rejecting a job application solely or partially on the basis of actual, perceived, or suspected HIV status.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

There are statutes in the Philippines which promote equal pay treatment to the sectors of women and persons with disability.

The Magna Carta for Women guarantees women's right to decent work. Decent work involves opportunities for work that are productive and fairly remunerative as family living wage, security in the workplace, and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize, participate in the decisions that affect their lives, and equality of opportunity and treatment for all women and men.

On the other hand, the Magna Carta for Persons with Disability mandates that qualified employee with disability shall be subject to the same terms and conditions of employment and the same



compensation, privileges, benefits, fringe benefits, incentives or allowances as a qualified person without disability.

## REMEDIES

Under Magna Carta for Women, a complaint for discrimination against women committed by a private entity or individual may be filed, and the person directly responsible for such violation shall be liable to pay damages. Filing such complaint, however, does not preclude pursuing other remedies available under other laws.

## ENFORCEMENT/LITIGATION

The Magna Carta for Women provides for the payment of damages in case of discriminatory practices or any violation of its provisions. On the other hand, the Magna Carta for Persons with Disability vests the Secretary of Justice the duty to investigate violations, and the courts with the power to grant any equitable relief. It also has a penal clause that imposes upon violators either imprisonment, fine, or both, with the fine ranging from USD900 to 3,600.

## OTHER REQUIREMENTS

There are no other requirements under Philippine laws.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Philippine contract law recognizes confidentiality, non-disclosure, non-solicitation, and non-compete agreements as types of restrictive covenants.

Confidentiality and non-disclosure agreements serve as legally binding agreements that restrict individuals from sharing any confidential or proprietary information with competitors or any other interested third parties. On the other hand, non-solicitation agreements are also restrictive covenants that prohibit employees from enticing their colleagues to leave their current employer and join a competitor. Additionally, these agreements forbid individuals from persuading customers or vendors of their employer to switch their business to a competing company.

Lastly, non-compete agreements are specifically designed to prevent employees from engaging in work within a field, practice, or business area that directly competes with their former employer. These agreements aim to safeguard the interests and competitive advantage of the employer, ensuring that their former employees do not pose a potential threat by leveraging their knowledge and expertise in a rival company.

In determining whether these restrictions are reasonable or not, the trial court should consider the following factors: (a) whether the covenant protects a legitimate business interest of the employer; (b) whether the covenant creates an undue burden on the employee; (c) whether the covenant is injurious to the public welfare; (d) whether the time and territorial limitations contained in the covenant are reasonable; and (e) whether the restraint is reasonable from the standpoint of public policy.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

A claim to recover damages on the violation of restrictive covenants in employment contracts is a cause of action that falls under the realm of Civil Law, and therefore rests upon regular courts.

## USE AND LIMITATIONS OF GARDEN LEAVE

The employer may put the worker on garden leave during the notice period but must ensure that the employee is still accorded his/her procedural rights. Nevertheless, care must be taken in implementing the garden leave since there is a risk that the employee on garden leave may claim constructive dismissal. There is constructive dismissal when the employee is compelled to give up his/her job because continued employment is rendered impossible, unreasonable, or unlikely as when there is clear discrimination, insensitivity, or disdain on the part of the employer towards the employee.

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

It is a valid exercise of management prerogative for employers to limit or prohibit access to social media at work. Management prerogative includes the right to prescribe reasonable rules and regulations necessary or proper for the conduct of the employer's business.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The employer can monitor, access, and review the employee's electronic communications in a company-issued device, subject to the employee's reasonable expectation of privacy. Philippine jurisprudence consistently holds that the reasonableness of a person's expectation of privacy depends on a two-

part test: (1) whether by his conduct, the individual has exhibited an expectation of privacy; and (2) whether this expectation is one that society recognizes as reasonable. It is common practice for employers to expressly and categorically stipulate that company-owned devices are subject to company regulations and monitoring, thereby negating any expectation of privacy on the part of the employee.

## **EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION**

Social media use by employees must be within the limits of the contractual agreement with their employer. Most employment agreements would contain confidentiality and non-disclosure clauses, which employers may enforce against employees who are divulging confidential information via their social media.

# **IX. TERMINATION OF EMPLOYMENT CONTRACTS**

## **GROUND FORS FOR TERMINATION**

Under Philippine law, an employee may only be lawfully terminated when there are just or authorised causes and following compliance with the prescribed procedure. This is anchored on the principle of security of tenure, which is not only statutorily provided, but is also guaranteed by the Philippine Constitution. The just causes for termination include serious misconduct or wilful disobedience, gross and habitual neglect of duties, fraud or wilful breach of trust, commission of a crime, and other analogous causes.

On the other hand, authorised causes for termination include installation of labour-saving devices, redundancy, retrenchment, closure or cessation of business, and incurable disease.

## **COLLECTIVE DISMISSALS**

Collective dismissals fall under the following authorised causes for termination: installation of labour-saving devices, redundancy, retrenchment, and closure of business.

With regard to the installation of labour-saving devices, redundancy, and retrenchment, when there are two (2) employees occupying the same position in the company to be affected by any of the three (3) enumerated authorised causes of termination, the last one employed will necessarily be the first one to go, i.e., Last-In, First-Out Rule, except when an employee volunteers to be separated from employment.

## **INDIVIDUAL DISMISSALS**

The law guarantees the employees' right to security of tenure, meaning, no employee can be dismissed from work except for just or authorised cause, and only after due process.

## **IS SEVERANCE PAY REQUIRED?**

Severance pay as a result of termination of employment, is set by law and given only in cases of dismissals due to authorised causes. If the authorised cause is the installation of labour-saving devices or redundancy, the separation pay is equivalent to one (1) month pay for one (1) month for every year of service, whichever is higher.

If the authorised cause is retrenchment, closure or cessation of business not due to serious business losses, or an incurable disease, the separation pay is equivalent to one (1) month pay or one-half (1/2) month pay for every year of service, whichever is higher.

If the dismissal is due to a just cause, separation pay is not required to be given to employees.

Employers are likewise not obliged to give separation pay if the closure or cessation of business is due to serious business losses. However, to prove serious business losses, employers must present in evidence financial statements showing the net losses suffered by the business within a sufficient period of time. Generally, it cannot be based on a single financial statement showing losses.

## **SEPARATION AGREEMENTS**

Employment may be terminated by mutual consent of the employer and the employee through the execution of a Mutual Separation Agreement ("MSA"). This mode of termination effectively transfers the extinguishment of the employer-employee relationship from the ambit of Philippine labour laws to the relevant laws on obligations and contracts, dispensing with the notice requirement in relation to termination for just or authorised causes. It is not necessary to offer separation payment to the employee executing the MSA, since only his/her consent is essential to the execution thereof. However, in practice, employers offering the option to mutually terminate employment through the execution of an MSA, usually provide a stipulation in the agreement paying the employee amounts over and above those which he/she would be legally entitled to, for the purpose of making the MSA more attractive to the employee.

## **REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION**

Philippine laws had made it easier for employees to file claims against the employers through the Single Entry Approach (SenA), which refers to the

administrative approach to provide an accessible, speedy, impartial, and inexpensive settlement procedure of all labour and employment issues through a 30-day mandatory conciliation-mediation.

If a matter was not settled at the SENa level, it may be referred to an office or agency of the Department of Labour or Employment, or to the National Labour Relations Commission (NLRC) wherein a Labour Arbiter (LA) would adjudicate on the dispute.

The decision of the LA may be appealed to the NLRC within ten (10) days from receipt. If the employer obtains an unfavourable decision from the NLRC, it may file a motion for reconsideration (MR) also within ten (10) days from receipt.

If the same is still unfruitful, the decision of the NLRC may be assailed before the Court of Appeals (CA) within sixty (60) days from notice of denial of the MR through a Petition for Certiorari.

Any adverse decision of the CA may be appealed to the Supreme Court within fifteen (15) days from the notice of judgment.

Nevertheless, the likelihood of a claim being raised formally against the employer through this mechanism ultimately depends on the level of litigiousness of the affected employee.

In establishments with a collective bargaining agreement (CBA), the termination may be questioned through the grievance machinery established under the CBA. If the complaint is not resolved at such level, it may be submitted to voluntary arbitration.

## WHISTLEBLOWER LAWS

The Labour Code considers it unfair labour practice to dismiss, discharge, or otherwise prejudice or discriminate against an employee for having given or being about to give testimony under the Labour Code.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

"Labour Organisation" refers to any union or association of employees in the private sector which exists in whole or in part for the purpose of collective bargaining, mutual aid, interest, cooperation, protection, or other lawful purposes.

"Union" refers to any labour organisation in the private sector organized for collective bargaining and for other legitimate purposes.

"Workers' Association" refers to an association of workers organized for the mutual aid and protection of its members or for any legitimate purpose other than collective bargaining.

In the Philippines, there is no legally mandated association to be organized for the collective interests of employers.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Labour unions are organised to represent the interests of labourers and employees in order to better obtain concessions from the employer through collective bargaining, even through strikes as a last resort. The rights of legitimate labour organisations under the Labour Code include, among others, to act as the representative of its members for the purpose of collective bargaining, to own real or personal properties, and to sue and be sued in its registered name.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

There are no other types of employee representative bodies under the Labour Code.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

This would depend on the type of transfer. In cases of share acquisitions, the acquiring company merely buys the shares of the target company and only the ownership or control of the corporation changes, and the underlying employment relationship between the target company and its employees is not affected. The employees remain with their original employer in exactly the same manner as before the transfer.

In an asset acquisition, generally, there is no obligation to absorb the employees because the personal nature of employment contracts cannot be enforced against a buyer in an acquisition transaction. The purchaser in good faith has no obligation to absorb employees of the vendor or to continue employing them.

With regard to mergers, under the Revised Corporation Code, there is an automatic succession of employment rights and obligations from the surviving company to the employees of the absorbed company. The absorbed company is deemed substituted as employer, by operation of law, by the surviving company.



## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The statutory rule is that because of the automatic succession of employment rights and obligations during a merger, the transferring employees' terms of employment, from the predecessor to the successor, should at least be the same before the transfer.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The Labour Code only provides for the minimum terms and conditions of employment, thus, employers are free to give more than what is set by the following standards:

- Minimum wage
- Holiday pay
- Premium
- Overtime pay
- Thirteenth-month pay
- Night shift differential
- Service incentive leave
- Maternity leave
- Paternity leave
- Parental leave
- Leave for victims of violence against women and their children
- Special leave for women
- Separation pay
- Retirement pay

### SALARY

Generally, employees' salaries are paid at least once every two (2) weeks or twice a month at intervals not exceeding sixteen (16) days. In the Philippines, the law explicitly prohibits employers to pay salaries by means of promissory notes, vouchers, coupons, tokens, tickets, chits, or any object other than legal tender, even when expressly requested by the employee. Employers are also not allowed to limit or interfere with the freedom of any employee to dispose of his/her wages. They cannot in any manner force, compel, or oblige the employees to purchase merchandise, commodities, or other property from any other person, or otherwise make use of any store or services of such employer or any other person.

### MAXIMUM WORKING WEEK

Employees have the right to weekly rest period of not less than twenty-four (24) consecutive hours after every six (6) consecutive normal work days. If the employees are made to work on their scheduled rest day, they are entitled to premium pay equivalent to an additional amount of at least 30% of the basic wage.

### OVERTIME

The normal hours of work of any employee shall not

exceed eight (8) hours a day. Work may be performed beyond 8 hours provided that the employee is paid for the overtime work an additional compensation equivalent to his regular wage plus at least 25% thereof. Work performed beyond eight hours on a holiday or rest day shall be paid an additional compensation equivalent to the rate of the first eight hours on a holiday or rest day plus at least 30% thereof.

In the Philippines, undertime work on any particular day cannot be offset by overtime work on any other day.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The Philippines acknowledges that a safe and healthful workplace must be ensured for all working people by affording them full protection against all hazards in their work environment. In 2018, Philippines passed Republic Act No. 11058 which strengthened the compliance with occupational safety and health standards, under which, employers are statutorily mandated to furnish the workers a place of employment free from hazardous conditions, give complete job safety instructions or orientation to all the workers, and to inform the workers of the hazards associated with their work, among others.

### COMPLAINT PROCEDURES

Employees may raise grievances or complaints in the manner stated in the company policy/handbook or the Collective Bargaining Agreement.

If the establishment is organized and represented by a union, the union may submit grievances through the grievance machinery. Such machinery is established under the Collective Bargaining Agreement for the adjustment and resolution of grievances arising from its interpretation or implementation and those arising from the interpretation or enforcement of company personnel policies. Despite the presence of the union, an individual employee or group of employees shall have the right at any time to present grievances to the employer.

Further, employees may also request for assistance with the Department of Labour and Employment through the Single Entry Approach (SEnA). The SEnA is an administrative approach to provide a speedy, impartial, inexpensive, and accessible settlement procedure for certain labour issues including money claims, unfair labour practices, and occupational safety and health standards issues.



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## I. INTRODUCTION

Poland is well known for its low personnel costs. Due to this fact, it is currently Europe's main outsourcing hub, with companies such as Amazon, General Motors, Dell and various major banks moving their plants and shared service centres to Poland. Easy access to qualified employees results from a state-paid university system, which produces many highly specialised and innovative workers, especially in the field of IT and engineering.

### KEY POINTS

Risks to prepare for:

- an ever-evolving tax and social security system.
- high presence and activity of trade unions in case of major employers (mostly in industrial-related sectors).
- labour courts sensitive to employee rights.
- strict EU data protection regulations (i.e. hindering transfer of personal data outside of the EU).

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

An employer is under the duty to respect the dignity and other personal rights of an employee and employees have equal rights for equal performance of the same duties. This principle in particular is applied to the equal treatment of men and women at work. It is not permissible to discriminate against an employee, either directly or indirectly, especially on the grounds of a person's sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, denomination, sexual orientation, as well as employment for a definite or indefinite term or on a full-time or part-time basis.

### PROTECTIONS AGAINST HARASSMENT

Any unwanted conduct with the purpose or effect of violating the dignity of an employee and of creating an intimidating, hostile, degrading, humiliating or offensive environment is treated as harassment, and sexual harassment is defined as any form of unwanted conduct of a sexual nature, or referring to a person's sex, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, including verbal, non-verbal or physical conduct. Employees have similar rights regarding both discrimination and harassment in the workplace.

Workplace bullying ("mobbing") is any act or behaviour relating to an employee or targeted against an employee that involves persistent and long-term bullying or intimidation, resulting in lower self-evaluation by the employee of his professional abilities, with the purpose or effect of humiliating or ridiculing, isolating or eliminating that employee from the team.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

It is an employer's obligation to provide a workplace adequately adapted for disabled persons. The employer must take into account the limited motor abilities of disabled workers. This includes the need for adaptation to a reduced operability of the communication routes within the building, stairs (elevator) doors, windows, bathrooms, etc. Disabled persons have additional rights, as their working time may be shortened, leave may be extended and additional breaks at work may be granted. However their rights depend on the level of disability adjudicated by respective authority. Nightshifts and overtimes are strictly forbidden.

Employers are further obliged to act against discrimination in employment. This also includes preventive actions. The employer should inform the employees of the kinds of actions that constitute examples of discrimination in employment, and how to react to witnessed or experienced violations.

The employer must provide employees with the contents of provisions concerning equal treatment in employment in the form of written information announced in the work establishment or must ensure that employees have access to these provisions in other standard methods used by the employer. In Poland, it is quite a common practice among employers to introduce specific anti-discrimination policies.

### REMEDIES

In the event of discrimination, employees can claim damages in a court proceeding. A person against whom the employer has violated the principle of equal treatment in employment, has the right to compensation of at least the amount of the minimum remuneration for work. A bullied employee has additional rights if his/her health has deteriorated as a result of bullying at work, and may claim financial compensation from the employer for the damage suffered, in particular if he/her terminated the employment contract as a result of the incident. The employee's statement of will when terminating

giving the grounds for termination that justify the termination thereof.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

The principles of social insurance coverage and the rules of establishing social insurance contributions are regulated in the Act on the social insurance system, under which employees are subject to mandatory pension, disability, health and accident insurance. Depending on the type of contribution, it is financed by the employer and the employee in different proportions. Nevertheless, it is the employer who is obligated to calculate the amount of the contribution to the Social Insurance Agency and deduct it from the employee's income. The employer is also responsible for the punctual transfer of the contributions to the Social Insurance Agency.

### HEALTHCARE AND INSURANCES

From the contributions made to the social insurance, an employee has a right to sickness benefits, maternity benefits, an attendance allowance, compensation benefits and a funeral allowance, as well as damages in the event of bodily injury caused by an on-the-job accident. Employees are entitled under health insurance to benefit from public health care centres.

### REQUIRED LEAVE

#### Holidays and Annual leave

An employee is entitled to annual, uninterrupted, paid holiday leave, the duration of which, depending on the number of years worked, is 20 or 26 days. Holiday leave is granted on days which, for the employee, are working days. Upon the employee's application, the holiday leave may be divided into parts. In such a case, however, at least one such part of the holiday leave should last no less than 14 consecutive calendar days. The employee is entitled to the remuneration for the holiday leave, which he/she would have received had he/she been working. Apart from the holiday leave, the employee is entitled to time off from work on Sundays and public holidays. At present, there are 13 public holidays in a calendar year.

#### Maternity and Paternity Leave

The right to maternity leave is connected with giving birth to a child during employment, regardless of the employee's length of service with the employer. Maternity leave is a right which can be exercised only in kind.

A female employee has a right to maternity leave of 20 weeks upon giving birth to one child. This leave is extended proportionately in the event of giving birth to more than one child. The female employee can use no more than 6 weeks of the maternity

leave before the anticipated date of the birth. An additional 41-week-long parental leave may be granted to any of the parents, while 9 weeks of the parental leave are reserved individually for each of the parents and cannot be transferred to the other parent. As a general rule, the parent on childbirth-related leave will receive 100% of his or her basic remuneration for the period of maternity leave, and 70% for the period of parental leave.

Having used up at least 14 weeks of maternity leave after the delivery, the female employee can renounce the right to the remaining part of the maternity leave. In such a case, the remaining, unused time of the maternity leave is awarded to the employee – the father who is raising the child, upon his written request. Additionally, the employee – the father who is raising the child – is entitled to a paternity leave of 2 weeks.

#### Sickness and Disability Leave

While an employee is unable to work due to an illness or isolation caused by a contagious disease, lasting in total up to 33 days in a calendar year, and in the case of an employee who has reached 50 years of age, lasting in total up to 14 days in a calendar year, the employee retains the right to 80% of his/ her remuneration. In case of an illness during pregnancy – within the period specified above – an employee retains the right to 100% of her remuneration. If the period of incapacity to work should last longer, the employee is entitled to sickness benefits paid by the Social Insurance Agency.

A person classified with a severe or moderate degree of disability is entitled to an additional holiday leave of 10 working days in a calendar year. The right is acquired by the person after working one year and after being classified in one of the above degrees of disability.

#### Any Other Required or Typically Provided Leave(s)

The employer is obliged to release an employee from work for a period of:

- 2 days – in the case of the employee's wedding, birth of a child, or death and funeral of his/her spouse or child, father, mother, stepfather or stepmother;
- 1 day – in the case of the employee's child's wedding or death and funeral of the employee's sister, brother, mother-in-law, father-in-law, grandmother, grandfather and other individuals maintained by the employee or under his/her direct care.

There are other special-case leaves as well, such as leave in order to donate blood or plasma, leave due to force majeure, carer's leave or leave for persons summoned to appear before a court or administrative body.



## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The current pension system in Poland consists of three segments, generally referred to as the pillars. In the first pillar, the Social Insurance Agency manages the funds. The means are not invested, although they are recorded on the insured person's individual account and are subject to valorisation. The second pillar is based on the operations of Open Pension Funds whose task is to trade and multiply the fund. The third pillar consists of the Employee Pension Schemes and Individual Retirement Accounts. The first is mandatory, whereas participation in the second and third one is voluntary.

Pension under the first pillar is calculated on the basis of the sum of valorised contributions recorded on an individual account of the insured at the Social Insurance Agency, the valorised initial capital and an average lifespan for women and men. The amount of the pension under the second and the third pillar depends on the investment effectiveness of the funds.

At present, the retirement age is 60 years for women and 65 years for men. Only after reaching this age, may one apply for the retirement pension. The exceptions are bridge retirement pensions for those working under special conditions or performing work of a special character. Such persons have a right to pension benefits at the age of 55 for women and 60 years of age for men.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Regardless of its type, the employment contract should define the parties to it, the contract's type, the date of its conclusion, and the conditions of work and remuneration, in particular the kind of work, the venue of work, the remuneration for work reflecting the type of work performed with a specification of the components of the pay, working time, and the date of commencement of work. The employment contract is concluded in writing. If this form has not been preserved, then at the latest on the day of starting the work by the employee, the employer should confirm in writing for the employee the conditions as regards the parties to the contract, its type and terms and conditions. Additionally, the employer is obligated to provide the employee with an information on detailed conditions of work and pay, as indicated in the Labour Code, within seven days from commencement of work, in paper or electronic form.

The Labour Code distinguishes three types of employment contracts, including an employment contract for a trial period, an employment contract for a fixed term and an employment contract for

an unlimited term. The employer should confirm in writing for the employee the conditions as regards the parties to the contract, its type and terms and conditions, particularly conditions of pay. All changes to the conditions of work and pay require a written form. It is also possible to conclude with an employee a part-time employment contract. Such employment may not, however, result in less advantageous employment terms and conditions in comparison to full time employees who perform the same of similar work.

### FIXED- TERM/OPEN- ENDED CONTRACTS

Unlimited-term contracts are the most common. Recently, however, there is a trend to depart from this form of employment toward fixed-term contracts or agreements in civil law. A fixed-term employment contract is concluded either until an agreed calendar date or until the date, which can be defined by a fact, which will occur in the future.

The period of employment under a fixed-term contract, as well as the total period of employment under fixed-term contracts concluded between the same parties of the employment relationship, may not exceed 33 months, and the total number of the contracts may not exceed three. Moreover if the term of employment under a contract of employment for a fixed-term is longer than the 33 months, or if the number of concluded contracts is higher than three, it is understood that the employee, accordingly as of the day following the lapse of the 33-month period or the date of conclusion of the fourth fixed-term contract, is hired under a contract of employment for an indefinite term. Additionally the agreement between the parties, during the term of a fixed-term contract, upon a longer period of performance of work under the contract, is understood as a conclusion, as of the day following the day of contract termination, of a new contract of employment for an indefinite term. There are four exemptions, when fixed-term employment contracts can exceed the period/number mentioned above:

- for replacement for an employee during their justified absence from work;
- for performance of occasional or seasonal work;
- for performance of work for a term of office;
- if the employer indicates objective reasons attributable to the employer.

The relevant district labour inspector must be notified in writing by the employer in case of conclusion of a fixed-term employment contract, in the event indicated in point 4 above.

### TRIAL PERIOD

An employment contract for a trial period is concluded in the event when, prior to making a decision on initiating an employment relation, one or both parties thereto wish to get acquainted with the

conditions of the future execution of mutual rights and obligations at a workplace. It is up to the parties to conclude such an agreement. The maximum length of the trial period depends on the length of future planned employment. An employment contract for a trial period shall be concluded for a period not exceeding 1 month - in the case of an intention to conclude a fixed-term employment contract of less than 6 months; 2 months - in the case of an intention to conclude a fixed-term employment contract of at least 6 months and less than 12 months; and 3 months - in the case of an intention to conclude a fixed-term employment contract of at least 12 months or an indefinite-term employment contract. The parties may extend the probationary period in the employment contract once, but for no more than one month if this is justified by the nature of the work. A trial employment contract may not last longer than 3 months. In addition, the parties may agree in the probationary employment contract that the contract shall be extended by the period of the holiday leave, as well as by the period of the employee's other excused absence from work if such absences occur.

## NOTICE PERIOD

Requiring a notice period in an employment contract is acceptable if provisions of law state so. The Labour Code allows for a notice period in a contract concluded for a trial period, for a fixed-term and for an unlimited term. The notice period may vary from two weeks, one month, or three months for both fixed and unlimited terms; and 3 working days, 1 week or 2 weeks for contracts wherein the trial period is concluded. In principle, it is possible, by way of normative agreements, to introduce longer notice periods than the ones provided for in the Labour Code.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Foreigners from the EU member states and from a state within the European Economic Area as well as their family members have unlimited access to employment in Poland. Foreigners from other countries must obtain a work permit and, in some cases an entry visa, if they want to take a job in Poland.

A work permit is issued exclusively upon a written application of an entity, which commissions a foreigner to perform work. Such a permit is issued to a specific foreigner. Furthermore, it defines the entity which commissions a foreigner to perform the work and the position the foreigner is to hold or the kind of work he/she is to perform. The work permit is issued for a specific term, however not longer than three years, and can be extended. Besides the work permit, the entitlement of a foreigner to work in Poland also requires obtaining an appropriate

visa unless the foreigner is staying in Poland legally by other means. In some cases, the immigration provisions waive the obligation of a work permit.

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

No. In Poland, foreign employers are allowed to hire employees directly.

## LIMITATIONS ON BACKGROUND CHECKS

There are strict limitations on background checks. An employer is only allowed to obtain the information concerning the candidate as indicated in legal acts – in the Labour Code or, if applicable, in other specific acts that may concern specific job positions. Some limited forms of background checks (such as verifying the references from the previous employer) might be possible after obtaining the candidate's detailed and explicit consent. However, the lack of such consent or its withdrawal (and consequently – inability to process the verification) may not be the basis for disadvantageous treatment of the candidate and it may not cause any negative consequences for the persons, in particular, it may not constitute a reason justifying the refusal of employment.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

An employer should demand an applicant to provide the following personal data only: name(s) and surname, date of birth, contact data indicated by such a person, and in the scope necessary to perform work of a specified type or in a given job position – education, professional experience and employment history. Personal data is provided to an employer in the form of a statement issued by the person whose data is provided. An employer may require the relevant documentation to confirm personal data of the persons. Employer may require the provision of personal data other than the data specified above pursuant to separate regulations.

The consent of a candidate may constitute the basis for processing their additional data by an employer, except for personal data relating to criminal convictions and offences. A lack of consent or its withdrawal may not be a basis for disadvantageous treatment of a candidate. Also, it may not cause any negative consequences for the person, in particular, it may not constitute a reason justifying the refusal of employment. It is important to note that the consent of the candidate does not justify processing any categories of personal data. Processing must

always comply with basic principles arising from the GDPR, including the principle of adequacy and minimisation. Therefore additional questions that force the candidate to provide information about their personal life, especially those concerning the candidate's family life and personal relationships, are strictly prohibited.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Employees have the right to the same remuneration for the same work or for work of the same value. Such remuneration includes all components of remuneration, regardless of their name and character, as well as other work-related benefits allocated to employees in cash or in forms other than cash. Work of the same value is understood as work, the performance of which, requires from the employees' comparable occupational qualifications, confirmed by documents envisaged in separate provisions or by professional practice and experience, as well as comparable responsibility and effort.

### REMEDIES

An employee who suspects discrimination in terms of remuneration or unequal remuneration, may take the case to court or file a complaint with the National Labour Inspectorate. In the event of a court dispute, if an employee accuses the employer of violating the provisions of non-discrimination, the employee should indicate the alleged cause of discrimination as well as facts to present the violation as probable. From this time, the employer bears the burden of proving that the differentiation of the situation of employees was caused by objective reasons.

### ENFORCEMENT/LITIGATION

In such cases, the decision of the labour court replacing the provisions of the employment contract with relevant non-discriminatory provisions, may shape the content of the ongoing employment relationship for the future. In the event of a breach of the principle of equal treatment in employment with regard to the amount of remuneration in the past (especially after termination of employment), an employee may claim compensation in the amount of the difference between the remuneration they should have received without violating the principle of equal treatment and the remuneration actually received, for a period of up to 3 years.

### OTHER REQUIREMENTS

It is becoming more popular among major employers (over 1000 employees) to introduce pay equity regulations, allowing for the monitoring of pay equity among employees and adjusting pay accordingly. Many employers, in order to avoid accusation of remuneration discrimination, introduce a clause of earnings confidentiality in employment contracts

or work regulations, which forbids informing other employees about the amount of the employee's remuneration, sometimes even under the threat of dismissal, which is contrary to the law, and therefore null and void. For example, in the judgment of 26 May 2011 (file no. II PK 304/10), the Polish Supreme Court decided that disclosure of remuneration that was covered by a confidentiality clause, in order to prevent violation of the principle of equal treatment and to manifest the remuneration discrimination, cannot constitute a reason justifying the termination of an employment contract. An employee can disclose the information on his remuneration if he suspects that there are cases of remuneration discrimination at the workplace. It should also be remembered that the information on the amount of individual remuneration is the personal data of the employee, not the employer, so ultimately the employee has the right to use this information.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Restrictive Covenants are regulated by a limited extent within the labour law. It is allowed to stipulate that an employee should not engage in any activity in competition with the employer, and should not perform work under an employment relationship, or on any other basis, to the benefit of any entity involved in such an activity (non-competition clause), unless such activity is specifically allowed as defined in a separate agreement. This includes non-solicitation of customers.

Accordingly, this rule applies to any post-employment non-competition agreement concluded by an employer and an employee, who has access to particularly sensitive information, the disclosure of which could cause damage to the employer. The agreement should define the extent of the non-competition clause and the amount of compensation due to the employee from the employer.

However, it must be remembered that an employer may not prohibit an employee from concurrently remaining in an employment relationship with another employer or concurrently remaining in a legal relationship which is the basis for the provision of work, except in the case of concluding a non-competition agreement or if separate provisions of law stipulate otherwise.

The extent of the restrictive covenant (i.e. in scope, length of time and geographic reach) as well as the consequences for each party in the event of a breach of said covenant, and any other pertinent details should be clearly defined in the agreement between the employer and employee.



Non-competition agreements and non-solicitation of customers clauses are recognised and may be enforceable under the law. However, non-solicitation of employee clauses are invalid based on case law as they violate the right to free choice of employment; no person may be prohibited from exercising his/her profession.

## **ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES**

If an employer suffers damage due to the employee's breach of the non-competition provisions of the employment contract or a post-employment non-competition agreement, the employer may claim compensation.

## **USE AND LIMITATIONS OF GARDEN LEAVE**

The employer may exempt the employee from the obligation to perform work until the lapse of the notice period, upon termination of the employment contract. During the period of exemption, the employee retains the right to remuneration.

# **VIII. SOCIAL MEDIA AND DATA PRIVACY**

## **RESTRICTIONS IN THE WORKPLACE**

The employer may restrict the employee's use of Internet and social media during working hours.

## **CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?**

As long as it is necessary to ensure the organisation of work enabling full use of working time and proper use of the work tools made available to the employee, the employer may monitor, access and review the employee's business e-mails, as well as other forms of communication. The provisions on such forms of monitoring should be included in work regulations.

From May 2019, new rules on protection of employees' personal data came into force. The regulations introduced detailed requirements in terms of various forms of monitoring at work (including video monitoring), as well as rigorous rules on processing the personal data of employees and job candidates.

## **EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE**

## **THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION**

The employee is obliged to take care of the best interests of the employer's establishment and keep confidential any information, disclosure of which could damage the employer. Violation of employer's personal rights or confidential information may be treated as a serious breach of the employee's basic duties and employer may terminate the employment contract without notice.

# **IX. TERMINATION OF EMPLOYMENT CONTRACTS**

## **GROUND FOR TERMINATION**

An employment contract can be terminated only in one of the ways listed in the Labour Code: under a settlement agreement between the parties thereto; by a unilateral statement of either party to the employment agreement while preserving the notice period (termination on a notice); by a unilateral statement of either party to the employment agreement without keeping the notice period (termination without notice); upon the end of the term for which the employment agreement was concluded.

## **COLLECTIVE DISMISSALS**

Collective dismissals are those, which are made in the event where the employer who employs at least 20 employees needs to terminate multiple employment relations where the employees are not at fault. The collective dismissal must take place within 30 days. The employer is obligated to consult with the company's trade organisations or with employee representatives prior to a collective dismissal.

## **INDIVIDUAL DISMISSALS**

The provisions on collective dismissals also apply accordingly to so-called individual dismissals, i.e. if it is necessary for an employer employing at least 20 employees to terminate employment relationships for reasons not attributable to the employees, and the redundancies within a period not exceeding 30 days cover a smaller number of employees than indicated in the Act on collective redundancies. They are also distinguished from collective dismissals by the fact that reasons not related to the employees must constitute the sole reason justifying the termination of the contract and the lack of the procedure preceding the dismissal described above.

Terminating an employment contract with notice should include a reason justifying the notice. The employer's statement of giving notice to an employment contract concluded for an unlimited time or fixed-term employment contract should

include a reason justifying the notice. Terminating an employment contract without notice will immediately end the employment relationship. The Labour Code lists three reasons for immediate termination due to employee misconduct (this list is exhaustive). The employer does not have to exercise the option should he decide that the employee's faulty behaviour makes it impossible to continue employing such an employee.

### IS SEVERANCE PAY REQUIRED?

In connection with terminating employment relations within a collective dismissal and individual dismissals for reasons which do not concern the employee (if the employer employs at least 20 employees), the employee is entitled to a severance payment; the maximum amount of severance is approx. 15.000 EUR gross. This limit may, however, be exceeded by agreement of the parties. There are also special categories of employees (government agency representatives, teachers and persons who perform home-based work, among others) whose dismissal requires the employer to pay a specified amount of severance payment.

### SEPARATION AGREEMENTS

A separation agreement is not a concept recognised either in practice or by the labour laws of Poland.

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

An employee seeking to challenge wrongful termination can file an appeal with a labour court. In such a case, the employee can demand a ruling on the ineffectiveness of the termination of employment, or reinstating him at work on previous terms, or a payment of damages. In the event of terminating an employment contract, effective immediately and in violation of law, the employee is entitled to file a claim for damages or to be reinstated at work. It is permissible under Polish law to terminate an employment contract by way of a unilateral statement of will, even if defective ; which requires the court to rule on the ineffectiveness of such a statement or whether the employee should be reinstated at work. Only the employee is allowed to appeal against a defective employment notice; his/her failure to appeal will have the effect of terminating the employment contract (even if it is defective).

### WHISTLEBLOWER LAWS

On September 25, 2024, a significant part of the provisions of the Whistleblower Protection Act will come into force, the purpose of which is to regulate the principles of reporting breaches and protect whistleblowers from retaliatory actions. The Act lists the scope of information that may be covered by a report, from which violations of labour law were ultimately excluded. The Act will protect

those reporting information on violations of the law obtained in a work-related context, i.e. employees, job candidates, persons cooperating under a civil law contract. It provides for three channels for reporting breaches, i.e. internal reports (directly to the employer), external reports (to public authorities) and public disclosure (on a public forum, e.g. social media). Employers are required to develop an internal reporting procedure, including information on who is authorised to receive reports, create reporting channels (at least the possibility of making reports orally or in writing must be ensured), keep a register of reports and maintain the confidentiality of the whistleblower's data.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Trade unions are social organisations that associate working people, which includes not only employees but also certain categories of contractors (however, in practice, contractors rarely form or join trade unions). They are a voluntary form of self-organising that operate on the basis of statutorily shaped organisational structures, which have a legal personality. Trade unions represent employees and protect their dignity, rights and material and moral interests, both collective and individual. They also have a right to represent employees' interests internationally. Trade unions co-participate in creating advantageous conditions for work, life and rest.

Employers' associations on the other hand, are corporate organisations that have the status of a legal person based on the collectiveness of their members. Such organisations protect the employer's rights and interests in employment relations. Therefore, they aim at protecting business, financial, economic as well as organisational and functional interests. All employers are entitled to the freedom to form an employer association.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

As organisations aimed at representing employees and protecting their interests, trade unions are authorised to appear on their behalf, to conduct collective negotiations and to conclude collective labour agreements, as well as other agreements, to ensure appropriate working conditions. They also oversee whether the labour law is being observed and participate in supervising the rules and regulations of health and safety at work. They are

also authorised to issue opinions regarding labour law development.

As a result, trade unions may exercise considerable influence over the distribution of the national income and the content of legislative decisions concerning labour legislation and social insurance. As a result, trade unions may exercise considerable influence over the distribution of the national income and the content of legislative decisions concerning labour legislation and social insurance. Trade unions ensure that the employer complies and appropriately implements the labour legislation. They also play a critical role in shaping policies on working conditions.

Polish labour law does not provide for employees or their representatives to participate in managing the employer's business, with the exception of commercialising state entities in which employees retain the right to elect some members of the supervisory board and the management board.

The Labour Code and the Act on trade unions regulate trade union rights in employment relations. The trade union concludes a collective labour agreement on behalf of employees and defines the terms, which should be reflected in the content of the employment relation and other provisions, including those concerning mutual obligations of the parties to the agreement. Furthermore, the employer is obligated to consult or inform the trade union about all-important decisions concerning its employees. This pertains to such issues as the transfer of the workplace to another employer, an intention to give notice to an employment contract, remote work conditions, agreeing on rules and procedures and taking actions within health and safety at work, among others.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

In some cases (e.g., within the procedure of collective dismissals), in the event when there is no trade union at a workplace, the employer must conduct consultations with representatives of the employees. The principles of electing employee representatives are defined at each employer separately. Employers with at least 50 employees can establish a works council. It is up to the employees to demand the establishment of a works council, after being informed of passing the 50-employee threshold by the employer. The rights of the works council are mostly consultative and advisory.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

Employees' rights in the case of a transfer of undertaking are defined in the Labour Code. Under the law, the new employer becomes a party to the current work relations. Consequently, under the principle of a legal successor, the new employer acquires any and all rights resulting from the work relations established with the previous employer, and all obligations which the previous employer owed to the employees of the entity. This entity's employees preserve the rights they were entitled to prior to the business transfer, and they are bound by the same duties they had toward the previous employer.

It is the new employer's duty to inform the company trade unions, and in the case of their absence, the employees, about the planned transfer of the company at least thirty days before the planned transfer of the business. This information should include the planned transfer date, the reasons for the transfer, the legal, economic and social effects thereof on the employees, as well as the intended activities concerning the conditions of employment, in particular the working conditions, salary and retraining.

An employee of the business being transferred may end the employment relation with the new employer. Within two months from the transfer, the employee can terminate the employment relation with a seven-day notice.

However, the transfer to a new employer cannot constitute a reason for the employer to terminate the employment relation.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The new employer is bound by the content of the employment relations in force at the time of the transfer. The content of the employment relation is shaped not only by the employment contract, but also by any normative agreements which the previous employer was a party to. The new employer is obligated to apply the provisions of collective labour agreements to those employees who were covered by such agreements, for a period of one year prior to the day of the business transfer.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The provisions of collective labour agreements and collective settlement agreements as well as the rules and procedures and statutes, have priority before



the solutions in the Labour Code and the provisions of other acts and secondary legislation, as long as they are not less beneficial to the employees. It is also acceptable to grant employees' rights that are more advantageous than those provided by the Labour Code. As of September 2020, new legislation is pending in the field of remote work, which is intended to replace regulations on telework – however, the Ministry of Labour has not yet provided any precise draft thereof.

## **SALARY**

An employee has a guaranteed minimum pay for his/her work, which is set pursuant to the principles and the procedure provided for in the Minimum Wage Act. If, however, a higher minimum salary has been set in collective labour agreements or the remuneration rules and procedures, then the employer is obligated to respect such agreements in place of the act. Apart from his/her basic pay, an employee may receive different allowances. Additional remuneration can be divided into those which are obligatory (e.g., extra pay for working overtime, extra pay for working at night), and those which are optional (e.g., extra pay for working shifts, service premiums).

## **MAXIMUM WORKING WEEK**

The working time may not exceed eight hours a day and forty hours in an average five-day working week in an accepted settlement period, which does not exceed four months (there are however, cases where settlement periods of up to 12 months may be used). The legislator has introduced a possibility to shorten or extend the settlement period and the working time in a day in accordance with the cases defined in the Labour Code. The weekly working time together with the overtime may not, however, exceed forty-eight hours in the accepted settlement period on average.

## **OVERTIME**

Working overtime is accepted in two situations only: in the event when there is a necessity to conduct a rescue mission to protect human life or health, to protect property or the environment, or to remove a breakdown, or in the event of special employer's needs. It is the employer who assesses whether there have occurred special needs which justify working overtime. The weekly working time together with the overtime may not, however, exceed forty-eight hours in the accepted settlement period on average. In the case of an annual limit, the Labour Code states that the number of overtime hours may not exceed one hundred and fifty hours in a calendar year. The maximum annual number of overtime hours is contingent on the need to maintain the maximum weekly number of working hours (on average, forty-eight hours per week in an average settlement period).

## **EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE**

The employer is obliged to protect the health and well-being of employees by ensuring conditions of health and safety at work, through the appropriate use of the achievements of science and technology.

## **COMPLAINT PROCEDURES**

In case of breach of health and safety rules, employees can submit their objections to the health and safety at work service operating at the workplace. If the health and safety at work service does not take appropriate action, or if there is no health and safety at work service at the workplace, employees can submit their objections to the State Labour Inspection, which can penalise the employer.

Employees cannot be discriminated due to the fact of submitting their objections to the health and safety at work service or the State Labour Inspection.



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## I. INTRODUCTION

Portugal's employment legal system is governed by a combination of labour laws and EU directives.

The Portuguese Labour Code is the principal piece of legislation that regulates employment relationships, setting out the rights and obligations of both employers and employees and covering all the central aspects of employment, including contracts, wages, working hours, dismissals, and employee rights.

