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**The International  
Comparative Legal Guide to:  
Employment & Labour Law 2011**

# GLG

Global Legal Group

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Alan Falach

#### Deputy Publisher

George Archer

#### Publisher

Richard Firth

#### Published by

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59 Tanner Street  
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Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
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## General Chapters:

1	<b>What to Expect in 2011 - The Impact of the New Government on UK Employment Law -</b> David Harper & Jo Broadbent, Hogan Lovells	1
2	<b>Employment and Labour Law Trends in the U.S. and the Impact of a Global Economy -</b> Garry G. Mathiason, Margaret Hart Edwards & Barry A. Hartstein, Littler Mendelson, P.C.	5
3	<b>Employment Class Actions in America – A Rising Tide -</b> William C. Martucci & Kristen A. Page, Shook, Hardy & Bacon L.L.P.	16
4	<b>Doing Business in the Great White North: A Guide to Frequently Asked Questions Relating to Canadian Labour and Employment Law -</b> Gary S. Rosen & Craig T. Munroe, Heenan Blaikie LLP	24

## Country Question and Answer Chapters:

5	<b>Albania</b>	KALO & ASSOCIATES: Emel Haxhillari & Aigest Milo	33
6	<b>Australia</b>	HopgoodGanim Lawyers: Andrew Tobin & Damon King	39
7	<b>Austria</b>	Gerlach Rechtsanwälte: Dr. Roland Gerlach & Mag. Branco Jungwirth	47
8	<b>Belgium</b>	Lydian: Jan Hofkens & Alexander Vandenbergen	52
9	<b>Colombia</b>	Cardenas & Cardenas Abogados: Lorena Arámbula & Juanita Vera	58
10	<b>Cyprus</b>	Andreas Neocleous & Co LLC: Nicholas Ktenas & Andrea Kallis	63
11	<b>Czech Republic</b>	Randl Partners: Nataša Randlová & Romana Kaletová	69
12	<b>France</b>	Hogan Lovells: Jean-Marc Albiol	76
13	<b>Germany</b>	Hogan Lovells: Kerstin Neighbour	83
14	<b>Greece</b>	Nikos Frangakis & Associates: Liana Kounadi & Georgia Skiada	90
15	<b>India</b>	Khaitan & Co: Sudip Mullick & Anshul Prakash	97
16	<b>Indonesia</b>	Soewito Suhardiman Eddymurthy Kardono: Richard D. Emmerson	103
17	<b>Ireland</b>	Matheson Ormsby Prentice: John Dunne & Bryan Dunne	110
18	<b>Israel</b>	Yigal Arnon & Co.: Ben Sandler & Shira Lahat	117
19	<b>Italy</b>	Hogan Lovells: Vittorio Moresco & Fabrizio Grillo	123
20	<b>Japan</b>	Anderson Mori & Tomotsune: Nobuhito Sawasaki & Sayaka Ohashi	129
21	<b>Korea</b>	Shin & Kim: Young-Seok Ki & John M. Kim	136
22	<b>Kosovo</b>	KALO & ASSOCIATES: Atdhe Dika & Vegim Kraja	142
23	<b>Luxembourg</b>	CASTEGNARO: Guy Castegnaro & Ariane Claverie	148
24	<b>Namibia</b>	Koep & Partners: Hugo Meyer van den Berg & Stephen Vlieghe	156
25	<b>Netherlands</b>	Hogan Lovells: Anita de Jong & Gerben Roffel	163
26	<b>New Zealand</b>	Simpson Grierson: Phillipa Muir & Carl Blake	169
27	<b>Nigeria</b>	Bloomfield-Advocates & Solicitors: Kunle Obebe & Dayo Adu	178
28	<b>Romania</b>	Pachiu & Associates: Alina Deiac & Alexandru Lefter	182
29	<b>Singapore</b>	KhattarWong: Deborah Evaline Barker	189
30	<b>Spain</b>	Hogan Lovells: Luis Enrique de la Villa & Eva Ceca de las Heras	195
31	<b>Switzerland</b>	Homburger: Dr. Balz Gross & Dr. Roger Zuber	201
32	<b>UAE</b>	Afridi & Angell: Charles Laubach & Omar H. Ayad	207
33	<b>United Kingdom</b>	Hogan Lovells: David Harper & Jo Broadbent	214
34	<b>USA</b>	Shook, Hardy & Bacon L.L.P.: William C. Martucci & Carrie A. McAtee	220
35	<b>Vietnam</b>	VNA Legal: Konrad Hull & Nguyen Thi Xuan Trinh	227

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## EDITORIAL

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Welcome to the first edition of *The International Comparative Legal Guide to: Employment & Labour Law*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of employment and labour laws and regulations.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key employment and labour issues, particularly from the perspective of a UK or North American transaction.

Country question and answer chapters. These provide a broad overview of common issues in employment and labour laws and regulations in 31 jurisdictions.

All chapters are written by leading employment and labour lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors David Harper and Jo Broadbent of Hogan Lovells, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk)

Alan Falach LL.M  
Managing Editor  
Global Legal Group  
[Alan.Falach@glgroup.co.uk](mailto:Alan.Falach@glgroup.co.uk)

# What to Expect in 2011 - The Impact of the New Government on UK Employment Law

Hogan Lovells

David Harper



Jo Broadbent



## Introduction

Following the general election in May 2010, it was unclear what impact the change of government would have on the UK employee relations landscape. It now appears that the new government will not make wholesale changes to the UK's employment law framework, at least in the short term. It has confirmed that legislation introduced by the former government will come into force as planned, introducing a range of new rights for employees and other workers. These developments include abolition of the default retirement age, additional paternity leave for fathers, an "equal treatment" rule for agency workers and further implementation of the Equality Act 2010.

## Abolition of the Default Retirement Age

When age discrimination was outlawed by the Employment Equality (Age Discrimination) Regulations (the Age Regulations) in 2006, many employers were concerned about how they would be able to manage an aging workforce without facing direct age discrimination claims. In response to that concern, the Age Regulations introduced a default retirement age (DRA) of 65. As long as employers followed a specific procedure, which included giving the employee at least six months' notice of a pending retirement and a right to ask to continue working, an employer could force an employee to retire at age 65 with very limited legal risk.

The DRA was subsequently challenged as incompatible with the EU Equal Treatment Framework Directive on which the Age Regulations were based. Although the High Court decided that the DRA was justified when it was introduced in 2006, there were compelling reasons against maintaining the DRA (or at least one of 65) in the longer term. Indeed, before the High Court decision was reached, the then government had already ordered a review of whether a DRA continued to be necessary.

The new government announced in July 2010 that it was proposing to abolish the DRA completely for a variety of policy reasons, including the impact of demographic change and the financial benefits to individuals of being able to work longer. Under the government's proposals, the DRA will be phased out from April 2011. Transitional arrangements will apply to the period between 6 April and 1 October. Employers can continue to give notification of retirements up until the end of March and force employees whose 65th birthday falls on or before 30 September to retire. After 30 September it will not be possible to force people to retire in reliance on the DRA. Businesses have not generally welcomed these proposals and the Confederation of British Industry (CBI) has called for them to be delayed.

## Managing without the DRA

Assuming that the abolition goes ahead in 2011, there are two key issues for employers to consider. The first is the extent to which they want to try and rely on a company retirement age to force employees to leave employment at a certain age. Adopting a company retirement age would on the face of it amount to direct discrimination, but in contrast to other types of discrimination, direct age discrimination can be justified. If an employer were able to show that adopting a retirement age is a proportionate means of achieving a legitimate aim, acts that would otherwise be direct discrimination will not be unlawful.

In some industries and for some jobs an employer may well be able to show that a company retirement age is a proportionate means of achieving a legitimate aim. For example, there may be health and safety reasons why someone doing a particular job cannot work beyond a particular age. In such cases justification is likely to be relatively straightforward. In other cases it is likely to be much more difficult. Although cases in the European Court of Justice have regarded "workforce planning" and the need to spread employment opportunities among different generations as a legitimate aim, there will still be a question about whether adopting a compulsory retirement age is proportionate. Decisions of the Employment Appeal Tribunal (EAT) and the Employment Tribunals suggest that English courts will take a cautious approach to this question.

For organisations that find it difficult to justify a company retirement age, the challenge will be deciding how to manage without the DRA. Employers may worry that holding discussions with older employees about whether they intend to continue working could subsequently be used as evidence of age discrimination. Older staff experiencing performance or health issues may require sensitive handling to avoid allegations of age discrimination and managers may benefit from additional training in this regard. Employers may also want to consider workforce planning issues and how they can continue to give younger employees opportunities for career progression to encourage them to stay with the organisation. It may be more difficult to provide this opportunity if older staff are no longer moving on from more senior roles. Flexible retirement policies, enabling older staff to move into a new role in return for flexible working options, could be attractive.

From a costs point of view, the most significant issue for employers is likely to be the need to manage employee benefits without a retirement age. Certain benefits will be more expensive to extend to staff over the age of 65 than to other staff. However, not offering such benefits to staff over 65 will be direct discrimination in the absence of

objective justification. A number of cases suggest that an employer cannot rely on cost alone to justify a practice that is otherwise discriminatory. Employers should start thinking about the design of benefits packages and other day to day management issues now so they are ready to cope when and if the DRA is abolished.

### Additional Paternity Leave

At the moment, the UK offers female employees extensive leave rights on the birth of a child, but male employees who become fathers have much more limited entitlements. A father is entitled to a maximum of two weeks' paternity leave, in comparison with the 52 weeks' maternity leave to which all female employees are entitled. This contrasts sharply with the position in many continental European countries, where women typically have less generous maternity leave rights, but families are entitled to much more generous periods of parental leave, which can be taken by either parent.

To try and address this imbalance and give parents greater flexibility in terms of how they choose to raise their families, the Work and Families Act 2006 gave the government power to introduce regulations that would allow a father to take a period of Additional Paternity Leave (APL). The details of the new right to APL are set out in the Additional Paternity Leave Regulations 2010 (APL Regulations), which came into force on 6 April 2010 but which only apply to babies due on or after 3 April 2011. The new government has confirmed that the APL Regulations will start to apply from April 2011 as planned.

Under the APL Regulations, fathers who have at least 26 weeks' service with an employer at the 15th week before a baby is due and who remain in employment with that employer will qualify for APL. A father can take between two and 26 weeks' leave in a continuous block for the purpose of caring for a child. Leave can only start once the child's mother has returned to work from a period of maternity leave and normally cannot start before the child is 20 weeks old. APL must finish by the time the child is 12 months old.

During APL the rights to which a father is entitled largely reflect those that a mother on maternity leave would receive. All terms and conditions of employment continue to apply except those in relation to "wages or salary". This means that although a father is entitled to continue to accrue holiday and receive other benefits under his contract of employment, he is not entitled to be paid by his employer while he is on APL. Instead, he may be entitled to receive additional statutory paternity pay if the child's mother has returned to work before she has claimed her full statutory maternity pay. In that case the father on APL will be entitled to claim the balance of the mother's statutory maternity pay.

A father on APL is also given preferential treatment in the event that his role is at risk of redundancy while he is on APL. He has an absolute right to be offered any suitable alternative employment that is available in preference to other employees, even if there are employees who are more qualified for the job in question. Women on maternity leave enjoy the same protection, so it will be difficult for employers to know how to treat a woman on maternity leave and a man on APL who are both qualified to undertake a particular role if there is a redundancy situation.

At the end of APL, fathers have a right to return to the job in which they were employed prior to their leave, unless APL is taken continuously with another period of family leave. In that case they are entitled to return to a suitable alternative job if it is not reasonably practicable for them to return to their previous role. An employee cannot be subjected to a detriment for taking leave and dismissals in connection with taking leave are automatically unfair.

Given that these changes come into force for babies due in April 2011, employers could start to receive requests for leave from late June 2011 onwards. It would be sensible to amend existing paternity leave policies so that employees and managers understand their new rights and obligations. One issue that has been causing particular difficulty is the extent to which an employer that offers enhanced maternity pay to women on maternity leave should offer enhanced paternity pay to men on APL. The government has so far taken the view that the position of a man on APL is not comparable with that of a woman on maternity leave, so there should be no obligation to offer the same benefits to men on APL. However, that view has not been tested at this stage and there remains a possibility that treating men and women taking leave differently could result in a sex discrimination claim (albeit not necessarily a successful one).

### Agency Workers Regulations

The third major piece of legislation coming into force in 2011 is the Agency Workers Regulations. These stem from the Agency Workers Directive, which was agreed at EU level in 2008. The EU Directive was designed to improve the working conditions of agency workers who were placed by an agency to work for an end-user client without being the end-user's employee. The aim of the directive is to ensure that such agency workers are entitled to the same basic working and employment conditions that they would have enjoyed had they been employed directly by the end user, known as an "equal treatment" right.

The UK (which has a more developed agency sector than many other European countries) was concerned that the Directive would harm its flexible labour market. Agreement was therefore secured for a "qualifying period" during which the right to equal treatment would not apply. The qualifying period in the UK will be 12 weeks. Once an agency worker has worked for the same hirer in the same role for 12 weeks, they will be entitled to equal treatment. There are complicated anti-avoidance provisions to stop agencies and end users engaging an agency worker with a break between roles to stop them achieving the qualifying period, including the possibility of a financial penalty.

Once an agency worker has completed the 12-week qualifying period, they are entitled to the "same basic working and employment conditions" as if recruited directly by the hirer. These basic working and employment conditions are defined as the terms and conditions that are ordinarily included in employees' contracts of employment in respect of pay, working time and holiday entitlements. "Pay" has a wide definition and encompasses any sums payable in connection with employment. However, a number of items that would normally be regarded as "pay" are specifically excluded from the definition. This means that benefits such as occupational sick pay, maternity, paternity and adoption pay, and redundancy pay do not have to be offered to agency workers.

Agency workers are also entitled to the same access to facilities such as canteens, childcare and transport services as other employees of the hirer, unless the hirer can justify a difference in treatment. This is a "day one" right that is not subject to the qualifying period, so agency workers are entitled to access facilities from the start of any assignment. However, facilities do not need to be opened to agency workers on terms that are more favourable than those that apply to employees. For example, if an employer operates an internal crèche with a waiting list, the agency worker would be entitled to go on the waiting list on the same basis as permanent employees. They would not be entitled to be offered a place in the crèche from the start of their assignment. Agency workers are also entitled to be informed of vacant posts in the hirer "to give the agency worker the same opportunity as a comparable

employee to find permanent employment”.

The Agency Workers Regulations contain an exception to the right to equal treatment that some agencies and end-users may wish to make use of. The right to equal treatment in basic terms and conditions relating to pay does not apply if the agency worker has a permanent contract of employment with a temporary work agency under which the employee is entitled to be paid between assignments. To prevent abuse, the contract of employment cannot be terminated unless the employee has received at least 4 weeks’ pay in aggregate during breaks in assignments.

Further guidance on the Agency Workers Regulations is expected from the government early in 2011, which will hopefully address some of the complicated issues that may arise, particularly where there is no obvious employee comparator for an agency worker. Pending that guidance, end-users who engage a large number of agency workers should review their employee terms and conditions of employment to establish what pay and conditions agency workers will be entitled to when the Agency Workers Regulations come into force. This should also help them to assess whether it will still be more cost-effective to engage agency workers rather than hiring employees direct.

One factor to take into account in that respect is that the Agency Workers Regulations do not change the current position in the UK that agency workers are typically not regarded as employees for the purposes of unfair dismissal or redundancy payments. There may still be advantages for a hirer in continuing to use agency workers to maximise flexibility, even if the cost of doing so is greater than it has been to date.

## Equality Act 2010

The Equality Act 2010 (the Act) was one of the previous government’s flagship pieces of legislation. It was largely designed to consolidate and harmonise existing discrimination law and did not extend the grounds on which individuals are protected against discrimination (broadly sex, race, disability, sexual orientation, religion or belief and age). However, the Act did introduce new protections in some areas.

The new government brought the majority of the Act into force in October 2010 as originally planned. From an employer’s perspective there were a number of significant changes, particularly in relation to disability discrimination.

### Disability discrimination

A new prohibition on discrimination arising from a disability was introduced. Such discrimination occurs where:

- an employee is treated unfavourably;
- because of something “arising in consequence of” the disability; and
- the treatment is not a proportionate means of achieving a legitimate aim.

For example, if an employee is dismissed because he has been absent from work for a disability related reason, that would be unfavourable treatment because of something arising in consequence of the disability. This would amount to discrimination if the employer could not show that the treatment was justified.

Another change was the extension of the concept of indirect discrimination to disability. A disabled employee would therefore be able to argue that:

- an employer had applied a “provision, criteria or practice”;
- which put people with the employee’s disability at a particular disadvantage; and

- which put the disabled person at that disadvantage.

This would be unlawful discrimination unless the employer could justify the “pcp”.

There is likely to be some overlap between an employer’s duty not to indirectly discriminate and the existing duty to make reasonable adjustments to accommodate a disabled employee. We anticipate that until the extent of the various new duties becomes clearer, claimants will bring disability discrimination claims on a number of different heads.

Alongside these measures the Act prevents employers from making health enquiries of a job applicant before a job offer is made. If an employer makes such enquiries:

- the Equality and Human Rights Commission could take enforcement action; and
- if an unsuccessful candidate alleges disability discrimination, the employer will have to show that the disability is not the reason why the applicant was unsuccessful.

It is still possible to ask a candidate whether reasonable adjustments are needed for an interview or assessment, but a prospective employer must not ask whether reasonable adjustments are necessary to enable the disabled person to do the job. An employer can however make health enquiries to see if a candidate can fulfil an “intrinsic” job function.

### Tackling the gender pay gap

The Act was also designed to try to reduce the national gender pay gap in the UK (broadly the difference between the average hourly earnings of men and women). One, although not the only, reason for the continuing pay gap is the fact that employers are not giving male and female employees equal pay for work of equal value.

The previous government believed that pay transparency would have beneficial effects by requiring employers to focus on whether they have a gender pay problem, and then take action to tackle the reasons why pay inequality persists. In addition, giving women more information about pay within their organisations might enable them to take action against employers who do not provide equal pay for work of equal value.

To encourage employers to report more transparently on their gender pay gaps, the Act gives the government the power to require employers to publish pay gap information annually. However, the current government is less enthusiastic about mandatory pay reporting and does not intend to bring the relevant section into force at this time. Instead, it intends to develop a voluntary scheme for gender pay reporting in the private and voluntary sector during 2011, targeted at employers with 150 or more employees. The government has not ruled out further action if this voluntary approach does not work.

With effect from October 2010, the Act has also outlawed “gagging” clauses that prevent employees from discussing their pay with each other. This provision applies where colleagues discuss their pay with a view to finding out whether it is related to having or not having a protected characteristic. Pay disclosures to third parties such as trade unions are also covered. The section is designed to make it harder for employers to conceal the existence of a gender pay gap from their employees. It is unlawful to victimise an employee for being engaged in such a pay discussion.

### New rights

One of the most controversial aspects of the Act was the provision that allowed employers to treat individuals who have a protected

characteristic more favourably than others in a recruitment or promotion process. Such positive action would only be permitted where those sharing a protected characteristic:

- “suffer a disadvantage”; or
- have disproportionately low rates of participation in an activity.

In those circumstances an employer can treat individuals with that characteristic more favourably in a recruitment or promotion decision if that is designed to overcome or minimise the disadvantage or encourage rates of participation. The employer must not have a policy of treating a particular group more favourably.

The employer will only be able to give more favourable treatment if the individual is “as qualified” as the other candidates to be recruited or promoted. At this stage it is not entirely clear what “as qualified” means. If it means having exactly the same qualifications for a role as someone else, the impact of the provision may be limited. Although the current government initially opposed the positive action provision, it has now confirmed that it will be brought into force in April 2011.

### Other Changes?

To a great extent the changes coming into force during 2011 simply reflect the approach taken by the previous government. In part this is because the current government’s hands are tied; it is obliged as a matter of European law to implement the Agency Workers Directive by the end of 2011. In part, the government may be implementing provisions such as the APL Regulations as a stop gap before introducing more radical policies; it has indicated that it is going to start consultation on introducing a flexible system of parental leave.

There are some signs that future developments may be more radical. In October 2010, the CBI took the opportunity to call for “modernisation” of the industrial relations framework to make it more difficult for unions to take strike action. The new government also indicated in November 2010 that it is considering increasing the period for which an employee needs to be employed before they can claim unfair dismissal from one to two years. Employers will need to keep an eye on the employee relations framework for some time to come, despite the government’s “steady state”.

### Note

This chapter was contributed by Hogan Lovells International LLP.



**David Harper**

Hogan Lovells International LLP  
Atlantic House, Holborn Viaduct  
London EC1A 2FG  
United Kingdom

Tel: +44 20 7296 2359  
Fax: +44 20 7296 2001  
Email: [david.harper@hoganlovells.com](mailto:david.harper@hoganlovells.com)  
URL: [www.hoganlovells.com](http://www.hoganlovells.com)

David is a partner in Hogan Lovells’ London office. He is a member of the Litigation Arbitration and Employment practice. He has more than 30 years’ experience of employment and labour law, 24 of them as a partner. He has extensive experience of employment litigation and also restructuring and national and international corporate transactions. His transactional work has included privatisations, PPP projects and takeovers. In recent years he has devoted substantial time to the growth of the Pan-European practice. He regularly cooperates with lawyers in Europe providing multi-jurisdiction advice to clients.



**Jo Broadbent**

Hogan Lovells International LLP  
Atlantic House, Holborn Viaduct  
London EC1A 2FG  
United Kingdom

Tel: +44 20 7296 2026  
Fax: +44 20 7296 2001  
Email: [jo.broadbent@hoganlovells.com](mailto:jo.broadbent@hoganlovells.com)  
URL: [www.hoganlovells.com](http://www.hoganlovells.com)

Jo Broadbent is Of Counsel and a professional support lawyer in the Hogan Lovells’ employment team. In addition to keeping clients and the team up to date with legal developments, she has extensive experience of developing and presenting internal and external client training courses and workshops. She recently presented a webinar on workplace bullying and harassment for a leading provider of employment law training. Jo is a co-author of the book “Informing and Consulting Employees: the New Law” and frequently writes articles for the HR and legal press.



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# Employment and Labour Law Trends in the U.S. and the Impact of a Global Economy

Littler Mendelson, P.C.

Garry G. Mathiason



Barry A. Hartstein



## Introduction

We are pleased to be part of this inaugural global publication on labour and employment law. While the focus of this chapter is labour and employment trends in the U.S., the world we live in today is increasingly interconnected. Aside from the broad reach of companies with global operations, technology is changing the face of the workplace in the U.S. and abroad, not only in terms of the way employees work and where they work, but also has broader implications, even potentially changing organising practices by labour organisations.

Aside from the impact of technology, this chapter also reviews other trends faced by employers operating in the U.S., including the ever-changing rules of employee privacy, the broad range of employment litigation faced by U.S. employers, a reinvigorated labour movement in the U.S. with global implications, a renewed focus on corporate ethics, the growth of the contingent workforce and employee benefits moving to centre stage. While focusing primarily on U.S. laws and court decisions, global developments may impact on labour and employment trends in the U.S. and thus are included as part of the discussion.

## 1. Technology is Redefining Employment Law in the Workplace

The Internet has brought us closer to our neighbours while allowing us to sit further apart. In no corner of the world has the impact of information electronisation been more acute, in terms of both benefit and detriment, than the workplace. Over the past decade, employers have battled through this potential minefield, hoping to stay on the cutting edge of technology, reaping its rewards but at the same time avoiding its pitfalls. Over the coming decade, technology is expected to continue its exponential growth and intrusion into our everyday lives, and employers who are prepared to accept and exploit the growing benefits of this technology, while also preparing for and avoiding its pitfalls, will inevitably have an advantage over their competitors.

For example, based on the internet and cloud computing, increasingly more workers will be able to telecommute, avoiding the office altogether and thus saving a staggering amount of money for both employers and the country as a whole. As President Obama declared in a speech at the White House Forum on Workplace Flexibility, “work is what you do not where you are”. (*Remarks by the President at the Workplace Flexibility Forum, Office of the Press Secretary, available at <http://www.whitehouse.gov/the-press-office/remarks-president-workplace-flexibility-forum>.*)

Workers in the coming decade will become untethered from a

specific workplace or work time, utilising technological advancements to create a work product away from the confines of their offices and beyond regular work hours. In 2009, 34 million adults in the U.S. telecommuted at least occasionally, and research suggests that by 2016, 63 million workers (or 43% of the U.S. workforce) will telecommute. (Ted Schadler, *U.S. Telecommuting Forecast, 2009 To 2016*, FORRESTER RESEARCH, Mar. 11, 2009, available at [http://www.forrester.com/rb/Research/us\\_telecommuting\\_forecast%2C\\_2009\\_to\\_2016/q/id/46635/t/2](http://www.forrester.com/rb/Research/us_telecommuting_forecast%2C_2009_to_2016/q/id/46635/t/2) (last visited Sept. 23, 2010).)

The Internet also has resulted in greater reliance on social media as a common and accepted form of communication by a wide array of individuals and businesses. Facebook, the most popular social networking site in terms of users, which currently has more than 500 million users, experienced a 276% rise in its 35-54-year old demographic in a six-month period. (Peter Corbett, *2009 Facebook Demographics and Statistics Report: 276% Growth in 35-54 Year Old Users*, Jan. 5, 2009, available at <http://www.istrategylabs.com/2009/01/2009-facebook-demographics-and-statistics-report-276-growth-in-35-54-year-old-users/>.) Other social media, like LinkedIn, were created to cater to the professional and job-seekers. Throughout the decade, it is likely that more of these professional sites will develop, or existing ones will promote use of their media specifically for business networking and hiring purposes. Recruiting coordinators can target their candidates to fill their hiring needs by accessing qualified candidates through searches of these sites.

Although the obvious benefits associated with increased use of technology in the workplace ensure its continued proliferation, its use is not without significant pitfalls that can be costly if not avoided.

**Discrimination.** One significant problem that has already surfaced is the threat of litigation against employers who currently use social media like Facebook to conduct background checks on potential employees. In the past, claims of age, race, or gender discrimination routinely followed employers who requested photos of potential employees on their applications. While most employers have abandoned this hiring practice, many employers fail to recognise that the same exposure follows those that have access to this same information through checking online profiles. The risk of litigation from these practices is truly unnecessary. Helpful information found through these online profiles is rare and should be discovered during a proper interview. Employers need to develop a comprehensive policy to proactively deal with this issue, one which goes beyond simply forbidding the use of Facebook background checks. This type of broad prohibition is unrealistic and employers should craft a more flexible and detailed policy to combat this emerging litigation threat.



**Wage and Hour.** The digitisation of work also raises numerous issues under wage-and-hour law. For example, how does an employer determine and record the hours of work of a nonexempt employee working in his or her home, including time spent reviewing and responding to e-mail on company-issued cell phones and laptops? The fact that a nonexempt employee is telecommuting does not change an employer's obligation to pay for overtime worked. This is becoming more visible as class-action wage and hour lawsuits proliferate around the country as employees seek overtime compensation for hours they claim they worked at home. (Sheri Qualters, *Telecommuters Are Reaching Out to Sue Their Employers*, NAT'L L. J., Dec. 15, 2006.) In one high profile example, an assistant to Oprah Winfrey claimed more than \$65,000 in overtime over a 16-week period due to activity on her personal digital assistant (e.g. Blackberry or iPhone), and the company paid it. (*Oprah Assistant Clocks 800 Overtime Hours in 4 Months*, Aug. 17, 2007, available at [http://www.huffingtonpost.com/2007/08/17/oprah-assistant-clocks-800-n\\_60832.html](http://www.huffingtonpost.com/2007/08/17/oprah-assistant-clocks-800-n_60832.html) (last visited Sept. 16, 2010).) Similar concerns arise based on the use of handheld devices outside the workplace.

**Workplace Safety.** In 1999, the Occupational Safety and Health Administration (OSHA) issued an opinion stating that employers were responsible for ensuring that telecommuting workers' home offices were in compliance with safety standards. (U.S. Dep't of Lab., Occupational Safety & Health Admin, Statement of Charles N. Jeffress Assistant Secretary for Occupational Safety and Health U.S. Department of Labor Before the Subcommittee on Employment, Safety, and Training Senate Committee on Health, Education, Labor and Pensions, Jan. 25, 2000, available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_tabl e=TESTIMONIES&p\\_id=123](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_tabl e=TESTIMONIES&p_id=123).) After widespread criticism, OSHA quickly retracted the opinion and issued a directive that it would not conduct inspections of employees' home offices and does not expect employers to conduct inspections of home offices, although it is unclear whether there will be any change in this view during the Obama administration. (*Id.*) OSHA's directive currently remaining in effect likely eliminates some liability for employers, but liability is still a threat in a telecommuting world. Employers should still be wary of potential claims of negligence from visitors or family members of the telecommuting employee who suffer an injury in the employees' home/home office. A related concern is employees' use of mobile technology while they are working or driving company vehicles. Litigation is on the rise across the country where employers are being sued for negligence in cases involving accidents on roadways. (*Employee on Cell Phone in Car Can Be Costly for Employer*, EMPLOYERS ADVOCATE, available at <http://theemployersadvocate.com/?p=589>.)

**Protection of Trade Secrets.** Telecommuting also exposes employers to internal threats because it may be more difficult to manage business and other proprietary information that is created and stored remotely. For example, remote employees may maintain unique files containing client information, customer lists, pricing, sales data, profit-margin data, engineering drawings and other sensitive information. An employer's ability to maintain protection of this information in a remote office is likely to be more difficult than in an on-site office. For these reasons, it is highly recommended that all remote work either be done on an employer-owned laptop or through a direct connection to the network.

Nevertheless, even these solutions are not fail-proof in today's world. Regardless of whether employees are telecommuting or taking a laptop to an out-of-town meeting, theft or loss of a company laptop could lead to loss or ultimate disclosure of confidential or proprietary information. Some threats can occur without the loss of a laptop. Employers should ensure that adequate

security (firewall, network encryption) is installed and working in any telecommuting environment so unwanted visitors do not gain access to employers' proprietary information.

## 2. Privacy Rights Vacillate and Remain Open to Continued Litigation and Legislation

While there has been enhanced protection of employee privacy rights around the globe, the U.S. and its courts and legislatures remain in a state of flux as the contours of employee privacy rights continue to evolve.

Workplace monitoring continues to be a subject of frequent litigation over privacy rights. As an example, a Federal Appeal Court in California ruled that review of personal and sexual text messages made on an employer-owned pager violated the employee's right of privacy. On appeal, the U.S. Supreme Court reversed, holding that the employer's review of text messages was motivated by a legitimate work-related purpose and was not excessive in scope. (*City of Ontario v. Quon*, 529 F.3d 892 (9th Cir.), rev'd, 130 S. Ct. 1011 (2010).) The New Jersey Supreme Court ruled that an employer violated an employee's rights of privacy by reading emails between the employee and her lawyer found on the employer's computer, even though the company had a policy banning personal use of the computer. The court declared such a policy overbroad and unenforceable, and found that the company's policy failed to give adequate notice of the type of monitoring that occurred. (*Stengart v. Loving Care Agency, Inc.*, No. A-16-09 2010 N.J. LEXIS 241 (N.J. Sup. Ct. Mar. 30, 2010).) In contrast, the California Supreme Court found no actionable privacy violation when an employer installed a hidden camera operated only at night to determine the identity of the person suspected of using a company computer at night to access pornography, because the occupants of the office where the camera was installed were never filmed. (*Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009).) Most recently, in *NASA v. Nelson*, 130 S.Ct. 1755 (Jan. 19, 2011), the Supreme Court held that NASA could constitutionally do background checks on independent contractors, which included questions about any history of counseling, drug treatment or drug use without violating any constitutional right of privacy. While the inquiries implicated a "privacy interest of Constitutional significance", the Court held that the requests were reasonable.

Some states are beginning to limit the ability of employers to obtain and use credit history information for job applicants and employees unless they can show that the information is job related. Oregon recently added a law that prohibits an employer from obtaining or using the credit history of a job applicant or employee in connection with hiring decisions or as a basis for adverse employment actions. (Oregon Senate Bill 1045 available at <http://www.leg.state.or.us/10ss1/measures/sb1000.dir/sb1045.en.html>.) Both Hawaii and Washington also have laws placing similar restrictions on employers. (HAW. REV. STAT., ch. 378, pt. I, §378-2, revised July 1, 2009; RCW 19.182.020 revised 2007.) Introduced July 29, 2009, the Equal Employment for All Act would amend the Fair Credit Reporting Act (FCRA) to prohibit use of consumer credit checks against both prospective and current employees for the purpose of making adverse employment decisions, including hiring, promotions, transfers, and terminations. (H.R. 3149.)

Security of data is a top concern. As of April 2010, 46 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have enacted laws requiring notice of a security breach. (<http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/SecurityBreachNotificationLaws/tabid/13489/Default.aspx>)

[ult.aspx](#).) The duty to give notice does not depend on whether the data pertains to an employee or the consumer. California adopted tough new laws in the healthcare sector after high profile instances of workers gaining access to health records of celebrities. (A.B. 1298 amending CAL. CIVIL CODE §§56.06, 1798.29 and 1798.82 (2008).)

Data protection in the U.S. clearly remains an area that will need to be closely monitored, particularly based on data protection that is quickly expanding around the globe and its potential impact on U.S. employers. As an example, over the next several years, it can be anticipated that a wave of countries seeking the economic benefits of easy cross-border data transfer with the European Union (E.U.) will enact omnibus data protection requirements that are similar to those in place in E.U. countries. This legislative change will be viewed as necessary because under the European Data Protection Directive, personal data related to a resident of the E.U. can be transferred outside the E.U. only if the laws of the country where the information will be received provide an adequate level of protection, meaning protections similar to those required by the E.U. These new laws will make it more difficult for global organisations to consolidate and centralise human resources information on servers located in the United States and to use cloud computing services to reduce IT costs.

The potential impact of the 2008 Genetic Information Nondiscrimination Act (GINA), which took effect on November 21, 2009, is still in its early stages. GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II, and prohibits retaliation against employees who complain about genetic discrimination. On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) issued a final rule implementing the employment provisions under GINA. Based on GINA and its implementing regulations, the protection of family medical history is juxtaposed against an employer's interest in wellness programmes. The EEOC allows employers to obtain genetic information in connection with employer-provided wellness programs as long as any individually identifiable genetic information that discloses the identity of the employee is accessible only to the employee and the health care provider involved in providing such services. (See [www.litler.com](http://www.litler.com), Press and Publications, ASAPs, "EEOC Issues Long Awaited Final Regulations On the Genetic Information Nondiscrimination Act," Nov. 2010.)

Social networking is also challenging the limits of privacy. Employee rants, drug use, sexual orientation, religious and political beliefs, as well as race and national origin are all discovered by this medium. Also uncertain is the right to speak privately on the Internet. If an employee posts on Facebook that he won a bowling tournament shortly after filing a claims for a work-related back injury, can the employee realistically expect the employer not to notice, and use the information? (Roberto Cenicerros, Comp Cheats Confess All on Social Networking Sites, WORKFORCE MANAGEMENT ONLINE, Sept. 2009, at <http://www.workforce.com/section/02/feature/26/66/08>.) While many employers use these sites for background checks on prospective employees, the full legal implications are unclear and these issues will continue to be litigated by the U.S. courts over the next several years.

Privacy concerns evaporate in the face of terrorist threats. The manner in which these concerns must be balanced against employee rights in the workplace will continue to evolve throughout the decade.

### 3. Employment Class and Collective Actions Will Continue to Create Challenges For Employers

While lawsuits by and on behalf of large groups of employees has not been a global phenomenon, class and collective actions continue to be an ongoing concern for U.S. employers.

A paradox that confronts any effort to forecast the future of class action employment litigation in the U.S. is that employers have become more compliant with employment and labour laws over the last decade, yet over 3,500 class actions were filed nationally in 2009, approximately five times the number filed in 2000. Almost 90% of these lawsuits involved wage and hour disputes, which has become a hotbed of legal activity. Therefore, it is tempting to conclude that the number of future filings will be shaped far more by plaintiff's attorneys, court decisions, and federal and state legislators, rather than the policies and practices of employers.

**Wage and Hour Cases.** From 2001 to 2006, the number of federal court wage and hour class actions doubled, and the pace has continued to accelerate. (Michael Orey, *Wage Wars*, BUS. WK., Oct. 1, 2007.) The number of reported wage and hour class action settlements/verdicts also increased, from 86 in 2008 to 124 in 2009. However, despite the increase in numbers of settlements/verdicts, the average settlement/verdict decreased slightly from approximately \$8.8 million in 2008 to \$8.2 million in 2009. Nonetheless, the amount awarded per work week for a full time employee remained relatively constant with \$100 per work week representing the plaintiff's "rule of thumb" for lawsuits filed for California workers, and significantly less (\$25 to \$35 per work week) for non-California settlements. (The above findings are based on data obtained from publicly available information, including Employment Law 360, the Daily Labor Reporter, newspapers, and a variety of other publications, and settlement estimates prepared based on analysis by Littler Mendelson attorneys.)

A trend that began in California has now spread across the U.S. Until 2009, California led the nation in wage and hour class actions. Indeed, between 2000 and 2005, employment class actions in California state courts grew more than any other type of class action, increasing by 313.8%. (*Report: Findings of the Study of California Class Action Litigation, 2000-2006*, California Courts: Court Research and Statistics, available at <http://www.courtinfo.ca.gov/reference/caclassactlit.htm>.) By 2009, more wage and hour class/collective actions were filed in Florida than California, and every state recorded such lawsuits. New York, Illinois, and Texas saw significant growth totaling more than 1,200, while in Alabama, Georgia, Illinois, New Jersey, Ohio, Oregon, Pennsylvania class/collective actions reached triple digits. Exemption from overtime, independent contractor status, off-the-clock work, commissions, tip-pooling, travel time, pre- and post-work activities, and meal periods were issues everywhere both under the FLSA and under various state laws.

In addition to the East Coast and Midwest expansion, lawyers are increasingly identifying and challenging industry-based pay practices. Large retail employers have already been the focal point of such suits. In 2009 and 2010, there was an explosion of class and collective actions against healthcare employers. Starting with cases filed by a law firm in Rochester, New York, against several large healthcare systems in the Northeast, the initial lawsuits have now snowballed and given rise to "copycat" lawsuits across the country. (*Initial Cases: e.g., Hintergerger v. Catholic Health Sys.*, 2009 U.S. Dist. LEXIS 97944 (W.D.N.Y. Oct. 20, 2009); *Taylor v. Pittsburgh Mercy Health Sys.*, 2009 U.S. Dist. LEXIS 57328 (W.D. Pa. July 7, 2009); *Colozzi v. St. Joseph's Hosp. Health Ctr.*, 595 F. Supp. 2d 200 (N.D.N.Y. 2009). *Recent Filings: E.g., Bajestani v. Consulate*

*Healthcare*, 1:10-cv-00030 (E.D. Tenn. Feb. 17, 2010); *Cason v. Vibra Healthcare*, 5:10-cv-10642-JCO-VMM (E.D. Mich. Feb. 12, 2010); *DeMarco v. Northwestern Mem'l Healthcare*, 1:10cv397 (N.D. Ill. Jan. 20, 2010); *Creely v. HCR ManorCare Inc.*, 3:09-CV-02879 (N.D. Ohio Dec. 11, 2009).) Many of these cases involve claims relating to off-the-clock-work and automatic deductions from pay for meal periods, but the cases often also assert claims for violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, the Employee Retirement Income Security Act (ERISA), Breach of Contract, Estoppel, and other types of claims. Claims for miscalculation of the regular rate of pay for short and long shifts are also prevalent in the healthcare industry. (E.g., *Parth v. Pomona Valley Hosp. Med. Ctr.*, 584 F.3d 794 (9th Cir. 2009); *Thomas v. Howard Univ. Hosp.*, 39 F.3d 370 (D.C. Cir. 1994); *Huntington Mem'l Hosp. v. Superior Ct.*, 131 Cal. App. 4th 893 (Cal. App. 2d Dist. 2005).)

Similar growth has taken place in the financial industry. These cases often involve misclassification claims focusing on specific jobs, such as mortgage brokers and underwriters. (E.g., *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009); *Mevorah v. Wells Fargo Home Mtg. (In re Wells Fargo Home Mtg.)*, 571 F.3d 953 (9th Cir. 2009); and *Edwards v. Audubon Ins. Group, Inc.*, 2004 U.S. Dist. LEXIS 27562 (S.D. Miss. Aug. 31, 2004).) Once a major settlement or significant legal decision suggests that such actions are viable, they spread quickly.

The growth of wage and hour class/collective actions litigation has been matched by the Obama Administration's pledge to make wage and hour enforcement a priority. Toward the end of 2009, Secretary of Labor Hilda Solis announced: "Make no mistake, the DOL is back in the enforcement business." (CCH WorkWeek, Week of Sept. 21, 2009, <http://hr.cch.com/netnews/employment-law/emp092109.asp>.) In early 2010 the DOL, in cooperation with advocacy groups, embarked on a "public awareness" programme to inform workers about their rights. (WHD News Release, Nov. 19, 2009, <http://www.dol.gov/opa/media/press/whd/whd20091452.htm>.) The DOL has also hired 250 new investigators, a one-third increase. (*Id.*) In 2008, 78% of DOL investigations resulted in findings of violations and it collected \$185 million in back wages for 228,000 employees.

(2008 Statistics Fact Sheet, U.S. DOL, <http://www.dol.gov/whd/statistics/2008FiscalYear.htm>.)

These statistics demonstrate the federal government's recent effort to increase enforcement of wage and hour laws.

With respect to DOL and related investigations, there clearly appears to be a greater focus and increased attack on independent contractor classifications as laws and regulations change and the DOL, IRS, and state task forces focus on this issue. These task forces will attempt to, among other things, ensure tax collection from independent contractors and impose penalties and back taxes on employers for misclassified employees. In short, this is an area that employers will need to carefully monitor and take care prior to entering into any independent contractor relationships based on the potential legal pitfalls involved in the event of misclassification of such workers.

Therefore, between a regulatory crackdown by the DOL and increased class action filings by private plaintiff's attorneys, wage and hour issues will continue to a significant compliance issue at least over the next several years, and perhaps throughout the decade.

**Employment Discrimination Class Actions.** In recent years, many leading plaintiffs' attorneys, who previously focused on employment discrimination class actions, have shifted their focus to wage and hour collective actions. In our view this trend reflects an obvious cost-benefit analysis on the part of the plaintiff's bar.

FLSA collective actions simply are much easier and less costly to certify, at least conditionally, than discrimination cases under Rule 23. As an example, courts frequently note that the initial burden to conditionally certify an FLSA class is a light one. (See *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), mandamus granted in part and appeal dismissed sub nom. *Lusardi v. Lechner*, 855 F.2d 1062 (3rd Cir. 1988), modified in part, *Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D.N.J.1988), aff'd in part, appeal dismissed, *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3rd Cir. 1992), adopted by other courts and dubbed the "Lusardi analysis" by later cases. See, e.g., *Mooney v. Aramco Servs.*, 54 F. 3d 1207, 1213 n.6 (5th Cir. 1995).) In contrast, the Supreme Court has famously held that the court's Rule 23 certification decision requires a "rigorous analysis". As a result, the plaintiff's attorneys are more likely to obtain an earlier and more favourable decision, at a lower cost, in FLSA litigation than in employment discrimination class actions.

The future growth and potential expansion of private employment discrimination class actions may hinge on the outcome of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, which has been set for oral argument on March 29, 2011, and an expected ruling in the summer of 2011. (Docket No. 10-277). On April 26, 2010, the Federal Appeals Court in California (Ninth Circuit), in an *en banc* decision of the full court, affirmed the lower court's decision certifying a class of approximately 1.5 million women who allege they were systematically discriminated against based pay and promotion practices. (603 F. 3d 571 (9th Cir. 2010); see also *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal.2004).) The outcome of the *Dukes* case, which is the largest ever certified discrimination class action, may not only change the way class actions are certified but will also have a tremendous trickle-down effect in the way other large corporations and employers align their business practices to conform with the evolving law stemming from this case.

Regardless of the outcome in the *Dukes* decision, there will be a continued focus on class action type "pattern or practice" lawsuits initiated by the Federal Equal Employment Opportunity Commission, which has shifted many of its resources in recent years to remedying what it views as systemic discriminatory employment practices by employers. (See EEOC Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission, March 2006, <http://www.eeoc.gov/eeoc/taskforce.cfm>.) As an example, for FY 2010, among the 250 "merit" lawsuits filed by the EEOC, 192 (37%) involved "multiple-victim" or "pattern or practice" lawsuits. (EEOC FY 2010 Performance and Accountability Report, [http://www.eeoc.gov/eeoc/plan/2010par\\_appendices.cfm](http://www.eeoc.gov/eeoc/plan/2010par_appendices.cfm).) It is anticipated that the EEOC's current trend will continue in which nearly 40% of all lawsuits initiated by the EEOC will involve class action type lawsuits, in which the EEOC is not bound by Rule 23 requirements applicable to class actions initiated by plaintiffs' attorneys.

#### 4. Retaliation Claims Remain a Serious Risk For Employers

Retaliation is included as a prohibition in virtually all employment statutes, and this area continues to pose a serious risk for employers based on lawsuits initiated by plaintiff's attorneys, and the EEOC in recent litigation efforts. Aside from Title VII of the Civil Rights Act of 1964 and the other laws enforced by the EEOC, Congress also has enacted and expanded employee rights to address what is viewed as a serious concern of retaliation in the workplace. Even what can be described as a relatively conservative U.S. Supreme Court has broadly interpreted employment statutes to protect against retaliatory conduct by employers. This trend has continued

based on the outcome of recent decisions by the Court.

**Retaliation and EEOC.** In recent years, there has been a steady rise in the number of retaliation claims under the various EEO statutes under the jurisdictions of the Equal Employment Opportunity Commission (EEOC). In FY 2010 the EEOC had a record number of discrimination charges filed with that agency (99,922), and for the first time ever, retaliation under all statutes (36,258) surpassed race (35,890) as the most frequently filed charge before that agency. (<http://eeoc.gov/eeoc/newsroom/release/1-11-11.cfm>.) Similarly, in a review of recent EEOC court filings between August – December 2010, thirty percent (61 of 204 lawsuits) included a retaliation claim against employers in lawsuits initiated by the EEOC. (Based on a study by Littler Mendelson attorneys of EEOC court filings around the U.S.)

**New and Expanded Retaliation Laws.** Over the past year, Congress also has expanded employee rights prohibiting retaliation in the workplace. On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). (Pub.L. 111-203, H.R. 4173.) While the focus of the Act is financial regulatory reform, aside from encouraging whistleblowers to report violations of securities and commodities laws, the Act prohibits employers from taking any adverse employment action against a whistleblower based on providing information to the Securities and Exchange Commission or Commodities Futures Trading Commission, participating in SEC or CFTC investigations or proceedings, or engaging in any activity protected under the Sarbanes-Oxley Act of 2002 (“SOX”). (§748(h)(1)(A)). Based on Dodd-Frank, Congress also expanded the whistleblower protections under SOX (29 U.S.C. §1514A(a)) by expanding the class of companies covered, lengthening the limitations period for filing a retaliation claim from 90 to 180 days and explicitly permitting a jury trial for a complainant who removes a claim from the OSHA administrative process to Federal Court if the Secretary of Labor fails to issue a final decision within 180 days of filing. (Dodd Frank, §§929A, 929b, 922c(1) and 922c(2).)

**Scope of Retaliation Claims.** Retaliation theories have become more nuanced. For example, the United States Supreme Court defined adverse action for the purposes of retaliation under Title VII very broadly in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) and held that the “actions and harms it forbids are not even confined to those that are related to employment or occur at the workplace”, citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) (e.g. filing false charges against a former employee). Rather, the retaliation provisions are intended to cover employer actions that are “materially adverse...that would dissuade a reasonable worker from making or supporting a charge of discrimination”. The Court also has broadly interpreted federal statutes to permit retaliation claims even in the absence of a retaliation clause. (*CBOCS West Inc v Humphries*, 128 S. Ct. 1951 (2008); *Gomez Perez v. Potter*, 128 S. Ct. 1931 (2008).) In further expanding the scope of retaliation claims, in January 2011, the U.S. Supreme Court in a unanimous decision held that a third party (i.e. fiancé of a charging party) falls within the “zone of interests” that may support a retaliation claim under Title VII. The fiancé, who never took part in any protected activity, was terminated several weeks after the discrimination charge was filed. The Court held that “injuring him was the employer’s intended means of harming [the charging party]”.

Most recently, on March 1, 2011, the U.S. Supreme Court again expanded protection against retaliation and decided an issue that had divided the courts - whether an individual manager may use superiors or human resources professionals as a “cat’s paw” to have the employer engage in retaliation. (*Staub v. Proctor Hosp.* 562 U.S. (2011), 2011 U.S. LEXIS 1900 (March 1, 2011), reversing.)

In discrimination law, if an employee who holds unlawful discriminatory animus against another employee, uses a supervisor who has no discriminatory animus as his cat’s paw to take adverse action against the other employee, the issue is whether the employee’s discriminatory animus can be imputed to the supervisor, thus making the adverse employment action unlawful. In *Staub*, the Supreme Court resolved the “cat’s paw” issue based on alleged retaliation in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Court held that “if a supervisor performs an act motivated by...animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable...” The Court thus held that the focus is not on the decision-maker. Rather, the focus is whether the supervisor intended to cause the termination and in fact caused the employee’s termination. The *Staub* decision clearly has broad implications for other laws, particularly discrimination laws, such as Title VII, prohibiting retaliation for exercising rights under the law.

Finally, one additional retaliation case that may soon be decided by the U.S. Supreme Court implicates the Fair Labor Standards Act (FLSA). (*Kasten v. Saint-Gobain Performance Plastic*, 585 F.3d 310, cert. granted, Mar. 22, 2010, No. 09-834, Argument - Oct. 13, 2010.) The FLSA protects an employee who as “filed any complaint” based on the FLSA. The *Kasten* case involves the crucial issue of whether a complaint must be written to constitute protected activity.

## 5. The Reach of Discrimination Laws is Becoming Broader

Over the 46-year history of Title VII of the Civil Rights Act of 1964 (“Title VII”), the prohibitions on discrimination against applicants and employees on the basis of protected characteristics such as race, sex, religion, and national origin have become ingrained. Following some setbacks in the courts based on the scope of coverage under the Americans with Disabilities Act (ADA), recent amendments to the ADA and impending regulations will result in expanded protection and increased litigation under the ADA. Litigation also is beginning to arise under the recently enacted GINA, prohibiting the use of genetic information in employment decisions. Employers in the U.S. today also must give greater attention to developments at the state and local level which in numerous jurisdictions significantly expand the nature and types of bans against discrimination and risk of expanded damages, which may include unlimited compensatory and punitive damages. Employers also must pay attention to potential new theories of liability, which may make their way “across the pond” from countries globally.

**Expanded Protection Under ADA.** On September 24, 2008, President Bush signed into law the ADA Amendments Act of 2008 (ADAAA), amending the ADA and directly overturning several decision of the U.S. Supreme Court interpreting that landmark law. The ADAAA sent an unmistakable message to the courts that the concept of disability is to be more broadly, rather than narrowly, construed. The primary consequence of these amendments to employers is that many more individuals will fall within the definition of a covered disability under the ADA. (*See www.littler.com*, Press and Publications, ASAPs, “Congress Tells Courts How to Interpret the ADA,” Sept. 2008.) While employers have been awaiting the final regulations, which most likely will have been issued by early 2011 (following submission of this article for publication), the final regulations merely will reinforce the intent of the ADAAA – the ADA is to be broadly interpreted to protect those with a disability, a history of a disability or those

“regarded” or perceived as having a disability. Lawsuits initiated by the EEOC in the latter half of 2010 make clear that the EEOC already has stepped up enforcement efforts under the ADA – 33 ADA lawsuits were filed around the U.S. by the EEOC between August – December 2010, as compared to 40 lawsuits filed during FY 2010. ([http://www.eeoc.gov/eeoc/plan/2010par\\_financial.cfm](http://www.eeoc.gov/eeoc/plan/2010par_financial.cfm); Littler analysis of EEOC lawsuits filed in U.S. courts between Aug. - Dec. 2010.)

**Additional Potential Areas of Coverage.** While protection under Federal law may be limited for individuals with certain characteristics, it is clear that many individuals and plaintiff’s counsel will seek relief under state and local laws, which in many jurisdictions provide broader coverage and expanded relief. Further, efforts continue to be made by plaintiff’s counsel and enforcement agencies, such as the EEOC, to interpret the existing law to extend coverage as broadly as possible.

**Sexual Orientation.** For example, no federal law exists at the moment that explicitly prohibits discrimination against employees on the basis of sexual orientation or gender identity or expression. Court rulings and state and local employment laws with respect to the treatment of gay, lesbian, bisexual and transgender employees have created a legal patchwork from jurisdiction to jurisdiction, often making it difficult for employers to navigate. Currently, 21 states, the District of Columbia, and 180 counties, cities and municipalities have incorporated sexual orientation into their anti-discrimination laws, making it illegal to discriminate in employment decisions on the basis of sexual orientation. In addition, 12 states, the District of Columbia, and 108 counties, cities and municipalities have added explicit protections against discrimination in employment decisions based upon gender identity or expression.

In June 2009, the Employment Non-Discrimination Act (ENDA) (H.R. 2981 (2009)) was introduced in Congress. Closely modeled on Title VII, ENDA provides basic protections in every jurisdiction in the United States against workplace discrimination on the basis of sexual orientation and gender identity or expression. ENDA is closely modeled on Title VII. Based on recent Congressional developments, however, any new Federal legislation in this area most likely will be delayed for some time.

Regardless of when - or whether - ENDA passes, the trend is clear: hundreds of companies have enacted policies protecting their lesbian, gay, bisexual and transgender employees. For example, as of February 2009, 434 (87%) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 207 (41%) had policies that include gender identity. The majority of these employers also provide benefits to same-sex partners and spouses of employees. (Human Rights Campaign Foundation, *The State of the Workplace* (Feb. 12, 2009) available at [http://www.hrc.org/about\\_us/7061.htm](http://www.hrc.org/about_us/7061.htm).)

**Personal Appearance.** Similarly, while no federal statute specifically prohibits appearance-based discrimination, a trend is developing among states and municipalities. Some jurisdictions have made it illegal to discriminate against an employee based upon such quantifiable factors of height and weight. Even more recently the District of Columbia passed legislation that prohibits a more generalised personal appearance standard, based upon “the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards”. (D.C. CODE ANN. § 2-1401.02.11(a).)

Much of the present body of law on “personal appearance” discrimination is rooted in Justice Sandra Day O’Connor’s now famous concurrence in *Price Waterhouse v. Hopkins*, 490 U.S. 228

(1989), wherein the Justice observed that Title VII prohibits gender discrimination based upon a stereotypical ideal of how a woman ought to appear in order to be considered “professional”. (The trial court in *Price Waterhouse* observed that the employer criticised the plaintiff for her lack of professionalism, which could be resolved if she would “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry”.) Thus, while the word “appearance” is not listed among the categories protected by Title VII and other federal laws, employers must proceed with caution if they choose to make employment decisions based upon opinions made from an individual’s personal appearance.