In addition, collective regulation instruments, such as Collective Bargaining Agreements (CBAs) may apply to specific sectors, industries or job positions.

### KEY POINTS

- **Employment Contracts:** The general in hiring employees in Portugal is that employment contracts must be made for an indefinite period. The possibility of hiring employees under term employment contracts is, in principle, limited to situations of a temporary need of the employer provided and specified in the applicable rules, and duration is limited to that of the need in question (with a maximum of 2 years for fixed term contracts and 4 years for contracts of unspecified duration).
- **Collective Regulation Instruments:** such as Collective Bargaining agreements (CBAs) play a significant role in Portugal, often setting terms beyond the minimum legal standards, including higher minimum wages, additional benefits or specific rules on working hours, holidays, and other employment conditions. These agreements can apply to specific sectors, regions or job positions and provide tailored conditions for employees and employers.
- **Termination:** Employment in Portugal is not strictly at-will. Notably, the termination of open-ended employment contracts is limited to certain cases expressly set out in Portuguese legislation (such as collective dismissal procedures, termination of a job position, or dismissal with just cause following a disciplinary procedure) and compensation for termination (when due) must follow specific rules.
- **Minimum Wage / Payments:** There is a national minimum wage – currently (2025) in the amount of € 870. Employees are entitled to 14 monthly payments per year, including holiday remuneration, holiday bonus and Christmas bonus. Collective Regulation Instruments may however foresee higher minimum salaries.
- **Social Security:** Contributions to the social security entity(s) are mandatory in Portugal and are shared between employers and employees (as

a rule 23.75% and 11%, respectively). The system provides coverage for various benefits, including retirement pensions, unemployment insurance, sickness benefits, and family allowances.

- **Workman Compensation Insurance:** It is mandatory that employers have a workman compensation insurance policy (seguro de acidentes de trabalho) that covers their employees, in order to compensate any damages that may arise from work accidents or occupational diseases.
- **Working Hours:** The maximum legal working hours periods are: 8 hours per day and 40 hours per week. However, flexible work arrangements, including exemption from working hour and part-time work may be agreed upon by the parties.
- **Holidays / Paid Leave:** Generally, employees are entitled to a minimum of 22 working days of holiday per calendar year. Nonetheless, special rules apply in certain situations, such as: (i) during the first year of employment, (ii) if the contract is suspended, (iii) for contracts with a duration of less than six months, (iv) for contracts lasting under 12 months or terminating in the year following the employee's admission and (v) upon termination of employment.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Portuguese employment law prohibits any form of discrimination based on factors such as gender, race, age, nationality, disability, sexual orientation, religion, or political beliefs.

Employers must ensure equal treatment in all aspects of employment, including hiring, promotions, pay, and working conditions.

The law mandates equal pay for equal work, protects employees from harassment, and requires reasonable accommodations for workers with disabilities. Discrimination in recruitment is prohibited, and in cases of alleged discrimination, the burden of proof may shift to the employer.

Violations can lead to penalties and compensation for affected employees.

### PROTECTIONS AGAINST HARASSMENT

Discrimination based on any grounds is forbidden. The law expressly prohibits discrimination grounded on parentage, age, sex, sexual orientation, gender

identity, marital status, family situation, economic situation, education, origin or social conditions, genetic heritage, reduced work capacity, disability, chronic disease, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological beliefs and affiliation with trade union, without prejudice of other discrimination grounds.

Mere orders or instructions aimed at harming someone based on a discriminatory factor constitutes discrimination. The law prohibits direct discrimination, indirect discrimination, harassment and victimisation.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

In summary, Portuguese law not only prohibits harassment but also obliges employers to put in place clear policies and preventative measures to avoid and react against it.

## REMEDIES

Under Portuguese law, employers are required to provide reasonable accommodations to individuals with disabilities or chronic illness, including those undergoing treatment for active oncological disease. These accommodations are intended to ensure equal access to employment opportunities, allowing affected individuals to perform their job duties effectively. However, employers are not obligated to implement accommodations if doing so would place an undue burden on the organisation, either financially or operationally.

In addition, Collective Regulation Instruments may establish specific rules concerning the provision of accommodations or the payment of allowances in certain sectors. These agreements can offer additional support for reasonable accommodations, particularly in cases where an employee is temporarily unable to perform their regular duties due to displacement or other work-related restrictions.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

Under the standard general regime that applies to individuals enrolled as employees, the employer must pay a monthly social security contribution equal to 23.75% of the employee's remuneration. Employees must pay a monthly social security contribution of 11% of their remuneration, deducted by the employer.

The contributions cover illness, retirement pension, maternity and paternity and unemployment, among others.

Some employers provide access or contribute to supplementary schemes for their employees (such as pension or illness schemes) which are

sometimes also prescribed by Collective Regulation Instruments.

## HEALTHCARE AND INSURANCES

By law, employers must take up workman compensation insurance (seguro de acidentes de trabalho) in relation to their employees, in order to cover damages that arise from work accidents or occupational diseases.

## REQUIRED LEAVE

An absence (falta) is qualified as the employee's failure to attend their workplace during their normal daily work period (as set out by the Labour Code).

Absences are justified or unjustified (as set out by the Labour Code). The legal regime regarding the justification of absences and their duration is mandatory.

The qualification of an absence as justified or unjustified is relevant in that it may for instance entail loss of remuneration and impact on the employee's length of service.

### Illness and injury of Employees

In particular, employees are entitled to time off from work for illness or injury, which is paid by the state social security protection schemes, provided they meet all the eligibility requirements.

State social security protection schemes pay sick pay to employees who are absent from work as a result of illness or injury.

The employee may receive sick pay for a total of 1095 days.

Sick pay is calculated based on the employee's remuneration reference for Social Security purposes and varies between 55% and 75% depending on the period of illness.

In some cases, collective labour agreements provide specific rules covering employee illness or injury.

### a. Holidays and Annual Leave

As a general rule, employees are entitled to a minimum 22 working days of holiday per each calendar year. This right falls due on 1 January and relates to work performed in the previous calendar year.

Special rules apply in the first year of employment, to contracts with a duration of less than six months, to contracts that do not attain 12 months or terminate the year after the admission, on termination and when the employment contract is suspended.

Employees must take their holidays in the year they accrue. Carry-over of days of holiday is exceptional.

Employees may not, as a rule, waive their entitlement to holidays, although there are exceptions.



In addition to personal holiday, the employee is entitled to national public holidays (provided by the Labour Code):

- 1 January
- Good Friday
- Easter Sunday
- 25 April
- 1 May
- Corpus Christi
- 10 June
- 15 August
- 5 October
- 1 November
- 1, 8 and 25 December

Collective Regulation Instruments or individual employment contracts may also grant the employee two optional “public” holidays: Shrove Tuesday and the local municipal holiday.

### **b. Maternity / Paternity Leave**

The Parental Protection regime is extensive and relatively complex. This chapter aims only at providing an overview of the main maternity and paternity rights, not excluding others provided by law.

Working parents are entitled to initial parental leave (licença parental inicial) for the birth of a child, which they can share. The minimum length of the leave is of 120 however this period may be extended if the employees so decide under certain limits and if the leave is shared between both parents.

Both mothers and fathers are also entitled to an exclusive parental leave (for mothers, licença parental exclusiva da mãe, and for fathers, licença parental exclusiva do pai).

A mother is entitled to:

- An initial exclusive parental leave of 30 days, which can be taken before the birth; and
- 42 days mandatory leave that must be taken after the birth.

These exclusive periods are part of the initial parental leave described above and are taken into consideration for the calculation and duration of the global leave period.

Fathers are entitled to an exclusive and independent leave of 28 consecutive or non-consecutive working days leave that must be taken within the six weeks period following the birth of the child, seven of which immediately after the child's birth.

### **c. Sickness and Disability Leave**

Employees are entitled to time off from work for illness or injury, which is paid by the state social security protection schemes, provided they meet all the eligibility requirements.

State social security protection schemes support and pay sickness allowance to employees who are absent from work as a result of illness or injury.

Sick pay is calculated based on the employee's reference remuneration for Social Security purposes and varies between 55% and 75% depending on the length of the illness period.

In some cases, collective labour agreements provide specific rules covering employee illness or injury.

### **Any Other Required or Typically Provided Leave(s)**

In addition to other situations provided for by law (article 249 of the Labour Code) and in the applicable collective bargaining agreement, justified absences are also considered to be, among others, those that are motivated by the reasons indicated below:

- Absence due to pregnancy bereavement (only when leave due to termination of pregnancy is not taken)
- Medical consultations and complementary diagnostic tests
- Wedding
- Death of spouse, partner, son, daughter, stepson, stepdaughter,
- Death of father, mother, father-in-law, mother-in-law, stepfather and stepmother
- Death of grandfather, grandmother, grandson, granddaughter, brother, sister, brother-in-law, sister-in-law, great-grandfather, great-grandmother, great-grandson and great-granddaughter (own or spouse's)
- Absence to care for spouse, partner, father, mother, grandfather, grandmother, father-in-law, mother-in-law, brother, sister, brother-in-law and sister-in-law
- Absences of informal carers in the event of illness or accident of the person being cared for

### **PENSIONS: MANDATORY AND TYPICALLY PROVIDED**

Protection in old age involves the payment of a monthly pension for life, which is intended to replace the income lost from work when the employee reaches the age legally presumed to be appropriate to cease professional activity.

Under the general regime employees are entitled to this pension when they reach 66 years and 4 months old (retirement age set for 2024) and paid Social Security contributions during a period of at least 15 years.

The law foresees that, in certain situations the possibility to anticipate retirement age.

In this way, pursuant to the general regime of early retirement, it is foreseen that old age retirement may be anticipated, for example in certain cases of involuntary long-term unemployment.

Pursuant to the Labour Code, employer and employee may also enter into a pre-retirement agreement under the terms of which the performance of the employee's activity is either reduced or suspended.

The employee must be at least 55 years of age. Under the agreement, the employee remains entitled to receiving a monthly monetary amount.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

As a general rule, an employment contract is not subject to written form, although it is best practice to do so, not only for clarity and certainty regarding each party's obligations, but also for compliance with information duties of the Employer.

### FIXED- TERM/OPEN- ENDED CONTRACTS

The standard legal form of hire is the permanent employment contract.

Under a permanent employment contract, it is during the probationary period (only) that the employer enjoys maximum flexibility to evaluate whether the employment relationship should be maintained or terminated unilaterally without having to justify the decision and without having to pay the employee any compensation.

Term contracts are qualified as exceptional by law: and they can assume one of the following types:

- fixed term employment contracts; or
- unspecified duration term employment contracts.

As a general rule, the possibility to hire employees under term employment contracts is confined to situations resulting from a temporary need of the employer and the duration of the contract is limited to that of the need in question.

The Labour Code lists the situations which are considered temporary needs for term employment purposes. In addition to temporary needs, term employment contracts may also be executed in case of:

- launching of a new business activity or the incorporation or commencement of operation of a company or undertaking with less than 250 employees, over a period of two years following the launching of a new business activity, incorporation or commencement of operation
- hire of very long-term unemployed workers (as defined by law).

The validity of a term employment contract also depends on its execution in writing, with express reference to the terms and conditions mentioned in the Labour Code, namely its duration, grounds and connection between the duration and the indicated grounds.

A fixed term employment contract's duration is subject to three simultaneous limitations:

- it cannot exceed two years (including renewals), depending on the circumstances that justify the contract's temporary nature
- it cannot be renewed more than three times; and
- the total duration of the renewals cannot exceed the initial period of duration of the contract

Unspecified duration term employment contracts are used when there is a temporary need to hire but it is not possible to foresee the length of the period during which it will endure, therefore the durations and termination date of this type of contract is not precisely determined in the contract. However, the total duration of this specific type of contract cannot exceed four years.

### TRIAL PERIOD

There are strict regulations governing probationary periods in Portugal, with specific maximum durations depending on the employee's role.

For open ended employment contracts:

- 90 days: standard probation period applicable to most employees
- 180 days: applies to employees in roles requiring technical complexity, high responsibility, special qualifications, or those in positions of trust, as well as first-time job seekers or long-term unemployed individuals
- 240 days: reserved for employees in senior management or directorial positions

For term employment contracts:

- 30 days if the contract's duration is equal to or exceeds 6 months
- 15 days: if the contract's duration does not reach 6 months (or, in case of term contracts for an unspecified period and the foreseeable duration of the contract does not exceed 6 months)

If the employer fails to inform the employee about the probationary period's duration and conditions, it is assumed that the probationary period has been waived.

Once the probationary period ends, the employer can only terminate employment in accordance with legal requirements, adhering to the principle that prohibits termination without just cause.

For probationary periods exceeding 60 days, the employer must provide a minimum of 7 days' notice for termination. If the probationary period extends beyond 120 days, a 30-day notice period is required for lawful termination by the employer.

### NOTICE PERIOD

Termination of employment in Portugal is governed by the constitutional principle that prohibits employers from unilaterally terminating employment without just cause.

Termination is permitted only under the following conditions:

**Objective Just Cause:** Based on market, technological, or structural reasons impacting the company's operations

**Subjective Just Cause:** Based on an employee's breach of legal or contractual duties

In all cases, termination must comply with the material and procedural requirements set out in the Portuguese Labour Code and these rules are mandatory.

### Notice Periods for Objective (Economic based) Terminations

For terminations based on objective (economic) grounds, employers must observe the following minimum notice periods (after the implementation of the correspondent legal proceeding and when the final decision is issued and handed to the employee), which vary based on the employee's length of service:

- 15 days: For employees with less than one year of service
- 30 days: For employees with one to five years of service
- 60 days: For employees with five to ten years of service
- 75 days: For employees with more than ten years of service

### Dismissals for Disciplinary Reasons

No notice period is required for dismissals due to disciplinary causes. The dismissal takes effect immediately once the employee is formally notified, following the completion of the mandatory disciplinary procedure.

### Fixed-Term Employment Contracts

For fixed-term contracts, if no renewal is agreed upon and no notice is given by either party, the contract will automatically renew for an equal period. Termination of such contracts requires written notice:

- Employer: Must provide at least 15 days' notice
- Employee: Must provide at least 8 days' notice

### Term Employment Contracts of Unspecified Duration

For contracts with an unspecified term, termination is permissible once the end date can be determined, with the following notice period:

- 7 days: For contracts lasting less than six months
- 30 days: For contracts lasting between six months and two years
- 60 days: For contracts exceeding two years

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In Portugal, foreign employees authorised to work in the country have the same rights and obligations as Portuguese citizens.

Notwithstanding, non-EU/EEA nationals or those from countries without reciprocal agreements must comply with specific and additional requirements.

Employment contracts for these employees must follow specific formalities, such as the inclusion of a copy of their residence visa or work permit details and information regarding beneficiaries in case of death deriving from a work-related accident.

Hiring foreign workers without valid permits can lead to fines of up to €10,000, bans on certain business activities, and the need to repay public benefits (if any). Employers can also face criminal charges for facilitating illegal immigration or employment.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

It is not mandatory to establish a local entity in Portugal to hire employees.

However, employing individuals based in Portugal will lead to specific obligations, including compliance with social security contributions and employee income tax requirements.

These obligations vary based on the particular circumstances of each case, and a detailed assessment should be conducted to address the specific legal, tax, and social security implications regarding not only the employee but also the Employer.

Additionally, it is important to assess whether the hiring of employees could result in the creation of a permanent establishment ("estabelecimento estável") for tax purposes, which could impose further corporate tax liabilities.

### LIMITATIONS ON BACKGROUND CHECKS

In Portugal, employers are generally not allowed to request personal information about employees or job applicants, unless it is strictly necessary for assessing their suitability for the job and this necessity is clearly explained in writing. This principle is tied to privacy, equality and non-discrimination rights.

Background checks are commonly used in certain sectors like finance, healthcare, and government, where assessing integrity and qualifications is critical. However, background checks must comply with privacy regulations, particularly the GDPR, and some types of checks are only legally permitted under very specific conditions.

Usually, background checks are carried during the recruitment process, in order to gather more information about candidates and potential employees. However, it is also possible to run background checks during the effective labour relationship.



In Portugal, while various types of background checks are commonly listed, many are only legally permissible under specific conditions. Some of the most common background check elements are the following:

- **Academic Qualifications:** Employers can verify education, but only request relevant qualifications related to the job.
- **Employment History and Reference Checks:** Requires the candidate's explicit consent and should not violate privacy or include discriminatory questions.
- **Criminal Record Check:** Allowed only for roles where it is legally required, such as jobs involving children or financial positions, written justifications shall be provided to the employee.
- **Social Media Searches:** Allowed, but only from public profiles and the collection of such information must considering the specific job position requirements.
- **Credit History Check:** Typically used in finance roles but requires the candidate's explicit written consent.
- **Medical Exams:** Allowed if necessary for job safety or specific job requirements, but only with proper justification and adherence to data protection laws.

**Drug and Alcohol Tests:** Allowed when job safety and security of the employee or third parties is at stake.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

There are clear limits regarding the type and range of questions an employer can ask a candidate during the recruitment process, namely, employers are prohibited from requesting information regarding a candidate's private life (e.g. sexual orientation, gender identity, political beliefs, trade union membership) or health status, including pregnancy, unless exceptional circumstances apply.

Personal information can only be requested if it is objectively and reasonably necessary for the specific job role, and the employer must provide a written explanation to justify such inquiries. Candidates and employees retain full control over their personal data, with the right to know how it is used, access its content, and request corrections. Moreover, candidates have the right to withhold or provide inaccurate information if unlawfully asked inappropriate or discriminatory questions.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Article 157 of the Treaty on the Functioning of the European Union consecrates the principle of equal pay for male and female employees performing equal work. This principle is reflected in Portuguese

law through Article 24 of the Labour Code, which guarantees the right to equal opportunities and equal treatment for all employees and job candidates.

As a result, employees are entitled to equal working conditions, particularly regarding pay, ensuring that any factors determining remuneration are free from discrimination based on gender.

To further combat the gender pay gap, Portugal has taken additional steps. Law no. 60/2018, which came into force on February 21, 2019, introduced measures to strengthen gender pay equality for equal work or work of equal value. This law mandates transparency in pay structures and obliges employers to justify wage differences where they exist.

At the national level, a cabinet resolution approved broader strategic objectives for the period 2018-2030 as part of the National Strategy for Equality and Non-Discrimination, accompanied by specific Action Plans.

These initiatives reflect Portugal's ongoing commitment to achieve gender equality in the workplace and eradicating wage disparities.

## REMEDIES

If an employee or union representative suspects of any disconformity of the compliance of any employer, they can request an opinion from CITE ("Comissão para a Igualdade no Trabalho e no Emprego") on the existence of gender-based wage discrimination.

The request must be submitted in writing and contain a duly substantiated allegation of wage discrimination.

CITE's final opinion is notified to the labour authority ("Autoridade Para as Condições de Trabalho") for the purposes of opening a proceeding due to gender-based discrimination and the application of due fines. gender-based discrimination qualifies as a very serious offence under the Portuguese Labour Code and is punishable with fines that may range from 2,040 to 61,200 Euros.

Dismissal or other sanctions allegedly imposed to punish a labour offence shall be presumed as being abusive if they take place up to one year after the request for CITE's opinion.

## ENFORCEMENT/LITIGATION

Discrimination cases regarding a differential remuneration based on gender are still rare.

## OTHER REQUIREMENTS

The Single Report, drawn up annually by companies, must include nominative information, segregated by gender. Such information must also be made available to employees.

Employers are subject to adopting a transparent remuneration policy, built on the basis of evaluation of the components of the functions performed

by employees, underpinned by objective criteria common to any gender (e.g. merit, productivity, attendance or seniority).

An assessment plan must be submitted by Companies with gender pay differences, within 120 days, if and when notified by Autoridade Para as Condições de Trabalho ("ACT").

Failure to submit and adopt an evaluation plan as described above, and to communicate the results thereof, constitutes a serious administrative infraction that, in addition to the applicable fines from 612 to 9,690 Euros, can also involve an ancillary sanction of temporary banning from public tenders for a period of up to two years.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The Labour Code includes provisions that address clauses limiting employees' freedom to work, such as non-competition agreements and permanence agreements.

In essence, the first are designed to prevent employees from competing with their former employer after the termination of their employment and the second are aimed to guarantee that the employee remains working for the employer after a relevant investment in the employees training or education.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

#### a. Non-compete clauses

Post-contractual non-compete clauses are designed to prevent employees from working for competing companies for a specific period after their employment ends.

Under Portuguese law, any clause in an employment contract or collective labour agreement that restricts an employee's freedom to work after the contract ends is generally considered null and void.

However, an exception to this rule applies if:

- The clause is part of a written agreement
- The employee's future activity could potentially harm the former employer
- The employee receives compensation for this restriction.

The compensation may be reduced if the employer has made significant investments in the employee's professional training.

Generally, non-compete agreements are limited to a maximum duration of 2 years. However, in some cases the non-compete period can be extended up to 3 years.

#### b. Non-solicitation of customers

Portuguese law does not specifically regulate this type of restriction and it is controversial whether they are enforceable in practice – it is recommended a case by case analysis in this regard.

#### c. Non-solicitation of employees

Portuguese law does not specifically regulate this type of restriction and it is controversial whether they are enforceable in practice – it is recommended a case by case analysis in this regard.

### USE AND LIMITATIONS OF GARDEN LEAVE

If an employee breaches a non-compete agreement, they may be required to repay any compensation received under the clause and could be liable for damages if the employer proves actual harm. In cases of uncertainty regarding the amount to be returned, or if the employee refuses to comply with the agreed repayment, the employer can seek recourse in court to resolve the issue.

Similarly, the employee can take legal action against the employer if the agreed compensation is not paid while the non-compete clause remains in effect. The clause may be declared void if it does not meet legal requirements.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

According to the Portuguese law, the employer can establish rules for the use of means of communication, especially emails, but is prohibited from accessing the content of personal messages that the employee receives or sends.

Therefore, the employer must - before starting the monitoring process - inform the employee about the conditions of use of the company's means for private purposes and how they are monitored (forms and methodologies adopted), about the existence of the associated data processing, its purposes, the data processed and their retention period, as well as about the degree of tolerance allowed and the consequences of misuse or improper use of the means of communication made available to them.

Regarding the monitoring process, and according to the Portuguese Data Protection Commission ("Comissão Nacional de Proteção de Dados"), the employer should favour generic control methodologies, avoiding individualized consultation of personal data whenever possible.

The employer should not carry out permanent and systematic monitoring of employees' emails. Checks and access should be occasional and targeted at the areas and activities that present the greatest "risk" to the company and follow the criteria provided by law in that respect.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Under the principle of the duty of loyalty, employees are obligated to act in good faith and protect the interests of their employer. This duty includes maintaining the confidentiality of any information related to the employer, its business, and its customers. Employees must refrain from disclosing sensitive information or making public statements that could harm the employer's reputation, including posting negative comments.

Breaching this duty may result in disciplinary measures. Any violations are to be evaluated on a case-by-case basis, considering the unique facts of each situation.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

Termination of employment is governed by the constitutional principle which foresees that the employer may not terminate employment unilaterally without just cause.

Unilateral termination may only occur with cause, either objective or subjective, in the terms defined by the Labour Code and in observance of the material and procedural requirements foreseen therein:

- Objective just cause which is based on economic reasons - market, technological or structural, related to the company's (i.e. employer's) business activity - may trigger collective dismissal or individual dismissals due to termination/extinction of job position.
- Subjective just cause which is based on disciplinary reasons, i.e. a breach of the employee's legal or contractual duties.

### COLLECTIVE DISMISSALS

Under Portuguese employment law, collective dismissal refers to the termination of employment contracts initiated by an employer for economic, structural, or technological reasons, affecting multiple employees. This process occurs when the company is facing market difficulties, technological

changes, or structural reorganisation that conduct to the need of reducing its workforce.

A collective dismissal is triggered when an employer seeks to dismiss at least two employees in companies with fewer than 50 workers, or five or more employees in companies with 50 or more workers, within a three-month period. The grounds for such dismissals must be objective, stemming from reasons such as reduced market demand, restructuring of operations, or the introduction of new technologies that render certain positions redundant.

The process is governed by strict procedural rules aimed at ensuring transparency and fairness. Employers must engage in consultations with employee representatives and the Ministry of Labour is also notified and provided with detailed information concerning the envisaged dismissals.

Failure to comply with these procedures will determine the unlawfulness of the dismissals with all the connected legal consequences.

Employees affected by collective dismissals are entitled to receive severance pay. Additionally, they may challenge the dismissal in court if they believe the employer has failed to meet the necessary legal requirements.

The termination of the employment contract must be communicated with a prior notice varying between 15 and 75 days, depending on the length of service of the employee.

### INDIVIDUAL DISMISSALS

Individual termination of employment in Portugal can occur for objective reasons or disciplinary reasons. Both are strictly regulated by the Portuguese Labour Code to ensure fairness and compliance with legal standards.

Objective dismissals are generally based on economic, structural or technological grounds and may include:

- Job redundancy due to economic, market, or organisational factors.
- Worker's inability to adapt to changes in job requirements or technological advancements (rarely implemented).

The employer must follow a strict consultation and notification process. This involves informing the affected employees in writing, providing clear reasons for the dismissal, and notifying the relevant labour authorities. Depending on the procedure and its specificities, employers may also be deemed to engage in consultations with employee representatives or unions (if applicable). Termination of employment must be communicated with a prior notice varying between 15 and 75 days, depending on the length of service of the employee.

Disciplinary dismissals arise from serious misconduct by the employee that undermines the



employment relationship, making it impossible to continue. Justifiable reasons may include:

- Repeated and unjustified tardiness or absences from work
- Insubordination or failure to follow legitimate orders from superiors
- Verbal or physical offenses towards the employer, colleagues, or clients
- Breach of trust or acting in bad faith, such as dishonesty or misuse of company resources
- Deliberate reduction in performance, failing to meet agreed-upon or expected work standards
- Intoxication by alcohol or drugs affecting job performance
- Harassment based on race, religion, gender, age, disability, sexual orientation, or other protected characteristics

The employer must initiate a formal disciplinary process, which includes notifying the employee of the allegations and allowing them the opportunity to present a defence. A detailed investigation must be conducted before any decision is made.

Employers must strictly follow procedural rules for both types of dismissal, and failure to comply can render the termination unlawful, subject to challenge in court.

## IS SEVERANCE PAY REQUIRED?

Employees dismissed for objective reasons are entitled to severance pay, which is typically calculated based on years of service. Employees dismissed for disciplinary reasons are not entitled to severance pay if the dismissal is justified and lawful.

## SEPARATION AGREEMENTS

### a. Is a Separation Agreement required or considered best practice?

Employer and employee are free to terminate employment by mutual agreement, in writing, at any time during their employment relationship.

### b. What are the standard provisions of a Separation Agreement?

The separation agreement must always state the date on which the agreement was concluded and the effective date. In addition, the written agreement must state the legal deadline for the agreement to be revoked (except when the agreement was signed in the presence of a notary).

If compensation is agreed, it must be described in the written agreement.

It is also common to include provisions regarding documentation to be handed to the employee, such as a work certificate; and other legally required documents (e.g. when applicable, the social security form for unemployment allowance).

Post contractual obligations provisions are commonly and may also be include.

### c. Does the age of the employee make a difference?

A mutual agreement may be reached between parties independent of the employee's age.

### d. Are there additional provisions to consider?

The main characteristics of this form of termination are the following:

- The parties are free to negotiate the terms of termination
- Termination may take effect immediately (no notice periods need to be observed)
- Termination is final and binding

The Labour Code does not foresee any minimum or maximum compensation amounts payable to the employee under termination by mutual agreement. Compensation is freely negotiable between the parties.

Enhanced compensatory payments (i.e. amounts that are higher than the statutory minimums) are however commonly negotiated in exchange of the employee's waiver and settlement of any and all claims or rights under the employment relationship or due as a result of its termination, although since May 2023 waivers may be challenged under the terms of the Labour Code.

Negotiations with a view to terminate an employment relationship by mutual agreement vary according to several factors, such as:

- grounds for termination/negotiation
- length of service
- seniority / position / job function
- Timeframe
- Access to unemployment benefit (if any)

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Under Portuguese law, employees cannot be dismissed without a valid reason (just cause) and dismissals based on political or ideological grounds are prohibited.

If an employer fails to provide a lawful justification or the mandatory legal proceeding is not fully followed, the termination is considered wrongful, and the employee may be entitled to remedies, including reinstatement or financial compensation.

Special protection is granted to certain categories of employees, such as pregnant women, women who have given birth within the past 120 days, breastfeeding mothers, and employees on paternity leave. Dismissal of these employees is illegal without a prior favourable opinion from the Commission for Equality in Labour and Employment (CITE) or a court ruling confirming a valid motive for dismissal.

Employees in these categories who are dismissed without these legal requirements being followed

may seek reinstatement or compensation for wrongful termination, as well as damages for any harm caused.

## WHISTLEBLOWER LAWS

Law no. 93/2021, which transposes Directive (EU) 2019/1937 and creates, among other things, a set of obligations for companies and other public entities regarding the protection of whistleblowers and the implementation of internal whistleblowing channels and procedures, regulates whistleblowing in Portugal and is now applicable.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Trade unions are recognised in Portuguese Law and its respective regime but are primarily ruled by the Portuguese Republic Constitution and by the Labour Code.

Portuguese law recognises each employee the right to affiliation, which means they may become a member and leave any trade union. Portuguese trade unions cover almost all existing professional activities.

Trade unions and employers' associations are governed by statutes and regulations approved within the organisation and members of the governing bodies are freely and democratically elected. An employer who unjustifiably prevents the exercise of the right provided for in the previous paragraphs commits a very serious administrative offence, punishable from 2,040 to 61,200 euros.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Employees have the right to join unions and similar organisations to protect and advance their social and professional interests. These organisations include unions, federations, leagues, and confederations.

Trade unions are entitled to develop their activity within the premises of employers, namely through union delegates, union committees and inter-union committees.

Employers are legally prevented from interfering with union activities, even with the purpose of promoting, supporting or financing trade unions.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Unions are entitled, among others, to negotiate collective labour agreements, render economic or social services to their members, participate in the preparation of labour legislation, initiate and intervene in legal and administrative proceedings concerning the interests of its members, take part in undertaking restructuring processes, establish relationship or membership in international union associations.

### a. Number of Representatives

The number of union representatives a trade union can appoint within the same company is based on the number of company's employees.

- Less than 50 employees: 1 member
- 50 to 99 employees: 2 members
- 100 to 199 employees: 3 members
- 200 to 499 employees: 6 members
- more than 500 employees: number of members is the result of the formula  $6 + [n - 500] : 200$ , where n is the number of unionised employees.

### b. Appointment of Representatives

# XI. TRANSFER OF UNDERTAKINGS

## EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

When a transfer of undertaking occurs, all employment contracts are automatically transferred to the new employer. This means the employee's rights, responsibilities, and terms of the contract, such as wages, seniority, and working conditions, are maintained without any need of renegotiation.

Employees have the right to object to the transfer. If an employee does not wish to work for the new employer, they may oppose the transfer under certain specific conditions provided in the law. In such cases, the employment contract can be terminated, and the employee may be entitled to compensation, as if they were dismissed without just cause, unless they terminate the contract for another legitimate reason.

Both the old and new employers are required to inform and consult employees (or their representatives, such as unions or works councils) about the transfer in advance. Employees must be notified of the reasons for the transfer, its legal, economic, and social implications, and any potential changes in their working conditions.

Both the former and new employer may be held jointly liable for obligations arising before the transfer, for a certain timeframe. This includes, among others, outstanding wages, holiday pay or any social security contributions due to employees. This ensures that employees are not left vulnerable

if the previous employer had failed to meet its obligations before the transfer.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The transferor and the acquirer must consult the representatives of the respective employees prior to the transfer, with a view to reaching agreement on the measures they intend to apply to the employees following the transfer, without prejudice to the legal and conventional provisions applicable to such measures.

At the request of either party, the competent department of the ministry responsible for the labour area shall take part in the negotiation, with a view to promoting the regularity of its substantive and procedural instruction, the conciliation of the interests of the parties, as well as respect for the rights of the employees.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employers and employees in Portugal are generally free to negotiate the terms of their employment relationship. Nonetheless, the Portuguese Labour Code establishes certain minimum working conditions that cannot be overridden, except in some cases by Collective Regulation Instruments. Such agreements may only modify these conditions if they provide more favourable terms for employees and do not contradict the legal terms regarding the following aspects:

1. Personality rights, equality and non discrimination
2. Protection during parenthood
3. Labour developed by minors
4. Employees with reduced working capacity, disabilities or chronic illness
5. Student employees
6. The employer's duty to provide information
7. Limits on the length of normal daily and weekly working periods
8. Minimum length of rest periods, including the minimum length of the annual holiday period
9. Maximum working hours for night employees
10. Form of fulfilment and guarantees of remuneration, as well as payment for overtime work
11. Remote work
12. Prevention and remedying of accidents at work and occupational diseases and the legislation that regulates it
13. Transfer of company or undertaking
14. Rights of elected employees' representatives.

### SALARY

The minimum statutory wage for 2025 is EUR 870 per month and applies to all full-time employees, irrespective of their age and experience.

Collective Regulation Instruments may establish specific benefits as well as a minimum salary above the minimum statutory wage, based on the employees' professional category and job level.

Employees are entitled to 14 monthly payments per annum:

- 11 payments corresponding to 11 months of work actually performed
- A 12th payment corresponding to holiday remuneration
- A 13th payment corresponding to holiday bonus and
- A 14th payment corresponding to Christmas bonus.

Although not mandatory under the general regime, it is common for employees to receive meal allowance, paid daily per each day of effective work performed, either in cash or in meal card.

Collective Regulation Instruments may foresee this benefit (also common), in which case it is mandatory.

Some companies (such as multinational corporations) frequently also offer the following benefits (although not necessarily all of them) to their employees:

- Participation in health insurance scheme
- Participation in life insurance / private pension scheme
- Participation in variable remuneration/ bonus / incentive scheme
- Participation in share / stock option scheme
- Company car
- Education vouchers (that co-fund schooling expenses)

### MAXIMUM WORKING WEEK

Generally, an employee is subject to maximum working hour limits as follows:

- Eight hours per day
- 40 hours per week

Key points related to working hours include:

- **Normal working hours:** The typical full-time schedule cannot exceed 40 hours per week or 8 hours per day.
- **Overtime:** In general terms, any work performed beyond the standard daily or weekly limits requested by the employer is considered overtime and must be compensated with higher pay and/or additional time off, depending on the circumstances.
- **Flexible Schedules:** Other working time regimes may be agreed, for example, exemption from normal working hours agreements pursuant to which an employee is not bound by a fixed work schedule; collective bank of hours; or adaptability regime under which the employee's normal work period is defined in average terms over a given period.



- **Reduced Schedules:** Part-time employment may be agreed upon; Additionally, Collective Regulation Instruments can reduce the working week to fewer hours.
- **Rest periods:** Employees are also entitled to a minimum rest period of 11 consecutive hours between two working days/periods and at least one full day off per week (general regime - Sunday). Additionally, the work period must be interrupted by a rest break with a duration of no less than one hour and no more than two hours, ensuring that the employee does not work for more than five consecutive hours without a break.
- **Flexible or reduced schedules:** Some exceptions apply, such as in cases of exemption from working hours, part-time employment, or specific employment contracts. Additionally, Collective Regulation Instruments can reduce the working week to fewer hours.

## OVERTIME

Overtime occurs when an employee works more than the established daily or weekly working hours.

It must be duly justified and it may be required for reasons such as increased workload, extraordinary business needs or emergency situations.

The law sets limits on the amount of overtime an employee can work, which generally cannot exceed: 2 hours per day and 150 hours per year for most employees. These limits may vary based on specific Collective Regulation Instruments or business sectors.

Overtime is remunerated as follows (under the provisions of the Labour Code): If the employee renders less than 100 hours annually of overtime work:

- An additional 25% for the first hour or fraction and an additional 37.5% per subsequent hours or fraction, on normal working days
- An additional 50% per hour or fraction on weekly rest days or public holiday

If the employee renders more than 100 hours annually of overtime work:

- An additional 50% for the first hour or fraction and an additional 75% per subsequent hours or fraction, on normal working days
- An additional 100% per hour or fraction on weekly rest days or public holiday

The performance of overtime is subject to statutory limits.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Under Portuguese law, employers are required to organize occupational safety and health services according to specific modalities, which are outlined in the legislation to ensure compliance with safety standards, the most relevant being the following:

1. **Internal Service (Serviço Interno):** The company organizes its own internal occupational safety and health (OSH) service. This is typically required for companies with higher risk activities or those employing a large number of workers. The employer is also required to appoint qualified personnel responsible for implementing health and safety measures.
2. **External Service (Serviço Externo):** Companies can outsource their occupational safety and health services to specialized external entities certified for this purpose. The external service provider must comply with all legal requirements and ensure that the company adheres to health and safety standards.
3. **Mixed System (Sistema Misto):** In some cases, companies may choose a mixed approach, combining internal and external services. For example, they may maintain internal staff for certain areas while outsourcing others.

Once the employer selects the appropriate modality, they must implement safety measures in line with the law. This includes creating emergency plans, conducting risk assessments, providing training, and ensuring ongoing compliance through regular safety checks and employee health evaluations.

In addition to these modalities, employers must also take into account specific obligations, such as training a sufficient number of employees in first aid, fire safety, and evacuation procedures, providing safety and health training relevant to each employee's job, and ensuring proper medical examinations and work accident insurance coverage for all employees.

## COMPLAINT PROCEDURES

In addition to filing internal complaints within the Company, employees have the right to report any legal violations to the Authority for Working Conditions ("Autoridade Para as Condições de Trabalho"). This entity is responsible for overseeing compliance with labour laws, particularly those related to health and safety in the workplace. The ACT also has the authority to investigate reported violations and impose penalties on employers for non-compliance with the relevant legislation.

### Protection from Retaliation

Under Portuguese law, employees cannot be penalized for leaving their workstation or a hazardous area when faced with serious and imminent danger. Additionally, they are protected from any disciplinary action for taking measures to safeguard their own safety or the safety of others in such situations.



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## I. INTRODUCTION

Romanian employment law is the product of constant changes made over the last years in order to establish equilibrium between the power of union organisations and the power of the employers. This has proven a hard task. As a result, Romanian legislation has both pro-employee regulations, being one of the few that establishes the mandatory reinstatement of wrongfully dismissed employees, allowing all union organisations, in some instances including non-representative unions and union federations to participate in collective negotiations at the company level, as well as pro-employer regulations limiting the right to strike for employees under collective agreements.

### KEY POINTS

- Most disputes involve financial claims from employees that usually include overtime payment, granting of working conditions, bonuses, etc. Employers often face collective actions from employees regarding these financial claims. Unions usually promote such collective actions.
- Unions must represent 35% of the employees in one company in order to be representative and part of a collective agreement, meaning that one employer could have two distinct representative unions. For employers that don't have representative unions, the right to negotiate and conclude a collective agreement is recognized to unions that are not representative and employees representatives are to be elected only when there are no unions present in the Company.
- Employers have the right to regulate working hours, but special legal provisions limit this right.
- Great importance is given to the form of the documents drafted by the employer. Court cases usually involve verifying the form of the documents and a significant number of rulings are based exclusively on this aspect.
- Strict regulations apply to individual and collective dismissals. In case of unlawful dismissal, the employee has the right to reinstatement and is granted all financial rights for the entire period in which he was unlawfully dismissed. Dismissed employees will often sue for unlawful dismissal.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

The Labour Code prohibits any type of discrimination, harassment or victimisation based on the protected

criteria determined by Article 5 – race, citizenship, ethnicity, colour, language, religion, social origin, genetic traits, gender, sexual orientation, age, disability, non-contagious disease, HIV infection, political option. Discrimination, whether direct or indirect, or discrimination by associations sanctioned under the same rules. In employment law related matters, special attention has to be paid to discrimination on union affiliation. Also some positive discrimination treatments such as reduced pension age for women, or salary bonuses based on solely the period of are being gradually replaced by neutral regulations. Victimisation is defined as any adverse treatment triggered by a complaint in general or by a case lodged with the courts of law regarding infringement of the principle of equal treatment and non-discrimination. Protection against victimisation is not limited by Romanian law to the complainant but also extends to the witnesses. At this time, no legal definition of “affirmative action” exists under the law, nor have any legal provisions been established on this issue.

As of 2020, the Labour Code also prohibits discrimination by association, meaning that individuals who are not part of a minority are also protected against discrimination, if they are regarded as being associated with that minority.

### PROTECTIONS AGAINST HARASSMENT

Harassment in general, is defined and sanctioned as any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, belonging to a disadvantaged group, age, handicap, refugee or asylum seeker status or any other criterion, which leads to establishing an intimidating, hostile, degrading or offensive environment. Moral harassment is defined as being any improper behaviour that takes place over a period, is repetitive or systematic and involves physical behaviour, oral or written language, gestures or other intentional acts that could affect personality, dignity or psychological or physical integrity of a person. Court cases where employees claim moral damages for psychological harassment at the workplace have increase substantially over the last years. Sexual harassment, which is tied to a working relationship, is a criminal offence. For years this was the only type of harassment recognised by Romanian law. However, only a few cases of sexual harassment have been registered in Romanian courts, even when criminally prosecuted. As of November 2023 employers need to implement internal guidelines

regarding the prevention and fighting of sexual and moral harassment at the workplace and have a designated individual that should investigate all harassment claims, propose remedial measures and help with the implementation of the guidelines.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The concept of reasonable accommodations for persons with disabilities is not included in the Romanian Anti-discrimination Law. Moreover, whilst the special legislation on the promotion and protection of the rights of persons with disabilities prescribes a definition for the term "reasonable accommodations", it is without any provision for sanctions. There were no incidents on restriction on the employee's religious practices, such as wearing distinctive religious objects or working hours. As stated, the Labour Code offers the opportunity to employees of all legally recognised religions to benefit of 2 paid holidays for each of the 3 major religious holidays. There are no quotas legally imposed in order to enforce equal opportunity for female employees. Usually, gender inequality in terms of payment is not a prominent issue; Romania having one of the lowest pay gaps in Europe. Each employer that employs more than 50 employees, has the obligation to either employ individuals with disabilities or to contribute to a special fund for the inclusion of individuals with disabilities in the workforce.

## REMEDIES

In case of suspicion of discrimination, the employee can seek remedies, either of administrative nature – filing a complaint to the NCCD, or of civil nature, filing a case directly in front of the national courts. For harassment and in particular for sexual harassment claims, the employee can address the police or the public prosecutor's office as this is considered to be a criminal offence. The employee can ask the NCCD or the court to establish that there is a case of discrimination. Both institutions can order the employer to stop the discriminating treatment and to take measures in order to avoid similar treatment. As stated the NCCD can apply fines to the employer if it finds that there is a case of discrimination. The courts can offer compensation if the employee asks for it and proves that there was a prejudice sustained that can be valued in money.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

In Romania, there are mandatory pensions, healthcare, unemployment common national systems that apply to all employees and employers. There are mandatory contributions made to each of these systems, by the employees. The employer pays a single contribution. The systems cover predetermined benefits for the employees. For

the employer, the required monthly contribution is 2.25% of the gross income for each employee. For the employee, the required monthly contributions are 25% of the employee's gross income for the pension system and 10% of the employee's gross income for the healthcare system.

## HEALTHCARE AND INSURANCES

Apart from the mandatory contributions that we referred to previously there are no other mandatory insurances that the employer is required to provide. Additional health and life insurance can be provided by the employer as a benefit. The fiscal regime of such benefits takes into consideration the amount paid by the employer.

## REQUIRED LEAVE

### Holidays and Annual Leave

There are approximately 17 public holidays in Romania and the workers are entitled to remuneration for each. Since some of the public holidays are religious there are legal provisions that state that paid holidays are to be granted to employees of other religions than the Christian Orthodox, considered majoritarian in Romania. Employees have the right to benefit from a minimum of 20 working days of paid annual leave each year. Compensation with financial benefits is only allowed in case of the termination of the employment. The employer has to ensure that employee benefits from a continuous period of 10 consecutive working days of paid annual leave.

Romanian law establishes a minimum duration of 20 working days of annual paid leave. The social partners may negotiate a collective employment agreement that provides more favourable conditions for the employees. Except for the case of terminating the employment contract, an employer cannot replace the right of the employees to a minimum annual holiday entitlement with the payment of the indemnity for the holiday.

### Maternity and Parental Leave

Romanian law provides for a period of 126 mandatory maternity leave days, of which 63 days can be granted before the due date and 63 days after the due date. The employee can receive more than 63 days for each of the periods, but has to benefit from at least 42 days of leave after the due date. The maternity leave is considered a medical leave, the employee's physician being the deciding factor in how the days are divided between the two periods.

Paternity leave is granted to the father of the newborn child for a duration of at least 10 working days, with the possibility of an additional 5 working days being granted if the father undergoes childcare training. The indemnity for the paternity leave is paid by the employer.

Apart from maternity leave, parents can also benefit from a paid leave in order to raise a young child, up



to 2 years of age, or if the child has a disability up to the age of 3 years. During this leave period the parent receives an indemnity that is a percentage of the income the parent had prior to the leave period. Incentives are granted to parents that return to work before the 2-year period expires. The indemnity is not paid by the employer.

### **Sickness and Disability Leave**

Medical leave is granted to the employee if the illness prevents him/her from performing his/her activity. The medical leave indemnity is paid by both employer and the state healthcare system depending on the number of days of medical leave. The first 5 days of medical indemnity are paid by the employer and the rest of the period by the state healthcare system. The indemnity is a percentage of the income of the employee.

Disability leave can be a form of medical leave or a form of pension, depending on the type of disability (people with permanent disabilities that cannot work benefit from a special type of pension).

### **Other Required or Typically Provided Leave(s)**

Employees have the right to paid or unpaid training leave. The employer has to grant paid training leave if he failed to ensure the periodic training of the employee. Unpaid training leave can be granted to employees who engage in training activities on their own initiative.

Parents have the right to receive paid leave if they have children under the age of 12 enrolled in schools where classes were suspended due to exceptional events (such as extreme weather or medical crisis). Only one of the parents can benefit from this type of leave and only if neither of the parents work from home. Parents of young children can also benefit for 4 days of work from home.

## **PENSIONS: MANDATORY AND TYPICALLY PROVIDED**

The mandatory contribution to the pension system covers in Romania 2 Pylons of the pension system – the state provided pension (Pylon 1) and the mandatory private pension (Pylon 2). In order to fund these two pylons, the mandatory pension contribution of both the employer and the employee are divided between the state pension system administrator and private insurance companies. The percentage of the mandatory contribution that is given to private insurance companies is very low; 4.75% in 2024.

In addition to these 2 mandatory pylons the pension system in Romania recognises 2 more pylons. Pylon 3 or the individual facultative pension system allows the employee to contribute to a private pension system with up to 15% of his monthly income, while pylon 4 allows the employee to contribute to a private pension system without any limits to the contributions. Pylon 4 pension plans usually include

life insurance. Pylons 3 and 4 are not mandatory. The employer can offer the employees the benefit of one of these facultative insurances. In addition to contributions to the national healthcare system the employer can offer the employees the benefit of private health or life insurance.

### **Other Required or Typically Provided Benefits**

Any uniform or equipment necessary for health and safety reasons will be provided, free of charge, to the employee by the employer. In certain industries where there are known risks to the health of the employees (such as exposure to toxic or irritant materials) additional rights to cover what is known as a protection diet should be granted. The employer can also grant daily meal tickets to employees as an additional benefit. The meal tickets are strictly regulated, have a legally established value, and have a distinct fiscal treatment (they are not subject to tax for the contribution for the pension fund). The maximum value of a meal ticket is set by legal provisions, but employers can grant meal tickets for lower values than the maximum set by these legal provisions. Employers can grant vacation tickets (vouchers) with distinct fiscal treatment that can only be used for traveling services within the country. Vacation tickets are more common in public companies. Other forms of benefits that can be granted by the employer are the kindergarten tickets or gift tickets, all having a distinct fiscal treatment.

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

As a rule, the individual employment agreement is an unlimited (open-ended) term contract. However, the individual employment contract may also be for a fixed-term or part-time. Any kind of individual employment contract must be concluded in writing, in the Romanian language and on the basis of both parties' consent (employer and employee). Before the beginning of the employment relationship, the employer has the obligation to conclude the individual employment contract and register it with the employees' electronic program (ReviSal).

When negotiating the employment contract, both the employer and the employee can be assisted by third party specialists, including lawyers.

### **FIXED- TERM/OPEN- ENDED CONTRACTS**

Open-ended contracts are the rule under Romanian law. Fixed-term contracts may be concluded only for the limited cases provided by the Labour Code (requires that agreement states essential information and the duration of the contract).

## TRIAL PERIOD

In order to verify the skills of the employee, the parties may agree upon a probationary period, mentioned within the individual employment contract, of a maximum 90 calendar days for standard positions and a maximum 120 calendar days for managerial positions. With respect to disabled persons, the probationary period will be of a maximum 30 calendar days.

## NOTICE PERIOD

The individual employment contract may be terminated by the employer or by the employee. In case the contract terminates due to the employer's decision, with the exception of 1) dismissal for disciplinary reasons or 2) if the employee is arrested for more than 30 days, the employee is entitled to a notice period of no less than 20 working days. In case the contract terminates due to the employee's decision to resign, he has the obligation to respect a notice period of 1) no more than 20 working days for standard positions and 2) no more than 45 working days for managerial positions. The employer has the right to waive the notice period and to agree to terminate the contract due to the employee's will, at any moment before the end of the notice period. Employees can resign without observing the notice period if the employer fails to comply with one or more of its obligations.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In Romania, citizens of the EU or the EEA do not need a work and residence permit. Foreign citizens (who are not EU or EEA citizens) must obtain a work permit in order to perform activity as an employee. Citizens of neighbouring non-EU countries – Republic of Moldova, Serbia and the Ukraine can be employed under certain conditions without working permits. Special provisions also apply in regards to Ukrainian citizens as a result of the conflict in Ukraine. The work permit is issued by the Romanian Office for Immigration. As a rule, the work permit is issued for a one-year period. The number of working permits issued every year is limited and is determined by the government. In 2024, the maximum number of working permits that could be issued was the highest ever, with 100,000 new working permits made available. Non-EU and EEA citizens have the right to work in Romania under certain conditions.

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

In order to hire an employee under Romanian law, the

employer does not need to have a national legal entity but the employer need to comply with the obligation to register the employment agreement with both fiscal and employment authorities. Employees of foreign companies can perform work in Romania based on their existing employment agreement, or can be dispatched to a Romanian company.

## LIMITATIONS ON BACKGROUND CHECKS

Private companies cannot conduct background checks, other than requiring information from the candidate and recommendations from previous employers. In cases when specific legal provisions are in place prohibiting individuals with criminal records or with specific types of criminal offences to occupy a position (such in some of the key position for the financial sector, in security or in childcare and education) presenting a clear criminal record prior to being hired might be required. The employer has to ask the candidate for a medical certificate that ascertains that the candidate is medically fit to be employed, since his medical fitness prior to the signing of the agreement is an issue of the employment agreement's validity.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

There are limited legal provisions on hiring practices in Romania. The Labour Code states only that the employee has to be informed on the essential clauses of the individual employment agreement during the hiring procedure. Ordinarily, vacant positions that are to be filled by hiring new personnel are advertised in media and/or on specialised on-line sites with general access. For public institutions there are specific rules on publishing the available jobs on their own website and in the Official Bulletin (local or national editions). The employer can ask for a CV and select only some of the candidates to meet with. Job interviews are held either face-to-face, over the phone, or using live video messaging technology.

There are no rules or express limitations on what questions the employer can ask the candidate, but it is generally accepted that the questions need not be too personal. Also during the hiring process the employer has to pay attention not to discriminate any category of candidates. To this end, the questions that are asked should not refer to matters that are grounds for discrimination such as: . ethnic or social background, sexual preferences, medical conditions (apart from the ones that make the individual not fit for performing the activity), political views or family situation.

# VI. PAY EQUITY LAWS

## EXTENT OF PROTECTION

The Romanian Constitution, the Labour Code and the law that establishes the salary for employees and public servants working for public institutions and authorities, all recognise the right to pay equity as a fundamental principle. However, employers are not required at this time to disclose information to specialised authorities, report salary levels for the purpose of verification of pay equity, or take any positive action to ensure equality in compensation or benefits. This might change as Romania will implement the EU Directive on pay transparency.

## REMEDIES

An employee challenging equal pay practices can petition the NCCD, which can take administrative measures in order to eliminate the discriminatory practices, or he/she may bring the claim before the local courts directly.

## ENFORCEMENT/LITIGATION

Litigation regarding equal pay in Romania is uncommon for the private sector. In the public sector, there are claims regarding the remuneration system set by law that can result in different payment between individuals performing similar work. However, in ruling on these cases, the discrimination aspect is only one part of the issue.

## OTHER REQUIREMENTS

Employers are not required to take any mandatory positive actions under pay discrimination, gender equality or equal pay laws. According to data collected by Eurostat, Romania has the lowest gender pay gap in the EU, with women under the age of 45 earning consistently more than men.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

There is no legal definition given for restrictive covenants in Romanian legislation. However, some legal provisions allow the inclusion of specific clauses in the employment agreements that can offer a guarantee of good will between the parties. Also, some legal provisions will impose sanctions directly, without the existence of any contractual clauses, for the inappropriate conduct of the employee, with regards to his current or former employer.

The following restrictive covenants are recognised and may be enforceable under the law:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

If the non-compete clause was agreed upon at the beginning of the employment and it is not the intention of the employer to enforce the clause, a new agreement regarding not enforcing the non-compete clause after the termination of the employment needs to be reached by both parties. In case of breach of the covenants, or any other similar clauses included in the employment agreement, the party who wants to enforce the clause has to address the court.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is not regulated under Romanian law. If the employment is terminated and the employer does not require the presence of the employee during the notice period, he can ask the employee to not perform work during the notice period. In case of resignation, the employer can waive his right to benefit from the notice period, meaning that he can agree for the employee to stop working immediately (and not pay the employee anymore). However, in case of dismissal the employer has to be careful in forcing the employee not to work during the notice period since the employer still preserves his constitutional right to work. Some collective employment agreements have provisions that allow the employee that was dismissed to perform work only for half of the normal working hours during the notice period in order for the employee to be able to actively seek employment (in this case it is up to the employee if he wants to benefit from this contractual clause).

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

On objective grounds and with the use of clear internal procedures, the employer can restrict the employee's use of Internet and social media during working hours. This restriction applies to the use of the Internet and social media on company provided platforms, including portable devices.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

A relevant national case that was brought to the attention of the European Court for Human Rights, confirmed that in the case where the employer has strict, clear and objective rules on the use of the Internet, and other programs that require Internet use, such as instant messaging programs, and which had been acknowledged by the employee, the violation of such rules can result in a disciplinary action and even in a disciplinary dismissal.



## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

If the employee has any confidential information as a result of their position within the company, they cannot divulge such secret with the use of social media. A ruling of a national court established that the social media is a public space, even if it has restrictions on access, meaning that any mentions on social media are to be regarded as publicly made. Also as a result of the general principle of conducting the relationship on good faith, the employee should refrain to make public affirmations that could discredit his employer.

Using social media in a manner that may affect the image or even the activity of the employer, may result in disciplinary action against the employee. Also, if the image or the activity of the employer is severely affected, the employer can also claim a financial compensation from the employee. Using confidential information and making it available on social media without authorisation can also lead to the disciplinary sanctioning of the employee, and may be grounds for a financial compensation claim.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FORS FOR TERMINATION

Under Romanian law, the employment contract may terminate de jure, by mutual consent or at the initiative of either of the two parties. The grounds for dismissal must have a real and serious cause and there are two types of valid grounds: objective grounds and economic grounds. The dismissal for economic grounds may be individual or collective. A dismissal for reasons not related to the person of the employee, is the termination of the individual employment contract determined by the cancellation of the employee's position, for one or several reasons, which are not connected to the employee's person. The cancellation of the position must be effective and have a real and serious cause. The dismissal of employees for reasons related to their person can be a result of a disciplinary offence, of the employee being under arrest or house arrest for more than 30 days, or of the employee being medically or professionally unfit.

### COLLECTIVE DISMISSALS

The employer needs to observe a procedure that is set by the Labour Code that includes notifications that need to be sent to the unions or representatives of the employees, as well as labour authorities. The Labour Code also includes mandatory terms to be observed during the procedure. Failing to comply with the procedure can result in the annulment of the dismissal.

## INDIVIDUAL DISMISSALS

For the objective grounds dismissal, the employer must respect the specific procedure stipulated by the Labour Code. In case of dismissal for disciplinary reasons, the employer must follow the preliminary investigation, in order to establish the breach of the employment contract's provisions or of the internal regulations. In case of dismissal for poor performance, the employer must first establish the grounds by the evaluation procedure. In all cases, the employer must issue the dismissal decision within 30 calendar days from the date the employer acknowledged the cause of the dismissal.

### IS SEVERANCE PAY REQUIRED?

Severance pay for individual dismissals is to be paid only if it is agreed as such in the individual or collective employment agreement. The only time that the Labour Code states that a severance payment (not specifying the amount) should be negotiated is for physical and/or mental unfitness to perform the activity required by the job description. The Labour Code only states that such compensation should be negotiated in the collective employment agreements, meaning that in the absence of such an agreement, the employer cannot be made to pay the employee any amount upon his termination.

## SEPARATION AGREEMENTS

A separation agreement is neither required and are considered best practice in Romania only in cases when the parties reach a mutual agreement to terminate the employment. The age of the employee usually does not affect the working relationship, apart from the case of reaching the legal pension age, when the individual employment agreement ends de jure, if the employee does not request to continue his/her employment and/or the employer does not agree to the continuation. Employers cannot restrict the right of women who have reached the standard retirement age for women, to continue their employment until they reach the standard retirement age for men (the process of equalising the retirement age for men and women is ongoing). Employees 18 years of age or younger, can enter into a separation agreement under the same set of rules used to enter into a legally enforceable employment contract, e.g. if the employee is younger than 16, parental consent is needed, but if they reached the age of 16 they have full exercise of their work capacity, that also includes the right to decide on the employment by concluding a separation agreement.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The employees seeking to challenge wrongful termination can file a claim in court against the employer. If the Tribunal finds that the dismissal decision is not legal or has no grounds (this being a rarer motif for the annulment of the dismissal

decision as most commonly they are annulled for reasons related to their legality), a court ruling annulling the dismissal decision is issued. The employee will be reinstated (automatically if they asked to be reinstated and the dismissal was found illegal or without grounds) and is entitled to payment of all financial rights they would have obtained if they were not wrongfully dismissed.

## WHISTLEBLOWER LAWS

Romania has implemented the EU Directive on the protection of whistleblowers by adopting Law No. 361/2022. Employers with more than 50 employees were allowed one year, up until December 17th 2023 in order to adopt internal procedures regarding internal reporting by whistleblowers and to implement internal channels of reporting. They also need to designate an individual that will be responsible for registering the reports, investigating the claims and propose measures based on the result of the inquiry. Whistleblowers are protected against any type of retaliation and if they consider that they were a victim of retaliation and they challenge in court the measure that they consider to be retaliatory, they can ask for a specialized legal representative (lawyer) to be provided.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Employees' and employers' organisations are structured by level: starting from the company level, where there are unions as organisations; sectoral level where there are employers' organisations and union federations; and the national level where there are employers' organisations and union confederations.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

The representative trade union is entitled to receive from employers, any necessary information for the negotiation of the collective labour agreements and other agreements related to the employment relations. Since a union needs 35% of the company's employees to be representative, and only a limited number of unions can reach the required number of members in order to become representative, Romanian law also allows non-representative unions and under certain conditions union federations that are representative at the sectoral level (representing at least 7% of the employees in the sector) to participate in collective negotiations at the company level.

The trade unions play a key role in collective bargaining, but they also have significant consultation and information rights. Also, based on a specific empowerment from their members, trade unions have the right to register petitions and to sustain their members' interests before the local courts. The representatives enjoy some of the rights that the representative unions have in gaining access to relevant information and being consulted in specific matters (such as when the employer wants to implement a new internal regulation) and can participate in collective negotiations.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

European legislation on works councils was transposed in Romanian legislation, but few companies actually have such representative bodies. The role of works council in the employer-employee relationship is reduced. Most of the rights that the works councils have involve only receiving information from the company on important matters.

Health and safety committees have an important negotiation role. The employer's representatives and the employees' representatives discuss and agree upon health and safety measures, but also on social and economic matters within these structures.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The transfer of an undertaking, business or part of a business to a new owner by agreement is subject to the Labour Code and Law no. 67/2006. The legal provisions grant a strong protection for the employees subject to the transfer. Prior to the transfer, both the seller and the purchaser have the obligation to consult their trade unions or the employees' representatives with respect to the judicial, economic and social implications related to the transfer of undertaking.

All of the seller's existing rights and obligations arising from the employment contracts and collective labour agreements will be transferred to the purchaser, except for cases when the seller is subject to restructuring or insolvency procedure. Nevertheless, the transfer of undertakings cannot be a reason for the individual or collective dismissal of the transferred employees by the seller or purchaser.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

According to Law no. 67/2006, the seller has the obligation to notify the purchaser about all the

rights and obligations that are transferred between parties. The purchaser is bound by all rights and obligations resulting from the existing employment contracts at the time of the transfer and has the obligation to maintain all the rights until the contracts expire or are terminated. Beginning one year following the transfer, the purchaser has the possibility to renegotiate the collective clauses with the employees' representatives.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have certain minimum rights granted by the law and the parties' negotiation cannot stipulate conditions or rights below the legal minimum provisions. Any contractual clauses that are meant to establish rights below the minimum ones are null.

### SALARY

As of 1 July 2024, the minimum gross monthly wage for a 168-hour work month is: LEI 3,700.00 (approx. EUR 743.00 or USD 824.00) that applies as a general rule in the sectors where there are no specific regulations; and LEI 4,582.00 (approx. EUR 920.00 or USD 2021.00) for jobs in the construction sector.

Employers cannot pay a full-time employee less than the minimum gross monthly wage. An employee cannot be paid the minimum wage for a period of more than 2 years. Special provisions apply to public servants. The negotiation of the monthly wage is individual, as a rule. Employees can be granted other benefits, financial or otherwise, such as supplementary insurances, the use of a company car and/or other company owned property (housing, telephones, laptops, etc.). Fiscal treatment of each benefit is to be determined according to the Fiscal Code (some of the benefits are exempted of all fiscal taxes, some are exempted up to a set monthly limit, some are exempted of some of the fiscal taxes and some are considered to be part of the monthly wage).

### MAXIMUM WORKING WEEK

The maximum average working time consists of 40 hours per week and 8 hours per day, and the maximum legal working time is 48 hours per week, including overtime. By exception, the maximum working legal time, including overtime may be extended over 48 hours per week, under the condition that the average working hours calculated for a 4 month period, will not exceed 48 hours per week. For certain activities, the parties (the social partners, employees' representatives and employers' representatives) may negotiate a period of more than 4 months, but not longer than 12 months.

### OVERTIME

Romania's stringent working hours' regulations are significantly stricter than its EU counterpart. Overtime shall be compensated with paid, off hours in the course of the next 90 days. If compensation is not possible within that 90-day timeframe, the overtime shall be paid to the employee by adding a bonus to the salary. The overtime addition cannot be lower than 75% of the base salary. Employees who are not 18 years old are prohibited from overtime work. Part-time employees cannot work overtime. The employee's total working hours for one month, including overtime is recorded in writing on the pay slip.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

With regards to the measures to be implemented for the health and safety of their employees, employers should bear in mind that there exists a series of principles aimed at preventing health and safety issues, such as avoiding risks, evaluating the risks that cannot be avoided, adapting the work to the individual, especially when designing the workplace and when choosing the equipment, as well as work methods and training for employees. At every employer's level, a health and safety committee has to be organised. Equal numbers of members will represent the employees and the employer within this committee. A medical certificate is necessary to conclude the individual employment agreement. Also, periodic medical check-ups are to be performed by a specialised doctor.

### COMPLAINT PROCEDURES

Employees can bring health and safety issues to the attention of the employer through their representatives in the health and safety committee, or directly to the individual responsible for the health and safety. Should the employer not take any action based on the employee's complaint, the employee can address the local Labour Inspectorate directly. The local Labour Inspectorate will conduct periodic inspections regarding the manner in which the employer complies with the health and safety rules. The employees can also seek redress through the local courts.

Health or safety incidents are to be announced to specialised public authorities that can investigate the conditions of such incidents, establish any fault of the employer or the employee and also impose measures to be taken in the future in order for such incidents to be avoided. Not informing the local labour inspectorate about health and safety incidents can result in fines for the employer.



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## I. INTRODUCTION

The Singapore employment legal system is comprised of employment legislation and common law principles. In addition, guidelines and advisories from the Ministry of Manpower ("MOM") and the Tripartite Alliance for Fair & Progressive Employment Practices ("TAFEP") (consisting of the Ministry of Manpower, National Trade Union Congress and Singapore National Employers Federation) are highly persuasive. Employment-related claims in Singapore can be heard in the Employment Claims Tribunal, State Courts of Singapore and the Supreme Court of Singapore.

### KEY POINTS

- The Employment Act is Singapore's main piece of employment law legislation and provides for the basic terms and working conditions for employees.
- All employees (whether foreign or local) are covered by the Employment Act, except for seafarers, domestic workers and statutory board employees or civil servants.
- Singapore is an at-will employment jurisdiction.
- Minimum salary levels are not prescribed by legislation and therefore, there is generally no minimum wage in Singapore, except for a progressive wage model which applies to certain employees in certain sectors.
- A social security scheme called the Central Provident Fund is mandatory for Singapore Citizens and Singapore Permanent Residents.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Employers must recruit and select employees on the basis of merit (such as skills, experience or ability to perform the job), and regardless of age, race, gender, religion, marital status and family responsibilities, or disability, treat employees fairly, provide employees with equal opportunities and reward employees fairly.

Employers are required to abide by the Tripartite Guidelines on Fair Employment Practices, which set out restrictions against discriminatory hiring practices. While these guidelines are not legally enforceable, they are highly persuasive and failure to abide by these may result in enforcement actions taken against the employer. Such actions may include having the employer's work pass privileges curtailed.

Additionally, a new workplace fairness legislation is expected to be implemented by end 2024. Amongst other measures, the new workplace fairness legislation would prohibit workplace discrimination covering all stages of employment and prohibit any retaliatory action against those who report cases of discrimination or harassment.

### PROTECTIONS AGAINST HARASSMENT

The Protection from Harassment Act of Singapore covers acts of harassment within and outside the workplace. The TAFEP has published the Tripartite Advisory on Managing Workplace Harassment, which employers should abide by. This includes following the recommendations below to prevent and respond to harassment at the workplace:

- develop a harassment prevention policy;
- provide information and training on workplace harassment;
- implement reporting and response procedures.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

While there are no specific statutory obligations regarding this, employers should keep in mind their general obligations to hire on the basis of merit, as well as their duty to ensure the health and safety of their employees in the workplace.

### REMEDIES

Any discriminatory job advertisements or human resource practices may be reported to the TAFEP. Where an employee has been dismissed on discriminatory grounds based on age, race, gender, religion, marital status and family responsibilities or disability, the employee may file a wrongful dismissal claim with the Tripartite Alliance for Dispute Management. If the dismissal is deemed to be wrongful, the employer may be ordered to reinstate the employee to the employee's former job and pay the employee for any loss of income due to the wrongful dismissal or pay the employee monetary compensation.

Once the new workplace fairness legislation is implemented, it is expected that a failure to comply with the same would result in range of penalties including corrective orders, work pass curtailment and financial penalties.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

The Central Provident Fund ("CPF") is a mandatory social security savings scheme funded by contributions from employers and employees, that enables working Singapore Citizens and Singapore Permanent Residents to set aside funds for retirement and addresses healthcare, home ownership, family protection and asset enhancement. Employers are required to pay both the employer's and employee's share of CPF contributions every month, and are entitled to recover the employee's share from the employee's wages.

### HEALTHCARE AND INSURANCES

Employers are required to obtain work injury compensation insurance for: i) all employees doing manual labour, regardless of salary; and ii) all employees doing non-manual work, earning a salary of S\$2,100 or less a month (this will be increased to S\$2,600 or less a month from 1 April 2021). Additionally, employers who employ work permit and S Pass holders are required to buy and maintain medical insurance coverage of at least S\$15,000 per year (for policies with start date effective before 1 July 2023) / S\$60,000 per year (for policies with start date effective on or after 1 July 2023) for each work permit and S Pass employee.

### REQUIRED LEAVE

#### Holidays and Annual Leave

By law, employees are entitled to paid public holidays. An employee who has served an employer for a period of not less than 3 months is entitled to a minimum of 7 days of paid annual leave for the first 12 months of continuous service with the same employer, and an additional 1 day of paid annual leave for every subsequent 12 months of continuous service with the same employer, up to 14 days of paid annual leave.

#### Maternity and Paternity Leave

A female employee may be entitled to either 16 or 12 weeks of maternity leave, depending on which eligibility criteria is met.

The first 8 weeks of maternity leave will be paid by the employer pursuant to section 76(1A) of the Employment Act, while the remaining 4 weeks of maternity leave will be unpaid if the female employee has less than 2 living children, or if the female employee has 2 or more children (i.e. twins or triplets. etc.) during the first pregnancy. For the avoidance of doubt, if the female employee has 2 or more living children and the children were born during more than one previous confinement (i.e. not twins or triplets, etc.), the female employee's 12 weeks of maternity leave will be unpaid.

Male employees may be entitled to 2 weeks of government-paid paternity leave with the option

for employers to grant an additional 2 weeks of government paid paternity leave on a voluntary basis if the following requirements are met: i) his child is a Singapore citizen at birth or a Singapore citizen within 12 months from the date of birth; ii) he is, or had been, lawfully married to the child's mother between conception and birth; and iii) he has served the employer for a period of at least 3 months before the birth of his child.

With effect from 1 April 2025, the additional 2 weeks of voluntary government paid paternity leave will be made mandatory, such that male employees who meet the above requirements will be entitled to 4 weeks of government paid paternity leave.

#### Sickness and Disability Leave

Employees are entitled to paid sick leave if they have worked for at least 3 months with the employer. Where the employee is between 3 to 6 months of service, the sick leave entitlement is pro-rated.

Disability leave is not provided for under the laws of Singapore, however the Work Injury Compensation Act may provide for additional medical leave wages in the event of injury.

#### Other Required or Typically Provided Leave(s)

Employees may also be eligible for adoption leave, shared parental leave, infant care leave, childcare leave and extended childcare leave.

### PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Apart from the CPF, Singapore's mandatory social security savings scheme (see above), there is no other mandatory pension scheme in Singapore, nor are these typically provided.

#### Other Required Or Typically Provided Benefits

Other typically provided benefits include dental coverage and medical insurance coverage, where such coverage is not otherwise required (as listed above).

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Employers must issue key employment terms in writing to all employees, such as, amongst others: full name of employer; full name of employee; job title, main duties and responsibilities; start date of employment; duration of employment (if employee is on fixed-term contract); working arrangements, such as daily working hours, number of working days per week and rest day; salary period; basic salary; etc.

## **FIXED- TERM/OPEN- ENDED CONTRACTS**

Fixed-term and open-ended employment contracts are both permitted and common in Singapore. Similar to open-ended contract employees, fixed-term contract employees are entitled to statutory benefits under the Employment Act and other relevant employment related legislation.

## **TRIAL PERIOD**

In Singapore, the length of the probation period is not prescribed nor is it mandatory for there to be a probation period. Common market practice would be for a probation period of between three to six months. Employees on probation are covered by the Employment Act and enjoy the same rights under the Employment Act as full-time employees. The length of an employee's service is calculated from the date on which the employee starts work, and not the date of confirmation.

## **NOTICE PERIOD**

Employers and employees may contractually agree to the length of the termination notice period, though such period must be identical for both employers and employees. Such notice period would usually be set out in the employment contract. Notice can be waived by mutual consent between the employee and the employer. If the employment contract does not specify the notice period, the notice period will depend on the employee's length of service.

# **V. HIRING PRACTICES**

## **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

All foreign employees working in Singapore are required to have a valid work pass before commencing work in Singapore. The most common work passes are Employment Passes, S Passes and Work Permits. When applying for work visas for foreign employees to work in Singapore, the type of work and the individual employee's general skillset determine which work pass is most suitable.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

In respect of Employment Passes, a foreign employer that does not have a registered office in Singapore would need to get a Singapore-registered company to act as a local sponsor and apply for an Employment Pass on their behalf. In respect of S Passes and Work Permits, the employing entity must be a company registered with the Accounting and Corporate Regulatory Authority (ACRA) in Singapore. Please note that foreign employers

which carry on business in Singapore are generally required to register a presence in Singapore with the Accounting and Corporate Regulatory Authority (ACRA) in Singapore.

## **LIMITATIONS ON BACKGROUND CHECKS**

There are currently generally no legal restrictions on an employer (or third party) conducting a background check on a job applicant. Credit checks are in practice conducted for candidates and employees employed in certain regulated roles, where they have access to the employer's assets or deal with financial matters. It is customary practice to ask candidates to sign a self-declaration or statutory declaration that they have or do not have a criminal record. For Singapore citizens, a certificate of clearance may be issued by the Singapore Police Force upon application, which will certify that the individual has no prior criminal convictions in Singapore.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

As employers are required to recruit employees on the basis of merit, questions related to age, race, religion, gender, marital status and family responsibilities or disability may be viewed as discriminatory and should not be asked during an interview.

# **VI. PAY EQUITY LAWS**

There is no specific statutory protection in Singapore that mandates equal pay for equal work. Neither is there any specific legislation preventing gender-based salary discrimination in Singapore. And at this stage, there are no other legal requirements that exist in Singapore.

# **VII. RESTRICTIVE COVENANTS**

## **DEFINITION AND TYPES OF RESTRICTIVE COVENANTS**

Restrictive covenants are used by employers to protect their business interests, by restricting certain activities of an employee for a period of time after the employee's employment with the employer has been terminated.

Under Singapore law, non-compete restrictions are generally prima facie unenforceable, unless they are reasonably required for the protection of the legitimate proprietary rights of the company. The restrictions must also be (1) reasonable in scope, geographical area and duration; and (2) not against public interest.



Generally, such clauses would have to be specifically tailored, taking into account, inter alia, the nature of the company's business, the position/job scope/seniority of the employee and the extent of his access to and influence over customers, etc. in order to be considered reasonable. Whether the restraint sought is reasonable under the circumstances is a question of fact, and would depend on a case-by-case basis.

Similar to non-competition clauses, non-solicitation clauses are generally unenforceable, unless the employer is able to prove that it has a legitimate proprietary interest to be protected by the non-solicitation clause.

## **ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES**

To enforce the restrictive covenants, the employer would first need to bear the burden to prove that the non-compete restriction is reasonable.

In the event that the court/tribunal has found the restrictive covenants to be reasonable and enforceable, and that the former employee has breached the restrictive covenants, the employer may be able to file for an injunction to put a stop to the former employee's breach. The employer may also sue the former employee for damages caused by the breach of the restrictive covenants.

## **USE AND LIMITATIONS OF GARDEN LEAVE**

It is common for employment contracts to include garden leave provisions in Singapore. Where there is no express garden leave clause in the employment contract, an employer may request for an employee to go on garden leave.

# **VIII. SOCIAL MEDIA AND DATA PRIVACY**

## **RESTRICTIONS IN THE WORKPLACE**

It is relatively common for employers to impose a ban on social media usage in the workplace, implement a social media policy governing employees' use of social media in relation to the employer, and provide training on the use of social media.

## **CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?**

An employer may legally monitor its employees' electronic communications where the employer

has obtained the employee's consent for the collection, use or disclosure (as the case may be) of their personal data against notified purposes, which must be purposes that a reasonable person would consider appropriate in the circumstances. Otherwise, the employer must show that the collection, use and disclosure of such personal data falls within the scope of one of the statutory exceptions under the Personal Data Protection Act.

## **EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION**

It is good practice for the consequences of breach of the social media policy to be stated in either a company policy or the employment contract. The employer should follow the disciplinary procedures set out in its own policy or rules. If the employer has no disciplinary policy in place, due inquiry should, in any case, be carried out before disciplinary action is taken.

# **IX. TERMINATION OF EMPLOYMENT CONTRACTS**

## **GROUNDINGS FOR TERMINATION**

Singapore is an at-will employment jurisdiction and employers and employees may terminate the employment relationship in accordance with the employment contract and applicable notice period (and payment in lieu of such notice). In addition, valid grounds for dismissal include misconduct, poor performance and redundancy.

## **COLLECTIVE DISMISSALS**

Employers who go through a retrenchment exercise are required to notify the Ministry of Manpower of the retrenchment, if they have at least 10 employees and have retrenched 5 or more employees within any 6-month period. Employers should also abide by the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment issued by the TAFEP. Each employee should be terminated in accordance with the termination provisions in their respective employment agreements (including the termination notice period or payment in lieu of such notice).

## **INDIVIDUAL DISMISSALS**

Employees should be terminated in accordance with the termination provisions in their respective employment agreements (including the termination notice period or payment in lieu of such notice).

## IS SEVERANCE PAY REQUIRED?

Employees who have served the company for at least 2 years are eligible for retrenchment benefits. Those with less than 2 years' service may be granted an ex-gratia payment out of goodwill. The MOM generally recommends that employees be paid a retrenchment benefit of 2 weeks' to 1 month's salary per year of service in respect of employees who have served 2 years or more and an ex-gratia payment of 2 weeks' to 1 month's salary in respect of employees who have been employed for less than 2 years, subject to the prevailing norm of the industry and financial position of the company.

## SEPARATION AGREEMENTS

A separation agreement is not generally required for terminations under Singapore law, but would be considered best practice. Such practice would be more common for senior employees.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

If the dismissal is deemed to be wrongful, the employer may be ordered to reinstate the employee to the employee's former job and pay the employee for any loss of income due to the wrongful dismissal or pay the employee monetary compensation.

## WHISTLEBLOWER LAWS

Singapore law does not expressly provide for specific statutory protection for whistleblowers in the context of employment. However, certain laws of general application may apply to protect whistleblowers. For instance, under the Prevention of Corruption Act of Singapore, witnesses in civil or criminal proceedings are generally not obliged or permitted to reveal an informer's identity.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Trade unions are generally uncommon in Singapore, though present in certain specific industries such as transport and manufacturing. Trade unions in Singapore are regulated in accordance with the Trade Unions Act of Singapore and other related legislation administered by the Registry of Trade Unions.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

While trade unions are not common in Singapore, they are recognised by the MOM as working to: i) promote good industrial relations between workers and employers; ii) improve the working conditions, as well as the economic and social status of workers; and iii) increase productivity for the benefit of workmen, employers and the economy of Singapore.

Trade unions must first be registered with the Registrar of Trade Unions and then be accorded recognition by the employer before it can represent its members.

Trade unions generally would assist in the carrying out of collective bargaining, negotiation for terms of collective agreements and representing members in trade disputes.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

There are no other types of employee representative bodies in Singapore.

# XI. TRANSFER OF UNDERTAKINGS

## EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

Where the transfer is covered by section 18A of the Employment Act, employees would generally have the right to (i) be notified of the transfer and of matters relating to the transfer; (ii) consult with the employer; and (iii) preserve the original terms and conditions of employment under the new employer.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Where the transfer is covered by section 18A of the Employment Act, the employer would need to ensure that (i) affected employees or their union are notified of the transfer within a reasonable period and regarding the terms of transfer; (ii) ensure there is no break in employment during the transfer; and (iii) ensure that the original terms and conditions of employment are preserved after the transfer.

The new employer would need to ensure that (i) the previous employer is informed of all matters that will affect the employees, so as to ensure that the employees may be informed within a reasonable period; (ii) perform the previous employer's rights, powers, duties and liabilities which are part of any contract or agreement with the employees' union



before the transfer; and (iii) ensure that the original terms and conditions of employment are preserved after the transfer (unless otherwise agreed).

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The Employment Act sets out certain minimum prescribed benefits and working conditions, such as annual and sick leave entitlements and payment of salary. Furthermore, Part IV of the Employment Act, provides additional protections in respect of rest days, hours of work and other conditions of service, only applies to: i) a workman (doing manual labour) earning a basic monthly salary of not more than S\$4,500; and ii) a non-workman employee earning a basic monthly salary of not more than S\$2,600 (managers and executives are generally not covered).

### SALARY

Minimum salary levels are not prescribed by legislation and there is therefore generally no minimum wage in Singapore, except for a progressive wage model which applies to certain employees in certain sectors. In accordance with the Employment Act, employers must pay an employee's salary at least once a month and within 7 days after the end of the salary period.

All employers must: i) issue itemised pay slips to employees covered by the Employment Act; and ii) keep detailed employment records, including salary records, of employees covered by the Employment Act.

### MAXIMUM WORKING WEEK

Where an employee is covered under Part IV of the Employment Act, such employee shall generally not be required to work for more than 6 consecutive hours without a period of leisure; more than 8 hours in one day or more than 44 hours in one week, unless exemptions apply.

### OVERTIME

Where an employee is covered under Part IV of the Employment Act, such employee shall generally not be permitted to work overtime for more than 72 hours a month.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Pursuant to the Workplace Safety and Health Act of Singapore, stakeholders are required to ensure the safety and health of employees in the workplace, so far as reasonably practicable. Stakeholders would include employers, principals, occupiers,

manufacturers or suppliers (including hazardous substances and machinery and equipment), installers or erectors, employees and the self-employed. "Workplace" means any premises where a person is at work or is to work, for the time being works, or customarily works, and includes a factory.

### COMPLAINT PROCEDURES

Employee complaint procedures are not statutorily prescribed in Singapore. Termination of an employee as a punishment or retaliation for the employee exercising his or her employment rights is wrongful and in such cases, employees would be able to make a claim against the employer for wrongful dismissal.