Throughout the decade, we are likely to see employees and applicants push the edges of existing federal law to make personal appearance discrimination illegal. For example, employers are likely to face resistance to implementing work rules that bar clothing styles that originate in Eastern and African cultures or in various religious denominations. It is also likely that more and more jurisdictions will pass legislation that prohibits personal appearance discrimination (i.e. employees who appear overweight or unattractive) because such practices are perceived as unfair and unrelated to the work the employee performs.

**Caregiver Discrimination.** Currently there is no distinct statutory protection under federal EEO laws for caregivers. Some localities have recently added caregiver status as a protected category under state human rights acts or local ordinance. (See *Chicago Human Rights Ordinance 2-160-030*; D.C. Human Rights Act § 2-1402.11. For others see, Stephanie Bornstein and Robert J. Rathmell, Center for Worklife Law, Hastings College of the Law, Univ. of Cal., *Caregivers As A Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination*, Dec. 14, 2009, available at <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>.) In addition, under existing laws on the federal level, there are circumstances in which discrimination against caregivers may be actionable because it constitutes discrimination based on sex, disability, or another category protected by federal employment discrimination laws. For example, because women are disproportionately likely to assume primary care-giving responsibilities, including the care of children, parents or relatives with disabilities, family responsibility discrimination typically becomes an extension of gender discrimination under Title VII. Thus, even without specific statutory protections, issues impacting family responsibility discrimination are being recognised under existing law. (For collections of cases and theories, see materials available at <http://www.worklifelaw.org> (last visited Sept. 16, 2010).)

**Workplace Bullying.** The concept of workplace bullying (also known as “mobbing” in the United Kingdom) has garnered much attention in recent years. While there is no single uniform definition of workplace bullying, it is often characterised as repeated, unreasonable acts of intimidation, slandering, social isolation, or humiliation by one or more persons against another, with the intent to intimidate or harass the victim. The key characteristic of workplace bullying is the repetitive, as opposed to isolated, nature of the intimidation or harassment.

A number of foreign countries have passed laws or ordinances that aim to prevent workplace bullying, including Sweden and the United Kingdom (Statute Book of the Swedish National Board of Occupational Safety and Health, Ordinance AFS 1993:17, *Victimization at Work*, available at <http://www.av.se/dokument/inenglish/legislations/eng9317.pdf>; Protection from Harassment Act 1997, available at <http://www.legislation.gov.uk/ukpga/1997/40/contents>).

In the U.S., there have been no federal or state laws passed that

prohibit workplace bullying. However, the Workplace Bullying Institute (WBI), an organisation that was formed to raise awareness of the issue of workplace bullying, has developed the “Healthy Workplace Bill”, and is currently lobbying state legislatures to pass the bill. (See The Workplace Bullying Institute, *Quick Facts About the Healthy Workplace Bill*, <http://www.healthyworkplacebill.org/bill.php>.) In early 2010, the bill was introduced in at least 17 state legislatures – Connecticut, Illinois, Kansas, Massachusetts, New Jersey, New York, Oklahoma, Utah, and Vermont. (See The Workplace Bullying Institute, *State Involvement in the Healthy Workplace Bill Campaign*, <http://www.healthyworkplacebill.org/states.php> (last visited Sept. 16, 2010).) Thus, this is an issue that may gain protection under various state laws over the next several years, and state law developments need to be monitored as part of an employer’s compliance efforts.

## 6. Labour Organising is Becoming Reinvigorated and has International Implications

The Bureau for Labor Statistics reports that in 2009 only 12.3% of workers were union members, a significant decrease from 1950 where 38% of the workforce was unionised. (Bureau of Labor Statistics, *Union Members Summary*, at <http://www.bls.gov/news.release/union2.nr0.htm>.) Yet these statistics – which suggest a possible demise of the American labour movement – do not tell the entire story. To the contrary, organised labour (both in the United States and internationally) is currently under a period of significant transition. Recent activities by organised labour both in the United States and around the globe, coupled with recent appointments at the National Labor Relations Board, clearly indicate that during the coming year, and for the immediate future, employers will be confronted with reinvigorated efforts by organised labour.

In an effort to increase the number of workers eligible to be organised under the National Labor Relations Act (NLRA), labour organisations are increasingly challenging employers’ classification of workers as independent contractors, who are not eligible to be organised under the NLRA, through class action lawsuits and through alerting government wage and hour investigators of questionable employer practices. Unions who have lost membership due to the economic downturn also are now focusing their efforts on non-union employers in the same industry that have historically remained immune to union organising. For example, the United Automobile Workers, with its membership at an all-time low, has identified traditional non-union automobile manufacturers as a prime target for organising efforts. (<http://detnews.com/article/20110120/AUTO01/101200346/UAW-Toyota-under-consideration-as-organizing-target> as of 1/22/11.)

While President Obama’s election initially signaled potential passage of the oft-mentioned Employee Free Choice Act (EFCA), which included a more aggressive “card check” system for recognising a union as the collective bargaining representative and other controversial reforms such as increased penalties for employer misconduct, its passage (even in a modified form) in the immediate future is now unlikely. (Employee Free Choice Act of 2009 (Introduced in House), H.R. 1409, 111th Cong. § 1 (2009), at <http://thomas.loc.gov/cgi-bin/query/z?c111:h.r.1409>.)

In contrast, radical change under the Railway Labor Act (RLA), the federal law governing labour relations in the railway and airline industries has already occurred, which now make it easier to unionise workers in such industries. On June 20, 2010, the National Mediation Board (NMB), the federal agency charged with administering the RLA, changed the RLA’s representation election

procedure, basing the outcome of union elections on the outcome of those who actually vote (similar to the NLRA), rather than requiring a majority of employees eligible to vote determining the outcome of the election. (Representation Election Procedure, 74 Fed. Reg. 56750 (Nov. 3 2009), at [http://www.nmb.gov/representation/proposed-rulemaking/repvotingproposal\\_11-03-09.pdf](http://www.nmb.gov/representation/proposed-rulemaking/repvotingproposal_11-03-09.pdf).)

*Impact of Technology.* Similar to the business community, unions are also experiencing various benefits from advances in technology. The increased ability of unions to organise workers through the use of “cyber organising” makes a labour organisation’s ability to reach out to workers easier than it has possibly ever been. At the same time, the use of technology creates new challenges for employers, including the extent to which an employer will be able to monitor employer-issued computers or limit the extent to which employees will be able to view this material while at the workplace. The challenge is even greater for larger employers who have a workforce that does not report to one centralised location. Not only do email and Internet organising efforts pose challenges for employers, dozens of unresolved legal questions pertaining to these practices will be before the National Labor Relations Board (NLRB) in the coming years.

*Potential Global Alliances Among Organised Labour.* Worldwide, labour organisations have united by industry and have created Global Union Federations, whose purpose is to advocate for uniform and fair labour standards. Global Union Federations (GUFs) are worldwide federations of unions who represent employees working in specific industry, craft or occupation. (For a review of the more active GUFs in various industries - see <http://www.global-unions.org>.) Recently, GUFs have increased pressure on multinational companies to enter into “International Framework Agreements” (IFAs) or international “codes of conduct”. The IFAs or “Codes of Conduct” commit a company to respecting minimum labour standards in its operations around the world. Typically, such agreements offer commitments on trade union rights, collective bargaining rights, information and consultation, equal opportunities, safety and health, minimum wage standards, and the banning of child labour and forced labour.

The United Steelworkers (U.S.W.), which claims to be the largest industrial union in North America, has been one of the leaders of this new, multi-national initiative. Starting in 2004, U.S.W. began to form a series of international labour alliances, beginning with one with German IG Metall, the world’s largest union. (*U.S.W. Strategic Alliances* at [http://www.usw.org/join\\_us/news?id=0371](http://www.usw.org/join_us/news?id=0371).) The American-based International Association of Machinists and Aerospace Workers has fostered similar relationships. (Kyle James, *In Era of Globalization, Unions Look Beyond Their Own Borders*, DEUTSCHE WELLE (Jan. 22, 2007), available at [http://www.dw-world.de/popups/popup\\_printcontent/0,,2318734,00.html](http://www.dw-world.de/popups/popup_printcontent/0,,2318734,00.html).) The Communications Workers of America also is conducting a joint organising effort with the German union, Verdi, through a newly created union named T-Union, to organise T-Mobile workers in the United States and to support German union members working for T-Mobile in the United States. (See <http://www.global-employmentlaw.com/2009/11/regions/north-america/united-states/recent-framework-agreements-indicate-the-continued-influence-of-european-labour-unions-in-north-ameri/>.)

IFAs also have provided some ammunition for union organising. For example, Swiss-based retailer H&M, signed an IFA with the Union Network International in 2007, part of which required the retailer to be labour neutral to organising efforts in the United States. After H&M’s U.S. operations became targets of union campaigns alleging violations of the IFA, in 2007, the Retail, Wholesale and Department Store Union organised clerks, cashiers

and other workers at the company's Manhattan-based retail stores. In May 2009, the parties agreed to a three-year collective bargaining agreement. (<http://cityroom.blogs.nytimes.com/2009/05/26/hm-workers-ratify-first-union-contract/>.)

*Application of U.S. Labour Law.* With the coordination of union efforts on an international scale, there will likely be increased litigation testing the application of the NLRA with respect to primary and secondary boycotts that originate on foreign soil. Traditionally, courts have held that the NLRA does not apply to disputes in U.S. territory that involve foreign labour relations. (*Benz v. Compania Naviera Hidalgo S.A.*, 353 U.S. 138 (1957) (holding that the NLRA does not apply to picketing of foreign ship concerning foreign sailors' wages, even when in U.S. waters).) But the NLRA does apply to picketing of a foreign vessel in U.S. waters where the purpose is to protest wages paid by a foreign employer to U.S. residents performing longshore work on U.S. soil. (*ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970).)

As the importance of coordinated efforts among U.S. and foreign labour organisations increases, the NLRB and courts will likely be tested to revisit, and perhaps rethink, precedent that was created before the globalisation of the 21st century.

As companies continue to outsource traditionally organised labour to foreign countries, we also anticipate that unions will increasingly push for "international collective bargaining agreements" that transcend U.S. borders. These agreements would include participants from within and outside the United States. However, whether these agreements will be held enforceable outside of U.S. boundaries remains uncertain. Courts have applied different standards in determining whether U.S. labour and non-labour statutes apply in situations where foreign conduct is involved. (*See, e.g., Independent Union of Flight Attendants v. Pan Am World Airways, Inc.*, 923 F.2d 678 (9th Cir. 1991) (U.S. labour law inapplicable to a collective bargaining agreement between a U.S. airline and a U.S. union where CBA included clause purporting to apply worldwide notwithstanding the fact that the CBA appeared to cover the carrier's flying throughout the world); but see *Local 553, Transport Workers Union of America v. Eastern Air Lines*, 544 F. Supp. 1315, (E.D.N.Y. 2002), *aff'd as modified*, 695 F. 2d 668 (2d Cir. 1982) (U.S. labour law was applicable and a collective bargaining agreement between a U.S. employer and a U.S. labour union was enforceable).)

## 7. International Labour Standards May Have a Greater Impact on U.S. Operations

Outside of the 27 European Union Member States, labour and employment law is, for the most part, a local affair. The United States developed its own labour law starting in the early 20th century, and much employment law remains distributed among the 50 states, District of Columbia and U.S. territories.

International efforts to formulate basic labour standards are best exemplified by the International Labour Organization (ILO), which now includes 183 nations, and has adopted 188 conventions, which are treaties creating international labour law standards. The United States has adhered to only two of the core conventions (treaties) on labour standards adopted by the ILO: Convention 105 on the Abolition of Forced Labour, and Convention 182 on the Worst Forms of Child Labour. (<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105> and <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.) The United States has resisted adoption of other ILO conventions on the theory that its own labour law provides at least equivalent standards.

In order to remain fully competitive and engaged in world commerce, the United States may need to begin bringing its labour and employment law into closer alignment with international labour

standards. The Obama administration has already shown an interest in the work of the ILO that was not apparent during the Bush administration. (<http://www.globalemploymentlaw.com/2009/10/regions/north-america/united-states/us-department-of-labour-taking-an-interest-in-the-ilo/>.) On an *ad hoc* basis, some U.S. companies with international supply chains have already started using existing international labour standards as terms and conditions for selection and retention of suppliers. These standards may be integrated with a corporate code of conduct. (For an example of such a code of conduct and a study of the effectiveness of enforcement mechanisms, see *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers*, 146 International Labour Review 21 (2007).)

Minimal labour standards in some countries may create a competitive advantage in manufacturing. The U.S. Department of Labor has announced that it is stepping up efforts to monitor and improve rights and working conditions for workers in developing countries, and to make sure that free trade agreements between the U.S. and other countries contain provisions related to labour standards. (46 Daily Lab. Rep. (BNA) A-15 (Mar. 11, 2010).)

The influence of global standards is showing in several areas. For example, hazard communication warnings about chemicals have been the subject of a U.N. subcommittee, which created a Globally Harmonized System and has urged its worldwide implementation. The European Union approved legislation imposing that system on its 27 Member States, and it has been embraced by Japan, New Zealand, South Korea, Taiwan and Thailand. (8 Daily Lab. Rep. (BNA) C-1 (Jan. 14, 2009).) In the United States, the Occupational Safety and Health Administration (OSHA) announced its intention to adopt the system with an advance notice of public rulemaking, (174 Daily Lab. Rep. (BNA) A-14 (Sept. 8, 2006)) and then issued a letter of interpretation saying it would consider labels prepared under the Globally Harmonized System to comply with the OSHA hazard communications standard if the label contains all of the information required by OSHA's standard. (213 Daily Lab. Rep. (BNA) A-7 (Nov. 6, 2009).)

Similarly, there are efforts to harmonise international rules for executive compensation and stock options. (157 Daily Lab. Rep. (BNA) C-3 (Aug. 14, 2008); see also pressures by global unions at the G-20 Summit in Philadelphia in September 2009, 184 Daily Lab. Rep. (BNA) A-11 (Sept. 25, 2009).) The conflict between the Sarbanes-Oxley Act ("SOX") requirement for tip lines for anonymous whistleblowers and privacy requirements of the European Union continues to bedevil U.S. companies operating in the European Union. The SOX provisions for anonymous tips conflict with strongly held values determined by history with dictators and informants. Similar challenges are posed by workplace monitoring of electronic communications. Efforts to bridge these divides continue.

## 8. Corporate Ethics and Compliance are Gaining Increased Importance

Since 2007, with markets crashing, hundreds of thousands of jobs lost around the globe, employers everywhere trying to find their way through the Great Recession, workplace ethics and compliance has taken on a new role in the business world and in our workplaces. There is no question the extraordinary economic events of the last several years have had an impact on ethical climates in the American workplace and around the globe. Indeed, it has become imperative for companies to have a robust compliance and ethics programme to succeed in today's marketplace.

Until quite recently, the disciplines of ethics, compliance, risk management and human resources have operated in separate silos within most organisations. In today's world, these disciplines must

converge and be managed together in a unified front in order to meet the varying needs of the market place and government regulators, and to regain the trust of their stakeholders. Organisations from around the globe are rethinking and restructuring their compliance mechanisms to meet the challenges presented by increasingly stringent ethics laws and government regulations, and the unprecedented rigor with which these laws and regulations are being enforced. Times have changed and we are already beginning to see massive effects of that change in the ethics and compliance world.

Following the passage of the Sarbanes-Oxley (“SOX”) Act, the U.S. government has been aggressively fighting corporate corruption. Most new legislation passed in the U.S. now includes whistleblower, retaliation and compliance components. The recent passage of the Dodd-Frank Act, signed into law on July 21, 2010 by President Obama, is the most recent evidence of this approach. (Pub.L.111-203, H.R. 4173). Included as part of Dodd-Frank’s provisions is a whistleblower programme that provides financial incentives (e.g. bounty) to whistleblowers providing information to the U.S. securities and Exchange Commission (“SEC”) and Commodities Futures Trading Commission (“CFTC”) that leads to successful prosecution for violation of such laws. (Dodd-Frank Act §748, 992.) The Act also protects against retaliation for those who report such violations. (*Id.* §748(h)(1)(A), 922a(h)(1).)

The U.S. government continues to crack down on unethical acts by corporations, both in America and abroad. In January 2010, 22 executives and other employees from 16 companies were arrested for allegations of various unethical acts, including violations of the Foreign Corrupt Practices Act (FCPA). The latter law prohibits employees from bribing government officials in foreign countries for the purpose of acquiring or retaining business. The sting operation that led to these prosecutions was unprecedented in terms of its size, but also in terms of its target — the individuals involved were from small to midsize companies. In the past, large public companies were the usual targets on Department of Justice (DOJ) investigations. The level of enforcement activity shows no signs of slowdown — as of January, 2010 the DOJ had more than 130 open FCPA investigations. All this comes at a time when global corporations increasingly seek growth in new and developing markets, many of which pose higher risks of bribery and corruption. It is more important now than ever before for those companies conducting business internationally to accurately measure and manage anti-bribery and anti-corruption risk and assess current global compliance programme effectiveness.

The U.S. government is also focusing on domestic fraud. This past year the DOJ developed a taskforce the Health Care Fraud Prevention and Enforcement Action Team, “HEAT”. The federal government plans to multiply by ten the number of agents and prosecutors targeting Medicare fraud in Miami, Los Angeles and other strategic cities where officials say tens of billions of dollars are lost each year.

The Federal Sentencing Guidelines, which were initiated in the 1980’s, and amended most recently in 2009, specifically require companies that hope to take advantage of the guidelines and receive more lenient sentences when convicted of wrongdoing to create a culture of ethics and compliance. Chapter 8 of the Guidelines, which applies to organisations, includes a provision directing organisations to establish an “Effective Compliance and Ethics Program”. The Guidelines also state that organisations shall exercise due diligence to prevent and detect criminal conduct and otherwise promote a culture that encourages ethical conduct and a commitment with the law. (Federal Sentencing Guidelines, § 8B2.1.) Among its many requirements, the Guidelines further instruct that an organisational compliance and ethics programme minimally requires several steps,

including the establishment of standards, appropriate oversight of the ethics and compliance programme by the organisations governing body, and the implementation of an effective training programme throughout the organisation.

All of these developments merely reinforce the basic conclusion that employers need to be pro-active and place increased emphasis on ethics training and compliance activities.

### 9. The Growth of the Contingent Workforce is the New “Normal”

Over the past year, as the U.S. has been emerging from the Great Recession, companies are pressed to exercise measured judgment when making hiring decisions. Currently the country’s total contingent workforce stands at approximately 14 million people, with U.S. businesses spending over \$400 billion on these workers. (*North American Insight*, Staffing Industry Analysts (SIA) (Oct. 26, 2009).) As companies move forward, mindful of the deep labour cuts that were made during the past couple of years, the ability to achieve median savings of 9% by using contingent workers will be a very attractive and compelling reason to embrace the recovery with contingent workers. (*Estimated Total Expense Savings Due to Use of Contingent Labour*, Contingent Workforce Strategies 30, Staffing Industry Analysts (Mar. 15, 2010).)

Economic indicators show that job losses have slowed and companies are ready to hire, however, the first hires are likely to be those in contingent positions. Indeed, heading toward the recession, all forms of contingent workers were the first to be laid off and the trend in the last two decades is that such workers are the first to be hired back in a recovery. Studies of just-in-time labour suggest that companies are becoming more sophisticated in their use of contingent help and increasingly use such workers and delay permanent hiring as the economy improves.

(Tom Abate, *In Economic Woes, Firm Count On Temp Workers*, SAN FRANCISCO CHRONICLE, Dec. 6, 2009, available at [http://articles.sfgate.com/2009-12-06/business/17182732\\_1\\_employment-temporary-workers-jobless-recoveries](http://articles.sfgate.com/2009-12-06/business/17182732_1_employment-temporary-workers-jobless-recoveries).) The flexibility and cost-savings associated with contingent labour will be attractive to executives who will be wary in the slow recovery, which has been dubbed the “jobless recovery”.

All forms of contingent work are projected to rise faster than general employment in coming years. The BLS predicts that general employment will increase by an average annual rate of 1.0% from 2008 – 2018. (Bureau of Labor Statistics, *Employment Projections 2008-2018*, Dec. 10, 2009, available at <http://www.bls.gov/news.release/ecopro.nr0.htm>.) Interestingly, BLS projects that one segment of the contingent workforce – temporary employment – will grow nearly twice that fast – at 1.8% annually. (*North American Insight*, Staffing Industry Analysts (SIA) (Feb. 2, 2010).) Staffing Industry Analysts believes the BLS projection is understated because it does not take into account the large increases in temporary employment in late 2009 or that companies have become more savvy in their use of contingent workers after the most recent layoffs. (*Id.*) By 2020, SIA predicts that contingent work will represent 20% of all work. The significance of national healthcare is not considered in the predictions of BLS or SIA, however, its importance is undeniable and cannot be understated. These conventional estimates do not account for the potential impact of national healthcare on the future of the contingent workforce. (National healthcare was discussed as a very important factor in Littler’s *The Emerging New Workforce: 2009 Employment and Labour Law Solutions for Contract Workers, Temporaries and Flex-Workers*, at 4, 30 (May 2009), available at



<http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=30.>)

Despite the potential desire of companies relying more heavily of the contingent workforce, legal compliance becomes more complicated with an increasingly contingent or contractor-based workforce, where there is a potential for creation of multiple joint employer relationships. Companies utilising such workers also need to ensure the independent organisations with which they work have compliant policies and reporting policies.

## 10. Employee Benefits Law Will Move To Centre Stage

Finally, it is anticipated that employers will place greater attention on a range of employee benefits, particularly the following: (1) health care, which will include a focus on wellness programmes; (2) executive compensation, particularly dealing with issues of accountability and transparency; and (3) retirement plans as employers deal with cost containment and continue to shift from defined benefit to defined contribution pension plans.

**Health Care.** On March 23, 2010, President Obama signed into law the historic Patient Protection and Affordable Care Act, with amendments in the Health Care and Education Reconciliation Act on March 30, 2010. Despite recent court challenges, the Obama administration has pressed forward with this new legislation. (*See State of Florida v U.S. Dept. of Health and Human Services*, Case No. 3:10-cv-91-RV/EMT, N.D. FL, 1/31/11, Judge Vinson ruling law unconstitutional based on individual mandate to purchase insurance.) Even assuming that Congress modifies various provisions, it is still anticipated that these laws will profoundly change the delivery of healthcare coverage. These laws currently will require most legal U.S. residents to obtain health insurance and will provide government subsidies to help lower-income individuals to obtain health insurance through newly created health insurance exchanges. An exchange is a virtual market where individuals and groups can shop for plans and purchase plans that best meet their needs. Two multi-state insurance plans will also be created. Current employer mandates, effective January 1, 2014, will provide penalties for employers of 50 or more who fail to provide coverage for essential benefits. All plans will have certain features, including: (1) no waiting periods over 90 days; (2) automatic enrollment for employers with more than 20 full-time employees; (3) elimination of exclusions for pre-existing conditions; and (4) no annual limits for all enrollees. (For additional information, see Ilyse W. Schuman and Steven J. Friedman, *Health Care Reform – What are Key Considerations for Employers*, Mar. 2010, available at <http://www.littler.com/PressPublications/Lists/Insights/DispInsights.aspx?id=153.>)

As part of the cost containment in dealing with health care, there will be an increased emphasis on mandating wellness programmes. The legal landscape is undeveloped and employers across the U.S. are testing the limits to determine what is permissible. Some employers have mandated that employees cannot use tobacco products. Others require comprehensive health assessments and use third-party administrators to evaluate the data. Many more are offering discounts on health insurance to achievement of wellness benchmarks like low body mass index or smoking cessation. (*See also Employer Mandated Wellness Initiatives: The Continuum from Voluntary to Mandatory Plans*, Apr. 2010, available at <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=25.>) The final regulations under the Genetic Information Nondiscrimination Act, adopted in November 2010, also provide some guidance, underscoring that any financial inducements must exclude any mandates regarding disclosure of

genetic information in any health risk assessments. (*See EEOC Issues Long-Awaited Final Regulations on the Genetic Information Nondiscrimination Act*, ASAPs, <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Ddbf81%2D3d045b6ede6d&ID=1555.>)

Employers will need to closely monitor potential legal challenges to mandatory wellness programmes in this evolving area of the law.

**Executive Compensation.** Executive compensation is a subject of increasing scrutiny. For example, the recently enacted Dodd-Frank Act will significantly affect publicly traded companies. While the SEC has yet to issue guidelines regarding many of these new requirements, the Act gives shareholders at public companies advisory say on executive pay packages, a similar vote on certain golden parachute arrangements and requires adoption of rules to allow regulators and investors to claw back bonuses if it is later discovered that such executives engaged in misconduct. The existing trends will continue and be strengthened. There will likely be much stronger regulation of executive compensation. This is an area that needs to be closely monitored.

**Retirement Plans.** Employers currently provide employees with a mix of retirement vehicles. Although 401(k) plans, which put the risk of investment performance on employees' shoulders, are the most common employer-provided retirement vehicle, there are still companies that maintain traditional defined benefit pension plans. These plans provide for great variability in annual expense and annual funding as such factors are dependent not only upon the plan's pension formula but also upon the plan's investment performance, prevailing interest rates and actuarial factors. These traditional pension plans provide much greater benefits to long-term workers than others as the formula dramatically increases benefits as employees reach retirement age. Employers have started to switch to less expensive and less volatile retirement vehicles and to those which provide less of a premium on longevity of employment. As part of cost containment efforts, the future of retirement benefits will depend on employee retirement plans with the focus on 401(k) plans and similar defined contribution plans.

## Conclusion

The above observations of current labour and employment trends are intended merely as a starting point for further review and discussion. For two years, Littler has been deciphering the hundreds of cases and thousands of developments that disclose the employment trends of the coming decade. A comprehensive discussion of these issues is set forth in *The Littler Ten: Employment, Labour and Benefit Law Trends for Navigating the New Decade*, which includes recommendations and best practices. (*See* <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=34.>)

The authors are indebted to the many contributors from Littler who are responsible for much of the contents included in the above article.

## Additional Author

The authors would like to acknowledge the contribution of their colleague Margaret Hart Edwards in the preparation of this chapter. Margaret Hart Edwards is nationally recognised for her expertise with the ADA. She advises and defends employers in a broad variety of employment and labour matters and has litigated hundreds of cases in state and federal courts since beginning practice in 1975. Ms. Edwards routinely advises employers on legal compliance and litigation prevention measures, and provides training on employment law subjects.

Ms. Edwards has written more than three dozen articles on various employment law subjects, including: the role of remarks in discrimination cases, discrimination against individuals with mental disabilities, sexual harassment, policies for email and internet use, telecommuting and employment law, steps to take to avoid employment litigation, and Title III of the Americans with Disabilities Act.

Ms. Edwards has also served as an adviser to the Employer's Delegate, and member of United States Delegation to the 98th International Labour Conference of the International Labour Organization, Geneva 2009.

She can be contacted on Tel: +1 (415) 288-6678 / Email: [mhedwards@littler.com](mailto:mhedwards@littler.com).



**Barry A. Hartstein**

Littler Mendelson, P.C.  
321 North Clark Street, Suite 1000  
Chicago, IL 60654  
USA

Tel: +1 312 795 3260  
Fax: +1 312 372-3880  
Email: [BHartstein@littler.com](mailto:BHartstein@littler.com)  
URL: [www.littler.com](http://www.littler.com)

Mr. Hartstein has earned a national reputation for his work; a career that includes more than 30 years of counseling and representing employers in a broad range of employment law matters. Mr. Hartstein has extensive experience as a litigator and has defended employers nationwide, in individual, class action claims and wage and hour collective actions. He is also a frequent writer, commentator and lecturer on workplace issues. Mr. Hartstein is a national leader in bar association activities involving the labour and employment field, particularly in EEO matters, and previously held the role of Management Chair of the Equal Employment Opportunity Committee, and has worked closely with local and national leadership of the Equal Employment Opportunity Commission. Mr. Hartstein has been honoured with his inclusion in The Best Lawyers in America, Chambers USA and various other publications and in 2010 was honoured as one of the "Top 100 Most Powerful Employment Attorneys" in Human Resource Executive and Lawdragon.



**Garry G. Mathiason**

Littler Mendelson, P.C.  
650 California Street, 20th Floor  
San Francisco, CA 94108-2693  
USA

Tel: +1 415 677 3146  
Fax: +1 415 399 8411  
Email: [GMathiason@littler.com](mailto:GMathiason@littler.com)  
URL: [www.littler.com](http://www.littler.com)

Mr. Mathiason defends employers in complex wage & hour and discrimination class action cases. He has originated several of the Littler's preventive employment law programmes and structures in-house employment law training programmes. He has also drafted model legislation on workplace violence, has appeared frequently on national radio and television regarding violence prevention in the workplace, and has developed the Firm's alternative dispute resolution programme. He oversees Littler's Corporate Compliance Practice Group, serves as Chair of the Open Compliance and Ethics Group's Employment and Labor Law and is the chairman and founder of Employment Law Training, Inc.™ (ELT), an on-line legal compliance training company with 4 million users. Mr. Mathiason has been recognised in: the National Law Journal on its list of the 100 most influential attorneys in the nation, Human Resource Executive as one of the nation's top 10 most powerful employment attorneys, and Staffing Industry Review as one of the "25 Most Powerful People in Staffing".



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# Employment Class Actions in America – Implications for the Global Employer

William C. Martucci



Kristen A. Page



Shook, Hardy & Bacon L.L.P.

In recent years, the United States has seen a major wave of wage and hour class action litigation, and it is now bracing for a potential surge of employment class actions of a new variety – those targeting systemic or pattern discrimination in the workplace. This rising employment litigation tide has been grabbing headlines in the U.S. in recent months. [See Endnote 1.] It has the potential to be a major force and will have a meaningful impact on all employers subject to U.S. employment laws, which can have a broad reach beyond U.S. borders and impact foreign employers with U.S. subsidiaries as well. This is a hot area and one which global employers should be mindful of as the rising tide emerges.

## I. Introduction and Overview

This chapter will provide an overview of wage and hour employment class actions in America, an analysis of the next potential wave of class and multi-plaintiff actions in the employment discrimination context, and an outline of how such broadened employment-related class litigation may impact upon global employers.

At the outset, we note as a foundational starting place that the rising tide of employment discrimination class actions has a variety of drivers. They include global economic conditions, priorities of the current presidential administration and governmental enforcement agencies, recent court rulings and high-profile settlements in employment class action cases, and an organised, coordinated employment plaintiffs' bar. No one factor alone has caused the rising tide, but rather they have come together in recent years in a way that has greatly increased the stakes for all employers.

## II. The Current Wave - Wage and Hour Multi-Plaintiff Actions

The Fair Labor Standards Act (FLSA) is the statute upon which the current wave of wage and hour multi-plaintiff litigation developed. [See Endnote 2.] The FLSA was passed by Congress during America's Great Depression in 1938. It has been amended several times through the years, but it remains, at its core, the same law that existed in 1938 – prescribing minimum wages that employers must pay and maximum hours that employers may require before paying overtime. [See Endnote 3.] Against this federal overlay, many U.S. states have their own wage and hour laws, which sometimes mirror the federal law and which sometimes provide greater protections for employees. [See Endnote 4.]

Although the FLSA has been on the books for more than seventy years, there has been an explosion of FLSA suits filed against employers in the last decade. Whether they are based on the FLSA

or similar state laws, these types of suits are collectively referred to as “wage and hour litigation”. A brief overview of the way in which wage and hour multi-plaintiff actions are handled from a procedural perspective is helpful to understanding how this type of litigation has emerged so strongly and pervasively and formed the foundation for a new generation of employment class actions based on alleged systemic or pattern discrimination practices.

Wage and hour suits are most often filed as multi-plaintiff group actions because individual FLSA claims typically involve relatively nominal damages – the cases are more valuable and attractive as group actions. Under the FLSA, group actions are maintained as “collective actions”. [See Endnote 5.] This means that class members may only participate by affirmatively *opting in* to the lawsuit by filing their written consent with the court where the action is pending. [See Endnote 6.] If an individual does not opt in to an FLSA collective action, they are not included in the action and retain whatever litigation rights they may otherwise have. Multi-plaintiff wage and hour actions may also be brought in federal court pursuant to state wage and hour laws, which makes them subject to Federal Rule of Civil Procedure 23, which governs procedural issues for class actions, as opposed to the FLSA. Rule 23 class actions are “opt-out”, meaning that potential class members are in the class unless they affirmatively opt out. If they do not affirmatively opt-out, they are included and bound by the result.

The differing opt-in and opt-out group action mechanisms for federal and state wage claims present a variety of challenges for courts, counsel, and parties. Those challenges are perhaps most acutely seen in “hybrid” cases where FLSA collective action claims are brought right alongside state-based wage and hour causes of action in federal courts. These cases require federal courts to attempt to reconcile the differing opt-in and opt-out procedures and the binding nature of Rule 23 class actions versus FLSA collective actions. Federal courts are currently split on how to handle the conflicting procedures. [See Endnote 7.]

Below is an overview of the respective procedural frameworks for analysis of multi-plaintiff actions under the FLSA and under Rule 23. These frameworks and the procedural issues that arise in the context of each are instructive and foundational for the discussion of emerging discrimination class actions.

### A. Collective Action Certification Framework Under the FLSA

The FLSA provides that a plaintiff may bring a collective action on behalf of himself and other “similarly situated” employees. [See Endnote 8.] This mechanism is outlined in § 216(b) of the FLSA.

The term “similarly situated” is not defined within the statute, but most courts follow a two-step approach for determining whether employees are “similarly situated” and, therefore, whether collective action certification is appropriate. [See Endnote 9.]

The first step requires a district court to make a *conditional* certification decision, which is typically based on minimal evidence and is made at a very early point in the litigation. The standard is considered “fairly lenient” – a plaintiff must make only a modest factual showing that he or she and other potential class members were victims of a common scheme or plan in order to show that an FLSA action warrants collective action treatment. [See Endnote 10.] The Supreme Court has held that district courts have significant discretion in making the conditional certification decision. [See Endnote 11.] If the court grants conditional certification, it then facilitates the issuance of notice to potential class members, who may then “opt-in” to the action, and it proceeds thereafter as a collective action for discovery purposes.

The second step is generally prompted by a defendant’s motion for “decertification” of the action. Such a motion is typically filed after discovery is complete or near complete. At this stage, the court’s analysis involves a more stringent factual determination on the “similarly situated” issue. Courts often consider the following factors: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defences available to the defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations that would make certification improper. [See Endnote 12.] If a decertification motion is denied, the case will proceed to trial as a representative action. If it is granted, the plaintiffs will proceed to trial on their individual claims. Of course, settlement is another common path in FLSA actions.

An important and notable aspect of FLSA litigation, whether individual or collective in scope, is that an employee cannot waive minimum wage or overtime pay claims without the U.S. Department of Labor or court supervision. [See Endnote 13.] In effect, this means FLSA settlements that include waivers of such claims (as is typical) must be approved by the DOL or a federal district court in order to be valid and able to withstand challenge. The impact of this required court or agency approval process is that FLSA settlements have been highly publicised, in contrast to most settlements of employment disputes, which are generally private and confidential between the parties.

Finally, FLSA conditional certification decisions are not appealable because they are not final judgments, although they are critically meaningful for parties involved in the high-stakes litigation. [See Endnote 14.] This is an important challenge in defending FLSA actions and it has also had an impact on the development of appellate decisions regarding the conditional certification standard and its application.

## B. Rule 23 Certification Framework for State Law Wage and Hour Claims

State law wage and hour claims brought in federal court are certified as class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure, as opposed to the FLSA procedure under Section 216(b), described above. Rule 23 requires a party seeking class certification to satisfy the four requirements of its subsection (a) and at least one of three conditions set out in its subsection (b). The U.S. Supreme Court has stated that a district court must undertake a “rigorous analysis of Rule 23 prerequisites” before certifying a class. [See Endnote 15.]

Under the Rule 23(a) prerequisites, plaintiffs must demonstrate that

a potential class has: (1) sufficient numerosity to make individual joinder impracticable; (2) commonality of questions of law or fact; (3) typicality of claims; and (4) representatives who fairly and adequately protect the interests of the class. Of the three Rule 23(b) requirements, one of which must be satisfied to support certification, subsections (2) and (3) are mostly commonly used in employment-related cases. The applicable rule subsection depends on the nature of the alleged injuries and relief being sought.

Certification under Rule 23(b)(2) is appropriate where the primary relief sought is injunctive or declaratory in nature, and the Rule provides for a binding litigation order as to all class members without guarantees of personal notice and the opportunity to opt-out of the suit. A class may be certified under Rule 23(b)(2) if “the opposing party has acted or refused to act on grounds generally applicable to the class, and injunctive or declaratory relief is the predominant relief sought.”

Rule 23(b)(3) certification, in contrast, applies in cases where the primary relief sought is money damages. Each class member in a Rule 23(b)(3) class action for money damages is entitled as a matter of due process to personal notice and an opportunity to opt-out of the class action. [See Endnote 16.] In addition to the Rule 23(a) requirements, certification under Rule 23(b)(3) also requires that: (1) common questions must predominate over any questions affecting only individual members; and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy.

Unlike with the FLSA, there is the possibility of appellate review of Rule 23 class action certification decisions through the provisions of Federal Rule of Civil Procedure 23(f), which gives parties the right to petition for interlocutory appeal of orders that grant or deny class certification. [See Endnote 17.] Despite this appellate review possibility, the Rule 23 class action mechanism remains very popular among plaintiffs’ counsel. Because participation rates in Rule 23 class actions are generally at or near 100%, and opt-in rates in FLSA collective actions typically range from 10 to 30%, plaintiffs are more and more frequently pleading and filing cases in such a way as to have Rule 23 govern the certification decision.

## C. Putting it all Together - the Formula for the Wage and Hour Explosion

Against the FLSA and Rule 23 frameworks for collective and class action certification of wage and hour cases, there are three primary case types that have emerged in this litigation area:

*Donning and Doffing*: The primary issue in these cases is whether changing clothes, such as a uniform, or putting on protective gear are activities for which an employee must be compensated.

*Misclassification*: These cases involve the propriety of employer classifications of employees as “exempt” from the FLSA’s overtime pay requirements based on executive, administrative, professional, outside sales, and computer employee exemptions. These exemptions involve duty and salary tests that are difficult to apply and regularly cause headaches and high-stakes litigation for employers.

*Off the Clock*: The factual bases of these types of cases can vary greatly, but essentially they involve claims by employees that they were not fully compensated for all time worked consistent with minimum wage and overtime pay requirements. They can involve work performed prior to clocking in and after clocking out, a reduction of recorded hours for meal breaks not taken, or a mechanical reduction of any employee’s recorded hours by a manager or supervisor (so-called “time shaving”).

Class-based litigation of claims in these three substantive areas has

exploded during the last decade. The above-described “lenient standard” for conditional certification of FLSA collective actions has, in large measure, led to this explosion of wage and hour multi-plaintiff actions. Such actions have become very attractive to the employment plaintiffs’ bar because early certification in FLSA cases, even if conditional, has been so readily granted, and conditional certification decisions are generally not appealable, creating immediate settlement leverage. And, because very, very few collective or class actions are tried in court, plaintiffs automatically achieve a high settlement value for a case certified as a collective or class action – even before the merits have been evaluated, which often involves an expensive discovery undertaking.

The settlements reported in wage and hour cases during the last decade have been astonishing, and the publicity around those settlements has very likely led to continued filings, as plaintiffs’ attorneys see the potential for a high return without having to carry a case through to trial. The wage and hour class litigation wave will no doubt continue for many years to come, but legal scholars are speculating that its prominence will soon diminish and will evolve into the next wave – the rising tide of systemic employment discrimination class actions. These mass actions will involve different issues, such as gender discrimination, diversity programmes, pay equity, and promotional practices. The next section in this chapter will address this emerging area of U.S. employment litigation.

### III. The Rising Tide - Employment Discrimination Class Actions

Against the backdrop of the wage and hour class action explosion in America, we are beginning to see a rising tide of other types of employment class actions. The wage and hour experience has certainly set the tone for the increasing use of multi-plaintiff actions in the employment discrimination area, but other factors have recently provided significant momentum as well – an unprecedented class certification decision, a high dollar, high profile jury verdict and resulting settlement in a class action discrimination case, and administrative agency litigation priorities aimed at systemic discrimination.

#### A. Momentum for the Rising Tide

The employment plaintiffs’ bar has not traditionally pursued discrimination claims as class actions due to the individual nature of the allegations. But, given plaintiffs’ recent successes and the increasing focus on systemic discrimination by regulators, the landscape is changing. There are a confluence of factors coming together to provide momentum for the next potential wave of employment class action litigation in America. The most prominent are:

*The Dukes Wal-Mart Decision – Certification of an Unprecedented Employment Class Action.* There is perhaps no greater or more impactful recent development than the landmark ruling by the U.S. Court of Appeals for the Ninth Circuit in the *Dukes v. Wal-Mart* case, affirming certification of the largest employment discrimination class action ever – a pay and promotions class of approximately 1.5 million female workers. [See Endnote 18.] The U.S. Supreme Court subsequently granted review of the decision, and the Supreme Court’s ruling on whether the historical class action will survive is expected in 2011. The high court’s ruling will be a bellwether decision in connection with the potential wave of employment discrimination class actions.

The Ninth Circuit’s ruling in the *Dukes* case was very highly publicised, and the potential appeal issues have also been the subject of significant commentary, given the potential impact of the decision. Among the issues to be presented to the Supreme Court are: (1) the appropriate interplay between Rules 23(b)(2) and 23(b)(3) in the employment discrimination context, which is an issue that has been decided differently among the circuit courts; and (2) the appropriateness of the apparent bar on Wal-Mart from presenting a defence that the individual challenged employment actions were motivated by legitimate, non-discriminatory reasons. The second issue, the so-called “stripping” of an employer’s key defence because its individual presentation is not “feasible” in the class action context, is critical for the future of employment discrimination class actions.

*The Novartis Class Action Trial Loss and Resulting High-Dollar Settlement.* Another headline-grabbing development in the employment class action area this year was the \$250 million punitive damages verdict in the Novartis gender discrimination class action that was tried before a New York jury in 2010. The jury found the company liable for discriminating against a class of 5,600 female sales employees and left the court to determine back pay and attorneys’ fee awards. The suit was originally filed in 2004 and it alleged pervasive bias against women sales representatives, including discrimination against pregnant women, disparate pay, and a culture that impeded female sales representatives’ promotion to management. [See Endnote 19.]

Following the verdict, the parties reached a court-approved settlement valued at \$175 million – a highly-publicised end to the lengthy litigation. The significant result, while long-fought and expensive for plaintiffs’ counsel, will be a model for similar litigation in the future.

*Administration Priorities and Agency Enforcement: Systemic, Pattern and Practice Actions.* Last among the drivers, but certainly not of least importance, are the priorities of the current U.S. presidential administration and the primary enforcement agencies – the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL).

The focus of the current administration on legislative initiatives for labour and employment reform has increased awareness of the issues among workers, and it has resulted in allocation of greater resources for enforcement agencies. [See Endnote 20.] The EEOC in particular, which has evolving areas of enforcement emphasis, has made the pursuit of systemic discrimination a top enforcement priority and has widely publicised its focus. The EEOC’s website prominently states: “The EEOC has long recognised that a strong nationwide systemic programme is critical to fulfilling its mission of eradicating discrimination in the workplace. For this reason, the systemic programme is a top priority of the agency. The identification, investigation and litigation of systemic discrimination cases, along with efforts to educate employers and encourage prevention, are integral to the mission of the EEOC.” [See Endnote 21.] Increased funding of the EEOC and DOL will result in the recruitment and training of more agency attorneys and investigators, which will likely mean that employers will encounter more investigations – and more governmental enforcement lawsuits – in 2011, perhaps especially on alleged systemic or “pattern and practice” discrimination.

In addition to the momentum provided by the above key developments, employers are also increasingly vulnerable to class action and other multi-plaintiff litigation because human resources functions within large companies are evermore coordinated and centrally managed, even among companies with multiple divisions, locations, and related entities. This coordination, at least on the

surface, lends itself to class litigation if a centrally-managed policy is challenged.

## B. The Rule 23 Framework and Associated Challenges for Employment Discrimination Class Actions

The Rule 23 framework, as outlined above in connection with the wage and hour litigation overview, is also applicable to purported class actions alleging employment discrimination. [See Endnote 22.] The primary emerging issues that have led to an increase and potential greater expansion of discrimination class actions are those highlighted in the *Dukes* case above – the appropriate interplay between Rule 23(b)(2) and Rule 23(b)(3) in terms of certification standards and the manageability of certified discrimination cases, particularly in consideration of an employer’s right to present individualised defences. The class action in *Dukes* was certified under Rule 23(b)(2), although plaintiffs are seeking injunctive and declaratory relief, plus punitive damages.

As noted above, Rule 23(b)(2) authorises a class action if “the party opposing the class has acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” This rule’s text does not require notice to absent class members, nor does it require or permit class members to opt out of the lawsuit. Rule 23(b)(3), in contrast, requires a court to make pre-certification findings that common questions predominate and that a class action is the superior method of resolving the dispute, and notice to class members is required. As highlighted above, Rule 23(b)(2) classes are appropriate in cases where the primary relief sought is injunctive or declaratory, and Rule 23(b)(3) is considered more appropriate for cases involving monetary damages, since it provides more protection for defendants and absent class members.

Given these distinctions between these two common certification paths in employment cases, many class plaintiffs have been pursuing certification under Rule 23(b)(2), rather than meeting the more rigorous and protective standards of Rule 23(b)(3), even where money damages are sought. The result has been the issuance of a variety of certification orders containing judicially-crafted solutions to problems with class treatment of cases involving claims for both injunctive relief and monetary damages, certifying under Rule 23(b)(2) classes that resemble those more properly considered under Rule 23(b)(3). The circuit courts are split as well. This issue has been brewing for the past number of years, but appears to be at a fever pitch in light of the historical *Dukes* certification decision. [See Endnote 23.] The issue is primed for Supreme Court review and guidance in 2011.

The foundational Supreme Court decision in *Ortiz v. Fibreboard Corporation* will, without doubt, be a meaningful part of the Supreme Court’s consideration of the landmark class certification decision in *Dukes*. The *Ortiz* decision involved an extensive analysis of Rule 23(b)(1), which, similar to Rule 23(b)(2), does not require notice nor permit opt-outs from certified classes. [See Endnote 24.] The teachings of *Ortiz*, accordingly, seem instructive for the *Dukes* case. A key insight from *Ortiz* is that “the ‘mandatory’ provisions of Rule 23(b) – those that do not require notice or allow opt-out – must be carefully applied to ensure that the procedural class action device does not transgress the rights of either the defendant or the absent class members.” [See Endnote 25.]

Resolution of these core certification issues under Rule 23 in the context of employment discrimination class actions has the potential to either dramatically boost the current rising tide of such actions or diminish their anticipated impact, depending on the conclusions reached. Even after a ruling is made in the *Dukes* case,

regardless of its substantive conclusion, its boundaries will no doubt be challenged for years to come.

## C. Distinction for “Pattern and Practice” Multi-Plaintiff Actions by the EEOC

In contrast to traditional class actions under Rule 23, when the EEOC pursues “pattern and practice” claims on behalf of classes of individuals, the requirements of Rule 23 are not strictly applicable. While EEOC pattern and practice actions resemble Rule 23 class actions in many ways, the EEOC is not required to satisfy the requirements of Rule 23 in order to litigate on behalf of a class. This rule was made clear by the Supreme Court in *General Telephone Company of the Northwest, Inc. v. EEOC*. [See Endnote 26.] In that case, the court held that because Title VII specifically grants to the EEOC the authority to enforce Title VII, the agency does not need to look any further than the statute itself “to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals”. [See Endnote 27.]

## IV. U.S. Employment Law and Class Action Potential Abroad – When do Extraterritorial Concerns Come into Play?

The rising tide of multi-plaintiff actions in the employment discrimination area is a high-stakes proposition for all employers, and it is an issue for global employers as well, given the broad reach of many of the key U.S. employment laws on which the new surge of class action lawsuits will likely be based. Not all U.S. employment laws have global reach – notably the FLSA, from which the wage and hour class action explosion emerged, does not have extraterritorial jurisdictional provisions. But, the next wave of class action employment litigation will be based on U.S. employment laws that do have extraterritorial jurisdictional provisions. This section will provide an overview of those laws and highlight when they reach beyond U.S. borders.

The primary U.S. employment laws with extraterritorial jurisdictional provisions are: (1) Title VII of the Civil Rights Act of 1964, as amended (Title VII) [see Endnote 28]; (2) the Age Discrimination in Employment Act of 1967 (ADEA) [see Endnote 29]; and (3) the Americans with Disabilities Act of 1990 (ADA) [see Endnote 30]. Title VII protects individuals against employment discrimination based on their race, colour, religion, national origin, or sex. The ADEA protects individuals over the age of 40 from employment discrimination based upon their age. In addition, the ADA protects qualified individuals with disabilities from employment discrimination. Each statute also provides protection from retaliation for individuals complaining about discrimination, filing charges of discrimination, or participating in investigations or proceedings related to complaints of discrimination. [See Endnote 31.]

When these laws reach beyond U.S. borders, they protect only U.S. citizens working abroad to the extent they are employed by a U.S. employer or by a foreign corporation controlled by a U.S. employer. Each statute has a unique standard for assessing extraterritorial jurisdiction and case law particular to the statute at issue, but there are common aspects of the analysis.

The jurisdictional question is straightforwardly answered in the case of a U.S. employer – Title VII, the ADEA, and the ADA protect employees of U.S. employers who are working abroad. Most of the conflict and, therefore, the reported decisions regarding each statute’s extraterritorial application, arise when a U.S. citizen is employed abroad by a foreign corporation somehow related to a

U.S. corporation. Those situations require an analysis of whether the foreign corporation is “controlled” by the U.S. employer. In other words, most of the litigation in this area involves U.S. citizens working abroad for foreign corporations connected to U.S. employers.

The jurisdictional analysis in such cases involves a series of “control factors.” The ADEA itself expressly sets out four criteria for determining whether a U.S. employer controls a foreign corporation, and these criteria have generally been used by courts in evaluating extraterritorial jurisdiction under Title VII and the ADA as well. Those criteria or factors are:

1. interrelation of operations;
2. common management;
3. centralised control of labour relations; and
4. common ownership or financial controls.

[See Endnote 32.] Generally, the third factor – centralised control of labour relations – is considered by courts to be the most important in the analysis. [See Endnote 33.]

Given the potential for U.S. employment laws to provide protections for U.S. citizens working abroad, there is potential for the rising tide of employment discrimination class actions to meaningfully impact global employers. This impact could take one of two forms. First, it could involve a discrimination class action targeting a U.S. employer’s global operations, including those operations outside the U.S. involving U.S. citizens. Second, it could involve a discrimination class action targeted specifically at a U.S.-controlled foreign corporation if the challenged employment practice impacted a sufficiently significant number of U.S. citizens. Either way, such actions would be very costly to defend in terms of potential international discovery, which has its own set of complexities.

Also, as discussed above, the EEOC regularly modifies its initiatives and areas of enforcement focus, and pursuing systemic violations of U.S. employment laws by U.S.-controlled foreign corporations could very well become a future focus for the agency. The likelihood of such an enforcement effort would depend on the number of U.S. citizens working abroad who would be potentially impacted by the employment practice at issue. This is an area to watch.

## V. European Attitudes toward Quotas for Corporate Diversity Efforts and American Legal Issues

In the implementation and ongoing analysis of the strong corporate culture of compliance, the global employer must be ever-mindful of the fundamental premise and societal values of various world regions. European attitudes toward diversity and quotas are, for example, fundamentally based on a premise different than the one applied in the United States. This fundamental difference can cause meaningful class action exposure for the global employer engaged in significant operations in the United States. Perhaps the area of diversity and quotas gives rise to this potential area of class action exposure in a way that is far more dramatic and clear than many other aspects of the employment relationship.

Unlike American attitudes towards quotas, many European and non-Western countries are more likely to utilise diversity quotas as a means to balance the workplace, and other aspects of public life, in terms of both race and gender. This is evidenced by the use of gender quotas, both legislatively imposed and imposed by political party, in many European countries as a means to having more women serve in the government. In addition, many European

countries have federally-mandated quotas for the employment of individuals with disabilities. Speaking broadly then, diversity plans that seek to mechanically employ numerical quotas are much more likely to pass legal muster in Europe than in the United States, where substantial liability exposure would result.

The use of quotas by European companies may pose legal problems for their American subsidiaries. It is well settled that, absent constraints imposed by treaty or by binding international agreement, Title VII applies to a foreign employer when it discriminates within the United States. [See Endnote 34.] By employing individuals within the United States, a foreign employer invokes the benefits and protections of U.S. law. As a result, the employer should reasonably anticipate being subjected to the Title VII enforcement process should any charge of discrimination arise directly from the business the employer does in the United States. Thus, to the extent a quota system affects employment practices within the United States, both the American subsidiary and the European-based parent company may face liability.

Furthermore, even if the European parent attempts to limit a quota system to its European operations, evidence of the parent company’s quota system may be difficult to keep out of evidence should the American subsidiary be sued. This is especially true if any U.S.-based managers received communications about the system, or if plaintiff can somehow show that the quota system affected American employment decisions.

Use of a quota system to increase the presence of women and non-Westerners in management positions will especially open up employers to claims of reverse race or gender discrimination. As stated above, even if the quota system is limited to a company’s European operations, it may be used as circumstantial evidence to prove reverse discrimination within the American subsidiary.

## VI. Use of Diversity Quotas and Potential American Class Action Challenges for the Global Employer with U.S. Operations

American courts have historically viewed the use of quotas with suspicion, often striking their use down as illegal discrimination. While the courts have been quick to say that diversity is a legitimate interest, both in the education world and in the workplace, diversity programmes that include quotas have generally not passed judicial scrutiny in America.

In two companion cases, *Gratz v. Bollinger* [see Endnote 35] and *Grutter v. Bollinger* [see Endnote 36], in the higher education setting of student admissions, the admissions policies at the University of Michigan’s undergraduate school and law school, which allowed for consideration of an applicant’s race, were challenged. In these cases, the Supreme Court found that diversity of the student body, properly attained, is a compelling governmental interest. For that reason, narrowly tailored diversity plans in this education admissions setting, such as those that treat race or other factors as a “plus” for an applicant, may pass judicial scrutiny. On the other hand, quota-based systems, or plans that effectively give race or gender nearly-determinative weight, will not withstand judicial review under the court’s decisions.

These lawsuits have touched corporate America closely, as well. Scores of multi-national corporate employers joined the University of Michigan through the filing of *amicus curiae* briefs. Some of the most respected corporations in the world argued that, in today’s marketplace, a diverse learning environment not only stimulates student thought but is the foundation for the ability of American corporations to compete in the global marketplace. The Court, in *Grutter*, recognised this position, citing corporate *amicus* briefs and

recognising that workplace diversity and “cross-cultural competence” are of tantamount importance to corporate America.

In light of the Supreme Court decisions in the University of Michigan cases, the issue that continues to challenge global employers (committed to global diversity goals) is: how can we diversify our workforces without using unlawful quotas in our employee selection practices? Generally, an employer who hires an employee using race or sex as a basis for employee selection violates Title VII, absent a valid affirmative action plan. To justify such a plan under Title VII, employers must follow a three-fold standard that was created in the seminal case of *United Steel Workers v. Weber*. [See Endnote 37.] Under the *Weber* standard, a voluntary plan to address a lack of diversity may be lawful if it is: (1) designed to eliminate manifest imbalances in traditionally segregated job categories; (2) does not unnecessarily trammel the interests of non-minority workers or create an absolute bar to the advancement of non-minority employees; and (3) is a temporary measure to eliminate a manifest racial imbalance and is not intended to maintain racial balance. If the employer is unable to make these showings, any reliance on the plan in selecting employees is usually deemed a violation of Title VII.