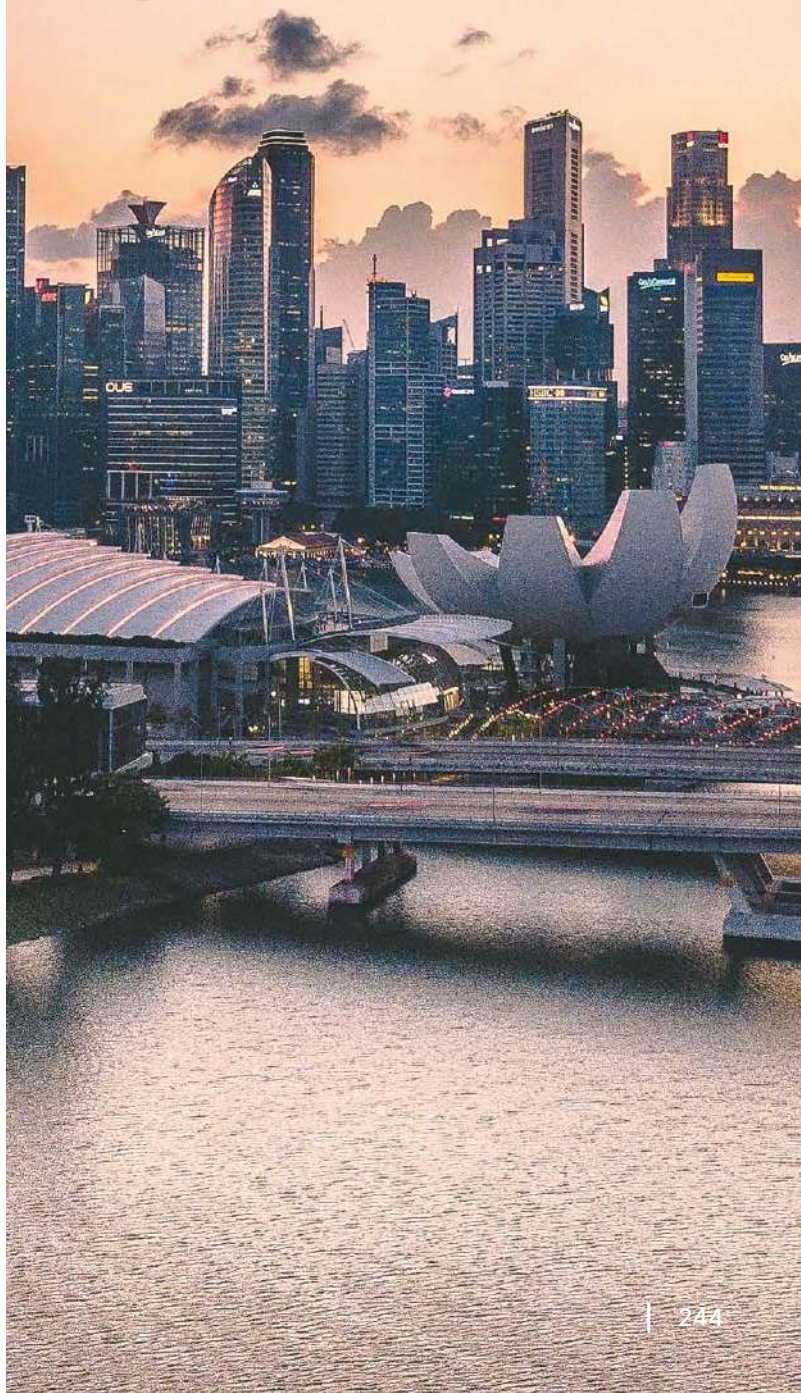
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## I. INTRODUCTION

As is the case in other European countries, Spanish labour law is very comprehensive and provides significant protection for employees. The labour law regulates individual and collective relationships between employees and employers, the scope of which extends to other related areas such as social security, health and safety at work, special employment relationships and procedural law.

### KEY POINTS

- Non-EU citizens must obtain a work permit.
- In principle, employment contracts are presumed to be for an indefinite term. However, the number of fixed-term employment contracts are subject to some limitations.
- Minimum working conditions are largely set out in the Workers' Statute and applicable collective agreements.
- Employment contracts are automatically transferred with the business to the new employer. Employees' rights and obligations are also transferred.
- Termination can be based on objective grounds.
- Dismissals are void if the termination is discriminatory or involves protected employees.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Any direct or indirect discrimination included in regulatory provisions, clauses in collective agreements, individual agreements, and unilateral decisions by employers shall be deemed null and void and could be subject to a complementary claim for damages. Among other causes of discrimination, are those for reason of age or disability handicap and in regarding remuneration, working hours and other working conditions for reasons of sex, origin, including racial or ethnic origin, marital status, social status, religion or beliefs, political ideas, sexual orientation, membership (or not) of unions and their agreements, kinship links with other employees in the Company and language in Spain. The decisions of the employer that involve unfavourable treatment of employees as a reaction to a complaint or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination, would also be null and void.

## PROTECTIONS AGAINST HARASSMENT

Employees are entitled to protection and respect of their privacy and due consideration for their dignity, including protection against harassment. Harassment for reasons of racial or ethnic origin, religion or belief, disability, age or sexual orientation by the employer or people working in the Company is considered a breach of contract. The employer could face a constructive claim for dismissal, which basically would entitle the employee to the same amount as an unfair dismissal, if the employee brings to court serious evidence of the harassment activities by the employer. This claim can be complemented with an action for moral damages against the Company.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Employers are required to take appropriate measures for adapting the workplace and accessibility of the Company, depending on the needs of each specific situation, in order to enable people with disabilities access to employment, job progress and access to training, unless such measures would impose a disproportionate burden on the employer. To determine whether a charge is excessive, the court will consider whether, if taken, it is sufficiently remedied by measures, public grants or subsidies for people with disabilities. Spanish regulations oblige companies with more than 50 employees to reserve a quota of 2% of their staff for people with disabilities.

## REMEDIES

If an employee considers that the employment relationship has been extinguished by any discriminatory reason, they are entitled to judicially demand the protection of their labour rights.

When the employer's decision to terminate a contract includes some of the causes of discrimination prohibited by the Constitution or the law, or has occurred in violation of fundamental rights and public freedoms of employees, the termination decision will be deemed null and void, and the employee will be entitled to reinstatement, with financial award to cover lost remuneration and – whenever proven – to moral damages as well.

### III. EMPLOYEE BENEFITS

#### SOCIAL SECURITY

In Spain, the social security system of national insurance contributions covers: i) common contingencies, these contributions cover the situations included in the general social security regime; ii) professional contingencies cover expenses resulting from labour accidents and occupational diseases; iii) overtime; and iv) other concepts such as unemployment, training, the Wage Guarantee Fund and the Intergenerational Equity Mechanism (IEM).

#### HEALTHCARE AND INSURANCES

Social security offers public medical care to all affiliated workers.

#### REQUIRED LEAVE

##### Holidays and Annual Leave

Employees are entitled to a minimum of thirty calendar (30) days of paid vacation per year. This can be improved by contract or collective agreement. In addition, there are fourteen (14) public non-working days per year, which may differ slightly by region.

##### Maternity and Paternity Leave: now 'childbirth, adoption and foster care for adoption leave'

Both maternity and paternity leaves now both last sixteen (16) weeks, in cases of childbirth, adoption and foster care for adoption. The parent must take six (6) of these weeks immediately after the birth. The remaining ten (10) weeks can be organised by them under their discretion until the child is twelve (12) months old. However, the biological mother can anticipate the suspension up to four weeks before the expected date of birth.

##### Sickness and Disability Leave

Temporary disability benefits are daily subsidies that cover the employee's loss of income due to any sickness such as common diseases or non-work-related injuries, or occupational diseases or work-related injuries. The maximum duration of the benefit is 365 days, but it can be extended for a further 180 days if, during this period, the person is expected to be cured.

The contents and amounts of these benefits are the following:

- in case of common diseases and non-work-related injuries the amount will be 60% of the base rate from the 4th day of leave until the 20th, inclusive, and 75% from the 21st day onward.
- in case of occupational diseases or work-related injuries the amount will be 75% of the base rate from the day following the date of leave from work.

In the case of disability of the child or the adopted child or foster care child, the suspension of the contract for maternity leave and paternity (now 'childbirth, adoption and foster care for adoption leave') leave will have an additional duration of two weeks, one for each parent. Whoever, for reasons of legal custody, needs to be in charge of the direct care of a child under twelve years of age or a person with a physical or sensorial disability who does not perform any paid activity shall have the right to a reduction of their working day, with the proportional decrease in salary between at least an eighth and at most half of its duration. Employees shall also have the right to a leave of not more than two years, unless a greater period is established by a Collective Bargaining Agreement, in order to attend to the care of a family member up to the second degree of consanguinity or affinity who, for reasons of age, accident, illness or handicap, cannot fend for themselves and who does not perform any paid activity.

#### Other Required or Typically Provided Leave(s)

The Employees' Statute recognises other benefits, including, amongst others: 15 calendar days in case of marriage; 5 days for the death, accident or serious illness, hospitalisation or surgical operation without hospitalisation, but requiring home rest, of relatives up to second degree of consanguinity or affinity or non-relative cohabitants; 1 day for change of domicile; for the indispensable time required to undergo pre-natal check-ups and childbirth preparation techniques that have to occur during the working day; for the indispensable time required to comply with public and personal duties (including voting), as well as for union or staff representation activities. Up to 4 days if the employee cannot reach the workplace or travel due to official restrictions, prohibitions, or severe risks (including adverse weather). Beyond 4 days, leave continues until circumstances change, without prejudice to any suspension or reduction of working hours under force majeure; for the time needed for organ or tissue donation procedures taking place during the working day; up to 4 days per year for force majeure absences relating to urgent family matters or cohabitants in cases of illness or accident requiring immediate presence.

#### PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Retirement pensions are included in all social security regimes and are for life. The conditions for obtaining a pension include:

- having turned sixty-five (65) years of age (there are exceptions: it could gradually change from 65 to 67 years if it attests 38.5 of contribution) (in 2024, we are at 66.5 months of age in case of less than 38 years worked); and

- having paid national insurance contributions for a minimum of fifteen (15) years – at least two (2) years of contributions must have taken place within the 15 years prior to retirement.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Generally, Spanish Labour Legislation allows for freedom of form when making a contract. Employment contracts can be verbal or in writing. However, during the term of a verbal contract, either of the parties may require that the verbal contract be reduced to writing. As an exception to the freedom of form, certain employment contracts must be in writing, including, but not limited to: temporary employment contracts, contracts involving special labour relations (such as those concerning lawyers, top managers or commercial representatives) and part-time contracts.

### FIXED- TERM/OPEN- ENDED CONTRACTS

In principle, employment contracts are presumed to be for an indefinite term. There are, however, a limited number of definite-term employment agreements. If the employee continues to work past the original term of the temporary agreement, the relationship becomes indefinite in time and the employee becomes entitled to the standard severance upon termination.

### TRIAL PERIOD

In the event that no special provision is contained in an applicable collective bargaining agreement, notice periods cannot exceed six months for employees with an academic degree ('graduate technicians') and 2 months for any other employees. However, the contract for entrepreneurs has established a probationary period of one year.

### NOTICE PERIOD

Spanish Labour Law requires that a party seeking to terminate an employment agreement provide the other party to the agreement with a minimum of fifteen (15) days' notice prior to termination. This rule does not apply to interim contracts. The parties to the contract may agree upon longer notice periods.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Foreign employees from outside the European Union, including self-employed individuals, must obtain an administrative authorisation or work permit to work

in Spain. The work permit may be requested at the Immigration Bureau.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

When a foreign employer wants to hire a local employee in Spain, it must take charge of all the obligations related to the employee, such as the social security contributions and the income taxes. There are essentially two ways that a foreign Company can hire employees in Spain. First, there is a possibility of setting up a Company (subsidiary or branch) in Spain and hiring employees through it. The set-up process consists of establishing a fixed base of business in Spain, to develop an activity, and grant a Public Deed before the Public Notary. Tax laws require a legal representative resident in Spain, as well as a Digital Certification, in order to work with the Spanish Tax Agency. The Company in Spain will have several other obligations as well. Second, in contrast to the first option and only when certain requisites are met, the foreign Company may have a legal representative in Spain (representation office). The legal representative in Spain must be a Spanish resident (individual or Company) and it will be responsible for ensuring compliance with taxes, and the social contribution system payments of the foreign Company in Spain, as these cannot be carried out directly by the foreign legal entity.

### LIMITATIONS ON BACKGROUND CHECKS

Information regarding criminal records is confidential and public disclosure is prohibited as it could violate data protection regulations. Additionally, there is a general prohibition forbidding discrimination against any employee, for any reason, either before or after being hired. In addition, access to the Central Registry of Convicts will only be allowed for certain state agencies, judges and courts, as well as the judicial police, when there is such a requirement. Therefore, the employer cannot obtain such data unless the candidates or the employees provide the data voluntarily. As an exception to the general prohibition mentioned above, there are certain sectors whereby there exists a legal obligation that entitles the employer to request and proceed with background checks: Public Administration, the state/local police, the army, managing members of financial institutions, insurance agents, professionals who work with minors and casinos.

### RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

By a series of strict regulations and case law on the prohibition of any type of discrimination as well



as a prohibition, as a general rule, on requesting candidates to submit personal data that is not directly related to the needs of the job they are opting for. However, in principle, it is indeed legitimate for the employer to use such information as long as it is public, unrestricted and available to anyone. There are no general guidelines that can be used to guarantee that the fundamental rights of the candidate will in no way be breached when extracting information from social networks. The employer is allowed to ask any question necessary, provided that it is reasonable and objective, and pertains to the job being offered. For example, requests for a candidate's minimum height and age could be necessary and objective for a flight attendant position.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Three key measures offer protection: i) the Organic Act 3/2007 of 22 March; ii) Royal Decree Law 6/2019 of 1 March, on urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation; and iii) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, on the application of the principle of equal opportunities and equal treatment for men and women in matters of employment and occupation.

The central, regional and local governments will actively mainstream the principle of equal treatment and opportunities for men and women (established by the Organic Act 3/2007) in the adoption and implementation of their legislative provisions. Moreover, from time to time, the State Government will approve a Strategic Plan for Equal Opportunities, which will include measures to attain the objective of equality between women and men and eliminate discrimination on the grounds of gender. Additionally, the Organic Act regulates affirmative actions. Such measures, which will be applicable while the situation exists, must be reasonable and proportional to the objective pursued in each case. Equality plans will stipulate the specific equality objectives to be reached, the strategies and practices to be adopted to attain them, and the establishment of effective monitoring and assessment systems.

### REMEDIES

Employees can change equal pay practices through their participation in the application and elaboration of equality plans; mandatory for companies with over 50 employees, or when mandated in the applicable CBA and/or when the labour authorities agree to substitute the formulation and implementation of such a plan for accessory penalties, resulting from penalty proceedings. Royal Decree-Law 6/2019 modifies the Organic Act and requires companies with 50 or more employees to draft equality plans and mandates

that such plans shall be registered accordingly. If an employee believes that the Company did not adhere to an equal pay practice, he is entitled to initiate an internal demand (within the Company) for the protection of his labour rights. However, if the Company does not have an internal procedure for this type of claim, a demand can be filed with the courts or the relevant labour inspection authority in order to guarantee the equal pay provisions.

### ENFORCEMENT/LITIGATION

Examples of remuneration discrimination can be found in case law related to the existence of a double salary scale. Specifically, the Supreme Court held that the company's salary structure comprised an unlawful double pay scale based on a personal complement of seniority, which led to a policy to establish wage differences between workers as a result of their entry date into the company, exclusively. Likewise, the discrimination in remuneration is also manifested in the classification and professional promotion of employees. The leading case law relating to discrimination involved a discrimination in remuneration established in the collective agreement between the professional category of labourer (mostly men) and the professional category of cleaners (mostly women), when both professional categories carried out manual work of equal value.

### OTHER REQUIREMENTS

Spain recognises and protects the right of men and women to receive equal pay for work of equal value. Also, the employer has an obligation to maintain a Salary Record, regardless of the number of employees, that must include the average values of salaries, salary supplements and extra-salary perceptions, such values being separate by gender and distributed by professional groups, professional categories and equal job posts or job posts of equal value (always ensuring confidentiality and animosity of each employee's individual salary, as per recent late-2024 case law). In companies with at least 50 employees, when the average of the remuneration of one gender is higher than the other by 25% or more, considering the total payroll or the average of the paid perceptions, the employer has the obligation to include in the aforementioned salary record a justification to prove that the difference does not correspond to reasons related to the gender of the employees. Lastly, in the event of invalidity due to wage discrimination on grounds of gender, the employee will have the right to the remuneration corresponding to equal work or work of equal value.

## VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The following restrictive covenants are recognised and may be enforceable under the law:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

If the employee breaches the non-competition agreement, they will be obliged to return the amount received for this concept and may be required to pay damages, should the Company provide evidence of damage. In case of doubt when determining the amount of compensation to be returned, or refusal from the employee to comply with the agreed payment as compensation, the employer may appeal to a social court or an arbitrator (when specifically agreed) to determine said amounts. Likewise, the employee can make a claim against the employer when the agreed compensation was not paid although the non-compete clause remains in full enforceability. The clause itself could be declared void if the legal requirements were not met. However, it is also possible to cancel the agreement if both parties agree to it, but it can never be cancelled or waived unilaterally.

## USE AND LIMITATIONS OF GARDEN LEAVE

The employer cannot, unless expressly referred to in the employment agreement, put the employee under garden leave, as they are not provided for statutorily. This is the reason why they may only be mutually agreed to within the scope of the employment contract. In the event that an employer puts an employee on garden leave without having regulated this possibility within the contract, the employer bears the risk of having the employee file a claim for lack of occupation, which ultimately may result in a court claim requesting a constructive dismissal, on the basis of a severe breach of the employer's duties for not procuring sufficient occupation.

Employers often use garden leave during an employee's notice period to prevent the employee from having further access to customers, clients and staff and to prevent the employee from working for a competitor, but this is generally used in Spain only when there is evidence of gross misconduct by the employee.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

In Spain, there is no express legal prohibition for employees not to use social media at the workplace. Such a prohibition can be regulated by the employer by written form, with a detailed policy on surveillance and control of the company's property and the use of social media tools during working hours. Although there is no need to seek approval with the employees' representatives to implement or negotiate such policies, some companies choose to negotiate directly with these representative bodies, before communicating such policies to the individual employees.

Therefore, if the employer considers the particular use of multimedia contents by its employees detrimental to the company's activities, the employer may within its responsibilities, issue the appropriate guidelines and instructions to regulate the use of these tools and seek greater productive capacity from the employees, and even prohibit the use of social media at the work place. Thus, the measures used by the employer will be assessed according to the principle of proportionality meaning the measures to control the employee at the workplace have to be justified, appropriate, necessary and balanced.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Spanish law recognises the employer's right to take the most appropriate measures to control the work of their employees, so as long as they do not violate their fundamental rights. Case law of the European Court of Human Rights and Spanish Courts have established that when the electronic communication systems used by employees are owned by the company, and therefore susceptible to being considered as work instruments and tools, they may be subject to the employer's control. However, for the monitoring of the electronic communications to be valid, the employer must comply with the following:

- establish guidelines on the use of these media, and inform the employees that the use of such devices is limited to professional tasks; and
- warn or notify employees, in advance, of the possibility to control and monitor their electronic devices and the possibility to penalise them for improper use.

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Without clear policies, it can be difficult to lawfully sanction employees for misuse of social media.

It is important to have a social media policy implemented by the employer and communicated to the employees, in order to control the use of company resources and tools. Also, some courts in first instance consider it necessary to include in such a policy, that it may be used for disciplinary reasons against the employee. The company will be entitled to enforce the policy and sanction the employee whenever breached. For example, the dismissal of the employee to be fair, because of the company's code of conduct, which explicitly permitted disciplinary measures for offensive or defamatory remarks made by employees against the company.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FOR TERMINATION

In Spain, the following are grounds for termination: Mutual consent of the parties; Grounds established in the contract; Expiration of the contract term or end of the specific job; Employee's resignation; Employee's death or permanent illness (after a 2-year period in which there could be a possible cure); Retirement of the employee; Employer's death, retirement or permanent illness; Force majeure that makes it impossible to continue rendering services; Individual or collective dismissal based on objective grounds; Employee's voluntary departure based on breach of contract by employer; and Disciplinary dismissal of the employee.

### COLLECTIVE DISMISSALS

Terminations based on economic, technical, organisational or productivity grounds are deemed collective based on the number of workers in the company and the number of workers that would be affected.

### INDIVIDUAL DISMISSALS

Termination can be based on objective grounds or disciplinary grounds.

In case of a disciplinary dismissal, the affected employee must be given the chance to defend themselves through a Charges statement/procedure, by which they are given a sufficient amount of time to present arguments that contradict and disprove the Company's charges. Not respecting this right is an automatic unfair dismissal.

### IS SEVERANCE PAY REQUIRED?

A disciplinary dismissal does not entitle an employee to receive any compensation from the Company. A severance payment will only be required in cases that involve a court ruling declaring the dismissal unfair. In this last case, the employees will be entitled to a

compensation of 33 days of salary per year worked, with a maximum of 24 months of payment (if the employee has seniority dating prior to 12/02/2012, the compensation related to this first period will be 45 days of salary per year worked, with a maximum of 42 months of payment).

However, in fair business decision dismissals (or dismissals based on objective causes), whether individual or collective, the employees will be entitled to a compensation of 20 days of salary per year worked, with a maximum of 12 months of payment.

### SEPARATION AGREEMENTS

The general practice for companies is to dismiss the employee so that they are entitled to the legal severance and also to unemployment benefits, subject to taxes and social security contributions. Although this system is used in a clear majority of cases by employers, a termination by mutual consent that has the appearance of a dismissal (giving dismissal letter to the employee to receive the severance free of taxes and unemployment benefits) is unlawful and considered fraudulent.

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

An employee is entitled to appeal against any such dismissal; prior to filing a claim with the courts, the parties are required to try to reach an agreement before the Mediation, Arbitration and Conciliation Service. The principal remedies available are: i) reinstatement, with financial award to cover lost remuneration; or ii) an award of 33 days salary per year of service, subject to a maximum of 24 months' salary (with the exceptions regarding the prior to 2012 seniority cases).

### WHISTLEBLOWER LAWS

Act 2/2023 provides legal protection for whistleblowers, establishing the obligation to implement a Whistleblower Policy in companies with 50 or more employees (voluntary for the rest).

The internal Company policy must provide for protection as well regulate specific procedures to report illegal practices. Protection in an internal policy will be granted to the Company's employees, which have a direct hierarchical relation with the Company, and also to shareholders, participants and people belonging to the administrative, management or supervisory body.

Outsourcing services, agency employees or independent contractors do not fall under the organisational scope of the employer, but this does not mean that they cannot be protected in case any breach needs to be violated. The main principle is that confidential information is only available to those people who are essential to the investigation of the



complaint. Anonymous complaints are protected and must be implemented in these policies. Finally, the body responsible for the investigation, which will be either a member of the Board/administrative body or a compliance officer, will need to inform the accused party regarding the protection and confidentiality of their personal information during all stages of the process, even upon its conclusion.

## **X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS**

### **BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS**

The Spanish Constitution grants unions the authority to promote and defend the workers' economic interests. It also empowers them to represent workers in collective bargaining and to participate in the preliminary mandatory conciliation steps, before disputes can be presented to governmental conciliation agencies.

### **RIGHTS AND IMPORTANCE OF TRADE UNIONS**

Freedom of association and representation include the following rights: Right to associate freely with any of the unions (this is a right, not an obligation); Right to establish unions without prior authorisation (both nationally and internationally); Right to choose employee representatives; Right to participate in union activities; Right to keep association preferences private and not communicate them to the employer.

There are two types of employees' representation: individual delegates and works councils. Individual delegates represent employees in companies or worksites having up to fifty (50) employees. Where the Company or the worksite has more than fifty (50) employees, employees may appoint a works council.

### **OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES**

The most basic form of collective representation in Spanish employment law is known as "Personnel Delegate" or "Staff Representatives". Representation of the workers in a company or work centre with less than fifty and more than ten workers shall be entrusted to the staff representatives. There may also be a staff representative in companies or centres that employ between six and ten workers, if so decided by the majority workers.

The employees are entitled to participate in the company on issues related to health and safety in

the workplace. Health and Safety representatives are elected by and among staff representatives in the field of the respective bodies of representation, and specialise in health and safety matters at work.

The works council is the representative and collegiate body of all the workers employed by the company or work centre in charge of defending their interests; it shall be established in each work centre with a register of fifty or more workers.

A company that holds two or more work centres in the same province or neighbouring municipalities, which register less than fifty workers but which, overall, total this amount, shall have a joint works council.

ACBA must establish the incorporation and operation of a Joint Council ("Comité Intercentros") up to a maximum of thirteen members, to be appointed from amongst the members of the various councils. Such Joint Councils may not take on other duties than those expressly granted in the CBA whereby their incorporation is agreed.

## **XI. TRANSFER OF UNDERTAKINGS**

### **EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING**

Employees' rights and obligations are subrogated to the new shareholder and remain intact. This includes seniority, special benefits and retirement compensation that employees may be entitled to.

### **REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES**

The Workers' Statute requires formal notice to employees in the event of transfer of undertakings, including date or proposed date of the transfer, reasons for the transfer, legal, economic and social implications for the employees, and any measures envisaged in relation to the employees. Employment contracts are automatically transferred with the business to the new employer. Employees' rights and obligations are also transferred.

## **XII. WORKING CONDITIONS**

### **MINIMUM WORKING CONDITIONS**

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights under the law, regardless of any contrary language in their employment agreement.

## SALARY

An employee's salary includes all amounts received by an employee in compensation for services rendered. Salary can be monetary or in kind, but the latter cannot be higher than 30% of the total amount received by the employee.

## MAXIMUM WORKING WEEK

The maximum working week is forty (40) hours calculated as an average over a yearly period (however, it is expected to be lowered down to 37.5 weekly hours sometime in 2025). A collective agreement, or failing that, an agreement between the employer and employee representatives, may establish the irregular distribution of working time throughout the year. In the absence of agreement, the Company may distribute unevenly throughout the year 10 percent of the workday. This distribution shall always respect the minimum daily and weekly rest periods.

## OVERTIME

As a general rule, overtime hours are of voluntary acceptance by employees, with exceptions made for specific individuals and an applicable collective agreement. Overtime hours can be compensated economically or with time for rest. If there is no agreement in this regard, it will be understood that the overtime hours must be compensated with resting time within the following four (4) months. According to statutory law, overtime cannot exceed eighty (80) hours per year. Those who have been compensated with periods of rest within the four (4) months following its completion will not be computed for this purpose.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The employer shall take the necessary measures to ensure that the use of the workplace does not create risks to the health and safety of its employees or, if this is not possible, so that these risks are minimised. A Company's Health and Safety Committee is an internal body tasked with consulting on a regularly basis the Company's actions in the field of risk prevention, and it will be constituted in all companies or work centres that have 50 or more employees with already existing Employee Representation. The Committee will participate in the preparation, implementation and evaluation of risk prevention plans and programs in the Company, as well as promote initiatives on preventive methods and procedures.

## COMPLAINT PROCEDURES

In addition to whistleblower regulations, employees can file complaints, either during or after employment. All actions and claims carried out by employees in defence of their rights are protected

from any form of retaliation. Therefore, any claim registered internally or externally before third parties, will effectively serve to protect employees from retaliation. Retaliation can include any negative job action, such as demotion, discipline, dismissal or salary reduction. The consequence of any action taken by the company with the intention of a reprisal will make it null and void.



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## I. INTRODUCTION

The labour market in Sweden is to a great extent self-regulated by employers' organisations and trade unions. The Swedish labour law model is based on civil rules that govern most aspects of the employer-employee relationship. Mandatory laws and regulations in collective bargaining agreements provide a comprehensive framework for the terms and conditions of employment. Disputes are finally settled by the Swedish Labour Court, which is the final instance in employment related disputes. However, the majority of disputes are solved by the parties on the labour market through consultations and negotiations.

### KEY POINTS

- An employment agreement does not have to take any specific form to be valid.
- An employment may only be terminated for objective reasons, such as redundancy or personal reasons.
- An employer has certain consultation and information obligations towards trade unions even if the employer is not bound by any collective bargaining agreement.
- Generally, citizens of countries outside the EU must have a work permit to work in Sweden.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

The anti-discrimination legislation consists of the Discrimination Act, which prohibits both direct and indirect discrimination as well as harassment in working life based on gender, gender identity or expression, ethnic origin, religion or belief, disability, sexual orientation and age. Furthermore, employers may neither discriminate against part-time nor fixed-term employees, nor treat an applicant or an employee unfairly on grounds related to parental leave under Swedish law. Trade union representatives are also protected from discrimination based on their union activities.

### PROTECTIONS AGAINST HARASSMENT

The employer is required to work with active measures and to take preventive actions against discrimination, reprisals and other hindrance of equal rights and opportunities in their business.

Employers with 25 or more employees must have a policy and a contingency plan detailing their work with such active measures. If an employer becomes aware that an employee considers that he or she has been subjected to harassment or sexual harassment in connection with work by someone performing work at the employer's establishment, the employer is obliged to investigate the circumstances surrounding the alleged harassment and where appropriate take the measures that can reasonably be demanded to prevent harassment in the future. This obligation also applies with respect to a person carrying out a traineeship or performing work as temporary or borrowed labour.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

According to the Discrimination Act an employer that provides inadequate accessibility, meaning that a person with disability is disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable, can be liable to pay damages. The prohibition of discrimination in the form of inadequate accessibility does not apply to a person enquiring about work. In addition, the Working Environment Act obliges the employer to adjust the company operations to the employee's individual possibilities and needs.

### REMEDIES

The employer can be incurred liability to compensate the employee for discrimination according to the Discrimination Act. Furthermore, if someone is discriminated against by a provision in an individual agreement or in a collective bargaining agreement in a manner that is prohibited under the Discrimination Act, the provision shall be modified or declared invalid if the discriminated person requests this.

### Other Requirements

Affirmative action is not considered discrimination, i.e., it is not discriminatory to make a decision of hiring, promotion or education based on one of the protected grounds, if such a decision is appropriate and necessary to achieve a legitimate aim in the business. Affirmative action may also be taken to, e.g., promote equality between women and men on matters other than salary or other terms of employment. There are, however, no quotas set forth in statute.



## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

There is no overall legislation regarding employee benefits, but there are some statutory provisions that give the right to payment in certain specific areas. Furthermore, employers are obliged to pay social security tax on the employee's salary and other employment benefits that, inter alia, include statutory pension contributions.

The employer's social security contributions, paid in addition to the salary, amount to 31.42 percent (2024) of the employee's gross salary. These contributions are mandatory and include specific charges, such as, old-age pension, survivor's pension, fees for health insurance and work injury. The fees constitute parts of the Swedish social security system.

### HEALTHCARE AND INSURANCES

Except for insurances included in the mandatory employer social security contribution, there is no obligation under the law for the employer to provide the employees with different insurances. However, employers that are bound by collective bargaining agreements are obliged to take out certain insurances, such as, group life insurance (TGL) or work injury insurance (TFA), in addition to the insurances included in the employer social security contributions.

### REQUIRED LEAVE

#### Annual Leave

Vacation entitlement is regulated by the Annual Leave Act, which distinguishes between unpaid and paid vacation, and between a "vacation year" (1 April to 31 March) and a "qualifying year" (the 12-month period prior to the vacation year). An employee earns his or her entitlement to paid vacation during the qualifying year and is entitled to use his or her paid vacation during the vacation year. The basic vacation entitlement is 25 paid days per year. Collective bargaining agreements or employment agreements normally contain rules entitling employees to a longer period of annual leave, in particular for white-collar employees not entitled to overtime pay. Employees are entitled to take a continuous four-week vacation during the period June to August, unless there are circumstances justifying other arrangements.

#### Parental Leave

The employee may be on parental leave until the child is 18 months. Thereafter, the employee is entitled to leave for as long as he or she receives compensation from the state. The mother can start drawing parental allowance 60 days prior to the expected birth of the child. The father of the child may also be on paternity leave for 10 working days in connection with the child's birth.

Compensation is paid by the state for a total of 480 days per child. The compensation may be paid until the child reaches the age of twelve years, but only 96 days may remain when the child reaches the age of four years. This entitlement of parental days is divided equally between the parents, but they have the right to transfer their entitlements to each other, with the exception of 90 days. These 90 days will be forfeited if they are not transferred to the other parent, hence, one parent may use a maximum of 390 days. For 390 days the allowance is capped at 80 percent of the employee's salary, though, the allowance can be SEK 1,218 per day as a maximum (2024). For the remaining 90 days, the compensation is SEK 180 per day. If a collective bargaining agreement applies, the employee may be entitled to certain compensation from the employer in addition to the compensation from the state. As of 1 July 2024, new regulations apply regarding so-called double days and transfer of parental days. A parent may transfer up to a total of 45 parental days to someone other than the other parent, such as the child's grandfather or grandmother. As regards double days (days where both parents are on parental leave together and both parents have parental allowance to use), parents to children up to 15 months can take 60 double days.

#### Sickness and Disability Leave

The employee is entitled to mandatory sick pay payable by the employer, provided that the employment is expected to continue for more than 1 month or if the employee has been working for more than 14 consecutive days. Sick pay is paid by the employer during days 1-14 at 80 percent of salary, but the employer is entitled to make a deduction of approx. 20 percent of the employee's employment benefits during a week. If the employee suffers sickness again within 5 days, the previous sick leave period will continue. As from day 15, the employee may be entitled to compensation payable by the state. The entitlement to such compensation is based on strict rules and is decided by the Swedish Social Insurance Agency. There is no obligation for the employer to provide any supplementary sick pay, unless a collective bargaining agreement is in place. If an employee can be assumed to be on full or partial leave due to sickness during a period of at least 60 days, the employee is entitled to a rehabilitation plan drafted in cooperation with the employer and including adaptive and rehabilitative measures which may facilitate the employee's return to work.

Disability leave is not recognised as being any different from sickness leave. However, a partial or full disability may entitle the disabled person to activity compensation or sickness compensation paid by the state.

#### Other Required or Typically Provided Leave(s)

Employees who have been employed during the preceding six months, or for a total of at least 12 months during the preceding two years, have the

right to educational leave. Employees are also entitled to full leave from his or her work for, at most, six months in order to start a business. However, the business of the employee may not compete with the employer's business, and the leave does not have to be granted by the employer if the leave would result in significant inconvenience for the operations of the employer. Additionally, there are several circumstances which entitle an employee to leave in special situations, such as to take care of a closely related person or to take Swedish-language education as an immigrant.

## **PENSIONS: MANDATORY AND TYPICALLY PROVIDED**

The Swedish pension system is based on an income-related pension, premium pension and guarantee pension. The pension system is administrated by the state and financed by employers and employees jointly. The employer's contribution is paid through the employer's social security contributions.

In addition to the state pension, the employees usually are entitled to supplementary pension provided by the employer, which, under a CBA, the employers are obliged to pay, and for those not bound by a CBA, such additional pension benefits are completely optional. The predominant pension scheme for white-collar employees in the private sector is the ITP pension plan, which is a supplementary pension plan. The plan includes old-age pension, supplementary old-age pension, disability pension and family pension. The employees belong to ITP-1 (a defined contribution plan) or ITP-2 (a defined benefit plan) depending on the employee's age. For blue-collar employees the SAF-LO pension plan applies, which is a defined contribution plan.

### **Other Required or Typically Provided Benefits**

There are no other required benefits, but it is common for employers to offer their employees a fitness benefit.

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

An employment agreement does not have to take any specific form. However, Sweden has implemented EU-directive 2019/1152 on an employer's obligation to inform employees of the conditions applicable to the agreement or employment relationship. As such, an employer must provide certain information in writing to the employee concerning the principal terms of the employment. This information must be provided to the employee within one month of the commencement of the employment.

## **FIXED- TERM/OPEN- ENDED CONTRACTS**

The general rule is that an employment agreement is for an indefinite period, unless otherwise agreed. The Employment Protection Act allows a general fixed-term employment when the employer needs fixed-term employees. A fixed-term employment agreement may also be concluded for a temporary substitute employment and for a seasonal employment. If, during the past five years, an employee has been employed in a fixed-term employment for in aggregate more than twelve months the employment is transformed into an indefinite-term employment.

### **PROBATIONARY PERIOD**

The Employment Protection Act permits probationary employment for a period of no more than six months. If the employment is not terminated before the expiry of the probationary period, the employment will automatically become employment for an indefinite term.

### **NOTICE PERIOD**

An employer must provide a prior notice of termination before dismissing an employee. Further, the employer must observe certain formal rules set out in the Employment Protection Act when serving a notice of termination to an employee. Notices shall always be made in writing and must state the procedure to be followed by the employee in the event the employee wishes to claim that the notice of termination is invalid or to claim damages as a consequence of the termination. The notice shall also state whether or not the employee enjoys rights of priority for re-employment. Statutory notice periods vary between one and six months, depending on the length of the employment term.

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

Generally, citizens of countries outside the EU must have a work permit to work in Sweden. In order for a person to get such a permit the employer must have prepared an offer of employment and advertised the job in Sweden and the EU for 10 days (this applies to new recruitments). The person applying for a work permit must also be able to show a signed written employment agreement and the terms of employment must be equal to or better than those provided under a Swedish collective bargaining agreement or customary for the occupation or sector. The relevant trade union must be given the opportunity to express an opinion on the terms of the employment. The person applying for a work permit must also earn enough to fulfil the maintenance requirement, which means that the person's salary must amount to at least 80

per cent of the median salary published by Statistics Sweden (SEK 28,480 per month as of 18 June 2024). However, the maintenance requirement does not apply for EU Blue Cards, ICT permits and certain exempted occupations.

EU and EEA citizens do not need a visa and they have the right to work in Sweden without work and residence permits. People who have a residence permit in an EU country, but are not EU citizens, can apply to obtain the status of long-term resident in that country. They thereby enjoy certain rights that are similar to those of EU citizens. Furthermore, the Posting of Workers Act applies to posted workers in Sweden.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

A foreign employer is not required to have a permanent establishment in Sweden to hire employees. However, if the employees are going to perform work in Sweden, the Foreign Employer is normally obligated to pay taxes in Sweden, as well as to register as an employer in Sweden. The employer will also need to pay social security contributions on the locally hired employee's salary. It is possible to enter into an agreement with the locally hired employee wherein the employee will report and pay the social security contributions and in such cases, the employee, instead of the foreign employer, should register with the Swedish Tax Agency. However, if the employee is working as a dependent representative in Sweden, the foreign employer will typically be seen as having a permanent establishment in Sweden. In order to facilitate the payment of taxes, the foreign employer will, in practice, need to register a branch office or a company in Sweden.

## **LIMITATIONS ON BACKGROUND CHECKS**

Employers have limited possibilities of obtaining information from registers containing information regarding applicants, such as medical or criminal records, and are limited by the EU General Data Protection Regulation (GDPR) as regards the processing of such personal data. An applicant can, on the other hand, voluntarily present medical or criminal information about himself or herself, if the employer should request it in connection with the recruitment. There is no obligation for the applicant to comply with such a request, but the non-compliance may result in the applicant not being offered the position in question. As regards credit checks, these are allowed and may be conducted by the employer, if the credit check is of relevance to the applied position, i.e. the position will involve economy related tasks such as accounting or handling payments as a cashier. Otherwise, consent should be provided by the applicant prior to a credit check.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

Employers have a freedom to decide which questions need to be asked in order to determine if an applicant is suitable for a position. However, an employer may not ask questions that could constitute discrimination, such as if the applicant is expecting a child or if the applicant is a member of a trade union. Furthermore, the employer may decide on tests and examinations that should be conducted as part of an application. Apart from the prohibition of discrimination and that an applicant may never be required to take a genetic test as a condition of employment, there are no other legal limitations to requiring an applicant to, e.g., undergo a medical examination or a drug or alcohol test. An employer can refuse to hire an applicant who does not consent to a test. However, an employer must act in accordance with good labour market practice.

## **VI. PAY EQUITY LAWS**

### **EXTENT OF PROTECTION**

The pay equity legislation consists of provisions in the abovementioned Discrimination Act, which set forth that employers are required to work with active measures to prevent discrimination and to promote equal rights and opportunities regardless of employees' gender, gender identity or expression, ethnic origin, religion or belief, disability, sexual orientation and age. The employer's active procedures shall include measures to promote pay equity, and to prevent non-objective differences in pay and benefits between women and men.

### **REMEDIES**

The employer can incur liability under the Discrimination Act, to compensate the employee for discrimination due to non-objective differences in pay and benefits based upon gender. Furthermore, if someone is discriminated against by a provision in an individual agreement or in a collective bargaining agreement in a manner that is prohibited under the Discrimination Act, the provision shall be modified or declared invalid upon the request of the discriminated person.

In addition, the Equality Ombudsman supervises compliance with the Discrimination Act and may order an employer, inter alia, to provide information or to take measures deemed necessary for supervision and compliance with the pay equity legislation in the Discrimination Act. If such order is not complied with, the Equality Ombudsman can issue an order to fulfil the obligation subject to a financial penalty.

### **ENFORCEMENT/LITIGATION**

Under the Discrimination Act, an individual may



seek compensation for illegal discrimination through litigation in court. Furthermore, the Equality Ombudsman may initiate litigation on behalf of an individual to ensure compliance with the Act. Several such cases regarding individual employees and pay inequity have been brought before the Labour Court. Whether or not discrimination due to pay inequity can be shown in such cases largely depends on if the employer can show that such differences in pay is based on the work performed and, as such, that objective non-discriminatory reasons for the pay difference exists.