In summary, any programmes adopted by an employer to increase diversity within the ranks of its workforce that call for the use of race and/or gender as a factor for determining the qualification for a position risk substantial legal challenges by non-minority/male employees and candidates. The University of Michigan decisions further clarify the *Weber* standard, making it clear that race or gender-conscious affirmative action or diversity efforts that meet the *Weber* standards can withstand judicial scrutiny only so long as they are not implemented in a purely mechanical fashion.

A quota-based system has the potential to create serious legal issues if it affects the employment practices of an American employer. While having aspirations that women and non-Westerners occupy a certain percentage of management positions is laudable, reaching such goals by applying a mechanical quota system has the significant potential to create major liability for global employers’ U.S.-based operations.

## VII. Looking Ahead: Considerations for the Global Employer

In this age of expensive, high-stakes class action litigation in the employment area, this is the time for all employers to take an inventory of their personnel policies and practices in order to ensure compliance and identify areas for potential improvement. Such efforts are the norm for many employers, but a heightened focus at this moment in time is likely appropriate, particularly concerning quotas, diversity initiatives, pay practices, and promotional practices, which are all quite likely to become the substantive focus areas for the next wave of class action employment litigation.

Creating a culture of compliance is the key. This means not only implementing effective policies, but also affirmatively monitoring compliance and reaching out to employees to find out whether policies are working and if there are concerns to be addressed. Consider where policy uniformity is important, but also where policy differences are appropriate and valuable. Individualised application of personnel practices to unique employment situations is essential in many circumstances, and that approach should be a clear guiding principle for those working in key management roles. This is a time of great challenge, but also great opportunity for employers to consider current policies and practices against emerging class-based employment litigation trends in America that have great potential to impact global employers.

## VIII. Concluding Remarks

As the wage and hour class action litigation wave continues and the rising tide of employment discrimination class actions rushes on, the stakes for employers governed, impacted, or influenced by U.S. employment laws will rise. Global employers should keep a watchful eye on how the trends develop and consider their exposure given the ever growing potential for class discrimination actions by employees.

## Endnotes

- [1] *See, e.g.,* Attorneys Brace For Surge in Sex Bias Class Actions, *Law 360*, November 23, 2010 (“[A] number of factors have been coming together in the last two years that could make gender discrimination class actions rival wage-and-hour class actions for employers’ top litigation threat...”); Wal-Mart Gets Top U.S. Court Review in Sex-Bias Case, *Businessweek*, December 6, 2010 (“Nineteen companies, including Bank of America Corp. and Microsoft Corp., urged the justices to take up the Wal-Mart appeal. They said the lower court opinion makes it too easy for workers challenging employment practices to secure class-action status and extract large settlements.”); EEOC Puts Bull’s Eye on Systemic Workplace Bias, *Law 360*, January 21, 2011 (“Systemic suits target widespread patterns or practices of discrimination or discriminatory company policies. One of the areas EEOC has been targeting include pay and promotion claims on behalf of female employees who allege they were paid less than their male counterparts or denied promotions because of their sex.”).
- [2] 29 U.S.C. §§ 201-219 (2006).
- [3] *See id.* §§ 206, 207.
- [4] The FLSA preempts any state laws that are less beneficial to workers than the FLSA. However, it explicitly requires employers to follow any state laws that are more beneficial to workers than the FLSA. *See id.* § 218(a).
- [5] *See id.* § 216(b) (allowing employees to sue on behalf of themselves and other similarly situated employees).
- [6] *See id.* § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).
- [7] *See e.g., Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178 (M.D. Pa. 2008) (joining of state opt-in and federal opt-out claims would undermine the objectives Congress sought to achieve by amending Section 216(b) to require written consent to become party plaintiffs to FLSA actions); *but see Lindsay v. Gov’t Employee’s Ins. Co.*, 448 F.3d 416 (D.C. Cir. 2006) (FLSA statutory language did not include express language prohibiting supplemental jurisdiction over state law claims and thus exercise of supplemental jurisdiction was proper).
- [8] 29 U.S.C. § 216(b).
- [9] *See Basco v. Wal-Mart Stores, Inc.*, NO. Civ. A. 00-3184, 2004 WL 1497709, at \*6 (E.D. La. July 2, 2004).
- [10] *See, e.g., Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997) (noting that at this stage of the action, “the burden on plaintiffs is not a stringent one” – they need only make a “modest factual showing”).
- [11] *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989) (explaining that notice should issue if it “serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action.”).
- [12] *See, e.g., Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528 (S.D. Tex. 2008).
- [13] *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).
- [14] Appellate review of conditional certification decisions under the FLSA is not available because such decisions are not final judgments under the final-judgment rule articulated in 28 U.S.C. § 1291.
- [15] *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).
- [16] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).
- [17] *See Fed. R. Civ. P. 23(f)* (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10



- days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”)
- [18] *Dukes v. Wal-Mart Stores, Inc.*, 605 F.3d 571 (9th Cir. 2010), aff’g in part, 222 F.R.D. 137 (N.D. Cal. 2004).
- [19] The case is *Velez, et al. v. Novartis Pharmaceutical Corp., et al.*, Case No. 04-9194 (S.D.N.Y.).
- [20] For example, the Paycheck Fairness Act, a proposed piece of legislation blocked by Senate Republicans in Fall 2010, likely would have encouraged more gender discrimination class actions based on pay decisions by making the classes opt out and enhancing the potential remedies. See Attorneys Brace for Surge in Sex Bias Class Actions, *Law 360*, November 23, 2010.
- [21] See EEOC website at: [www.eeoc.gov/eeoc/systemic/index.cfm](http://www.eeoc.gov/eeoc/systemic/index.cfm).
- [22] Two notable exceptions to this rule are claims under the Equal Pay Act (EPA) and the Age Discrimination in Employment Act (ADEA), both of which are governed under the same “collective action” framework as FLSA actions.
- [23] A number of law review articles have been written during the past year that detail this issue, provide the historical underpinnings, and argue for Supreme Court clarification. See, e.g., Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. ANN. SURV. AM. L. 681 (2010); Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. EN BANC 105 (2010).
- [24] 527 U.S. 815 (1999).
- [25] Perry, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. ANN. SURV. AM. L. at 692 (discussing the *Ortiz* decision and its importance in light of *Dukes*).
- [26] 46 U.S. 318 (1980).
- [27] *Id.* at 324.
- [28] 42 U.S.C. § 2000e *et seq.*
- [29] 29 U.S.C. § 621-34.
- [30] 42 U.S.C. § 12111-12117.
- [31] In addition to federal employment laws that may apply extraterritorially, there are certain state antidiscrimination laws that may also apply abroad to protect U.S. citizens. Specifically, the Florida Civil Rights Act, the New York State Human Rights Law, and the New York City Human Rights Law have been applied extraterritorially in certain circumstances.
- [32] 29 U.S.C. § 623(h)(3).
- [33] See, e.g., *Levine v. Reader’s Digest Ass’n, Inc.*, 347 Fed. Appx. 602 (2nd Cir. 2009) (noting that “centralised control of labor relations” was the most important factor); *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007) (discussing the four factors but noting that “centralised control of labour relations” was the “most important element”; and also that “[c]ommon management and common ownership...are less important as they represent ordinary aspects of the parent-subsidiary relationship.”).
- [34] See, e.g., *Ward v. W & R Voortman*, 685 F. Supp. 231, 233 (M.D. Ala. 1988) (“any company, foreign or domestic, that elects to do business in this country falls within Title VII’s reach”).
- [35] *Gratz v. Bollinger*, 539 U.S. 244 (2003).
- [36] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
- [37] 443 U.S. 193, 208 (1979).

**William C. Martucci**

Shook, Hardy & Bacon L.L.P.  
1155 F Street, N.W., Suite 200  
Washington, D.C. 20004-1305  
USA

Tel: +1 202 783 8400  
Fax: +1 202 783 4211  
Email: [wmartucci@shb.com](mailto:wmartucci@shb.com)  
URL: [www.shb.com](http://www.shb.com)

Bill practices nationally in complex class action (employment discrimination and wage & hour) and EEOC litigation, and holds an LL.M. in Employment Law from Georgetown University in Washington, D.C. *Chambers* notes, "Bill Martucci is worth having on any dream team for employment litigation and policy issues". His jury work has been featured in *The National Law Journal*. He is listed in the *EuroMoney Guide to the World's Leading Labour and Employment Lawyers* and *The Best Lawyers in America for Employment and Business Litigation*. *Lawdragon* and *Human Resource Executive* have recognised Bill as one of America's Most Powerful Employment Lawyers. He teaches Multinational Business Policy and Global Employment Law at Georgetown. Bill is the practice leader of SHB's National Employment Litigation & Policy Practice.

**Kristen A. Page**

Shook, Hardy & Bacon L.L.P.  
2555 Grand Boulevard  
Kansas City, Missouri 64108-2613  
USA

Tel: +1 816 474 6550  
Fax: +1 816 421 5547  
Email: [kpage@shb.com](mailto:kpage@shb.com)  
URL: [www.shb.com](http://www.shb.com)

Kristen is a partner in SHB's National Employment Litigation & Policy Practice, and she focuses exclusively on representing corporate employers on a national scale, both in federal and state courts, with respect to a wide range of employment and business matters. She has extensive experience litigating in the areas of discrimination and harassment, wage and hour, non-competition, and retaliation. She frequently handles litigation in the class and multi-plaintiff context, including litigating complex matters with the Equal Employment Opportunity Commission and addressing the intricacies of international employment jurisdiction and electronic discovery concerns for the global employer. She also assists clients navigate administrative processes and tackle challenging personnel and global employment policy issues.



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**For more information, contact:**

William C. Martucci  
Partner, Shook, Hardy & Bacon L.L.P.  
1155 F Street, N.W., Suite 200, Washington, D.C. 20004-1305  
Tel: +1 202 783 8400  
Fax: +1 202 783 4211  
Email: [wmartucci@shb.com](mailto:wmartucci@shb.com)  
URL: [www.shb.com](http://www.shb.com)

# Doing Business in the Great White North: A Guide to Frequently Asked Questions Relating to Canadian Labour and Employment Law

Heenan Blaikie LLP

Gary S. Rosen



Craig T. Munroe



### I. Constitutional Issues Governing Canadian Labour and Employment Law

Canada is a federal state consisting of 10 provinces and three territories. The form of government is a constitutional monarchy based on the British model.

#### A. The Division of Powers Related to Canadian Labour and Employment Law

Canada has two legal systems in civil matters. In the provinces and territories other than Quebec, English common law provides the fundamental principles. In Quebec, a civil code derived from French customary law and the Napoleonic Code performs a similar function. The distinction between the Canadian common law and civil law systems is of practical importance for labour and employment law purposes principally in regard to the creation and termination of individual employment relationships. Collective bargaining and matters such as occupational health and safety and employment discrimination law are governed by specific statutes that are, generally speaking, similar throughout Canada.

The division of powers between the federal and the provincial governments under the Canadian Constitution is based on a theory of exclusive jurisdiction: every possible subject matter falls under either exclusive federal or exclusive provincial jurisdiction. Labour and employment law is not a subject matter listed as such in the Canadian Constitution, so the development of the present division of powers in these areas between the two levels of government has been the product of judicial interpretation.

The basic rule in Canadian constitutional law has come to be that all aspects of labour and employment law fall under the exclusive jurisdiction of the provinces over “property and civil rights”. Thus, both individual and collective employment relations in each province fall under the exclusive jurisdiction of that province.

The federal government has exclusive jurisdiction over labour and employment relations in the industries expressly assigned to its jurisdiction in Section 91 of the Constitution Act 1867. Most of these involve interprovincial or international transportation and communications, although banks also are included. In the 20th Century, the federal government’s exclusive jurisdiction has been enlarged to include all forms of telecommunications, broadcasting, airlines, and interprovincial and international trucking.

#### B. The Canadian Charter of Rights and Freedoms

The Charter of Rights and Freedoms was added to the Canadian

Constitution in 1982. The wording of the Charter, and the case law interpreting it, has established that the Charter binds federal, provincial, and municipal governments but does not apply to actions by private parties. Decisions on employment matters such as hiring, promotions, and terminations by private sector employers are thus not subject to review by the courts under the Charter.

### II. Individual Employment Across Canadian Jurisdictions

#### A. Contract Formation

Under Canadian law, collective bargaining and individual employment relationships are mutually exclusive. The Supreme Court of Canada has held that where a collective agreement exists, any individual employment relationship is precluded. This absence of an individual contract of employment where employees are unionised means that the requirements of reasonable notice in advance of termination of employment under the Quebec Civil Code cannot be invoked by unionised employees. Such employees are limited to the notice or layoff provisions in their collective agreements and cannot take advantage of both legal regimes.

Under Canada’s common law and civil law, the content of individual employment contracts is left largely to the parties. All jurisdictions in Canada, however, have enacted employment standards legislation that establishes statutory minimums in matters such as wages, hours of work, paid holidays, vacations, and maternity leave. Equally, all Canadian jurisdictions have human rights legislation that forbids discrimination on various grounds in employment contracts. These statutes prevail over any contrary provisions in an individual employment contract or collective bargaining agreement.

The typical individual employment contract in Canada is an informal one. Employees commonly are given a letter confirming their hiring and stating an initial salary or wage rate. Any fringe benefits such as a pension plan, company car, or supplementary health care plan normally are set out or referred to in this letter. If the employer has (as larger employers normally do) written personnel policies, this letter usually states that the employee’s contract is governed by the terms and conditions set out in those policies. The contract that can be enforced by the parties typically includes the longstanding practices of the parties, even if they have not been reduced to writing.

This traditional informality has become much less prevalent in recent years for executives, particularly those of publicly traded corporations. These executives normally have detailed written contracts setting out matters such as their fringe benefits, how their fixed and bonus compensation is to be determined, and the notice,

or pay in lieu of notice, they will receive if dismissed.

Unless a hiring is for a specified term, employment contracts under both the civil and common law systems in Canada are presumed to be for an indefinite period, terminable by either party for cause or upon reasonable notice.

## B. Terminating the Employment Relationship

### 1. Notice

Where an employee is not unionised, the parties to an employment contract may specify the length of notice to be given by either of them for purposes of termination. Provided that the amount of notice meets the minimum required by the applicable labour standards legislation, the parties are free to specify any length of notice. As discussed below, unionised employees' employment is virtually never terminable on notice. Such employees may be dismissed for just cause or may be laid off when economic reasons require the employer to reduce its workforce. In the latter case employees virtually always have recall rights for a time period set by the applicable collective agreement.

When no notice period is specified in the employment contract, then courts in both the civil and common law provinces will determine a reasonable notice period based on the circumstances of the case and the case law in similar instances. In fixing the length of this notice period, courts in both the common and civil law provinces normally consider matters such as the employee's age, length of service, type of position, salary, and the availability of suitable similar employment. Other circumstances, such as the type of industry in which the employee worked, or whether he or she was recently hired away from another employer, also may affect the length of reasonable notice in particular cases.

The courts have repeatedly stressed that the length of reasonable notice depends on the exact circumstances of each case. A formula of one month's notice per year of service has provided a rough guide for notice periods in the common law provinces; the courts in Quebec have tended in the past to be somewhat more conservative in assessing notice periods. Two years' notice has been seen as the normal maximum in the common law provinces. Quebec courts had held that one year was the maximum normal notice period, but this rule has now been practically abandoned and notice periods of up to two years have been awarded in recent case law. Under either legal system, lengthier notice periods may be awarded in special circumstances. In addition to pay in lieu of notice, federal and Ontario labour standards legislation provides for "severance pay" in addition to notice of termination in certain circumstances.

If the court determines that the employer has not given the employee sufficient notice or payment in lieu of notice, it will assess damages based on the value of the salary and benefits that the employee would have earned during the notice period that the court finds reasonable. Damage assessment can become fairly complex where benefits such as stock options or pensions are at issue.

Employees who have been dismissed with insufficient notice must seek to mitigate their damages, normally by making all reasonable efforts to find alternate comparable employment.

### 2. Dismissal for Cause

An employer may dismiss an employee for cause without notice in all Canadian jurisdictions. Dismissals require an act by the employer that deprives an individual of his or her employment; nonrenewal of a fixed-term contract when it expires does not amount to a dismissal.

#### a. Challenges to Dismissal

A dismissed employee who is not unionised may bring an action

before the civil courts alleging that the cause relied on by the employer was not such as to warrant dismissal without notice. A right of appeal generally exists before the appellate courts across Canadian jurisdictions, although in certain instances this right may be subject to having first obtained the court's permission to institute appeal proceedings.

In the federal jurisdiction, and in Quebec and Nova Scotia, labour standards legislation provides that employees with a specified length of service may also have their dismissals adjudicated by an arbitrator who is empowered either to order the employee's reinstatement (generally, with full back pay) or to award damages in lieu of notice if the dismissal was not for just cause. The statutory recourses available in each of these jurisdictions generally provide for pre-hearing mediation and/or conciliation sessions. Decisions rendered by arbitrators pursuant to a statutory recourse are generally shielded from appeal, although administrative remedies may be of limited application.

A unionised employee can request that the union bring a grievance contesting the dismissal under the collective agreement. This grievance will be heard by an arbitrator or a board of arbitration. If the dismissal is found not to be for just cause, then the employee will be ordered reinstated, normally with full back pay. In reinstating a non-unionised employee, adjudicators may "tailor" their reinstatement orders to the exact circumstances of the case. An employee can, for example, be reinstated in another position, placed on probation, reinstated following a suspension, or benefit from a conditional reinstatement. Decisions rendered by grievance arbitrators are generally shielded from appeal, although administrative remedies may be of limited application.

Most jurisdictions in Canada, including Ontario and Quebec, the two largest provinces, have class action legislation and rules of court that permit class actions in certain circumstances. Class actions, however, have been of only limited importance in labour, employment, or human rights litigation in Canadian courts.

#### b. Grounds for Dismissal

A considerable variety of employee misconduct can justify an employee's dismissal, particularly if the conduct is repeated. However, in the collective bargaining context, only a comparatively few employment offenses are regarded by arbitrators as justification for dismissal without the prior application of progressive discipline in the form of warnings and disciplinary suspensions. Arbitrators sitting under the wrongful dismissal arbitration provisions of the federal, Quebec, and Nova Scotia labour standards statutes, who are drawn largely from the ranks of collective agreement arbitrators, apply this same model of progressive discipline.

The types of employee conduct that will justify dismissal without notice (or, in a collective bargaining context, will constitute just cause for discharge) have been established by case law.

Some forms of employee misconduct are more likely to be seen as constituting cause for termination than others. Sexual harassment, for example, tends to be treated strictly by the courts and may justify dismissal without notice even where the employer has no formal policy forbidding it. Other categories may include: wilful misconduct or neglect of duty that is not trivial and has not been condoned by the employer; theft or fraud; insubordination; and conflicts of interest. The threshold for establishing just cause is generally high. Essentially, the degree of misconduct must be such that it fundamentally undermines the employment relationship.

## C. Privacy Legislation Applicable to Labour and Employment Matters

In 2000, the federal government enacted the Personal Information

Protection and Electronic Documents Act (PIPEDA), which applies to the following:

- all information gathered by employers under federal jurisdiction since January 1, 2001;
- the collection, use, and disclosure of health-related information by any employer since January 1, 2002; and
- all commercial activity within a province as of January 1, 2004.

PIPEDA provides that it does not apply to provincially regulated matters in provinces with legislation “substantially similar” (that is, equal or superior) to PIPEDA in the degree and quality of privacy protection they provide.

Three provinces—Alberta, British Columbia, and Quebec—have enacted their own personal data protection laws, which are applicable to the provincially regulated private sector, including provincially regulated employers. The federal government has recognised these statutes as “substantially similar” to PIPEDA, which accordingly does not apply in those provinces to commercial activity falling under provincial jurisdiction. The provincial statutes apply to organisations that are engaged in the collection, use, or disclosure of personal information within the particular province.

In the context of employment relations, PIPEDA and the provincial statutes all require employers to state the reason for collecting, using, or disclosing personal information about employees prior to doing so and to take steps to ensure the security of any information gathered. This includes developing policies that enable employees to review all personal information held by the employer for accuracy and completeness. Personal information may not be used or disclosed other than for the purpose for which the employee’s informed consent was given. An employer may incur legal liability for the misuse or dissemination of personal information.

#### D. Employee Duty of Loyalty, Trade Secrets, Covenants Not to Compete

Under both the Canadian common law and civil law systems, all employees owe a duty of loyalty, good faith, and honesty to their employers. In addition, senior employees may have a fiduciary relationship to their employer distinct from their duty of loyalty. Both of these duties can survive the end of the employment relationship.

The employee’s duty of loyalty extends, though in a much weaker form, for a reasonable time after the end of employment. Once employment has ceased, the employee’s duty is generally limited to not making use of confidential information from the former employer. Senior employees, the employer’s “top management”, are treated as fiduciaries of their employer in the common law provinces, and their obligations may extend to include not unlawfully competing with their former employer, by, for example, stealing business opportunities or soliciting key employees.

Both Canadian legal systems recognise a limited range of employer interests that may legitimately be protected by covenants not to compete and covenants to protect trade secrets. Covenants not to compete normally prohibit employees from engaging in the type of work they performed for their former employers for a stated period of time in a defined geographic area. These clauses often are accompanied by non-solicitation clauses under which employees may not solicit other employees of their former employer to join them and may not solicit the former employer’s customers to transfer their business. Contractual clauses by which employees are prohibited from divulging or making use of certain types of proprietary information once they leave an employer also are common.

The permissible scope of a covenant not to compete will vary from case to case depending on matters such as the nature of the employer’s business, the nature of the employee’s work, the employee’s place in the employer’s organisation, and the degree of customer contact involved. A geographical or temporal restriction that would be found reasonable in one case may not survive judicial scrutiny in another. As well, courts will not “read down” or modify a covenant that they find to be unreasonable; the clause simply is declared to be entirely unenforceable.

### III. Collective Bargaining Across Canadian Jurisdictions

#### A. Trade Union Recognition

##### 1. Bargaining Agents and Bargaining Units

Fundamental to the Canadian labour relations system are the concepts of the exclusive bargaining agent and the bargaining unit. The exclusive bargaining agent is the trade union that has been either certified by the appropriate labour relations board, or voluntarily recognised by the employer, as the sole collective bargaining agent for a defined group of employees. These employees comprise the bargaining unit. No union other than the exclusive bargaining agent may attempt to represent the employees in the bargaining unit in their employment relations with the employer. The union’s exclusive bargaining authority is balanced by a duty to represent all members of the bargaining unit fairly and in good faith.

Determination of what is an appropriate bargaining unit very largely has been left to the labour relations boards. All labour relations boards in Canada follow generally similar principles in determining the makeup of an appropriate bargaining unit. Boards seek to give effect to employee self-organisation, while ensuring that bargaining units are viable in the context of the industry in which the employer operates and avoiding excessive fragmentation of the employer’s unionised workforce. Typical bargaining units include all production employees at a particular manufacturing plant, all employees carrying out certain types of related functions in a defined geographic area, or, in the case of small employers, all employees eligible for unionisation.

All Canadian labour legislation excludes managerial employees from the definition of employee. Thus, managerial employees may not form part of a bargaining unit and may not engage in collective bargaining.

##### 2. Types of Union Recognition

Except in Quebec, Canadian labour legislation allows a union to be recognised as the bargaining agent for a group of employees in two ways: voluntary recognition by the employer; or certification by the appropriate labour relations board. Certification is the more commonly used method, and the only one permitted in Quebec.

##### 3. Union Certification Process

While there are considerable differences in detail, the certification procedures of all jurisdictions in Canada follow the same general pattern.

- A union presents evidence to the appropriate labour relations board that a certain percentage of the employees in a group it alleges is a suitable bargaining unit are members of the union and applies for certification. Often, the evidence presented takes the form of signed membership cards, though increasingly a vote is required by statute before a union can be certified.
- The certification application is served on the employer, who is required to post it publicly for a fixed period.
- The labour relations board verifies the evidence of union membership.

- The officials also hear representations and gather evidence from the employer and the employees in the potential bargaining unit on the appropriateness of the proposed bargaining unit.
- Employees who do not wish to be represented by the union that has filed the certification application may file a petition to this effect with the labour relations board.

Canadian labour legislation on the federal level and in several provinces (see endnote 1) permits labour relations boards to certify unions without holding a vote where the union presents evidence, normally in the form of signed membership cards, of having more than a specified percentage of the proposed bargaining unit as members. Where a majority of the employees in a proposed bargaining unit have signed membership cards, certification without a vote is the normal practice in such jurisdictions. Where more than a specified percentage of the employees in the proposed bargaining unit, but fewer than a majority, have signed membership cards, labour relations boards in these jurisdictions have the discretion to hold representation votes. If a vote is taken, the board will certify the union as bargaining agent where a majority of the employees in the proposed bargaining unit vote for union representation.

In British Columbia, Alberta, Saskatchewan, Nova Scotia, Newfoundland and Labrador, and Ontario, votes are mandatory before a union can be certified. The vote is held at the request of the union, but the labour relations board normally does not order a vote unless there is evidence that 40 to 45 percent of the employees in the proposed bargaining unit are members of the union.

Certification or voluntary recognition lasts for an indefinite period of time. In most jurisdictions, the incumbent bargaining agent may be displaced by another union only at the “open periods” specified in the applicable labour legislation, normally three months before the expiration of the current collective agreement. In British Columbia, there is an annual “open period” in the seventh and eighth month in each year of the collective agreement.

## B. Union Membership Across Canadian Jurisdictions

Under Canadian law, anyone whom a union chooses to accept may be a union member. The source of this principle is the common law right to associate with others for lawful purposes. This common law right received constitutional status in 1982 when “freedom of association” was included in the Canadian Charter of Rights and Freedoms.

Both private and public sector employees have the right to belong to unions and engage in collective bargaining. Managerial and executive employees are, as discussed above, not generally permitted to engage in collective bargaining and very few of them belong to unions.

## C. Duration

Collective agreements must have a minimum term of one year in all Canadian jurisdictions, but no maximum duration is fixed by law. As well, labour relations statutes in most jurisdictions create an “open” period every three years when a new certification or a decertification application can be made, even if the collective agreement extends beyond those years. In British Columbia a decertification application may be made at any time (after at least ten months of certification) and an application for certification by another union (or “raid”) may be made annually in the open period. In practice, collective agreements most frequently are concluded for either two- or three-year periods. Longer terms of five, or even seven, years are becoming more common.

## D. Strikes and Other Industrial Action

### 1. Strikes

Under the Canadian labour relations system, strikes are permissible as the ultimate means of resolving collective bargaining disputes by testing the parties’ economic strength and determination. However, before a strike may lawfully commence, Canadian legislation requires the exhaustion of a lengthy process of negotiation, conciliation, and sometimes mediation. As noted above, legislation in all Canadian jurisdictions prohibits strikes during the term of a collective agreement.

#### a. *The Pre-Strike Process*

In all Canadian jurisdictions, the process that may end in a legal strike begins when the union or the employer sends a notice to the other party to bargain for the conclusion of a collective agreement. Labour legislation in most jurisdictions requires that this be done some three to four months before the expiration of the current collective agreement; a newly certified or recognised union usually is required to send a notice to bargain within a similar time period. If negotiations have not resulted in an agreement before the expiration of the collective agreement, then the parties’ subsequent conduct depends on the course of negotiations and their intentions. Where there is a reasonable prospect of settlement, negotiations normally continue for some time, with the terms of the expired agreement being applied in the interim. Where the likelihood of settlement is low, then one party or the other may set the mechanisms of conciliation and mediation in motion so as to be in a legal strike or lockout position as quickly as possible.

Conciliation usually is carried out by a conciliation officer employed by the relevant ministry of labour, though conciliation boards of outside experts also are provided for in labour relations statutes. The conciliation officer or board functions as an impartial, confidential go-between to assist the parties in reaching an agreement. Should conciliation efforts prove unsuccessful, the conciliation officer reports this fact alone; the parties’ statements and positions in conciliation are kept in strict confidence.

On receiving a conciliator’s report stating a failure of conciliation, the minister of labour in most jurisdictions may name a mediation board. Unlike conciliation, mediation is, in practice, seldom used. A strike or lockout is considered legal in most jurisdictions if it follows an unsuccessful negotiation-conciliation (and occasionally mediation) process.

Except in certain circumstances arising in first collective agreement negotiation, a conciliation or mediation process is not a precondition to a strike or lockout in British Columbia.

#### b. *Return to Work Rights*

Under the labour relations legislation of all Canadian jurisdictions, an employment relationship is not severed simply because an employee goes on strike or is locked out. The rule that a strike or lockout does not end the employment relationship holds true whether a strike is legal or illegal, though an illegal strike gives cause for discipline, which could include discharge.

Federal labour relations legislation prohibits the hiring of replacement workers during a strike or lockout where the purpose of the hiring is to undermine the union’s representational capacity. Manitoba and Ontario prohibit the hiring of professional strike-breakers during a work stoppage. In these provinces, strike-breakers are defined legislatively as persons hired during a work stoppage for the purpose of interfering with employees’ collective bargaining rights. In British Columbia and Quebec, the hiring of replacement workers during a strike or lockout is prohibited, and strict limits are placed on the use of managerial employees to perform bargaining unit work during the strike or lockout. The

Quebec legislation, though, does not prevent the employer from ceasing to carry on the part of its business that provided employment for the workers who are on strike.

In the federal jurisdiction and in Quebec, Manitoba, and Saskatchewan, labour relations legislation entitles striking or locked-out employees to resume their former employment on the ending of the work stoppage. In Ontario, employees who make an unconditional application to return to work within six months of the beginning of the work stoppage must be re-hired. These rights to return to work are lost or postponed if an employee has engaged in conduct during the work stoppage that gives cause for discharge or if there is no work available for the employee.

In practice, strike settlements normally provide for the return to work of all striking employees. In some instances, this return may be gradual as an employer's business returns to its pre-strike level.

## 2. Lockouts

An employer's right to lock out employees as a means of putting economic pressure on them during collective bargaining is recognised in all Canadian jurisdictions. Lockouts, like strikes, are lawful only after the process of negotiation, conciliation, and mediation has been followed (except in British Columbia). The two rights, to strike and to lock out, are generally, in law, always acquired at the same time.

Lockouts are infrequent in Canada. Although the lockout is in theory the employer's equivalent of a strike as a means of putting economic pressure on a union, in practice, employers usually rely on their ability to withstand a strike where negotiation has failed to produce an agreement. Legislative restrictions on the use of replacement workers during a strike apply equally during a lockout.

## E. Third-Party Resolution of Disputes

Third-party resolution of disputes in the form of arbitration is a widely-used device in Canadian labour law. It is the almost invariable method of resolving "rights" disputes concerning the interpretation or application of the terms of collective agreements, and it is sometimes used in the public and quasi-public sectors in the form of "interest" arbitration to settle all or part of the terms of collective agreements. Under federal, British Columbia, Manitoba, Newfoundland and Labrador, Ontario, Quebec, Saskatchewan, and Prince Edward Island law, interest arbitration also may be requested by an employer or union to settle the terms of a first collective agreement.

## F. Representation by Entities Other Than Unions

Works councils analogous to those provided for under European legislation do not form part of Canadian labour and employment law.

A number of Canadian jurisdictions provide by statute for the formation of joint committees of employer and employee representatives to deal with issues such as occupational health and safety, or retraining and other assistance programs in the event of large-scale layoffs. If the employees are not unionised, they select representatives from among themselves for these committees. The same is true under provincial pay equity legislation, where nonunionised employees select their representatives for negotiations with the employer concerning its pay equity plan.

In Quebec, it is possible for a nonunionised employee to be represented by a non-profit organisation dedicated to the defence of employee rights when filing a complaint based on that Province's applicable labour standards legislation or a regulation promulgated thereunder.

## IV. Redundancy and Transfers of Undertakings in Canadian Jurisdictions

### A. Redundancy

Redundancy is not defined either by statute or by case law, but is determined by the employer as part of its entitlement to decide on the size of its workforce. However, under both the common law and civil law systems in Canada, redundancy and other economic reasons do not constitute cause for dismissal without notice. Consequently, an employer that reduces its workforce must provide redundant employees with reasonable notice, or pay in lieu of notice, before terminating their employment. Employers in all Canadian jurisdictions are free to reduce the size of their workforce without need of approval from another body.

However, all provinces except Prince Edward Island have enacted specific protections for employees facing mass termination or layoffs in defined groups, as has the federal government. Each jurisdiction has a different definition of the number of employees affected before these mass-termination provisions are triggered. The amount of notice also differs between jurisdictions, though it always uses a sliding scale on which the length of notice given increases with the number of employees to be terminated. Layoffs extending beyond a length of time defined in the relevant legislation are considered to be terminations.

#### 1. Unionised Employees

In a unionised workforce, seniority provisions in the collective agreement almost invariably require that the more junior employees be laid off before the more senior ones, subject to the senior employees' ability to perform the remaining work. Collective agreements sometimes provide for relatively brief notice periods (two days to one week) between the announcement of a layoff and its implementation. Labour standards legislation also generally provides that a layoff of more than a certain length is deemed to be a termination of employment. This may trigger payment to employees under employment standards or unemployment insurance legislation.

#### 2. Nonunionised Employees

In a non-union context, employees may bring a wrongful dismissal action before the courts if they believe that they were given insufficient notice, or insufficient pay in lieu of notice, before their employment was terminated. However, non-union employees are not entitled to challenge the termination decision itself. In the federal jurisdiction and in Nova Scotia and Quebec, legislation authorising the adjudication of unjust dismissal claims brought by non-union employees, as well as the relevant case law, provides that a dismissal for economic reasons, as opposed to a dismissal for misconduct, cannot form the basis of a claim for unjust dismissal under this legislation.

### B. Transfers of Undertakings

All Canadian jurisdictions have "successor rights" provisions in their labour relations statutes which, in the event of a sale of all or part of a business, make union certification and any collective agreement binding on the purchaser. The term "sale" is defined in these statutes to include any form of transfer. Thus, the key to applying the successor rights provisions is in determining what constitutes a "business" for purposes of the legislation.

The predominant tendency among Canadian labour relations boards has been to require the transfer of all or part of a going concern, as opposed to a transfer of assets or work alone. Labour boards have

emphasised that what constitutes a going concern will vary from industry to industry and that each case will be determined by its exact facts.

Overall, it may be said that the more a transaction approaches a pure transfer of physical assets, with no transfer of goodwill, know-how, key personnel, customers, or bargaining unit personnel, the less likely it is that the transaction will be found to constitute a sale of a business for labour relations purposes.

Successor rights concepts in the labour relations context have only limited relevance for individual employment. Traditionally, under either common or civil law, a change in the employing entity would put an end to employees' contracts of employment, while a simple change in the ownership of the employing entity would have no legal effect on employees' contracts. Over the past two decades, this position has been modified in important ways in both Canadian common and civil law.

First, where a business is sold or otherwise disposed of, labour standards legislation typically deems employment to be uninterrupted for purposes of applying minimum employment standards that depend on length of service. Article 2097 of the Quebec Civil Code also applies this principle in determining the notice periods to that terminated employees are entitled. This legislation has been broadly interpreted, so that rights acquired by employees cannot readily be circumvented by the new employer. For example, an employer which terminates the employment of its employees before the sale or disposition of the business does not prejudice the continuity of their employment.

Second, courts in the common law provinces now generally take the position that where a sale or transfer of a business has occurred, an employee's service should be regarded as continuous for purposes of any subsequent wrongful dismissal action. The courts reason that this intention ought to be implied into the employee's contract in the absence of clear evidence to the contrary. This reasoning is particularly likely to be applied where an employee's working conditions do not change with the sale of the business, or if the employer has expressly or tacitly treated the employee's service as continuous for purposes such as calculating vacation periods.

Canadian employment standards legislation makes no express provision with respect to the question of whether the purchaser or the vendor of a business is responsible for any termination payments to redundant employees. Absent such a provision, the party responsible for termination payments would be whichever employer, in fact, terminates the particular redundant employee.

## V. Wages, Hours of Work, and Leave Across Canadian Jurisdictions

### A. Minimum Wage

The labour standards legislation of all Canadian jurisdictions provides for a minimum wage, which applies to all employees not specifically exempted by the legislation. In most jurisdictions, the minimum wage amounts are fixed by regulation and may change with some frequency.

All jurisdictions exempt certain types of employees from the minimum wage. The most common are managerial, professional, and supervisory employees, fishermen and agricultural workers, commission salesmen, and trainees. Some jurisdictions specify a lower minimum wage for employees working in occupations where tipping is customary, such as waiters, and for trainees, students working during the summer or winter recesses, and the disabled.

### B. Hours of Work and Overtime

The various Canadian jurisdictions all regulate matters such as the length of the workday, the length of the workweek, the length of time after which payment of overtime is compulsory, and Sunday work under their labour standards legislation. Although this legislation differs in detail from jurisdiction to jurisdiction, the standards established are broadly similar.

Employees may be required to work in excess of the statutory maximums but must be paid overtime, usually at one and one-half times their regular hourly rate.

### C. Holidays and Vacations

Labour standards legislation in all jurisdictions provides for a number of paid holidays. The list varies according to the jurisdiction, but in all cases includes the following:

- New Year's Day;
- Good Friday;
- Canada Day (July 1) or the Monday nearest July 1;
- Labour Day (first Monday in September); and
- Christmas Day.

Employees also are entitled under labour standards legislation to a certain amount of paid vacation time along with a sum of money as vacation pay. In all cases, the amount of vacation pay is equal to two percent of the employee's pay for the preceding year per week of vacation.

- In the federal jurisdiction, employees are entitled to two weeks' vacation, increasing to three weeks after six years' employment.
- Alberta, British Columbia, Manitoba, and Quebec legislation provides for two weeks' vacation, with three weeks after five years' service.
- New Brunswick and Nova Scotia legislation provides for two weeks' vacation, with three weeks after eight years' service.
- Newfoundland and Labrador provides for two weeks' vacation, increasing to three weeks after 15 years' service.
- In Saskatchewan, employees are entitled to three weeks' vacation after one year's employment, and four weeks after 10 years.
- Ontario and Prince Edward Island provide for two weeks' vacation.
- Northwest Territories and Nunavut legislation provides for two weeks' vacation, increasing to three weeks after six years' service. The Yukon requires two weeks' vacation.

Many employees have employment contracts that provide for longer vacation periods than the minimum required by statute. This is especially true for office employees, managers, and professionals. Similarly, for unionised employees, collective agreements often provide for longer vacation periods.

### D. Leave

#### 1. Maternity and Paternity Leave

All Canadian jurisdictions provide in various ways for pregnancy leave and for parental leave to care for a newborn or adopted child. These provisions generally are coordinated with the pregnancy and parental leave provisions of the federal Employment Insurance Act. Alberta provides 15 weeks' unpaid maternity leave, most provinces and the federal jurisdiction provide 17 weeks' unpaid leave, while Saskatchewan and Quebec provide the most with 18 weeks' unpaid leave.



Parental leave is available for both men and women for periods of up to 35 weeks in Prince Edward Island and Newfoundland and Labrador; 37 weeks in the federal jurisdiction, Alberta, Manitoba, New Brunswick, the Northwest Territories, Nunavut, and Yukon; and 52 weeks in Quebec. The duration of parental leave in British Columbia, Ontario, Nova Scotia, and Saskatchewan depends on whether the employee also takes pregnancy leave. In these provinces, employees who take pregnancy leave are entitled to 34 (in the case of Saskatchewan) or 35 weeks of parental leave, compared with 37 weeks (52 weeks in Nova Scotia) for those who do not. In practice, the maximum length of parental leave for employees who have taken a full maternity leave in New Brunswick, the Northwest Territories, Nunavut, and the federal jurisdiction is limited because the applicable legislation in these jurisdictions provides that the maximum combined duration of maternity and parental leave may not exceed 52 weeks.

Adoption leave usually is subsumed under parental leave. Nevertheless, three provinces have distinct provisions for adoptive parents: 52 weeks' adoption leave is available in Prince Edward Island; 17 weeks' adoption leave, to which may be added an additional 35 weeks' parental leave, is available in Newfoundland and Labrador; and 18 weeks' adoption leave, to which may be added an additional 34 weeks' parental leave, is available in Saskatchewan.

## 2. Military Leave

Laws in most Canadian jurisdictions require employers to provide reservists in the Canadian armed forces with unpaid leaves of absence from their employment for the duration of any deployment outside of Canada or deployments inside Canada occasioned by civil emergencies.

## 3. Compassionate Care Leave

Federally regulated employees may benefit from eight weeks unpaid leave to care for, or provide support to, a seriously ill family member. The legislation also entitles employees to up to six weeks of unemployment insurance benefits.

The following other Canadian jurisdictions have introduced compassionate care legislation:

- *British Columbia*: The Employment Standards Act provides that qualified employees may take up to eight weeks' unpaid leave to care for an immediate family member whose medical condition implies a likelihood of death within 26 weeks. There is no minimum service requirement prior to taking leave.
- *Manitoba*: The Employment Standards Code Amendment Act provides up to eight weeks' leave in a 26-week period. Eligibility for leave requires 30 days' service with the current employer.
- *New Brunswick*: An Act to Amend the Employment Standards Act provides up to eight weeks' leave in a 26-week period.
- *Newfoundland and Labrador*: An Act to Amend the Labour Standards Act provides up to eight weeks' leave in a 26-week period. The employee must have 30 days' employment with the same employer.
- *Nova Scotia*: An Act to Amend the Labour Standards and the Vital Statistics Act provides up to eight weeks' leave in a 26-week period. The employee must have three months' service with the current employer. Employees are also entitled to three days unpaid leave of absence every year to attend to a sick child, parent, or family member or for medical, dental "or other similar appointments during work hours".
- *Nunavut*: An Act to Amend the Labour Standards Act provides up to eight weeks' leave.
- *Prince Edward Island*: An Act to Amend the Employment Standards Act provides up to eight weeks' leave in a 26-week period.
- *Saskatchewan*: An Act to Amend the Labour Standards Act

provides 16 weeks' leave in a 52-week period. Workers are provided with full job protection while they are receiving federal compassionate care benefits. Employees not eligible for federal compassionate care leave benefits are eligible for 12 weeks' job-protected leave per year.

- *Yukon Territory*: An Act to Amend the Employment Standards Act provides up to eight weeks' leave in a 26-week period.
- *Ontario*: Employees may take up to 10 days' unpaid emergency leave, defined to include personal illness, injury or medical emergency, or a death, illness, injury, medical emergency, or urgent matter related to certain defined family members. Employees can also take up to 26 weeks' unpaid leave in certain circumstances where the death of family member (generally limited to spouses, parents, or children) is imminent.
- *Quebec*: Unpaid family care leave of up to 12 weeks is provided to attend the needs of a child, spouse, spouse's child, father, mother, brother, sister, or grandparent afflicted with a serious illness or involved in a serious accident. It is also possible to obtain an extension of up to 104 weeks in case of a serious life-threatening illness affecting an employee's child.

Provinces provide for unpaid leave in various other circumstances, such as, for example, to allow for organ donation in Ontario.

## VI. Antidiscrimination Legislation Across Canadian Jurisdictions

### A. Prohibited Grounds of Discrimination

The prohibited grounds of discrimination in all Canadian jurisdictions are similar, though there are variations in detail. Canadian jurisdictions generally prohibit discrimination on the grounds of race, color, national or ethnic origin, place of origin, age, sex, marital status, physical disability, religion or creed, and mental disability. Each jurisdiction prohibits either national or ethnic origin discrimination or else discrimination based on ancestry or place of origin. Saskatchewan bans discrimination based on "perceived race". Harassment based on any prohibited ground of discrimination is prohibited federally and in Newfoundland and Labrador, Ontario, Quebec, and the Yukon Territory. New Brunswick prohibits sexual harassment only.

Pregnancy and childbirth are prohibited grounds of discrimination federally and in Alberta, Manitoba, Nova Scotia, Ontario, Quebec, and the Yukon Territory. Various other grounds of discrimination are prohibited in one or more jurisdictions, as follows:

- Political beliefs are a prohibited ground of discrimination in six jurisdictions: British Columbia; Manitoba; Newfoundland and Labrador; Prince Edward Island; Quebec; and the Yukon Territory.
- Sexual orientation is a prohibited ground of discrimination in most jurisdictions.
- Matters such as criminal convictions, alcohol or drug addiction, family status, civil status, and source of income are also prohibited grounds of discrimination in some jurisdictions.
- Civil status and language are protected in Quebec, whose human rights legislation also protects a right to the safeguard of an individual's dignity, honour, and reputation; respect for private life; the non-disclosure of confidential information; and freedoms of opinion, expression, peaceful assembly, conscience, religion, and association.

### B. Duty to Accommodate

Both employers and unions have a duty to accommodate employees in all Canadian jurisdictions. This issue typically arises in cases when

work requirement conflicts with an employee's ability to work due to, for example, religious requirements or a disability. Employers and unions have a duty to accommodate the employee up to the point of undue hardship. Employees have the duty to cooperate with the employer and the union in achieving an appropriate accommodation.

### C. Drug and Alcohol Testing

The law concerning pre-employment drug and alcohol testing and tests for drug and alcohol use during employment is heavily influenced by the fact that addiction is considered a disability in all Canadian jurisdictions. Employers are thus subject to the duty of reasonably accommodating employees or applicants who are addicted to drugs (legal or illegal) or alcohol. The law equally recognises that employers have the right, and in fact a duty to their employees and the public generally, to take measures for reducing the risk of accidents being caused by alcohol- or drug-impaired employees.

Leading cases have held that employers cannot require pre-employment drug or alcohol testing of all job applicants or random testing for drugs. These cases have upheld alcohol testing in circumstances where impairment would pose a risk to safety or property and there are reasonable grounds to believe that specific individuals may be impaired by alcohol use at the time of the test. In part this case law relied on the fact that, at the time it was decided, tests for drugs other than alcohol which could measure present impairment did not exist.

More recent case law seems to indicate more concern for safety considerations, at least where the applicant or employee does not claim to be addicted to alcohol or a drug. Thus, refusals to employ non-addicted persons who tested positive for drugs when applying for positions where there was a high risk of injury have been upheld.

It cannot be said that the drug-testing debate is by any means settled in Canadian law. Employers may be able to require drug and alcohol testing for employees in, or applicants for, positions posing high risks of injury or property damage in case of impairment. But where an employee shows that he or she is addicted, the employer normally will be required to cooperate with the employee (and any union representing the employee) in reasonably accommodating him or her. For positions where the risks of injury or property damage are less elevated, an employer will face real difficulty in justifying drug or alcohol testing.

### D. Psychological Harassment

On June 1, 2004, Quebec became the first jurisdiction in North America to enact legislation that grants employees the right to work in an environment free of psychological harassment. Psychological harassment is defined in the legislation as "any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures that affect an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee". The legislation also states that a single serious incident of vexatious behaviour may constitute psychological harassment where it has a lasting harmful effect on an employee. Under the legislation, it is the employer's responsibility to provide a harassment-free work environment, so that employees may sue the employer, as well as the harassing employee, for damages regardless of whether the harasser is a co-worker or "a person in authority". Under the new provisions, the harassment need not be based on a prohibited ground of discrimination in order to be actionable.

In Ontario, employers are obligated by law to put in place both workplace violence and harassment policies. As in Quebec, harassment includes things such as bullying, offensive jokes, intimidation and the like. Employers must measure up in place to assess and reduce the risk of workplace violence and harassment, respond to complaints, and communicate the policies and plans to employees.

## VII. Occupational Safety and Health and Workers' Compensation

### A. Occupational Safety and Health

All provinces and the federal government have occupational safety legislation. This legislation and the often very detailed regulations issued pursuant to the legislation govern safe working practices, machinery safety standards, and the use of hazardous materials in the workplace.

### B. Workers' Compensation

Workers' compensation legislation is administered and enforced largely by workers' compensation boards. The general scheme of workers' compensation legislation is much the same in each province. All employers must pay an annual assessment determined by the workers' compensation board, based on the type of activity in which they are engaged. Many provinces also adjust these assessments according to an employer's accident record. The assessments then form a workers' compensation fund from which employees injured in the course of employment may claim compensation for injuries and lost earnings, pensions to compensate for any loss of future earning power, and rehabilitation assistance following an injury. Compensation is payable regardless of any negligence or other fault on the part of the employee or the employer. All workers' compensation legislation prohibits civil suits by employees with respect to covered injuries.

## VIII. Pension Matters Affecting Canadian Jurisdictions

### 1. Public Plans

Canada has two state pension plans, one for Quebec and one for the rest of Canada. The Quebec Pension Plan applies, generally speaking, to residents of that province. The Canada Pension Plan applies to all of Canada other than Quebec. Both plans are funded in a similar manner by matching contributions from employees and employers, and both pay out pensions to all contributors after age 60. The two plans are fully portable if an employee changes employment, and contributions to either plan are fully portable to the other. Benefits are equivalent under the two plans and are coordinated so that a pensioner receives a single payment regardless of place of residence or contribution to either or both plans.

### 2. Private Plans

A considerable number of employers provide supplementary pension plans for their employees. These plans must be registered under provincial or federal statutes, which establish minimum funding standards, specify the types of investments that the plans may make, and deal with matters such as portability, benefit vesting, and locking in contributions. No Canadian jurisdiction requires employers to introduce a pension plan for its employees.

**Endnote**

- 1 These provinces are Manitoba, Quebec, New Brunswick and Prince Edward Island.

**Additional authors**

The authors wish to acknowledge the assistance of their colleagues Tim Lawson, Evan VanDyk and Michael D. Grodinsky. Mr. Lawson, a partner, is Section Head of the Toronto Labour and Employment group and a member of the firm's National Management Committee. In addition to representing employers before tribunals and courts, he provides them with strategic labour and employment advice in many areas including corporate restructuring, management-union relations, collective bargaining,

construction law and privacy rights. He can be contacted at 416 360.3522, [tlawson@heenan.ca](mailto:tlawson@heenan.ca).

Evan VanDyk, an associate in the Toronto office, advises clients on a wide range of labour and employment law matters. While in law school, he was an editor of the Osgoode Hall Law Journal. He was a clerk at the Court of Appeal for Ontario prior to joining Heenan Blaikie. Mr. VanDyk's contact info is 416 643.6921, [evandyk@heenan.ca](mailto:evandyk@heenan.ca).

Michael D. Grodinsky is an associate in the Montreal office. He focuses his practice on issues relating to collective agreements, grievance arbitrations, labour relations, and employment litigation. His experience includes a secondment in the legal department of a major international forest products company. Mr. Grodinsky can be contacted at 514 846.2333, [mgrodinsky@heenan.ca](mailto:mgrodinsky@heenan.ca).

**Gary S. Rosen**

Heenan Blaikie LLP  
1250 René-Lévesque Blvd. West, Suite 2500  
Montreal, Quebec H3B 4Y1  
Canada

Tel: +1 514 846 2229  
Fax: +1 514 921 1229  
Email: [grosen@heenan.ca](mailto:grosen@heenan.ca)  
URL: [www.heenanblaikie.com](http://www.heenanblaikie.com)

Gary S. Rosen focuses his practice on labour and employment law. He is also very experienced in commercial litigation, with a particular emphasis on shareholder disputes as well as banking, bankruptcy and insolvency litigation. He has appeared before all levels of Quebec civil courts as well as various administrative tribunals.

Mr. Rosen is Chair of Heenan Blaikie's national Partnership Admission Committee and Head of its Labour and Employment Law group for the province of Quebec. He is recognized as one of Canada's leading lawyers in the area of labour and employment law in the 2010 edition of The Best Lawyers in Canada (Woodward/White). Mr. Rosen was called to the Quebec Bar in 1988.

**Craig T. Munroe**

Heenan Blaikie LLP  
1055 West Hastings Street, Suite 2200  
Vancouver, British Columbia V6E 2E9  
Canada

Tel: +1 604 891 1176  
Fax: +1 866 895 2140  
Email: [cmunroe@heenan.ca](mailto:cmunroe@heenan.ca)  
URL: [www.heenanblaikie.com](http://www.heenanblaikie.com)

Craig T. Munroe is a partner with Heenan Blaikie, practising in the firm's Labour and Public Policy groups. Mr. Munroe represents and advises public and private clients facing labour relations and employment issues. In addition to providing management training and ongoing advice as issues arise, he regularly appears before various courts and tribunals including the British Columbia Labour Relations Board, the Canada Industrial Relations Board, grievance arbitration panels, the British Columbia Human Rights Tribunal, and the provincial and federal courts.

Mr. Munroe also has extensive experience assisting clients in areas involving public policy and relations with municipal, provincial and federal levels of government. He was called to the Bar of British Columbia in 1998.

# Heenan Blaikie

Since its inception, Heenan Blaikie has grown progressively to over 550 lawyers and professionals in its nine offices in Canada, its Paris office and Singapore representative office. The firm provides sought-after expertise in business law, labour and employment law, litigation, tax law, intellectual property and entertainment law. For more information, please visit the firm's Web site at [heenanblaikie.com](http://heenanblaikie.com).

# Albania

Emel Haxhillari



Aigest Milo



## KALO & ASSOCIATES

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main sources of employment law are: the Constitution of the Republic of Albania; Law no. 7961 dated July 12, 1995 “Labour Code of the Republic of Albania” (amended); Law no. 7703 dated May 11, 1993 “On Social Security” (amended); Law no. 7870 dated October 13, 1994 “On Health Insurance” (amended); Law no. 7995 dated September 20, 1995 “On Promotion of Employment” (amended); Law no. 9634 dated October 30, 2006 “On Labour Inspection State Labour Inspectorate”; Law no. 8549 dated November 11, 1999 “On the Status of the Civil Servants”; Law no. 9959 dated July 17, 2009 “On Foreigners”; Law no. 8829 dated November 5, 2001 “On Ratification of ILO Convention no. 183 on Maternity Protection, 2000”; Law no. 8856 dated July 2, 2002 “On Ratification of ILO Convention no. 154 on Collective Bargaining”; and Law no. 8775 dated April 4, 2001 “On Ratification of ILO Convention no.131 Minimum Wage”.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The Labour Code (‘LC’) protects all workers, unless their employment is not regulated by any special law.

The LC provides for the following types of engagement: part-time employment agreement; home-based work agreement; commercial agent agreement; and agreement for acquiring a specific profession. The parties entering into such engagements are also subject to the provisions of the Albanian LC.

The employment of civil servants is regulated by a special law, Law no. 8549 dated November 11, 1999 “On the Status of the Civil Servants”.

In addition, a service agreement is another type of engagement frequently used in practice in Albania. However, this type of agreement can only be entered into with physical person(s) registered for commercial purposes. The service agreement is a *sui generis* agreement, and such agreement is regulated by the provisions of the Albanian Civil Code and not by the LC.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Employment contracts may be agreed orally or in writing. In the event that the employment contract is agreed orally, the employer is

obliged to produce a written employment contract within 30 (thirty) days from the date of the oral agreement, bearing the signature of the employer and that of the employee and containing all mandatory legal elements as provided in the LC. Failure to issue the employment contract in written form will not affect the validity of the agreed contract, but the employer will be subject to a fine.

#### 1.4 Are any terms implied into contracts of employment?

Some terms are implied into employment contracts e.g.: payment of social insurance and health contributions and of the corresponding withholding tax on personal incomes generated from employment; the right to the minimum notice period; non-discrimination; duty of the employer and employee for confidence and trust (i.e. good faith); the right of the employee to not work during public holidays (in the case that the employee works during such public holidays, the employee should be paid as defined in the LC); and the employees’ duty to obey any reasonable instructions given by the employer, etc.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The employer should respect the minimum employment age. According to article 98 of the Albanian LC, the employment of a minor person under 16 (sixteen) years’ old is prohibited. Furthermore, the employer ought to respect the minimum monthly salary to be paid to all employees which according to the Council of Minister Decision no. 566, dated July 14, 2010 “On Defining the National Minimum Salary” is 19,000 ALL (~190 USD) and to declare them periodically at the Labour and Tax Office.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining can negotiate all employment terms and conditions, providing that these provisions are not less favorable for the employees than the provisions defined in the existing laws and secondary legislation. Usually, collective bargaining takes place between the employer and one or more trade unions of the company (i.e. employer).

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

A trade union must have a minimum of 20 (twenty) people and is formed as an organisation/body with legal status gained through the registration as such with the Court of Tirana.

### 2.2 What rights do trade unions have?

A trade union can negotiate with employers on the pay and conditions of work. Each legally-founded trade union may also make a collective bargaining request to its employer or employer organisation, in order to commence negotiations in relation to a collective labour contract at either enterprise, group of enterprises, or sector level. Furthermore, the trade unions are entitled to exercise the right of strike for the purpose of solving their economic and social requests in compliance with the rules as defined by the LC.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

Yes. There are specific rules defined in the LC that govern the trade unions' right to take industrial actions such as strike. According to the provisions of the LC the strike shall be lawful if it is organised by a trade union and it aims to reach the signing of a collective agreement, the trade union and the employer have made efforts to come to an agreement and the strike is in compliance with the legislation in force.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

This is not applicable in Albania.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable in Albania.

### 2.6 How do the rights of trade unions and works councils interact?

This is not applicable in Albania.

### 2.7 Are employees entitled to representation at board level?

Article 21 of the Company Law no. 9901, dated April 14th, 2008 expressly provides for the participation of employees at board level and only in joint stock companies. According to this legal provision, the legal representative of the company (i.e. the employer) and the Employees Council (EC) may agree that the EC may nominate persons to represent the employees at board level.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The discrimination of employees is prohibited under the Constitution of the Republic of Albania, with the conventions ratified by Albania and the Albanian legislation. The LC, Law no. 9773 dated July 12, 2007 "On Ratification of the ILO Convention, 1958 on Discrimination (Employment and Occupation)" and article 1 of Law no. 10221 dated February 4, 2010 "On Protection from Discrimination" provides that the persons cannot be discriminated against because of gender, race, colour, sexual orientation, disability, ethnic background, nationality, religion or belief, age, educational or social origin, family relation, pregnancy and maternity leave, economic condition, residence, and/or belonging to a particular group.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Any differentiation, exclusion or preference based on race, colour of skin, sex, age, religion, political beliefs, nationality, pregnancy and maternity leave, social origin, family relation, or physical or mental disability, that violates the right of an individual for equal treatment in employment, is considered unlawful. Please note that differentiation, exclusion or preferences required by a specific job position are not considered as discrimination. Furthermore, according to article 115 of the LC, the employer shall give the same salary to employees carrying out the same jobs. In the case that the employer pays to the employee a different salary for the same job, this shall be considered as discrimination.

### 3.3 Are there any defences to a discrimination claim?

Employers may defend against discrimination claims by proving to the tribunals that they had reasonable cause or a legitimate non-discriminatory cause for dismissing or taking other actions against the employee(s).

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

The employees can enforce their non-discrimination right(s) by referring any discrimination matter to a competent tribunal. The employer may settle claims before or after they are initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

In the case that the employment contract is terminated because of discrimination, the employer should pay to the employee a damage compensation of 12 (twelve) monthly salaries. Other remedies also may include payment of expert witness fees, and court costs and expenses, etc.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

The existing Law "On Social Security" provides that a pregnant

woman is entitled to paid maternity leave of 365 calendar days (the “protection period”), including a minimum of 35 (thirty five) days prior to childbirth and 42 (forty two) days after childbirth.

In the event of the birth of more than one child, the duration of this period is extended to 390 days. During this period, the employees shall receive payment from the Social Security Institute (‘SII’) amounting to: 80 per cent of the average daily salary over the last calendar year, applicable for the first 150 days of the maternity leave; and 50 per cent of the average daily salary for the last calendar year, applicable for the remaining days of maternity leave. Maternity leave is paid by the SII and not by the employer.

#### **4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?**

The employer cannot terminate the employment contract in the period during which the woman benefits from income from the SII due to child birth or child adoption. When the termination of the employment contract is announced before the “protection period” (as defined in our response to question 4.1), and the notice period has not expired, this notice period shall be suspended during the “protection period”. The deadline for the notice of termination continues only after the “protection period” has expired.

#### **4.3 What rights does a woman have upon her return to work from maternity leave?**

The employer cannot terminate the employment contract, because of child birth, when the female employee is back at work from maternity leave.

#### **4.4 Do fathers have the right to take paternity leave?**

According to the Council of Minster Decision No. 511 dated October 24, 2002 “On working Hours and Leave in Public Administration”, as amended, the male employees working in public administration have 3 (three) days’ leave as paternity leave. The Albanian LC does not provide for any paternity leave and does not have any other povision related to paternity leave.

#### **4.5 Are there any other parental leave rights that employers have to observe?**

The employee is entitled to other periods of paid leave in specified circumstances:

- i. in the event of the death of a spouse, direct predecessors or descendants: 10 days;
- ii. in the event of serious illness of direct predecessors or descendants, as evidenced by a medical report: 10 days;
- iii. in the event of indispensable care for dependent children: 12 days per year; and
- iv. in the event of illness, as evidenced by a medical report, of a child less than 3 years: 15 days.

Furthermore, the employee is entitled to an additional 30 (thirty) days’ leave without pay in case of indispensable care for dependent children.

#### **4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?**

Breastfeeding mothers cannot be obliged to begin their work day before 5am in summer time or 6am in winter time and to terminate

the working day after 8pm. Breastfeeding mothers are entitled to a paid break of not less than 20 (twenty) minutes every 3 (three) hours, in the case that this is justified by their condition(s).

The LC does not have other related mandatory provisions. However, the employer and the employee can agree on other flexible work arrangements.

## **5 Business Sales**

### **5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?**

In the event of transferring an enterprise or part of it, all rights and obligations arising from a contract of employment valid until the moment of transfer, will pass on to the person that, due to such transfer, will inherit the rights and obligations of the employer. Any employee refusing to change employer in this event remains bound by the employment contract until the expiration of the termination notice.

### **5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?**

In a business sale, all rights and obligations, powers and liabilities under the employee’s employment contract are transferred to the transferee. Liabilities arising before the transfer such as unpaid wages, etc., are excluded from the applicability of the general rule; such liabilities remain with the transferor (i.e. the employer).

### **5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?**

Article 139 of the LC provides for an information and consultation procedure in the event of a transfer of an enterprise. The transferor and the transferee are obliged to inform the trade union of its role in the capacity of the representative of employees, or, in the absence of a trade union, the employees are informed of and explained the reason for the transfer, its legal, economic and social effects on the employees, and the measures to be undertaken in respect thereof. Moreover, they are obliged to engage in consultations regarding the necessary measures to be taken at least 30 (thirty) days prior to the completion of the transfer. In the event that an employer terminates the contract without following the above-mentioned procedures of information and consultation, each employee(s) is entitled to a compensation equal to six months’ salary in addition to the salary he/she would have received during the prior notice period.

Employers failing to comply with the above-mentioned procedures may be punished with a fine in the amount of 30 (thirty) times of the minimal monthly salary.

### **5.4 Can employees be dismissed in connection with a business sale?**

An employee cannot be dismissed because of a business sale. Exceptions to this rule are when the dismissals are due to economic, technical or organisational reasons that impose changes to the organisational structure of the company.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

The Albanian legislation does not have any expressive restriction on such issue.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The employer is obliged to give notice for the termination of the employment relationship. The notice period for the termination of the employment contract is defined in the individual employment contract. In the event that the parties have not defined the notice term in the employment contract, reference shall be made to the provisions of the LC. According to the LC, the notice period for termination within the 3- (three) month probationary period is at least 5 (five) days, which may be changed by the written agreement of both parties.

The LC provides for mandatory minimum notice periods to be applied in the case of termination of an indefinite (open) term employment contract by either the employer or the employee, as follows:

- i. during the first 6 (six) months: two weeks;
- ii. between 6 (six) months and 1 (one) year: one month;
- iii. between 1 (one) and 5 (five) years of employment: two months; and
- iv. for more than 5 (five) years of employment: three months.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed, but does not have to attend for work?

The employee is obliged to give a notice period. However, insofar as the employee still remains on the payroll (i.e. he/she receives the salary), it is at the discretion of the employer to decide whether the employee shall work or shall stay away from work during the notice period.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

The general rules on protection against dismissal are defined in the LC. However, restrictions on dismissal may be imposed by collective agreement and by individual employment contract. The employee is treated as being dismissed if the employer terminates the employment contract with or without notice, when the employer offers to the employee a choice to resign or to be dismissed, and/or when the employer refuses to engage the employee in work for any reason that is not related to the employee and the employer does not pay the salary to the employee during this period.

The consent of any third party is not required.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

The employer may not terminate the employment contract when, according to the existing legislation, the employee is completing his/her military service, they are receiving benefit payments from

the employer or from SII for a period not longer than 1 (one) year for temporary disability to work, or in the case the employee is on vocational leave approved by the employer.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and, if so, how is compensation calculated?

According to the LC, a termination of the employment contract by an employer is considered without cause (i.e. the employer cannot dismiss the employee for these causes) when it is based on the fact:

- a) the employee had genuine complaints arising from the employment contract;
- b) the employee had satisfied a legal obligation (e.g. given evidence in court);
- c) the employee's particulars only (such particulars being race, colour, sex, age, civil status, family obligations, pregnancy, religious or political beliefs, nationality, social status);
- d) that the employee had to exercise constitutional rights; and
- e) the employee participates in lawful labour organisations and their activities.

Thus, the employer may terminate the employment contract for any other cause which is not mentioned above.

The Albanian LC provides for dismissal compensation as described below:

If the employer terminates the employment contracts with a cause, the employer has to pay to the employee:

- a) a salary for the notice term;
- b) a seniority bonus if the employee has worked for more than 3 (three) years, such seniority bonus ought to be at least the equivalent of 15 days' salary for each complete working year, calculated on the basis of the salary existing at the termination of the labour relations;
- c) a salary corresponding to days of annual leave not given/taken; and
- d) 2 (two) monthly salaries, if the employer has failed to observe the procedure for the termination.

In the case that the court shall decide that the employment contract is terminated without cause, it may order the employer to pay, in addition to the above payments, a damage compensation that according to the law can go up to 12 (twelve) monthly salaries.

In the case of immediate termination for serious breach of the employment contract, the employer is obliged to pay to the employee only an amount equal to the salary corresponding to annual leave vacations which have not been taken/given.

### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

There are procedures which must be followed when the employer decides to terminate an employment contract, both in the case of immediate termination for a cause or with prior notice. If such termination takes place after the probationary period, the employer must convene a meeting with the employee to discuss the reasons giving at least 72 hours' prior written notice. The notice of termination of employment may be given to the employee from 48 hours to one week following the date of the meeting. Should the employer fail to follow this procedure, the employer shall be obliged to pay the employee a compensation equal to two monthly salaries, and other possible compensation. This procedural requirement does not apply to collective dismissals for which there is a separate special procedure.

### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

If the contract is terminated by the employer without cause, the employee has the right to sue the employer within 180 days, starting from the day on which the notice deadline expired. Furthermore, the employee has the right to sue the employer for termination without respecting the termination procedure and the notice deadline, or for the failure to pay the payments due to the employee in the case of termination. Remedies for successful claims include: a salary for the notice term; the seniority bonus; payment equal to the salary corresponding to any annual leave not given/taken; two monthly salaries, if the employer has failed to observe the procedure for the termination; a damage compensation for termination without cause of up to 12 (twelve) monthly salaries; and/or payment of expert witness fees and court costs and expenses.

### 6.8 Can employers settle claims before or after they are initiated?

Yes, the employer(s) can settle claims before or after they are initiated.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes. In the case that the employer dismisses a number of employees at the same time, it may be considered as collective dismissal. Collective dismissal is defined as the termination of labour relations by the employer for reasons unrelated to the employee(s), where the number of dismissals in a 90-day period is at least:

- i. 10 for enterprises employing up to 100 employees;
- ii. 15 for enterprises employing 100-200 employees;
- iii. 20 for enterprises employing 200-300 employees; and
- iv. 30 for enterprises employing more than 300 employees.

Article 148 of the LC defines specific procedures which need to be followed when an employer plans to execute collective dismissals. The employer shall inform the employees' trade union in writing. In the absence of a trade union, the employees shall themselves be informed by way of a notice placed visibly in the workplace. The notice shall contain: the reason(s) for dismissal; the number of the employees to be dismissed; the number of employees employed; and the period of time during which it is planned to execute the dismissals.

One copy of this notice must also be submitted to the Ministry of Labour and Social Affairs.

In order to attempt to reach an agreement, the employer shall then undertake the consultation procedure with the employees' trade union within 20 days of the date on which the notice was displayed. In the absence of a trade union, all interested employees are entitled to participate in the consultations. If the parties fail to reach an agreement, the Ministry of Labour and Social Affairs shall assist them in reaching an agreement within 20 days of the date on which the employer informed the Ministry in writing of its aims of completing the consultation procedure. After the termination of the 20-day deadline the employer can then inform the employees of their dismissal and begin the termination of employment contracts providing the following notice periods:

- i. for up to one year of employment: one month;
- ii. for two up to five years of employment: two months; and
- iii. for more than five years of employment: three months.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees can enforce their rights by suing the employer via the competent tribunal. Non-compliance with the procedure defined in our response above shall result in the employees receiving compensation of up to six months' salary in addition to the salary payable for the notice period, or to additional compensation awarded due to non-compliance with the provision of the specified notice periods.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

In addition to the provision which provides that during the employment period the employees are not permitted to work for third parties if such other employment would harm the employer or create competition for the employer, there are provisions to prevent the employee from working for a competitor after the termination of the employment agreement.

### 7.2 When are restrictive covenants enforceable and for what period?

According to the LC, non-competition clauses taking effect after termination can be enforced subject to the following conditions:

- a) they are provided in writing at the beginning of the employment relationship;
- b) the employee is privy to professional secrets in respect of the employer's business or activity during the course of employment; and
- c) the abuse of such privilege shall cause significant damage to the employer.

The "non-competition" period may not be longer than one year.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

According to article 28 of the Albanian LC, an agreement on non-competition after termination is subject to remuneration for the employee, such remuneration amounts to 75 per cent of the salary he would have received if he were still working with the employer.

### 7.4 How are restrictive covenants enforced?

The restrictive covenants are enforced by signing up to restrictive covenants as a separate agreement or as a part of the employment contract.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Lawsuits against the persons living inside the territory of Albania are filed at the court of the defendant's place of residence. A lawsuit may be filed even in the court of the country where the employee



usually carries out his/her job. When the employee does not carry out his/her job in the same country, a lawsuit may be started in the country where the seat of the employer is located. Albanian courts hear individual labour disputes with one judge.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

There is no mandatory conciliation procedure prior to a complaint being submitted to the Albanian court. However, after the lawsuit is submitted to the competent court, the provisions of the Albanian Code of Civil Procedures apply for the employment-related complaints in the same manner and at the same extent as with other civil disputes. For such civil disputes, a conciliation mandatory hearing is held by the court before such court proceeds further with the lawsuit.



**Emel Haxhillari**

KALO & ASSOCIATES  
Kavaja Avenue, 4th Floor  
G-KAM Business Centre  
Tirana  
Albania

Tel: +355 4 223 3532  
Fax: +355 4 222 4727  
Email: [e.haxhillari@kalo-attorneys.com](mailto:e.haxhillari@kalo-attorneys.com)  
URL: [www.kalo-attorneys.com](http://www.kalo-attorneys.com)

Emel Haxhillari graduated from the Law Faculty at the South East European University in Macedonia/FYROM and she has further completed a post graduate degree (Masters Degree) in European Studies at the University of Tirana. Ms. Haxhillari is an employment lawyer who has worked at "KALO & ASSOCIATES" for over 3 years. She is also a member of the Tirana Bar Association.

Amongst other matters, Ms. Haxhillari advises on: employment contracts, drafting and reviewing, and also management service contracts; registration of employees for new companies, branches, etc.; collective labour agreements and trade unions; social security and health insurance and pension schemes in Albania; and termination of labour relationship, etc. In addition, as an employment lawyer she covers issues including entry clearance requirements, residence permits and work permits. Emel is fluent in Albanian, English and Italian. Since 2007, she has published articles in various domestic and foreign publications on Albanian employment law.

### 8.3 How long do employment-related complaints typically take to be decided?

Court decisions for an employment-related complaint may take from 6 (six) months up to 1 (one) year.

### 8.4 Is it possible to appeal against a first instance decision and, if so, how long do such appeals usually take?

Yes, it is possible to appeal against a first instance decision and before the relevant Court of Appeals and then to the Supreme Court; in practice, the appeal process may only take 1 (one) year.



**Aigest Milo**

KALO & ASSOCIATES  
Kavaja Avenue, 4th Floor  
G-KAM Business Centre  
Tirana  
Albania

Tel: +355 4 223 3532  
Fax: +355 4 222 4727  
Email: [a.milo@kalo-attorneys.com](mailto:a.milo@kalo-attorneys.com)  
URL: [www.kalo-attorneys.com](http://www.kalo-attorneys.com)

Aigest Milo is a lawyer who graduated in Business Law from the "Paris Ouest Nanterre La Defense", Paris, France. Mr. Milo joined "KALO & ASSOCIATES" in 2009, serving as an Associate within the Tax & Employment Department. The focus of his work includes legal opinions on employment issues. He has provided some qualitative legal assistance to several local and foreign companies such as Cargill, Bechtel International, Global Petroleum, Vodafone, Alpha Bank, etc. Aigest Milo is fluent in English, French, Italian and Greek.



Established in 1994, KALO & ASSOCIATES is recognised as a leading law firm in Albania and Kosovo. As a full service law firm, it specialises in a broad spectrum of areas of commercial law and as a first class legal counsel acts for the most prominent foreign and multinational companies, providing high-quality, efficient and cost-effective legal services.

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The Employment Team advises on all aspects of Labour law and Residency issues having represented many domestic and international clients on matters ranging from the drafting of employment contracts, negotiating settlements, advising on re-structuring and reorganisation, employee share scheme, social security and related tax issues and more.

# Australia



Andrew Tobin



Damon King

## HopgoodGanim Lawyers

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

Commonwealth, State and Territory legislation (involving nine separate legislatures across mainland Australia) coincide with common law and equity to regulate employment matters in Australia.

While each of the six States and two mainland Territories have their own laws relating to various aspects of employment law, since early 2006, the Commonwealth Parliament has sought to cover the field for employers and workers in the private sector.

Today the most relevant legislation is the Commonwealth *Fair Work Act 2009*. The States generally regulate, through separate legislation, State and local government industrial arrangements.

Australian common law and equitable jurisdictions developed from, and continue to be generally consistent with, English law.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The primary distinction is between employees (who work under contracts of service) and contractors (who work under contracts for services). Various specific statutory protections are extended to both.

For example, while contractors cannot make an unfair dismissal claim, in some circumstances they will have an unfairness remedy under specific contracting legislation, and in any event are protected by anti-discrimination legislation and a broad 'general protections' jurisdiction available also to employees.

In cases of doubt, the classification of a worker as an employee or contractor is subject to a multi-factor approach including: consideration of the intention of the parties; the degree and nature of control exercised over the worker by the employer/principal; the mode of remuneration; the responsibility for the provision and maintenance of tools or equipment; the extent of the obligation to work for the employer/principal; any capacity for the worker to delegate work to others; and where liability to correct defective work lies.

A worker is more likely to be classified as a contractor if they: are paid a lump sum for results achieved (as opposed, for example, to an hourly rate for labour); provide all or most of the necessary materials and equipment to complete the work; are free to delegate work to others; are free to work for others; and bear the risk of correcting defective work.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

A contract of employment will usually be binding on the parties if the basic principles of a contract (offer, acceptance and consideration) are present. Writing is not required. However, various legislation does require some information relating to the employment contract or relationship to be provided to employees in particular forms.

These include, for example, the *Fair Work Information Statement*, as part of the *National Employment Standards* (see question 1.5). Other requirements for documentation are imposed by legislation relating to superannuation (retirement savings) and industrial instruments such as awards or statutory workplace agreements. In each of these cases, employers can be liable for significant penalties for non-compliance.

#### 1.4 Are any terms implied into contracts of employment?

An employment relationship is subject to a number of implied rights and obligations, although these can vary from case to case.

In all cases, the law will imply a mutual obligation of good faith, imposing a range of rights and obligations on the parties. These will include, for example, an obligation on the part of the employer not to do anything calculated to destroy the relationship of trust and confidence between the parties; and obligations on the part of the employee to obey the employer's lawful and reasonable directions; to advance the employer's interests; and to not to do anything contrary to the employer's interests.

In some situations the law will imply an entitlement on the part of the worker to be given substantial - up to 12 months - notice of termination of their employment.

Terms may also be implied into a contract of employment based on trade, industry or local custom or practice.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. The *National Employment Standards* prescribed by the *Fair Work Act 2009* provide a safety net of 10 minimum standards that apply to all 'national system' employees. These deal with:

- maximum weekly hours of work;
- flexible working arrangements;
- parental leave;
- annual leave;

- personal/carer's leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- provision of the *Fair Work Information Statement* to new employees.

There is also a National Minimum Wage (AUD \$15 per hour as at 1 July 2010, excluding a loading payable to casuals) and, for many workers, awards will also impose minimum terms and conditions of employment applicable to particular occupations and industries. Statutory workplace agreements can do likewise in particular workplaces or for individuals to whom a statutory individual agreement applies.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

According to the May 2010 Survey of Employee Earnings and Hours report by the Australian Bureau of Statistics, approximately 43.4 percent of Australian workers have their pay determined by a collective agreement. This compares with 37.3 percent whose pay is determined by individual arrangement, and 15.2 percent by award only.

While ultimately collective, or enterprise, agreements are made at the enterprise level, unions of employees will sometimes run campaigns for relatively common terms and conditions of employment across particular industries. This can produce some consistency in enterprise bargaining outcomes across the industries concerned.

Many awards apply at industry level and provide the benchmark for minimum terms and conditions of employment for enterprise bargains negotiated in those industries.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

Under current national rules, a union of employees must seek registration through Fair Work Australia, Australia's national workplace relations tribunal. The main criteria for registration are that: the aim of the organisation is to further or protect the interests of its members; it must be free from control, or improper influence from, an employer; the organisation must have at least 50 members who are employees; and there must be no other association to which the members could more conveniently belong or which would more effectively represent them.

### 2.2 What rights do trade unions have?

Union officials have a conditional right of entry to workplaces to allow them to meet and hold discussions with employees, and to investigate suspected contraventions of industrial laws and instruments, and occupational health and safety laws. Their rights extend to the inspection of related records and things.

Unions also have a default right to represent employees during bargaining for a collective agreement, and are also generally entitled to initiate and prosecute proceedings in the industrial jurisdictions relating to the interests of their members – for

example, unfair dismissal and wage recovery proceedings and proceedings to enforce industrial instruments (awards and agreements).

Unions are also entitled to be notified of certain information by employers where the employer has decided to dismiss 15 or more employees, any of whom is a member of the union.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

Yes. The right to take 'protected' or lawful industrial action is regulated by a detailed legislative scheme.

Employees and their unions can only legitimately engage in industrial action (such as strikes, bans and limitations) to support claims made in negotiations for a proposed enterprise agreement. Various other requirements must also be met including, particularly, authorisation of the taking of the action by secret ballot of the employees concerned. The ballot itself must be undertaken pursuant to a 'protected action ballot order' secured from the workplace relations tribunal, Fair Work Australia. The taking of the action itself cannot then ordinarily occur without three days' notice to the employer.

Fair Work Australia has a range of functions and powers through which it is able to regulate the taking of industrial action, both protected and otherwise, including power to suspend or terminate protected action or to restrain unprotected action.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There is no provision for the recognition of works councils or like groups in the Australian industrial system.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

(See question 2.4.)

### 2.6 How do the rights of trade unions and works councils interact?

(See question 2.4.)

### 2.7 Are employees entitled to representation at board level?

No, they are not.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. Commonwealth, State and Territory human rights legislation make provision for the protection of workers against discrimination on certain grounds.

Those grounds and the circumstances in which discrimination is unlawful vary to some extent between Australian jurisdictions. In

most, protection from discrimination in the work area extends to the attributes of age, race, relationship status, pregnancy, parental status, breastfeeding, disability, religious belief/activity, political belief/activity, trade union activity, gender identity, sexuality, family responsibilities, or association with or relation to a person identified by reference to any of these attributes.

Other protections are extended by human rights laws from conduct amounting to: sexual harassment; racial and religious vilification; and victimisation of persons involved or potentially involved in proceedings alleging human rights breaches.

It is also generally unlawful for employers and prospective employers to ask workers and prospective workers to supply information upon which unlawful discrimination might be based.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Unlawful discrimination can be both direct and indirect. Both are prohibited in a wide range of work and work-related contexts.

Direct discrimination in the work context occurs where an employer treats a worker with a particular attribute less favourably than other workers without that attribute.

Indirect discrimination is any practice which appears non-discriminatory in form and intention but is discriminatory in impact and outcome. For example, the imposition of a minimum height requirement for a particular position has the potential to indirectly disadvantage some ethnic groups and females, who as a group are less likely to meet the height requirement, leading to a risk of indirect discrimination on the ground of race or sex.

In relation to disabled persons, employers have a positive obligation to seek to identify and implement reasonable adjustments to assist persons with disabilities to overcome their limitations.

### 3.3 Are there any defences to a discrimination claim?

Yes. There are a number of exemptions from what would otherwise amount to unlawful discrimination in the work context. They include, for example, the imposition of genuine occupational requirements or something done for reasons associated with workplace health and safety.

Liability upon an indirect discrimination claim can be avoided if the alleged discriminator can show that the condition or requirement said to be discriminatory is reasonable.

Employers can avoid liability for failing to make reasonable adjustments for disabled persons if they can show that to implement the adjustments required would cause “unjustifiable hardship”.

Generally speaking, employers will be vicariously liable for conduct amounting to unlawful discrimination engaged in by their workers or agents. However, an employer can escape vicarious liability if they can show that they took reasonable steps to avoid contravention by their workers or agents of the legislation.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

In all jurisdictions the enforcement process is complaint driven, although the dispute resolution process varies. Typically the parties to a complaint will be required to participate in some form of conciliation followed, in the absence of a resolution, by formal adjudication.

Opportunities for settlement arise at all stages of the complaint process and, by far, most complaints are resolved without formal adjudication. Employers are encouraged by the regulators to have internal complaint handling systems which, in some cases, will enable claims to be resolved without the commencement of formal proceedings.

### 3.5 What remedies are available to employees in successful discrimination claims?

There are a wide range of remedies available to employees who are subject to unlawful discrimination at, or in connection with, their work. They include orders:

- for reinstatement or re-employment;
- for promotion/redeployment;
- for payment of compensation for loss or damage (including for embarrassment, humiliation and intimidation);
- varying or invalidating agreements;
- requiring publication of an apology;
- requiring implementation of specific management programmes;
- restraining a person from repeating or continuing specific conduct; and
- in some jurisdictions, requiring payment of a civil or criminal penalty.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Employees do not become entitled to take parental leave unless they have completed 12 months’ continuous service with the employer.

There is an entitlement to take up to 12 months’ unpaid parental leave if the leave is associated with the birth of a child of the employee or the employee’s partner. Both parents (including *de-facto* and same sex couples) are entitled to take consecutive periods of 12 months’ leave each, or one parent can request their employer for an extension to their leave period for up to a further 12 months (for a total of two years’ leave).

The same entitlements are available to parents adopting a child under the age of 16.

To be eligible for the leave, the employee must have or will have primary responsibility for the care of the child.

Employers can refuse requests for an extension to an initial period of parental leave upon ‘reasonable business grounds’. If a request is to be refused the employer must provide written reasons for the refusal within 21 days after the request was made.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

The employment of a person taking a period of parental leave is suspended; the leave period does not break continuity of service, but does not count toward entitlements dependant upon service, for example leave or termination entitlements.

While on leave, employees are entitled to be kept informed of decisions made by their employer that will have a significant effect on them. Employers are obliged to take all reasonable steps to inform employees on leave about, and to given them an opportunity to discuss, the effect of such decisions.

There is no requirement for employers to provide paid parental leave, although many larger employers do so voluntarily as part of their staff retention strategies. In some industry sectors paid parental leave is a common feature of collective agreements.

Subject to a number of conditions, employees on unpaid parental leave may be entitled to government funded paid parental leave. Payments are made at the level of the National Minimum Wage for a maximum period of 18 weeks to eligible primary carers. In most cases the payments are administered by the employer.

#### **4.3 What rights does a woman have upon her return to work from maternity leave?**

The employee is entitled to return to their pre-parental leave position. If the position no longer exists, the employee must be offered an alternative position for which they are qualified and suited, nearest in status and pay to their original position.

#### **4.4 Do fathers have the right to take paternity leave?**

Both parents have the same rights to parental leave dependent upon which of them is the primary care giver, although mothers have additional rights arising out of the physical issues associated with pregnancy.

When one parent takes parental leave, the other is entitled to take concurrent leave, usually upon the birth or adoption of the child, for a period of up to three weeks.

#### **4.5 Are there any other parental leave rights that employers have to observe?**

An eligible pregnant mother is entitled to take unpaid special maternity leave if she is not fit for work because of a pregnancy-related illness, or if the pregnancy ends otherwise than through the birth of a living child within 28 weeks of the expected date of birth.

Pregnant mothers are also entitled to be transferred to an 'appropriate safe job', without affecting their pay and conditions, if they are certified as medically fit for work but, because of the pregnancy, advised not to perform the duties of their current position because of medical risks. If there is no appropriate safe job available, the employee is entitled to take paid 'no safe job leave' for the risk period.

All employees are entitled to up to two days of unpaid pre-adoption leave to attend interviews or examinations required for the adoption of a child, although the employer can choose to direct the employee to take some other form of leave, such as paid annual leave, before accessing the entitlement.

Parents also have an entitlement to paid carer's leave (unpaid for casuals), funded from their personal leave entitlement, where required to care for or support a child who is sick, injured or in the event of an unexpected emergency. This is part of the broader personal leave entitlement provided for in the *National Employment Standards* (see question 1.5).

#### **4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?**

The primary carer of a child under school age, or under 18 with a disability, may request their employer for a change in their work arrangements to assist the employer to care for the child.

The right to request such an arrangement is limited to employees who have completed at least 12 months' continuous service, and is also available to some long term casual employees.

An employer may only refuse a request for a flexible work arrangement upon reasonable business grounds. If a request is to be refused the employer must provide written reasons for the refusal within 21 days after the request was made.

## **5 Business Sales**

### **5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?**

Unless the transaction involves only the transfer of shares in a corporate employer - which of itself will have no effect on the employer's relationship with its employees - generally not.

In an asset sale, the vendor's arrangements with its employees come to an end, and the decision whether or not to re-employ the workers in the business is at the discretion of the purchaser.

### **5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?**

If the transaction is a share sale, employees continue to be employed on their existing terms and conditions.

Otherwise, if the purchaser re-employs the vendor's workers in positions similar to their old positions with the vendor, the purchaser will usually become bound by the terms of any industrial instrument - a 'transferable instrument' - that applied to the workers in their service with the vendor. Applicable collective agreements will usually transfer in this way.

In both cases, the employees' service with the vendor will usually count as service with the new employer, except that in the case of an asset sale the purchaser can decline to recognise prior service for annual leave or redundancy pay purposes. The effect of this will be to crystallise those entitlements with the vendor, requiring the vendor to pay them out upon completion of the sale.

### **5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?**

Usually a business sale will trigger the notice and consultation provisions - relating to 'major workplace change' - included in modern awards or applicable collective agreements and individual statutory agreements. These require workers to be notified of impending significant changes by which they might be affected, and to be consulted about mitigation measures. Commonly there is an exception for sensitive commercial information, which need not be disclosed.

The obligation to notify and consult generally arises as soon as relevant decisions are made. The duration of the consultation process will be affected by a range of variables and can range from a few days to weeks or months.

Failure to comply with relevant requirements imposed by an industrial instrument can lead to prosecution for breach of the instrument and imposition of substantial civil penalties, upon both the employer and any natural persons involved in the contravention.

No such obligations arise for employees not covered by a statutory instrument or agreement, unless they arise out of contracts of employment or policies binding the employer.

#### 5.4 Can employees be dismissed in connection with a business sale?

Upon the sale of a business to a new employer, the positions occupied by the employees of the old employer become redundant, and the employees may be dismissed on that ground.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Yes, with varying degrees of difficulty, consequences and expense. As one example, an incoming employer who becomes or will become bound by a transferring collective agreement can apply to Fair Work Australia for an order that the agreement not apply, with or without an order that some other instrument apply instead.

## 6 Termination of Employment

#### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Yes, unless the termination is for serious misconduct, in which case no notice or payment in lieu is required.

Minimum notice entitlements are determined by the *National Employment Standards*, ranging from one week to five weeks dependant upon length of service and age.

Employers are commonly bound, by express or implied terms in the contract of employment, to provide greater periods of notice than the statutory minima.

#### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Usually yes, although the issue can be affected by express or implied terms of the contract of employment. In some situations these can preclude an employer from insisting that an employee serve a period of "garden leave".

However, even where the employer is able to insist on a period of garden leave, this will not necessarily enable the employer to prevent the employee from commencing alternative employment during the leave period.

#### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employees are provided with a wide range of protections from dismissal. They include protections from a dismissal that is:

- harsh, unjust or unreasonable (unfair dismissal);
- the consequence of the exercise of a 'workplace right' (general protection);
- for a reason expressly prohibited by legislation (unlawful dismissal); or
- contrary to worker's compensation, anti-discrimination or workplace health and safety legislation.

An employee is treated as being dismissed if, regardless of the form of relevant events, in substance the employment was terminated at the employer's initiative.

There are no situations where the consent of a third party is required before a dismissal can occur.

#### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Only those employees who meet certain criteria have access to the 'unfair dismissal' jurisdiction, although a greater percentage of the workforce than not is likely to qualify. The main criteria are:

- length of service (one year for small business and six months for others); and
- coverage by an industrial instrument; or
- annual earnings beneath the 'high income threshold' (AUD \$113,800 as at 1 July 2010, indexed annually for inflation).

There are no threshold requirements for access to the other jurisdictions described at question 6.3.

#### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Employees who do not have access to the unfair dismissal jurisdiction can be dismissed for any lawful reason (including no reason), subject only to compliance with any relevant statutory and contractual requirements – for example, to give notice or to pay redundancy pay.

For employees who qualify to access the unfair dismissal jurisdiction, employers must be able to show in the case of an employee dismissed for:

- a reason related to them – that the reason justified termination (e.g. unsatisfactory work performance) and the dismissal was accompanied by a fair process (e.g. warnings, opportunity to improve); or
- business-related reasons – that the employer no longer requires the employee's job to be done by anyone; that the employer followed the consultation requirements imposed by any applicable industrial instrument; and that there was no reasonable opportunity for redeployment of the employee within the employer's business or a related business.

In most cases employees will be entitled to notice of termination or to payment in lieu for any short notice. See questions 1.4, 1.5 and 6.1.

If an employee's position is made redundant, the employee may be entitled to receive redundancy pay ranging from four to 16 weeks' pay, dependent upon length of service.

#### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

See question 6.5. Additionally, on dismissal of an employee, an employer must generally:

- give the employee written notice of the effective date of the dismissal; and
- ensure the requisite notice, or payment in lieu, is provided to the employee (see questions 1.4, 1.5 and 6.1),

although neither requirement will usually apply where the reason for the dismissal is serious misconduct by the employee.

#### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

Possible claims include:

- a claim for common law damages upon a variety of grounds – for example, for damages for short notice. See question 1.4;
- a claim to Fair Work Australia for a remedy for unfair dismissal, unlawful dismissal, or breach of the general protections provisions;
- a claim to Fair Work Australia alleging breach of legislative requirements or an industrial instrument; and
- a claim to another Commonwealth or State regulator alleging unlawful discrimination or breach of workers' compensation or workplace health and safety legislation.

Potential remedies range from reinstatement or re-employment to payment of compensation and, in some cases, to the imposition of civil and criminal penalties. Maximum compensation in the unfair dismissal jurisdiction is capped at six months' pay, but is unlimited in the other jurisdictions where compensation orders are available.

### 6.8 Can employers settle claims before or after they are initiated?

Yes, they can.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

An employer who has decided to dismiss 15 or more employees for reasons of an economic, technological or structural nature must, before any dismissal occurs:

- notify unions, of whom affected employees are members, of certain matters; and
- give notice of certain matters to the Commonwealth Services Delivery Agency (Centrelink).

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Failure to comply with the requirements at question 6.9 can result in the intervention of Fair Work Australia, corrective orders and the imposition of substantial civil penalties.

Application to Fair Work Australia for corrective orders can be made by affected employees or their unions.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Employers can incorporate limited post-employment non-compete restraints into their employment contracts. Legitimate employer interests which may be protected include the employer's trade secrets and confidential information, customer connections and staff connections. A bare restraint against competition, or one that has broad application, will not be enforceable.

### 7.2 When are restrictive covenants enforceable and for what period?

Post-employment restraints are only enforceable if they can be shown to be reasonably necessary for the protection of the legitimate business interests of the employer. What is reasonable in any given case will depend upon the duration of the restraint, the

geographic area in which it will apply, and the activities to which it will apply. A restraint that is too broad against any of these dimensions will not be enforceable (as unreasonable).

There is no limit on the permissible duration of a restrictive covenant. However, longer restraints will be more difficult to justify as reasonable than shorter restraints. Restraint periods of 12 months or more might be justifiable in some cases, but this is approaching the outer limit of what can be enforced.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

No, they do not.

### 7.4 How are restrictive covenants enforced?

The remedy commonly sought by employers faced with an employee's breach of a restraint clause is a court-ordered injunction, sought on an urgent basis.

An employer can also seek damages for breach of contract based on breach of a restraint.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

They include Australia's State courts with jurisdiction to hear common law claims; Fair Work Australia; the Federal Court and several other bodies with jurisdiction to hear anti-discrimination claims and claims arising out of State and Territory based workers' compensation and safety laws.

Fair Work Australia is the national workplace relations tribunal with statutory jurisdiction over a range of industrial and employment matters, but not common law matters. In most instances it is constituted by a single conciliator or member. Members typically come from an industrial background and may or may not have legal qualifications.

The Federal Court has jurisdiction to hear and determine a range of industrial matters and associated claims, usually following compulsory conciliation proceedings in Fair Work Australia. Usually it is constituted by a single judge or Federal Magistrate sitting alone. Federal judges and magistrates are qualified lawyers.

Anti-discrimination complaints can be made to State or Territory regulators or, at federal level, to the Australian Human Rights Commission. All jurisdictions feature some form of preliminary conciliation which, if unsuccessful, lead to formal adjudication. Adjudication procedures vary between jurisdictions. In the federal jurisdiction, unconciliated discrimination complaints proceed to hearing in the Federal Court.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The procedures vary depending on the nature of the claim and the jurisdiction in which it is made.

Unfair dismissal claims are dealt with entirely by Fair Work Australia. Other claims based on rights conferred by the *Fair Work Act 2009* must generally be initiated in Fair Work Australia but, if

not resolved through conciliation, proceed to hearing and determination in the Federal Court. All of these kinds of matters are generally subject to mandatory conciliation as a means of early resolution.

Similar procedures apply in all Australian anti-discrimination jurisdictions in that a preliminary attempt at settlement through conciliation is a mandatory pre-requisite to formal adjudication. In some jurisdictions the conciliating body is separate from the adjudicating body.

Claims that cannot be resolved at conciliation must generally be prepared for hearing and heard according to procedures that require the parties to document their respective cases, disclose relevant documents and give evidence at a public hearing. In most jurisdictions legal representation is allowed, either with leave or as of right.

- Other types of claims initiated in Fair Work Australia generally follow a two-stage process, involving initial conciliation conducted by Fair Work Australia, with unresolved complaints proceeding to a hearing in the Federal Court. While initial conciliation will normally occur within a few weeks after lodgement of a claim, the progression of a claim through the Federal Court to hearing will normally take between six and 12 months.
- Initial conciliation of an unlawful discrimination complaint made to the Australian Human Rights Commission will usually follow within two to three months after lodgement of the complaint. A complainant with an unresolved complaint then has 60 days within which to elect to pursue their complaint to a hearing in the Federal Court, where progression of the matter to hearing will normally take another six to 12 months.

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### 8.3 How long do employment-related complaints typically take to be decided?

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The time for determination of any complaint will depend on the nature of the complaint, the jurisdiction in which it is brought and numerous other variables. As examples:

- Initial conciliation of an unfair dismissal claim by Fair Work Australia will normally occur within a few weeks or less and, if the matter is unresolved, the parties can normally expect it to proceed to hearing within a matter of two to four months or so following the conciliation.

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### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

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While it is possible to appeal an unfair dismissal decision to a full bench of Fair Work Australia, permission to appeal is required and permission will not be granted unless the full bench considers it is in the public interest to do so. Appeals are normally heard and determined within three to four months of the decision at first instance.

Federal Court decisions in employment and human rights matters can also be appealed, usually to a full bench of the Federal Court, although a Federal Court judge sitting alone can hear appeals from Federal Magistrates. Determination of these kinds of appeals can be a lengthy process, taking up to 12 months or more from the original decision.



**Andrew Tobin**

HopgoodGanim Lawyers  
Level 8, Waterfront Place, 1 Eagle Street  
Brisbane QLD 4000  
Australia

*Tel:* +61 7 3024 0313  
*Fax:* +61 7 3024 0013  
*Email:* [a.tobin@hopgoodganim.com.au](mailto:a.tobin@hopgoodganim.com.au)  
*URL:* [www.hopgoodganim.com.au](http://www.hopgoodganim.com.au)

Andrew Tobin leads HopgoodGanim's Industrial and Employment Law practice. He specialises in all aspects of industrial and employment law, equal opportunity and discrimination law, safety and privacy.

From front-end bargaining and agreement composition to dispute management, Andrew is committed to obtaining a depth of understanding that will ensure that his team develops the most effective strategy to manage issues to successful outcomes for clients.

Andrew is a current member of the Australian and Queensland Industrial Relations Societies and is an approved mediator with the Queensland Law Society. He is also an accomplished speaker and writer in the employment law arena.

**Damon King**

HopgoodGanim Lawyers  
Level 8, Waterfront Place, 1 Eagle Street  
Brisbane QLD 4000  
Australia

*Tel:* +61 7 3024 0418  
*Fax:* +61 7 3024 0518  
*Email:* [d.king@hopgoodganim.com.au](mailto:d.king@hopgoodganim.com.au)  
*URL:* [www.hopgoodganim.com.au](http://www.hopgoodganim.com.au)

Damon King is a Solicitor in HopgoodGanim's Industrial and Employment Law team. He advises clients on the full range of legal issues associated with industrial and employment law, including unfair dismissal, discrimination, serious injury, workplace bargaining, workplace policies and procedures, independent contractor agreements, and redundancy.

Damon has advised clients in a variety of sectors, including government agencies, blue-chip insurers and large employers. He has extensive experience conducting alternative dispute resolution, including mediation, to resolve employment-related disputes.

Damon holds qualifications in Laws from Queensland University of Technology and was admitted to practice in 2000. He is currently studying towards a Master in Laws, majoring in labour relations.



Based in Brisbane, Australia, HopgoodGanim Lawyers offers a full range of corporate and commercial legal services, in addition to housing one of Australia's largest family law practices.

With a strong and healthy internal culture, the firm's legal professionals work together to deliver commercially-effective advice and solutions to meet our clients' business needs.

Since its establishment in 1974, HopgoodGanim has remained a proudly independent firm. We are one of the largest law firms in Queensland, but still at a size that allows us to remain efficient and competitive, and to provide the highest quality of service to clients throughout Queensland, across Australia, and on international transactions.

Headed by Managing Partner Bruce Humphrys, the firm today stands at 200 people including 25 partners.

# Austria



Dr. Roland Gerlach



Mag. Branco Jungwirth

## Gerlach Rechtsanwälte

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main source of employment law are various statutory regulations, governing all aspects of labour and employment law, for example the white colour workers statute (*Angestelltengesetz*), work statute on working time (*Arbeitszeitgesetz*), statute on paid vacation (*Urlaubsgesetz*), etc. Apart from these statutory regulations employment contracts are governed by collective agreements and it is noteworthy that nearly every single employment contract falls under a collective agreement. In Austria, an employee doesn't have to be a member of a trade union to fall under a collective agreement. Further, it is not possible to opt out of such agreements.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

All dependent workers are protected by employment law, however, some rules do not apply to the management of a company. As in other jurisdictions, the law distinguishes between white colour workers and blue colour workers.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Employment contracts do not have to be in writing. Employers are requested by statutory law to provide their workers with written information about the terms and conditions of their employment. These "*Dienstzettel*" do not have to be signed by the worker and in case of a court case, are not considered as evidence, as they are just declarative notices which are overruled by the verbal and written employment agreements.

#### 1.4 Are any terms implied into contracts of employment?

Only very abstract terms are implied into employment contracts, such as the employer's duty to care for the employees and the employee's duty to be faithful against the employer.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

There is a huge variety of terms and conditions that employers have to observe, for example the relations as to the maximum working

hours, to the minimum amount of paid holiday and sick leave, minimum notice periods, etc. It is a principal of Austrian employment law that contractual terms and conditions opposing statutory law or collective agreements are considered null and void. It is not possible out of the protection provided by statutory law and collective agreements.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective agreements are concluded between the trade unions and the employers associations on industry level. Collective agreements on company level are a very rare exception to that rule. The coverage of collective agreements is nearly 100%.

### 2 Employee Representation and Industrial Relations

#### 2.1 What are the rules relating to trade union recognition?

The notion of trade union recognition is unknown to Austrian labour law. The employers' associations negotiate collective agreements with the trade unions on an annual basis and the companies are legally obliged to abide by the respective collective agreements.

#### 2.2 What rights do trade unions have?

The most important right is to negotiate collective agreements, in bigger companies they can even become members of the works council.

#### 2.3 Are there any rules governing a trade union's right to take industrial action?

No, in Austria no statutory regulation on industrial action exists.

#### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

In companies with more than five workers the workers are allowed to set up works councils. The number of the members of a works

council depends on the numbers of employees represented. Works councils can conclude works council agreements with the employer in such matters where statutory law or collective agreements explicitly empower the works council. In a small number of matters, especially where the dignity of the employees can be affected or in data protection matters the works council can force the employer into concluding a collective agreement and/or the employer must not take certain measures without the prior conclusion of a works council agreement. Works council representatives are elected for a four-year period by the workers.

**2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?**

See above.

**2.6 How do the rights of trade unions and works councils interact?**

Works council representatives are very often members of the trade unions, although this is not a prerequisite. The unions provide legal support to the works council, especially in larger companies.

**2.7 Are employees entitled to representation at board level?**

Works councils are entitled to delegate representatives to the supervisory board of companies where they represent one third of the board members. In the absence of a works council there is no employee representation at board level.

### 3 Discrimination

**3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?**

It is unlawful to discriminate on grounds of sex, race, age, sexual orientation, personal beliefs and handicaps.

**3.2 What types of discrimination are unlawful and in what circumstances?**

Discrimination on the above-mentioned grounds is prohibited in every stage of the employment relation, starting with the application for a job and ending with the termination of the employment contract. Further discrimination is to harass with a special emphasis on sexual harassment.

**3.3 Are there any defences to a discrimination claim?**

With the acceptance of direct sexual discrimination the employer may legitimate a discriminatory practice on account of objective reasons (for example, a Greek restaurant would be free to hire only Greek waiters and waitresses).

**3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?**

Employees can enforce the discrimination rights at the ordinary labour courts or in special commissions set up by law for that

purpose. Employers are free to offer settlements before and after claims are initiated, however, the equal opportunity commission can further investigate into the discriminatory behaviour even if the employee has accepted a settlement.

**3.5 What remedies are available to employees in successful discrimination claims?**

Employees may claim financial compensation and courts are usually awarding rather small amounts. Further courts can order the employer to take back a discriminatory measure.

## 4 Maternity and Family Leave Rights

**4.1 How long does maternity leave last?**

Eight weeks prior and after giving birth, up to twelve weeks in case of a Caesarean. Further, women can stay at home up to two years and are legally entitled for the same or an equivalent position after returning back to work.

**4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?**

In the 16-week period before and after giving birth women receive the same salary. If they decide to stay at home up to two years women will not receive any money from the employer but are entitled to financial support from the state.

**4.3 What rights does a woman have upon her return to work from maternity leave?**

See above.

**4.4 Do fathers have the right to take paternity leave?**

Mothers and Fathers may share maternity leave with the acceptance of the 16-week period before and after birth.

**4.5 Are there any other parental leave rights that employers have to observe?**

Mothers and Fathers are entitled to claim part-time work up to the seventh birthday of their child with the employer having to ask the labour court for permission to terminate the employment contract during that period.

**4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?**

See above.

## 5 Business Sales

**5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?**

Yes, the automatic transfer is provided by statutory law.

## 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

All individual rights remain unaffected from a business sale, however, the collective agreement of the new employer will replace the former one.

## 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

It is provided by statutory law that the works council or, in the absent of a works council, the individual employees must be informed of a business sale. However, the duty to inform will not delay the transaction in most circumstances. Works councils may be entitled to bargain a works council agreement on the consequences of a business sale.

## 5.4 Can employees be dismissed in connection with a business sale?

Employees can be dismissed after a business sale, however, the employer has to establish that reason for terminating is not the transaction *per se*.

## 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Since individual rights remain unaffected by a business sale, the new employer is not entitled to unilaterally change terms and conditions of the employment.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The notice period is defined by statutory law and has to be between six weeks and five months. Some collective agreements provide for longer notice periods.

### 6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

Employers are entitled to send employees on “garden leave” whenever they wish to do so.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employees may claim reinstatement at the labour courts after having been dismissed. It is then up to the employer to establish objective business needs and/or disciplinary or other personal reasons for the dismissal. Some protected group of workers, such as mothers and fathers during part-time work, works council members, handicapped, etc. may only be dismissed after the employer has received permission by the labour court, in the case of handicapped workers, by the equal treatment commission.

## 6.4 Are there any categories of employees who enjoy special protection against dismissal?

See above.

## 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

See above.

## 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

If a works council exists the works council has to be involved in individual dismissals. Failure to consult the works council makes the dismissal null and void. However, the works council cannot prevent the employer from dismissing, but can file a law suite in a name of a dismissed employer under certain circumstances.

## 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

See above, the employee can file for reinstatement.

## 6.8 Can employers settle claims before or after they are initiated?

Yes, employers can try to reach a settlement at any stage of the proceedings.

## 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

The law provides for a duty of the employer to notify the unemployment authorities in case of so-called “mass dismissals”, starting with five dismissals within a month (in companies with 20 to 100 employees, bigger companies have different criteria).

## 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

In case the employer fails to notify the unemployment authorities the dismissal would be considered null and void. Additionally, employees are entitled to file for reinstatement even in the case of mass dismissals.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

It is admissible to insert a clause into an employment contract preventing the employee from any form of competition for a maximum period of one year after the contract has been terminated by the employee, after the agreed period of time or in mutual agreement. Further, employees can contractually agree to return costs for trainings up to a certain extent unless the contract has been terminated by the employer.

**7.2 When are restrictive covenants enforceable and for what period?**

Such clauses are enforceable at the labour courts.

**7.3 Do employees have to be provided with financial compensation in return for covenants?**

Employees are not entitled to financial compensation in return for covenants.

**7.4 How are restrictive covenants enforced?**

See above.

**8 Court Practice and Procedure****8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?**

The jurisdiction falls into the competence of the local labour courts where senates are composed of one judge and two lay judges.

**8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?**

Labour and employment disputes generally follow the procedural rules of civil law claims with certain exceptions. Conciliation is not mandatory and occurs only rarely.

**8.3 How long do employment-related complaints typically take to be decided?**

Employment-related complaints are very often settled either in front of the judge or out of court. If no settlement is possible claims will normally take one to two years to be decided by the first instance court.

**8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?**

Appeals against first instance decisions are always possible and will regularly take another four to eight months. In certain cases of specific importance another appeal to the Supreme Court would be possible, again involving another six to ten months.

**Dr. Roland Gerlach**

Gerlach Rechtsanwälte  
Köllnerhofgasse 6  
A - 1010 Wien  
Austria

Tel: +43 1 512 77 89  
Fax: +43 1 513 88 48  
Email: [roland.gerlach@arbeitsrecht.at](mailto:roland.gerlach@arbeitsrecht.at)  
URL: [www.arbeitsrecht.at](http://www.arbeitsrecht.at)

Roland founded the law firm Gerlach Rechtsanwälte in 2011. Formerly he was partner of Griesser-Gerlach-Gahleitner, a distinguished boutique law firm practising exclusively labour and employment law. Excelling in this practice area Roland has regularly been listed in the top tiers of Austria's employment lawyers in various international publications.

Roland is convinced that it is of great importance to never lose the conspectus of the whole subject, for which reason he advises employers as well as employees and refuses to get caught in conflicts of ideologies, but prefers quick, effective and lasting solutions on either side. Thus he advises national and multinational corporations as well as individuals on all aspects of individual/collective labour law and social security law. His main areas of practice include employment law aspects of corporate restructuring, the human resource aspects of mergers and acquisitions, (management) employment contracts just as management contracts and occupational pension schemes. Litigation forms another aspect of the firm's strong presence in Austrian employment law.

Roland is author of a wide range of publications and is now working on a comprehensive handbook on employment contracts. He regularly lectures at seminars for employment and human resources specialists just as national and international congresses, especially on the comparative view of Employment law in different countries of the EU.

Trained at the University of Vienna Roland received his Doctor iuris in 1988. He was admitted to the Austrian Bar in 1993 and is a graduate from the London School of Economics.

In the European Employment Lawyers Association (EELA) Roland acts as Austria's representative and besides he is member of the Industrial Law Society (ILS), Law & Society, American and International Bar Association (ABA and IBA).

**Mag. Branco Jungwirth**

Gerlach Rechtsanwälte  
Köllnerhofgasse 6  
A - 1010 Wien  
Austria

Tel: +43 1 512 77 89  
Fax: +43 1 513 88 48  
Email: [branco.jungwirth@arbeitsrecht.at](mailto:branco.jungwirth@arbeitsrecht.at)  
URL: [www.arbeitsrecht.at](http://www.arbeitsrecht.at)

Branco Jungwirth is founding partner of Gerlach Rechtsanwälte and was associate in the law firm Griesser-Gerlach-Gahleitner. He advises on all areas of individual and collective labour and employment law, such as restructuring processes, the human resource aspects of mergers and acquisitions, employment contracts and occupational pension schemes as well as litigation. Branco was trained at the University of Vienna and he was admitted to the Austrian Bar in 2011. He also lectures and is publisher/author of a Practical Handbook of Employment Law ("*Das aktuelle Arbeitsrecht in der Praxis*", Forum Verlag).