## OTHER REQUIREMENTS

In order to identify measures necessary to promote pay equity, an employer's active policies shall include an annual review of provisions and practices applied in respect of pay and benefits. The annual review shall include an analysis of pay differences, inter alia, between women and men performing work that may be deemed comparable. An employer with ten or more employees shall document the employer's review and analysis in writing and such documentation shall include measures deemed necessary by the employer, to correct non-objective differences and to promote pay equity. Furthermore, the employer shall cooperate with employees, as well as with trade unions to which the employer is bound to by a collective bargaining agreement, regarding active measures to promote pay equity. The employer shall also provide relevant trade unions with information that is necessary for cooperation on active measures, but there are no requirements to keep the work with active measures on pay equity publicly available.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The following restrictive covenants are recognised and may be enforceable under the law:

- Confidentiality;
- Non-compete clauses;
- Non-solicitation of customers;
- Non-solicitation of employees.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Covenants are normally combined with a contractual penalty. The penalty shall be reasonable in relation to the employee's salary. Normally such penalty for each breach of the clause is set to between three and six months' salary. Furthermore, restrictive covenants may also be combined with a continuing penalty.

## USE AND LIMITATIONS OF GARDEN LEAVE

The employer may under certain circumstances unilaterally release the employee from the duty to perform work during the notice period. When the parties agree on a mutual separation, it is common to agree also on a release from work, i.e. garden leave.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

An employer has the right to direct and allocate work and is thus able to restrict employees' use of Internet and social media during work hours. However, practically, this depends on the type of work that is being performed.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

An employer with a legitimate aim to supervise communications of the employee, may be allowed to do so as far as the employee has been informed of it beforehand and the supervision is not excessive in regard to the employee's right to privacy.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

An employee who wilfully or through negligence attacks a trade secret of an employer, of which he or she has been informed in the course of the employment, shall compensate the employer for the damage caused by the attack. However, only under such circumstances that the employee understood, or ought to have understood, that he or she was not allowed to acquire, use or disclose it, shall the employee be liable for damages caused by the action. Moreover, the employee may, by use of social media, act in breach of his or her employment contract, e.g. the duty of loyalty. Depending on the circumstances at hand, the employee may be dismissed for disloyal behaviour. However, the employee may have certain rights to criticise the employer when grievance is at hand.

### Data Privacy

The General Data Protection Regulation provides protection for individuals against violation of their personal integrity by processing of personal data. Accordingly, there are restrictions on employers' use of data regarding employees, former employees

and applicants. According to the Regulation, any form of processing of personal data must be lawful. Employers may often rely on the performance of the employment contract or a legitimate interest when processing personal data relating to the employee. The processing must be relevant and necessary for the purpose stipulated and personal data may not be stored for longer than necessary with reference to the specified purposes. Furthermore, the legitimate interest of the employer may not be outweighed by the employee's interest of personal integrity. The Regulation also stipulates situations in which personal data may be processed in cases where the individual has not given his or her consent to the processing. For example, personal data may be processed in order to satisfy a purpose that concerns a legal obligation of the employer.

Sensitive personal data – for example, information about employees' or applicants' race or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade union or personal data concerning health or sexual preference – may only be processed in special circumstances.

## **IX. TERMINATION OF EMPLOYMENT CONTRACTS**

### **GROUND'S FOR TERMINATION**

Employers may dismiss employees either with or without notice. A dismissal with notice must be based on objective reasons. Objective reasons are not defined by statute but has been developed through case law, and can relate either to redundancy or to the employee personally. Redundancy covers all reasons attributable to the employer, such as reorganisations, shortage of work or the economic situation of the employer, while personal reasons are reasons attributable to the employee, such as the employee's conduct or performance.

### **COLLECTIVE DISMISSALS**

Swedish employment law does not recognise the term "collective redundancies". In contrast to many other European countries where the obligation to consult collectively is triggered only if there are several redundancies, the provisions on obligations to consult with any present trade unions according to the Co-Determination Act are applicable even if the redundancy concerns only one employee. Nonetheless, a notification to the Swedish Public Employment Service shall be made if at least five employees are affected by a decision on terminations due to a redundancy situation. This also applies if the total number of notices of termination is expected to be 20 or more during a 90-day period. When the labour force has to be made redundant, the basic principle to be applied is that the employee with the longest aggregate

period of employment with the company should be entitled to stay the longest. Hence, the employer must select those to be dismissed on a "last in, first out" basis. A condition for continued employment is that the employee has sufficient qualifications for one of the available positions that may be offered.

### **INDIVIDUAL DISMISSALS**

Negligent performance, serious misconduct, theft, disloyalty or other aggravating circumstances relating to the employee and his/her individual performance may constitute objective reasons for termination due to personal reasons. The employer has the burden of proof in this regard and it is often very difficult to present sufficient evidence to support the ground of termination of an employee for personal reasons. Further, the employer has an obligation to provide support to the employee to improve through, e.g., education or performance improvement plans. Dismissal without notice is lawful only where the employee has committed a fundamental breach of the employment agreement, such as gross misconduct by disloyalty in working for competitors, and should be implemented only in exceptional cases.

### **IS SEVERANCE PAY REQUIRED?**

There are no statutory provisions regarding severance pay. However, an employee may be entitled to severance pay in accordance with an employment agreement, a collective bargaining agreement or a separation agreement.

### **SEPARATION AGREEMENTS**

The employer and the employee are free to enter into a final settlement. Hence, the employment may be terminated disregarding the strict rules of the Employment Protection Act. Normally, but not always, the employee is financially compensated in some way by the settlement. Consequently, an employee may waive his or her contractual rights. As a general rule, an employee cannot waive rights laid down in mandatory law, which are not yet accrued, but an employee is free to waive already accrued rights.

### **REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION**

In case of wrongful termination of employment, the termination could be challenged by the employee and declared invalid by the court. The employer may be obliged to pay punitive damages (normally not exceeding SEK 100,000), compensation for economic losses (the maximum compensation that follows from the Employment Protection Act is 32 monthly salaries), and the costs for the litigation.

### **WHISTLEBLOWER LAWS**

An employee who reports criminal activity or other misconduct, of which the employee has a valid reason to suspect in the employer's business and for which

there is a public interest of the misconduct being made known, shall be protected from reprisals from the employer. The Swedish Whistleblowing Act imposes, inter alia, obligations on businesses with 50 or more employees to implement and document internal procedures and routines for reporting irregularities in the business as well as for following-up on such reports.

## **X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS**

### **BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS**

The "Swedish model" of industrial relations is characterised by a high degree of organisation even though trade union density is currently falling. The system is based on the principles that law and collective bargaining agreements together shall provide a comprehensive framework. There are approx. 110 different trade unions and employer's organisations on the Swedish labour market. The parties have agreed on more than 650 collective bargaining agreements. Almost one out of ten employers in Sweden are members of an employers' organisation and approx. 70 percent of the employees in Sweden are members of a trade union.

The employer is, through the membership in an employers' organisation, bound by the collective bargaining agreements applicable for that organisation. The employer is obliged to apply the terms and conditions of the collective bargaining agreement also to employees that are not members of a trade union.

### **RIGHTS AND IMPORTANCE OF TRADE UNIONS**

The high level of unionisation on the labour market is the foundation to the co-determination between employees and trade unions on the one hand, and employers and employers' organisations on the other hand. The individual employee and employer are granted the right to join and become members of associations and engage in activities through these without hindrance from the other side. The Co-Determination Act contains the general provisions governing the relationship between the employers and the unions in such areas as association, information, negotiations, industrial actions and labour stability obligations.

According to the Co-Determination Act, an employer has certain consultation and information obligations towards the trade unions. For example, prior to any decision to reorganise the business and prior to any decision to terminate employment agreements, the

employer must call for and conduct consultations with the trade unions under the applicable collective bargaining agreements (both at a local and a national level, if applicable). Even if the employer is not bound by any collective bargaining agreement, the employer is obliged to consult the planned reorganisation and potential redundancies with any trade union of which a concerned employee is a member.

The act also, to the benefit of the trade unions, contains certain interpretation regulations. Generally, these rules give the trade union the right to interpret the collective bargaining agreement until the matter has been finally decided by court, and, hence, are important in the case of disputes.

Once a collective bargaining agreement has been entered into and is in effect an obligation to refrain from industrial action comes into effect and prohibits strikes or lockouts. Breaking the peace obligation will incur liability for damages on the breaching party.

### **OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES**

Sweden has implemented the Works Council Directive and the Directive establishing a general framework for informing and consulting employees in the European Community. In a workplace where at least five employees are regularly employed, one or more safety representatives should be appointed in accordance with the Work Environment Act. If the employer is bound by a collective bargaining agreement, the union appoints the safety representatives. Otherwise, they are appointed by the employees.

## **XI. TRANSFER OF UNDERTAKINGS**

### **EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING**

In conjunction with the transfer of a business from one employer to another, the rights and obligations under employment agreements and employment relationships that existed at the time of the transfer to the new employer shall also be transferred.

Where an employee's employment agreement and the employment relationship have been transferred to a new employer the new employer shall be obligated, for a period of one year from the date of the transfer, to apply the employment terms and conditions of the collective agreement which the previous employer was bound to. The terms and conditions shall be applied in the same manner in which the previous employer was obligated to apply them.

Prior to the decision to transfer the business (or a part of it), the acquiring company, as well as the



transferring company, must, as a rule, call for and conduct union consultations with the local union representatives under the applicable collective bargaining agreements. Even if the companies are not bound by collective bargaining agreements, they are obliged to consult with any trade unions of which any concerned employees may be members.

Union consultations must be initiated and concluded before a decision regarding the transfer is made. If the consultation requirement is not observed, the breaching company may be obliged to pay damages to the unions concerned.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The transferring company will remain liable (jointly with the acquiring company) towards the transferred employees for liabilities relating to the time prior to the transfer. However, the parties to a business transfer agreement are free to agree on a different distribution of liability between them.

# XII. WORKING CONDITIONS

## MINIMUM WORKING CONDITIONS

There are mandatory rules concerning minimum working conditions in Swedish law that must be observed by the employer. For example, there are regulations regarding working hours, work environment and non-discrimination. However, the terms and conditions are mainly regulated in the individual employment agreement and/or, if applicable, in the collective bargaining agreement.

## SALARY

There are no provisions regarding minimum salary in Swedish law. However, provisions regarding such matters are often found in the collective bargaining agreements.

## MAXIMUM WORKING WEEK

According to the Working Hours Act, regular working hours may not exceed 40 hours per week. Where the nature of work or working conditions generally so demand, working hours for a given week may exceed 40 hours, provided that the average working hours per week does not exceed 40 hours per week for a period of no more than four weeks. If the nature of the business is such that it is necessary for an employee to be at the employer's disposal at the workplace in order to carry out work, if necessary, an employee may be on-call for no more than 48 hours over a four-week period or 50 hours over a calendar month. Deviations from certain regulations in the Working Hours Act can be made by collective bargaining agreement, but not in individual employment agreements.

## OVERTIME

Overtime comprises working hours in excess of regular working hours and on-call hours. Where additional working hours are required, overtime hours may not exceed 48 hours over a period of four weeks or 50 hours over a calendar month, subject to a maximum of 200 hours per calendar year.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Sweden has extensive legislation providing guiding principles regarding the work environment. The work environment encompasses all factors and relationships at work: technical, physical, organisational, social and work content. The employer is responsible for the work environment and must take all necessary measures to prevent ill health and accidents, instruct and inform employees on how to avoid risks, have an organisation for rehabilitation and adaptation activities and have recourse to the occupational health care that is needed. Employers should investigate, implement and monitor activities so that ill health and accidents at work are prevented and a satisfactory work environment is achieved, by carrying out risk assessments, investigating ill health, accidents, serious incidents, implementing measures, controlling measures and allocating work environment assignments.

## COMPLAINT PROCEDURES

The employer is responsible for the work environment and shall work together with the employees in the work environment management. Each employee, who deems that certain work constitutes an immediate threat to life or health, is obliged to report this to the employer or safety representative as soon as possible. However, the appointed safety representative has the main responsibility to convey work environment issues and demands from the employees to the employer.

## Protection from Retaliation

A safety representative is protected from having his or her terms and conditions of employment changed for the worse due to the assignment as safety representative. Furthermore, an employee or a safety representative is not liable for damages caused due to the employee or safety representative stopping work, which the employee or safety representative deemed as an immediate threat to life or health. Additionally, an employee or applicant shall not be subject to any retaliation due to the employee or applicant reporting, participating in an investigation of or rejecting employer conduct, which is in violation of the Discrimination Act.



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# SWITZERLAND



## I. INTRODUCTION

The legal regime governing employment relationships in Switzerland is generally more liberal and favorable towards the employer than in many other European countries. This is partly because labour unions are somehow less influential in Switzerland compared to, for example, labour unions in European Union countries, but also because the unemployment rate traditionally has been and remains relatively low in Switzerland.

According to the principle of freedom of contract, the parties of an employment agreement are free to agree on the content and terms of their agreement to an extent that is substantially greater than in most other European jurisdictions. Swiss employment law, however, does contain some basic mandatory provisions. Most important, are the mandatory provisions aiming to protect the safety and the health of the employee. Public labour protection regulations cover, among other things, working hours and breaks, special protection for young employees, pregnant women and breastfeeding mothers, work-related injury insurance and industrial accident prevention.

For issues relating to employment law, the provisions of the employment contract should be the first point of reference, taking into account mandatory statutory provisions. If the employment contract is silent on a certain issue, then the non-mandatory statutory provisions apply.

### KEY POINTS

- Switzerland has a dual system for the admission of foreign workers (preferential treatment of EU/EFTA nationals).
- Every employee has the right to decide whether to join a trade union or not. The unions are financed through the contributions of their members.
- A Swiss employer is fully liable for social security contributions in respect of his employees.
- Where the employer transfers a business or a part of a business to a third party, the employment relationship and all attendant rights and obligations pass to the acquirer as of the day of the transfer, unless the employee refuses to transfer.
- In principle, no particular cause to terminate an employment relationship is required.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Pursuant to Swiss employment law, employers are generally prohibited from discriminating against employees based upon an employee's "personality trait" which has been interpreted to include the employee's age, religion, race, disability and political affiliation. International agreements between the European Union and Switzerland also expressly prohibit discrimination by a Swiss employer against an employee based upon an employee's nationality and require that the employee be treated the same with respect to working conditions and compensation as Swiss nationals. Employers are not permitted to treat employees less favorably based upon the employee's marital status, pregnancy or familial status with respect to all conditions of employment including hiring, compensation, working conditions, promotions, demotions, benefits and termination of employment.

### PROTECTIONS AGAINST HARASSMENT

Sexual harassment of employees is expressly prohibited. Sexual harassment is defined to include threats, the promising of job-related advantages or coercive acts to obtain favors of a sexual nature. Swiss employers by law are required to take all reasonable steps to prevent sexual harassment.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The Federal Disabled Equality Act only directly protects employees of the federal government; hence, disabled persons are protected within the framework of the general protection of their rights of personality. There is, however, an increased protection in connection with building laws.

### REMEDIES

An employee can commence a legal action in a Swiss court of proper jurisdiction against an employer alleging discrimination or harassment based upon both statutory law and the employee's employment contract and seek an order prohibiting further discrimination, compensatory and emotional distress damages and/or a declaratory judgment. The Swiss Gender Equality Act also provides specific remedies to employees for gender discrimination and sexual harassment including reinstatement, up to six months' salary, and in the case of discrimination relevant to unequal pay, the difference in compensation, which resulted from the discrimination.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

A Swiss employer is fully liable to social security contributions in respect of its employees. This system, however, only applies to resident employers and non-resident enterprises having a permanent establishment in Switzerland. The contributions are borne fifty-fifty by both employer and employees. However, the employer contributes insurance premiums for occupational accidents and diseases. He can deduct insurance premiums for non-occupational accidents (as well as the employee's share for pension, sickness and unemployment insurance) from the employees' salary. The rates are, in general, based on the gross salary.

### HEALTHCARE AND INSURANCES

The mandatory Accident Insurance (UVG) contributes to the costs of medical treatment and gives financial support after accidents and occupational diseases. All employees occupied in Switzerland are covered. Sickness allowance insurance compensates for loss of salary due to incapacity for work caused by illness or pregnancy. All employees in Switzerland who have not yet reached the legal retirement age must be covered by unemployment insurance, subject to certain conditions.

If you become involuntarily unemployed, you are entitled to 70% of the average earnings paid into your unemployment insurance in the previous six months. If you have a child or your daily allowance falls below a predetermined minimum, you are entitled to 80% of the average earnings in the last six months.

The unemployment benefit is allocated as a daily allowance covering five days per week. Entitlement begins after a waiting period of five days of proven unemployment. Unemployment benefits provide up to 400 daily allowances to be received in a two-year period. Employees over 55 and having made unemployment insurance contributions for at least 18 months are permitted up to 520 daily allowances in the same period.

### REQUIRED LEAVE Holidays and Annual Leave

The minimum paid annual holiday entitlement in Switzerland for all employees is four weeks. Young employees up to the age of 20 are entitled to five weeks of holidays per year. Vacation must be used and cannot be compensated by payment; compensation of vacation by payment is admissible only at the end of an employment relationship. For the duration of their holidays, employees are entitled to the same pay as if they were working. Part-time employees and employees paid on an hourly basis are entitled to pro-rata holiday time.

In addition, and depending on the canton in which they work, employees enjoy between five and fifteen public holidays per year. Whenever a public holiday falls on a work-free day, employees are not entitled to a substitute day off. A public holiday is not deducted from the vacation entitlement whenever it falls within the vacation of an employee.

### Maternity and Paternity Leave

Maternity leave lasts 98 days (or 14 weeks) from the day it starts. Both full-time and part-time employees are entitled to maternity leave. Women who return to work earlier lose their entitlement to compensation. Mothers are paid 80% of their wages in the form of a daily allowance up to the maximum of CHF 196 per day. Cantonal provisions, staff rules and collective labour agreements may provide additional solutions. Women must not work during the first eight weeks after the birth.

**Paid Paternity Leave (new legislation as per 1 January 2021):** fathers must take the new two-week paid paternity leave within six months after the child's birth. They can either take such leave days consecutively or as individual days. Employers must apply to the relevant social security authorities for loss of income compensation, as it is not paid out automatically. The amount of compensation is the same as under the maternity insurance: 80% of the average earned income before the birth of the child, up to a maximum of CHF 196 per day.

**Paid Care Leave (new legislation as per 1 January 2021):** in addition to paternity leave, the new so-called care leave legislation introduces an obligation on the employer to continue to pay the salary for the care of a family member or partner with a health impairment, during a short-term absence of a maximum of three days per specific impairment, up to a maximum of ten days per year (329h CO).

**Care Leave for the Care of Seriously Ill Children (new legislation as per 1 July 2021):** newly introduced is a childcare leave if an employee's child is seriously impaired in health due to illness or accident. The leave is limited to a maximum of 14 weeks (329i CO). Salary continuation is governed by the Swiss Federal Act on Income Compensation for Service Providers and for Maternity, which amounts to 80% of the salary and is capped at CHF 196 per day.

### PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The Swiss pension system rests on three pillars:

1. the first pillar provides old age pensions as well as benefits for widowers and orphans. The ordinary age of retirement is 65 years for men, 64 for women. It can be anticipated or postponed, with financial consequences. It is an PAYGO system, financed by contributions from employees and employers (4.2% of the employee's income each) and shall cover the basic living expenses.



2. the occupational pension scheme (2nd pillar) shall, together with the Old-age, Survivors' and Invalidity Insurance, enable the insured person to maintain his or her previous lifestyle in an appropriate manner. It is a funded pension plan. It is compulsory for employees and is financed by both employees and employers. The sum of the contributions of the employer should be at least equal to the sum of the contributions of his employees. The second pillar offers old age pensions. The pension funds also provide benefits in case of invalidity and benefits to survivors in case of premature death. Under certain conditions, the second pillar can be used before retirement to buy a principal home or to start an independent activity.

3. the third pillar consists of private pension schemes provided by the private sector. It is optional and financed entirely by the individual.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

**Material requirements:** under Swiss law, an employment contract is a contract whereby the employee is obliged to perform work in the employer's service for either a fixed or an indefinite period of time, and the employer is obliged to pay salary either based on time periods or based on the work performed. As compared to other contracts involving the rendering of personal services, the most distinctive feature of the employment contract is that the employee's personal and organisational dependence reflects a relationship of legal subordination, i.e. the employee is not free to choose the time, place or type of work he or she will perform. By contrast, for example, contracts for legal services concluded between attorneys and their clients typically lack such legal subordination and, accordingly, do not qualify as employment contracts. Consequently, different statutory rules will apply.

**Formal requirements:** except for a few special agreements - such as the apprenticeship contract, the employment contract with a commercial traveler or the employment contract between a commercial staff supplier and an employee (which all require written form) - an employment contract is not subject to any specific form and may even be agreed verbally or by implication. Certain contractual provisions are, however, only valid if agreed in writing (e.g. restrictive covenants, exclusion of compensation for overtime, notice periods differing from statutory law, etc.).

### FIXED- TERM/OPEN- ENDED CONTRACTS

The parties are free to enter into an unlimited or a fixed-term contract. The sequence of several fixed-term contracts between the same parties may, however, be regarded as circumvention of the employee's protection against dismissal (if there is no

objective reason for such sequence). In this case, the employment contract is considered to be unlimited.

### PROBATIONARY PERIOD

During the trial period, either party may terminate the contract at any time by giving seven days' notice; the trial period is, by statutory law, considered to be the first month of an employment relationship. However, if agreed in writing, the trial period may be extended to three months. Where the period that would normally constitute the probation period is interrupted by illness, accident or performance of a non-voluntary legal obligation, the probation period is extended accordingly. During the trial period, the statutory rules on termination at an inopportune juncture (pregnancy, illness, accident, military service, et al.) do not apply.

### NOTICE PERIOD

**Ordinary termination:** any employment contract concluded for an indefinite period of time may be unilaterally terminated by both employer and employee, subject to statutory notice periods ranging from one to three months, depending upon the length of service.

**Extraordinary termination:** both employers and employees have a right to terminate the employment contract immediately and without notice for cause, regardless of whether or not the contract was concluded for an indefinite period of time and regardless of any statutory notice periods, which would apply to an ordinary termination.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Switzerland has a dual system for the admission of foreign workers.

Nationals from the EC (European Community) or EFTA (European Free Trade Association) 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, subject to certain restrictions and exceptions for nationals from Croatia.

In regard to non-EC 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 non-EC or non-EFTA nationals (without residence in Switzerland) work in Switzerland temporarily for more than eight days for a non-Swiss company, such employees must be reported to the authorities in advance, even if no work or residence permit is required.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK

## THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

In order to employ staff in Switzerland, it is not necessary to set up your own company in Switzerland. Employees can be employed directly by a foreign company.

## LIMITATIONS ON BACKGROUND CHECKS

Employers may contact references given in an applicant's CV or job application. Medical checks may be requested only to the extent that this is justified by the work involved (e.g. dealing with heavy workloads or dangerous jobs where physical fitness is a requirement). Drug screening is justified only to the extent that it is required due to the work involved (e.g. for truck drivers or dangerous jobs where physical fitness is required). Credit checks are generally not permissible unless the position in question justifies such a check (e.g., bankers, accountants or lawyers). Employers cannot screen a candidate's social media accounts. However, professional sites such as LinkedIn and Xing may be screened.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

As a general rule, the employer may handle data concerning the employee only to the extent that such data concerns the employee's suitability for this job or are necessary for the performance of the employment contract. This also applies to pre-employment screening and hiring practices. Consequently, to give some examples, it is permitted to ask the candidate for an excerpt from the criminal register to the extent that the position in question justifies asking (e.g., for positions requiring higher trustworthiness).

# VI. PAY EQUITY LAWS

## EXTENT OF PROTECTION

In Switzerland, employees have the right to equal pay for equal work, or work of equal value, irrespective of gender. Since 1981, equal pay has been enshrined in the Federal Constitution (Art. 8) and since 1998 this principle is specified in the Swiss Gender Equality Act.

Workers may not be discriminated against on grounds of their sex, especially with reference to their marital status, their family situation or, in the case of female workers, pregnancy. The prohibition applies in particular to the recruitment, the allocation of tasks, the organisation of working conditions, remuneration, training, promotion and dismissal.

Since 1 July 2020, the amendment to the Swiss Gender Equality Act has obliged companies with 100 or more employees to conduct wage equality analyses.

## REMEDIES

The provisions of the Swiss Gender Equality Act are intended to facilitate effective enforcement of the law. This includes the introduction of free proceedings before the Cantonal courts for disputes relating to equality claims, the easing of the burden of proof, representative actions and protection against revenge dismissals. Swiss law does not provide for criminal sanctions in case of violations of equal pay regulations.

## ENFORCEMENT/LITIGATION

Shortly after the introduction of the Gender Equality Act, several worker unions in the health and care industry, successfully claimed higher salaries for the predominantly female personnel engaged in medical therapy and care. The claimants compared the salaries of such nursing professions with the salaries of the predominantly male police officers. As a result of the litigation, the Canton of Zurich had to compensate approx. 3000 employees with more than CHF 32 mio Swiss francs retroactively.

Apart from a few minor cases each year, one particularly interesting case that is attracting media attention involves an action brought against Berne University Hospital, which deals, indirectly, with equal pay (differentials). A female employee who had been dismissed because she campaigned for women's rights and against discrimination within the hospital, has sued the hospital for five million Swiss francs. According to the claimant, the five million constitutes the amount of income she is missing, because she was abusively dismissed in 2014. It is the difference between the lifetime income she would have earned – as an already habilitated physician – if she had become chief physician and professor, and the amount she could have earned in her stalled career. Berne Hospital disputes the allegations and as of September 2024, the case is still pending.

## OTHER REQUIREMENTS

Employers with more than 100 employees (headcounts) must carry out an internal wage equality analysis. The results of the analysis must be externally verified by an independent body and communicated to the employees and shareholders (in case of listed companies).

If the analysis shows that pay equality has been maintained, further analysis will not be necessary. Otherwise, the analysis must be repeated after four years.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

**Non-Compete Clauses:** the law does not require a consideration for the post-termination non-competition covenant. However, courts are generally more reluctant to restrict agreed prohibitions where the employee receives consideration. Non-compete obligations are extinguished if the employer terminates the employment relationship without the employee having given him any good cause to do so, or if the employee terminates it for good cause attributable to the employer.

**Non-Solicitation of Customers:** non-solicitation clauses follow the same rules as non-compete clauses. If the legal prerequisites are fulfilled, a non-solicitation covenant may even apply for customers and clients who were prior customers or clients of the employee when he or she joined the employer, because they become—from a legal perspective—clients and customers of the employer. However, case law makes a very difficult distinction with regard to the reasons why customers and clients do business with enterprises or organisations. If a client or customer does business with an employer solely because of very specific knowledge or specific capabilities of an individual employee (e.g., lawyers, doctors), then a non-solicitation covenant can be void. Furthermore, if clients follow an employee because personal aspects characterise their business relationship, a non-solicitation clause will not be valid or applicable to such clients.

**Non-Solicitation of Employees:** the majority of scholars are of the opinion that non-solicitation covenants regarding employees are not subject to the same restrictions as general post-contractual noncompetition covenants because such covenants do not restrict employees in their professional development. This position is also supported by case law. Nevertheless, the restrictions have to be adequate to protect the employers' legitimate interests because excessive covenants would constitute a breach of employees' personal rights. Considering this, an employee can be prohibited from soliciting other employees.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Without including a specific enforcement clause, the employer can claim only damages, but not compliance with the non-competition covenant. In practice, the burden of proof for damages requires real factual evidence of damages and an exact calculation, which makes it very difficult for an employer to claim damages. Hence, without an agreed penalty in case of infringement, a non-competition clause is rather toothless. Consequently, it is very important to define an adequate penalty for breach, knowing that courts tend to reduce stipulated penalties. Penalties are quite often based on the duration of non-compliance, for example, on a daily, weekly, or monthly basis. Further, the remedy of specific performance requires an express written agreement.

## USE AND LIMITATIONS OF GARDEN LEAVE

In principle, there is no entitlement to active employment under Swiss law. However, members of specific professional groups may be adversely affected in their economic development by garden leave, which is why a claim to active employment may exist in exceptional cases (e.g. professional athletes, researchers, pilots, surgeons, etc.). Garden leave is very common in case of dismissals, particularly the dismissal of executives and/or in connection with the dismissal of sales forces or client relationship managers. During garden leave, employees retain all contractual entitlements to remuneration, including pension entitlements. Hence, the base salary and variable salary must be paid. The calculation of variable salary during garden leave is quite often difficult, due to the lack of provisions in employment agreements or compensation programs. For instance, an employee may be entitled to on-target variable pay. However, if the employee was always over target in the past, he or she may be entitled to be paid on the basis of past performance. In case of a dismissal, garden leave may be granted to compensate the employee for their outstanding vacation balance, to a certain amount. There is no strict rule on the ratio garden leave/compensation of vacation, and court practices vary considerably. As a rule of thumb, some courts apply the 1/3 rule, meaning that one third of the period of garden leave can be used for the compensation of vacation.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

In principle, the employer can restrict the use of the Internet and social media during working hours. An employer may control social media in the workplace if it is necessary for the performance of the employment contract and further is proportionate. Under these conditions, an employer may block social media completely. In contrast, it is rather unlikely that an employer is able to show a legitimate interest in controlling an employee's use of social media outside the workplace. However, this may for instance hold true for ideological enterprises.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

To the extent that the employment falls under the Labour Act, monitoring mechanisms are not permitted if they are directed at the employee's behaviour. However, they may be permitted if they pursue other aims, for example, security or



controlling the proper use of the work infrastructure and working time. Monitoring mechanisms need to be codified in internal regulations and the latter communicated to the employees.

In general, an employer will only be able to monitor peripheral data (such as the point in time of the communications or interactions, their length, and the involved connections). Monitoring the actual content of communications requires outstanding interests, which the employer will not be easily able to show. As regards telephone communications, they are in principle protected by criminal law.

### **EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION**

If an employee disparages or even defames the employer or illegally discloses business secrets through the authorised or unauthorised use of social media, or through entries in publicly accessible blogs or assessment platforms, this can justify sanctions up to termination without notice. In addition, the employer can have such entries deleted or banned by court order and, if necessary, take criminal action against the employee.

## **IX. TERMINATION OF EMPLOYMENT CONTRACTS**

### **GROUND FORS FOR TERMINATION**

As a principle, both parties to an employment contract may terminate the employment agreement at any time, subject to either the statutory or contractual notice period; without the need to fulfil any particular grounds for termination. In recent years, courts have established stricter rules for dismissing elder employees with many years of service. The Federal Supreme Court has ruled that an employer has a higher duty of care toward these employees. In particular, the employer must inform the employee in good time, of the intended dismissal and the employee must have an opportunity to be heard. Solutions must be sought in order to maintain the employment relationship and avoid dismissal. Only if these measures do not bear fruit, can dismissal be pronounced as a last resort.

### **COLLECTIVE DISMISSALS**

Collective dismissals are defined as notices of termination in enterprises issued by the employer within the period of 30 days for reasons unrelated to the person of the employee and that effect: at least 10 employees in companies usually employing more than 20 and fewer than 100 persons; at least 10% of all employees in companies usually employing more

than 100 and fewer than 300 persons; and at least 30 employees in companies usually employing more than 300 persons. Before a collective dismissal, the employer must consult with the works council (if any) or the employees. Employers must also inform the cantonal labour office of every planned collective dismissal and the employer must hold negotiations with the employees with the aim of preparing a social plan.

### **INDIVIDUAL DISMISSALS**

Employees have to be given notice of termination of their employment. The length of the notice period is agreed in the employment contract, subject to statutory rules on minimum length and equality of the notice periods for notice to be given by employer, and employee. An employment relationship can be terminated with immediate effect for cause.

### **IS SEVERANCE PAY REQUIRED?**

Unless in very rare cases where employees are 50 years or older, have worked for an employer for at least 20 years and have not accumulated adequate pension benefits there are no statutory severance payment obligations. An obligation may, however, be provided by a collective agreement or by a social plan in case of collective redundancy.

### **SEPARATION AGREEMENTS**

The termination of an employment relationship does not require a separation agreement. A separation agreement may, however, be advisable in order to amicably settle all mutual claims relating to the employment and its termination. Although the parties are free to terminate employment by mutual consent as per any day, separation agreements are considered valid, only if the terms are well-balanced, favoring both the employer and the employee.

### **REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION**

An abusive termination must be challenged by the employee before expiration of the notice period by written communication to the employer; the employee can claim up to 6 months' salary as indemnification in such a case.

### **WHISTLEBLOWER LAWS**

Swiss labour law still lacks explicit labour law protection for whistleblowers despite political advances and government efforts. De lege lata, an employee must first turn to the employer's internal departments to uncover grievances. Only if they do not react can the authorities or the public be informed. However, there is still no effective protection against dismissal. A dismissal as a result of a permissible disclosure of grievances would be abusive, but valid. The employer could be sanctioned by penalty of payment up to a maximum of 6 monthly salaries.

# X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The "labour accord" dates back to 1937, when the trade unions and employers in the metalworking industry signed an agreement to regulate the conduct of disputes. On the one hand, the unions undertook not to use strikes as a weapon to settle grievances, while on the other, the employers agreed to accept arbitration to resolve wage claims. As a result, strikes are rare, although occasionally workers may stop work for a few hours as part of a campaign. Lengthy strikes are even more unusual, although not entirely unknown.

The Swiss Federation of Trade Unions is the umbrella body for 16 trade unions in the areas of industry and construction, and is Switzerland's largest employees' organisation. A second umbrella grouping is Travail Suisse, with 13 member organisations.

The Swiss Employers Association is the umbrella body of about 80 regional and branch employers' organisations. With its headquarters in Zurich, it was founded in 1908 as the Central Association of Employers' Organisations. The Swiss Employers' Association has close ties with the Swiss Business Federation. The two, along with the Swiss Association of Small and Medium-Sized Enterprises, are the country's leading economic bodies. Under the Swiss constitution, all three are invited to give their opinions during the consultation procedure on federal issues.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Trade unions play an important role in some business sectors, which are, to a great extent, regulated by collective agreements, including construction and gastronomy. Trade unions have the right to organise and proclaim industrial actions such as strikes, but only if negotiations with the employers' side have failed and only in case these actions are proportionate.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Employees may elect a works council in companies with at least 50 employees. The works council representatives have to be informed of all substantive issues necessary to fulfil their tasks, and they must be consulted on the following matters: security at work and health protection; collective dismissals; affiliation to an occupational pension

fund and termination of the affiliation agreement; and 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. Works councils may decide how to organise themselves. Apart from the Federal Participation Act, no special rights for works councils within the company have been established by law, but such rights are recognised by some collective agreements.

# XI. TRANSFER OF UNDERTAKINGS

## EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

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 the employee objects to the transfer. If an employee objects to the transfer, the employment relationship is terminated upon the expiration of the statutory notice period even if longer or shorter contractual notice periods apply.

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, must be consulted in due time, prior to the decision that employees are made redundant 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 dismissal and changes would be seen as a result of the transfer of business if implemented within the first few months after the transfer. It is important to note that 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.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The current employer and the new employer are jointly and severally liable for any employee's claim that have become due prior the transfer, and that will later become due until the date upon which the employment relationship could have validly been terminated. If a collective employment contract applies to any employment relationship transfer, the new employer would need to comply with it for one year, unless the collective employment contract expires earlier or is terminated by notice.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

In Switzerland, the most important conditions of an employment contract are provided by statutory law and by the applicable collective agreement (if any). In particular, collective agreements set the terms and conditions of employment, which include, amongst others: categories and related job descriptions; duties and obligations; minimum wages; job retention rights during absences due to illness; salary increases due to length of service; termination, resignation, criteria for calculation of the severance pay; night work; maternity leave; and holidays.

### SALARY

Salary is usually paid at the end of the calendar month deducting all applicable social security contributions and withholding taxes (if any). Swiss law explicitly provides that the salary paid to employees must be stated in a pay slip. So far, four cantons (Jura, Neuenburg, Geneva and Ticino) have introduced minimum wages for all employees. They vary from CHF 19 to CHF 23 per hour. Minimum wages may also be found in collective labour agreements.

### MAXIMUM WORKING WEEK

In the majority of Swiss companies, the normal weekly working hours under an employment contract of a collective bargaining agreement are between 40 and 44 hours. The legal maximum weekly working hours are 45 for industrial workers, office, technical and other employees including salespersons in large retail stores; for all other commercial enterprises, the legal maximum weekly working hours are 50. The difference between the normal weekly working hours and the maximum weekly working hours is important for distinguishing between overtime and excess working hours.

### OVERTIME

Overtime is defined as hours worked in excess of the normal weekly working hours. An employee is obliged to work more than the normal working hours to the extent that the employee can in good faith be reasonably expected to do so. By statutory law, overtime must be compensated with an additional premium of 25%.

It is, however, permissible to agree in writing that overtime work will not be compensated with an additional premium or even not compensated at all. It is also possible, subject to the employee's consent, for overtime to be compensated by time off of at least equivalent duration. Contracts with management-level employees usually completely waive their right for overtime, either by payment or time off.

Excess working hours are the hours worked in excess of the legal maximum weekly working hours. To safeguard the employee's health, the Federal Labour Act prohibits more than two hours per day of excess working hours; in a calendar year, an employee may not work more than 170 excess working hours (where the weekly maximum is 45 hours) or 140 excess working hours (where the weekly maximum is 50 hours). Excess working hours must always be compensated by an additional premium of 25%, unless the employee consents to take an equivalent amount of time as compensation within a given time period (in case weekly maximum is 45 hours this only applies for excess hours exceeding 60 hours per calendar year).

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Although Switzerland has set its own policies on occupational safety and health, these basically comply with the EU legislation. Differences do exist e.g., non-reporting of occupational accidents in Switzerland. The employer shall take all measures necessary to maintain and improve health protection and to ensure the physical and mental health of workers.

### COMPLAINT PROCEDURES

Complaints about non-compliance with health and safety regulations can be submitted to the employer itself and, if this does not help, to the cantonal labour inspectorate. In the case of collective labour agreements, it is also possible to bring complaints to the attention of the contractually agreed complaint office or directly to the trade union concluding the agreement. An employee who asserts rights from the employment relationship in good faith may not be dismissed for this reason. If he is nevertheless dismissed, although the dismissal is valid, the employer must pay a penalty of up to 6 months' salary.



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## I. INTRODUCTION

In Taiwan, the regulatory framework governing labour relations is structured around specific statutes rather than a singular “Employment Law.” The Labour Standards Act (LSA) serves as the cornerstone of individual labour law, establishing minimum standards for working conditions, wages, working hours, and other employment-related matters. This statute aims to protect the rights of employees and ensure equitable treatment in the workplace. In addition to the LSA, collective labour statutes play a crucial role in shaping the dynamics between labour organisations and employers, emphasising the importance of worker organisation and collective action in negotiating improved working conditions and resolving disputes. The three major statutes in this category are the Labour Union Act, the Collective Agreement Act, and the Act for Settlement of Labour-Management Disputes. Together, these statutes create a comprehensive framework for labour relations in Taiwan, balancing the rights and responsibilities of both employees and employers.

### KEY POINTS

- The Labour Standards Act (LSA), enacted on 30 July 1984, became applicable to all employment relationships on 1 January 1999, with the exception of certain designated categories of professionals, such as medical doctors, and was last amended on 31 July 2024.
- Employment terms and conditions agreed upon by an employer and an employee shall not be less favourable than the minimum mandatory requirements established under LSA; otherwise, such terms and conditions shall be deemed null and void and shall be superseded by the corresponding provisions prescribed under the LSA.
- In Taiwan, there exists a minimum wage requirement.
- A company in Taiwan must possess a minimum capital of NT\$5 million if it intends to employ expatriates to work in Taiwan.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Several statutes prohibit discrimination and impose penalties on violators, including the Employment Service Act, the Middle-aged and Elderly Employment Promotion Act, the Gender Equality in Employment Act, and the People with Disabilities

Rights Protection Act. The specific circumstances under which discrimination is prohibited vary among these statutes.

Most anti-discrimination statutes employ administrative control measures, imposing administrative penalties on violators. Only a few explicitly stipulate that when an individual violates anti-discrimination statutes, the victim of discrimination may file a claim for damages, such as Article 26 of the Gender Equality in Employment Act and Article 17 of the Middle-aged and Elderly Employment Promotion Act.

### PROTECTIONS AGAINST HARASSMENT

Pursuant to Paragraph 1, Article 5 of the Employment Service Act, employers are prohibited from discriminating against job seekers or current employees on the basis of race, class, language, ideology, religion, political affiliation, place of origin, place of birth, gender, sexual orientation, age, marital status, appearance, facial features, physical or mental disabilities, zodiac sign, blood type, or previous union membership status.

The scope of this provision applies not only to Taiwanese nationals but also extends to foreign workers who meet specific conditions, such as those who have obtained legal authorization or foreign workers who are married to our nationals and have been granted residency.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Pursuant to the Gender Equality in Employment Act, sexual harassment encompasses: (1) actions by any person during the performance of an employee's duties; (2) an employer making sexual demands or engaging in sexually suggestive or gender-discriminatory language or conduct towards employees or job applicants. Depending on the number of employees, employers are subject to varying degrees of proactive obligations to prevent sexual harassment, such as implementing preventive measures, establishing complaint and disciplinary procedures, and publicly displaying these in the workplace. Furthermore, it is mandated that when an employer becomes aware of sexual harassment, they must undertake immediate and effective corrective and remedial actions, such as implementing appropriate isolation measures, referring for assistance, conducting relevant investigative procedures, or imposing disciplinary actions, among others.