**GERLACH**  
Rechtsanwälte

Gerlach Rechtsanwälte was founded in 2011 by Roland Gerlach and Branco Jungwirth. The firm remains true to the realm of labour and employment law, which also has been the focus of Griesser-Gerlach-Gahleitner, where both were members until the closing down at the end of 2010.

Excelling in labour and employment law and always focused on the individual and economic requirements Gerlach Rechtsanwälte provides for clarity in existing disputes and obviation of controversies in the future. In this way the team develops together with the clients the best possible solutions:

- made-to-measure in the detail as well as on the whole
- swift
- comprehensible
- sustainable

Consequently Gerlach Rechtsanwälte set a high value on a holistic view of employment law: Roland and Branco represent employers as well as employees, stay in close contact with universities as well as international bar associations and frequently publish in scientific journals.

# Belgium



Jan Hofkens



Alexander Vandenberghe

Lydian

## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The Belgian federal parliament governs employment law. Employer/employee relations are mainly governed by labour law, collective bargaining agreements (CBAs) (please see question 1.4), work regulations (company level) and individual employment contracts. Their main aim is to define employees' and employers' rights and obligations. They lay down rules on matters such as hiring and dismissing employees, pay protection, working time, work conditions, minimum holidays and equal pay for men and women.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Employment law protects workers with an employment agreement, not independent contractors.

Employees in Belgium are workers performing manual work, so-called blue-collar workers or workers performing intellectual work, so-called white-collar workers. This distinction is currently under huge debate in Belgium.

Besides this distinction, different rules apply for sales representatives, students, homeworkers and house servants.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Written employment contracts are only mandatory for specific contracts, such as (a) fixed-term contracts, (b) contracts for the completion of a specific task, (c) part-time contracts, (d) student contracts, etc.

It is, however, always advisable to draft a written contract to avoid evidential problems.

Some clauses, such as those relating to a trial period or non-compete agreement are only valid if set out in writing.

### 1.4 Are any terms implied into contracts of employment?

The employment relationship is not solely governed by the express terms in an employment contract. The employment conditions that are set out in statutes or CBAs are automatically implied in the contract. Other sources of law, such as work regulations and customs or practices, have an impact on the employment relationship.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes, all labour law statutes provide for minimum employment terms.

The main statutes that provide minimum terms and conditions in employment are:

- Work Regulations Act 1965.
- Remuneration Protection Act 1965.
- Working Time Act 1971.
- Annual Leave Act 1971.
- Public Holidays Act 1974.
- Employment Contracts Act 1978.
- Social Documents Act 1978.
- Temporary Work Agencies Act 1987.
- Well-being at Work Act 1996.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining is the key mechanism through which labour standards are established and maintained. A multi-industry agreement creates a formal framework for all collective labour agreements and is concluded every two years. A number of CBAs are concluded within the National Labour Council. They apply to all Belgian employers and employees.

CBAs at industry level are negotiated and concluded within so-called Joint Labour Committees (*"Paritair comité / Comité paritaire"*) i.e. a committee for a certain industry sector composed of an equal number of representatives of the employers' associations and trade unions and is presided over by a government-appointed social mediator. Many are extended by royal decree to become generally binding to all employers in a particular sector or geographical area. The main business of the employer determines which industry sector it belongs to.

CBAs are also concluded at company level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The Act on CBAs and Joint Labour Committees of 5 December

1968 (Act of 1968) defines the criteria for trade union recognition. Trade unions recognised as a representative must:

- be an inter-professional organisation of employees;
- be set up for the entire country (Flemish, Brussels and Walloon Region);
- have at least 50,000 members; and
- be represented in the Central Council of trade and industry and the National Labour Council.

Currently, three trade unions meet the representativeness criteria: ACV/CSC; ABVV/FGTB; and ACLVB/CGSLB.

All subdivisions of (recognised) trade unions are also recognised as being representatives.

## 2.2 What rights do trade unions have?

Trade unions have no corporate rights. However, in some cases, trade unions are granted a limited functional corporate existence by law, giving them the right to, for example:

- sign CBAs;
- take legal action in case of disputes relating to the Act of 1968;
- take legal action to protect their members' rights; and
- take legal action to protect the principle of equal treatment for men and women or in case of disputes relating to the non-discrimination issues, racism and xenophobia.

## 2.3 Are there any rules governing a trade union's right to take industrial action?

No specific rules exist on this matter. Therefore, trade unions are, in principle, entitled to take industrial action at any time.

It is common practice to limit the rights to take industrial action in CBAs. The enforceability of such clauses is discussed.

## 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

An employer with, on average, 100 or more employees must organise social elections in order to establish a Works Council (WC).

The WC is made up of management representatives and employee representatives. WC employee representatives are elected through social elections that take place every 4 years. The next social elections are scheduled in 2012. Management representatives are appointed by management.

The WC:

- is entitled to receive information on business operations of the company;
- must consult and negotiate with the employer before a collective dismissal, a plant closure or any substantial change in the company's structure;
- must examine which initiatives can be taken to increase co-operation between management and personnel and make recommendations on the organisation of work and work conditions with a view to increasing productivity;
- introduces and amends the work regulations;
- advises on the standard for hiring and dismissing personnel;
- fixes the period of the annual vacation in agreement with management; and

- agrees on the appointment of the statutory auditor.

## 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Except in exceptional cases (ex. drafting and amending of the work rules) co-determination rights do not exist in Belgium. The WC does, in principle, not interfere with business decisions.

The WC has an advisory role and is entitled to receive information on all business operations of the company. It must therefore be consulted before every substantial company's structure change, such as a collective dismissal or a plant closure.

## 2.6 How do the rights of trade unions and works councils interact?

Trade unions unilaterally select which employees appear on the lists for the social elections. In this way they indirectly exert an influence on WCs.

## 2.7 Are employees entitled to representation at board level?

Employees are not entitled to representation at board level.

# 3 Discrimination

## 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes, three Acts, all dated 10 May 2007, prohibit both direct and indirect discrimination in employment matters. These Acts contain a list of criteria which cannot be used to make a distinction in treatment. Some criteria are the same as those protected under EC legislation, but the list also includes other criteria.

1. The General Discrimination Act prohibits and sanctions discrimination based on age, sexual orientation, disability, religion or belief, marital status, birth, wealth, political or trade union beliefs, language, present or future health status, physical or genetic characteristics and social origin.
2. The Racism Act prohibits and sanctions discrimination based on nationality, race, skin colour, background, and national or ethnic origin.
3. The Sex Discrimination Act prohibits and sanctions discrimination based on sex.

## 3.2 What types of discrimination are unlawful and in what circumstances?

Direct discrimination based on a criterion that is also protected under EC legislation is forbidden, unless such distinction can be justified by a genuine and determining occupational requirement. In employment matters and labour relations, most often no such justification exists. Direct discrimination based on another criterion is forbidden, unless the distinction in treatment can be objectively and reasonably justified.

Indirect discrimination occurs where, owing to one of the protected criteria, an apparently neutral provision or practice puts a certain group of people at a particular disadvantage compared to other people. Such provisions or practices constitute indirect discrimination unless they are objectively justified by a legitimate



aim and the means of achieving that aim are appropriate and necessary.

### 3.3 Are there any defences to a discrimination claim?

The employer must prove that the action taken was not discriminatory or that he had a good cause or a legitimate non-discriminatory reason for its action.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

The employee can:

- contact the Social Legislation Inspectorate who will initiate a reconciliation process to end discrimination; or
- directly begin legal proceedings.

Employees raising a complaint on the ground of breaching discrimination legislation are protected against dismissal for reasons related to filing the complaint.

An employee can, in principle, only sign a valid settlement agreement after termination of his employment contract. Whether or not the employee has introduced an official claim has no impact on the signing of a settlement agreement.

### 3.5 What remedies are available to employees in successful discrimination claims?

Victims of discrimination are entitled to a compensation of six months' salary. An employer breaching the Discrimination Acts risks civil and criminal penalties.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Mothers are entitled to 15 weeks' maternity leave. They must take at least one week before the birth and at least nine weeks after the birth.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

The employment contract is suspended during maternity leave and the employees are entitled to social security benefits (that is, a maternity allowance). The allowance amounts to 82% of the normal (non-topped up) remuneration (during the first 30 days) and 75% of a (topped up) remuneration as from the 31st day until the end of the maternity leave.

As from the moment a pregnant employee informs her employer about her pregnancy until 1 month after the end of maternity leave, she is protected against dismissal for reasons related to her pregnancy or birth giving.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

Mothers must be given the same function and other employment conditions as before. They can convert two weeks of their maternity leave into vacation days which they can take when they return to work.

### 4.4 Do fathers have the right to take paternity leave?

Yes. Fathers are entitled to ten days' leave within a four-month period after the birth of a child. The employer pays employees on paternity leave for the first three days and the other seven are covered by sickness insurance.

### 4.5 Are there any other parental leave rights that employers have to observe?

Yes. Parental leave rights consist in the full or partial suspension of the employment contract. In case of full suspension of their contract, mothers and fathers can take a parental leave of 3 months before their child is 12 years. The same exists in case of adoption. Subject to certain conditions, employees are entitled to a career interruption allowance, i.e. an allowance paid by the social security.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Employees who need to care for a very sick family member can take leave under certain conditions. They are either entitled to:

- A complete suspension of their employment contract for a maximum period of one year.
- A 50% or 20% reduction in their full working hours for a maximum period of two years.

During this leave, employees can claim a monthly career interruption allowance (see above, parental rights).

Similar rights apply to employees who interrupt their career to assist in the palliative care of a person who is suffering from an incurable disease and is terminally ill.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

If a business is transferred and falls within the scope of CBA 32 bis, all existing employment contracts will be automatically transferred to the buyer. A new contract must not be signed.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

All individual rights and duties arising from employment contracts that exist on the date of the transfer are automatically transferred. This is also applicable for rights and duties arising from CBAs.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The employer must inform and/or consult the WC (or in its absence, the trade union delegation or in its absence, the HSC) prior to the business transfer or in some cases, the employees individually. The process can take from 1 day to 1 month.

The employer's decision is not in danger. An employer breaching the I&C risks criminal penalties.

#### 5.4 Can employees be dismissed in connection with a business sale?

The business transfer as such is not a reason to end the employment contract. This rule applies to both the former and new employer. Employees dismissed due to a business transfer can therefore claim compensation in lieu of notice unless the employer proves an economic, technical or organisational reason for the dismissal involving a change of workforce.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

The buyer is not entitled to change important individual or collective employment conditions unilaterally after the transfer. However, to comply with anti-discrimination law, the buyer may be required to negotiate harmonised employment conditions.

## 6 Termination of Employment

#### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

An employer is entitled to terminate an employment contract for an indefinite term by serving notice on the employee or by paying a severance payment in lieu of notice.

Different rules apply to blue-collar workers and white-collar workers to determine the notice period:

- The notice period to be observed in case of dismissal of a blue-collar worker depends upon the length of service with the company.

Length of service (in years)	Notice period (in days)
> 20	112
Between 15 and 20	84
Between 10 and 15	56
Between 5 and 10	42
Between 0.5 and 5	35
< 0.5	28

- The notice period to be observed in case of dismissal of a white-collar worker depends upon the gross annual remuneration and the length of service with the company.
  - White-collar workers with an annual remuneration of less than EUR 30,535 are entitled to a notice period equal to 3 months per commenced period of 5 years of continuous service at the company (legal minimum).
  - White-collar workers with an annual remuneration of more than EUR 30,535 are entitled to a reasonable notice period to be agreed at the earliest at the time of dismissal, or failing that, by the Labour court. The Claeys formula (based on a statistical analysis of case law) is often used to estimate the “reasonable notice”. As a general rule, an employer should give 1 months’ notice for each year of continuous service.

#### 6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

Yes, that is possible.

#### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employees with an indefinite employment contract are protected because they can only be dismissed by serving notice or by paying a severance payment.

No prior approval from a third party agency is required for dismissing employees, unless for candidates and members of the WC or Health Safety Committee (see question 6.4).

#### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Some employees are specifically protected against dismissal. This does not mean that the employer is prohibited from dismissing them. An employer remains entitled to dismiss said employees, but must follow a special procedure and must prove that the reason for the dismissal is not the reason for protection.

Most important categories of protected employees are:

- candidates and members of the WC or HSC (only to be dismissed for an economic or technical reason, with prior approval of the joint labour committee, or for a serious cause with prior approval of the labour court), members of the trade union delegation;
- pregnant employees; and
- employees who have made a formal complaint for harassment, discrimination, etc.

#### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

A justification or cause is in principle not necessary to dismiss an employee, except in case of a dismissal for serious cause or in case of a special protection from dismissal (see question 6.4).

The dismissal must however not be unfair.

In case of unfair dismissal, blue-collar workers are entitled to six months’ salary. A dismissal is considered unfair if the employer cannot prove the dismissal is based on economic grounds, or on the workers’ incompetence or attitude.

White-collar workers are also entitled to compensation for unfair dismissal but they must prove that the employer abused its right to dismiss and that this fault caused damage apart from the job loss, which is already compensated by the severance payment.

#### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

The employer has to follow strict formalities. Notice must:

- be in writing in the appropriate language (depending on the location of the company’s place of business);
- be sent by registered mail or bailiff’s writ; and

- clearly indicate the start date and duration of the notice period.

### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

Employees can claim (additional) severance payment or other indemnities (for example, for unfair dismissal).

### 6.8 Can employers settle claims before or after they are initiated?

Parties often sign a settlement agreement to close or avoid disputes concerning the termination of their contract.

The agreement may not be entered into prior to the termination of the contract and implies mutual concessions. By signing the settlement agreement, parties waive statutory and contractual rights.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

In that case the rules on collective dismissals can apply. This means that:

- Prior to the decision of collective dismissal, the WC (or trade union delegation or HSC) must be informed and consulted (I&C procedure). The employer must examine all alternative proposals to prevent restructuring or to mitigate the social consequences.
- Upon closing the I&C procedure, the formal decision of the collective dismissal must be notified to several authorities.
- No dismissals must be made during a 30 (or 60)-day period after this notification.
- A social plan must be drafted, containing rules on special redundancy payments and early retirement.
- An Employment Unit Cell must be set up to help employees find new jobs.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

There is a specific procedure provided in Belgian regulation to enforce their rights. Frequently, employees use industrial action.

Employees can go to court and force the employer to comply with mass dismissals regulations. An employer breaching the regulation on mass dismissals risks civil (payment of specific collective dismissals indemnities, re-instatement) and criminal penalties.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Only post-termination non-compete clauses are regulated. Post-termination non-compete clauses are only valid if the employee's gross salary exceeds EUR 30,535. If the remuneration does not exceed EUR 61,071 the non-compete clause will only be valid for employees whose functions appear on a list determined by collective agreement. If the remuneration exceeds EUR 61,071 the non-compete clause is in principle valid.

The non-compete clause:

- must be in writing;
- must address similar activities carried out by the employer and the employee;
- should be geographically limited and may not extend beyond Belgian territory (companies with international activities or with a research centre may conclude non-compete clauses for a wider geographic area of application);
- must be restricted in time (see question 7.2); and
- must provide compensation (see question 7.3).

A post-termination covenant not to solicit is, in principle, recognised and valid, insofar as it does not entirely exclude the ex-employee's freedom to provide services.

### 7.2 When are restrictive covenants enforceable and for what period?

The non-compete clause is only enforceable after the probationary period if the employee terminates the employment contract (without serious cause) or if the employer terminates the employment contract for a serious cause. The non-compete clause must not exceed 12 months (companies with international activities or with a research centre may conclude non-compete clauses for a longer duration).

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

The non-compete clause must provide for the payment of a lump sum compensation of at least ½ of the gross remuneration equal to the duration of the clause. If the employer waives the non-compete clause within 15 days following the termination of the employment contract, no compensation is due.

### 7.4 How are restrictive covenants enforced?

The employee/employer must send a notice of default to the employer/employee or go to court to enforce his rights.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The competent courts are labour tribunals in first instance and labour courts in appeal.

The claimant should generally summon the defendant before the labour tribunal of the place where the employment is executed by the employee.

Every chamber of a labour tribunal has three judges: one professional judge as president; and two judges in social matters, of which one is appointed by an employers' organisation and the other by a trade union. Every chamber of a labour court has three or five judges: one professional judge as president; and two or four judges in social matters depending on the importance of the dispute, of which half are appointed by an employers' organisation and the other half by an employees' organisation (trade union).

## 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

A dispute is brought before the labour tribunal by a writ of summons, though a petition can also be used. Appeal before a labour court is generally done by petition.

Shortly after serving the writ of summons or the petition, parties are requested to appear for an introductory hearing. In general, a calendar for written briefs is agreed upon at the introductory hearing and a date is set for oral pleadings. Parties take turns in developing their arguments in written briefs, the first and last brief normally being for the defendant. Afterwards, oral pleadings take place on the set date. The judgment usually takes place about one month after the oral pleadings.

For certain matters, conciliation is mandatory before starting legal proceedings. In reality, mandatory conciliation is rather useless and it is simply noted on the records of the tribunal's session that there was a conciliation attempt.



### Jan Hofkens

Lydian  
Tour & Taxis, Avenue du Port 86c Box 113  
1000 Brussels  
Belgium

Tel: +32 2 787 90 37  
Fax: +32 2 787 90 99  
Email: [jan.hofkens@lydian.be](mailto:jan.hofkens@lydian.be)  
URL: [www.lydian.be](http://www.lydian.be)

Jan graduated with a degree in law in 1992 from the Catholic University of Leuven (KUL). In 1993, he received a further bachelor's in tax sciences at the Brussels Tax College (EHSAL). From 1993 to 2002 he was an attorney with Stibbe.

On 1 January 2003 he joined Lydian, where he represents both companies and executives in employment counseling and transactions. He has +17 years' experience in the full range of employment law, with a special focus on company restructurings, negotiation of severance packages for senior executives and drafting of HR policies.

Jan is also a Registered Forensic Auditor at the Belgian Institute for Forensic Auditors (IFA), and he lectures at the Master course in Forensic Auditing at the University Management School of Antwerp (UAMS).

He has written numerous articles on issues of labour law. Since 1 January 2010, he has also been the managing partner of Lydian.

## 8.3 How long do employment-related complaints typically take to be decided?

This strongly depends on the complexity of the matter and especially the delay of the tribunal. As a general rule it would take about one year from the introductory hearing to the judgment.

## 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Filing an appeal against a first instance decision of the labour tribunal is possible in the vast majority of cases. The duration of the procedures before the labour courts also depend on complexity and the delay of the court. The proceedings will generally take about one year.

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### Alexander Vandenberghe

Lydian  
Tour & Taxis, Avenue du Port 86c Box 113  
1000 Brussels  
Belgium

Tel: +32 2 787 90 75  
Fax: +32 2 787 90 99  
Email: [alexander.vandenberghe@lydian.be](mailto:alexander.vandenberghe@lydian.be)  
URL: [www.lydian.be](http://www.lydian.be)

Alexander graduated in 1991 as a licentiate in law from the Catholic University of Leuven (KUL). He also studied European law at the University of Edinburgh.

From 1991 to 1999 he was an attorney at Loeff Claey's Verbeke (now Allen & Overy). In 1999 he was made a Director at KPMG Tax & Legal Advisers. He left on 1 January 2001 to found Lydian. Within the firm, he deals with all aspects of employment law and pensions law. His practice concentrates on two specific niches: (i) collective labour law issues with particular emphasis on the labour law aspects of large corporate reorganisations; and, (ii) specific projects in the area of pensions (i.e. restructuring or winding down of pension schemes, complex litigation, etc.).

Alexander is a member of the International Pension and Employee Benefits Lawyers' Association, of the European Employment Lawyers' Association and of the American Chamber of Commerce.

**LYDIAN**  
lawyers

Lydian is one of the largest independent full-service business law firms in Belgium.

Its practice areas include: commercial & litigation; insurance & reinsurance; corporate & finance; employment; pensions & benefits; and regulatory, real estate & environment.

The firm currently has around 67 lawyers working in its offices in Brussels and Antwerp. As one of Belgium's leading independent law firms, we have earned an impressive reputation in the area of employment & labour law, both nationally as well as internationally.

Lydian frequently handles referral cases from prestigious law firms outside Belgium.

Lydian recently strengthened its corporate practice with new partner Patrick della Faille and its tax practice with Geert De Neef.

Lydian's lawyers are recommended in leading legal publications such as Chambers and Legal 500. Lydian is recommended for its 'pragmatic, knowledgeable and comprehensive advice' (Legal 500).

# Colombia

Lorena Arámbula



Juanita Vera



## Cardenas & Cardenas Abogados

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main sources of employment law are:

- The labour code (Law 141 of 1961), as amended, and complementary laws.
- Laws, which govern similar cases (analogy).
- Jurisprudence.
- Custom or use.
- Doctrine.
- The conventions and recommendations adopted by the international organisations.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

All the individuals that render subordinated services in the Colombian territory are protected. Workers are distinguished depending on the duration of the contract, the type of salary, and the type of activity they develop.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

The employment contracts can be verbal or in writing. However, there are certain kinds of stipulations that are valid only if set forth in writing such as the stipulation of a trial period, or the stipulation of the so-called integral salary, or the stipulation of the duration of the contract for a fixed term rather than for an indefinite term.

#### 1.4 Are any terms implied into contracts of employment?

The following terms are implied into contracts of employment:

- Thirty days' notice to terminate fixed term contracts of longer than 1 month.
- Prior notice before application of some of the just causes of termination of employment.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The following minimum employment terms and conditions are set down by law:

- Minimum legal wage.
- Payment of mandatory labour benefits and vacation.
- Registration and contributions to social security and payroll taxes.
- Payment of indemnification to the employee in case of unilateral termination without just cause.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining mainly refers to stability on employment, yearly salary increase over the percentage determined by the Government and extralegal benefits, permits and licences.

Depending on the type of union (company union or an industry union) the bargaining takes place at company or industry level.

### 2 Employee Representation and Industrial Relations

#### 2.1 What are the rules relating to trade union recognition?

To be recognised, a trade union must follow the following rules:

- Employee's trade unions need a minimum of 25 members; employer's trade unions, need a minimum of 5 members.
- A preliminary meeting must be held to organise the union, and the name of all the members, their identification, the activity they follow and what binds them to each other, and the name and purpose of the association must be recorded in the corresponding minutes.
- The employer and the Labour Inspection must be notified of the intention to organise a union, indicating the names of the organisers and members of the Board Directors and their identifications.
- The union must be registered before the Ministry of Labour within the following 5 days after the preliminary meeting to organise the union was held.

#### 2.2 What rights do trade unions have?

Trade unions have the following rights:

- Association right.
- Negotiation right.
- Strike right.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

No specific rules exist in this regard.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

The employers are not required to set up formal works councils for negotiation of the collective bargaining agreement. They only need to designate representatives for the negotiation.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable in Colombia.

### 2.6 How do the rights of trade unions and works councils interact?

This is not applicable in Colombia.

### 2.7 Are employees entitled to representation at board level?

This is not applicable in Colombia.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected against discrimination. Employees may not be discriminated against due to age, sex, religion, race, political affiliation, economic condition or health condition (disability or illness).

### 3.2 What types of discrimination are unlawful and in what circumstances?

Any discrimination preventing access to employment, equal employment conditions or denying employment are unlawful.

### 3.3 Are there any defences to a discrimination claim?

Yes. For example in case of a *tutela* action or a labour harassment claim due to discrimination, the employer has the right to defence within the corresponding procedure to evidence a lack of discrimination activity.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

The employees may initiate *tutela* actions or administrative or judicial labour actions. The claims regarding discrimination rights may be settled before or after the claim has been initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

The following remedies are available:

- Reintegration to the job in case of termination of contract with payment.
- Granting of equal conditions of employment.
- Hiring in case the candidate complies with the required conditions for the job.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

The maternity leave is equivalent to twelve (12) weeks.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A woman has the following rights during maternity leave:

- Leave of absence of twelve (12) weeks, with pay.
- Protection not to be terminated without just cause and without the approval of the Ministry of Labour.
- If the termination takes place without the authorisation of the Ministry of Labour, the worker has the right to reintegration with payment of all the amounts not paid between the termination of the contract and the reintegration to the job.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

The woman has the right to two periods of rest, of thirty minutes each, during the work day, to feed the child, without any wage deduction, during the first 6 months after childbirth (approximately 3 months after returning to work).

The woman may also have the right to additional periods of rest when she presents a medical certificate as justification.

### 4.4 Do fathers have the right to take paternity leave?

The male workers (fathers) have the right to paternity leave equivalent to eight (8) business days, with pay, from the day of childbirth.

### 4.5 Are there any other parental leave rights that employers have to observe?

No additional parental leave rights are provided in the law (except in cases of abortion or adoption). Only those rights granted separately (i.e. additional days of leave agreed in employment contracts, collective bargaining agreements, etc.) need to be observed.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Only in case the parties agree on flexi-time work. The entitlement to work flexibly is not mandatory by law.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Yes. On a business sale (if the employees' activity is continued) the employees automatically transfer to the buyer under the employer's substitution figure.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

A business sale does not extinguish, suspend or modify the existing employment contracts; thus, all the employees' rights are transferred. The business sale should not affect the rights provided in collective agreements.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

From a labour point of view, the employer does not need to consult or inform the employees (nor the labour authorities) about the sale of a business.

### 5.4 Can employees be dismissed in connection with a business sale?

Yes, but the former or the new employer, to terminate the employment contract of some employees of the company, will have to pay the indemnification for termination of the contract without just cause and respect the legal provisions regarding protections against mass dismissals.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Employers are not able to change the terms and conditions based on the business sale. To modify the terms and conditions of employment, the express agreement of the employees will be required.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The following termination notices have to be given by employers:

- In fixed term contracts agreed for a fixed period of longer than 1 month, a termination notice has to be given by the employer at least thirty days before the expiration of the stipulated term.
- To apply some of the just causes provided in the law (i.e. retirement, etc.) the employer has to give 15 days' prior notice of the termination.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Yes, it will be possible.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

- i) Some employees have a special protection not to be dismissed without the existence of a just cause and without the prior authorisation from the Ministry of Labour (i.e. pregnant employees, employees on sick leave, handicapped employees, some union directors and board members, collective dismissal). If terminated without compliance of the above, they will have the right to claim reintegration to their jobs.
- ii) An employee is treated as being dismissed when the employment agreement is terminated unilaterally by the employer with or without just cause.
- iii) Yes, in cases of special protection (as explained in i) above), prior authorisation from the Ministry of Labour is required.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Please see the response to question 6.3 above.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

According to Colombian law, the employer could dismiss an employee based on the occurrence of a just cause, which are expressly listed in the law. In case no just cause exists, the employee will be entitled to receive an indemnification which should be estimated as follows:

- For contracts entered into for an indefinite term of duration, this indemnification applies as follows: (i) for employees with a salary of less than ten (10) minimum legal monthly salaries: thirty (30) days' salary for the first year of services plus twenty (20) additional days of salary for each of the years following the first and proportionally for the fractions; (ii) for employees with a salary of ten (10) minimum legal monthly salaries or more: twenty (20) days' salary for the first year of services plus fifteen (15) additional days of salary for each of the years following the first and proportionally for the fractions; and (iii) workers that on December 27, 2002 had ten (10) or more years of continuous service have the right to an indemnification equivalent to 45 days for the first year of service and 40 days for each year subsequent to the first and proportionally for the fractions.
- For contracts entered into for a fixed period of duration or for the duration of a specific job, the indemnification is equivalent to the salaries corresponding to the pending period of the contract, but in no event less than 15 days' salary.

### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

If an employer is going to terminate an employment agreement with just cause, first they will have to call the employee to hear his/her explanations on the charges (just cause). If the explanations are not satisfactory or sufficient to the employer, and if it wants to proceed with the termination, then it has to send a termination notice to the employee indicating the just cause. Also, according to the law and the jurisprudence, some of the just causes have a previous procedure that have to be followed (i.e. low performance requires at

least two notices asking the employee to improve performance); otherwise, eventually the employee could claim the payment of the indemnification for termination of the labour contract without just cause.

#### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

The employee can initiate *tutela* or ordinary labour actions claiming payment of any outstanding labour rights, indemnification for unilateral termination or reintegration to the job if dismissed when being under special protection (i.e. maternity leave, etc.). The remedies, depending on the claim, will be the payment of the corresponding amounts and sanctions, if applicable (updated) and reintegration to the job with payment of the outstanding amounts.

#### 6.8 Can employers settle claims before or after they are initiated?

Yes. It will be possible to agree the settlement of claims with the employee before or after they are initiated, by paying a settlement bonus.

#### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes. If an employer wants to dismiss a number of employees at the same time, the employer has to obtain prior authorisation from the Ministry of Labour (based on some specific causes provided in the law) to terminate the employment agreements; otherwise, it may be guilty of mass dismissal which will have the effect of the terminations being understood as not having occurred and therefore the personnel will have to be reintegrated to the jobs.

Once the authorisation has been granted, the employer can terminate the employment agreements by paying the corresponding indemnification for termination without just cause.

To avoid requesting the above indicated authorisation (which in some cases may be difficult to obtain), the employer may agree a termination with the employees by mutual consent by offering to pay a termination bonus which at least should be equivalent to the value of the indemnification plus an additional amount (to be attractive for the employees to agree on the termination by mutual consent).

#### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

If an employer does not obtain the authorisation from the Ministry of Labour indicated above to dismiss a number of employees at the same time, the dismissal (depending on the total number of employees working for the employer and the number of employees being terminated) could be considered as mass dismissal and therefore the employees could request before a court the reinstatement of their jobs and payments of all the labour obligations caused between the termination date and the reinstatement date.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

The restrictive covenants that do not violate the minimum rights established in the labour law or that are included in settlement agreements (either executed in private or before a labour court or a labour inspector which do not violate the legal labour rights) are recognised.

### 7.2 When are restrictive covenants enforceable and for what period?

The restrictive covenants are enforceable upon execution of the corresponding documents. There is no time limit to enforce them and they will be enforceable in accordance with the agreement of the parties.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Only in case of the execution of a settlement agreement; in which case it will have the effect of *res judicata* (the employee should waive some or all of his/her rights and the employer should compensate such waiver).

### 7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced through court proceedings.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The following courts and tribunals have jurisdiction:

- Supreme Court of Justice (Labour Appeals Court).
- Labour tribunals (second instance).
- Labour judges or judges with mixed jurisdiction.
- Other judges for *tutela* action.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Depending on the claim, the judicial procedures that apply to employment-related complaints are, *inter alia*: ordinary labour proceeding; enforcement proceeding; union immunity proceeding; cassation; arbitration; labour harassment action; and *tutela* action.

In employment-related complaints conciliation is not mandatory before a complaint can proceed.

### 8.3 How long do employment-related complaints typically take to be decided?

The time varies depending on the action and the court but for ordinary labour proceedings it may be estimated as follows:



- In first instance (labour judge), it can take between 6 months to 2 years.
- In the tribunal (second instance - Court of Appeal), it can take between 6 months to 2 years.
- In the Supreme Court of Justice (cassation), it can take 2 to 4 years.

#### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes. Please refer to the estimates above.



#### Lorena Arámbula

Cardenas & Cardenas Abogados  
Cra. 7 No. 71-52 Torre B Piso 9  
Bogota, D.C.  
Colombia

Tel: +57 1 313 7800  
Fax: +57 1 312 2410  
Email: [larambula@cardenasycardenas.com](mailto:larambula@cardenasycardenas.com)  
URL: [www.cardenasycardenas.com](http://www.cardenasycardenas.com)

**Education:** Universidad Externado de Colombia. *Specialist in Social Welfare*. Bogotá, Colombia. 2008; Universidad del Rosario. *Postgraduate Course in Labor Law*. Bogotá, Colombia. 2000; Universidad del Rosario. *Specialist in Financial Law*. Bogotá, Colombia. 1998; Pontificia Universidad Javeriana. *Lawyer*, Bogotá, Colombia. 1996.  
**Admitted to practice:** Colombia, 1996.  
**Languages:** Spanish and English.  
**Professional Experience:**  
Cárdenas & Cárdenas Abogados Ltda. Partner. Since 2008. Associate (1997 - 2007).  
Links S.A. Attorney - Secretary General (1996 - 1997).  
Jose Lloreda Camacho & Cia. Legal Assistant (1992 - 1995).



#### Juanita Vera

Cardenas & Cardenas Abogados  
Cra. 7 No. 71-52 Torre B Piso 9  
Bogota, D.C.  
Colombia

Tel: +57 1 313 7800  
Fax: +57 1 312 2410  
Email: [jvera@cardenasycardenas.com](mailto:jvera@cardenasycardenas.com)  
URL: [www.cardenasycardenas.com](http://www.cardenasycardenas.com)

**Education:** Universidad del Rosario. *Specialist in Labor law and Social Security*. 2010; Universidad del Rosario. *Lawyer*. Bogotá, Colombia. 2009.  
**Admitted to practice:** Colombia, 2010.  
**Languages:** Spanish and English.  
**Professional Experience:**  
Cárdenas & Cárdenas Abogados Ltda. Associate (Since 2010).  
Arboleda Valencia Asociados (2009-2010).  
Ferreira y Ruan Asociados - Practice (2006).



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# Cyprus

Nicholas Ktenas



Andrea Kallis



## Andreas Neocleous & Co LLC

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

Cyprus labour law is an area of law made up by case law and statute. Legislative instruments (for example, the Termination of Employment Law, 1967) govern certain aspects of an employment relationship whereas the employment relationship generally is based on ordinary contract law (Contract Law, Cap 149 as amended).

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Cyprus law distinguishes a contract of service (employment) from a contract of services (independent contractor). This distinction is important for two main reasons:

- for determining the payment of taxes and social insurance; and
- for the application of statutory employment and other rights, such as the right to statutory compensation for unlawful dismissal.

Cyprus employment law also distinguishes young persons and protects them from working excessive hours. According to the Protection of Young Persons at Work Law (48(I)/2001) all persons under 18 are considered young persons.

In addition, the law distinguishes between part-time and full time workers. The aim of the law is to ensure that part time employees enjoy proportionately the same rights as corresponding full time employees.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

There is a statutory obligation on the employer to provide an employee with specific information about his terms of employment within 1 month from the commencement of the employment.

The information may be given in any of the following ways:

- In a contract of employment.
- In a letter of appointment.
- In any other document signed by the employer which contains at least all the information detailed below.

The information given by the employer must include at least the following:

- Information about the identity of the parties.

- The place of work and the registered address of the business or the home address of the employer.
- The position or the specialisation of the employee, his grade, the nature of his duties and the object of his employment.
- The date of commencement of the contract or the employment relationship and its anticipated duration if this is for a fixed time.
- The duration of any annual leave to which the employee is entitled, as well as the manner and time it may be taken.
- The time limits which must be observed by the employer and the employee in the event of a termination of the employment, either by consent or unilaterally.
- All types of emoluments to which the employee may be entitled and the time schedule for their payment.
- The usual duration of the employee's daily or weekly employment.
- Details of any collective agreements which govern the terms and conditions of the employment.

#### 1.4 Are any terms implied into contracts of employment?

Under Cyprus employment law there is an implied duty of fidelity which goes to the root of the existence of a contract of employment. Statutory rights and obligations are also implied into contracts of employment.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Employers must observe certain statutory minimum terms in relation to matters including:

- notice of termination;
- annual and other (e.g. maternity and childcare) leave; and
- rate of pay for certain occupations.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Terms and conditions of employment can be agreed through collective bargaining (which usually takes place at industry level) in the case of employers who have collective agreements in place with trade unions. Collective bargaining is particularly important in the hotel and tourist industries, which are highly unionised, and most terms and conditions of employment are agreed through collective agreements and in line with applicable law.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

Trade unions are established and regulated by law. They are recognised by employers through collective agreements signed between the employer and the trade union as well as through the relevant provisions of the 1977 Industrial Relations Code (IRC). This is a voluntary agreement which lays out the procedures to be followed for the settlement of labour disputes, and for arbitration, mediation and public inquiry in disputes over interests and disputes over rights. Even though it is not legally enforceable, it is generally respected by both employers and employees.

### 2.2 What rights do trade unions have?

Collective agreements can be concluded through the mechanisms instituted by the IRC. The trade union's rights are specified in the IRC and collective agreements as well as certain statutes which refer to trade unions as "employees' representatives", which reflects their role and scope of involvement in industrial relations. The IRC mechanisms for dispute resolution include direct negotiations between the trade unions and the employer and his or her representatives. Statutory rights include, for example, the right to be involved in information and consultation in the event of collective redundancies.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

There are no rules governing a trade union's right to take industrial action. The right to strike is founded in the Cyprus Constitution itself. However, the reasons for a strike in every case must be reasonable and based on genuine disputes which cannot be resolved through the mechanisms of the IRC and the collective agreements in place.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Works councils are mandatory only in relation to Community-scale undertakings and Community-scale groups of undertakings, where the provisions of the law on the Establishment of European Works Councils, implementing Directive 94/45/EC into Cyprus law, apply. Community-scale undertaking means a group of undertakings with the following characteristics:

- at least 1,000 employees within the EU Member States;
- at least two group undertakings in different EU Member States; and
- at least one group undertaking with at least 150 employees in one EU Member State and at least one other group undertaking with at least 150 employees in another EU Member State.

European Works Councils have the right to meet once a year with the employer's management and be informed and consulted about the development and the prospects of the business. A European Works Council or a procedure for the purposes of consultation and providing information to employees must be established in all groups of Community-scale undertakings, at the initiative of its

central management or after being so requested by at least 100 employees or their representatives, belonging to two undertakings or establishments which are in at least two different EU Member States. Representatives are elected from the existing trade unions where applicable or from the employees directly.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Formal co-determination rights do not exist in Cyprus and the only ways of exerting influence are informal ones such as strikes and delays.

### 2.6 How do the rights of trade unions and works councils interact?

Trade union representatives can represent employees in the special negotiation team which must be set up for the purposes negotiating the establishment of a European Works Council or the information and consultation procedure, where applicable. Trade union representatives can also participate in the European Works Councils as representatives of the employees.

### 2.7 Are employees entitled to representation at board level?

Although there is a general right of employees to information and consultation in certain cases (i.e. restructuring, transfer of business, redundancies etc.), there is no statutory right of employee representation at board level.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Equal treatment in employment is a legal obligation of every employer. Any direct or indirect discrimination or harassment or order which aims to discriminate on the grounds of religion or beliefs, age, sexual orientation, racial or ethnic origin in relation to the terms of entry into employment, self employment and work, terms and conditions of employment or a similar matter is prohibited.

Furthermore there is an obligation on the employer to provide to his employees equal payment for equal work regardless of sex.

Part time employees should enjoy proportionately equal rights to those of comparable full time employees.

Sexual harassment at work is considered as discriminatory and is expressly prohibited.

### 3.2 What types of discrimination are unlawful and in what circumstances?

The less favourable treatment of a person on the grounds of racial or ethnic origin, religion or beliefs, age or sexual orientation at work and employment constitutes direct unlawful discrimination. Furthermore, every provision, criterion or practice which may cause less favourable treatment of a person for any of the above reasons in comparison to other persons, even though it may appear neutral at first instance, constitutes unlawful discrimination unless it can be

justified objectively by a legitimate aim and the means of achieving this aim are legitimate and necessary.

### 3.3 Are there any defences to a discrimination claim?

There are certain exemptions which may constitute defences where the law provides for different treatment in relation to specific professional activities where a certain characteristic constitutes a substantial and decisive professional qualification, as long as the object is achievable and the condition relevant.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can address any complaints about discrimination either to the Office of the Commissioner for Administration (Ombudsman), which is the designated National Equality Body (NEB) for the combat of all forms of discrimination, or by taking legal action for compensation, such as for example where a discriminatory action results in loss of office or resignation (constructive dismissal).

Employers are able to settle claims at any time, before or after they are initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

The remedies that are available to employees are compensation and reinstatement where this is practicable.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Maternity leave entitlement is for a total duration of 18 continuous weeks, of which 11 must be taken within the period beginning with the second week before the week of expected childbirth.

In the event of adoption, the employee has the right to maternity leave for a total duration of 16 continuous weeks starting immediately from the date of commencement of the caring of a child under the age of 12 years, provided she has given at least 6 weeks' prior notice to her employer. Prior notice must also be given to the relevant government department (the Services Department of Social Providence).

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

During maternity leave the employee receives maternity entitlement, pursuant to the provisions of the Social Insurance Law.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

In addition to maternity leave, for a period of 9 months after childbirth, a female employee is entitled to either interrupt her employment for one hour or to commence work one hour later or finish employment one hour earlier for the purposes of childcare. Such time shall be considered and be paid as normal working time. She also has a right to return to her position after maternity leave.

### 4.4 Do fathers have the right to take paternity leave?

There is currently no right to paternity leave as such.

### 4.5 Are there any other parental leave rights that employers have to observe?

Employees who have completed 6 months or more of continuous employment with the same employer can claim unpaid parental leave for up to 13 weeks in total on the grounds of childbirth or adoption for the purposes of caring and raising the child. This right applies equally to men and women.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Generally there is no such statutory entitlement. The employee, however, is entitled to unpaid leave of a total of 7 days per year for reasons of *force majeure* which are connected to family reasons in relation to illness or accident of his dependants and necessitate the immediate presence of the employee.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Under the Transfer of Undertakings Law employees' contracts of employment automatically transfer to the buyer where there is a change in employer. There is as yet no clear guidance on whether a share sale constitutes a "transfer" for these purposes of this law as shareholders are distinct from the company, which remains the employer at all times.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The rights and obligations of the transferor, deriving from a contract of employment or from an employment relationship which exists during the date of the transfer, are transferred along with this transfer, to the transferee. Furthermore, after the transfer, the transferee must preserve the terms of employment agreed by collective agreement, to the same extent that these apply to the transferor, according to the collective agreement or the practice, up to the date of termination or expiration of the collective agreement or the commencement or application of another collective agreement, with a minimum period of 1 year for preserving the terms of employment.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

In the transfer of a business, the transferor and the transferee must consult with and inform the employees or their representatives promptly, and in any event before their terms and conditions of employment are directly affected by the change, about the date or proposed date of the transfer, the reasons for and the legal, economic and social consequences of the transfer for the employees and any measures which will be taken as regards the employees.

The duration of the consultation process depends on the facts and

circumstances of each case and may take from a few weeks to a few months.

Failure to inform and consult is punishable on conviction with a fine of up to EUR 855, without prejudice to the rights of every affected employee to claim for damages or compensation.

**5.4 Can employees be dismissed in connection with a business sale?**

No. Their rights are fully preserved under the law. However, this does not affect the rights of the new employer to proceed with redundancies on the basis of reorganisation.

**5.5 Are employers free to change terms and conditions of employment in connection with a business sale?**

No. Any changes must be agreed with the employees.

**6 Termination of Employment**

**6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?**

Yes. Statutory minimum notice to be given by the employer to the employee varies according to the employee’s period of continuous employment, as follows:

Duration of employment	Statutory notice period
6 months to 1 year	1 week
1 to 2 years	2 weeks
2 to 3 years	4 weeks
3 to 4 years	5 weeks
4 to 5 years	6 weeks
5 to 6 years	7 weeks
More than 6 years	8 weeks

**6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?**

An employer who serves a notice of termination on an employee has the right to require the employee to accept payment in lieu of notice and to serve the period of notice as “garden leave”. As far as a salaried employee is concerned, such payment should cover his salary entitlement, *pro-rata*, for the period of the notice.

**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

An employer can lawfully dismiss employees only on the grounds mentioned in question 6.5 below.

An employee is treated as dismissed if he is given notice of termination of his employment or he resigns by reason of the employer’s conduct (i.e. constructive dismissal). The burden of proof that a dismissal was lawful is on the employer, the defendant, and not the claimant (employee) as in other types of civil

proceedings. In effect a dismissal is deemed unlawful unless otherwise proven.

No consent from a third party is required before an employer can dismiss.

**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

The protection offered under the Termination of Employment Law applies equally to all categories of employees, i.e. every person working for another person either under a contract of service or under such circumstances from which the relationship of employee and employer may be inferred. However, the general unfair dismissal rules do not apply to public servants, the police and the armed forces, whose employment is regulated by special legal provisions.

**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

The only valid grounds on which an employee can be legally dismissed are:

- If the employee does not perform his duties in a reasonably satisfactory manner (excluding temporary disability to work due to illness, injury and childbirth).
- If the employee has been made redundant.
- If the termination is due to *force majeure*, act of war, civil commotion, act of God, destruction or similar circumstances.
- If the employment is terminated at the end of a fixed period of employment.
- If the employee displays such conduct so as to render himself subject to summary dismissal.

An employee may be dismissed without notice as a result of:

- conduct on his or her part making it clear that the employer-employee relationship cannot be reasonably expected to continue;
- commission of a serious disciplinary or criminal offence during the performance of the employment;
- indecent behaviour during the performance of his or her duties; or
- for repeated violation or ignorance of the rules of his or her employment.

An unlawfully dismissed employee will be entitled to statutory compensation *pro-rata* to his period of continuous employment with the employer who dismissed him, according to the following table:

Years of service	Cumulative entitlement
First four years	2 weeks’ wages per completed year
Fifth to tenth years	2 1/2 weeks’ wages per completed year
Eleventh to fifteenth years	3 weeks’ wages per completed year
Sixteenth to twentieth years	3 1/2 weeks’ wages per completed year
Twenty-first to twenty-fifth years	4 weeks’ wages per completed year

He may, depending on the circumstances, also have a legal right to any general damages which may be payable to the employee for breach of contract/loss of career, where applicable.

## 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Where dismissals are based on the employee's unsatisfactory performance, prior warning should be given in writing as far as this is possible.

In addition, at least the minimum notice must be given (either statutory or as provided in the employment contract, whichever is longer).

Where dismissals are made by reason of redundancy, it is the employer's statutory obligation to give notice to the Minister of Employment and Social Insurance of any proposed redundancy dismissal at least one month before the intended date of termination. The notice must be given on a standard form including information about the number and nature of posts affected, the location and the reasons for redundancy.

## 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

A dismissed employee can bring a claim for unlawful dismissal at the Industrial Disputes Tribunal or, depending on the circumstances, a claim for breach of contract in the District Court. The remedy for a successful claim is usually damages. Reinstatement is possible in theory but very rarely awarded in practice.

## 6.8 Can employers settle claims before or after they are initiated?

Yes, claims can be settled at any time.

## 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Depending on the number of employees affected, consultation can be a statutory obligation in relation to collective redundancies in Cyprus.

There are also specific obligations on employers to consult and inform employees' representatives under the Collective Dismissals Law.

## 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees can enforce their rights by applying to the Industrial Disputes Court with a claim for unlawful dismissal where the employer has not followed its statutory obligations, such as with regard to information and consultation requirements and notice to the Ministry.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Any agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void under the law, subject to specific exemptions, concerning the sale of goodwill of a business and partnerships after dissolution.

Case law of the Supreme Court of Cyprus suggests that such clauses in "restraint of trade" relating to employees will not be upheld by a Cyprus court, in view of the fact that express provision is made for exemptions under the Contract Law, Cap. 149 as amended, which does not include such clauses. In the opinion of the court the list of exemptions is exhaustive.

### 7.2 When are restrictive covenants enforceable and for what period?

Under Cyprus employment law there is an implied duty of fidelity, which stems from the duty of trust and good faith which must exist in every employment relationship, requiring the employee not to act in a manner directly and substantially prejudicial to his employer's interests or generally in a manner which is capable of causing real or substantial harm to the employer's interests.

This duty would automatically prevent an employee from working for a competing business for the duration of his employment contract but not after the termination of his employment for the reasons outlined above.

As regards confidentiality in employment contracts, this extends only to information classed as trade secrets or so confidential that it requires the same protection as a trade secret. This would be valid for the duration of the contract and if so specified it may be extended beyond that if this is reasonably justifiable.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

No. There is no such requirement under Cyprus law.

### 7.4 How are restrictive covenants enforced?

Restrictive covenants, where valid and enforceable, can be enforced by applying to the court for restraining orders and compensation for damages.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Industrial Disputes Tribunal has exclusive jurisdiction to determine matters arising from the termination of employment such as the payment of compensation (except where the amount claimed exceeds the equivalent of two years' salary, in which case the jurisdiction is vested in the District Court), payment in lieu of notice, compensation arising out of redundancy and any other claim for any payment arising out of the contract of employment. Additionally the Industrial Disputes Tribunal has jurisdiction to determine any claim arising out of the application of the Protection of Motherhood Law, cases of unequal treatment or sexual harassment in the workplace and disputes between Provident Funds and their members.

The Industrial Disputes Tribunal is composed of a President or a Judge, who is a member of the judiciary, and two lay members appointed on the recommendation of the employers' and employees' organisations. The lay members have a purely consultative role.

## 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

An employee can apply to the Industrial Disputes Court by filing a petition and putting forward his claims. The employer then must answer with his side of the argument and the case is then heard before the Industrial Disputes Court. Conciliation is not mandatory unless it has been agreed between the parties in the contract of employment or an applicable collective agreement.

## 8.3 How long do employment-related complaints typically take to be decided?

Where an application is made before the Industrial Disputes Court

the procedure could take anywhere from a few months to a couple of years, depending on the complexity of the case, the reactions of the parties and the workload of the court. Typically, a relatively simple claim where both parties desire to have the claim resolved as soon as possible can be concluded within 6-12 months.

## 8.4 Is it possible to appeal against a first instance decision and if so how long such do appeals usually take?

Decisions of the Industrial Disputes Court are subject to appeal to the Supreme Court of Cyprus confined to legal issues. The appeal mechanism of the Supreme Court of Cyprus is unfortunately very slow and appeals can take anywhere from 1-3 years to conclude.



**Nicholas Ktenas**

Andreas Neocleous & Co LLC  
P.O. Box 26821  
CY-1648, Nicosia  
Cyprus

Tel: +357 2211 0000  
Fax: +357 2211 0001  
Email: [ktenasn@neocleous.com](mailto:ktenasn@neocleous.com)  
URL: [www.neocleous.com](http://www.neocleous.com)

Nicholas Ktenas graduated in law from Sheffield University in 1997 and was awarded an LL.M in European Law by Nottingham University in 1999. He has been a member of the Cyprus Bar Association since 1999.

Nicholas joined Andreas Neocleous & Co in 2001, having previously been an internal legal advisor in one of the largest cruise shipping companies in Cyprus. From 2001 to 2003 he was also a visiting instructor in Business and Company Law (Business Law 101 and ACCA paper 2.2) at a private university in Cyprus. He became a partner in Andreas Neocleous & Co on 1 January 2007.

His main areas of practice are employment law, data protection law, company law, contract law and EU law. He has written a number of articles and country chapters in respected international legal publications.



**Andrea Kallis**

Andreas Neocleous & Co LLC  
P.O. Box 26821  
CY-1648, Nicosia  
Cyprus

Tel: +357 2211 0000  
Fax: +357 2211 0001  
Email: [andrea.kallis@neocleous.com](mailto:andrea.kallis@neocleous.com)  
URL: [www.neocleous.com](http://www.neocleous.com)

Andrea Kallis was born in London. Andrea graduated in law from the London School of Economics and Political Science in 2005 and was awarded an LLM in Corporate and Commercial Law from the London School of Economics and Political Science in 2006. Andrea was admitted to the Cyprus Bar Association in 2007. Since her qualification at the Bar she has been an associate at Andreas Neocleous & Co LLC, where her main areas of practice are corporate law, employment law, telecommunications law, insurance law, and commercial law. Andrea has extensive experience in employment law, especially in employment issues as regards company reorganisations and transfers.



# NEOCLEOUS

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# Czech Republic

Nataša Randlová



## Randl Partners

Romana Kaletová



### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main constitutional provisions relating to employment are contained in Chapter Four, “Economic, social and cultural rights” of the Czech Charter of Fundamental Rights and Basic Freedoms. These provisions refer mainly to the right to work, to associate freely with others for the protection of economic and social interests, to strike, to the protection of health at work in certain cases, to fair remuneration for work, and the right to satisfactory work conditions.

The main statutes and regulations relating to employment are:

- Act No. 262/2006 Coll., the Labour Code, as amended;
- Act No. 40/1964 Coll., the Civil Code, as amended;
- Act No. 435/2004 Coll., the Act on Employment, as amended;
- Act No. 251/2005 Coll., on Work Inspection, as amended;
- Act No. 2/1991 Coll., on Collective Bargaining, as amended;
- Act No. 245/2000 Coll., on State Holidays, Significant Days and Rest Days, as amended;
- Act No. 198/2009 Coll., on Equal Treatment and Legal Remedies for Protection Against Discrimination, as amended;
- Government Decree No. 567/2006 Coll., on Minimum Wage and the Lowest Levels of Guaranteed Wage, Delimitation of a Hazardous Work Environment and Extra Pay for Work in a Hazardous Work Environment; and
- Government Decree No. 590/2006 Coll., on the Area and Scope of Other Important Personal Impediments to Work.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The law distinguishes between employees and self-employed persons. Only employees are subject to employment law protection, as they are subordinated to the employer and perform work at the employer’s cost and liability (responsibility). On the other hand, self-employed persons perform work in its full autonomy and at one’s own responsibility. Employees are hired under an employment contract or special “agreement to complete a job” or “agreement to perform work” regulated by the Labour Code. Self-employed persons are hired based on the Commercial Code.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

All employment relationships must be entered into and governed by a written employment contract. However, failure to do so does not render a verbal employment contract invalid. The following terms must always be agreed in the employment contract:

- type of work;
- place of work; and
- date of commencement of work.

Additionally, employees must be notified, in writing, either in the employment contract itself or within one month of commencing the employment relationship, of the following:

- the employer’s business name and registered seat, if the employer is a legal entity / the employer’s name and address, if the employer is an individual;
- details of the type of work and the location in which work is to be carried out;
- the annual holiday entitlement or the manner in which the entitlement will be determined;
- information about notice periods for termination of employment;
- information about the employer’s wage and remuneration system, payment dates, and the place and method of payment;
- weekly working time and schedule; and
- information about any existing collective agreement.

#### 1.4 Are any terms implied into contracts of employment?

Many terms are implied in an employment contract, primarily those which are regulated by the Labour Code. These terms cannot be contracted out to the employees’ detriment.

The Labour Code stipulates basic obligations for the employees resulting from the employment law relationship. The employees are especially obliged to work properly, to fully use the working hours, to observe legal regulations and to properly manage resources. The Labour Code stipulates only a basic framework for these obligations – it is up to the employer to specify them in the working rules taking into respect their specific needs.

In order for the employees to fulfil their obligations the employer must provide them with suitable working conditions. This means, for example, effectively organising work, providing them with working tools, etc.



### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Again, many minimum employment terms and conditions, which the employers have to observe, are set by the Labour code.

For example, the current minimum monthly wage is CZK 8,000/month (about EUR 331) and the lowest minimum hourly wage is CZK 48.10 (about EUR 2). The minimum entitlement for annual leave is 4 weeks in the private sector, and the minimum payment for overtime in the private sector is 25% of the average hourly salary.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

In collective bargaining, the following terms and conditions are usually agreed:

- Guaranteed increase of salary after certain period of time.
- Reduction of working time without reduction of salary and other arrangement concerning working time and compensatory period.
- Increase of different allowance (overtime, night work, weekend work etc.).
- Social programmes – cultural sport events, operation of canteen, monetary gifts for employee anniversary etc.
- Increased entitlement for annual leave.
- Pension insurance etc.

The Czech Republic has both collective bargaining at the company level (“company collective agreement”) and at the industry level (“higher level collective agreement”), which is concluded between more than two employers and a trade union or between trade unions and employers’ associations. Higher level collective agreements are more general as they cover whole industries while company collective agreements only cover particular companies. Employers are usually more involved in company collective agreements than higher level collective agreements which are negotiated by employers’ associations.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

According to the Czech Charter on Fundamental Rights and Basic Freedoms, everyone has the right to associate freely with others for the protection of his/her economic and social interests. Trade unions are created independently from the state, in accordance with the Act on Citizens Association, in the legal form of citizens associations.

Trade unions are the most common form of employee representation. They can be formed by three or more employees forming a preparatory committee.

A trade union comes into legal being (it receives legal subjectivity):

- on the day following the day the application for registration of the trade union and its statutes have been filed with the Ministry of Interior; or
- on the day defined by the statutes of the professional trade union federation that the preparatory committee has decided to join. In this case the legal subjectivity is derived from membership in the professional trade union federation; therefore, it is not necessary to apply to be registered as a trade union with the Ministry of Interior.

### 2.2 What rights do trade unions have?

Trade unions have broad entitlements with the employer, including collective bargaining, co-decision making, consultation and information, inspection of certain measures taken by the employer or consent to dismissal of trade union body members. More than one trade union can be active at the employer’s workplace. In such case the employer is obliged to fulfil its duties towards all of them.

### 2.3 Are there any rules governing a trade union’s right to take industrial action?

The right to strike is generally ensured by the Czech Charter of Fundamental Rights and Basic Freedoms. This right is further determined by the Act on Collective Bargaining, but only in relation to strikes and lockouts arising from disputes over the conclusion of a collective agreement.

Commencement of a strike is decided by the competent trade union body, provided that this is agreed by at least one-half of the employees to whom such collective agreement in dispute would apply. The competent trade union body must notify the employer in writing at least three days in advance of:

- the commencement of the strike;
- the reasons for and objectives of the strike; and
- the names of the representatives of the competent trade union body who are authorised to represent the participants in the strike.

Some professions are not permitted to strike (e.g., doctors, firefighters, judges, police officers, etc.).

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

A works council may (it is not an obligation) be elected at every employer, regardless of the number of employees. The Labour Code provisions regulating its constitution are mandatory. The elections for establishing the works councils are valid only if at least one-half of the employees participate in the elections.

A works council must have at least three and no more than fifteen members. The number of members must always be an odd number. The employer sets this number after consulting with the election committee. At its first meeting, the works council must elect a chairman from amongst its members, of whom the employer is then informed. The members serve a three-year term.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Works councils do not have co-determination rights. Thus the employer has no obligation to obtain works council agreement to proceed with its legal acts. The role of works councils is limited only for consultation and information duties.

### 2.6 How do the rights of trade unions and works councils interact?

If the works council coexists with the trade union at the same employer, the employer must fulfil the set duties towards all employee representative bodies, unless they agree with one another

and with the employer on some other manner of cooperation.

### 2.7 Are employees entitled to representation at board level?

Typically for bigger public limited companies, and in some special cases also for limited liability companies, employees are entitled to elect a number of the supervisory board members of the employer. Specific conditions may be stipulated by the Articles of Association of the given company.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes, several provisions, which provide the employees protection against discrimination, are incorporated in Czech law. The Anti-Discrimination Act (Act No. 198/2009 Coll.) is the main source of anti-discrimination legal regulation. It applies not only to employment but also, in particular, to independent business activity, professional training, access to employment, and membership in employers' and employees' organisations.

The Anti-Discrimination Act recognises the following discriminatory grounds:

- racial or ethnic origin;
- nationality;
- sex;
- sexual orientation;
- age;
- disability;
- religion and beliefs; and
- world leanings.

The Anti-Discrimination Act further considers harassment, sexual harassment, victimisation, instruction to discriminate and solicitation of discrimination as discrimination, and therefore these behaviours are prohibited.

Furthermore the Labour Code regulates a general obligation for employers to ensure equal treatment of all employees in their working conditions, including pay and other emoluments in cash or in kind for their work, conditions for their vocational training and opportunities for career development (promotion). Also the Employment Act stipulates the special protection against discrimination in the area of recruitment.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Generally any kind of discrimination is prohibited, if it leads to unequal treatment on grounds mentioned under the question 3.1 (directly or indirectly).

On the other hand the Antidiscrimination Act recognises certain legitimate forms of discrimination. For example the positive discrimination of employed mothers or age discrimination as a proportionate means of achieving a legitimate aim (required minimal age or working experience).

### 3.3 Are there any defences to a discrimination claim?

If the employee brings a discrimination action before court and presents facts from which the discrimination can be deduced, it is

the employer's burden of proof to rule out this possible discrimination. So it would be necessary for the employer to prove that there was no discrimination or it was a legitimate form of discrimination.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees may bring a discrimination action before the court to achieve remedies or compensation. This kind of dispute can be settled before as well as during the course of the judicial proceeding.

In addition the employer may be fined by the state authorities for the acts of unlawful discrimination.

### 3.5 What remedies are available to employees in successful discrimination claims?

Where rights and duties concerning discrimination are infringed (breached), the concerned employee is entitled to demand desistance from this infringement, removal of the consequences of this infringement and appropriate satisfaction. If the employee's dignity or reputation in the workplace is substantially harmed and the above-mentioned rectification is not sufficient, the employee may claim monetary compensation for this nonmaterial detriment.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Female employees are entitled to 28 weeks of maternity leave (37 weeks for multiple births). Leave can begin as early as the eighth week before the expected date of childbirth; however, employees generally start maternity leave at the beginning of the sixth week. Maternity leave must not be taken for less than 14 weeks and cannot be terminated or interrupted under any circumstance for six weeks after childbirth.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Employees are entitled to maternity benefits paid by the Social Security Administration in the amount of 70% of their average earnings reduced in accordance with respective law.

Generally, an employer is not allowed to dismiss a female employee on maternity leave except under certain exemptions, for example if all or part of an employer is shut down.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

A woman returning to work from maternity leave is entitled to return to the position in which she was employed before her maternity leave on the same terms and conditions.

### 4.4 Do fathers have the right to take paternity leave?

Czech law does not regulate any specific right to paternity leave. Fathers are entitled to take parental leave from the date of birth of the child until it reaches three years of age. In some cases, they are

entitled to receive maternity benefits, if they care for the child and such benefits are not paid to the mother.

#### 4.5 Are there any other parental leave rights that employers have to observe?

Parental leave must be granted to female or male employees on request. Parental leave can be granted at any time from the end of maternity leave (for mothers) or the date of birth (for fathers) until the child reaches three years of age.

Parental benefits are paid by the Labour Offices and are not related to the employee's income.

Generally, an employer must not dismiss an employee on parental leave. Dismissal is possible only under certain specific conditions, for example shut down of an employer or its part. An employee returning from parental leave is entitled to return to work under conditions agreed in his/her employment agreement.

#### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Employers are obliged to provide part-time work or some other suitable adjustment of the working hours upon the request of employees providing necessary care to the dependant. The employer may refuse such request only if it has serious operational reasons to do so.

### 5 Business Sales

#### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

If a new employer (buyer) takes over the tasks or activities (or even a part of them) of the current employer (seller), an automatic transfer of employees takes place under the Czech Labour Code. However such employment transfer takes effect in the case of an asset transfer and not in the case of sale of shares.

#### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The transferred employees' employment relationship must continue unchanged with the buyer. The buyer must continue granting the transferred employees all the benefits they had under the seller, including the conditions agreed under the collective agreement until its expiration or until new terms and conditions are agreed between the new employer (buyer) and trade union.

#### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The seller is obliged to inform and consult with its directly affected employees about several aspects of the employment transfer. If there is a trade union or works council at the seller, the information obligation must be fulfilled towards them.

The necessary information must be provided and consultation must be started sufficiently in advance before the employment transfer – usually 30 days in advance is considered a sufficient period. A breach of the information or consultation obligations would not

itself invalidate a transfer, but the Labour Inspection Office can impose a fine of up to CZK 200,000 on the employer for a breach of the obligation to inform or consult the trade union or council of employees (not individual employees) in case of a transfer.

#### 5.4 Can employees be dismissed in connection with a business sale?

Employees cannot be dismissed in connection with the employment transfer, either before or after. However, they can be dismissed on other grounds as set out in the Labour Code (such as for organisational reasons or conduct issues), if the statutory conditions are met.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

In relation to the previous questions, the employer is not allowed to unilaterally change the terms and conditions in connection with a business sale.

### 6 Termination of Employment

#### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The employer may give a notice of termination to its employees only on the following grounds (a notice of termination given without grounds or on the basis of different grounds will be void):

- the employer's undertaking (or a part thereof) shuts down;
- the employer's undertaking (or a part thereof) relocates;
- the employee is made redundant pursuant to a decision by the employer to effect an organisational change (e.g., a change of technology, reduction of the number of employees in order to enhance work efficiency);
- the employee is no longer able to perform his/her work tasks in the long term, due to the state of his/her health according to the opinion of a medical expert, due to a work injury, an occupational disease or the threat of such disease;
- the employee is no longer able to perform his/her work tasks in the long term, due to the state of his/her health according to the opinion of a medical expert;
- the employee does not meet the conditions stipulated by law for performance of the agreed work, or, through no fault of the employer, the employee does not meet the requirements (provided by the employer) for proper performance of this kind of work; or
- there are grounds upon which the employer might immediately terminate the employment relationship without notice, or there is a serious or a systematic but less serious breach of obligations arising from laws applicable to the work performed by the employee.

The statutory notice period is a minimum of two months. It does not depend on the length of employment but can be extended by the parties' mutual agreement. In this case, the notice period must be the same for both parties. The employer may not provide pay in lieu of notice.

The notice period commences on the first day of the calendar month following the month the notice of termination was delivered to the employee and ends on the last day of the relevant calendar month (with some exceptions, for example, a dismissal before a protective period, such as maternity leave).

**6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?**

Yes, but under Czech law “garden leave” is known as the impediments to work on the employer’s side. During such impediments the employee is still employed, but not performing work, and receives 100% compensation of salary which is based on average earnings.

**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

The employees are protected against dismissal without the legal reason stipulated in the Labour code. There are also formal requirements for an employee’s dismissal (written form, form of delivery, etc.).

The employees have the possibility of claiming invalidity of employment termination in court no later than within two months of the date when the employment relationship should have originally terminated. Otherwise they are treated as dismissed even if the legal requirements of dismissal have not been fulfilled.

The employer is obliged to prior consultation with the trade union on employee dismissal, however, the breach of this obligation does not cause the invalidity of such dismissal.

**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

An employer may not dismiss certain employees during a so-called “protective period”. Protective periods concern, in particular, the following situations:

- an employee is temporarily unfit to work due to illness, injury, or medical treatment;
- an employee has been granted long-term unpaid leave in order to hold a position in public office; and
- an employee is pregnant or on maternity or paternity leave.

Furthermore, an employer must not dismiss members (or former members) of a trade union body without prior written consent of the trade union.

**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

In the case of an employee being dismissed due to reasons related to him/her, the compensation on dismissal (in Czech “severance pay”) is only required in case when these reasons are a work injury or a work-related sickness. In such cases the minimum severance pay is 12 average monthly earnings.

In the case of an employee being dismissed due to business-related reasons, he/she is entitled to severance pay amounting to a minimum of 3 average monthly earnings.

**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

The specific procedure of dismissal depends on the type of such a dismissal. For example in the case of a less serious breach of

employee’s obligations it is necessary to give the prior written warning to the given employee, or in the case of unsatisfactory working results it is necessary to give the employee the adequate time period to eliminate them.

**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

As mentioned under question 6.3 the employee is entitled to claim invalidity of dismissal in court. If the employment termination is judged invalid, and the employee insists on further employment, the employment shall remain in existence and the employee shall obtain the salary compensation for the determined time period.

**6.8 Can employers settle claims before or after they are initiated?**

Any kind of dispute may be settled before as well as during the course of the judicial proceeding.

**6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?**

Collective dismissal rules described under the Labour Code apply to termination of employment relationships taking place over a period of 30 days based on a termination notice served by an employer for reasons of reorganisation (organisational changes). The thresholds for collective dismissal are as follows:

Number of Dismissed Employees	Size of Employer’s Business
10 or more employees	20 – 100 employees
10% of employees	101 – 300 employees
30 or more employees	300 or more employees

The thresholds are also met if the employment relationships of at least 5 employees are terminated by a notice from the employer within a period of 30 days; and if the employment relationships with the remaining employees within this threshold are terminated by agreement on the same grounds.

In the case of collective dismissals, the employer must notify and consult with the relevant employee representatives (if one does not exist at the employer, then each affected employee individually) of the proposed collective dismissals, in writing, at the latest 30 days before notices of termination are given. Consultation shall cover possible measures to reduce redundancies or mitigate adverse consequences for employees. Consultation alone is sufficient to meet the legal obligations (no agreement with employee representative needs to be reached).

At the same time, the employer must deliver a written initial notification to the Labour Office of the proposed reorganisation resulting in a collective dismissal no less than 30 days before giving notices to the individual employees.

After consultations with the employees have been finalised and the final decision on collective dismissals has been made, the employer must file a final written report with the Labour Office.

**6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

The individual dismissals within the mass dismissals are valid even if the employer breaches its obligations (information and

consultation). So the employees are not allowed to claim invalidity of such dismissal. However the employer may be fined by the Labour Inspection Office for such breach of obligations.

The employment of an employee who is subject to mass dismissal terminates no sooner than 30 days after the delivery of the written report to the Labour Office. So if the employer fails to meet his obligation to file the final written report, the employment of dismissed employees may be extended (unless the employee declares that he/she does not insist on his/her employment being extended).

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

An employee must not pursue any other gainful activity identical with the business activities of the employer during the term of his employment relationship without the prior written approval of the employer.

In addition, a non-competition clause can be agreed, which prevents the employee from pursuing any gainful activity that is competitive to the business activity of the employer after the termination of employment. This clause has to be agreed upon in writing in order to be valid. Non-competition clauses prevent an employee from pursuing any gainful activity that is in competition with the employer's business activity.

### 7.2 When are restrictive covenants enforceable and for what period?

A non-competition clause must not be agreed upon during a probationary period or it is considered void and it may be concluded for a maximum period of one year after employment termination.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

The employer must pay to the employee remuneration amounting to at least the employees' average earnings for each month of the non-competition.

### 7.4 How are restrictive covenants enforced?

A penalty clause may be agreed upon should the employee breach the non-competition clause. The employer is also entitled to claim for damages in relation to breach of the non-competition clause.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The court system is the primary means by which employment disputes are resolved; however, the Czech Republic has no special labour law courts.

An employee and an employer may also agree to use arbitration to resolve disputes relating to property (i.e., not for disputes regarding rights and obligations arising from employment relationships, but only for disputes concerning claims for payment of some amount, such as for compensation or benefits). However, they are rarely used by either employers or employees.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Employment-related complaints proceed as standard civil complaints. There are no special court proceedings related to employment relationships. Conciliation is not mandatory in the Czech Republic; however it can be undertaken even during court proceedings.

### 8.3 How long do employment-related complaints typically take to be decided?

A court proceeding generally takes several years depending on the specific case and location of the court within the Czech Republic. The first instance decision is typically made within 1-2 years.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

It is possible to appeal against a first instance decision on the grounds stipulated by law. The appeal proceedings can take approximately one year, depending on the given circumstances. It is possible to call for appellate review even against the second instance decision to the Supreme Court of the Czech Republic but without suspensory effect. The proceedings of an appellate review take approximately 1-2 years.



### Nataša Randlová

Randl Partners  
Hvězdova 1716/2b  
140 78 Praha 4  
Czech Republic

Tel: +420 222 755 311  
Fax: +420 239 017 574  
Email: [randlova@randls.com](mailto:randlova@randls.com)  
URL: [www.randls.com](http://www.randls.com)

Nataša Randlová is a partner of Randl Partners, a Czech law firm specialising mainly in employment and labour law. She has significant experience with collective and individual dismissals, preparation of all types of employment documents and contracts, transfers of undertaking, employment of expatriates and anti-discrimination law.

She has been named as a leading Czech practitioner in Labour and Employee benefits repeatedly in publications such as *PLC - Which Lawyer?* or *Chambers Europe*. *Who's Who Legal* recommends her in Management Labour and Employment. In 2008 Randlová was named Lawyer of the Year (*Právník roku*) for employment law by legal professional bars (Czech Bar Association, Czech Union of Judges, Czech In House Lawyers). Randlová received her law degree from the Faculty of Law of Charles University in Prague. She also did postgraduate studies at Robert Schuman University in Strasbourg.



### Romana Kaletová

Randl Partners  
Hvězdova 1716/2b  
140 78 Praha 4  
Czech Republic

Tel: +420 222 755 311  
Fax: +420 239 017 574  
Email: [kaletova@randls.com](mailto:kaletova@randls.com)  
URL: [www.randls.com](http://www.randls.com)

Romana Kaletová is an attorney of Randl Partners, a Czech law firm specialising mainly in employment and labour law. She is experienced in litigation, personal data protection, employees' representatives and preparation of all types of documents relating to employment-law relationships. Romana Kaletová received her law degree from the Faculty of Law of Charles University in Prague.



Randl Partners, attorneys at law, was incorporated in 2009, gathering a team of lawyers who have been working together for several years. The firm's lawyers have years of experience in providing legal advice to international corporations and Czech companies. In their practice they focus mainly on employment and commercial law.

The Randl Partners employment law team provides clients with comprehensive legal services covering the entire spectrum of employment law, collective bargaining and human resources. Years of experience combined with an extensive knowledge of employment law - ensured by the team's exclusive specialisation in employment law and related areas - guarantee professionalism in the delivery of our services. In addition to regular legal advice clients are provided with special supplementary services.

In 2009 and 2010 Randl Partners was chosen **LAW FIRM OF THE YEAR** in the Employment Law category for the Czech Republic.

# France

Hogan Lovells

Jean-Marc Albiol



## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The main sources that govern the employment relationship, in order of importance, are: EC law; the French Constitution; the French Labour Code; case law; collective bargaining agreements; company collective agreements; internal rules and regulations; and company practices.

### 1.2 What types of workers are protected by employment law? How are different types of workers distinguished?

There are two main types of workers under French employment law: employees; and the self-employed. Employees have greater protection as they benefit from the provisions regarding termination as detailed in section 6 and could be entitled to benefit from unemployment allowances if they are dismissed. Individuals are employees if they perform duties for a company under a subordinating link and receive remuneration in return for their work.

The self-employed are less protected by French law. An individual is self-employed if he chooses to work for himself without being answerable to an employer.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

While it is generally advised to have all contracts in writing, it is not a legal requirement to have written employment contracts, except when an applicable collective bargaining agreement requires it or when the contract is for a fixed-term, part-time, or an apprenticeship.

It should be noted that oral fixed-term contracts are categorically deemed to be indefinite-term contracts and oral part-time contracts are considered to be full-time contracts.

Moreover, in the absence of a written contract, in accordance with EU law, an employer should provide every employee with a written statement of the main terms which determine the employment relationship. It is mainly: name of the parties; place of work; position; starting date; length of paid holidays; name of applicable collective bargaining agreement; salary; and working time.

### 1.4 Are any terms implied into contracts of employment?

Employers and employees are expected to behave in a correct

manner towards one another and mutual trust should be maintained and respected.

Employees should respect their duties of loyalty, should not disclose confidential information to people outside of the workplace and are expected to carry out reasonable tasks when asked to do so; while employers engage to pay wages and to provide a safe working environment.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

#### Minimum wage

All employees who are employed under an employment contract, either indefinite or fixed term, are entitled to receive a minimum gross monthly wage (in 2010: €1,343.77 for a 35-hour work week). Depending on the job category, collective bargaining agreements also frequently determine the minimum monthly wage.

#### 35-hour work week

The normal working time is 35 hours a week. It should be noted that employees must not work more than:

- an average of 44 hours a week during 12 consecutive weeks;
- 48 hours during any given week;
- 10 hours a day; and/or
- 220 hours of overtime a year (subject to applicable collective bargaining agreements).

However, the 35-hour work week can be adapted if employers successfully enter into an agreement with the trade unions present in the company or if the industry-wide collective bargaining agreement provides specific arrangements. This provides for a longer working week or allows employees to work their hours more flexibly, including agreeing day packages with autonomous executives under which their working time is organised over a certain number of days instead of a fixed number of hours and daily hours are not recorded by the employer.

In general, all employees, executives included, must be granted (i) a daily rest period of 11 consecutive hours and (ii) a weekly rest period of 35 consecutive hours, including Sunday.

#### Paid holidays

Employees are entitled to a minimum of five weeks' paid holiday a year. In France, there are also approximately 10 public holidays every year.

#### Additional paid leave

The law and collective bargaining agreements provide for additional paid leave. This can be granted (i) to employees who have reached a specific length of service and (ii) for family-related events.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

In French employment law, a collective bargaining agreement is an essential element of an employment relationship between employer and employee. Most companies are governed by a bargaining agreement at industry level. Bargaining agreements at company level will come on top and will be negotiated only in companies of a certain size.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The law published on 20th August 2008 dramatically changed the conditions applicable to determining trade union representation and trade unions' rights.

The unions who are already present in companies will continue to be considered as representative until 2013.

Otherwise trade unions are considered as representative only when they have existed for more than two years and gained at least 10% of the votes at the latest works council election.

### 2.2 What rights do trade unions have?

The extent of trade unions' rights depend on whether they are representative or not.

A union section (*section syndicale*) may be created by (i) representative trade unions, (ii) trade unions affiliated to one of the five trade union confederations, and (iii) trade unions who meet several criteria i.e. respect of republican values, independence, minimum two years of existence, having a geographical and professional scope which includes that of the company, or if they have at least two members in the company or establishment.

The role of the union section is to represent the social and economic interests of its members before the employer. In order to carry out this role, the union section may collect dues, post notices and hold meetings. Furthermore, unions may distribute hand-outs within the enterprise. The union sections may have union meetings once a month on the company's premises.

Non-representative unions may appoint a union section's representative. In addition, all unions which are representative and have established union sections in a company employing 50 employees or more, have the right to appoint one or more union delegates (*délégués syndicaux*) in order to represent the union section in discussions with the employer. Trade union delegates are, in principle, the only representatives with whom the employer may negotiate and enter into collective bargaining agreements.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

An industrial action may originate from trade unions or the employees themselves. Case law interprets industrial action as *a collective and concerted work stoppage aiming to support professional demands*. While trade unions may be bound by certain agreements providing notice or prior steps before calling for industrial actions, these restrictions are not binding on the employees themselves.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

In companies with at least 50 employees, a works council must be established. The works council is in charge of expressing the opinions of the employees and to that effect play an important role in the economic and financial evolution of the company as well as the work conditions and the training.

The works council must be informed and consulted on almost all major company decisions, including:

- Matters relating to the employer's organisation, management, and general running of the business.
- Decisions that are likely to affect the company e.g. the volume or structure of the workforce, working hours and conditions, and training.
- Restructuring operations and collective redundancies.
- A change in the company's economic or legal structure, especially in the case of mergers, transfers or undertakings, or major changes in the production structure of the company, as well as of the takeover or sale of subsidiaries.

The information and consultation of the works council must have occurred before taking the decision on any project.

It also manages the social and cultural activities for employees, which the employer pays for. Works council members are elected for four years and may be re-elected by employees. The number of members elected to the works council depends on the company's headcount.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

The works council's consent, favourable opinion, or absence of opposition is only required in a very limited number of cases:

- Introduction of exception to collective working hours.
- Replacement of overtime pay by additional rest.
- Health and safety elections.
- Refusals of certain employee absences.

### 2.6 How do the rights of trade unions and works councils interact?

The works council expresses the employees' opinion on economic matters, whereas trade unions aim to satisfy varied professional claims. Works councils are consulted prior to execution of company-wide collective bargaining agreements by the unions.

### 2.7 Are employees entitled to representation at board level?

Two works council representatives (or four in large companies), appointed by the works council, may attend board meetings. These members must be invited to every board meeting in the same way as the directors and prior to these meetings, they must receive the same information. The works council representatives cannot vote on the suggested resolutions, but they have the right to express their opinion on them.

Two works council representatives, appointed by the works council, can also attend shareholders' meetings. They have the same rights as for the board meetings.



### 3 Discrimination

#### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected against discrimination, according to the French Labour Code (section L. 1132-1).

#### 3.2 What types of discrimination are unlawful and in what circumstances?

Discrimination strictly prohibits sanctions of existing employees, as well as exclusion of applicants from the recruitment process, on the basis of their origin, name, habits, political opinions, trade union activities, ethnic group, race, religion, health, sex or family situation.

Discrimination is subject to criminal sanctions.

#### 3.3 Are there any defences to a discrimination claim?

The main defence is evidence of objective reasons for the difference of treatment.

#### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can bring discrimination claims before the Employment Tribunal. Employees have to present the Tribunal with evidence illustrating examples of discrimination. In turn, the employer has to prove that his/her decision was based on elements unrelated to discrimination.

Claims can be settled before or after lawsuits are initiated.

However the public prosecutor is always able to pursue the claims before a criminal court despite existence of a settlement between the parties.

#### 3.5 What remedies are available to employees in successful discrimination claims?

Discrimination is a criminal offence punishable by:

- a maximum of three years' imprisonment and a fine of €45,000 (Article 225-2, Criminal Code) for the author of the offence and employer's legal representative (namely the chief executive officer); or
- a fine of up to €225,000 (Article 225-4, Criminal Code) for the employing legal entity.

Any decision resulting from discrimination is void. As a consequence in case of dismissal for instance the employee must be reinstated or receive compensatory damages.

### 4 Maternity and Family Leave Rights

#### 4.1 How long does maternity leave last?

Employees are entitled to maternity leave which vary in duration:

16 weeks for a single birth bringing the number of children to one or two:

- 6 weeks before childbirth and 10 weeks after childbirth.

26 weeks for a single birth bringing the number of children to three or more:

- 8 weeks before childbirth and 18 weeks after childbirth.

34 weeks for a multiple birth of twins:

- 12 weeks before childbirth and 22 weeks after childbirth.

46 for a multiple birth of triplets or more:

- 24 weeks before childbirth and 22 weeks after childbirth.

The applicable collective bargaining agreement can provide for longer leave.

#### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Employees on maternity leave are given an allowance by the French Social Security. The employer is not required by law to pay salary during this time. However, collective bargaining agreements often state that the employee must receive her usual salary if the employee has a certain length of service.

#### 4.3 What rights does a woman have upon her return to work from maternity leave?

Following maternity leave, employees have the right to return to their original position (or a similar position with the same remuneration).

Employees with at least one year's service on the date of the birth or adoption can either:

- work part-time; or
- take unpaid parental leave up until their child's third birthday.

#### 4.4 Do fathers have the right to take paternity leave?

Fathers may take three days' leave on the birth of a child as well as 11 consecutive days' paternity leave (18 days if there are multiple births), which must be taken within the four months following the birth. Special durations apply in case of adoption.

During the leave the employment contract is suspended and the French Social Security pays a specific allowance. However, the employer does not have to maintain the male employee's remuneration during the leave unless provided otherwise by the collective bargaining agreement.

#### 4.5 Are there any other parental leave rights that employers have to observe?

All employees authorised to adopt by social services have the following rights to leave:

- For adoption of a single child:
  - ten weeks for the first two children adopted separately; and
  - 18 weeks when the adoption brings the number of children at home to three or more.
  - 22 weeks for multiple adoptions at one time.

It is possible to split the leave between the two parents in which case the duration of the leave is slightly increased. Finally, before adoption, employees can claim unpaid leave of up to six weeks if they need to travel abroad to adopt a child.

#### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Employees who are carers for dependents and have at least two

years' length of service may ask for an unpaid leave of three months, which may be up to a year.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In case of a share sale the employees' contract is not directly impacted. They remain employees of the transferred entity. In case of an asset transfer, if there has been a transfer of an autonomous economic entity, employees are automatically transferred by application of Article L.1224-1 of the French Labour Code. An autonomous economic entity is an organised group of persons, with its own assets, clients and line of business.

Recent case law has now made it easier to transfer employees in case of a transfer of part of the business when employees shared their time between two or more of his employer's businesses.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The terms of each individual contract will transfer without any change. However on the collective employment front the transfer is for a limited period of time (maximum 15 months.) During that period the transferred employees continue to benefit from rights that were in force with their previous employer immediately before the transfer and also start to enjoy rules applicable to their new employer.

During the 15-month period, the new employer must negotiate a new collective agreement to adapt the rules previously applicable to the transferred employees. If an agreement cannot be established, the previous collective rights will cease to apply but the transferred employees will benefit from their individual acquired rights.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The works council must be informed and consulted on any proposed change to the economic or the juridical organisation of the employer, including modifications resulting from a merger, sale of assets, or a merger or acquisition of a subsidiary, if such modifications would affect employees.

There are also specific consultation requirements in case of a public open bid.

The information-consultation has to fulfil certain conditions:

- it must occur before the implementation of a project; and
- in order to allow the works council to express a reasoned opinion, the employer has to provide it with precise and written information, a reasonable time to consider all elements, and to give a reasoned answer to its observations.

The duration of the process depends on the complexity of the project and its impact on the work force. 3 weeks to 4 months is a representative range of the time it may take.

Any employer, who does not consult the works council or consults it irregularly, is subject to sanctions consisting of a fine of €3,750 and/or 12 months' imprisonment.

### 5.4 Can employees be dismissed in connection with a business sale?

Dismissals implemented by the transferor before the transfer are forbidden and are considered as void if they are to prevent the employee transfer rules from applying. The sanction for the employer is to reinstate the concerned employees or pay them compensation.

Dismissals after the transfer are possible but cannot be justified by the transfer.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

The employers cannot change the terms and conditions of employment because of a business sale. They have to comply with the normal process for changing terms. However the fact that new collective rules apply to the buyer can impact individual employees.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The employer must serve notice in which he will lay out the grounds for dismissal, either personal or economic.

The dismissal letter must be sent by registered mail no earlier than 2 days after a preliminary meeting at which the employee and the employer will discuss the contemplated termination.

The notice period is usually of 1 to 3 months' duration but the employee's age and the length of service can increase the length of the notice period.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

There is no concept of garden leave. The employer can release the employee from working his notice period but in this case the employee is free to join another employer, even if he continues to be paid his notice by his previous employer.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

A specific process must be respected by employers before implementing a termination. The preliminary meeting referred to in question 6.1 is part of that protection.

Labour Inspector authorisation is required in the case of dismissing an employee representative or an employee benefiting from the same protection (employment tribunal judges). All other cases do not require third party consent.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

The following employees benefit from a special protection against dismissal:

- pregnant women;

- employees on sick leave resulting from a work-related accident or illness;
  - employee representatives; and
  - Employment Tribunal judges, social security tribunal judges.
- Labour Inspector authorisation is essential for the dismissal of an employee representative.

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#### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

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An employer is entitled to dismiss for reasons related to the individual employee for disciplinary or non-disciplinary grounds:

- A disciplinary termination could be contemplated if an employee has committed a fault or violated one of the disciplinary rules established by the employer; noting that the termination cannot be implemented more than two months after the employer's acknowledgment of the misconduct.
- A non-disciplinary termination could be contemplated if the employee fails to adequately perform the job assigned to him. The employer will have to show that the employee lacks the necessary skills to adequately perform his/her job.

An employer is entitled to dismiss for reasons related to the business when three cumulative conditions are fulfilled:

- the termination is unrelated to the specific employee's abilities and performance;
- the termination results from the elimination or transformation of the position, or from a modification of an essential element of the employment contract; and
- the termination results from economic difficulties, technical changes or a reorganisation necessary to safeguard the group's competitiveness.

Employees are entitled to benefit from a severance indemnity which is determined by the applicable collective bargaining agreement or by the Labour Code (whatever is more favourable to the employee) which amounts to at least 1/5 monthly salary per year of service.

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#### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

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It is rather simple to terminate an employee for personal grounds as long as there is a valid ground for dismissal. The following steps need to be followed:

- invite the employee to a preliminary meeting by registered post or letter remitted by hand, received five working days' prior to such meeting. This letter must state the time and place of the meeting as well as the employee's right to be accompanied by a colleague (or an outside party subject to certain conditions);
- hold the meeting with the employee; and
- send the dismissal letter by registered post no sooner than two days after the meeting, the presentation of the letter to the employee's home will be the starting point of the notice period (generally between 1 to 3 months).

For dismissals based on economic grounds, the employer will have to:

- apply selection criteria to all the employees belonging to the professional category within which the employer wishes to suppress the position. The criteria for selecting the terminated employee are determined by law: family situation (single parents for example); length of service; difficulties finding a new job (age or disability); and professional skills;

- search for all available positions within the company and within the whole group, even abroad to redeploy the employee prior to any redundancy; and
- order the customary redeployment scheme documentation; in groups with less than 1,000 employees in Europe, the employer has a statutory obligation to inform the employee about his entitlement to benefit from the CRP scheme: specific State retraining programmes allowing employees to follow training sessions to find new employment while receiving higher unemployment allowances. If the employer belongs to a group of more than 1,000 employees, in the redundancy letter he must offer the employee redeployment leave. The employee has 8 days to either accept or refuse such measure. In case of acceptance, the employee will benefit from a specific training for 4 to 9 months while being compensated by his employer.

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#### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

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An employee can challenge the grounds for his termination before the Employment Tribunal and request the payment of additional indemnities. Employees with more than 2 years' length of service in companies with at least 11 employees are entitled to a minimum of 6 months' salary. There is no maximum compensation that can be ordered by the Tribunal.

In addition, if the court decides in favour of the employee, it will order the employer to reimburse all or part of the unemployment compensation received by the employee, if any, to the unemployment agency (*Pole Emploi*). The amount of such reimbursement may not exceed 6 months of unemployment compensation (roughly equivalent to 3 months' salary).

In order to counteract an employee's claim, the employer must prove that the grounds for termination were real and serious and for dismissals based on economic grounds, the employer must prove that the redundancy plan was justified and fulfils all necessary criteria.

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#### 6.8 Can employers settle claims before or after they are initiated?

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Employers can settle claims before and after they are initiated:

- Before: so as to prevent the terminated employee from suing the company to obtain compensation for unfair termination, in exchange for the payment of a specific financial compensation. The risks and the costs of litigation will thus be avoided.
- After: so as to request the terminated employee to waive his claim in exchange for specific financial compensation.

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#### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

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An employer has additional obligations if it is dismissing various employees at the same time.

In case of 2 redundancies or more over 30 days (but less than 10): the information-consultation of the employees' representatives is mandatory as well as the information of the labour administration within 8 days of the sending of the redundancy letter.

In case of more than 9 redundancies within a 30-day period, the Company will have to apply the following procedure (in addition to the steps described in question 6.6):

- the employer must prepare a job protection plan which

contains concrete and precise measures that the employer proposes to implement in order to accompany terminations but more specifically to avoid or reduce the number of redundancies and facilitate the obtaining of new employment positions within or/and outside the group;

- the employees' representatives must be informed and consulted on the economic grounds and on the job protection plan; and
- in addition to reviewing the Job Protection Plan, the labour inspector checks the adequacy of the consultation procedure, and notifies the employer of any relating remarks.

#### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees, through the intermediary of the employees' representatives can negotiate a higher severance indemnity and/or better measures of outplacement or trainings in the job protection plan.

If an employer fails to comply with its obligations i.e. if the Employment Tribunal considers that the employer did not comply with the redeployment obligation or when the redundancy is not based on real and serious economic grounds, damages for unfair termination will be awarded to the terminated employee.

If the job protection plan is considered as being insufficient by the Employment Tribunal, the redundancy proceedings will be considered as null and void. The employees made redundant could then ask for their reinstatement or for damages.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Various types of restrictive covenants are recognised:

- non-compete;
- non-solicitation of employees; and
- confidentiality.

### 7.2 When are restrictive covenants enforceable and for what period?

A non-compete clause is valid only if it is necessary to protect the company's legitimate interests, taking into consideration the specificities of the job position of the employee concerned and is limited geographically and in time.

The non-compete clause must also ensure financial compensation to the employee.

The period is generally defined by the collective bargaining agreement. When there is no provision in the collective bargaining agreement in this regard, case law considers that two years is the limit.

The non-solicitation of employees and the confidentiality clauses are enforceable without any specific conditions.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Employees have to be provided with financial compensation in return for non-compete covenants.

The compensation is generally provided in the collective bargaining agreement. However, an employment contract can provide the

employee with a more favourable compensation.

The compensation generally represents at least 30% of the employee's former salary for the period for which the clause is applicable. Payment of the compensation during the course of the contract is not valid.

### 7.4 How are restrictive covenants enforced?

A breach in the non-compete or confidentiality covenants can be enforced by the former employer before the tribunals which could:

- decide that the breach must immediately end; and/or
- decide to award damages to the employer (which for the non-compete clause could represent the reimbursement of the financial compensation plus additional compensation based on the prejudice suffered).

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Employment Tribunal (*Conseil de Prud'hommes*) has jurisdiction to hear employment-related complaints at first instance level. It is composed by non-professional judges elected by the employees and the employers.

Claims for specific cases can also be brought before administrative courts and tribunals for social affairs.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The employment-related complaints are examined by the Employment Tribunal in two procedural steps:

- the conciliation hearing: judges intend to conciliate the parties; and
- the trial hearing: if the parties have not been able to conciliate, at the trial hearing where the parties plead their case.

The conciliation is therefore mandatory once the claim has been filed except for claims with their aim regarding a disqualification of a fixed-term contract to an indefinite-term contract as, in that case, the parties will be convened directly to the trial hearing.

### 8.3 How long do employment-related complaints typically take to be decided?

There is no minimum or maximum time for the proceedings to be dealt with. It depends on the jurisdictions.

On average, it takes one year for an employment-related complaint to be judged at first instance level.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

A decision rendered by an Employment Tribunal may be appealed against before a Court of Appeal within two months after the decision has been rendered.

The procedure takes approximately another year before the Court of Appeal renders its decision.

**Note**

This chapter was contributed by Hogan Lovells (Paris) LLP.

**Jean-Marc Albiol**

Hogan Lovells (Paris) LLP  
6, Avenue Kléber  
75116 Paris  
France

*Tel:* +33 1 53 67 4747  
*Fax:* +33 1 53 67 4748  
*Email:* [jean-marc.albiol@hoganlovells.com](mailto:jean-marc.albiol@hoganlovells.com)  
*URL:* [www.hoganlovells.com](http://www.hoganlovells.com)

Jean-Marc is an employment partner in Hogan Lovells' Paris office. He regularly advises clients on the employment law aspects of company restructurings, as well as senior executive remuneration packages. Jean-Marc advises on all cross-border employment issues including the harmonisation of employees' status and negotiation of employment contracts. He has extensive experience in resolving social unrest and represents major French and international companies in trade union disputes.

Jean-Marc is a lecturer of labour law at Paris II Pantheon-Assas University and has authored numerous articles in a variety of publications. He is co-author of the book Lamy Social group "Lamy Groupe des Sociétés".



In today's world, the ability to work swiftly and effectively across borders and in a variety of languages and cultures, is invaluable. This is something that the Hogan Lovells employment team does as a matter of course.

The breadth and depth of Hogan Lovells' employment practice and their global reach, provides a platform from which they offer sophisticated and coordinated guidance on the most pressing and complex employment challenges, wherever they arise.

Hogan Lovells' award-winning employment law team has extensive experience in advising clients on the full spectrum of employment matters - from workplace policies and practices, developing comprehensive risk avoidance strategies, advocating for clients in litigation and arbitration, to negotiating with unions and other employee representatives and helping them to implement their strategic domestic and international initiatives.

Hogan Lovells assist clients in resolving their employment challenges creatively, strategically and cost-effectively.

# Germany

Hogan Lovells

Kerstin Neighbour



## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The main source of employment law is legislation. Rights agreed at a European level are normally brought into force through national legislation. Other rights are included in collective bargaining agreements, works council agreements and in contracts of employment.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

In former times, German employment law distinguished between blue-collar workers and white-collar workers. Today, the law protects all kinds of employees equally. An employee is a person who performs “dependant” work for the benefit of another person on the basis of a civil law contract. The fact that the employee works dependently distinguishes the work of an employee from services performed by a freelancer or independent contractor. Some employees (e.g. pregnant women, disabled employees, works council members) enjoy a special protection.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Employment contracts do not have to be in writing. However, fixed term contracts must be in writing. Employees must be provided with a written statement about the essential conditions of contract, which are: name and address of employer and employee; beginning of employment; for temporary employment, its ending; place of work; brief job description; pay rates and payment intervals; hours of work; holiday entitlement; termination period; and whether the terms of employment are governed by a collective agreement.

### 1.4 Are any terms implied into contracts of employment?

Various terms are implied into employment contracts. The duty of mutual trust and confidence is very important: employers and employees should not behave in a way that may have a negative effect on the relationship of confidence and trust between them.

The implied duty of loyalty and fidelity prevents an employee from competing with his employer while he remains in employment and from disclosing confidential information. Employees are under an implied obligation to exercise reasonable skill and care and to obey

reasonable instructions.

Under certain preconditions, terms can also be implied by custom and practice if an employer invariably follows a particular practice over a period of time.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

German law stipulates a lot of minimum employment terms that employers have to observe, e.g.:

- The employer has to observe certain notice periods depending on the employee’s seniority (length of service).
- Moreover, the Working Time Act (“*Arbeitszeitgesetz - ArbZG*”) regulates the maximum length of an employee’s working day, the minimum length of breaks, the minimum length of an uninterrupted rest period as well as the legality of night work.
- Furthermore all employees are entitled to a minimum of 20 working days holiday each year (in a five-day week).

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

In 2009 around 65% of the western and 50% of the eastern German workforce was covered by collective agreements.

Collective bargaining takes place both at company and industry level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The formation and function of trade unions as well as their internal democratic structures are protected by constitutional law. An employee’s freedom to choose whether or not to join a union is an individual constitutional right pursuant to Article 9 para. (3) of the German Constitution (“*Grundgesetz - GG*”).

Trade unions must be a separate legal entity, formed freely and voluntarily, with the purpose of improving working conditions, including engaging in labour disputes. They must be independent and organised on a supra-company level and may not have members from the opposing side, e.g. employers. German case law requires that the trade unions are powerful enough to force an

employer or employers' association to negotiate collective bargaining agreements with them.

## 2.2 What rights do trade unions have?

Trade unions represent the interests of the employees *vis-à-vis* the employers and employers' associations. In particular, they conclude collective bargaining agreements and they are entitled to organise strike actions.

## 2.3 Are there any rules governing a trade union's right to take industrial action?

Complex rules, especially established by precedents, govern a trade union's right to take strike actions.

Formally, a strike must be organised by a trade union and called following a strike vote conducted according to democratic principles. Therefore, a so-called "wildcat" strike is illegal.

The strike must pursue a change in working conditions. It must also be conducted in a lawful manner.

The underlying collective bargaining agreements must not be in force anymore, otherwise, the trade union violates the obligation to keep the peace.

The strike action must not be unreasonable and out of proportion.

## 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

The formation of a works council is not mandatory for employers. The initiative for creating a works council must come from the employees or the unions. Works councils may be established if an operation has at least five employees aged 18 or over and at least three employees who are eligible to be elected. To be eligible for election an employee must be 18 or over and have at least 6 months' service.

If a works council exists it has to represent the employees' interests. The Works Council Constitution Act ("BetrVG") determines the works council's co-determination rights.

The works council is elected by the employees of the operation every four years.

## 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

The Works Council Constitution Act particularly provides enforceable co-determination rights in respect of certain social matters, hiring and relocation of employees and in respect of economic matters.

An enforceable co-determination right regarding social matters is for example the co-determination right regarding beginning and ending of the daily working time or the preliminary reduction or extension of the usual working time of an operation.

If the employer wants to hire or relocate an employee, he needs the works council's approval. The works council is only entitled to refuse the hiring or the relocation of an employee because of certain reasons that are enumerated exclusively in the Works Council Constitution Act. If the works council disapproves the hiring or relocation of an employee the employer has to ask the labour court for approval. Otherwise, he is not entitled to hire or relocate the employee.

Regarding economic matters the works council is not able to prevent the decision of management itself, but under certain preconditions the employer has to conclude a so-called social plan with the works council that provides for benefits for the affected employees. Furthermore, under certain preconditions, the employer has to try to reach a so-called reconciliation of interests with the works council about how operational changes are carried out.

If the employer and the works council are not able to find an agreement in cases of enforceable co-determination rights, a conciliatory board has to make a final decision. This conciliatory board consists of an agreed chairman (or nominee of the employment court in the absence of agreement) and an equal number of representatives denominated by the employer and by the works council.

## 2.6 How do the rights of trade unions and works councils interact?

Formally, the rights of trade unions and of the works council are independent from each other.

However, according to some provisions of the Works Council Constitution Act, works council agreements are not valid if there is a collective bargaining agreement covering a certain issue.

## 2.7 Are employees entitled to representation at board level?

Several laws (Co-determination Act, Montane Industry Co-determination Act, One-third Participation Act) regulate the employees' representation at board level depending on the company's legal structure and the number of employees:

In companies with 500 or less employees there is no mandatory employee co-determination at board level.

In stock corporations, associations limited by shares, private limited companies and in associations with more than 500 employees, one third of the members of the supervisory board must consist of employee representatives.

In stock corporations, associations limited by shares, private limited companies and in associations with more than 2000 employees half of the members of the supervisory board must consist of employee representatives.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected against discrimination because of race, ethnic roots, sex, religion or belief, disability, age or sexual identity ("protected characteristics"). Discrimination is prohibited at every stage of the employment relationship, including recruitment and after termination.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Direct discrimination occurs if an employee is treated less favourably than another because of a protected characteristic. Direct discrimination can be justified on grounds of occupational requirements. Furthermore, different treatment on grounds of religion or belief and of age can be justified by another objective, reasonable and legitimate aim.

Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put an employee, who shares a protected characteristic, at a particular disadvantage compared with other employees, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Harassment shall be deemed to be discrimination when an unwanted conduct in connection with any of the protected characteristics takes place with the purpose or effect of violating the dignity of the person concerned and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Sexual harassment shall be deemed to be discrimination when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.

It is unlawful to victimise an employee because he has taken action to enforce his rights not to be discriminated against, or because he has made or supported someone else's allegations of discrimination.

### 3.3 Are there any defences to a discrimination claim?

The employer has to show that, in fact, no discrimination has taken place.

An employer is vicariously liable for discrimination acts of its employees. He will be able to avoid liability if he can show that he has taken all reasonable steps to prevent the discrimination occurring.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can bring discrimination claims before the labour court. Claims can be settled at any time before and out of court.

### 3.5 What remedies are available to employees in successful discrimination claims?

Compensation is the main remedy in discrimination claims, comprising a loss of earnings award and an injury to feelings award. A loss of earnings award compensates the employees for the financial loss they have suffered because of the employer's discrimination.

Injury to feelings awards also have no limit. However, this compensation shall not exceed three monthly salaries in the event of non-recruitment if the employee would not have been recruited anyhow even without unequal treatment.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

For a period of six weeks before giving birth, and for a period of eight to twelve weeks after having given birth, women must not be employed.

Both father and mother of the newborn child are entitled to parental leave for a period of up to three years, generally to be taken before the child has reached the age of three.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

During maternity leave employees receive a maternity benefit which is approximately as high as the last net salary. The employee's health insurance and the employer have to fund the maternity benefit together.

An employee cannot be dismissed while she is pregnant and within 4 months after pregnancy. For this reason, during maternity leave, a woman cannot be dismissed.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

A woman returning to work from maternity leave is entitled to return to the job in which she was employed before her maternity leave on the same terms and conditions, and with the benefit of any general improvement in terms and conditions.

### 4.4 Do fathers have the right to take paternity leave?

Fathers have exactly the same rights as mothers to take parental leave. German law does not distinguish between mothers' and fathers' parental leave. There is no freestanding right to paternity leave.

### 4.5 Are there any other parental leave rights that employers have to observe?

During parental leave, the employee may be employed part-time and ask twice for a reduction of his working time.

Employees may be entitled to parental benefits which are provided by the government. The parental benefits amount to 67% of the employee's average income in the 12 months prior to the child's birth, however the maximum amount is €1,800 and the minimum amount is €300. The employee is entitled to parental benefits for 12 to 14 months starting from the date of the child's birth.

Moreover, employees on parental leave are granted a special protection against dismissals. 8 weeks before and during parental leave employees may not be dismissed. In special cases, the competent authority is entitled to declare that the dismissal is legal in spite of parental leave.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Every employee who has been employed with the company for more than six months is entitled to request a reduction of his contractual working time. The employer shall consent to the reduction of the working time in accordance with the employee's wishes unless barred by operational reasons.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

An asset sale will quite often be regarded as a transfer of an undertaking ["TUPE"] if tangible and intangible assets are transferred and the business continues. Employment relationships existing at the time of the business transfer will pass over automatically with all rights and obligations from the transferor to the transferee by operation of law.



However, in a share sale there is no change in the identity of the employer. Hence, the employees remain employed with the same legal entity.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

According to Sec. 613a of the German Civil Code (“BGB”) the buyer succeeds to the rights and duties arising from the existing employment relationships. The contractual relationship as a whole passes over to the buyer. For this reason, the buyer will be bound by all obligations arising from the transferred employment relationships.

If the business passes over as a whole and retains its identity, all the works council agreements concluded previously will remain in force. In contrast, if the business does not retain its identity, the works council agreements concluded previously will be transformed into individual contractual provisions for each employee. Such a transformation in individual contractual provisions will not occur if the buyer has a works council agreement regarding the same topic.

Collective bargaining agreements (“CBAs”) of the seller will remain in force on a collective basis if both the buyer and the seller are bound by the same CBA. Otherwise, the provisions of the CBAs that apply collectively, will be transformed into provisions of the individual employment agreement and continue on this basis. If the buyer is bound to a CBA and some of the transferring employees are members of the trade union having concluded that CBA, it also applies to these employees’ employment relationships.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Under certain circumstances a transfer of business can constitute a change of operation. In these cases the works council must be informed promptly and comprehensively of the intended measures that constitute a change of operation. The employer must provide any information necessary for the works council to evaluate the forthcoming changes in the business structure and their detrimental effects on the employees. Furthermore, the employer has to consult with the works council on the intended measures.

The works council also has co-determination rights in case of a change of operation. It is entitled to negotiate a so-called reconciliation of interests and the employer has to conclude a so-called social plan with the works council. Whereas the reconciliation of interests describes the operational changes in the (part of the) transferred business, the social plan contains measures to compensate or mitigate the economic disadvantages for the employees due to these changes (e.g. severance payments, re-education opportunities, mobility packages).

Due to its extensive co-determination rights, the works council is able to delay the implementation of a change of operation drastically.

On a transfer of business the buyer or the seller are obliged to inform each individual employee before the transfer of business regarding the buyer, the date or planned date of the transfer, the reasons for the transfer, the legal economic and social consequences of the transfer as well as the intended measures in respect of the employees. The employees are entitled to object to the transfer of their employment relationship from the seller to the buyer within one month after having been informed correctly and completely.

Without proper information, the employees may object to the transfer without being barred by the one month-period.

### 5.4 Can employees be dismissed in connection with a business sale?

Any dismissal of an employee by the buyer or the seller because of the transfer of a business shall be invalid. The right to terminate an employee’s employment relationship for other reasons remains unaffected by the business sale.

No special rules apply to dismissals in connection with a share sale.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Terms and conditions of the employment contract may be changed according to the “normal rules”. Changes may be implemented by mutual agreement or (in exceptional cases) a dismissal with the option of altered conditions of employment is valid.

If collective agreements have been transformed into individual provisions of the employment contract (see question 5.2) these provisions must not be changed within one year after the transfer of business has taken place.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Except in relation to fixed-term contracts, employees always have to be given notice of termination. Notice of termination requires written form.

The length of the notice period is often set down in contracts of employment, subject to the statutory minimum of four weeks (effective to the 15th or the end of a calendar month) and increases depending upon the seniority (length of service) of the employee.

### 6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

An employer can require employees to serve a period of “garden leave” if this is permitted under the employee’s contract.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

The right of the employer to terminate an employment relationship is very severely restricted by the Act against Unfair Dismissal (“KSchG”). All employers are bound by this Act except employers who employ a very small number of employees. Where the statute applies, employees come under its protection after six months’ service.

According to the Act against Unfair Dismissal an employer needs a justifying reason to dismiss an employee (i.e. operational reasons, reasons regarding the employee’s conduct or personal reasons).

An employee is treated as being dismissed if his employer terminates his contract by notice of termination.

#### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Special protection against dismissal is granted to pregnant employees, employees during parental leave, persons with disabilities, employees who have taken a special leave to care for their relatives (“*Pflegezeit*”), works council members and other employee representational bodies.

With respect to persons with disabilities, dismissals require the prior consent of the competent authority for the integration of severely disabled persons. The same applies for the dismissal of someone in an equal position as severely disabled persons. Members of works councils and other employee representational bodies can only be dismissed for good cause provided the consent of the works council has been rendered or replaced by a court decision. In general, it is impermissible to dismiss a woman during pregnancy and in the first months after delivery. In special cases, however, the state authority responsible for the protection of employees may declare the dismissals to be permissible upon application by the employer. The authority’s consent is also required in order to dismiss an employee during parental leave.

#### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Due to the general protection against dismissal an ordinary dismissal will only be effective on the following grounds: conduct-related dismissal (e.g. due to the employee’s workplace misconduct), dismissal for person-related reasons (e.g. the employee’s inability to do the work) and dismissed for operational reasons. However, where the Act against Unfair Dismissal (“*KSchG*”) does not apply, the employer is free to dismiss any employees he chooses at any time, as long as the dismissal is not arbitrary.

Employees are not entitled to compensation on dismissal. Nevertheless, after a dismissal, the employer and employee often conclude a settlement agreement before the labour court. In most cases, employees are granted a severance payment, the amount of which usually depends on the seniority and the age of the employee.

#### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

If a works council exists in the operation, it is absolutely essential to inform it prior to the dismissal. The requirements for the information are rather strict. If the works council is not informed or not informed correctly, the dismissal will be void.

In some cases of dismissals the employer has to follow certain rules. The most important are the following:

- Prior to a conduct-related dismissal the employer must provide the employee with a warning letter with sufficient time to improve his conduct.
- For a dismissal based on suspicion relating to a severe breach of contract, the employee must first be heard and given the opportunity to respond to the allegations raised against him.

#### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee can file a claim to the labour court within three weeks

after having received the letter of notice. If the claim is successful, the employment relationship will continue. In practice, the parties very often conclude a settlement which provides for a termination of the employment relationship against a severance payment.

Employees can also bring a discrimination claim if they believe their dismissal is based on a protected characteristic.

#### 6.8 Can employers settle claims before or after they are initiated?

Employers can settle claims at any point of time.

#### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

The employer has to notify the Employment Agency of dismissals within a period of 30 days that exceed a certain threshold, depending upon the size of the establishment concerned. The mass dismissal notification has to be submitted before the dismissals are delivered to the employees.

If an employer fails to notify the Employment Agency in case of mass dismissals, all dismissals will be invalid. For this reason, the employees can bring a claim to the Employment Tribunal.