## REMEDIES

Pursuant to the People with Disabilities Rights Protection Act and the Act to Implement the Convention on the Rights of Persons with Disabilities, employers are required to provide suitable working conditions and employment protection for individuals with disabilities. Furthermore, individuals with disabilities are entitled to request reasonable accommodation from employers regarding the workplace, equipment, and living facilities.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

*Labour Insurance (ordinary accident insurance) and Employment Insurance*

Except otherwise prescribed by the law, an employer should enrol all employees in the statutory social insurance from the first day of their employment. The formula for calculating the labour insurance premium and employment insurance premium is (i) Employee's monthly insurance salary \* (ii) contribution percentage \* (iii) insurance rate.

### HEALTHCARE AND INSURANCES

#### National Health Insurance (NHI)

Except otherwise prescribed by the law, an employer should enrol all employees in the NHI. The formula for calculating health insurance premiums for an employer is (i) Employee's monthly insurance salary \* (ii) contribution ratio by an employer \* **(1+ number of average family dependents)** \* (iii) health insurance rate.

#### Occupational Accident Insurance

The formula for calculating the occupational accident insurance premium and employment insurance premium is (i) Employee's monthly insurance salary \* (ii) contribution percentage \* (iii) insurance rate.

### REQUIRED LEAVE

#### Holidays and Annual Leave

- Public holidays (paid): Commemorative days, Labour Day and other dates designated by the Ministry of Interior as public holidays. The public holidays for employees are 12 days. Employers must compensate employees double the daily salary for working on holidays (for up to 8 hours) or grant compensatory days off in lieu of overtime pay if agreed by the employees.
- Annual leave (with pay): Annual leave days for workers are as below:
  - Three days of annual leave for a worker who has worked for more than six months but less than one year.
  - Seven days of annual leave for a worker who has worked for one year or more but less than two years.
  - 10 days of annual leave for a worker who has worked for two years or more but less than three years.

- 14 days of annual leave for a worker who has worked for three years or more but less than five years.
- 15 days of annual leave for a worker who has worked for five years or more but less than 10 years.
- One additional day of annual leave for each year of service over 10 years, up to a maximum of 30 days.

Employers shall pay employees wages for the unused annual leave at the year-end settlement or upon the termination of the employment contract. For unused annual leave days that are carried over to the following year according to the agreement between the employer and the employee, wages must be paid for the unused annual leaves at the end of the following year or upon the termination of employment.

#### Maternity / Paternity Leave

1. Pregnancy check-ups leave (with pay): Female employees are entitled to 7 days of leave for pregnancy check-up during pregnancy.
2. Maternity leave: Female employees are entitled to 8 weeks of maternity leave and 4 weeks of miscarriage leave after being pregnant for at least three months and are entitled to receive full pay if employed for at least 6 months, or half pay if employed for less than 6 months. An employee who suffered a miscarriage after being pregnant for at least two, but less than three months is entitled to one week's leave. For a miscarriage after being pregnant for less than two months, five days' leave should be granted. The amount of salary for leave taken due to a miscarriage after being pregnant for less than three months may be decided by the employer.
3. Paternity leave/Accompany Pregnancy check-up leave (with pay): employees are entitled to 7 days of paternity leave (which must be taken around the time when his/her spouse is expected to give birth or has given birth) and accompany pregnancy check-up leave (which must be taken during the pregnancy period of his/her spouse).

#### Sickness and Disability Leave

1. Job-related injury/sick leave (with pay): For so long as the employee requires medical treatment or recuperation.
  2. Non-job-related sick leave (half pay within 30 days in one year).
- For illness (es) not requiring hospitalisation: Up to 30 days in one year; and For illness (es) requiring hospitalisation: Up to one year in any two years.
3. Menstrual leave: 1 day per month. Half pay for the first three days.

#### Any Other Required or Typically Provided Leave(s)

1. Marriage leave (with pay): 8 days.
2. Funeral leave (with pay): 3 to 8 days
3. Personal leave (without pay): 14 days.

4. Family care leave (without pay): When an employee's family member is giving birth, suffering from a serious disease or a significant matter requiring the employee's personal attention, he/she may take up to 7 days of family care leave to be included in calculating his/her personal leave in one year.

5. Leave for official business (with pay): For so long as the employee is required by law (e.g., military service) or the employer to take leave.

6. Parental leave (suspension of employment without pay): Upon having worked for more than 6 months, an employee may, before each of his/her children turns 3 years old, apply for unpaid parental leave for a period, until the said child turns three years old, provided, however, that the period of unpaid parental leave shall not exceed 2 years.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

### Employees' eligibility for retirement

- Voluntary retirement: An employee is entitled to retire if he/she (i) has worked for at least 15 years and attained the age of 55, (ii) has worked for 25 years, or (iii) has worked for 10 years and attained the age of 60.
- Compulsory retirement: An employee may be ordered to retire if he/she reaches the age of 65 (unless otherwise extended through agreement between the employee and employer) or becomes incapable of performing his/her duties due to mental or physical disability.

### Employees' eligibility to be enrolled in the statutory pension schemes

- Defined benefits scheme under the Labour Standards Act (DB Scheme or better known as Old Pension Scheme): The Old Pension Scheme applies to local employees hired before 1 July 2005 and foreign employee's ineligible to be enrolled in the New Pension Scheme.
- Defined contributions scheme under the Labour Pension Act (DC Scheme or better known as New Pension Scheme): The New Pension Scheme applies to local employees hired after 1 July 2005 and foreign employees who have married ROC citizens and have a residency in Taiwan.

### Employers' obligations under the statutory pension schemes

- DB Scheme/Old Pension Scheme

An employer should appropriate labour retirement reserve fund ("Reserved Fund") ranging between 2% and 15% of the total monthly salary of the eligible employees and deposit such amount under the employer's Committee's account at the Bank of Taiwan ("BOT") every month.

Each employer assesses the balance of the Reserve Fund for all the employees having service period accrued under the Old Pension Scheme before the end of each year. If the amount of the Reserve Fund is insufficient to pay the retirement benefits

calculated for the employees who will be eligible for retirement in the following year, the employer should make up the difference in one appropriation before the end of March of the following year and submit the statement to the Committee for its verification.

In case of retirement, an employer can withdraw the Reserve Fund to pay for the retirement benefits ("Retirement Benefits") at two units for one year of service up to 15 years, and one unit for any additional year of service from the 16th year onwards, up to a maximum of 45 units. The term "unit" refers to the one-month average wage received by the employee for the last six months prior to the retirement date. An employer should pay the Retirement Benefits within 30 days after the retirement date.

### • DC Scheme/New Pension Scheme

An employer should contribute to at least 6% of each eligible employee's monthly pensionable salary into his/her individual pension fund accounts at the Bureau of Labour Insurance ("BLI") every month ("Pension Fund"). An employee under the New Pension Scheme may apply to the BLI for the accrued Pension Fund upon reaching the age of 60. An employer need not provide any additional Pension Fund for the employee upon retirement.

### Statute of limitation:

An employee's right to claim the Retirement Benefits or Pension Fund is subject to a statute of limitation of 5 years from the month following the date of retirement.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

For any business entity subject to the Labour Standards Act (LSA), an employment relationship is established with workers based on the employment contract. Employment contracts may be executed in writing or orally. In practice, employment contracts are in a written form to clearly describe the important employment terms. For the purpose of obtaining a work permit, a written employment contract is required.

### FIXED- TERM/OPEN- ENDED CONTRACTS

#### a. Fixed-term Contract:

Only when the work is of a non-continuous nature can the employer enter into a fixed-term contract with the employee as required by the Labour Standards Act (LSA). In this regard, only a contract for temporary work (completed within 6 months), short-term work (completed within 6 months), seasonal work (completed within 9 months) or specified work (the local labour authority's approval is required if the period is longer than one year) of a non-continuous nature can be regarded as a fixed-term contract.



### **b. Open-ended Contract:**

A non-fixed term contract shall be entered into with an employee whose work is of a continuing nature relating to the employer's regular business operation. Any fixed-term contract for continuous work should be considered as a non-fixed term contract by operation of law.

### **PROBATIONARY PERIOD**

The Labour Standards Act (LSA) is silent on the issue of trial period. However, it is legally acceptable for both employer and employee to agree to a probationary period. In local practice, a reasonable trial period is up to 6 months.

### **NOTICE PERIOD**

#### **Termination notice:**

The notice period for an employer or an employee to terminate an employment contract shall depend on the employee's service period.

| <b>SERVICE YEARS</b>                        | <b>NOTICE PERIOD</b> |
|---------------------------------------------|----------------------|
| three months or more but less than one year | 10 days              |
| one year or more but less than three years  | 20 days              |
| three years or longer                       | 30 days              |

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

If an employer intends to hire a foreign national, they must submit an application for a work permit on behalf of the foreign national to the appropriate authority. In most instances, when an employer seeks to employ a foreign national in Taiwan, they are required to execute an employment contract with the foreign national and prepare the requisite documentation to apply for a work permit for foreign professionals. The maximum duration for each work permit application for foreign professionals is three years. An application for extension may be submitted prior to the expiration of the employment period, and there is no cap on the number of extensions that may be granted.

Relevant regulations include the Employment Service Act, the Regulations on the Permission and Administration of the Employment of Foreign Workers, and the Qualifications and Criteria Standards for Foreigners Undertaking the Jobs Specified Under Subparagraphs 1 to 6 of Paragraph 1 of Article 46 of the Employment Service Act, among others.

### **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK**

### **THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

The Labour Standards Act (LSA) does not specifically forbid a foreign employer to directly hire an employee to work in Taiwan. However, please note that under the Company Act, a foreign company without making a branch office registration may not conduct its business operations in the name of a foreign company in the territory of Taiwan. Any person violating the aforementioned will be punished with imprisonment for a period of not more than a year, short-term detention, or in lieu thereof or in addition thereto a fine of not more than NT\$150,000 and shall assume on his/her own the civil liabilities arising therefrom, or shall be jointly and severally liable therefor in case there are two or more violators. In addition, the violator shall be forbidden by the competent authority from using the name of the foreign company. In practice, local courts hold a relatively wide interpretation of the definition of "business operations." Whether a foreign company is conducting business operations in Taiwan will be subject to the court's review and discretion on a case-by-case basis.

### **LIMITATIONS ON BACKGROUND CHECKS**

Within the scope of reasonable necessity, a company may conduct appropriate background checks based on personnel management needs. However, it is important to note that Subparagraph 2 of Paragraph 2 of Article 5 of the Employment Service Act explicitly prohibits employers from requiring employees to furnish personal information that is not essential for employment; failure to comply with this provision constitutes an unlawful infringement on personal privacy.

### **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

Pursuant to Article 5 of the Employment Service Act, in order to ensure equal employment opportunities, employers shall not discriminate against job seekers on the basis of sexual orientation, age, marital status, appearance, physical or mental disabilities, zodiac sign, blood type, and other similar characteristics. The Gender Equality in Employment Act further stipulates that employers shall not engage in differential treatment on the basis of gender or sexual orientation during the recruitment of job seekers. Should an employer specifically inquire about such matters during an interview and subsequently choose not to hire the candidate, it may give rise to reasonable suspicions of employment discrimination. Should an employer be found in violation of these regulations, they shall be subject to administrative penalties.

## **VI. PAY EQUITY LAWS**

## EXTENT OF PROTECTION

The Gender Equality in Employment Act stipulates that employers must not discriminate against the payment of wages to employees based on gender or sexual orientation. Employers are prohibited from circumventing the aforementioned provision by reducing the wages of other employees. Furthermore, aside from the requirement of equal pay for work of equal value, employers are also required to conduct educational training and ensure that various welfare measures are free from discriminatory treatment.

## REMEDIES

Apart from administrative penalties, currently a few laws, such as the Gender Equality in Employment Act and the Middle-aged and Elderly Employment Promotion Act, explicitly stipulate that when an individual violates anti-discrimination provisions, the discriminated party may seek civil damages from the employer.

## ENFORCEMENT/LITIGATION

In practice, most cases involving the principle of equal pay for equal work are hindered by the difficulty employees face in proving that the employer has violated this principle. This is because employers often claim that higher wages are paid to other employees in the same position based on considerations such as education, work experience, job skills, and performance. Additionally, the lack of transparency in employee compensation is another challenge.

## OTHER REQUIREMENTS

Pursuant to Article 5 of the Employment Service Act, employer shall publicly display or inform the range of regular pay less than NT\$40,000 when recruiting or employing employee(s).

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

Restrictive covenants in employment contracts are provisions designed to limit the actions of employees during their employment and post-termination, with the objective of safeguarding the employer's business interests, including trade secrets, customer relationships, and proprietary business information. Common types of restrictive covenants include non-compete agreements, non-solicitation agreements, non-disclosure agreements (NDAs), and no-poaching agreements.

### Types of Restrictive Covenants

#### 1. Non-compete clauses

Under the principle of freedom of contract, parties to an employment relationship are generally permitted to agree upon non-compete clauses. However,

given that post termination non-compete clauses may impinge upon an employee's right to work and freedom, Article 9-1 of the Labour Standards Act (LSA) and Articles 7-1 to 7-3 of the Enforcement Rules of the Labour Standards Act prescribe minimum reasonable restrictions, such as limiting the non-compete period to a maximum of two years and stipulating the minimum compensation the employer must provide to the employee. In addition, it is mandatory to sign a written post termination non-compete agreement in order to create binding power.

#### 2. Non-solicitation of customers

Currently, there is no explicit legislation in Taiwan regarding a non-solicitation of customers agreement between the employer and the employee, and under the principle of freedom of contract, parties to an employment relationship may negotiate their own terms.

#### 3. Non-solicitation of employees

Currently, there is no explicit legislation in Taiwan regarding a non-solicitation of employees' agreement between the employer and the employee, and under the principle of freedom of contract, parties to an employment relationship may negotiate their own terms.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Currently, the only explicitly regulated covenant in Taiwan is the post termination non-compete clause. The minimum monthly compensation the employer must provide to the employee is at least 50% of the employee's monthly wage before the termination of employment contract. Other restrictive covenants are generally enforceable without the need to pay statutory compensation.

## USE AND LIMITATIONS OF GARDEN LEAVE

Taiwanese law does not contain specific provisions concerning "Garden Leave." A comparable legal concept is "paid leave for employees." This type of leave pertains to a situation where the employer instructs the employee not to report to work, yet the company continues to remunerate the employee. It typically arises when an employee has tendered a resignation, the company suspends the employee pending investigation, or the employment contract is terminated for other reasons. Although not explicitly articulated in labour-related statutes, provided the employer can substantiate the existence of legitimate reasons, mandating paid leave for employees is generally not unlawful.

# VIII. SOCIAL MEDIA AND DATA PRIVACY

## RESTRICTIONS IN THE WORKPLACE

According to the provisions of the Labour Standards Act (LSA), employers with 30 employees or more need to establish rules regarding rewards and penalties in their workplace regulations. Employers may restrict employees from using social media in the workplace within these regulations. However, it is important to ensure that any penalties are announced in advance so that employees are aware of them, and the disciplinary measures must be reasonable and appropriate. Smaller employers can also explicitly include a "Social Media Usage Policy" clause in the employment contract to clearly regulate employees' use of social media.

## CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

In our country's legal framework, there is no explicit prohibition against employers monitoring employees' official emails. Employers should only monitor official content on employees' computers and must follow rule of proportionality. Past rulings show that temporary audits based on system alerts do not violate privacy if they are proportional. Employers must inform employees in advance about monitoring practices to respect privacy rights. Local court judgments have indicated that the legality of an employer's monitoring of employees' official computers or emails depends on whether employees can reasonably expect privacy in their email communications within the company.

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

If the employee's conduct is severe enough to cause reputational and business losses to the company, the company may also seek civil damages from the employee. The Trade Secrets Act may be applicable when it involves divulging confidential information of the employer. If the employee's action is considered a material breach to the employment contract/work rules, or an intentional act to disclose the employer's technical or business secrets, causing damage to the employer, the employer may terminate the employment contract based on Article 12 of the Labour Standards Act (LSA).

# IX. TERMINATION OF EMPLOYMENT CONTRACTS

## GROUND FOR TERMINATION

### Termination by employer:

An employer may not terminate an employment contract unilaterally unless any of the events specified in Article 11 (layoff with advance notice and severance pay) or Article 12 (dismissal without notice or pay) of the Labour Standards Act (LSA)

- **Layoff:** The following causes could serve as statutory grounds for termination of employees with prior notice and severance pay (Article 11 of the LSA):
  - The employer's business is suspended or transferred;
  - The employer's business is suffering operating losses and/or business contractions;
  - The employer's business is suspended for more than one month due to force majeure;
  - The nature of the employer's business has changed that requires a reduction of workforce and employees could not be reassigned to other positions; or
  - An employee is unable to perform satisfactorily in his/her contracted position.
- **Dismissal:** An employer may terminate any employment contract without giving advance notice under any of the following grounds (Article 12 of the LSA):
  - The employee misrepresents a fact at the time of signing the employment contract which might cause damage to the employer;
  - The employee commits a violent act or grossly insults the employer, his agent/family, or fellow employees;
  - The employee is sentenced to temporary imprisonment in a final judgment and is not granted a suspended sentence or an alternative sentence to pay a fine;
  - The employee is in serious breach of the employment agreement or work rules;
  - The employee deliberately damages/abuses the employer's property or intentionally releases the employer's confidential information; or
  - The employee is absent for three consecutive days or a total of six days in any month without good cause.

Any dismissal for (i), (ii), (iv), (v) and (vi) above must be made within 30 days from the date when the employer is aware of the specific circumstance.

### Termination by employee:

An employee may terminate his/her employment contract based on a voluntary resignation by giving prior notice to his/her employer.

Pursuant to Article 14, Paragraph 1 of the Labour Standards Act (LSA), an employee may terminate the employment contract and seek for severance under certain conditions, including: the employer making a misrepresentation at the time of entering into the employment contract, which may cause



harm to the employee; the employer or their agent engaging in acts of violence or significant insult against the employee; the work being detrimental to the employee's health and the employer failing to make necessary improvements; the employer or other employees having an infectious disease that poses a significant threat to the employee's health; the employer failing to pay wages or provide adequate work; and the employer violating the employment contract or applicable laws, thereby infringing upon the employee's rights.

## COLLECTIVE DISMISSALS

If the number of laid-off employees reaches any of the prescribed thresholds for mass redundancy of employees, an employer shall go through the mass redundancy procedure including to prepare a mass redundancy plan with a 60-day prior notification to be submitted to the government authorities and the affected employees and proceeds with the subsequent consultation procedures.

## INDIVIDUAL DISMISSALS

In a case of lay-off under Article 11 of the Labour Standards Act (LSA), an employer shall notify the labour authorities at least 10 days before the termination date in each case. Such a request does not apply to a summary dismissal case.

## IS SEVERANCE PAY REQUIRED?

The statutory severance pay is (i) 100% of an employee's average monthly salary for each full year of service with respect to service years under the Old Pension Scheme without an upper limit, and/or (ii) 50% of an employee's average monthly salary for each full year of service, up to a maximum of 6 average monthly salaries, with respect to service years under the New Pension Scheme.

## SEPARATION AGREEMENTS

### a. Is a Separation Agreement required or considered best practice?

In Taiwan, a resignation agreement mutually executed by both employer and employee to terminate the employment relationship is not a mandatory requirement, but it is often regarded as an ideal method to conclude the employment relationship.

### b. What are the standard provisions of a Separation Agreement?

The content of a resignation agreement is not subject to statutory standard clauses and typically depends on the negotiation between the employer and the employee in each case. It may usually include the amount and date of a mutual separation payment to the employee, general release, work handover, and confidentiality obligations.

### c. Does the age of the employee make a difference?

Local laws are silent on the mutual separation agreement. There is no mandatory requirement to consider the age of the employee.

### d. Are there additional provisions to consider?

It is important to make sure that the employee executes the Mutual Separation Agreement out of free will.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Please note that if an employee files a wrongful termination lawsuit against the employer's employment termination decision, and if the court renders a judgement in favour of the employee, the company's liability would be to reinstate the employee's employment and to compensate him or her for loss of salary from the date of wrongful termination to the date of reinstatement (at the same time the employee is not employed by another employer), a period which could be two to three years pending the final outcome of the judgement.

In addition, please be informed that according to the Labour Incident Act (LIA), if the court believes that it is possible for the employee to receive a favourable ruling in the suit and that there is no material difficulty for the employer to continue employing the employee, the court may order the employer to continue employing and paying wages to the employee. In this way, the employee may be reinstated and continue to work and receive wages during the course of the litigation.

## WHISTLEBLOWER LAWS

Article 74 of the Labour Standards Act (LSAL), Article 39 of the Occupational Safety and Health Act, Article 33 of the Labour Inspection Act, Article 40 of the Labour Pension Act, and Article 36 of the Gender Equality in Employment Act, etc. are the established regulations to prevent whistleblowers from facing retaliatory actions.

Furthermore, the concept of protecting whistleblowers and encouraging public interest disclosures has gradually gained recognition by the courts in Taiwan. Employers are prohibited from taking retaliatory adverse actions against employees who courageously expose illegal practices within the company.

While the newly enacted Whistleblower Protection Act will take effect in July 2025, this new law does not apply to private entities that are not invested by government.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

A trade union (labour union) is an organisation formed by workers to advocate for their labour and employment rights. Under current regulations, labour unions are broadly categorized into three types: 1) occupational unions, 2) industrial unions, and 3) enterprise unions.

Occupational unions consist of workers from the same occupation or professional field. For instance, teachers, nurses, and engineers may establish their own occupational unions. Typically, there is only one occupational union of the same type within a county or city, and these unions are dedicated to representing employees of specific professions to ensure that the unique needs and rights of different occupations or professional fields are safeguarded.

Industrial unions consist of employees from enterprises within the same industry. For instance, the manufacturing, service, and construction industries may each have corresponding industrial unions. The scope of industrial unions is relatively broad, aiming to represent all employees within a particular industry.

Enterprise unions are formed within a particular enterprise and are established by the employees of that enterprise. These unions focus on managing internal affairs of the enterprise, such as employee welfare, salary negotiations, and working conditions.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

The responsibilities of a labour union encompass, but are not limited to, the negotiation, modification, or termination of collective agreements; resolution of labour disputes; enhancement of labour conditions, occupational safety and health, and member welfare; advocacy for the development and amendment of labour policies and laws; and the organisation of labour education, among other activities.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

### a. Number of Representatives

Pursuant to Article 11 of the Labour Union Act, an enterprise union may be established with the signatures of 30 or more employees. In accordance with Article 17 of the Labour Union Act, unions with 500 or fewer members are required to have 5 to 9 directors, and the number of supervisors must not exceed one-third of the directors.

### b. Appointment of Representatives

The formation of a labour union, in addition to fulfilling the procedural requirements of Article 11 of the Labour Union Act, must also be registered with the county, city, or central competent authority.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

In the event the proposed transfer is subject to the Business Mergers and Acquisitions Act, the Successor Party shall, no later than thirty days before the reference date of the merger/consolidation and acquisition, serve a written notice expressly describing labour conditions to any labour staying after the merger/consolidation and acquisition according to the negotiation between the Predecessor and Successor Parties. Any employee must inform the new employer of their decision to accept the conditions in writing within ten days of receiving the notice. Failure to provide such notice will be considered as consent to remain with the new company following the merger, consolidation, or acquisition. The service years shall be recognised by the Successor Party.

For a transaction not subject to the Business Mergers and Acquisitions Act, the transfer of employees is typically resolved through a tripartite agreement, wherein the employee, the former employer, and the new employer execute an agreement to terminate the original employment contract and establish a new contract with the new employer.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employment terms and conditions agreed to by an employer and an employee should not be less favourable than the minimum/mandatory requirements set forth under the Labour Standards Act (LSA); otherwise, they are null and void and will be superseded by the corresponding provisions prescribed under the LSA. For employment terms and conditions not stated in an employment contract or the employer's work rules/policies, the legal minimum/mandatory requirements shall apply. For employment terms and conditions provided in an employment contract or the employer's work rules/policies, which are more favourable than the legal requirements, such favourable terms and conditions shall prevail.

### SALARY

Salary should be paid in two instalments each month unless otherwise agreed between an employer and an employee. The amount of salary agreed to by both the employer and the employee should be no less than the basic wage announced by the Ministry of Labour (MOL), which is NT\$27,470 per month (NT\$183 per

hour) starting 1 January 2024 (subject to adjustment from time to time). Employers are prohibited from deducting any amount that has not become due to the employer from any employee's salary.

Salary includes base salary, regular allowances, and any and all performance-based bonuses/payments paid by an employer to an employee on a regular basis. Exclusions are prescribed in Article 10 of the Enforcement Rules of the LSA such as profit-sharing, year-end bonus, festival allowances, and so on.

## MAXIMUM WORKING WEEK

### (1). Regular work hours:

The maximum regular work hours should not exceed 8 hours a day and 40 hours in a week.

### (2). Flexible work hour arrangement:

Upon obtaining the consent of the labour union or the labour-management conference if there is no labour union, the work hours every two weeks can be spread over the same two weeks or a four-week or an eight-week period, subject to the relevant requirements.

## OVERTIME

Overtime refers to the work hours exceeding the regular work hours. Upon obtaining the consent of the labour union or the labour-management conference if there is no labour union, employers may request employees to work overtime. The maximum number of work hours should not exceed 12 hours per day (including both regular work hours and overtime), and the total number of extended work hours should not exceed 46 hours per month. The extension of work hours, with the consent of the labour union or the labour-management conference if there is no labour union, shall not exceed 54 hours a month and 138 hours every three months.

The employer may provide compensatory leave in lieu of the overtime pay with the consent of the employee (the ratio of compensatory leave and the overtime pay can be 1:1). The effective period of the aforesaid compensatory leave shall be agreed between the employer and the employee but no later than the end of the calendar year when the overtime work occurs. Upon expiration of the period of compensatory leave or the termination of the employment, the wages for unused compensatory leave shall be calculated based on the wage for the day when the work hours were extended or the rest day when the worker performed the work.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

### Employer's Duty to Provide a Healthy and Safe Workplace

Pursuant to Taiwan's Occupational Safety and Health Act, employers are required to ensure the safety and health of the workplace to protect employees'

occupational safety and health. Specifically, employers must:

- Provide a safe working environment: Ensure that workplace facilities, equipment, and operational methods comply with safety standards, and conduct regular inspections and maintenance.
- Risk Assessment and Management: Conduct hazard identification and risk assessment within the workplace and implement appropriate risk management measures to mitigate or eliminate hazards.
- Safety and Health Education and Training: Provide employees with necessary safety and health education and training to equip them with relevant knowledge and skills to address potential workplace hazards.
- Emergency Response Measures: Develop and implement a contingency plan to respond to potential accidents or emergencies.
- Health Management: Provide necessary health examinations and health promotion measures to maintain employees' physical and mental health.

## COMPLAINT PROCEDURES

Pursuant to Paragraph 1, Article 39 of the Occupational Safety and Health Act, if employees discover that a business entity is violating the Act or related safety and health regulations, suspect an occupational disease, or experience physical or mental harm, they may file a complaint with the employer, the competent authority, or a labour inspection agency. Additionally, the competent authority or a labour inspection agency may conduct investigations to verify the preventive and remedial measures implemented by the employer.

### Protection from Retaliation

Pursuant to Paragraph 4, Article 39 of the Occupational Safety and Health Act, employers shall not dismiss, transfer, or impose any other adverse treatment on employees who file a complaint.



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## I. INTRODUCTION

First of all, it should be noted that Turkish Employment Law has a very wide framework. In this sense, it can be said that it has some special resources that are not found in other legal disciplines and the hierarchy among the resources has some different characteristics. In fact, in Turkish Law, social and economic rights related to working life and labour law are primarily regulated by the Constitution of the Turkish Republic (the "Constitution"). Moreover, the rules of the Constitution concerning employment law do not only consist of social and economic rights. Provisions regarding individual rights and freedoms (such as principle of equality, personal immunity, prohibition of drudgery, protection of private life, freedom of communication, freedom of thought and opinion) are also related to working life.

In addition to this, the rules regarding the employee-employer relationship are regulated both in the Turkish Code of Obligations numbered 6098 ("Turkish Code of Obligations") and the Employment Law numbered 4857 ("Employment Law"). The primary and simplest reason for the regulation of the aforementioned rules in the Turkish Code of Obligations, as well as the Employment Law, is that the relationship between the employee and the employer regulates a debtor-creditor relationship. Apart from these, other basic regulations regarding employment law are regulated by other laws such as Trade Unions and Collective Labour Agreements Act numbered 6356, Occupational Health and Safety Law Act numbered 6331, and the Labour Courts Law Act numbered 7036. Practical measures for implementation are possessed through regulations, legislations, notices, and Presidential Decrees. On the other hand, while Judicial opinions and international agreements are also among the main sources of employment law, employment agreements, internal regulations, and workplace practices can be named as private sources.

### KEY POINTS

- In Turkish Law, it is obligatory to apply to a mediator before filing a lawsuit concerning employee and employer disputes. Mediation is a legal remedy that must be completed as a pre-condition. If the parties cannot reach an agreement during mediation proceedings, then they will have the right to file a lawsuit.
- The working conditions arising out of the employment agreement, internal regulations, or workplace practices, may be changed only if the employees are notified in written form before the change. Employees of the company should be

notified in writing and asked to respond within 6 business days, whether or not they object to the changes. If an employee rejects the changes or does not provide a written approval, such change cannot be applied to the related employee.

- Parties to the employment agreement may agree upon a trial period in order to evaluate each other. However, concerning individual employment agreements, trial periods cannot be longer than two months as per Article 15 of the Employment Law. On the other hand, trial period can be increased up to four months concerning collective labour agreements.
- As per Article 41 of the Employment Law, overtime is defined as the time which exceeds 45 hours per week, under the circumstances stipulated under the law. However, concerning white-collar employees, it can be agreed under the employment agreement that the wages for overtime of up to 270 hours in one year are included in the employee's salary. In other words, the employee would not be entitled to any overtime payment concerning overtime works which do not exceed the annual 270-hour limit. For any hour exceeding this limit, the employer is obliged to make overtime payments to the employee. On the other hand, compensation regarding works performed on weekly days off or on national holidays must be paid, regardless of the 270-hour limit.
- In order not to face the administrative, legal, and penal responsibilities, the rules set out in Occupational Health and Safety Law Act numbered 6331 and the Occupational Health and Safety Services Regulation must be followed.

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

No discrimination based on language, race, colour, gender, disability, political thought, philosophical belief, religion, sect, and similar reasons can be made in the business relationship. Unless there are fundamental reasons, the employer cannot treat a part-time worker against a full-time worker, or a fixed-term worker against an indefinite-term worker. Unless biological or work-related reasons necessitate, the employer cannot directly or indirectly treat a worker differently in the conclusion of the employment contract, in the creation, implementation, and termination of the employment contract, due to gender or pregnancy. For work of the same or equal value, a lower wage cannot be agreed upon solely based on gender. The

application of special protective provisions due to the gender of the worker does not justify the application of a lower wage.

## PROTECTIONS AGAINST HARASSMENT

In accordance Article 5 of the Employment Law, employers cannot discriminate employees based on their language, race, colour, gender, disability, political opinion, belief, religion, or any other reason. Employers equally treat employees performing substantially similar work, of equal skill and seniority. If not, the employee will the right to terminate his/her employment agreement, claim compensation for discrimination and the rights he/she has been deprived of.

If the employee sexually harasses another employee of the employer, the employer may terminate the employment contract based on a just cause without waiting for the notification period, regardless of its duration. Likewise, if the employee is sexually harassed at the workplace by another worker or a third party and the necessary measures are not taken despite informing the employer of this situation, the employee may terminate the employment contract with just cause.

## EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

As per Article 30 of the Employment Law, in establishments employing 50 or more employees, employers are obliged to employ disabled personnel at a ratio of 3% of the total personnel. Governmental establishments with 50 or more employees are obliged to employ disabled personnel at a ratio of 4% and ex-convicts at a ratio of %2. As per Article 101 of the Employment Law, employers who fail to fulfil this obligation shall pay to the Turkish Labour Institution a monthly penalty for each unemployed disabled or ex-convict employee. The administrative penalty for the year 2024 is TRY 20,900.

## REMEDIES

**Discrimination Compensation:** Discrimination compensation is the compensation that can be given to the employee in the number of up to four months' wages in case of violation of the employer's obligation of equal treatment. The employee may also claim other rights that he/she is deprived of, apart from compensation for discrimination. Examples of these are social benefits, bonuses, and raises applied regularly.

**Compensation for Bad Faith Damages:** In cases where the employment contract of employees outside the scope of application of Articles 18, 19, 20, and 21 of the Employment Law is terminated by misuse of the right of termination, compensation is paid to the employee in the triple amount of notification period.

**Union Compensation:** Within the scope of job security, the employee can only request job security compensation in case of union discrimination; but the amount of this compensation cannot be less than one year's wage. If the employee is not an employee within the scope of job security and the employment contract is terminated for union reasons, then the employee will only be able to request union compensation. It is not possible to claim discrimination compensation and union compensation together. Since the sanction envisaged due to trade union discrimination is union compensation, they cannot also demand discrimination compensation.

**Other Requirements:** Turkey has signed ILO conventions 100, 111, 122 and 142, which ensure equality between men and women and promote women's employment. In this framework, in the light of the general policy of the ILO on the development of women's employment and the fact of the low rate of women's employment in Turkey, ILO Ankara Office in cooperation with the Turkish Employment Agency (=İŞKUR) in 2009, in order to improve women's employment in Turkey. Launched the Active Labour Market Policies Pilot Project for Realizing Gender Equality through the Provision of Decent Work Opportunities.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

Salary, social security contributions, paid annual leave, paid sick leave, general health insurance contribution, weekends, public holidays, official holiday salaries, overtime payments, maternity leave or paternity leave pays are main mandatory benefits. The employer may also provide employees some additional voluntary benefits. Under the social security laws, each employee is insured from the date of employment. The employer must inform the Social Security Institution about each employee that works in the workplace. The employer is also legally under the obligation to pay social security contributions to the Social Security Institution.

### HEALTHCARE AND INSURANCES

Employees covered by the Social Security Institution receive free examination and treatment at state hospitals. The employer deposits a certain amount each month to the Social Insurance Institution so that the employee can retire and benefit from health services. This amount is determined according to the gross wage of the worker and must be paid regularly by the employer. As of 1 January 2017, public and private sector employees under the age of 45 and, upon request, persons over the age of 45 are automatically included in the private pension plan by their employers, regardless of whether they have existing private pension contracts.

## REQUIRED LEAVE

### Holidays and Annual Leave

The minimum paid annual leave entitlements do not include national holidays. In other words, the employees benefit from national holidays, in addition to their annual leave entitlements. In principle, employees do not have to work on national holidays and they receive full wages on such holidays. However, if employees do work on national holidays, they will be entitled to receive additional payments for each day. Whether employees will work on public holidays or not is determined by the employment contract. Unless there is a clause in the contract, the employee's consent is required for working on public holidays.

According to Article 53 of the Employment Law, after working for at least one year, employees become entitled to paid annual leave. Depending on the length of employment, the length of the paid annual leave varies. The Employment Code states minimum annual leave entitlements, which can be increased through employment agreements, however, cannot be decreased.

### Maternity and Paternity Leave

Maternity rights are determined under the Article 74 of the Employment Law. According to this article, pregnant employees can take fully paid leave for: i) Eight weeks before birth; and ii) Eight weeks after birth. Pregnant employees and their spouses will be entitled to nursing benefits under certain conditions. Regarding paternity leave, 5 days, in the event of employee's spouse gives birth.

### Sickness and Disability Leave

In case of injury or illness, employees become entitled to time off for sick leave. By documenting their illness or injuries with a medical report, employees will be entitled to time off during the period of rest recommended in the report. However, on condition that the employee's illness or injury exceeds the valid notice period mentioned in the report by six weeks, this will give the employer the right to terminate the employment agreement with immediate effect by paying the employee's severance payment on the grounds that the employee's sickness cannot be cured.

If the employee becomes disabled, the employer has the right to terminate the employee's employment contract with just cause, if the absence due to this reason lasts more than 3 working days in a row or 5 working days in a month.

### Other Required or Typically Provided Leave(s)

In accordance with the Employment Law, other types of leaves are as follows:

- **Marriage Leave:** 3 days, in the event of employee's marriage,
- **Bereavement Leave:** 3 days, in the event of death of the employee's mother, father, spouse, brother or sister, and child,

- **Adoption Leave:** 3 days, in the event of employee's adoption of a child,
- **Disabled child leave:** up to 10 days in a year to escort the treatment of a child in case employed parents have a child with at least 70% disability or chronic disease approved by medical report. However; only one of the parents can take this leave, and there can neither be any interruption to the leave nor can it be used in segments.

## PENSIONS: MANDATORY AND TYPICALLY PROVIDED

### Mandatory Pension Schemes

All employers are legally obliged to register their employees under their payrolls and within the registries of the Social Security Institution. Each month, a premium of "old age insurance" is cut from the salary of the employee, and paid as a contribution to the Social Security Institution. When the retirement age arrives and the employee becomes eligible to retire by meeting all the conditions, the employee will also be entitled to receive a retirement pension from the government.

### Private Pension Schemes

With the legal regulation that entered into force on 01.01.2017, employees automatically participate in the Private Pension Scheme (the "PPS") through their employers. As of 01.01.2019, workplaces with 5 or more employees are required to include their employees in the "PPS". With this practice, public and private sector employees under the age of 45 (and also upon request, persons over the age of 45) are automatically included in the private pension scheme by their employers, regardless of whether they have an existing individual retirement contract. 3% of the gross wage written on the payroll of the employees is taken as a contribution. Thus, employers are obliged to register their employees with the "PPS" and pay the compulsory contribution directly to the company holding the "PPS", deducting the mandatory contribution from their wages. However, if employees do not want to be involved in a private pension scheme, they can apply to their employers to opt out within 2 months after joining the scheme.

### Other Required Or Typically Provided Benefits

- **Excused Leave:** An excused leave is a leave taken by the employee regarding any matter related to his/her personal life.
- **Administrative Leave:** Administrative leave means that the working day is declared a holiday as a result of the President's decision. However, administrative leave is a type of leave that only covers civil servants.
- **Fringe Benefits:** Some employers provide their workers some fringe benefits such as a meal at the company, private health insurance, a company car, a company phone, a laptop etc. However, these fringe benefits are not mandatory for the employer to provide. It is worth to mention that if



an employer is to provide fringe benefits, they must be provided equally to all employees unless there is an objectively valid reason. Otherwise, employees may terminate their employment agreements based on a just cause, claim severance payment and compensation for unequal treatment.

## IV. EMPLOYMENT CONTRACTS

### MINIMUM REQUIREMENTS

Principally, there is no special requirement for an employment agreement unless otherwise specified. The employee and the employer may agree upon terms and conditions of the work either verbally or in written form. On the other hand, if the duration of the employment agreement has been determined as one year or longer, the contract will then have to be in written form. Additionally, Article 11 of the Employment Law states that all “definite term employment agreements” must be in written form, regardless of their duration.

### FIXED- TERM/OPEN- ENDED CONTRACTS

Fixed-term agreement is an agreement between an employee and an employer, where parties mutually agree upon a certain expiration time. Fixed-term employment agreements can be executed (i) if the work subject to the agreement has a definite term (ii) if the work requires the completion of a definite task (such as a project) or (iii) if the work is in connection with the emergence of a cause.

Indefinite-term employment agreement can be regarded as the most commonly used, while the fixed-term employment agreement as an exception, since the former provides better protection for employees. Furthermore, fixed-term employment agreements cannot be renewed without a valid reason. If parties renew it without objective reasons justifying the renewal; the agreement will be deemed as an indefinite-term employment agreement from the very beginning.

### PROBATIONARY PERIOD

Parties to the employment agreement may agree upon a trial period in order to evaluate each other. The employer may want to inspect the employee's manner of work, while the employee may want to evaluate the workplace and conditions. A great majority of employment agreements in Turkey include such provisions even though it is not mandatory.

Trial periods cannot be longer than 2 months as per Article 15 of the Employment Law. In case parties decide upon a longer trial period, such provision shall be deemed partially invalid and the period will be executed as 2 months for individual employment agreements. However, for collective employment

agreements, this period can be extended up to 4 months. Within such trial period, parties may terminate the agreement without any obligations or granting any notice period. However, employers will still be obliged to pay employees' wages for the days they worked and overtimes, if any.

### NOTICE PERIOD

According to Article 17 of the Employment Law, both the employer and the employee can terminate the employment agreement, which has been signed for indefinite period through a notice. The terminating party must comply with the termination procedure explained in Article 17 of the Employment Law.

## V. HIRING PRACTICES

### REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In accordance with the International Labour Force Act No 6735, foreigners must obtain a work permit from the Ministry of Labour and Social Security before starting to work for an employer or to work independently.

### DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

In accordance with the Foreign Direct Investment Law Act No 4875, foreigners can establish a company in Turkey. If foreigners want to establish a workplace and work on behalf of their name and account; following the completion of the establishment procedures such as the publication of the workplace in the trade registry or chamber of artisans registry gazette and obtaining a tax number for the workplaces in question, they must apply to the Ministry of Labour and Social Security for a work permit. In addition to the above principally, 5 Turkish citizens must be employed in workplaces that will employ a foreign employee. In other words, 5 Turkish citizens must be employed for each foreigner.