Under certain preconditions, he must inform the works council in writing and in a timely manner of, in particular and among others, the reasons for the planned dismissals and the number and occupational group of the concerned employees. Furthermore, he has to try to reach a reconciliation of interests and he has to conclude a so-called social plan.

#### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

There are no special rules for the employees in respect of the enforcement of their rights in case of mass dismissals.

## 7 Protecting Business Interests Following Termination

#### 7.1 What types of restrictive covenants are recognised?

During an existing employment, restrictive covenants are governed by law. Because of the existing employment relationship the employee has to refrain from competition with his employer. For the period after termination of the employment agreement, restrictive covenants only apply if agreed upon in the employment agreement.

#### 7.2 When are restrictive covenants enforceable and for what period?

Post contractual restrictive covenants will be only enforceable under severe preconditions:

- the restriction must not exceed two years;
- it must be concluded in writing;
- there must be a justified commercial interest of the employer;
- the employee’s professional freedom must not be restricted unreasonably; and
- the employer undertakes to pay compensation for the duration of the restrictive covenant in the amount of at least

50% of all contractual benefits the employee received before the termination of the employment relationship.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

See question 7.2.

### 7.4 How are restrictive covenants enforced?

If a former employee is acting in breach of a restrictive covenant, an employer can apply for a preliminary injunction or bring an action for injunctive relief to the labour court in order to prevent further breaches.

The employer may also be entitled to claim damages from the employee.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Labour courts are divided into three levels. The court of first instance is the labour court which has exclusive subject-matter jurisdiction over all disputes arising from the employment relationship. Appeals are heard in the state labour courts. In order for the appeal to be allowed, the value of the matter in dispute must exceed €600.00 in principle. In the third instance, the Federal Labour Court can, upon special admission, rule on appeals of the final decisions of the state labour courts. The Federal Labour Court serves as the final court of appeal.

Labour courts are composed of both professional and lay judges. The divisions of the labour court and the state labour court each comprise one professional judge and two lay judges. The lay judges have the same rights and powers as the professional judges, but as a rule, the latter play the leading role in the proceedings. The divisions of the Federal Labour Court comprise three professional judges as well as two lay judges.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

In a claim for unfair dismissal the employee must submit the statement of claim within three weeks after the dismissal. In respect of other claims there are sometimes also deadlines that have to be observed.

After receipt of a statement of case, the judge schedules a conciliatory oral hearing. Before this hearing, the defendant does not have to respond to the plaintiff's statement. If the parties cannot find an agreement in the conciliatory hearing, the defendant has to respond to the plaintiff's statement of claim. In most cases the plaintiff replies again before the next hearing takes place.

### 8.3 How long do employment-related complaints typically take to be decided?

A first instance case generally takes around three to six months from being lodged until it is decided by the court of the first instance.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

See question 8.1

Appeals usually take six to nine months. The final appeal to the Federal Labour Court, if admissible, may take between one and two years.

#### Note

This chapter was contributed by Hogan Lovells International LLP.

**Kerstin Neighbour**

Hogan Lovells International LLP  
Kennedydamm 24, 40476 Dusseldorf  
Germany

Untermainanlage 1, 60329 Frankfurt am Main  
Germany

*Tel:* +49 211 13 68 0 (Dusseldorf)

+49 699 62 36 0 (Frankfurt)

*Email:* [kerstin.neighbour@hoganlovells.com](mailto:kerstin.neighbour@hoganlovells.com)

*URL:* [www.hoganlovells.com](http://www.hoganlovells.com)

Kerstin Neighbour is an employment partner in Hogan Lovells' Dusseldorf and Frankfurt offices. Having joined the firm in 2003, Kerstin advises national and international clients on both individual and collective labour law issues. The key aspects of her work include advisory services in connection with acquisitions and reorganisations and the counselling of senior managers in respect of their service agreements. She advises clients on all cross-border employment issues including the harmonisation of employees' status and negotiation of employment contracts. Kerstin is an experienced speaker at employment law seminars and regularly writes articles about current labour law issues for newspapers and the legal press.



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Hogan Lovells assist clients in resolving their employment challenges creatively, strategically and cost-effectively.

# Greece

Liana Kounadi



Georgia Skiada



## Nikos Frangakis & Associates

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main sources of employment law are: 1) **National** sources, which are divided into a) **common/statutory** (constitutional rules, labour laws, labour custom) and b) **independent** (collective agreements, arbitration awards, work regulations, union statutes, employers' and employees' co-decisions, business practice), and 2) **European and International** sources (international agreements, International Labour Organisation's recommendations, the European Convention of Human Rights, European Social Charter, International Covenant of Economic, Social and Cultural Rights etc.).

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The law distinguishes between clerical workers, manual workers, managers and under-age workers. Specifically, **clerical workers** [παράλληλοι] are those who render primarily mental work, while, **manual workers** [εργάτες] are those who render primarily manual work. The importance of the distinction appears mainly in the notice period to be observed before terminating the employment agreement and in the severance payment. **Managers** are highly educated employees with special skills, who are involved in managerial decision making. **Under-age workers** are considered employees between 15 - 18 years of age.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Contracts of employment do not have to be in writing. However, employees must be informed in writing by the employer on essential terms of their contracts or regarding their employment, i.e.: the names of the employer and employee; place and hours of work; job title; commencement of employment and its duration; duration of annual leave; when and how the annual leave will be granted; pay rates and payment intervals; conditions for termination of employment; and the amount of compensation etc.

#### 1.4 Are any terms implied into contracts of employment?

Various terms are implied into employment contracts. The employee has the duty of loyalty, namely to promote and not act against the company's interests. Specifically, employees are under

an implied obligation to exercise reasonable skill and to obey reasonable instructions. Also, the employee must not reveal trade secrets and must not receive gifts from clients without the employer's approval. Finally, employees have an obligation not to compete with their employers during the term of their employment. On the other hand, employers have a duty to pay wages, provide a safe environment, give the appropriate guidance and facilitate the execution of work, respect employees' personality, give leaves of absence, equally treat his/her employees and actually employ them.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Minimum employment terms and conditions are set down by law and the National General Collective Labour Agreement [NGCLA]. In principle, the terms of collective agreements which are favourable to the employee prevail, unless law contains mandatory provisions. Moreover, the employment contract may provide a more favourable approach to the employee clauses than those prescribed by law.

The maximum legal working period for most employees is 40 hours per week. Moreover, the employee is entitled to receive a minimum notice period varying from 1 to 6 months, depending on the years of service.

Furthermore, the minimum wages for all employees in Greece, in both the public and private sector, have been determined for many years through free collective bargaining between the social partners. If the parties failed to reach an agreement, assistance is sought from the Organisation for Mediation and Arbitration. That regime was recently reversed, because of the 2010 financial crisis, which has caused major changes in labour law: labour relations are now governed by new labour laws (Law 3863/2010, Law 3899/2010 etc.), altering certain long-standing rules. As a result of the financial crisis, wages in the private sector were frozen under the NGCLA, signed on 15 July 2010, for the period 2010-2012. More specifically, the following apply to the private sector employees:

- A pay freeze is imposed throughout 2010 and for the first half of 2011.
- As from 1 July 2011 and 1 July 2012, increase in wages (as determined on 31 December 2009 and on 1 July 2011, respectively) may be agreed upon, up to a maximum limit equal to the inflation annual rate in Europe.

All employees are entitled to annual leave, based on the duration of employment. Employees, who work 6 days per week, are entitled to 24 working days of leave, and those who work 5 days per week are entitled to 20 working days of leave. The duration of leave can be increased up to 30 and 25 days, respectively.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective agreements can regulate all matters relating to working conditions as well as to conclusion and termination of the employment agreement. Furthermore, collective agreements may also regulate issues relating to: a) the exercise of trade union rights in the enterprise; b) the exercise of business policy, where it directly affects the working relations; and c) the interpretation of the regulatory conditions of the collective agreements and finally issues that belong to the scope of work regulation. The law accepts the view that the company is the most appropriate level for collective bargaining. However, collective bargaining often takes place at industrial level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

Trade unions are organised in a three-level structure. The first level consists of associations, unions of persons and local centres of nationwide trade unions; the second level consists of federations and labour centres and the third level of confederations. The same rules apply for the recognition of trade unions of all levels with the exception of unions of persons. The latter can be founded by at least 10 employees only in small- or medium-sized businesses (with less than 40 employees), when half of the employees are not members of the same undertaking's association. The deed of incorporation must be filed with the Justice of the Peace and sent to the employer. For all other trade unions the founders (minimum 20 employees) shall file an application with the Court of First Instance (CFI). The trade union acquires legal personality and recognition as from the date of its registration in the Register of Associations.

### 2.2 What rights do trade unions have?

Recognised trade unions have a wide variety of rights, which serve the principle of protection and development of employees' labour and financial rights. The most representative trade unions have the power to participate in collective bargaining and conclusion of collective agreements. When the parties fail to reach an agreement, the trade union has the right to recourse to mediation and arbitration. Moreover, trade unions are entitled to consult, at their request, with employers at least once a month, take industrial action and be informed and consulted regarding collective redundancies and business sales. According to the size of the workforce the most representative trade union may have the right to a suitable place for general meetings and to adequate office space provided by the employer.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

Industrial action is allowed in two cases, as a means for the protection and development of employees' financial, labour and insurance rights and as a manifestation of solidarity for employees of multinational enterprises, when the outcome of the industrial action of the latter will affect them directly. Normally a 24-hour notification of the employer is required. In case of public utilities' employees and civil servants it is extended to a 4-day notification

of the employer and the competent Ministers. Moreover, employees of public utilities must invite the employer to public debate. Trade unions are also required to provide for security personnel. In case of first-level trade unions their general meeting is the appropriate body to make the decision for industrial actions, while in case of second- and third-level trade unions the appropriate body is the BoD.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Employers are not required to set up works councils. In undertakings with at least 50 employees, the latter have the right to set up works councils. However, if a trade union has not been set up in the undertaking, it suffices that 20 workers are employed. Works councils are not meant to be in confrontation with employers, but are mainly cooperation bodies, aiming not only at the improvement of working conditions but also at the development of the company. Works councils' main right is to be informed regarding business sales, introduction of new technology, changes in staff structure and work organisation, transfer, extension and limitation of facilities and the undertaking's progress in financial terms. Works councils' representatives are appointed on a two-year basis by the employees' general meeting, which is composed of the whole workforce, except for the trainees and workers who have been employed for less than two months.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Works councils have co-determination rights for specific matters, provided that there is no trade union in the company and these matters are not regulated by collective agreements. In these extremely rare cases works councils' co-determination rights relate mainly to the compilation of the internal regulation, the regulation for health and safety issues and the control of employees' presence and conduct by way of audiovisual means.

### 2.6 How do the rights of trade unions and works councils interact?

In principle trade unions' rights prevail over the rights of works councils. When a trade union exists in an undertaking, the trade union and not the works council exercises the co-determination rights and the right to be informed and consulted regarding collective redundancies and business transfers.

### 2.7 Are employees entitled to representation at board level?

It is not provided by the law that employees have the right for representation at board level and it is uncommon for employees to be appointed as directors. There are exceptions, though, especially among corporations of the public sector of the economy.

### 3 Discrimination

#### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The law prohibits discrimination on grounds of sex, race or national origin, age, disability, religion or belief, pregnancy or motherhood and sexual orientation. Moreover, the principle of equal treatment at the work field is guaranteed by the Constitution. The protection against discrimination aims at equality regarding access to employment, career development, vocational training, working conditions, pay and social security.

#### 3.2 What types of discrimination are unlawful and in what circumstances?

There are four unlawful types of discrimination: a) *direct discrimination*, when a person is treated less favorably than another under the same working conditions; b) *indirect discrimination*, when a provision, criterion, or practice, that at first sight is neutral, may cause different treatment in the work field; c) *harassment*, when undesirable conduct is expressed in order to offend a person's dignity, including sexual harassment; and d) any mandate to discriminate against a person.

However, judging *in concreto* according to the specific working conditions discrimination may be lawful only on significant grounds, such as a) in case of employees with special characteristics, like disabled people and women during pregnancy or motherhood, and b) measures necessary for the maintenance of public security and order, the prevention of crime, the protection of health and human rights.

#### 3.3 Are there any defences to a discrimination claim?

Employers may challenge discrimination claims on the significant grounds mentioned under question 3.2.

#### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Any employee who believes that he/she has suffered discrimination at work may seek legal protection by raising discrimination claims before the Court. Besides the aforesaid protection, employees can ask for the assistance of the independent authority named the Greek Ombudsman and the Labour Inspectorate, which mediate settlements in cases of discrimination.

Employers can settle discrimination claims before or after they are initiated either before the Court or extra-judicially. Moreover, the abovementioned authorities may use reconciliation proceedings.

#### 3.5 What remedies are available to employees in successful discrimination claims?

The victim of discrimination may seek compensation, which may cover not only the loss of earnings and salary, but also the moral damage. The amount of compensation varies according to the specific circumstances.

The Court will decide whether criminal or administrative sanctions should be imposed on the employer.

### 4 Maternity and Family Leave Rights

#### 4.1 How long does maternity leave last?

Women are entitled to a 17-week compulsory maternity leave as follows: 8 weeks before and 9 after the birth. Furthermore, employees are entitled to a special 6-month additional leave, starting after the expiration of the 9-week leave after the birth. A mother has also the right to work one hour less for thirty months after her return to work, which, with the employer's consent, may be exchanged for an extra contiguous leave of approximately 3 months.

#### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A woman retains her usual terms and conditions of employment. However, if she takes the 6-month leave, she will receive the minimum legal salary and benefits, which are paid by the Manpower Employment Organisation (OAEΔ).

#### 4.3 What rights does a woman have upon her return to work from maternity leave?

A woman, who has taken the 17-week maternity leave or the additional leave, is entitled to return to her previous job, or a job equivalent to that, on no less favorable terms and conditions.

#### 4.4 Do fathers have the right to take paternity leave?

Fathers are entitled to a 2-day leave for a child's birth. They also have the possibility to work one hour less for thirty months after the end of maternity leave or take the equivalent contiguous leave of approximately 3 months, on the same terms as provided for the mother, in case their partner decides not to use this right herself.

#### 4.5 Are there any other parental leave rights that employers have to observe?

Both parents have the right to a maximum of 3½ months unpaid leave for the upbringing of a child under the age of three and a half years, provided that each one has been working for the same employer for over a year. Mothers, and alternatively fathers, who have adopted children under 6 years of age, are also entitled to work one hour less daily for thirty months or take the equivalent leave. Parents also have the right for 4 days leave per year, in order to be informed of their children's schooling.

#### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Employees, who are responsible for disabled children and are working for undertakings with at least 50 employees, are entitled to work one hour less and receive a proportionately decreased salary. Apart from this right, employees, who have the responsibility for caring for dependents (children, parents or unmarried brothers and sisters), are entitled to unpaid leave of at least 6 days per year in order to take care of them in case of sickness.

**5 Business Sales**

**5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?**

A share sale does not normally amount to a change in the identity of the employer, save where it takes effect within the framework of a takeover or a merger. Employees are automatically transferred to the buyer provided that the business sale amounts to a transfer of an economic entity which retains its identity, meaning an organised grouping of resources pursuing an economic activity.

**5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?**

On a business sale all employees' rights existing on the date of the transfer and arising from a contract of employment, the employment relationship, collective agreements, arbitration awards and regulations are automatically transferred, save for where the transferor has initiated bankruptcy proceedings or any analogous insolvency procedure.

The transferor and the transferee are jointly and severally liable regarding obligations which arose before the date of the transfer. Prior to the transfer being carried out the transferee is entitled to refuse to undertake the employees' rights arising from any existing insurance schemes. Alternatively, the transferee may accept the continuation of existing insurance schemes and upon consultation with the employees and the transferor he may stipulate a new agreement with different clauses with respect to these schemes. Upon the business sale the employees' rights provided by collective agreements are transferred to the transferee until their expiration or termination. However, the collective agreement of the transferor is superseded by a new collective agreement, arbitration award or regulation.

**5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?**

Both the transferor and the transferee are obliged to inform the representatives of their respective employees affected by the business sale regarding the proposed date of the transfer, the reasons for the transfer, its legal, economic and social implications and any measures envisaged regarding employees. The transferor is required to provide the foregoing information in due course and in any case prior the execution of the sale and the transferee in any event before his employees are directly affected by the transfer. The transferor or the transferee intending to take measures which will change the employees' status is required to consult the employees in good time with a view to reaching an agreement. Where the transferor or the transferee fails to abide his information and consultation obligations, a fine may be imposed dependent upon the gravity of the violation, repeated failure to comply with the competent authorities' recommendations, the degree of culpability and similar past infringements.

**5.4 Can employees be dismissed in connection with a business sale?**

The business sale does not constitute in itself grounds for dismissal of employees. Exceptionally, dismissal of employees may take place for economic, technical or organisational reasons entailing

changes in the workforce according to the relevant provisions regarding redundancies. In order to make the decision to dismiss employees, the employer should take into account their financial and marital status, the length of their service, their qualifications, age, prospects to find a new job and pension rights and among employees, who have the same qualifications and performance the employer should keep the weakest in economic terms and those with more family responsibilities. If the contract of employment is terminated by the employee because the transfer involves a substantial change in working conditions to his/her detriment, the employer shall be regarded as having been responsible for termination of the contract of employment and the respective favorable for the employee provisions shall apply.

**5.5 Are employers free to change terms and conditions of employment in connection with a business sale?**

Employers are not free to change the terms and conditions of employment. The employees' rights transfer automatically to the transferee and the latter is not entitled to deviate from them, save with respect to the employees' insurance schemes. Any agreements to the contrary with the transferor or any agreements with the employees concerning the waiver or limitation of their rights are not allowed. However, in any event upon business sale a new collective agreement, arbitration award or regulation takes precedence over those existing at the time of the transfer.

**6 Termination of Employment**

**6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?**

A contract of fixed duration exists where there is a specific written agreement as to its duration, or where its termination is linked to the nature of the task for which the employee was hired. Premature termination of the contract by the employer is allowed without notice only on serious grounds.

A contract of unlimited duration exists where its termination is not defined or implied by its nature. The law provides two types of termination of the employment agreement:

a) The regular termination is possible at any time, provided that the employer gives the appropriate notice and pays the legal severance. Notice and severance are based on the time period for which the employment to be terminated lasted as follows:

Years of prior Service	Prior Notice/Severance
0 - 12 months	0
12 months - 2 years	1 month
2 years - 5 years	2 months
5 years - 10 years	3 months
10 years - 15 years	4 months
15 years - 20 years	5 months
Over 20 years	6 months

b) The irregular termination takes effect immediately, without a notice period, provided that the specified severance is paid. The irregular termination is the only way to terminate the employment contract of manual workers.



**6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?**

Unless otherwise agreed the employee has the right to be effectively occupied, because the employee by providing his/her work, develops his/her personality, builds his/her professional progress, maintains and enhances his/her abilities and social status. Thus, the employee may consider that by not being effectively employed, this amounts to a detrimental change in working conditions and claim compensation. However, this right is limited during the notice period, if the employer can prove the breach of trust to the employee.

**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

Employees have the right to challenge the legality of their employment’s termination before the courts; they are in principle protected against unfair dismissal. An employee is treated as dismissed if his/her employer terminates the employment agreement (with or without notice). Consent from a third party is not required.

**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

An employer may dismiss union officers or representatives only under limited circumstances. Pregnant women, individuals serving in the military or in companies with mandatory employment relationship (i.e. disabled people, war victims etc), and other specific categories also enjoy special protection against dismissal. Finally, dismissals are prohibited: a) during the annual leave; b) due to family obligations; c) due to the exercise of the right to parental leave; d) during the rehabilitation period of addicted people; e) due to refusal to accept part-time occupation instead of full-time; and f) in reaction to complaints for breach of the principle of equal treatment.

**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

In contracts of fixed duration the employer may terminate the contract only on serious grounds. This does not apply for employment agreements of indefinite duration, where the employer must exercise the right of termination in observance of the principle of good faith; that means the employer should not act in an abusive manner.

Case law has established two main categories of acceptable reasons:

- Reasons related to the employee, e.g. inadequacy in the performance of the employee’s duties, lack of co-operation with his/her colleagues, breach of duties, repeated absences, misconduct, financial impropriety etc.
- Reasons related to the employer, e.g. financial difficulties, diminishing activity and restructuring of the employer’s activities.

If the contract of fixed duration has been terminated due to a breach or change in the personal or economic situation of the employer,

he/she may be obliged to compensate the employee. The employee may seek the payment he/she was entitled to receive until the end of the contract.

If a contract of indefinite duration has been terminated, the employer is obliged to pay severance, which is calculated on the basis of the “regular” monthly remuneration of the last month prior to termination of the employment agreement, taking into consideration that every employee is entitled to 14 months of salaries per annum. Exceptionally the law defines cases, where the employee is not entitled to a termination severance or he/she is entitled to a reduced termination severance.

**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

A fixed duration contract may be terminated before the expiry of its term only if the employer demonstrates that there are important and specific reasons for the termination.

In order for the employer to terminate an employment agreement of indefinite duration two basic requirements must be met. Firstly, the employee must be notified in writing of the termination and secondly, the employer must pay the severance provided by the law. Furthermore, the employer’s right to terminate the employment agreement is tested according to the principle of good faith; namely the employer should not act in an abusive manner.

Additionally, a prerequisite of the validity of the termination is the registration of the employee to the Social Security Fund. Moreover, the employer has the obligation to: a) notify the OAEΔ of the termination within a period of 8 days; b) grant the employee work leave during the notice period in order to seek a new job; and c) provide the employee with a work certificate, stating, at a minimum, the period of work and the kind of work performed.

**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

In case of a premature termination of a fixed duration agreement, the employee may allege that the termination was not based on sufficiently serious grounds. For an indefinite duration agreement, the employee may allege that the employment agreement was not terminated in writing or the termination severance was not paid or was not adequately paid. The employee may further allege that the employer acted in an abusive way. Finally, in both types of employment agreement the employee may allege that the principle of equal treatment was violated or that he/she belongs to one of the protected categories of employees, which according to the law, can be dismissed only if specific requirements are met. If the Court concludes that the termination is null and void the employer may be compelled to: a) re-employ the employee; b) pay the employee his/her salaries since the day of the termination and until the day of re-employment; c) pay the employee’s salary as long as he/she refuses to re-employ him/her; and d) compensate the employee for moral damages.

**6.8 Can employers settle claims before or after they are initiated?**

Claims can be settled before or after they are initiated, by way of compromise between the parties.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

According to the law, collective redundancies are allowed exclusively for economic or technical reasons. The percentage of employees that the employer can legally dismiss within a 30-day period depends on the workforce size. In case of undertakings with 20 to 150 employees only 6 employees may be dismissed, while in case of undertakings with more than 150 employees 5% of the personnel and up to 30 employees. In this case, the employees' representatives are consulted in accordance with a specific procedure. Particularly, employers must draft a memorandum on the economic grounds justifying the collective redundancy and a collective redundancy plan providing measures to avoid and/or limit its effects.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

The employees are entitled to challenge the legality of collective redundancies on the basis of abuse of their rights. Collective redundancies made in breach of law are null and void.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

The types of restrictive covenants are prohibition of future competition and the duty of confidence.

### 7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants are enforceable only when they are necessary to protect the legitimate interests of the employer. They are limited in time and place and judged only *in concreto*.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

A covenant is enforceable only if it has a commensurate provision. No covenant is enforceable if it is against the principle of contractual freedom, even if there is a provision of compensation.

### 7.4 How are restrictive covenants enforced?

In case of breach of covenants employers may seek compensation for their losses and no repetition of these actions in the future. Moreover, criminal sanctions may be sought afterwards for certain abusive acts.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Justice of the Peace (for disputes up to 12,000 Euros) and Single-member Court of First Instance (for disputes above 12,000 Euros) have the competence to hear employment-related claims.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The procedure begins with the submission of the action before the competent Court and is regulated as a special procedure by the Code of Civil Procedure. The law provides that the court must try to conciliate the litigants during the hearing, but in practice this is a formality often disregarded.

### 8.3 How long do employment-related complaints typically take to be decided?

Decisions are delivered within approximately four to eight months after the hearing.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

A first instance decision may be opposed by all the legal remedies which the Code of Civil Procedure provides, mainly by appeal. An appeal usually takes approximately 1 year to be heard. If the decision on the appeal is further challenged by an extraordinary legal remedy (cassation or reopening of contested judgment), an extra period of more than 1 year is likely to be needed.

**Liana Kounadi**

Nikos Frangakis & Associates  
6 Kriezotou Street  
Athens, 10671  
Greece

Tel: +30 210 36 32 671  
Fax: +30 210 36 32 617  
Email: [lkounadi@fralaw.gr](mailto:lkounadi@fralaw.gr)  
URL: [www.fralaw.gr/default.aspx](http://www.fralaw.gr/default.aspx)

Liana Kounadi is an associate at *Nikos Frangakis & Associates Law Firm*. She has an LL.M in Labour law (*University of Athens*). Her postgraduate studies dissertation was on "Business practice in correlation to the Principle of Equal Treatment". Her legal experience, in litigation and counseling, covers a wide variety of matters, including the areas of Civil, European, Real Estate and Administrative law. She is an active Labour law litigation lawyer, handling complicated and diverse lawsuits. Moreover, she provides legal advice on general employment-related matters, indicatively collective employment issues; pension- and insurance-related issues; unlawful termination of employment agreements; the granting of all kinds of leaves (maternity, annual, absence etc.); collective dismissals, temporary agency work, collective bargaining, conclusion of collective agreements etc. Furthermore, she has large experience in drafting employment contracts, internal labour regulations and other legal documents.

**Georgia Skiada**

Nikos Frangakis & Associates  
6 Kriezotou Street  
Athens, 10671  
Greece

Tel: +30 210 36 32 671  
Fax: +30 210 36 32 617  
Email: [gskiada@fralaw.gr](mailto:gskiada@fralaw.gr)  
URL: [www.fralaw.gr/default.aspx](http://www.fralaw.gr/default.aspx)

Georgia Skiada is an associate at *Nikos Frangakis & Associates Law Firm*. She has an LL.M. in Civil law (*University of Athens*) and an LL.M. in Corporate and Commercial law (*London School of Economics and Political Science*). She has a strong practice in Civil, Corporate and Commercial law and a sizeable experience in Labour law. She advises listed and large private companies on how best to incentivise their executives and employees with share and cash-based employee incentive arrangements. Additionally, she provides legal support on labour issues which arise during corporate transactions, corporate restructurings and plant closures. During her career at *Nikos Frangakis & Associates Law Firm*, she offers services ranging from drafting individual employment contracts and resolving industrial disputes to representing clients in Labour law litigation, including claims for unfair dismissal, all types of unlawful discrimination, sexual harassment, industrial accidents and other employment-related torts, unfair competition, misappropriation of trade secrets and confidential information.



LAW FIRM  
**Nikos Frangakis & Associates**

6 Kriezotou str., 10671 Athens, Greece • Tel: +30.210.3632671 • Fax: +30.210.3632617 • [lawfirm@fralaw.gr](mailto:lawfirm@fralaw.gr) • [www.fralaw.gr](http://www.fralaw.gr)

Labour law, compared to other 'traditional' fields of law, is particularly exposed to social, political, economic and technical developments. The current economic downturn in Greece is an inimitable example; new legislation enacted for the needs of countering the crisis, has significantly reformed the Labour law landscape.

While Labour law is in a constant state of flux, *Nikos Frangakis & Associates Law Firm* [FRALAW] succeeds to adapt to all changes, by providing accurate legal services and offering a wide range of employment law solutions that minimise costs and maximise results. FRALAW has a long-standing experience in handling the most complex and sensitive employment-related matters, since the time of the 1st edition of *Nikos Frangakis Elements of Labour Law*, Eugenides Foundation Publ., Athens 1979.

Moreover, FRALAW has extensive experience in most fields of law, including Civil, Administrative, Commercial, Corporate and European law. FRALAW has a team of distinguished and talented lawyers, led by Nikos Frangakis, with the ability to respond quickly and efficiently, in a wide legal spectrum, with innovative solutions to the rapidly changing needs of corporate and individual clients from all over the world.

# India



Sudip Mullick



Anshul Prakash

## Khaitan & Co

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main sources of employment law are legislations enacted by the Parliament and respective State Legislatures and related rules and regulations. Employment and labour laws in India have also developed through case laws laid down by the Supreme Court.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Under the Industrial Disputes Act 1947 ('ID Act') legal protection in India on issues such as notice period (one month or wages in lieu) only applies to a certain category of employees (termed 'workmen'). This term applies to those employed in an industry to carry out manual, unskilled, technical, operational, clerical or supervisory work for hire or reward. It also includes persons employed in a supervisory capacity who earn less than a specified amount (currently Rs 10,000 per month). For employees in an executive or managerial capacity, their terms and conditions of employment are governed by the contract of employment and internal personnel policy of the employer.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Yes, contracts of employment have to be in writing. Oral contracts are difficult to enforce in a court of law. However, under the Contract Labour (Regulation and Abolition) Act 1970, workmen employed as contract labourers by a contractor in government-owned establishments may become regular employees of the establishment even in the absence of an express employment contract if the government by notification abolishes employment of contract labour in the sector in which such establishment is operating. In the absence of an express contract, the terms and conditions of service of such contract labourers would be governed by the certified model industrial employment standing orders of the establishment.

#### 1.4 Are any terms implied into contracts of employment?

There is no specific format prescribed by law in respect of an employment contract. As a matter of practice, all the terms and conditions should be expressly mentioned in the contract to avoid any ambiguity. Such terms and conditions of employment as

expressed in a contract cannot override the applicable provisions of law.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The minimum terms and conditions that are mandated by law are employees' provident fund and pension benefits, gratuity, leave (as per the applicable State specific shops and commercial establishments' legislations) and work hours (specifically for workmen) as well as overtime pay.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining related to terms and conditions of employment is not confined to any numerical threshold of workers or industry. In the backdrop of a strong trade union movement in India, collective bargaining is witnessed in many establishments employing a minimum of 7 workmen but is widespread in industrial establishments engaged in manufacturing operations with a relatively larger workforce (100 or more workmen) and having a registered trade union to which these workmen are affiliated.

### 2 Employee Representation and Industrial Relations

#### 2.1 What are the rules relating to trade union recognition?

The governing law for regulating trade unions in India is the Trade Unions Act 1926 (the 'Trade Unions Act'). This deals with the registration of trade unions, their rights, liabilities and responsibilities and the utilisation of funds by trade unions. Though a federal legislation, the Trade Unions Act is administered by the state governments.

The Trade Unions Act provides for the registration of the trade unions with the registrar of trade unions, appointed in each state. To register a trade union, seven or more members can submit their application in the prescribed form to the registrar of trade unions along with a copy of the rules of the trade union in respect of elections of office bearers and finance and a statement giving particulars of members and office bearers as per the prescribed format under the Trade Unions Act. A trade union must, both at the time of registration and at all times thereafter, have as members at least 10% of the workforce or 100 workers, whichever is less (and

subject to a minimum of seven workmen), engaged or employed in the establishment or industry with which it is connected.

## 2.2 What rights do trade unions have?

A registered trade union has the right to enter into collective bargaining agreements with the management on conditions of service of member workers in relation to their wages, work hours, leave, health and safety and discipline. A trade union cannot by default have an upper hand over the management and the courts in India have recognised the importance of cordial and healthy industrial relations developed through peaceful negotiations to ensure that legitimate rights of workers and employers alike are protected for economic development of the country. As per the ID Act, a trade union will be bound by the terms of a settlement arrived at by agreement between the employer and the workmen represented by such trade union during a conciliation proceeding or an award passed by a labour court on a dispute to which the employer and such workmen represented by the trade union are a party.

## 2.3 Are there any rules governing a trade union's right to take industrial action?

A registered and recognised trade union may initiate industrial action in a labour court or industrial tribunal against the employer for reasons of non-fulfilment of agreed obligations under a collective bargaining agreement by the employer. A trade union may also act on behalf of an aggrieved member worker against any acts of unfair labour practice such as unlawful termination, change in service conditions without notice, coercion and discrimination by the employer. However, the union is required to conduct an action ballot and serve a notice to the employer stating its intention to call for an industrial action.

## 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

The ID Act provides for a works committee composed of both workers' and employers' representatives to settle worker-related disputes and any other issues related to conditions of service.

The appropriate government may, by general or special order, require the employer to constitute a works committee, consisting of employer and employee representatives in any industrial establishment where 100 or more workmen are, or have been, employed in the preceding 12 months.

Both the employer and the employee must have equal numbers of representatives. The employee representatives must be chosen in the prescribed manner and in consultation with the trade unions.

The works committee must promote good relations between the employer and employees and, to that end, engage in dialogue relating to matters which are in their common interest and endeavour to resolve any material difference of opinion in respect of such matters.

## 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

The works committee is not intended to supplement the trade

unions for the purpose of collective bargaining. They are not authorised to consider real or substantial changes in the conditions of service. Their task is only to smooth any friction that may arise between the workforce and the management on a day-to-day basis. Even if the employee representatives in a works committee agree to a scheme of rationalisation, this is not binding on either the workers or the employers.

## 2.6 How do the rights of trade unions and works councils interact?

As mentioned in response to question 2.5, a works committee is responsible for promotion of cordial relations between the employer and the employees, building understanding and trust between them, promotion of measures which may lead to increase in productivity and securing better administration of welfare measures and adequate safety measures. Essentially the intent of setting up a works committee with equal representation of the employees and the employer is an increased level of interaction for mutual good and understanding on industrial relations without overriding the rights of a trade union to negotiate with the employer on the measures that have been proposed by the works committee.

## 2.7 Are employees entitled to representation at board level?

There is no statutory requirement to have workers' representative on the board of an Indian company, although some government-owned companies have workers' representatives on their board of directors.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes, the Constitution of India prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Employees are protected against discrimination on grounds of sex, caste and maternity status under specific laws. Employees of government-owned companies are also protected against discrimination on grounds of disability.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Any discrimination exercised by an employer directly or indirectly, through harassment or victimisation of an employee on grounds of sex, caste and maternity status is considered unlawful and action may be brought by the aggrieved employee against his or her employer on these grounds. The courts while hearing the plea against discrimination would look into the circumstances, including the nature, frequency, intensity, context and duration of the questioned behaviour to determine whether the employee has been discriminated against.

### 3.3 Are there any defences to a discrimination claim?

There is no typical defence to a discrimination claim. An employer would be required to prove that an alleged act of discrimination was unintentional and was committed in furtherance of company's operational objectives without the intention of indulging in any discriminatory act against the employee.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

The employees may enforce their discrimination rights by filing a complaint to the regional labour commissioner of competent jurisdiction on grounds of unfair labour practice. In case of discrimination on the basis of sex and maternity status, a female employee may also approach the National Commission for Women. Besides approaching these authorities the aggrieved employee may also directly file a case in a court of law. Depending on the nature of discrimination alleged by an employee, claims may be settled monetarily before or after the claim initiation.

### 3.5 What remedies are available to employees in successful discrimination claims?

In case of successful discrimination claims, a court may order compensation based on the amount claimed or even an enhanced compensation amount. The law does not prescribe any limit on compensation. In cases involving termination on discriminatory grounds, the court may also order reinstatement of employee with payment of back wages or unpaid wages from the date of termination.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Under the Maternity Benefit Act 1961, irrespective of her remuneration or position in an establishment, every female employee (who has worked for the employer for a minimum of 80 days in the year immediately preceding the date of her expected delivery) is entitled to maternity benefit for a maximum period of 12 weeks, of which not more than six shall precede the date of her expected delivery. In case a female employee has not completed minimum of 80 days in an establishment she may avail leave without maternity benefits subject to the employer's discretion by furnishing a certificate from a registered medical practitioner.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Maternity benefit is payable at the rate of the average daily wage for the period of absence (i.e. 12 weeks). The average daily wage is the average wage for the days on which she has worked during the three-month period immediately preceding the date from which she starts her maternity leave. Female employees are also entitled to a medical bonus of Rs 2,500 if the employer does not provide pre-natal confinement and post-natal care free of charge.

A female employee is also entitled to paid leave, if she suffers a miscarriage or undergoes the medical termination of a pregnancy, for a period of six weeks immediately following the day of her miscarriage or medical termination. The woman is required to submit a medical certificate to this effect. On production of medical certificate, a female employee is also entitled to an additional one month's paid leave if she is suffering from illness arising from pregnancy, the birth, miscarriage or medical termination.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

No specific rights have been provided for under the Maternity

Benefit Act for the period following the return of a woman employee from her maternity leave.

### 4.4 Do fathers have the right to take paternity leave?

No, there is no paternity leave statutorily provided for. An employer may provide for paternity leave in addition to paid leave in its internal personnel policy.

### 4.5 Are there any other parental leave rights that employers have to observe?

There are no other parental leave rights that employers in India are required to observe.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Flexibility in work hours for taking care of dependents depends on the internal personnel policy of the employer and is not mandated by law.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Transfer of employees is automatic in case of transfer of an undertaking from one owner to another. The ID Act defines an undertaking as a unit of an industrial establishment carrying out any business, trade or manufacture. The ID Act provides for compensation to 'workmen' in the event of transfer of ownership or management of undertakings from one employer to another by agreement or by operation of law.

In the event of a transfer of an undertaking all workmen who have been in continuous service for a period of at least one year, are entitled to one month's notice and compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months, as if such workmen have been retrenched.

However, compensation need not be paid when:

- the service of the workman is not interrupted by such transfer;
- the terms and conditions of service applicable to the workman after a transfer are not in any way less favourable than his terms and conditions prior to the transfer; and
- the new employer, under the terms of such transfer or otherwise, is liable to pay compensation, in the event of his retrenchment, on the basis that his service has been continuous and has not been interrupted by the transfer.

The above exceptions are cumulative and all the conditions must be met if the current employer is to be released from his liability to compensate the workmen on the transfer of the undertaking. The new employer will be responsible for paying compensation to an employee in such circumstances.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

All the rights in terms of wage, work hours, leave and allowances or any other service condition cannot be altered to the detriment of

an employee and remain the same on a business sale. Depending on the relations between the trade union, if any, and the management of the establishment, a fresh collective bargaining agreement may be entered into with the new employer without causing any material alteration to the existing terms and conditions of service of workmen.

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**5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?**

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Though not mandated by law, the employer may inform the employees on the impending business sale.

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**5.4 Can employees be dismissed in connection with a business sale?**

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Dismissal of a workman in connection with a business sale would attract compensation requirements mentioned in question 5.1 above.

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**5.5 Are employers free to change terms and conditions of employment in connection with a business sale?**

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The employers cannot change the terms and conditions of employment such that these are less favourable to the employees when compared to the current terms and conditions of employment. If they do so, compensation is payable as set out in question 5.1 above.

## 6 Termination of Employment

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**6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?**

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As per the States specific shops and establishments legislations the minimum notice period for termination of employment is 30 (thirty) days or salary in lieu thereof. In case of workmen, the ID Act prescribes one month's notice period and compensation equivalent to 15 days' average pay for every completed year of service.

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**6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?**

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An employee may be required to serve a period of 'garden leave' during their notice period if the same has either been provided for in the employee's contract of employment or if the employer, in furtherance of his business and operational interest, requires him to do so in the absence of an express contract. However, such requirement should be cautiously exercised by the employer such that the employee does not consider the act defamatory in any manner.

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**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

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An employee may be terminated in three different situations: dismissal for misconduct, discharge on reaching the age of superannuation and retrenchment (under the ID Act). Third party consent is not required for an employer to dismiss an employee

(other than a workman). In case of retrenchment of a workman, an establishment employing 100 or more workmen must obtain permission of the appropriate government.

Dismissal for misconduct, except in cases involving moral turpitude and criminal acts, should be preceded by a domestic enquiry which involves a show cause notice by the employer, the employee being given an opportunity to be heard and dismissal for reasons recorded in writing. Dismissal without domestic enquiry may be viewed as unlawful termination by courts in India.

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**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

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Employees in the category of workmen enjoy protection against dismissal.

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**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

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The employer may dismiss an individual employee for disciplinary reasons. Some instances of misconduct which may justify dismissal after conducting a domestic enquiry are wilful insubordination or disobedience, theft, fraud or dishonesty. As for business-related reasons such as wilful damage or loss of employer's property, bribery, habitual lateness or absence and participation in illegal strike, employees may be entitled to compensation in lieu of statutory notice period. A workman alleged to have participated in a strike cannot be terminated by the employer unless such strike is declared illegal. In case of retrenchment, workmen having completed one year of continuous service or more are entitled to compensation equivalent to 15 days' average pay for each completed year of service.

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**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

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Except for cases involving moral turpitude and criminal behaviour, individual dismissal should be preceded by a domestic enquiry. Retrenchment of a workman by an establishment employing 100 or more workmen would require prior approval of the appropriate government.

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**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

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An employee may file a claim for damages in a court of law alleging unlawful termination of employment and non-adherence to the principles of natural justice. Courts may direct the employer to either reinstate the aggrieved employee with back wages and/or pay him appropriate compensation as the court may deem fit in the facts and circumstances of a particular case.

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**6.8 Can employers settle claims before or after they are initiated?**

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An employer may settle claims before or after they are initiated by an employee for an amount and on such terms and conditions which may be mutually agreed upon. If the settlement occurs after the claim has been initiated then the parties should file a settlement statement before the court adjudicating the claim for withdrawal of

proceedings. The employer and workmen as well as trade unions representing such workmen are bound by a settlement arrived at in course of a conciliation proceeding to which they are a party.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Approval requirements for retrenchment of employees by establishments employing 100 or more workmen would not differ with the number of workmen to be retrenched.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

In case of collective termination of employment on alleged unlawful grounds, employees either individually or through the representative trade union may file a representation or case before the conciliation officer or the labour court respectively as the case may be.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Courts in India recognise restrictive covenants such as non-compete, non-solicitation and confidentiality provided for in contracts of employment during the tenure of employment.

### 7.2 When are restrictive covenants enforceable and for what period?

Restrictive provisions such as 'non-compete' and 'non-solicitation' clauses in an employment agreement are governed by the Indian Contract Act 1872 ("Contract Act"). Under Indian law, the restrictions must be reasonable between the parties (i.e. no wider than is reasonably necessary to protect the interests of the employer). Whether a covenant is reasonable or not will depend on the facts of the case and the nature of the interest that needs protection. However, the three main factors that are required to be considered when determining whether a covenant is reasonable are duration, geographical extent and ambit of activities which are restrained by it.

Under Section 27 of the Contract Act, any agreement which prevents an individual from exercising a lawful profession, trade or business of any kind, is void. It has been held by the courts that a negative covenant restraining an employee from carrying on a similar business or activity as that of the past employer can be enforced during the employment contract, but not after he or she leaves service of such employer.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

The law does not mandate any financial compensation in return for imposition of any restrictive covenant and such arrangement or obligation is purely contractual.

### 7.4 How are restrictive covenants enforced?

Restrictive covenants may be enforced by an employer against an employee for an act committed during employment by filing a

petition/suit for injunction in a court of law. The employer may also claim damages for any harm caused to its business interest due to any breach of a restrictive covenant by an employee in course of his or her employment.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The ID Act provides for setting up of labour courts, industrial tribunals and national tribunals. Labour courts and industrial tribunals are set up by the central and state governments or the administrations of union territories, for dealing with labour and industrial matters which fall in the central government or state sphere. It is, however, open to the central government to refer a matter in relation to which it is the appropriate government, to a labour court or industrial tribunal that has been constituted by the state government.

Labour courts deal with matters pertaining to the discharge and dismissal of workmen, the application and interpretation of standing orders, the propriety of orders passed under standing orders and the legality of strikes and lock-outs. Industrial tribunals deal with collective disputes such as wages, working hours, leave, retrenchment and closure, as well as all matters that come under the jurisdiction of labour courts. Labour courts and industrial tribunals may order appropriate compensation to a workman in cases of dismissal or discharge from service, if it is evident that a lesser punishment could have been given to such workman.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Yes, as per the procedure laid down under the ID Act, a workman may first approach the conciliation officer appointed by the appropriate government for settlement of a dispute. If the conciliation officer fails in having the parties i.e. the employer and the workman, reach a settlement within forty five days of the date of filing a conciliation application then the employee may make an application directly to the labour court or tribunal for adjudication of such dispute. The labour court may adjudicate the dispute on the basis of the application filed by the workman as if it were referred to the labour court or tribunal by the appropriate government.

### 8.3 How long do employment-related complaints typically take to be decided?

There is no fixed timeframe prescribed by law for the courts to decide on employment-related complaints.

### 8.4 Is it possible to appeal against a first instance decision and if so how long such do appeals usually take?

An order passed by a labour court or an industrial tribunal may be challenged, by an appeal or by invoking writ jurisdiction of a high court with jurisdiction over the concerned labour court or industrial tribunal, by either of the employer or the employee who is aggrieved by the order. There is no fixed timeframe for disposal of appeals and writ petitions.





### Sudip Mullick

Khaitan & Co  
One Indiabulls Centre, Tower I 13th Floor  
841, Senapati Bapat Marg, Elphinstone Road  
Mumbai (Bombay) - 400 013  
India

Tel: +91 22 6636 5000  
Fax: +91 22 6636 5050  
Email: [mumbai@khaitanco.com](mailto:mumbai@khaitanco.com)  
URL: [www.khaitanco.com](http://www.khaitanco.com)

Sudip Mullick leads the Real Estate and Infrastructure team at Khaitan & Co, Mumbai.

Sudip has been advising clients on structuring transactions, drafting contracts, giving legal opinions on issues that arise from time to time, negotiating and finalizing the transactions. His clientele includes companies belonging to the power, road, rail, marine and aviation sectors. He has advised them and documented several power purchase agreements, concession agreements, EPC contracts, operation and maintenance agreements, hypothecation agreements, loan agreements, escrow agreements, bid documents and the like that are executed into for such sectors.

Some of his major clients are Electrosteel Castings Limited, IDFC, Chowgule Ports & Infrastructure Private Ltd., SKS, South Asian Petrochemicals, Inox

He has also advised several international and domestic clients on issues related to labour and employment.



### Anshul Prakash

Khaitan & Co  
One Indiabulls Centre, Tower I 13th Floor  
841, Senapati Bapat Marg, Elphinstone Road  
Mumbai (Bombay) - 400 013  
India

Tel: +91 22 6636 5000  
Fax: +91 22 6636 5050  
Email: [mumbai@khaitanco.com](mailto:mumbai@khaitanco.com)  
URL: [www.khaitanco.com](http://www.khaitanco.com)

Anshul has a significant role in the employment law practice of Khaitan & Co and has advised several prominent domestic and international clients on various employment-related issues and labour relations. Some of his major clients are Blackstone Group, Total SA, NTT Data Corp, Babcock & Wilcox Power Generation Group, Merck & Co., Inc., Koch Chemical Technology Group, USA, Invista Inc., Fosroc International, Sourcefire Inc., Verizon Business, Nokia Corporation, Ubisoft, Vistaprint and Russell Reynolds, whom he has advised on employment and labour related issues.

He also advises clients on PE and M&A transactions, including the investment by Arcapita Bank, Bahrain in Polygel Technologies, India, the acquisition of McKinnon & Clarke, UK, and its subsidiary in India by Lyceum Capital Partners LLP, UK, and the acquisition of a majority stake in Sanfield India Limited by Maurer Sohne GmbH, Germany. Prior to joining the firm in 2008, he was an in-house counsel for the Sahara India Group, a prominent business conglomerate.

## KHAITAN & CO

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# Indonesia



Soewito Suhardiman Eddymurthy Kardono

Richard D. Emmerson

## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The main sources of employment law in Indonesia are:

- Law No. 13 of 2003 (March 25, 2003) on Manpower (the Manpower Law), as amended by Constitutional Court decision No. 012/PUU-I/2003 of October 28, 2004;
- Law No. 2 of 2004 (January 14, 2004) on Industrial Relations Dispute Settlement (Law No. 2); and
- Law No. 21 of 2009 (August 4, 2000) on Labour Unions (Law No. 21).

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The Manpower Law protects all employees which is any person working in return for a salary or compensation in another form. Certain rights, such as overtime pay, are not available to manager-level employees. The statutory minimum termination benefits are not payable to an employee who is a shareholder (excluding employees holding shares due to employee stock benefit plans).

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Only fixed-term employment agreements have to be in writing and in the Indonesian language. If there is a written employment agreement, it must at least contain the following:

- name, address and type of business of the company;
- name, gender, age and address of the employee;
- position or type of work;
- place of work;
- amount of salary and method of payment;
- employment conditions containing employer and employee's rights and obligations;
- commencement date and term of effectiveness of employment agreement;
- place and date of the employment agreement was made; and
- signatures of the parties to the employment agreement.

For permanent employment, the Manpower Law simply requires an employer to issue a letter of appointment as an employee (article 63 of the Manpower Law).

### 1.4 Are any terms implied into contracts of employment?

Yes, all statutory rights pursuant to the prevailing laws and regulations are effectively considered to be implied into contracts of employment.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

There are minimum terms and conditions set down by law including the following:

- mandatory termination benefits (see question 6.5);
- minimum annual leave (12 days);
- minimum wages are stipulated by regional government decrees based on location and industry;
- Religious Holiday Allowance (*Tunjangan Hari Raya* or "THR"): The THR payment is payable to employees who have worked for at least three consecutive months. The THR is paid *pro rata* if an employee has worked for three months but less than 12 months. If an employee has worked for 12 months, he/she will get the full THR payment in the amount of 1 month's salary (basic salary plus fixed cash allowances); and
- Manpower Social Security Scheme (*Jaminan Sosial Tenaga Kerja* or "Jamsostek"): Under Law No. 3 of 1992 Regarding Jamsostek, all employers employing ten or more employees are required to participate in the Jamsostek programme. Under this Law, those employers are obligated to cover their employees through the Jamsostek programme and make contributions to the programmes for the benefit of the employees: (i) Work or Occupational Accident Security; (ii) Death Security; (iii) Old Age Security; and (iv) Healthcare Security.

An employer who has implemented its own healthcare programme for workers with benefits better than the basic healthcare package under the Jamsostek programme is not obligated to participate in the Healthcare security. The other three programmes are mandatory.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

In general, the vast majority of Indonesian workers are not unionised. This may in part be attributable to the fact that the Indonesian employment standards legislation provides very generous benefits and requires Labour Court approval for all

employee terminations except where the employee accepts the termination by written agreement or resignation.

Any group of at least 10 employees can register a union. One or more unions representing more than 50% of all employees have the right to negotiate a Collective Labour Agreement which is binding on all employees. Bargaining in Indonesia takes place at the company level as industry level negotiations are not well developed.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The Manpower Law and Law No. 21 recognise trade unions. Law No. 21 protects the employees' right to form a "labour union" and imposes criminal sanctions on anyone, including the employer, who engages in certain anti-union activity, for example:

- preventing employees from forming a labour union, becoming a member of a labour union or conducting labour union activities;
- terminating an employee or reducing their salary for conducting labour union activities;
- conducting an anti-labour union campaign; and
- intimidation in any form.

As noted above, any group of at least 10 employees can establish a labour union if they wish to do so. There is no concept of a "bargaining unit" based on specific trades and there is no real certification process *per se*. As long as the employees submit the requisite application and provide that there are at least 10 employee members, the application for trade union registration will be accepted.

### 2.2 What rights do trade unions have?

According to Law No. 21 the rights of a labour union are:

- to formulate collective labour agreements with an employer;
- to represent employees in employment-related disputes;
- to represent employees in labour-related institutions;
- to participate in such counsels and other activities for the welfare of the employees; and
- to conduct other activities in accordance with the prevailing laws and regulations.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

Employees and labour unions may strike in an orderly and peaceful manner in the event there is a breakdown of negotiations on an outstanding matter in dispute. Such breakdown must be documented by the employer being unwilling to continue negotiations despite two written requests from the union or employee within 14 days or such breakdown being acknowledged by the minutes of a meeting between the management and labour. The union or employees must give at least 7 working days' prior written notice of a strike to the company and Ministry of Manpower. Employees are entitled to statutory entitlements under applicable laws and such greater benefits under contract, Company Regulation or Collective Labour Agreement ("CLA") while on a lawful strike.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

In Indonesia, a "bipartite cooperation" council is a communication and consultation forum for manpower-related matters within the company, while a "tripartite cooperation" council is a forum among employees, employers and relevant government officials to provide considerations, suggestions, and opinions to the government and related parties in drawing up policy and resolving manpower issues.

A bipartite cooperation council is mandatory for companies with 50 (fifty) or more employees. Employees' representatives on bipartite cooperation councils are nominated by the head of the labour union or by election amongst fellow employees if there is no labour union, while employer's representatives are selected by the management.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

If one or more unions represent more than 50% of the employees, then such union or unions collectively are entitled to represent and bind all employees in a CLA and appoint the employee representatives to bipartite or tripartite councils. Such bipartite council or, if applicable, tripartite council may play a role in the negotiation of the CLA but the rights of employees is governed by the CLA.

### 2.6 How do the rights of trade unions and works councils interact?

As per question 2.5 above, the council itself does not exercise any rights but serves as a body to facilitate negotiations and, in some cases, settlement of disputes depending on the terms of the CLA and applicable laws.

### 2.7 Are employees entitled to representation at board level?

No, employees are not entitled to representation on either the Board of Directors (which is the day-to-day senior executive management) or the Board of Commissioners (which supervise the Board of Directors on behalf of the shareholders).

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes, the Manpower Law provides that each employee shall be entitled to equal treatment from the employer without discrimination. Each employee has the same rights and opportunities to obtain a decent job and livelihood without discrimination by sex, ethnic group, race religion or political orientation, in accordance with the interests and abilities of the employee, including equal treatment for the disabled.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Any discrimination based on sex, ethnic group, race, religion, skin colour or political orientation is unlawful under any circumstances.

### 3.3 Are there any defences to a discrimination claim?

Discrimination claims in Indonesia are rare and thus the law and practice is not well developed. The burden of proof rests with the complainant. The law does not clarify any available defences. It is conceivable that the courts may accept the defence that discrimination is justifiable in certain very specific circumstances (e.g., recruiting from a particular ethnic group to manage corporate social responsibility programmes for that ethnic group).

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

All disputes, including discrimination, are handled by (i) bipartite negotiations, (ii) non-binding mediation with the Ministry of Manpower (or, in theory, arbitration or conciliation), and (iii) Labour Court (please see question 8.2).

Claims may be settled at any time during the process.

### 3.5 What remedies are available to employees in successful discrimination claims?

The employee is entitled to reinstatement, if applicable, or double severance pay, ordinary service pay and ordinary compensation. These terms are discussed in further detail below. The Manpower Law does not expressly recognise other damages such as loss of reputation and mental suffering but these may be recognised in a civil action.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Maternity leave lasts for 3 months; one-and-a-half months before delivery and one-and-a-half months after the delivery.

In a case of miscarriage, a female employee is entitled to one-and-a-half months off after the miscarriage.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A female employee is entitled paid time off during her maternity leave. The same applies in a case of miscarriage.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

If applicable, a female employee who is still nursing her child must be given an appropriate time and facility to nurse her child if it has to be done during working hours.

### 4.4 Do fathers have the right to take paternity leave?

Yes, if the male employee's wife gives birth or miscarries, he may take two days' paid leave.