### LIMITATIONS ON BACKGROUND CHECKS

While being limited with personal data protection rules and regulations, employers can perform certain background checks of potential employees whether the employee is suitable for the relevant position. The background checks, however, must be in relation to evaluation of the potential employees fitness to the role to be offered. In other words, it is not possible to carry out intelligence work or to provide control through any data base. As criminal records and health records are categorized as special category personal data, they can only be processed with the explicit consent of the data subject or in special conditions.

Effective from 1 June 2024, amendments to the DP Law have been introduced. Notably, the processing of special categories of personal data, such as data related to criminal convictions, security measures, and health data, has been permitted to meet legal obligations in specific areas, including employment, occupational health and safety, labour and social security, or social services and assistance.

While the DP Law explicitly addresses the fulfilment of legal obligations within the context of an 'employment' relationship, its application to job candidates is not broadly permissible. However, depending on the nature of the position and the employment process, it is possible to process data related to criminal convictions and security measures of prospective employees, provided this is done in accordance with the 'principle of proportionality'—a key principle of the DP Law. Nonetheless, this practice is highly restricted and must be assessed within the framework of obligations explicitly defined by the relevant legislation.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

There are no legal limitations regarding the questions to be asked during applications, interviews or other hiring procedures. However, employers must still be cautious and should not invade the privacy of potential employees, or should not ask questions which may lead to harassment / sexual harassment allegations.

# VI. PAY EQUITY LAWS

## EXTENT OF PROTECTION

The principle of equality before the law is regulated in the Constitution of the Republic of Turkey. In this context, everyone is equal before the law, regardless of language, race, colour, gender, political thought, philosophical belief, religion, sect, and similar reasons. Women and men have equal rights. The state is responsible for ensuring that this equality is realized.

## REMEDIES

An employee can file a lawsuit against the employer and claim compensation for discrimination and bad faith. On the other hand, an administrative fine of TRY 1,402 per worker for the year 2024 may be imposed on the employer who violates the principle of equal treatment.

## ENFORCEMENT/LITIGATION

The Supreme Court seeks proof that there is a wage gap between workers of similar nature. Moreover, Supreme Court states that even if it is accepted that such a wage difference is created between workers of similar nature, the difference created in wages alone will not necessitate a judgment for discrimination compensation. Also, the burden of

proof concerning the breach of the equal treatment principle rests with the claimant employee. For an employee to be entitled to this compensation, it is necessary to put forward strong evidence of the existence of the violation and the contrary must not be proven by the employer.

## OTHER REQUIREMENTS

The Prime Ministry Circular No. 2010/14 on "Increasing Women's Employment and Promotion of Equality in Opportunities" was published in the Official Gazette and entered into force on 25th May 2010 in order to increase women employment and to implement equal pay for equal work principle for strengthening the socio-economic positions of women, implementing the equality of women and men in social life, and achieving the sustainable economic growth and social progress. In this circular, it is stated that in all kinds of audits carried out for both public and private sector workplaces, the issues of whether the provisions regarding gender equality expressed in Article 5 of the Labour Law are complied with will be included in the audit report. However, it cannot be said that such controls are encountered in practice.

Next to the obligation to publish a bi-annual report and the possibility to take positive actions, the Act of 28 July 2011 inserted a quota of at least one third of the less represented sex for all members of the Board of Directors of autonomous public undertakings, listed companies and the National Lottery, which had to be fulfilled before specific deadlines. Failure to comply with these provisions may result in sanctions: nullity of the appointment or suspension of financial benefits.

# VII. RESTRICTIVE COVENANTS

## DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The employee and the employer may determine that the employee shall refrain from competing with the employer in any way after the termination of the contract, especially by establishing a competing business on his/her account, working for another competitor, or otherwise engaging in any other kind of interest relationship with the competitor.

## ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

The prohibition of competition is valid only;

- if the employee – employer relationship is of such nature that it provides the employee with the ability to engage information about its clientele or its productions or the business,

- and at the same time if the use of this information would result in any cause of employer's loss.

Such prohibition may be determined within the employment agreement or may be signed by the parties as an additional protocol. Pursuant to Article 445 of the Turkish Code of Obligations and the precedent judgements of the Court of Appeals, except for special circumstances and conditions, the non-competition clause cannot contain inappropriate restrictions in terms of place, time and type of work, in a way that endanger the economic future of the employee unfairly, and its duration cannot exceed 2 years.

In addition to the above, in the event of a potential lawsuit, the judge may limit the excessive nature of the non-competition clause in terms of scope or duration, by freely evaluating all situations and conditions and by considering the counter-action that the employer may have undertaken in an equitable manner. This is a requirement of freedom to work.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is not a recognized concept under Turkish law. Therefore, an employer cannot put an employee in a leave while paying his/her salary, unless such employee accepts to be put in a leave. In this regard, if the employer wishes to put an employee in an administrative (garden) leave, the employer must obtain the written approval of the employee. If the employee is put in a leave without his/her approval, he/she may theoretically terminate his/her employment agreement based on a just cause and demand severance payment, due to the fact that the right to work is a right protected under Turkish Constitution.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

Employer can restrict the private use of internet and/or social media during working hours over the workplace internet. The employer may limit the internet provided by the workplace to be used for business purposes, as well as block access to social media sites and/or certain sites.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Employer's legitimate interest is essential for the surveillance of employee communication. Legitimate interest is assessed for each individual

case by taking into account the characteristics of the workplace and the job the employee performs. In the Constitutional Court's decision no. 2018/31036, as the purpose of the e-mail surveillance was to ensure the business to run effectively in the workplace which provides financial services with a large number of employees, legitimate interest of the employer was recognized. In this regard, the Personal Data Protection Board has issued several decisions imposing administrative fines in cases where the employer has monitored employees using tools without fulfilling the obligation to inform. The Board examines such cases within the framework of the six criteria established by the Constitutional Court under this heading. The same approach was also adopted in Constitutional Court's decision no. 2016/13010, and although the surveillance was found lawful as the employee was not informed beforehand, the legitimate interest of the employer was recognized in surveillance of employee communication in order to ensure effective conduct of business. It is crucial, however, that this surveillance of employee communication is conducted with the employee's knowledge. Even when the legal basis for surveillance is legitimate interest, the employer's obligation to inform under the DP Law remains. In this regard, the Supreme Court holds that even though a confidentiality agreement may stipulate that the employee is prohibited from taking company information and documents outside the workplace, either verbally or in writing, and even if the employee violates this obligation, it is considered unlawful for the employer to monitor the employee using a program installed on the employee's computer without their knowledge. Consequently, the Supreme Court deems the termination of the employee's contract, based on evidence obtained in this manner, to be unlawful. In this regard, it would be fair to state that employers have a legitimate interest in monitoring email conversations during internal investigations or inspections to ensure that business is conducted effectively and that laws and regulations as well as company policies are followed. As a personal data processing activity, the employer must base its processing on one of the conditions under Article 5 of the DP Law as well as comply with the principles under Article 4. In case the employer bases its processing on the legal basis of legitimate interest, a balance test should be conducted with the legitimate interest of the employer as data controller and the fundamental rights of the employee as data subject. In order to process data based on this condition, the data controller must have a legitimate interest and the fundamental rights and freedoms of the data subject must not be damaged. In practice, particularly in internal investigation processes, it is common for global companies to have these investigations conducted not by the employer, but by the global entities to which the employer is affiliated. In such cases, the internal investigation process cannot be justified based on the legitimate



interest of the employer as a data controller. If an internal investigation is conducted by a third party other than the employer, explicit consent must be obtained from the employees.

## **EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION**

Such a sharing by the employee, in any case, concerns the disclosure of confidential information and personal rights if it directly targets an employee. In accordance with Article 25/II-b of the Employment Law, the employer can immediately terminate the employment agreement without having to pay severance, whether it is an agreement for definite or an indefinite period, before it expires or without having to comply with the notice periods, if the employee speaks or acts against the honour or reputation of the employer or a member of the employer's family, or asserts or accuses the employer in matters affecting his honour with groundless accusations. Therefore, use of social media to disparage the employer can be a reason for immediate termination of the employment relation, if the employer duly finds out about such social media post before the employee deletes it. Also, divulging confidential information is also regarded as a reason for immediate termination. Therefore, using social media for this purpose would also be result in employment relation. The employer, as a data controller, may need to monitor employees' social media activities to prevent the unauthorised sharing of personal data processed within the organisation. This responsibility requires taking technical and administrative measures to protect such data. For instance, The Personal Data Protection Board's dated 2022 and numbered 2022/630 highlighted a case where a doctor shared patient photos on social media without consent. The hospital, aware of this, failed to prevent it, leading to a 100,000 TRY fine for not taking the necessary precautions.

## **IX. TERMINATION OF EMPLOYMENT CONTRACTS**

### **GROUND FORS FOR TERMINATION**

Both the employer and the employee can terminate the employment agreement, which has been signed for indefinite period through a notice. The terminating party must comply with the termination procedure explained in Article 17 of the Employment Law. Pursuant to Article 17/3 of the Employment Code, these periods are relatively compulsory. Therefore, the parties cannot decrease or fully cancel these periods, but they can enter into a written contract in

order to extend these periods. However, the employer can terminate the contract without complying with the notice periods specified in Article 17 by paying the wages corresponding the notice period.

### **COLLECTIVE DISMISSALS**

Pursuant to Article 29 of the Employment Law, a collective dismissal takes place when an employer terminates the employment contracts of:

- At least 10 employees if there are between 20-100 employees in total.
- At least 10% of the employees if there are between 101-300 employees in total.
- At least 30 employees if there are more than 301 employees in total.

The terminations of employment agreements must result from economic, technological, structural or similar requirements regarding the enterprise, business or work, and must be performed on the same date or at different days within the same month.

### **INDIVIDUAL DISMISSALS**

Employment agreements with definite and indefinite periods will be immediately terminated if the parties terminate such agreements with just cause. Both the employer and the employee can terminate employment agreement on grounds of just cause. Reasons of just cause are limited and listed in the Employment Code for both of the parties.

### **IS SEVERANCE PAY REQUIRED?**

For an employee to be entitled to severance pay, he/she must work continuously for at least 1 year in the workplace or workplaces of the same employer. If the employee has worked at the employer's workplace for less than 1 year, it is not possible for the employee to receive severance pay. Even if the employee works in different workplaces or even in different companies of the same employer, the period of employment shall be collectively taken into account in calculating the 1 year. In addition to the above, if the employee resigns without a just cause or if the employer terminates the employment agreement based on a just cause, the employee will not be entitled to any severance payment.

### **SEPARATION AGREEMENTS**

It is not required. However, it is a preferred option considering that the conclusion of a potential employment lawsuit may take years. Principally, a separation agreement (mutual termination agreement) prevents potential future disputes.

### **REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION**

In case one of the parties fails to comply with the termination periods, the employment agreement will still be deemed as terminated. However, in

such situation, the other party will have the right to claim notice pay from the other party. It is important to underline that not only the employee, but also the employer can request notice payment. Additionally, even if the employee does not have any loss, he/she can claim the notice payment and severance payment.

Furthermore, provided that the employer collectively has more than 30 employees, the employee's length of service is longer than 6 months and the employee is not the employer's representative or assistant authorised to manage the entire enterprise who is also authorised to recruit and to terminate employees; such employee will have the right to file a re-employment lawsuit against the employer. If the court determines that the employment agreement has been terminated without a valid reason or a just cause, the employee will be required to re-instated back to his/her previous position. If the employer does not wish to re-employ the employee, such employer can pay an amount between 8 – 12 months' salary, based on the court judgement.

## WHISTLEBLOWER LAWS

Whistleblowing is not regulated in a uniformed source but rather it is regulated under multiple laws and regulations.

Article 18 of the Employment Law specifically provides that terminating an employment agreement on the basis that the employee has filed a complaint or participated in proceedings against the employer (such as external reporting), seeking fulfilment of obligations or rights arising from law or the employment agreement, will not be considered a valid reason for the employer to terminate the employment agreement. This provision provides protection to whistleblowers towards any termination by their employers. Employers must also protect whistleblowers against retaliation from other employees. The Supreme Court has an established practice of protecting the right of employees to file complaints. It has ruled in most cases that if an employee reports his/her employer's alleged fraudulent act based on a reasonable belief and if such employee believes that the employer is involved in a criminal act, such employer cannot use this as the basis of retaliation and/or termination with just cause or valid reason.

Article 278 of the Turkish Criminal Law and Article 158 of the Law of Criminal Procedure require all individuals who have knowledge of criminal offences in progress or have been completed (if it is possible to limit the consequences of the offence) to report these offences to the Public Prosecutor's Office. However, legislation does not define a time limit for making such reports. There are no legislative requirements regarding the level of suspicion which must exist before reporting a criminal offence to the Public Prosecutor's Office. However, it would be prudent to externally report any conduct which goes beyond a reasonable suspicion.

The Witness Protection Law no. 5726 provides certain protections to persons reporting a crime. However, the Witness Protection Law only applies to persons reporting crimes that are subject to an aggravated life sentence, life sentence, and crimes that are punished with a minimum of ten years or more, as well as terrorism-related crimes.

When collecting personal data under a whistleblowing scheme, the employer or external company must comply with DP Law, including registration with the Data Controller Registry if required. Employees should be informed about the process, and a specific privacy notice is necessary. External service providers, as data processors, share responsibility for data security and must ensure confidentiality and compliance with data protection standards.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

In the Trade Unions and Collective Labour Agreements Act No 6356, the union is defined as: *"Organisations with legal personality formed by at least 7 employees or employers to work in a line of business in order to protect and develop the common economic and social rights and interests of workers or employers in their labour relations."* As can be understood from the definition, no distinction has been made between the employees' union and the employer's union.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

Trade unions are considered to be important as they are the basis of freedom of association, which is one of the basic human rights. Herewith, trade unions aim to protect and develop the economic and social rights of employees.

The rights of unions can be sorted as below:

- *Making a collective bargaining agreement,*
- *Deciding on strike or lockout,*
- *Organizing vocational training, courses, and conferences to increase the knowledge of its members, to establish cultural facilities,*
- *Assisting in the establishment of mutual aid funds for social security or to give credit to the established funds.*

In addition, the trial period registration added to the employment contract can be extended up to 4 months with a collective bargaining agreement. Also, whether

or not to work on national and public holidays is also determined by the collective bargaining agreement.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

In practice in Turkey, it is not seen that it is divided into different bodies in this way. However, if the committees as exemplified above are included within the collective bargaining agreements, then employee representative bodies within a workplace can be established.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

Transfer of employees is not usually easily determinable and the employers must obtain employee approval in a workplace transfer as well.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

With the transfer process, the transferee (i.e. the successor) becomes the new employer of the employment contract with all its rights and obligations. In terms of the employee's rights related to the period of service, the date of employment with the former employer shall be taken as a basis regarding the calculation of employment receivables.

However, concerning transfer of employment agreements, there is no legal regulation on the determination of responsibility in terms of labour receivables that were borne but not paid in the period of the former employer. In its precedent judgements, the Supreme Court states that the transferee employer and the former employer will be jointly liable for a limited period of 2 years for employment receivables such as salary, overtime wage, week-end wage, and national holiday wage regarding the transfer of employment agreements. On the other hand, regarding the former employer's responsibility for severance pay, the Supreme Court states that the responsibility should be limited to its period and the employee's last salary on the date of transfer. Therefore, the severance pay should be calculated for the entire period of employment, before and after the transfer of the employment contract, but the former employer should be limited to their term and salary on the date of transfer.

Under the DP Law, both predecessor and successor parties in a transfer of undertaking have specific obligations regarding the protection of personal data. The predecessor (original employer) must

ensure that the personal data of employees is transferred lawfully, with appropriate safeguards in place. The successor (new employer) becomes the new data controller and must inform employees about how their data will be processed under the new management. Both parties must ensure compliance with DP Law, including obtaining necessary consents and maintaining data security during the transition.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

The national minimum wage applies to all employees except the ones working in the coal and lignite mining sectors. In these sectors, the minimum wage must be at least twice the regular minimum wage determined by the commission. The gross minimum monthly wage in force until 31 December 2024 is TRY 20,002.50 gross, which corresponds to net TRY 17,002.12. The minimum wage is expected to increase in 2025; however, it has not been decided yet.

### SALARY

Article 32 of the Employment Law states that the employer shall pay the employees on a monthly basis, at the latest. The payment period can be reduced to a week under collective bargaining and employment agreements. Pursuant to Article 32 of the Employment Law, the payment shall be made in Turkish currency, in principle.

### MAXIMUM WORKING WEEK

As per Article 41 of the Employment Law, overtime is defined as the time which exceeds 45 hours per week, under the circumstances stipulated under the law. As per Article 63 of the Employment Law, weekly working hours can be distributed to the working days in a week by the mutual agreement of the parties, provided that a maximum of 11 hours per working day is not exceeded. In this manner, the weekly average working time of the employee within a period of two months, cannot exceed the regular weekly working time. The reference period can be increased up to four months under collective bargaining agreements. Provided that the average working hours of the employee do not exceed regular weekly working hours, even though it may exceed a total of 45 hours during some weeks, it is not considered to be overtime, if the two-month reference applies in accordance with Article 63.

### OVERTIME

Extra wages for each overtime hour shall be paid as 50% more than the regular working hour salary. However, if the weekly working hours are determined to be less than 45 hours in the employment agreement, working hours which exceed the applied



average time within the abovementioned conditions and up to 45 hours, are considered to be overtime work. Extra wages for each overtime work hour shall be paid as 25% more than the regular working hour salary. Employees who do overtime, are entitled to take a free time of 1,5 hours for each hour of their overtime, instead of receiving increased wages as explained above. The employees should use this free time during their working hours within a six-month period and without any deductions from their salary. The written consent of the employees must be obtained through the employment agreement or through an additional written document, if they are asked to do overtime. In accordance with Article 102/c of the Employment Law, employers may be subject to an administrative fine for each employee, in case of the absence of the employee's approval for overtime work. The administrative fine is revised each year.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Pursuant to the Occupational Health and Safety Law, some of the general responsibilities of the employers are as follows:

- Working to avoid occupational hazards,
- Informing and training employees about the risks and occupational health and safety issues which exist in their workplace in particular,
- Providing employees with the necessary tools and equipment,
- Adopting health and safety measures to meet changing workplace conditions,
- Monitoring whether employees abide by occupational health and safety measures,
- Ensuring the suitability of an employee in terms of health and safety before assigning them to a particular task or duty,
- Employ on-site doctor and occupational safety specialist at the workplace under the Occupational Health and Safety Law (applicable for entities having less than 50 employees as of 1 July 2020).

In addition to the general requirements above, some further measures may be required from the employers depending on the hazard class of the respective workplace.

## COMPLAINT PROCEDURES

**Administrative Fines:** Administrative fines vary according to the nature of the violation and the hazard class of the workplace. Also, if the violation continues, these administrative fines continue to be applied every month. Administrative fines applied as of 2024 are listed below as an example.

- Not assigning a workplace doctor: Between TRY 61,602 – 184,806

**Private Litigation:** A lawsuit may be filed against the employer, demanding material and immaterial

compensation, by the employee or their relatives who have suffered bodily harm.

**Criminal Proceedings:** An employee who has suffered bodily harm can complain about the employer to the prosecutor. In this case, the investigation process related to the incident begins. In accordance with the provisions of the Turkish Penal Code Act No 5237, a penalty may be imposed on the responsible persons.



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## I. INTRODUCTION

This guide is intended as a brief outline of employment law in England & Wales. Much of the relevant legislation also applies in Scotland. Northern Ireland has a separate statutory code although much of its employment law is coordinated with that of England, Wales and Scotland. This guide is therefore not to be used as authority for the law in Scotland or Northern Ireland. Provided they are prepared to pay sufficient compensation, employers in England & Wales can usually achieve what they wish. In any event, most businesses are conscientious about wanting to be seen as “good employers”.

### KEY POINTS

- Termination of employment is process-driven so if the right procedure is followed, liability can usually be avoided.
- Discrimination and whistleblowing laws provide a high degree of protection in the workplace; claims are frequently brought in the tribunals and compensation is based primarily on financial loss (with no cap) and there are no punitive damages.
- Although union representation is declining, workplace representation is becoming more common but is generally not problematic for employers.
- Women are entitled to take one year's maternity leave, and this leave can be shared with their partner; maternity pay can also be shared but the pay that can be shared is limited to 37 weeks' pay capped at GBP 184.03 per week (3 April 2024 – 2 April 2025).

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

Anti-discrimination legislation in the UK is concerned with protecting employees, applicants for employment and other categories of protected individuals from discrimination and harassment in respect of the following protected characteristics:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;

- race;
- religion or belief;
- sex; and
- sexual orientation.

### Extent of Protection

Discrimination can be either direct or indirect:

- direct discrimination occurs where, ‘because of one of the protected characteristics’, an employer treats an employee less favourably than it treats or would treat others.
- indirect discrimination occurs where acts, decisions or policies are applied which have the effect of disadvantaging a group of people with one of the protected characteristics.

If an employee can show that they have been treated less favourably compared to a colleague with circumstances broadly similar to their own, then they may have a claim for discrimination against their employer. However, the extent of protection afforded to employees is not without limits, and employers may be able to rely on the objective justification defence if the act etc. was a “proportionate means of achieving a legitimate aim”.

Victimisation relating to any of the protected characteristics is prohibited. Victimisation occurs where an employer treats a person less favourably because they have brought a discrimination complaint or have assisted another in doing so.

### PROTECTIONS AGAINST HARASSMENT

Harassment occurs where an employer subjects a worker to unwanted conduct relating to a protected characteristic, which has the purpose or effect of:

- violating a worker's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the worker.

### EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

UK anti-discrimination legislation imposes a duty on employers to make reasonable adjustments to their premises or employment arrangements (e.g. altering working hours) if they substantially disadvantage a disabled worker or job applicant, unless the employer does not know, and it cannot be expected



to know, that the worker or applicant is disabled. A number of factors can be taken into account to assess whether it is reasonable to make a particular adjustment, including the cost of the adjustment, the financial resources of the employer, how easy it is to make the adjustment and how much it would improve the situation.

## REMEDIES

A dismissal on discriminatory grounds is not subject to any limit on compensation and there is no requirement for any period of continuous service. The award is made up of:

- A compensatory award – uncapped for past and future financial losses and career loss, judged in the light of the employee's future job prospects; and
- An injury to feelings award – there are 3 guideline bands, with the upper band ranging from GBP 35,200 – GBP 58,700, depending on the seriousness of the case – but an exceptional case may exceed GBP 56,700.

In addition, the Equality and Human Rights Commission has a range of powers, including the power to undertake formal investigations and issue non-discrimination notices.

## III. EMPLOYEE BENEFITS

### SOCIAL SECURITY

The UK has a comprehensive social security system, funded from general taxation and from National Insurance Contributions. The social security system provides state benefits to cover maternity/paternity/adoption, childcare, disability and carer matters. It also administers retirement pensions. State benefits can be contractually supplemented by employers. The National Insurance Fund aims to provide subsistence level benefits to all those in need. Employers are under an obligation to collect income tax at source from employment income, pensions and taxable state benefits under the Pay As You Earn ("PAYE") system. Employed earners and their employers must also pay National Insurance Contributions ("NICs"). Various contributions are required to be made in respect of all UK employees. Class 1 contributions are payable in respect of earnings by both employer and employee.

### HEALTHCARE AND INSURANCES

Employers carrying on business in Great Britain are required to have in place employer's liability insurance against liability for bodily injury or disease sustained by employees and arising out of and in the course of their employment in Great Britain. Some employers may offer employees benefits such as life insurance, permanent health insurance, private medical insurance and company cars.

## REQUIRED LEAVE

### Holidays and Annual Leave

Employees and workers are entitled to 5.6 weeks' paid annual leave (pro-rated for part-timers). This holiday entitlement can include public holidays, of which there are currently eight in England and Wales.

Statutory holiday entitlement under the Working Time Regulations cannot normally be carried over into the following year, nor can workers be paid in lieu of taking statutory holiday, except on termination of employment.

However, new rules provide a new holiday entitlement and accrual system for irregular hours and part time workers and allow employers to use a system of rolled-up holiday pay for them (if the employer wishes). This applies for leave years starting on or after 1 April 2024.

### Maternity, Paternity and Adoption Leave

Pregnancy rights include health and safety protection and the right to reasonable paid time off for ante-natal care. Family rights to leave and pay have been subject to major reform in Great Britain with the introduction of shared parental leave and pay which applies to all qualifying working parents of children. Whilst the default 52 weeks' maternity/adoption leave for employed mothers/adopters remains, those employees are entitled to give up their leave and pay and share it with the father/their partner (i.e. whoever shares the main caring responsibility for the child at the date of birth/adoption). Employees with 26 weeks' service also qualify for Statutory Maternity/Adoption Pay which is calculated as follows: (1) six weeks at 90% of salary; and (2) 33 weeks currently at a flat rate of GBP 184.03, or 90% of salary if that is lower. Shared Parental Pay follows the same flat rate for up to 37 weeks. Fathers/co-adopters continuously employed for 26 weeks are entitled to: two weeks' Ordinary Paternity Leave; and two weeks' Statutory Paternity Pay: currently at GBP 184.03, or 90% of salary if that is lower.

All employees have the right to request flexible working, i.e. to request a change to the hours/times they work or their work location, irrespective of their caring responsibilities. Although compensation for non-compliance, or for a decision based on incorrect facts, is capped at eight weeks' pay, victimisation, sex discrimination and unfair dismissal claims may also be brought following an employer's refusal to grant the employee's request.

### Sickness Leave

Employers are required to pay Statutory Sick Pay ("SSP") to employees who are off work due to illness, after the third day of absence (subject to certain qualifications). The current rate of SSP is GBP 116.75 per week from 6 April 2024, for a maximum of 28 weeks. Employers often supplement SSP with contractual sick pay for a specified period.



### **Disability Leave**

Employers are required to pay Statutory Sick Pay ("SSP") to employees who are off work due to injury, after the third day of absence (subject to certain qualifications). The current rate of SSP is GBP 116.75 per week from 6 April 2024, for a maximum of 28 weeks. Employers often supplement SSP with contractual sick pay for a specified period.

### **Other Required or Typically Provided Leave(s)**

#### **Unpaid Parental Leave**

Eligible employees can take unpaid parental leave to look after their child's welfare; up to 18 weeks' leave for each child and adopted child, up to their 18th birthday. The limit on how much parental leave each parent can take in a year is 4 weeks for each child (unless the employer agrees otherwise).

#### **Time off for Dependants**

All employees are entitled to reasonable unpaid time off work to deal with an emergency involving a dependant (e.g., if a dependant falls ill or is injured, if care arrangements break down, or to arrange or attend a dependant's funeral).

#### **Time off for Public Duties**

All employees have to be allowed time off for jury duties/service. Employers do not have to pay employees for time spent on public duties or jury service, but some choose to do so.

#### **Time off for Losing a Child or Suffering Stillbirth**

A new law was introduced in April 2020 giving employed parents the right to 2 weeks' leave if they lose a child under the age of 18 or suffer a stillbirth from 24 weeks of pregnancy. Parents are also able to claim Statutory Parental Bereavement Pay for this period, subject to meeting the eligibility criteria.

#### **Carer's leave**

From 6 April 2024, unpaid carers have a new right to a week of flexible unpaid leave each year to care for a dependant with a long-term care need.

### **PENSIONS: MANDATORY AND TYPICALLY PROVIDED**

Employers have to ensure that workers in the UK, between the ages of 22 and state pension age, and earning a salary of at least GBP 10,000 per annum are automatically enrolled into a qualifying pension scheme to which the employer must contribute. There are minimum total contributions that have to be made. Currently for employers this is 3% of each employee's qualifying earnings.

### **Other Required Or Typically Provided Benefits**

Some employers choose to provide other benefits to employees such as season ticket loans to enable employees to buy an annual train ticket to commute

to work or subsidised gym membership, but this is entirely at the employer's discretion.

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

The standard type of employment contract in the UK is an "open-ended" contract which can be terminated on notice (subject to the protection which the law provides on unfair dismissal). An employment contract need not be in writing and may be partly written and partly oral. However, the basic terms of the employment must be confirmed to employees in writing. Since April 2020, further information must be included in the written statement of terms and this must be provided on or before their start date. From April 2020, this right was extended to workers who are entitled to the basic terms of their engagement in writing on or before their first day.

The most common employment relationship is that of full time permanent employment, but an increasing number of staff have flexible working arrangements. This may include working part time, through fixed-term contracts or through an agency. UK law gives special protection for these types of workers. Zero hours contracts have become more common in the UK. New regulations prohibit the inclusion of exclusivity clauses in such contracts. There are also special rules relating to apprentices, trainees and young persons.

Agency workers are entitled (i) from day one of an assignment to the same rights as comparable permanent employees in relation to access to shared facilities and job vacancies and (ii) after 12 weeks of an assignment, to additional rights – in particular the same basic working and employment conditions as comparable permanent employees, including those relating to pay, annual leave and working time and rest periods. Agency workers are also entitled to a key information document which must include certain basic information about the terms and conditions on which they work.

### **FIXED- TERM/OPEN- ENDED CONTRACTS**

Workers may be contracted to work for a fixed period only or to perform a particular task with the contract terminating at the end of this period or on the completion of the task. Examples are those who are employed specifically to cover for maternity, parental or paternity leave; employees who do seasonal or casual work such as agricultural workers and shop assistants during busy periods; employees hired to cover unusual peaks in demand as in the tourist industry; and employees whose contracts will end on the completion of a specific task such as installing a computer system. There is

no requirement for fixed-term contracts to specify the reason why it is a fixed-term, although a job title should be included in the contract to comply with the employer's statutory requirements on the written statement of particulars of employment.

## TRIAL PERIOD

Employment contracts often provide that the employee will undergo a trial or probationary period at the start of their employment, during which the employer has the opportunity to assess the employee's suitability for the position. The exact terms of the trial period will be governed by the employment contract, but it will typically last between three and six months. During this time, the employee may not be entitled to certain benefits.

## NOTICE PERIOD

The employment contract should state the notice period that either party must give to the other party to terminate the employment. Employees have a statutory right to receive a minimum period of notice from employers once they have been employed for one month, as follows:

- one week's notice for those with between one month and two years' service;
- thereafter, an additional week's notice for each continuous year of service, up to a maximum of 12 weeks for 12 complete years' service.

The statutory minimum notice periods will be implied into the employment contract and will override any express terms providing for a shorter period of notice than that provided by statute.

# V. HIRING PRACTICES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

EU nationals have previously had the right to enter, remain in and work in the UK without a UK visa. This right ended on 31 December 2020, and EU nationals arriving in the UK after this date are subject to the same immigration requirements as non-EU nationals. Any EU nationals living and working in the UK before this date could have made an application under the EU Settlement Scheme by 30 June 2021, and could register for Settled Status (if they had been in the UK for 5 continuous years) or Pre-Settled Status (if they had been in the UK for less than 5 years).

From 1 January 2021 in most cases non-UK nationals seeking entry into or permission to remain in the UK for the purpose of employment must apply under the Sponsored Skilled Workers ("SSW") framework of the Points Based System ("PBS"), which replaces the Tier 2 (General) route.

Applications under SSW can only be sponsored by Home Office approved UK-based employers on behalf of the person they wish to employ.

Employers must ensure that the role for which they are recruiting is sufficiently skilled and meets the minimum salary threshold requirement, and that anyone coming to the UK meets the relevant English language requirements. All applicants must also meet the new Good Character requirements which means, for example, that they do not have a custodial sentence of at least 12 months.

The previously applicable Tier 2 (General) route could lead to Indefinite Leave to Remain ("ILR") after five years' lawful residence in the UK, and its successor, the SSW route is also a route that leads to ILR. Alternatively, UK employers can use the Global Business Mobility: Senior or Specialist Worker route ("GBM") (previously Intra Company Transfer ("ICT") route) for temporary transfers of those already employed by a group company outside the UK. Like its predecessor ICT, GBM visas do not lead to ILR.

An employer (and any individual found personally at fault) that employs workers illegally may face criminal and civil sanctions. Where the employer continues to employ someone having "reasonable cause to believe" that they have no right to work in the UK, they face a possible custodial sentence up to a maximum of 5 years and an unlimited fine. Where the employer is found to be employing someone illegally and fails to conduct the requisite "Right to Work" ("RTW") checks, the employer may face a civil penalty up to a maximum of GBP 60,000 per illegal worker (or up to £45,000 for the first breach). This is a significant increase from the previous maximum figure of £20,000 per worker (or £15,000 for the first breach). There is a defence to a civil penalty if the employer can show it had carried out the appropriate RTW checks prior to the commencement of the worker's employment.

## DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers are not required to establish, or work through, a local entity in order to hire employees in the UK. How any tax and national insurance contributions will be dealt with will depend on the circumstances and advice should be sought in relation to this. Care should also be taken that a permanent establishment is not inadvertently created that would mean that trading income derived from the employee's activities would be subject to the UK tax regime.

## LIMITATIONS ON BACKGROUND CHECKS

There are certain background checks that must be carried out before hiring an individual. Employers have a duty to prevent illegal working in the UK by carrying out prescribed document checks on candidates before employing them to ensure they have the right to work in the UK.

As regards criminal records checks, employers may seek information about an individual's criminal records history by:

- Voluntary disclosure – asking the individual directly about their criminal convictions history.
- Official criminal records checks through the Disclosure and Barring Service (“DBS”) – carried out by the employer or through a registered body.

Most spent convictions do not need to be disclosed to an employer even where there is a direct request for that information or a contractual requirement to disclose it, except in relation to a number of excepted occupations, offices and professions.

The processing of data relating to criminal convictions and offences is restricted under the UK GDPR and Data Protection Act 2018. The guidance issued by the Information Commissioner's Office provides that the legal bases for processing such data include consent, where the processing is necessary for performing obligations in relation to employment, or where the processing is necessary for the prevention or detection of unlawful acts. However, the onus will be on the controller to determine what is necessary in the specific circumstances and as consent needs to be freely given, and employers are in a position of power, they may not be able to rely on this, so another legal basis will likely be needed. The fact that consent is required for a DBS check does not mean that that consent will be a valid lawful basis for data privacy purposes. Many of the legal bases require the employer to have an “appropriate policy document” in place. This must be maintained for at least six months after the processing and must be kept under review.

Where the legal basis relied on is based around using the data for a specific purpose it is important that employers critically assess whether their use of the data is necessary and proportionate to that purpose. In addition, in most cases, employers will need to carry out a data protection impact assessment where they are processing criminal offence data.

It is a criminal offence for an employer to require an individual to obtain a copy of their criminal records by means of a subject access request as a condition of employment, or continued employment.

## RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

In recruitment, employers are prohibited from discriminating against actual and potential job applicants because of a “protected characteristic”. Employers must ensure that discriminatory practices are not used during the recruitment process, which includes job advertisements and the interview and selection process.

It is generally unlawful for an employer to ask about the health of a job applicant, or about any disability they may have, before making an offer of employment.

There is no legislation that specifically deals with social media use in recruitment, but when using social media to assess the suitability of potential new recruits, employers need to take care not to discriminate unlawfully. Another area of risk for employers relates to data protection. Some information about an individual that is available through a social media site will constitute personal data and in some cases, it will amount to sensitive personal data under

the UK GDPR. Employers will need to ensure that they are complying with their data protection obligations if using this information during the recruitment process.

Employers should keep clear and objective records of job applicants, focusing on the extent to which each candidate's qualifications, skills and experience matched up to the requirements given in the job specification.

## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Equal pay legislation in the UK prohibits discrimination in relation to the terms and conditions of employment as between men and women. EU law which underpins the legislation will continue to be directly effective post-Brexit. Where men and women are paid at different rates, an employee can bring an equal pay claim and the employer must prove that the reason for this is not gender-related or be able to objectively justify this.

### REMEDIES

Equal pay claims are usually brought in the employment tribunal, either during employment or within six months of the termination of their employment or appointment. Equal pay awards are made up of:

- compensation of arrears of pay plus interest, limited to 6 years; and
- revised contractual terms, including remuneration terms, so that they are, in the future, the same as that of the person of the opposite sex doing the same work.

In a successful equal pay claim, the tribunal will also order the employer to undertake an equal pay audit (unless an exception or exemption applies). This involves publishing relevant information about gender pay (such as gender pay information relating to the people in question, identifying the differences in pay and any reasons for those differences and the employer's plan to avoid future equal pay breaches) on the employer's website and providing this to the individuals involved.

### ENFORCEMENT/LITIGATION

While historically equal pay claims were predominantly brought in the public sector, a



significant number of claims have been brought against private sector employers in recent years, in particular in the retail sector. In one such claim, the UK Supreme Court (the final court of appeal) held that shop floor staff are entitled to compare their wages to those of distribution centre staff for equal pay purposes. Their decision will impact on other similar group action claims currently being brought against other major supermarkets.

## OTHER REQUIREMENTS

UK employers with 250 or more employees must report their gender pay gap figures annually. These are published on a government website and on the employer's own website in an easily accessible place for the public to view. Although there are no formal monetary penalties for non-compliance, reputational risk of non-compliance is high. There was no requirement to report gender pay gaps for the 2019/20 reporting year due to the Covid-19 pandemic. This was resumed as normal from April 2021.

Voluntary ethnicity pay reporting has been introduced, with government guidance which sets out detailed advice on analysing and reporting on ethnicity pay.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

A restrictive covenant is a clause, which is intended to protect an employer's business by restricting the activities of its employees, generally after the employment has terminated.

These include:

- non-compete clauses;
- non-solicitation of customers;
- non-solicitation of employees; and
- non-dealing clauses (prohibits an employee from doing business with certain clients or customers of their former employer for a certain period of time after termination).

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Restrictive covenants are not automatically enforceable simply because they have been incorporated into a contract of employment. In fact, there is a presumption that restrictive covenants are automatically void for being in restraint of trade and contrary to public policy, unless the employer can show that:

- it has a legitimate proprietary interest that it is appropriate to protect, and

- the protection sought is no more than reasonable having regard to the interests of the parties and the public interest.

If an employer can demonstrate this, then restrictive covenants are usually enforced by way of equitable remedies such as injunctions, which are granted at the discretion of the court. Alternatively or additionally, an employer may make a claim for damages, a claim for inducing breach of contract against the employee's new employer, or they may seek undertakings from the employee that they will observe the contractual restrictions pending the outcome of a speedy trial of the action.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is a tool by which an employer can prevent departing employees from performing their regular duties. Typically, the employee will be prevented from attending the workplace but will still receive full pay. This has the effect of restricting the employee's access to customers, clients, staff and information, and hampers their ability to work for a competitor. If an employer wishes to put an employee on garden leave there must, in most circumstances, be an express term in the employment contract permitting it to do so. Otherwise, they could be breaching the employee's implied right to work and therefore be in breach of contract.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

Employers can set their own rules in relation to use of the Internet and social media at work.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

It is advisable for employers to implement clear policies on the use of social media and social networking websites, setting out the standards of conduct expected from staff and making clear that a breach may lead to disciplinary action, including dismissal. Otherwise it could be difficult for employers to defend dismissing an employee for inappropriate conduct on a social networking site. Employers can lawfully intercept, monitor and record communications for certain specified purposes, including investigating or detecting unauthorised use of the system by employees, provided they have made "all reasonable efforts" to inform employees that they may monitor email and Internet use.

## EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

In some cases, posting disparaging statements about the employer on social media may constitute misconduct amounting to a potentially fair reason for dismissal, and may be a repudiatory breach of contract leading to grounds for summary dismissal (i.e. dismissal by the employer without notice). Disclosure of the employer's confidential information on social media is likely to amount to a breach of the employee's employment contract, either of an express confidentiality clause or of the employee's implied duty of confidentiality, which could lead to the employer taking disciplinary and other action against them. Employers should consider putting in place clear rules on the use of social media and communicate these to employees. This could be in a social media and/or electronic communications policy.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND'S FOR TERMINATION

There are several ways in which a contract may be terminated. These include:

- Notice being given by either the employer or the employee;
- Mutual agreement;
- Expiry of a fixed-term contract (a fixed-term contract automatically terminates at the end of the fixed-term without the need for notice);
- Dismissal by the employer;
- Termination by the employee based on a serious breach of contract by the employer (that is, constructive dismissal).

### COLLECTIVE DISMISSALS

A redundancy situation arises where the business, workplace or job disappears, or fewer employees are needed. For a fair redundancy, the employer must show:

- the reason for the dismissal is redundancy;
- it is reasonable to dismiss the employee for redundancy; and
- a fair procedure was followed.

There must be fair selection of employees for redundancy and genuine consultation with the affected employees. Although redundancy is a fair reason for dismissal, a redundant employee is still entitled to a statutory redundancy payment. Employees with over two years' service have the right to a statutory redundancy payment currently capped at GBP 19,290.

If an employer proposes to dismiss as redundant a total of 20+ employees across any site in the UK within a 90-day period, it must also follow a collective consultation procedure involving a minimum consultation period of 30/45 days, depending on the number of redundant employees, in addition to any individual redundancy procedure. Employers that breach these collective obligations may be liable for protective awards of up to 90 days' pay for each affected employee.

### INDIVIDUAL DISMISSALS

An employee who has been continuously employed for two years or more has a statutory right not to be unfairly dismissed. Provided there is no discrimination, employers will not be liable for dismissals where:

- they follow a fair procedure;
- the reason for dismissal is one of the designated fair reasons set out in the legislation.

These fair reasons are:

- capability or qualifications;
- conduct;
- redundancy;
- contravention of a duty or restriction imposed by or under an enactment; or
- some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held e.g. personality clash, a reorganisation.

Certain dismissals are automatically unfair and there is no requirement for any qualifying service (for example, dismissals relating to the employee's pregnancy, certain health and safety matters, trade union membership and trade union activities).

It is unlawful to dismiss employees, or to subject employees or workers to a detriment, if they disclose information with a reasonable belief in its truth, about certain types of wrongdoing by the employer.

### IS SEVERANCE PAY REQUIRED?

Except for redundancy dismissals (where an eligible employee will be entitled to a statutory redundancy payment) there is no statutory entitlement to a severance payment as such. An employee is entitled to notice, and it is common for employees to be paid a sum in lieu of notice, usually equal to the value of pay over the notice period.

### SEPARATION AGREEMENTS

Although there is no statutory requirement for parties to settle their dispute by way of a settlement agreement, it is advisable for employers to make an offer of a payment, which is more than the employee's statutory and contractual entitlement on termination, conditional on the employee waiving all claims they have against the employer. A settlement agreement should not prevent the employee from blowing the whistle (making a protected disclosure)

or otherwise speaking up where they have the right to do so, for example by informing the police or a regulatory authority that a crime has taken place.

Save that employers should avoid directly or indirectly discriminating against an employee on grounds of age; and an employee's redundancy payment is dependent on their age as well as length of service, the age of the employee does not make any difference.

There have been changes to the treatment of tax and NICs on termination payments over recent years. All payments made in lieu of notice on termination of employment, regardless of whether there is a contractual entitlement, are subject to income tax and NICs. Since April 2020, employers are liable to pay employer's NICs on termination payments over GBP 30,000.

## REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

In a successful claim, the employee will generally be entitled to compensation equal to the net value of the salary and benefits, which they would have received if they received their full notice period. However, the employee is under a duty to mitigate their loss i.e. to take reasonable steps to seek alternative employment.

If the employer terminates an employee's employment against their will, the employee will generally have no choice but to accept the dismissal. The employment contract will end, and the employees will have to consider their options in terms of any claims they may have against their employer, for either breach of contract (such as failure to give proper notice or failure to make payments under the contract of employment) or breach of some other statutory right, such as unfair dismissal or discrimination. Commonly, an employee might threaten a tribunal claim and secure a settlement with the employer through legal advisors, particularly if the employer is keen to avoid the publicity of an employment tribunal claim or if the employer is concerned that there is a good chance they will lose at tribunal. An employee who has been unfairly dismissed may ask for reinstatement but it is very rare for a tribunal to make a reinstatement order; and even where one is made, the employer can opt to pay compensation instead.

An unfair dismissal award, which is currently capped at a maximum of GBP 124,997, is made up of: a basic award (calculated according to the employee's age, length of service and pay) - currently capped at GBP 19,290; and a compensatory award (a "just and equitable" amount) - currently capped at the lower of one year's gross pay (excluding pension contributions, benefits in kind and discretionary bonuses) and the overall cap of GBP 105,707.

The length of time a claim takes from start to finish depends on the complexity of the case and the particular region the claim is brought in. However, it is not uncommon for a case to take, from claim until hearing, anything between 3 months and one year.

## WHISTLEBLOWER LAWS

The dismissal of an employee will be automatically unfair if the reason or principal reason for their dismissal is that they have made a "protected disclosure". It is unlawful to dismiss employees, or to subject employees or workers to a detriment, if they disclose information with a reasonable belief in its truth, about certain types of wrongdoing by the employer. A qualifying disclosure arises where a worker discloses information which in their reasonable belief shows a certain type of wrongdoing has and/or will take place within the workplace. Such wrongdoing includes, but is not limited to:

- committing a criminal offence;
- breaching a legal obligation; and
- endangering healthy and safety.

The worker must also have a reasonable belief that the disclosure is in the public interest. There is no requirement for good faith. A qualifying disclosure is "protected" if it is made directly to the employer, a "responsible" third party or a "prescribed" person such as a regulator. Workers should be encouraged to raise concerns internally in the first instance. A whistleblowing policy should be put in place to encourage this. As with discrimination claims: there is no qualifying period of employment necessary to bring a "whistleblowing" claim nor is there a cap on the level of compensation that may be awarded. It is not uncommon for employees to raise whistleblowing claims as part of the tactics of bringing a tribunal claim.

## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Employees in the UK can be represented in a number of ways including through trade unions, works councils and employee representatives.

Works councils and trade unions are not mutually exclusive representative bodies and these organisations work alongside each other with both performing a representative role. There may be a division of responsibilities, with the trade unions typically concentrating on collective bargaining, while the works councils are often more involved with information and consultation.



In the UK, it is possible for an employer to establish employee representative bodies that are neither trade unions nor works councils, such as a staff or employee association. These employee representative bodies will often have lesser rights and powers than trade unions or works councils, and may be established for a limited range of purposes, such as consultation for large-scale redundancies.

## RIGHTS AND IMPORTANCE OF TRADE UNIONS

Union rights may be collective or individual. A union will be protected from legal proceedings where it calls industrial action provided that it follows the correct procedures. As regards individual rights, it is unlawful to refuse to employ a person, because they are a member of a trade union. In addition, the dismissal of an employee or detrimental treatment on union grounds will be an automatically unfair dismissal.

An official who is an employee of the union is often known as a 'trade union officer', whereas lay union officials or union representatives are elected or appointed to represent members in a given workplace or location. Union representatives are appointed by an independent union in workplaces where the union is recognised for collective bargaining purposes.

If a union is "recognised" by an employer, it will be able to undertake "collective bargaining" with the employer. The employer and trade union may enter into a collective agreement covering matters such as terms and conditions of employment, conditions of work, disciplinary procedures, and hiring and firing employees. Collective agreements are generally not legally enforceable.

Apart from engaging in collective bargaining, a union representative may also represent and give advice to colleagues in relation to workplace problems and may also accompany union members to disciplinary or grievance hearings. A union may also have a right to be informed and consulted on a number of issues, including redundancies.

## OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Workers have the right to be accompanied in the workplace in certain situations, such as in disciplinary and grievance hearings. Where the worker is a trade union member, they will usually be accompanied by a union representative or official, but they can choose to be accompanied by a work colleague instead.

Employers who have at least 1,000 employees throughout the European Economic Area ("EEA") and at least 150 employees in each of at least two of the relevant member states have to establish a European Works Council ("EWC"). The EWC has the right to receive information about the business and to

be consulted about some of the business' activities. From 1 January 2021, after the Brexit transition period ceased to apply, UK employees are no longer able to ask their employers to set up an EWC. Employees who currently sit on an EWC may be able to continue if this is agreed between the parties.

A National Works Council ("NWC") is a permanent consultative body made up of management and employee representatives whereby a UK-based employer can inform and consult its workforce about economic and employment-related matters. UK employers with 50 or more employees must put in place an Information and Consultation Agreement ("ICA") if certain criteria are met. Under these rules, the employees must have made a valid request to negotiate or the employer must have given a valid notification of intention to negotiate. In April 2020 the percentage of employees required for such a request to be valid was reduced from 10% to 2% of employees. It remains a requirement that at least 15 employees must make the request. Once a valid request or notification has been given, the employer must negotiate with representatives of the employees to put in place an ICA. If the parties cannot agree on its terms within a specific timescale, the regulations provide a set of standard information and consultation provisions, which will automatically apply until any agreement to the contrary.

Recognised trade unions have the right to appoint health and safety representatives at a particular establishment. They have wide-ranging functions relating to health and safety issues, including being consulted on health and safety matters.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") applies to employees when either: a business or asset is transferred from one entity to another; or there is a change of identity in an entity providing a service (e.g. outsourcing). The effect of TUPE is that all employees "assigned" to the economic entity or activity will transfer to the transferee (i.e. the successor). In addition, the transferor's (i.e. the original employer's) rights, powers, duties and liabilities under the employment contracts of those employees who are transferring, transfer to the transferee.

The transferor and transferee have a duty to inform and consult with "appropriate representatives" (generally trade union representatives or representatives elected from the affected employees) of "affected employees" about the facts and implications of the

transfer. Employers that breach this duty may be liable for up to 90 days' pay for each "affected employee". Finally, subject to certain exceptions, dismissals are automatically unfair if the sole or principal reason for dismissal is the TUPE transfer unless there is an economic, technical or organisational reason entailing changes in the workforce.

## REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Both the transferor and the transferee (predecessor and successor) have an obligation to inform and, if appropriate, consult with appropriate representatives in relation to any of their own employees who may be affected by the transfer or any "measures" (any step, action or arrangement) taken in connection with the transfer. The duty to consult only arises if the employer envisages taking measures in relation to the affected employees. Certain information must be provided to the appropriate representatives long enough before the transfer to enable consultation to take place.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Employers have extensive obligations to safeguard the health, safety and welfare of all of their employees under both common law and statute.

### SALARY

Employers must pay all workers (not just employees) at least the statutory minimum pay per hour that they are entitled to. The National Minimum Wage ("NMW") is the minimum pay per hour payable for those under the age of 21. There are four hourly rates of minimum pay, depending on the age of the worker and whether they are an apprentice. The National Living Wage ("NLW") is payable to most workers aged 21 and over and is currently GBP 11.44 per hour. Workers who are not paid at least the correct rate can bring a claim before the employment tribunal. It is a criminal offence for employers, wilfully, to refuse to pay the statutory minimum rates of pay.

Employers can only make deductions from wages if the deduction is required by statute (for example deductions for income tax), the employee has expressly authorised the deduction or the deduction is provided for by a term of the employment contract.

Men and women have the right to be paid the same for the same, or equivalent, work (see 6. Pay and Equity Laws).

All workers (not just employees) have the right to a written itemised pay statement (a 'payslip') at the time, or before, their wages are paid to them, to enable them to establish whether they have been paid correctly. Payslips must include the number of hours paid for where an individual is paid on an hourly rate basis.

### MAXIMUM WORKING WEEK

Workers' hours of work are regulated by the Working Time Regulations 1998 ("WTR"). Workers may not work, on average, for more than 48 hours per week (normally calculated over a 17-week reference period). In the UK employers can ask workers to consent, in writing, to opt-out of the 48-hour weekly working limit. However, workers must have the right to cancel their opt-out by up to three months' notice at any time. The WTR also provides the right to daily, weekly and in-work rest periods.

### OVERTIME

If employers may want to require their employees to work longer than their normal working hours, they should ensure that the employment contract provides for this with an overtime clause. This clause should state whether or not the overtime is paid.

### EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Employers have a general duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees.

### COMPLAINT PROCEDURES

If a worker believes their employer is exposing them to risks or is not carrying out their legal duties relating to health and safety, and if the worker has informed the employer but no satisfactory response has been received, they can make a complaint to the HSE.

Workers are protected from being subjected to a detriment or being dismissed because they have made a protected disclosure about malpractices at work (see Whistleblower Laws), this includes disclosures of information about health and safety breaches or risks.



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## I. INTRODUCTION

The employment relationship in the United States is subject to markedly less regulation than in other countries. With the exception of some protections on wage and hours and a prohibition on discrimination, the parties to an employment relationship in the United States are generally free to negotiate and set the terms and conditions of their relationship. Moreover, the default position is that private-sector employment relationships are at-will: either the employer or the employee may terminate the employment relationship at any time, for any (non-discriminatory or non-retaliatory) reason with or without notice.

### KEY POINTS

- The laws governing employment relationships in the U.S. come from federal, state and local statutes, agency regulations, and case law.
- Under United States law, there are no minimum requirements for an employment contract.
- Except in certain mass dismissals or as provided for in an employment contract or a collective bargaining agreement, U.S. law does not impose a formal “notice period” to terminate an individual employment relationship.
- Employees employed on an “at-will” basis may be terminated, with or without cause or grounds, provided it is not for an illegal reason, notably discrimination on grounds of a category protected by law or protected “whistleblowing” activity (reporting certain employer activity where the employee reasonably believes that the information he or she provided relates to potential violations of specific laws).
- Under U.S. labour law, if a majority of the employees in the bargaining unit who cast their vote had voted in favor of union representation, the union obtains the right of “exclusive” representation of all the employees in the bargaining unit (not only the employees who voted in favor of the union).

## II. ANTI-DISCRIMINATION LAWS

### SUMMARY

It is illegal under U.S. federal law to discriminate against an employee, either intentionally or through a disparate impact, on account of his or

her race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age (40 or older), disability or genetic information. It is also illegal to harass an employee on account of these protected characteristics or to retaliate against an employee because he or she complained about discrimination, filed a charge of discrimination, or participated in an investigation or lawsuit concerning employment discrimination. Most employers with at least 15 employees are covered by this body of federal law, as are most labour unions and employment agencies.

### PROTECTIONS AGAINST HARASSMENT

Harassment is included in the prohibitions on discrimination. Harassment is described as unwelcome conduct that, based on one or more protected characteristics, a “reasonable person” would consider “intimidating, hostile, or abusive”. It is illegal to harass an employee on account of these protections or to retaliate against an employee because he or she complained about discrimination, filed a charge of discrimination, or participated in an investigation or lawsuit concerning employment discrimination.

In June 2020, the U.S. Supreme held that LGBTQ+ employees are protected from workplace discrimination under Title VII. Before this decision, discrimination on the basis of sexual orientation or gender identity was a matter of state law, meaning that there were inconsistent standards depending on the state where the employee worked. Now employees throughout the U.S. are protected from such discrimination. The Employment Opportunities Commission recently rescinded its position that mandatory arbitration agreements, which cover employment discrimination claims, undermine the enforcement of U.S. anti-discrimination laws.

### EMPLOYER’S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of



the business of such covered entity. Furthermore, employers must accommodate an employee's reasonable request for modification of dress and uniform policies on sincerely held religious beliefs, unless there is an undue hardship.

During the COVID-19 pandemic, if an employee provides notice that they are unable to come to work because they fall in a vulnerable population category, the employer may be obligated to provide a reasonable accommodation, particularly if the request is due to a medical condition or is pregnancy-based. Employers should consider whether these employees can work remotely and/or whether another accommodation is available. These employees may be eligible for paid sick leave under various laws, including the FFCRA. Importantly, an employer may not compel an employee to stay home simply because he or she falls into a "vulnerable population" category.

## REMEDIES

Employees who believe they have been unfairly discriminated against may seek redress in various federal, state and local administrative agencies, and the U.S. federal and state courts. If the court finds that a termination was the result of unlawful discrimination, the employee may be entitled to reinstatement (rarely granted), monetary damages and attorneys' fees. Monetary damages include compensation for wages and benefits lost as a result of the termination, and, in some cases, for emotional or physical distress suffered as a result of the employer's actions. In cases involving an egregious violation of the law, the employer may be liable for punitive damages. Federal law imposes caps on compensatory and punitive damages; many states do not.

# III. EMPLOYEE BENEFITS

## SOCIAL SECURITY

United States law provides for retirement benefits and subsidised health insurance under federal Social Security and Medicare programs. Employers are required to contribute 6.2% of each employee's salary (in 2024, on the first \$168,600 of an employee's gross wages) to Social Security, as well as 1.45% of each employee's salary (without any limit on the wage base) to Medicare. Equal contributions are deducted from each employee's wages and act as an "employee contribution." These federal programs provide benefits for retirees, the disabled, and children of deceased workers. Social Security benefits include old-age, survivors and disability insurance. Medicare provides hospital insurance benefits.

## HEALTHCARE AND INSURANCES

Under the Patient Protection and Affordable Care Act, certain large employers who do not offer

affordable health insurance that provides minimum essential coverage to 95% of their full-time employees and their dependents may be subject to significant penalties. Specifically, covered employers will be subject to an annualised employer shared responsibility (ESR) payment of \$2,970 (indexed) in 2024 per full-time employee (less the first 30 full-time employees). Employers may also be required to provide employees with health insurance benefits pursuant to a negotiated collective bargaining agreement or employment contract.

## REQUIRED LEAVE Holidays and Annual Leave

Although the United States government recognises several "national holidays" there is no federal law that requires employers to provide employees with time off for a holiday. However, it is customary for employers to provide employees with paid time-off to observe nationally and locally recognised holidays.

For example, the public holidays widely observed by employers in private industry are: New Year's Day, Memorial Day (in late May), Independence Day (4th of July), Labour Day (early September), Thanksgiving Day (third Thursday in November) and Christmas Day. Some states require that employees working on enumerated holidays be paid at a higher rate of pay.

Similarly, no federal law requires employers to provide employees with paid vacation time. In practice, all employers provide employees with paid vacation time. It may range from one week per year during the first few years to three weeks or more for long-serving employees. Employees who are represented by a labour union may receive more generous vacation time.

## Maternity and Paternity Leave

Under the Family and Medical Leave Act, employers with fifty (50) or more employees within a seventy-five (75) mile radius are required to provide employees with twelve (12) weeks' unpaid leave in a 12-month period for the birth or placement of a child. Some state laws provide for maternity leave for employees who are not covered under the FMLA. In addition, several states provide workers with partial pay during parental leave and in general, it seems there is a trend toward state family leave laws.

## Sickness and Disability Leave

Employees may be entitled to unpaid sick leave under the FMLA, which allows eligible employees to take up to twelve (12) weeks' unpaid medical leave in a 12-month period for a serious health condition that prevents the employee from performing the functions of his or her job. Though there is no national law guaranteeing paid sick leave, a number of states, counties, and cities require employers doing business within their boundaries to offer paid sick leave. Further, employers must offer paid sick leave to employees working on certain federal contracts.

In addition, on 18 March 2020, President Trump signed the Families First Coronavirus Response Act into law, requiring certain employers to provide their employees with paid sick leave and expanded family and medical leave, for specified reasons related to COVID-19. The FFCRA creates two new emergency paid leave requirements in response to the COVID-19 global pandemic, that will remain in effect from 1 April 2020 through 31 December 2020. "The Emergency Paid Sick Leave Act" entitles certain employees to take up to two weeks of paid sick leave. "The Emergency Family and Medical Leave Expansion Act" amends the FMLA and permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID-19. States have also created paid sick leave programs for certain employers in response to the COVID-19 pandemic.

A disabled employee may be entitled to unpaid leave under the FMLA as discussed above. In addition, workers' compensation insurance administered at the state level may provide for paid leave. Finally, while the Americans with Disabilities Act does not expressly provide for disability leave, employers are required to make reasonable accommodations for qualified employees with disabilities, which could include leave, so long as doing so does not pose an undue burden on the employer.

## **PENSIONS: MANDATORY AND TYPICALLY PROVIDED**

Unless otherwise provided for pursuant to a collective bargaining agreement or an employment contract, employers are not required to provide employee pensions or any retirement benefits. Many American employers do provide some retirement benefit to their employees, increasingly in the form of a retirement savings plan, which is a defined contribution plan and commonly named after the applicable section of the Internal Revenue Code as a "401k" plan.

### **Other Required Or Typically Provided Benefits**

Depending on the size and industry of the employer, additional benefits, while not required, are typically provided. Popular employee benefits in the U.S. include: long term/short term disability insurance, health insurance, life insurance, dental insurance, vision insurance, paid parental leave, commuting/travel assistance and gym/wellness benefits.

## **IV. EMPLOYMENT CONTRACTS**

### **MINIMUM REQUIREMENTS**

Under the laws of the United States, there are no minimum requirements for an employment contract. Also, in most states, no written memorialisation of any terms is required. An employment relationship

in the United States is presumed to be "at-will," i.e., terminable by either party, with or without cause or notice. Indeed, a majority of employees in the United States are employed on an "at-will" basis, without a written employment contract, and only with a written offer of employment that outlines the basic terms and conditions of their employment.

## **FIXED- TERM/OPEN- ENDED CONTRACTS**

No legal provision governs fixed or unlimited term contracts. Unlike many other countries, American law does not limit the duration of a fixed-term employment contract or the circumstances under which the parties may enter into a fixed-term employment contract. In the absence of an employment contract, employment relationships are presumed to be "at-will," terminable by either party at any time, with or without cause.

## **TRIAL PERIOD**

No federal legal provision governs a formal "trial period." However, some employers prefer from a business perspective, to have an internal policy on trial periods, often referred to as "introductory periods" or "probationary periods", which generally provide for a formal performance evaluation after an initial stated period of employment (ninety 90 days). Employers often condition an employee's participation in their individually established employee benefits programs on a successful completion of the "probationary" or "introductory" period. From a legal perspective, there is no real advantage to having a trial or probationary period; but there is a potential downside to it, if it causes confusion regarding the employee's at-will status.

## **NOTICE PERIOD**

Except in certain mass dismissals or as provided for in an employment contract or a collective bargaining agreement, U.S. law does not impose a formal "notice period" to terminate an individual employment relationship. Most employees are employed "at-will" and either party can terminate the employment relationship without notice. Under the Worker Adjustment and Retraining Notification Act ("WARN Act"), employers must give 60 days' advance notice to affected employees in advance of plant closings or covered mass layoffs.

## **V. HIRING PRACTICES**

### **REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK**

Foreign nationals who are not U.S. nationals, permanent residents, asylees or refugees are not permitted to work in the United States without work visas. An employer seeking to hire a foreign national may file, on behalf of its prospective employee, a petition with the United States Department of Homeland Security/ United States Citizenship and

Immigration Services (“USCIS”) for an employment visa. If the petition is approved, the prospective employee must obtain a “visa stamp” from a United States embassy or consulate to enter the U.S. unless the individual already resides in the U.S. Canadian citizens are exempt from the visa issuance requirement.

Alternatively, an employer may sponsor a potential employee’s application for permanent resident status, referred to as a “green card,” if they are able to establish that the potential employee is a multinational executive/manager transferee, has unique, outstanding or extraordinary skills, or is being offered a job in the United States for which the employer has been unable to recruit a U.S. worker who meets the minimum requirements of the position. In most of the immigrant visa categories, the processing delays make it impractical to use an immigrant visa as the vehicle for entering the United States for an initial assignment. The normal procedure is to obtain a short-term work visa initially (assuming the individual meets the eligibility requirements) and seek an immigrant visa after the employee has started working in the United States.

Rather than hiring workers one by one, U.S. companies may engage outsourcing and staffing firms that obtain H-1B visas and hire groups of high-skilled foreign workers who then are placed with the U.S. company as needed.

All employers are obligated to verify an employee’s employment eligibility, which is done through the examination of identification and work authorization documentation. To do so, employers are required to complete a USCIS Form I-9 for each newly hired employee. Employers may also participate in the government’s internet-based system, E-Verify, that compares information entered by an employer from the Form I-9 to records available to DHS and the Social Security Administration to confirm employment eligibility. Federal contractors with contracts containing the mandatory E-Verify clause are required to use E-Verify and some states require that employers use E-Verify. During COVID-19, DHS announced that it would exercise prosecutorial discretion to defer the physical presence requirements associated with completion of Form I-9. In July 2023, responding to the lessons learned during the pandemic, DHS announced a permanent optional alternative to in-the in-person physical document examination method for employers who are enrolled and participating in good standing in E-Verify. This optional alternative has a number of requirements including a live video interaction to examine the documents as well as document retention.

## **DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?**

As a matter of tax, state corporate law, and other regulatory requirements, it may be necessary to either establish a local entity or register a foreign entity locally, depending on the nature and scope of the business activity associated with the hiring. This needs to be investigated with tax and corporate law advisors on a case-by-case basis. Independent of these requirements, the foreign employer may be subject to federal and state income tax withholding obligations as well as payment of social security, disability, unemployment and other payroll contributions with respect to employment of individuals within the U.S.

## **LIMITATIONS ON BACKGROUND CHECKS**

It is illegal in certain U.S. states (and cities) to ask about an applicant’s criminal history on an employment application. Such laws typically make exceptions for certain positions for which criminal history information may be required by law. The best practice under U.S. law is generally to avoid asking about arrests and/or convictions on the job application and, instead, wait until the employer has made a conditional offer of employment. In the case of a conviction revealed later in the application process, the best practice is to conduct an individualised assessment of the job-relatedness of the conviction to the job to which the candidate applied.

Another consideration in the application process is compliance with the federal Fair Credit Reporting Act (“FCRA”), which governs the collection, assembly and use of information about consumers by consumer reporting agencies, including credit information, criminal background, motor vehicle reports, and other public record information. Though FCRA applies only to “consumer reports,” employers must ensure they comply with any relevant requirements if they seek to obtain such information. Certain states and cities also prohibit the use of credit-related information when making employment decisions.

## **RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

In general, federal prohibitions on employment discrimination (see Section V below) also apply to hiring decisions. In other words, just as you cannot terminate an employee because he or she belongs to a protected category, you cannot refuse to hire an applicant on account of his or her protected status. For this reason, employers should avoid asking questions on a job application or in an interview, which are likely to reveal the applicant’s membership in a protected group. Similarly, to comply with background check laws mentioned above, employers should avoid asking about arrests and/or convictions on the job application or during an interview.



## VI. PAY EQUITY LAWS

### EXTENT OF PROTECTION

Under the Equal Pay Act, an employer cannot discriminate between employees of the same establishment on the basis of sex, “paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions”. Further, an employer cannot lower the wages of some employees to make wages equal.

Amending Title VII, the Lilly Ledbetter Fair Pay Act of 2009 overturned Supreme Court precedent severely restricting the time period for filing unfair pay complaints, establishing that such complaints can be filed within 180 days of a discriminatory paycheck, a period which resets each time a paycheck is issued. Employer practices subject to challenge include managerial decisions about base pay or wages, job classifications, career ladder or other noncompetitive promotion denials, tenure denials and failure to respond to requests for raises.

Nearly all states also have their own “equal pay acts”. Since 2016, many states have sought to broaden the pool of comparators to those performing “substantially similar work” or “comparable” work. Many of the state laws do not restrict comparison to the same establishment or geographic location. In addition, several states specifically prohibit sex-based wage discrimination, while other states prohibit wage discrimination based on protected class status. Many cities and states have passed laws restricting the collection of prior salary information during the hiring process based on concerns that setting the starting pay rate on the basis of prior salary, may have the effect of perpetuating pay discrimination. Nearly half of the states have also enacted pay transparency laws that prohibit employers from discharging, or taking any other retaliatory action against an employee, for discussing wages or compensation with another employee.

### REMEDIES

An employer who violates the Equal Pay Act is liable to the affected employee, for the amount of wages the employee was underpaid, for liquidated damages equal to 100% of the underpaid wages, as well as for reasonable attorneys’ fees and costs. Further, if the employer has retaliated against an employee for filing a complaint under the EPA, the employee is entitled to equitable relief which may include reinstatement, promotion and the payment of wages lost, as well as an additional equal amount as liquidated damages. The employer must also pay the reasonable attorneys’ fees and costs of the action; compensatory and punitive damages are not available. Under Title VII pay discrimination claims, in addition to the EPA remedies available, an

employee can recover compensatory and punitive damages (the amount is limited by the size of the employer. Similar remedies exist under state law.

### ENFORCEMENT/LITIGATION

New state and local pay equity laws and the increased attention afforded to equal pay issues, pose significant challenges and unprecedented risks to employers. Recent litigation and settlements demonstrate the significant exposure in defending these claims.

### OTHER REQUIREMENTS

All federal contractors who are covered under affirmative action regulations, must, annually, perform an evaluation of their compensation practices to ensure minorities and women are being fairly treated, locating any pay disparities and determining whether such disparities can be explained by a non-discriminatory reason. Employers with at least 100 employees are required to submit annual reports to the EEOC, which can be used to investigate the pay practices of those employers whose data suggests indefensible pay disparities. Some states stipulate that voluntary self-audits can be an affirmative defense to a pay discrimination claim. It is worth noting, that even if a state does not explicitly include a self-audit provision as a viable affirmative defense, such an audit can be helpful in defending a pay discrimination claim.

## VII. RESTRICTIVE COVENANTS

### DEFINITION AND TYPES OF RESTRICTIVE COVENANTS

The following restrictive covenants are recognised and may be enforceable under the law:

- Non-compete clauses;
- Non-solicitation of customers;
- Non-solicitation of employees.

### ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Federal initiatives and a state-level trend away from enforceability of restrictive covenants create ongoing changes in the law of restrictive covenants in the U.S. Generally, unless state law limits or prohibits restrictive covenants, state courts will hold that a covenant restricting the activities of an employee upon the termination of his or her employment with the employer will be enforced if it protects a legitimate business interest, is reasonably limited in scope, time and place, and is supported by consideration, and is reasonable. In other words, it should afford only a fair protection to the employer’s interest and not be so broad in its operation as to

interfere with the interests of the public or prevent an employee from engaging in his or her livelihood.

## USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave – a period during which a departing employee is paid his or her salary, but is not permitted to work – is not a typical concept in the U.S., to the surprise of some foreign employers. As the effect of garden leave is not only to prevent the employee from competing with the employer or taking confidential information, but also to carry out work of any kind for any other employer, U.S. courts may question whether there is a valid business interest in such a broad restraint, even if it is fully compensated. As it is not a common arrangement in the U.S., the federal and state laws regarding garden leave are nominal and each situation will be examined independently. Unlike in many countries, however, it should not be assumed that an extended garden leave (beyond a period reasonable for normal transition) would be valid in the U.S. if it does not satisfy restrictive covenant requirements.

## VIII. SOCIAL MEDIA AND DATA PRIVACY

### RESTRICTIONS IN THE WORKPLACE

While there is no specific rule prohibiting employers from restricting employees' social media use during working hours, there are certain laws, discussed below, that employers should consider, particularly with respect to any type of monitoring of employees' social media use.

### CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The Stored Communications Act generally prohibits accessing the online account of another without that individual's consent. In the context of monitoring, accessing or reviewing the employee's electronic communications, the SCA has been interpreted to allow employers to access employee communications stored on their own electronic communications services (e.g. a company provided email service), as long as access is authorised under the employer's policies, and the employer has a valid business purpose for doing so. Employee notice of the company's monitoring policies is critical.

Regarding private email accounts (e.g. gmail, yahoo, etc.) on a company provided device, generally courts have held that an employer cannot access an employee's private email account. That said,

some courts have concluded that an employer can monitor an employee's private email account, if the employee is using a company provided device or network and has provided written consent to an employer's policy authorising broad monitoring practices on company provided devices/networks. Additionally, the National Labour Relations Board's General Counsel issued a memorandum advocating limiting electronic surveillance of employees. However, there have been recent court decisions striking down the NLRB's prohibitions.

When organisations decide to engage in any level of search or surveillance of their employees, they should consider what their employees' expectations are concerning privacy. In general, it is best practice to communicate to employees a well-drafted acceptable use and electronic communication policy that informs employees on what they can expect when using the organisation's systems, whether in the workplace or when working remotely. This includes addressing employees' expectations of privacy, as well as making clear the information systems and activities that are subject to the policy.

Numerous states across the U.S. have enacted comprehensive consumer data privacy laws which may affect those doing business in those states. Employers should take special note of California's law, the California Consumer Privacy Act (CCPA) as unlike most other state data privacy laws, California includes employees in the definition of consumer. Under the privacy notice provision, covered businesses are required to inform employees with respect to the categories of personal information they collect and the purposes for which the information will be used. In addition, employees are permitted to commence a private right of action, if affected by a data breach caused by a failure of the employer to maintain reasonable safeguards.

### EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Employers may prohibit the employee's use of social media to disparage the employer or divulge confidential information, and may discipline employees for violating such a prohibition, but must tread carefully for two main reasons: First, the employee may be protected under a federal or state whistleblower law, which generally protects employees who complain about certain company activities or conditions affecting public health and safety or violating public policy standards, as well as employees who report potential securities fraud violations. Second, employees (even those who are not unionised) have the right to engage in "concerted activity" including the right to discuss the terms and conditions of their employment - and even to criticise their employers - with co-workers

and outsiders. However, these protections can be lost where the communication is disloyal or has the tendency to damage an employer's business and has been made with reckless disregard of the truth or are maliciously untrue.

## IX. TERMINATION OF EMPLOYMENT CONTRACTS

### GROUND FORS FOR TERMINATION

Generally, workers employed on an "at-will" basis may be terminated, with or without cause or grounds, provided it is not for an illegal reason; notably discrimination on grounds of a category protected by law or protected "whistleblowing" activity (reporting certain activity where the employee reasonably believes that the information he or she provided relates to potential violations of specific laws by the employer). The employment contracts of executives and other highly-skilled individual often incorporate a "just cause termination" clause, mandating that the employee may only be terminated for "cause" and lists the permissible grounds.

### COLLECTIVE DISMISSALS

There are no restrictions on an employer's ability to collectively dismiss its employees. However, the WARN Act requires covered employers to provide 60 days' notice in advance of covered plant closings and mass layoffs to: 1) the affected workers or their representatives (e.g., a labour union); 2) the dislocated worker unit in the state where the layoff or plant closing will occur; and 3) to the local government. Even if a single mass layoff or plant closing does not trigger the WARN Act's collective dismissal requirements, an employer also must give the 60-day WARN Act notice if the number of employment losses for two or more groups of workers, each of which is fewer than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Many states have implemented their own collective dismissal notification statutes that mirror the federal statute, but with some variations, such as lower minimum thresholds for providing notice.

In April 2019, the U.S. Supreme Court weighed in on class action arbitration. Class action arbitration is such a departure from ordinary, bilateral arbitration of individual disputes that courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement. Following the Supreme Court's decision, arbitration agreements must clearly and unmistakably state that the parties agree to resolve class and collective actions through arbitration. Without such a clear agreement, a party cannot be compelled to class arbitration.

### INDIVIDUAL DISMISSALS

Except as otherwise provided in an employment contract or collective bargaining agreement, no law requires employers to follow a formal procedure when discharging individual employees. However, employees are protected from unfair dismissal in violation of federal, state and local discrimination or anti-retaliation laws.

### IS SEVERANCE PAY REQUIRED?

Except as otherwise provided in an employment contract or collective bargaining agreement, employers need not make severance payments to terminated employees. However, employers often offer severance payments to bind an agreement made between the employer and employee at the time of termination to waive any potential claims arising out of the employment relationship.

### SEPARATION AGREEMENTS

Separation agreements are not required under U.S. law. In certain situations, the employee may agree to a contractual waiver of statutory rights, such as those under federal and state anti-bias laws.

### REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Employees found to have been unfairly terminated in violation of the civil rights statutes or anti-retaliation provisions can resort to the various administrative agencies and the court systems. If an employee is found to have been terminated in violation of any applicable statute, the employee may be entitled to some or all of the following remedies: 1) reinstatement to former position (rarely granted); 2) monetary damages for wages and benefits lost as a result of the termination; 3) monetary damages for any emotional or physical distress suffered as a result of the employer's actions; 4) punitive damages intended to punish an employer for egregious violations of the law; and 5) attorneys' fees.

### WHISTLEBLOWER LAWS

Sarbanes-Oxley's whistleblower provisions create broad protection for employees of publicly held companies (and their contractors, subcontractors, and agents) who have a reasonable belief that fraud or other wrongdoing has occurred in violation of U.S. securities laws. The Dodd-Frank Act allows for the award of monetary incentives to individuals who voluntarily provide original information relating to a violation of the securities laws, which results in the collection of monetary sanctions exceeding \$1 million dollars. Some states have their own whistleblower laws, prohibiting termination or other adverse employment actions, in retaliation for good-faith reports made by employees about company activities that allegedly violate laws or regulations, or are fraudulent or criminal.



## X. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

### BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Trade unions constitute the largest and most influential employee organisations in the United States. A majority of trade unions are organised under two umbrella organisations: the American Federation of Labour and Congress of Industrial Organisations (“AFL-CIO”) and the Change-to-Win Federation.

The U.S. Chamber of Commerce, an organisation dedicated to representing employers' interests by engaging in lobbying campaigns, is the largest employers' organisation in the United States. In certain heavily unionised sectors (e.g., healthcare), employers can and do create multi-employer bargaining organisations to collectively negotiate the terms of collective bargaining agreements with employee-elected unions.

### RIGHTS AND IMPORTANCE OF TRADE UNIONS

Due to the United States Constitution's guarantee of a freedom of association, employees are free to form and join trade unions. As of late 2022, 14.6 million workers or 10.1% of the workforce are members of a trade union. Public-sector employees are unionised at a much higher rate (33.1%) than private-sector employees. Only about 6.0% of private industry employees are unionised. Industries with high unionisation rates included utilities (19.6 percent), motion pictures and sound recording industries (17.3 percent), and transportation and warehousing (14.5 percent). Among occupational groups, the highest unionisation rates in 2022 were in protective service occupations (34.6 percent) and in education, training, and library occupations (33.7 percent).. While only a small portion of the U.S. workforce is unionised, trade unions wield significant lobbying power.

### OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Once certified as the exclusive bargaining representative of the employees in the bargaining unit, the employer must begin bargaining for a collective bargaining agreement in good faith with the union as the employee's exclusive bargaining agent. Outside of the representation by a union, or as otherwise provided by a negotiated collective bargaining agreement, employees do not have an independent right to management or board representation. American law does not recognise works councils or other forms of employee representation.

## XI. TRANSFER OF UNDERTAKINGS

### EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

No statute governs the employment relationship when a business transfers to new ownership. As most employees are employed “at-will,” a “new employer” is free to offer employment to the employees of the seller/transferor employer or alter the terms and conditions of employment at the employment site.

If a transfer of undertaking will result in a plant closing or mass layoff, as defined under the WARN Act, employees are entitled to 60 days' advance notice by the seller/old employer. If a union represents the employees of the seller, the new employer may be under a duty to bargain with the labour union and cannot change any terms and conditions of employment without first bargaining with the labour union.

### REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

There is no obligation for a party acquiring a business (an asset sale) to retain any of the seller's employees. However, if the new employer reorganises the workforce after the transfer, which results in a covered plant closing or mass layoff, the new employer or “take over party” must provide the employees with 60 days' advance notice. In addition, an employer who acquires a workforce consisting of unionised employees is required to bargain with the union in good faith regarding the effect of the layoff on unionised employees and, in certain situations, may be required to honor the terms and conditions of employment articulated in an existing collective bargaining agreement.

## XII. WORKING CONDITIONS

### MINIMUM WORKING CONDITIONS

Federal law regulates wages, working hours and overtime pay for (covered) employees, but employees in executive, administrative or professional positions are exempt, as are outside sales employees, certain skilled computer professionals, employees of certain seasonal amusement and recreational businesses, casual babysitters and persons employed as companions to the elderly or infirm.

## SALARY

The FLSA sets forth a (national) minimum wage for all non-exempt employees of \$7.25 per hour. States are free to legislate a higher minimum wage. The majority of U.S. states have minimum wage rates above the federal standard. As of January 1, 2024, 30 states and the District of Columbia have a minimum wage higher than the national minimum. For example, California's minimum wage for non-exempt employees is \$16.00 per hour as of January 1, 2024. Some cities impose higher minimum wage rates for employees who work for employers in the municipal areas of those cities. For example, in San Francisco, the minimum wage is \$18.67 per hour as of July 2024.

A higher minimum wage applies to private-sector workers who perform work related to certain federal government contracts. In 2021, President Joe Biden issued an Executive Order mandating a staged increase in the minimum wage for federal contractors. As of January 1, 2024, the minimum wage for federal contractor employees is \$17.20 per hour. The Executive Order also eliminated the lower cash wage that contractors were permitted to pay tipped employees. (Under the FLSA, there is a reduced minimum wage rate for employees in occupations that customarily earn tips, such as restaurant servers and other hospitality industry employees.)

Employers may compensate tipped workers at a reduced "tip credit" hourly rate, provided that certain criteria are met, including that the workers earn enough from tips to satisfy the standard minimum wage and overtime rate requirements.)

## MAXIMUM WORKING WEEK

American workplace law does not impose maximum working hours. However, many state statutes mandate daily rest periods as well as a one-day rest period each week; generally requiring that employees who work more than four hours per day receive a break of at least 10 minutes for every hour worked. Also, many states require an unpaid meal break of at least 30 minutes after employees worked a set number of hours per day (threshold working hours generally ranging from five to eight). Furthermore, several states mandate that employee receive at least one day off in each seven-day period.

## OVERTIME

Under the FLSA, non-exempt employees must receive one-and-one-half times (1.5X) their "regular rate" of pay for all hours worked in excess of 40 hours per week. Generally, non-working time, including leaves of absence, rest periods, holidays and vacation time, is not counted toward the 40-hour-a-week overtime threshold. An employee's "regular rate" may be higher than their standard hourly rate, as it may include other forms of compensation, such as non-discretionary bonuses.

## EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The Occupational Safety and Health Act ("OSHA") requires employers to provide employees with a safe and healthy place of employment, which is free from recognised hazards (death or serious physical harm). The OSHA regulations govern a wide variety of workplace conditions, and require employers: a) to remedy known workplace hazards; b) to limit the amount of hazardous chemicals workers can be exposed to; c) to use certain safe practices and equipment; and d) to monitor hazards and keep records of workplace injuries and illness.

## COMPLAINT PROCEDURES

There are several ways that the Occupational Safety and Health Administration may initiate an inspection of an employer's facility or worksite, in response to health and safety concerns that have been reported to the agency. Any employee who believes that he or she has been discharged or retaliated against as a result of engaging in protected activity, such as reporting potentially unsafe working conditions, may file a whistleblower complaint within 30 days of the discharge or other retaliatory conduct. Thus, in addition to ensuring overall compliance with OSHA safety and health standards, employers need to ensure that they have strong internal programs to encourage employees to voice safety and health complaints and do so without fear of retaliation.



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