### 4.5 Are there any other parental leave rights that employers have to observe?

Yes, article 93 (4) of the Manpower Law provides, among others,

the following parental paid leave rights:

- if an employee's child gets married, two days;
- if an employee's child is circumcised, two days;
- if the employee's child is baptised, two days;
- if the employee's husband or wife, parent or parent-in-law, child, or daughter-in-law or son-in-law dies, two days; and
- if the employee's family member living in the same house dies, one day.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

A female employee who is still nursing her child must be given an appropriate opportunity to nurse her child if this has to be done during working hours.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

No. In a share sale, the employer entity remains the same. In an asset sale, the transfer of employees may be agreed with the buyer and employees but is not automatic.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The Manpower Law provides that employees have a right to resign due to change of control (which in practice means a change of more than 50 per cent of the shares in the employer) in a company and are entitled to enhanced resignation benefits.

The Manpower Law is silent on transfers of employees due to an acquisition of assets. It is necessary for all parties, including the employee, to agree that his or her employment will be transferred to the acquirer either as a successor employer or as a fresh employment. In the latter case, the employees shall be paid their termination benefits and their employment period with the acquiring company starts anew.

Alternatively, the employees may agree to start employment with the acquiring company and their existing employment period with the transferring company will be transferred to the acquiring company. In this case, the employees should not receive the termination benefits.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Yes, Law No. 40 of 2007 on Limited Liability Companies (the Company Law) provides that employees must be provided with written announcement 30 days prior to the General Shareholders' Meeting (GMS) with regard to the business sale plan. Any objections will be settled in the GMS.

The failure to provide such information to the employees would subject the business sale to challenge by the employees.

### 5.4 Can employees be dismissed in connection with a business sale?

In a sale of shares, the employer has no right to terminate

employees due to change of control. On the other hand, if a business sale is conducted by sale of assets then in the event that there is no transfer of employment agreement reached between the seller, buyer and the employees, the seller may terminate the employees upon payment of enhanced benefits with either the agreement of the employee or Labour Court approval.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

In a share sale, there is no change to the employer entity or terms and conditions of employment. In an asset sale where the employer voluntarily accepts the buyer as a successor employer, the terms and conditions of employment with the successor employer may not be identical. As a matter of Ministry of Manpower policy, the value of salary and benefits with the successor employer should not represent a reduction.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The notice of termination or pay in lieu of notice concept does not apply in Indonesia. Instead, all terminations involve (i) bipartite negotiation, (ii) non-binding mediation and (iii) Labour Court approval unless settled by agreement in writing at any time during the process.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Yes, employers can require employees to serve a period of "garden leave" in a form of suspension pending the outcome of mediation and Labour Court proceedings. During such period the employees are still entitled to their salary.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

An employer is prohibited from terminating an employment relationship based on the following reasons:

- an employee is prevented from attending work due to illness based on a doctor's statement, for a period not exceeding 12 consecutive months;
- an employee is prevented from carrying out his/her work due to fulfilling state duties in accordance with the provisions of the prevailing laws and regulations;
- an employee performs religious rites prescribed by their religion;
- an employee gets married;
- a female employee is pregnant, gives birth, miscarries or is nursing her baby;
- an employee has a blood and/or marital relationship with another employee in the same company, except where this is regulated in the employment agreement, company regulation or collective labour agreement;
- an employee establishes, and/or becomes a member of, the management of a labour union, or an employee conducts

activities for a labour union outside working hours or during working hours with the agreement of the employer or pursuant to the provisions regulated in the employment agreement, company regulation or CLA;

- an employee reports the employer to the authorities for a criminal act committed by the employer;
- differences in ideology, religion, political leaning, ethnic group, skin colour, group, gender, physical condition, or marital status; or
- an employee is permanently disabled, injured due to a work accident or injured due to the employment relationship where, based on a doctor's statement, the recovery period required cannot be predicted.

An employment termination conducted for one of the reasons above shall be void by law and the employer must rehire the employee.

Under the Manpower Law and other prevailing labour laws and regulations, termination at will is not recognised in Indonesia, and termination must be 'with cause'. The termination of employment relationship must follow the procedures under the Manpower Law and Law No. 2.

Causes for termination are as follows:

- "ordinary" cause (i.e., violation of the employment contract, company regulation or collective labour agreement) after 3 warning letters; and
- "serious" cause including theft, providing false information harmful to the company, dangerous or immoral conduct etc. We note that the "serious" cause provision of the Manpower Law was revoked by a Constitutional Court decision in 2003. However, in 2005 the Minister of Manpower and Transmigration issued Circular Letter No. SE.13/MEN/SJ-HK/I/2005 which mentions that a company may terminate an employment relationship for an "emergency reason", subject to approval from the Labour Court. This is intended to reinstate termination for serious cause provided that the employer obtains Labour Court approval.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

No, there is not.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

An employer is entitled to dismiss an employee for reasons related to that individual employee when:

- there is a cause as explained in question 6.3;
- the employee resigns;
- in the event of death of the employee; or
- the employee reaches retirement age.

An employer is entitled to dismiss an individual employee for the following business-related reasons:

- upon a change in status, merger or consolidation of the company;
- if the company (or a division thereof) is closed down with or without losses being suffered by the company for a continuous period of 2 (two) years or due to *force majeure* (losses or *force majeure* impacts on entitlement); or
- if the company goes bankrupt.

Termination of employment relationship gives rise to termination benefits which include severance pay, service pay, other

compensation and separation pay (*uang pisah*). An employee's termination entitlement depends upon the circumstances of his/her separation. In each case, all references to a "month's wages" means the sum of the fixed cash monthly salary and other monthly fixed cash benefits payable to the employee during his/her last month of employment, and does not include any non-cash benefits or discretionary bonus arrangement.

#### Severance Pay:

Completed Years of Service	Benefit
less than 1 year	1 month's wages
1 year or more but less than 2 years	2 months' wages
2 years or more but less than 3 years	3 months' wages
3 years or more but less than 4 years	4 months' wages
4 years or more but less than 5 years	5 months' wages
5 years or more but less than 6 years	6 months' wages
6 years or more but less than 7 years	7 months' wages
7 years or more but less than 8 years	8 months' wages
8 years or more	9 months' wages

#### Service Pay:

Completed Years of Service	Benefit
3 years or more but less than 6 years	2 months' wages
6 years or more but less than 9 years	3 months' wages
9 years or more but less than 12 years	4 months' wages
12 years or more but less than 15 years	5 months' wages
15 years or more but less than 18 years	6 months' wages
18 years or more but less than 21 years	7 months' wages
21 years or more but less than 24 years	8 months' wages
24 years or more	10 months' wages

#### Other Compensation:

- Compensation for annual leave to which the employee is entitled but which has not been taken and which has not been forfeited.
- Any costs or expenses incurred in returning the employee and his/her family to the place where he/she was recruited.
- Compensation for housing, medical and hospitalisation (which is deemed to be 15 percent of the severance pay and/or service pay to which the employee is entitled).
- Other matters agreed in the employment agreement, company regulation or collective labour agreement.

#### Separation Pay (*Uang Pisah*)

The Manpower Law contemplates another form of compensation called 'separation pay' which is, in effect, a fourth category of termination entitlement. For non-management employees only, they may be entitled to a certain amount of separation pay (*uang pisah*) for resignation (Article 162 of the Manpower Law), serious cause termination (Article 158 of the Manpower Law) and/or termination due to absence without leave (Article 168 of the Manpower Law) only if so specified in the respective company regulation, CLA or employment contract.

#### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Yes. Before terminating an employment relationship, the parties (the employer and the employee or, if applicable, the union representative) are required to meet in an attempt to reach an amicable termination settlement. If negotiations fail, the employer may only terminate the employee after obtaining approval from the Labour Court with few exceptions. The exceptions are:

- an employee is still in his/her probationary period;
- an employee who has submitted a resignation request in writing of his/her own accord without any conditions;
- an employee who has reached the retirement age stipulated in the employment contract, company regulation or CLA;
- an employee whose employment contract terminates after a fixed period (i.e., a fixed term contract employee);
- an employee who dies;
- an employee who faces criminal proceedings for more than six months or who is found guilty by the court before the end of the six-month period; or
- if in a dispute brought an employee against the employer, the claim filed by the employee against the employer is not proven.

In case the plan to terminate an employee is disputed, then the termination process may take up to 140 working days to complete, from bipartite negotiations through to a Supreme Court decision (i.e., if the Labour Court decision is appealed). During the termination process the employer is still required to pay salary and other benefits to employee.

#### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

With regard to his or her termination, an employee can bring the following claim:

- termination is without a valid cause;
- termination is conducted in a manner not in conformity with the prevailing laws and regulations; or
- the termination benefit is less than the mandatory amount (please see question 6.5).

Remedy for successful claim can be in the form of rehiring or enhanced termination benefit.

#### 6.8 Can employers settle claims before or after they are initiated?

Yes, employers can settle claims at any time during the above-noted process.

#### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

No, the prevailing laws and regulations do not differentiate based on the number of employees dismissed.

#### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

The prevailing laws and regulations do not differentiate between mass dismissals and individual dismissals therefore all dismissals

are subject to Labour Court approval unless settled in writing at any stage of the process.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

The most common restrictive covenants recognised are non-competition and non-solicitation (customers, employees, or suppliers). The restrictive covenants are mostly available in executive employment contracts to provide that employees are prohibited, directly or indirectly, from soliciting or diverting any customers, business employees, or suppliers of the employer with whom they became acquainted as a result of their employment.

### 7.2 When are restrictive covenants enforceable and for what period?

The enforceability of restrictive covenants is unclear. It is preferable to limit the same reasonably in geographic location and duration, and to provide compensation.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Compensation is the best way to ensure enforceability.

### 7.4 How are restrictive covenants enforced?

In practice, enforcement of non-competition and non-solicitation would likely depend upon the facts of the case (i.e., scope and duration of restrictions) which should not interfere with a person's right to gainful employment under Indonesian Law and should not interfere with the nation's development. There has been almost no jurisprudence on this point.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Labour Court has the jurisdiction to hear employment-related complaints. The Labour Court is composed of 3 judges, one judge sits as the chairman of the panel and two *ad-hoc* judges sit as members of the panel.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The Law No. 2 sets the category for employment-related complaints or disputes as follow:

- dispute on rights;
- dispute on interest;
- dispute on termination of employment relationship; and
- dispute between workers union/labour union within the same company.

All disputes must first be settled through bipartite negotiation to reach a mutual agreement. If settlement through bipartite negotiation fails, then parties have the option to try to settle their dispute through arbitration (for disputes over interest or disputes between labour unions) or conciliation (for disputes other than disputes over rights). If neither of the parties chooses their dispute settlement method then the dispute will be settled through mediation (for all disputes). Only when the arbitration or conciliation or mediation fails, may one of the parties bring their case to the Labour Court.

### 8.3 How long do employment-related complaints typically take to be decided?

Employment-related complaints typically take up to 140 days to be decided, from bipartite negotiations process through to a Supreme Court decision (i.e., if the Labour Court decision is appealed). The process may take longer if the parties choose to settle through arbitration which is rare.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Except for decisions toward disputes on interest and disputes among workers union/labour unions, the decision of the first instance can be appealed directly to the Supreme Court.

An arbitration award in an employment dispute may also be appealed to the Supreme Court.

Appeals to the Supreme Court should take 30 days.



### Richard D. Emmerson

Soewito Suhardiman Eddymurthy Kardono  
14th Floor Mayapada Tower  
Jl. Jend. Sudirman Kav.28  
Jakarta 12920  
Indonesia

Tel: +62 21 5212038  
Fax: +62 21 5212039  
Email: [richardemmerson@ssek.com](mailto:richardemmerson@ssek.com)  
URL: [www.ssek.com](http://www.ssek.com)

An advisor to SSEK since 1996, Mr. Emmerson has 25 years of experience as a corporate-commercial lawyer. His practice includes foreign investment planning, establishment of subsidiaries and joint venture companies and their ongoing corporate and commercial affairs, corporate restructuring, mergers and acquisitions, and employment law.

Mr. Emmerson has extensive experience in privatisations and infrastructure development projects (drinking water, private power) and advises clients in the insurance, telecommunications, pharmaceuticals and manufacturing sectors.

Mr. Emmerson has been endorsed by the International Financial Law Review, Chambers Asia, Asia Law & Practice and Who's Who Legal as a leading labour and employment lawyer.

A graduate of Queen's University in Canada (B.A. Honours 1980; LL.B. 1983), Mr. Emmerson was admitted to the Law Society of Upper Canada (Ontario) as a Barrister and Solicitor in 1985.



SSEK was formed in 1992 by experienced lawyers with a vision of creating a modern Indonesian law firm capable of delivering legal services at the highest international standard. Today, we have more than 55 lawyers and are one of the largest law firms in Indonesia. Our lawyers have received numerous individual awards and recognitions, including from the International Financial Law Review, Asia Pacific Legal 500, Asia Law & Practice, Chambers' Global and Chambers Asia.

A full service corporate law firm, SSEK has a strong international reputation in M&A, banking & finance, infrastructure, oil & gas, mining & natural resources. We assist both domestic and foreign clients in all areas of business and ensure compliance with the complex regulatory requirements for doing business in Indonesia. The work of SSEK has been described as "*a high-calibre and sophisticated service*" that gives "*thorough and effective advice*" to all its clients (Chambers Asia 2009).



# Ireland



John Dunne



Bryan Dunne

## Matheson Ormsby Prentice

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main source of employment law in Ireland is legislation. Ireland has an extensive range of employment legislation, much of which is derived from European Directives. Other important sources of employment law, however, include the common law, and the Constitution.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Employment Law in Ireland draws a distinction between employees who work under contracts of service and independent contractors (self-employed) who work under contracts for services. While statutory definitions of the term “employee” may vary slightly, an employee is generally defined as someone who has entered into, or works under, a contract of employment with another person or entity.

In determining whether an individual is an employee or an independent contractor, a court or tribunal will look at the entirety of the relationship between the parties. One of the main factors is the degree of control which the employer has over the individual. An independent contractor provides services to another on his own account and is exposed to a degree of financial risk. Genuine contractors will usually also have flexibility in relation to the provision of the work and the freedom to sub-contract or hire other individuals.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Contracts of employment do not have to be in writing. However, an employer is statutorily obliged to provide employees with a written statement setting out the basic terms of their employment. This statement must be given to all employees no later than two months after commencement, and must include details such as pay, hours, holidays, paid sick pay and length of notice of termination. The employer is also required to inform the employee of the procedure which will be followed if the employee is to be dismissed.

#### 1.4 Are any terms implied into contracts of employment?

Various terms are implied into employment contracts. The common

law implies terms in relation to the employee which include the implied duty to be ready and willing to work, to use reasonable care and skill and to obey lawful and reasonable instructions. Both parties are bound by a mutual obligation of trust and confidence. In addition to the above, any minimum statutory entitlements, such as, for example, the right to a minimum of twenty days’ paid annual leave, will, if not expressly provided for, be implied into contracts of employment, as will the constitutional right to fair procedures prior to any dismissal.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

There are a number of minimum employment terms and conditions which employers must observe, some examples of which are as follows. Depending on length of service, employees have the right to the following statutory minimum periods of notice:

Length of Service	Notice
Thirteen weeks to two years	One week
Two to five years	Two weeks
Five to ten years	Four weeks
Ten to fifteen years	Six weeks
Fifteen years or more	Eight weeks

The national minimum wage is currently €7.65 per hour, and employees cannot be required to work more than 48 hours per week, generally averaged over a four-month period. There is no opt out of the maximum working week, except in very limited circumstances.

Employees are entitled to a minimum daily rest period of 11 hours and weekly rest period of at least 24 hours. In addition, employees are entitled to certain daily breaks.

Employees also have a minimum annual leave entitlement of four weeks’ paid leave where they work at least 1,365 hours in a year, plus an additional nine days’ paid public holidays.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Pay and conditions of employment are normally agreed through free negotiations between employers and employees, without intervention of the State. National pay agreements, negotiated

between the unions, employer bodies, Government and other “social partners” have in the past provided a framework for collective bargaining, and although not legally binding, have been widely observed across a variety of sectors. Collective bargaining can take place at either company or industry level and in specific sectors, such as the construction sector, certain legally binding minimum terms are set at industry level, and published in the form of Registered Employment Agreements.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The Irish Constitution gives all citizens the right to join a trade union. However, an employer does not have to recognise a trade union for collective bargaining purposes. Where employers do not recognise unions, or otherwise engage in collective bargaining, there is a statutory mechanism whereby, subject to certain conditions being met, disputes regarding terms and conditions can be referred to the Labour Court for adjudication.

It is estimated that trade union density in the private sector is currently at around 30%. In the public sector it is much higher.

### 2.2 What rights do trade unions have?

Recognised trade unions have various rights. These include the right to engage in collective bargaining, the right to be informed and consulted with in relation to collective redundancies, and in relation to transfer of undertakings, and to be provided with certain types of information in those situations, and the right to engage in industrial action.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

There are complex rules governing a trade union's right to take industrial action. In essence, the rules of a trade union must provide for the conduct of a secret ballot of its members prior to embarking upon industrial action, following which the union must give the employer a week's notice of that action to prevent the employer seeking an injunction in the High Court. Furthermore, industrial action may only be embarked upon in the context of a legitimate trade dispute.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Workplace employee representation is generally voluntary or based on agreement. Employers can be required in certain circumstances, to enter into an agreement to establish an information and consultation forum, although such forums are rare. At least 10% of employees must request the establishment of the forum and the employer must have at least 50 employees. Employee representatives are elected by agreement. Employers have to provide information and consult with the elected representatives on matters such as the company's activities and economic situation, any anticipated measures and decisions which are likely to lead to changes in the workforce.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Works councils do not have co-determination rights in Ireland.

### 2.6 How do the rights of trade unions and works councils interact?

An employer must notify but does not necessarily have to consult with a works council. This will depend on the particular agreement. Trade unions have rights in relation to information and consultation in certain circumstances, for example where there are collective redundancies proposed or in a transfer of undertakings situation and may have further rights pursuant to any collective agreement negotiated with employers.

### 2.7 Are employees entitled to representation at board level?

Employees are not normally entitled to representation at board level save in relation to some state and semi-state companies, and in limited circumstances as prescribed by Statute.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected against discrimination on nine specific grounds by virtue of the Employment Equality Acts 1998-2004, those grounds being age, disability, gender, family status, marital status, sexual orientation, race, religion and membership of the Traveller community.

Certain other categories of employees are specifically protected from discrimination by reason of their status, for example, part-time and fixed-term employees.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Discrimination in relation to access to and/or terms and conditions of employment on any of the nine grounds above is prohibited. Discrimination is defined in the relevant legislation as the treatment of a person in a less favourable way than another person is, has been or would be treated in a comparable situation on any of the nine grounds. Discrimination can be direct or indirect.

Harassment of an employee on any of the nine grounds is also prohibited, as is victimisation as a consequence of an employee making a complaint of discrimination.

Part-time and fixed-term workers are similarly protected.

### 3.3 Are there any defences to a discrimination claim?

An employer will only be able to avoid liability (which will be vicarious) in relation to direct discrimination if it can show that it has taken all reasonable steps to prevent the discrimination occurring. There are some specific circumstances in which discrimination can be justified, for example, the setting of mandatory retirement ages. Indirect discrimination can be justified on objective grounds.

In relation to fixed-term employees, discrimination can only be justified on objective grounds not related to the fixed-term or part-time status of the employee concerned.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can bring equality discrimination claims to the Equality Tribunal, and to the Labour Court on appeal. Such claims can be settled at any stage of the process either before or after they are initiated by the employee. It is normal practice for an agreement to be drawn up if settlement is reached which is legally binding.

Voluntarily mediation is offered to both parties in equality cases. Either party can object to mediation and proceed straight to a formal investigation by an equality officer.

Part-time and fixed-term employees can bring discrimination claims before a Rights Commissioner who will issue a legally binding decision, or the Labour Court on appeal.

### 3.5 What remedies are available to employees in successful discrimination claims?

In equality cases, employees are entitled to compensation up to a maximum of two years' gross remuneration and/or the Equality Tribunal can order an employer to take specific action to address ongoing discrimination.

In relation to part-time and fixed-term employees a Rights Commissioner can make an award of up to two years' gross remuneration as well as requiring the employer to address any ongoing discrimination and comply with the legislation.

Reinstatement or re-engagement may also be awarded in cases of discriminatory dismissal.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Employees are entitled to maternity leave of at least 26 consecutive weeks and an additional maternity leave of 16 consecutive weeks beginning immediately at the end of the maternity leave period. Employees must take at least two weeks of maternity leave prior to the expected date of confinement and at least four weeks after giving birth.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

There is no statutory obligation on an employer to pay an employee who is on maternity leave or additional maternity leave. However, such employees may be entitled to maternity benefit, paid by the State, which equates to 80% of earnings, subject to a maximum of €270 per week. This payment is available to a woman on maternity leave, but not on additional maternity leave. With the exception of remuneration, all other terms and conditions of employment are protected throughout maternity leave and additional maternity leave. Most employers do, however, pay some form of maternity pay above maternity benefit.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

Employees have a general right to return from maternity leave to the position which they held before the maternity leave commenced. If it is not reasonably practicable for the employer to permit the employee to return to work in their previous position, they must be offered suitable alternative employment.

### 4.4 Do fathers have the right to take paternity leave?

There is no statutory right to take paternity leave (either paid or unpaid) following the birth of a child, except in very limited circumstances, such as, for example, on the death of the mother during maternity leave. However, some employers do voluntarily provide a limited form of paternity leave to fathers.

### 4.5 Are there any other parental leave rights that employers have to observe?

Any natural or adoptive parent of a child is entitled to unpaid parental leave amounting to 14 weeks to enable the parent to take care of the child. This leave must be taken before the child's eighth birthday. In the case of an adopted child this age limit is extended. Parental leave is only available to employees with over one year's service with the employer and is in respect of each child. Force majeure leave is available to employees to deal with family emergencies and is paid for three days in a 12-month period, or five days in a 36-month period.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Employees do have the right to request to work flexibly. While the employer is under no obligation to comply with the request, he/she must nonetheless act reasonably with regard to it, and should only refuse the request where there are genuine business reasons for this. The code of practice in relation to access to part-time working is not legally binding, but could be considered by the Equality Tribunal or Rights Commissioner in discrimination cases.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

An asset sale could potentially amount to a transfer of undertaking within the meaning of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. These Regulations apply to any transfer of an undertaking, business or part of a business from one employer to another employer as a result of a legal transfer or merger. If so, any employee engaged wholly or mainly in the business (or part thereof) being bought has the right to automatically transfer to the buyer.

As a share sale does not involve a change in the identity of the employer, no transfer of the undertaking occurs and no right to transfer arises.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

With an asset sale under the Regulations (see question 5.1 above),

all employees who are affected transfer automatically on their existing terms and conditions of employment, save in respect of pension rights, which are generally excluded. The buyer is also obliged to recognise existing collective agreements.

In a share sale, employees will continue to be employed on their existing terms and conditions.

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### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

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With an asset sale under the Regulations, both the seller and buyer are obliged to inform employees affected by the sale, via their representatives, of several matters, including the date of the transfer, the reasons for the transfer, as well as the legal, social and economic implications of the transfer for them. Where there are any measures envisaged in relation to the employees, they have the right to be consulted with. This information must be given to employee representatives not later than 30 days before the transfer is carried out, or if that is not reasonably practicable, as soon as possible. Where a seller or buyer fails to comply with their obligations, employees may bring a claim to a Rights Commissioner for breach of the Regulations which can lead to an award of compensation of a maximum of four weeks remuneration.

In a share sale, employees do not automatically have any information and consultation rights.

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### 5.4 Can employees be dismissed in connection with a business sale?

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Employees have an automatic right to transfer in an asset sale under the Regulations. However, the buyer (and in some limited cases, the seller) may be permitted to effect dismissals post (or pre) transfer for economic, technical or organisational reasons (akin to redundancy). All other transfer related dismissals will be deemed automatically unfair.

There are no special rules which apply to dismissals in connection with share sales.

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### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

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The buyer does not have the right to adversely change the terms and conditions of employees who are transferred to the buyer in an asset sale under the Regulations. There are no contracting out provisions in the Regulations in this regard, even where the changes are agreed by the employees.

No special rules apply in respect of changes to terms and conditions in connection with a share sale.

## 6 Termination of Employment

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### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

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All employers are obliged to give employees notice of termination of employment unless they are being summarily dismissed. The length of the minimum statutory notice period is as set out under question 1.5 above, although longer periods of notice are typically provided for in most employees' contracts of employment.

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### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

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Employers can require employees to serve a period of garden leave during their notice period but only if this is expressly provided for under the contract of employment or is otherwise agreed between the parties. Garden leave periods may not, generally, be unduly lengthy.

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### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

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Where an employee has over one year's service with an employer, he/she has the right to claim unfair dismissal. Employers must be able to prove not only that they had a fair reason for the dismissal, but also that they followed fair procedures in effecting the dismissal.

Certain dismissals are automatically unfair, including, dismissals relating to pregnancy, religion or political opinions, trade union membership, race, age, sexual orientation, asserting a statutory right, or where an employee is involved in criminal or civil proceedings against the employer. In the case of trade union membership or pregnancy-related matters, the employee does not need one year's service to bring the claim.

An employee is treated as being dismissed if his/her employer terminates the contract (with or without notice). Constructive dismissal occurs where an employee resigns in response to a fundamental breach of contract by the employer or where the employer's behaviour is so unreasonable as to leave the employee with no option but to resign.

Employees may also challenge their dismissals at common law, where a failure to dismiss on the appropriate notice has occurred, or where the employer is otherwise in breach of some term of the contract. There is no service requirement to bring proceedings at common law.

Employees may not be dismissed on any one of the nine discriminatory grounds referred to under question 3.1 above.

Consent from a third party is not required before a dismissal takes place.

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### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

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See question 6.3 above. Employees may claim discriminatory dismissal under the nine protected grounds set out in equality legislation (see question 3.1 above).

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### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

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Employers are entitled to dismiss an employee, whether for individual or business reasons, provided those reasons are fair, and follow fair procedures. The reasons prescribed as fair in the Unfair Dismissals Acts 1977-2007 are those related to the capability, competence or qualifications of the employee, the conduct of the employee, the redundancy of the employee, or some other substantial reason.

Employees must be provided with a statutory redundancy payment, if they are dismissed for redundancy reasons. This is calculated at two weeks' pay per year of service (capped at €600 per week) plus an additional bonus week (also capped at €600).

Employees who are dismissed for a reason other than redundancy are not entitled to receive a statutory redundancy payment. However, they must be paid any outstanding statutory and contractual entitlements and may be compensated if their dismissal is deemed to be unfair following any subsequent litigation, subject generally to a maximum of two years' remuneration.

#### **6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

Employers must follow fair procedures when effecting any dismissal in order to avoid liability for unfair or wrongful dismissal. There is a code of practice in relation to disciplinary procedures. Although the code is not legally binding, employment tribunals and courts may take consideration of it in unfair or wrongful dismissal cases if no analogous procedure has been put in place by the employer. The procedure includes prior warning to the employee that their position is at risk of dismissal, giving the employee the opportunity to comment and respond in relation to the allegations, allowing the employee to be adequately represented at meetings, giving the employee the reasons for any decision to dismiss and giving the employee the opportunity to appeal the decision. The sanction of dismissal must also be proportionate to the allegations made against the employee. If the dismissal relates to performance issues, employees should be given a reasonable opportunity raise the standard of their performance. In cases of capability, employers would be required to make appropriate enquiries as to the employee's health, and should only dismiss on the basis of an up to date medical evaluation.

#### **6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

Employees with over one year's service can initiate proceedings, within six months of the dismissal (or up to twelve months in exceptional cases) before a Rights Commissioner or Employment Appeals Tribunal for unfair dismissal. Employees can be awarded re-instatement, re-engagement or compensation up to a maximum of two years' gross remuneration. Employees have a duty to mitigate their loss.

Employees who are dismissed on one of the nine equality grounds (see question 3.1 above) can bring a claim to the Equality Tribunal. Such employees do not need one year's service. The maximum award that can be made is up to two years' gross remuneration and employees do not have to mitigate their loss. The Equality Tribunal can also require the employer to take a specific course of action.

Employees may also bring proceedings at common law in the civil courts, which may be preceded by an application for an injunction to restrain the dismissal in certain circumstances.

#### **6.8 Can employers settle claims before or after they are initiated?**

Unfair or discriminatory dismissal claims can be settled in the same way as discrimination claims (see question 3.4 above). Common Law claims can also be settled before or after they are initiated.

#### **6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?**

Special rules apply in respect of collective redundancies. A collective redundancy means a dismissal which is effected, for reasons unconnected with the individual, over any period of thirty consecutive days of: at least five employees in an establishment normally employing twenty to fifty employees; at least ten in an establishment employing fifty to a hundred employees; at least ten percent in an establishment employing a hundred to three hundred employees; or at least thirty in an establishment employing three hundred or more employees.

The employer must first enter into consultation with employee representatives with a view to reaching an agreement on whether the dismissals can be avoided or reduced, and, if not, on the basis on which particular employees will be made redundant. Such consultation must commence at least thirty days before the first notice of dismissal is given. The Minister for Trade, Enterprise and Innovation must also be notified in writing. In very exceptional cases, employees or employers may refer a proposed collective redundancy to a government-appointed redundancy panel for an opinion and possible Labour Court hearing on whether the circumstances constitute an exceptional collective redundancy (essentially where an employer seeks to replace employees being made redundant with lower paid workers).

#### **6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

Unfair dismissal claims can be brought in the normal way. Failure to comply with the notification and consultation obligations under collective redundancy legislation may result in awards of compensation of up to four weeks gross remuneration per employee. Employers may also be liable to a potential fine of €5,000 on summary conviction in respect of a failure to inform and consult, or on conviction on indictment, to a fine not exceeding €250,000 in circumstances where any dismissal is effected prior to the conclusion of the statutory consultation period.

## **7 Protecting Business Interests Following Termination**

### **7.1 What types of restrictive covenants are recognised?**

The normal types of restrictive covenants which may be recognised in Ireland are those which seek to prevent employees competing with their former employers, dealing with or soliciting their customers, and poaching other employees.

### **7.2 When are restrictive covenants enforceable and for what period?**

Post termination restrictive covenants are *prima facie* void under Irish law as an unlawful restraint of trade. This is unless the covenant protects the employer's legitimate business interests and the restrictions go no further than is necessary to provide that protection. Legitimate business interests include such matters as confidential information, trade secrets, and customer or trade connections. A restriction must be reasonable in relation to duration, geographical scope, and the activities which are restricted.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

It is unlikely that the covenant would be enforceable if no consideration were made by the employer. Such covenants are normally included in the contract of employment where the salary payable under the contract of employment is arguably good consideration for entering into the restriction. If the covenant is provided in a separate contract or deed, then it is more usual to see specific financial compensation provided for.

### 7.4 How are restrictive covenants enforced?

The employer can make an application to the civil courts for an injunction to restrain an employee from breaching the covenant and preventing further breaches. It may also be possible for the employer to recover damages by way of compensation for any loss suffered.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The table below sets out the main courts and tribunals which have jurisdiction to hear employment related complaints and their composition.

Type of Claim	Forum	Composition
Unfair Dismissal	Rights Commissioner Service/Employment Appeals Tribunal.	Rights Commissioner Service: Rights Commissioner. Employment Appeals Tribunal: Chairperson (legally qualified) and two lay representatives, nominated from panels drawn up by employer's bodies and trade unions respectively.
Discrimination	Equality Tribunal.	Equality Officer.
Breach of Contract/Injunction application	Civil Courts.	Judge.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Type of Claim	Procedure	Mandatory Conciliation
Unfair Dismissal	Claims must be lodged with the Rights Commissioner Service/Employment Appeals Tribunal within six months of the dismissal (or twelve months in exceptional cases). The complaint is sent to the employer for a response and a date is set for hearing. There may be a voluntary exchange of documents. Each party is responsible for bearing their own costs.	No mandatory conciliation process. However, the Rights Commissioner Service is a relatively informal process. Either party can opt out of the Rights Commissioner stage.

Type of Claim	Procedure	Mandatory Conciliation
Discrimination	Claims are lodged with the Equality Tribunal within six months of the date of discrimination (or twelve months in exceptional circumstances). The employer is given the opportunity to respond throughout the investigation which includes an exchange of submissions in advance of the hearing before an Equality Officer. He/she will issue a legally binding decision. Each party is responsible for bearing their own costs.	There is no mandatory conciliation process. However, voluntary mediation is offered. Either party can object.
Breach of Contract/Injunction	Plenary Summons is issued by Plaintiff and Appearance and Defence are entered by Defendant. Further particulars of the claim and/or Defence can be sought, as can the mandatory production of documents via an application for discovery. When the "pleadings" have closed, a date is set for hearing. Costs are generally awarded to the successful party. Where an injunction is sought, the plenary summons must be accompanied by a Notice of Motion. The injunction application is heard on affidavit only.	No mandatory conciliation process.

### 8.3 How long do employment-related complaints typically take to be decided?

In unfair dismissals cases, the time frame from being lodged until a claim is heard is variable, depending on the backlog. Cases generally take six to twelve months until they are heard by the Employment Appeals Tribunal. In the Equality Tribunal, cases can take twelve to eighteen months from the date of lodgement until the case is heard. Before the civil courts, the waiting time is usually longer, and cases can take two years or more to come on for hearing unless an injunction has been granted in the meantime, in which case they are usually heard within a year.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Type of Claim	Initial Forum	Appeal Forum	Time
Unfair Dismissal	Rights Commissioner	Employment Appeals Tribunal	Approximately 12 months
Unfair Dismissal	Employment Appeals Tribunal	Circuit Court	Approximately 6 months
Discrimination	Equality Tribunal	Labour Court	Approximately 6 months
Breach of Contract	District/Circuit/High Court	Circuit/High/Supreme Court	Approximately 12-36 months

**John Dunne**

Matheson Ormsby Prentice  
70 Sir John Rogerson's Quay  
Dublin 2  
Ireland

*Tel:* +353 1 232 2319  
*Fax:* +353 1 232 3333  
*Email:* john.dunne@mop.ie  
*URL:* www.mop.ie

John is a partner in the Employment Pensions and Benefits Group at Matheson Ormsby Prentice. John advises on a wide range of employment law issues, both contentious and non-contentious. This work includes the drafting and review of employment contracts and policies, plaintiff and defence work in litigious matters, advising on the various aspects of commercial transactions and on new developments in case law and legislation in the area of employment and equality law.

John previously practised with the Irish Business and Employers Confederation (IBEC), and has developed extensive experience both on industrial relations issues and trade union law. He has particular expertise regarding contentious matters regularly representing clients before the Rights Commissioner Service and Employment Appeals Tribunal. In addition to this, John has advised on a number of large and complex commercial transactions, involving many facets of employment law, with particular emphasis on commercial re-structuring and the transfer of employees.

**Bryan Dunne**

Matheson Ormsby Prentice  
70 Sir John Rogerson's Quay  
Dublin 2  
Ireland

*Tel:* +353 1 232 2388  
*Fax:* +353 1 232 3333  
*Email:* bryan.dunne@mop.ie  
*URL:* www.mop.ie

Bryan is a Partner in the Employment Pensions Benefit Group at Matheson Ormsby Prentice's Dublin Office. He advises on a wide range of both contentious and non-contentious employment law matters. Due to his involvement in some of the largest Irish corporate transactions in recent years, Bryan has built up considerable experience in the varied employment and labour aspects that arise in commercial projects and reorganisations, such as the Transfer of Undertakings Regulations Industry, employee relocation and post acquisition restructuring. Bryan's clients include a broad base of large national and multinational companies, requiring diverse advice on compliance, operational and management issues. Bryan has particular expertise in advising on cross-border and international employment law issues such as inward investment, foreign secondment and assignment arrangements, as well as leading the Irish aspects of numerous cross border transactions. He is a regular speaker on cross-border employment issues to the American Bar Association, and has written extensively on this topic.

## MATHESON ORMSBY PRENTICE



Matheson Ormsby Prentice is Ireland's largest law firm employing more than 600 people in Dublin, London, New York and Palo Alto, California. The firm's clients include many of the Fortune 500, FT Global 500 and FT Euro 500 companies doing business in and through Ireland, as well as some of the largest public, private and State owned companies in Ireland.

The Employment, Pensions and Benefits Group is one of the largest employment law practices in Ireland, providing expert legal advice on all aspects of the employment relationship, including employment contracts and policies, business immigration, industrial relations, outsourcing, internal investigations, M&A transaction support to include transfer of undertakings and post acquisition integration, pension schemes and employee benefits. Sitting within the Commercial Litigation and Dispute Resolution Department, the Group has a strong contentious practice and its lawyers frequently advise clients on contentious matters before the courts and tribunals.

# Israel

Yigal Arnon & Co.

Ben Sandler



Shira Lahat



## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The main sources of employment law are protective labour law legislation and developing case law. In addition, there are general collective agreements in certain industrial sectors. Certain terms of the general collective agreements between the largest labour union (the “Histadrut”) and the largest organisation of employers organisations (the “Coordinating Bureau for Economic Organisations”) apply to all private sector employees, whether or not they are members of the union, by virtue of “extension orders” issued by the Minister of Industry, Trade and Labour.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

All employees are entitled to protection under Israeli labour law. Independent contractors and freelancers are usually not subject to labour laws, but in some circumstances independent contractors or freelancers may be deemed “*de facto*” employees and benefit from mandatory labour laws.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Written employment agreements are not required, but under the Notification to an Employee (Employment Conditions) Law, employers are obligated to provide their employees detailed written notification of certain employment conditions, including written updates with respect to any changes in the employment conditions (unless the changes arise from a change in the law or are visible on the employee’s pay slip).

The required notification must include: (i) identification of the employer and the employee; (ii) the date of commencement of employment, and the term of employment (if the employment agreement is for a fixed period), or indication that the employment is not for a fixed period; (iii) a description of the main duties required; (iv) the name or title of the employer’s direct supervisor and, in a place of work where salary is determined on the basis of ranking set forth in a collective agreement, the employee’s ranking and the applicable salary scale; (v) all payments to be made to the employee as compensation, and the timing of such payments; (vi) the length of a standard workday or workweek, as applicable; (vii) the employee’s weekly day of rest; (viii) contributions to social benefits made by the employer and the employee, and details of the

institutions to which such payments are to be made; and (ix) in the event that the employer (or the association the employer belongs to) is a party to a collective agreement applying to the employee’s employment, the name and address of such association.

### 1.4 Are any terms implied into contracts of employment?

Mandatory labour protection laws are implied into all contracts of employment, and supersede any contractual stipulation, even if not written in the agreement. Arrangements set forth by collective agreements or extension orders are also implied into contract of employment to which they are applicable. In addition, an established consistent practice of the employer in a particular workplace may be deemed as binding upon the employer.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Minimum employment terms and conditions include minimum vacation days per year, sick leave days, maximum working hours per day (including limitations on the number of overtime hours the employee may work), weekly day of rest, restrictions on night work, minimum wage, minimum disbursements towards pension, minimum travel expenses, and minimum notice requirements upon termination of employment.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Much depends on the field and industry. Generally speaking, company collective employment agreements are much more commonly found in traditional industrial companies. Historically, certain collective employment agreements were created with application to an entire field of industry or occupation, but their terms are more general in nature and have more or less been superseded in their entirety by more specific agreements and legislation.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

Under Israeli law, an employer may not object to the incorporation of a workers’ union, and must negotiate with the union in good



faith. In addition, the law protects the employees and imposes a fine on employers who refrain from employing, dismiss or otherwise abuse the employment terms and conditions of members of workers unions, or employees who try to establish a workers union in the workplace, or an employee who refrains from becoming a member of a workers union. A recognised trade union is a union which incorporates the highest percentage, and in any event, no less than one third, of the employees in a workplace.

## 2.2 What rights do trade unions have?

The representative workers union in a workplace is usually entitled to collect membership fees or representation fees, which are deducted by the employer from employees' salaries and transferred to the union. An employer is obligated to negotiate a collective employment agreement in good faith with the representative employee union. The union officials are entitled to access to the place of employment and to meet with employees, after coordinating with the employer.

## 2.3 Are there any rules governing a trade union's right to take industrial action?

The Collective Agreements Law, 1957 and the Settlement of Labour Disputes Law, 1957 permit unions to take industrial action steps (such as slowdowns, strikes, etc.) subject to certain restrictions and notice requirements, such as declaring a labour dispute and providing advance of industrial action to the employer.

## 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There are no requirements for employer initiated work councils in Israel. Employers may join employers' unions, and those unions are authorised to sign general collective employment agreements which apply to the members in the union and are sometimes applied to specific sectors or groups through extension orders issued by the Minister of Industry, Trade and Labour. Upon issuing such extension orders or before legislation of new regulations, the Minister of Industry, Trade and Labour usually consults the relevant employers union.

## 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable in Israel.

## 2.6 How do the rights of trade unions and works councils interact?

This is not applicable in Israel.

## 2.7 Are employees entitled to representation at board level?

This is not applicable in Israel.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The purpose of the Equal Employment Opportunities Law, together with the Equal Opportunities for Disabled Law, the Women Employment Law, and some other relevant laws, is to prohibit discrimination on the basis of any of the following grounds: gender; sexual orientation; age; race; religious beliefs; nationality; country of origin; opinion; political party; military service (including military reserve duty); and matrimonial or parental status. However, Israeli labour courts have held that this list is not exhaustive and other discriminatory parameters can be considered as violation of the Law.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Discrimination is prohibited with respect to all aspects of employment, including recruitment, promotion, advancement and professional training of employees, and termination (including when determining termination or retirement benefits). Discrimination is also prohibited with respect to work conditions, including salary, severance pay, and other benefits.

### 3.3 Are there any defences to a discrimination claim?

Israeli law recognises the defence of justified distinction – distinction on the basis of parameters relevant for the fulfilment of the position (such as expertise and education).

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees may bring discrimination claims before the court, the Minister of Industry, Trade and Labour, the Equal Employment Opportunities Commission, or, where relevant, the Commission for Equal Rights for Persons with Disabilities or the Supervisor under the Women Employment Law. Employers may settle civil claims at any stage. However, violations of the Equal Employment Opportunities Law are also criminal offenses, and proceedings in connection therewith cannot be settled. Employees are also entitled to ask for and receive information regarding other employees' terms of employment, in order to be able to prove the alleged discrimination.

### 3.5 What remedies are available to employees in successful discrimination claims?

Employees may seek injunctive relief in order to eliminate the discriminatory treatment or act, monetary compensation for damages, and statutory award without being required to prove damages of up to NIS 60,000 (approximately US\$16,000).

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Under Israeli law, women are statutorily entitled to maternity leave.

There are two components of maternity leave: (1) the amount of time during which a woman is required or entitled to be physically absent from the workplace; and (2) a woman's entitlement to be paid during such absence.

The law was recently amended to extend statutory maternity leave by an additional 12 weeks, from 14 to 26 weeks. During the first 14-week period (which may be, in some cases, extended to up to 18 weeks), the employee is entitled to receive maternity payments from the Israeli National Insurance Institute, while during the additional 12-week period the employee is not entitled to receive payment. The 12-week extension is available solely to employees who have worked in the same workplace or for the same employer for at least 12 months prior to taking maternity leave, and may be waived in whole or in part at the request of the employee, in which case the employer must permit her to return to work within three weeks of providing such notice. In addition, all employees who have been on maternity leave are entitled to additional leave, but without pay or social benefits, for, depending on the circumstances, up to one year from the date of birth.

#### **4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?**

As detailed above, during the first 14 weeks, eligible employees are entitled to payment.

Whether a woman will be paid during her period of physical leave from the workplace is a function of the amount of time during which she worked before going out on maternity leave. A woman who has worked at least 10 months out of the previous 14 months, or 15 months out of the previous 22 months, will be entitled to be paid by National Insurance for 14 weeks of maternity leave. A woman who has only worked for six months of the previous 14 months will be entitled to be paid by National Insurance during only 7 weeks of her leave. The woman will be paid her salary, limited to a ceiling of three times the national average wage.

As opposed to her salary, a woman's benefits during the maternity leave period are paid by the employer, and remain completely intact. As such, the period of maternity leave is included in calculations for all seniority-based benefits. In addition, the employer continues to pay all of the woman's social benefits, including payments to pension funds and education funds established for her.

In cases where the woman's absence from the workplace is allowed for a longer period of time due to sickness or medical contingencies of her or the newborn, the woman may be entitled to additional payment during this extended period.

It is forbidden to employ an employee during mandatory maternity leave, and a woman's employment cannot be terminated for any reason during that period, with or without authorisation of the Ministry of Industry, Trade and Labour (see question 6.4).

#### **4.3 What rights does a woman have upon her return to work from maternity leave?**

Once a woman returns from maternity leave (or after leave of absence following maternity leave), her employment cannot be terminated for 60 days after her return. During such 60-day period, the employer is required to allow the employee to actually return to work and cannot give notice of termination and pay her for the 60-day period. Since employees (who have worked for over one year) are entitled by law to 30 days' prior notice of termination, the practical effect is that a woman who has just returned from

maternity leave must remain employed for 90 days after she returns from leave.

During the first four months after a woman working full-time returns from maternity leave, she will be entitled to work one hour less per day without a reduction in pay.

#### **4.4 Do fathers have the right to take paternity leave?**

Men are entitled to paternity leave of at least 21 days and up to 7 weeks, on the terms detailed in question 4.2 above, provided that the mother is entitled to maternity leave of 14 weeks at full pay and has chosen to return to work prior to the completion of her full maternity leave. The first six weeks of the mother's maternity leave cannot be waived by her.

#### **4.5 Are there any other parental leave rights that employers have to observe?**

Upon the advice of a doctor, a pregnant woman is entitled to medical "bed rest" if it is required to protect her pregnancy. During this period, she is entitled to be absent from work, and in certain cases is entitled to receive payment from the National Insurance Institute. In addition, a woman is entitled to be absent from the workplace during each pregnancy for purposes of medical supervision authorised by a doctor. In the event of a miscarriage, the woman may be absent from the workplace for one to six weeks, if authorised by a doctor. Fertilization treatments are fairly common in Israel and special rules apply with respect to the effect of such treatments on an employee. A woman undergoing fertility treatments and *in vitro* fertilization may be excused from the workplace if her doctor provides written authorisation, and the time of absence from work will be treated as sick leave. Certain rights exist for male employees who undergo fertility therapy as well.

In addition, employees are entitled to a certain amount of sick leave due to the illness of any child under the age of 16.

#### **4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?**

Disabled employees and employees who are responsible for a disabled first-degree relative, are entitled to reasonable flexibility in their work time and other terms, as long as it does not put an unreasonable burden on the employer or affect work performance.

## **5 Business Sales**

#### **5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?**

In the event of a share sale, the employing entity will typically remain the same, and unless the employing entity initiates an act of termination, the employees remain employed by the same entity, currently owned by the new shareholder. However, if the employees are transferred as part of an asset transfer, there will be a change of the employer, which requires receipt of the employees' consent. This may be achieved through an assumption of the existing employment arrangements by the buyer, or through a "fire and rehire" approach, however, even in the latter alternative, the new employer may in some circumstances be responsible for residual liabilities deriving from the period of employment preceding the transfer.

## 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

If the place of employment and the employee's position remain essentially intact, then rights and entitlements deriving from seniority will generally continue to accrue on a going forward basis. With respect to unpaid salary or disbursements towards pension fund, a new employer may publish a notice requesting the employees to file claims within three months, following which the employer will no longer be required to compensate the employee for such unpaid rights if no such claims have been made.

If a collective employment agreement applies, it will bind the new employer as well.

## 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

In workplaces where employees are organised in unions, the union has a right to receive information about any material transaction in the workplace. Additional rights may appear in specific collective employment agreements. Otherwise, there is no obligation to consult or provide information to employees regarding a contemplated business sale.

## 5.4 Can employees be dismissed in connection with a business sale?

In general, there is no prohibition on dismissal of employees in connection with a business sale provided that: (a) the employer has acted in good faith and in accordance with all requirements applicable for dismissal; and (b) no applicable collective employment agreement stipulates otherwise. In such cases, employees will be entitled to such rights and entitlements generally applicable upon dismissal.

## 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

In case of a transfer of employees to a new employer (in an asset sale), the new employer is entitled to offer the employees a new employment agreement, and whatever will be agreed upon in the new agreement will apply. In case of a share sale, the employer cannot change the terms of employment unilaterally. However, the employer can change any terms the employees agree to change, provided such consent is genuine and was freely given.

Terms of a collective employment agreement can only be amended by a new collective employment agreement.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Israeli law sets certain minimum notice periods based upon a sliding scale.

For employees paid on a monthly basis: if an employee has worked less than twelve months, then he/she is entitled to advance notice of one day for each month during the first six months of employment and an additional 2½ days for every additional month thereafter. If the employee has worked for the employer on a full time basis for at least twelve months, the employee is entitled to an advance notice

of 30 days (additional contractual notice periods may apply). The length of the notice period will be less for employees paid on an hourly basis. During the notice period, salary and benefits must continue to be paid unless the employer terminates the employer/employee relationship with earlier effect. If the employer/employee relationship are terminated with earlier effect, the employer will be responsible to make a payment "in lieu of notice" immediately upon termination, in the amount of the salary to which the employee would have been entitled in the remaining notice period, unless a contractual provision or binding practice provides otherwise or provides for additional benefits.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Employers may choose to require their employees to refrain from attending work during their notice period, provided that the employees receive full salary and benefits during such period, unless a contractual provision provides otherwise.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employees may claim unlawful dismissal on the grounds of discrimination, breach of the employer's obligation of good faith and/or failure to comply with the procedural requirements for termination.

Employees will be treated as dismissed for purposes of severance pay entitlement in the event of: (i) material worsening in their working conditions; (ii) if their employment is no longer possible, such as a result of the death of the employer or employee, health condition of the employee or his/her close family member or completion of liquidation procedures; (iii) under certain circumstances, change in the employee's place of residency to a place which is at least 40 kilometres away from the employee's work place; (iv) enrolment into military service; or (v) stay in a women's crisis shelter.

If a collective employment agreement applies, employees may benefit from special defences or procedures relating to dismissal, and certain collective employment agreements require the consent of the workers union to certain dismissals.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Generally, pregnant women, women on maternity leave or during the first 60 days following their return to work, and employees undergoing fertility treatments may not be dismissed without the prior approval of the Ministry of Labour. In addition, the employment of an employee in military reserve duty cannot be terminated during the period of reserve duty and for 30 days following return to work.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Assuming the employer is not subject to a collective bargaining

agreement, dismissals may be initiated by the employer for any reason, provided it acts in good faith. The final payments made to the terminated employee will include last salary, payment for accrued but unused vacation days, and unpaid recuperation pay, payment in lieu of notice in the event that the termination takes place prior to completion of the notice period, and statutory severance pay, if applicable, according to the following formula: the last monthly salary multiplied by the number of years (or portions thereof) that the employee worked. Under certain rare circumstances employees will not be entitled to severance pay. It is common for employers to opt into a voluntary arrangement to limit severance pay liability to amounts disbursed to “managers insurance” (a common instrument combining elements of pension planning and insurance) or provident funds on a monthly basis, provided certain conditions are met, in accordance with Section 14 of the Severance Pay Law. Special rules for calculating severance pay apply for employees who work on sales commissions or have significant supplemental payments to base salary, or who have had their salaries lowered during the course of employment.

#### **6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

As a result of developing case law, an employer seeking to fire an employee is generally required to provide the employee a hearing before making a final decision to dismiss. The hearing is intended to allow the employee an opportunity to respond to the employer’s grounds for dismissal and to express his or her position regarding the possible dismissal. The employer is required to consider the employee’s responses in good faith. In some circumstances, failure to carry out the above could result in reinstatement and/or significant compensation payable to the employee.

#### **6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

Employees can claim unlawful dismissal on substantive and procedural grounds. The remedies include receipt of injunctive relief (including reinstatement), compensation for damages, and, in certain circumstances, a statutory award without having to prove damages. Employees can also file a criminal claim in certain cases of dismissals.

#### **6.8 Can employers settle claims before or after they are initiated?**

Civil claims can be settled at anytime. If criminal or other procedures have been initiated by governmental agencies, such procedures will continue to be carried out at the discretion of the relevant authority.

#### **6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?**

In any event of dismissal, notwithstanding the number of employees dismissed, the employer is required to provide each dismissed employee with a hearing, as described above. If more than ten employees are dismissed, the employer must notify the local Employment Service Bureau of the dismissals.

#### **6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

In the absence of collective agreements, the employees may enforce their rights as set forth in question 6.7 above. It is common for employees to retain counsel for this purpose. If a collective employment agreement applies, the employer must comply with its terms regarding dismissals, and failure to do so might cause industrial actions to be taken.

## **7 Protecting Business Interests Following Termination**

### **7.1 What types of restrictive covenants are recognised?**

It is common for Israeli companies to require employees to sign a proprietary information agreement upon the commencement of their employment, which typically includes nondisclosure, non-solicitation and non-competition provisions.

### **7.2 When are restrictive covenants enforceable and for what period?**

Under current case law, post-termination non-competition undertakings are generally not enforceable, unless in very unique situations. Non-solicitation and confidentiality undertakings are, in principle, enforceable.

### **7.3 Do employees have to be provided with financial compensation in return for covenants?**

Post-termination non-compete covenants may only be enforceable (if at all) if such non-compete is in exchange for sufficient compensation, and may not be enforceable for more than a limited period of time.

### **7.4 How are restrictive covenants enforced?**

Claims asserting violation of restrictive covenants may be brought before the court. However, and as stated above, the courts are extremely reluctant to enforce non-competition arrangements. Non-solicitation and non-disclosure undertakings are, in principle, enforceable, but it is often difficult to establish from an evidentiary standpoint that a violation has occurred.

## **8 Court Practice and Procedure**

### **8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?**

Israel’s labour courts have wide and exclusive jurisdiction to hear claims pertaining to employment-related matters. The labour court of first instance will be a regional labour court. In addition, complaints and discrimination related claims may be filed with the Equal Employment Opportunities Commission, or, depending on the specifics of the case, the Commission for Equal Rights for Persons with Disabilities or the Supervisor under the Women Employment Law (under the aegis of the Ministry of Industry, Trade and Labour).

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

It is very common for employment-related claims to be referred to mediation procedures after the initial court hearing of the claim. The law does not specify any internal procedures for handling employee complaints, except in cases of sexual harassment, for which procedures are set forth in the statute.

### 8.3 How long do employment-related complaints typically take to be decided?

Claims submitted to the labour courts are usually decided in a period between six to twenty-four months, depending on the complexity of the case and the parties involved.



**Ben Sandler**

Yigal Arnon & Co.  
22 Rivlin Street  
Jerusalem 9242  
Israel

Tel: +972 2 623 9200  
Fax: +972 2 623 9236  
Email: [bens@amon.co.il](mailto:bens@amon.co.il)  
URL: [www.arnon.co.il](http://www.arnon.co.il)

Ben Sandler has a wide-ranging and sophisticated practice concentrated on emerging and established technology companies. His practice straddles corporate and employment areas of the law. His clients range from entrepreneurs and start-ups to major international corporations. Ben has acted as Israeli counsel in numerous M&A transactions, often for prominent international clients. In addition to negotiating and handling traditional corporate aspects of M&A transactions, he often works with clients to structure and implement complex retention and post-transaction integration programmes. Ben also advises corporate clients with respect to general corporate and employment matters on an ongoing basis. He has extensive experience in executive compensation and employment issues, and leads the firm's practice in employee incentive plans. Ben was born in New York. He graduated *magna cum laude* from the University of Pennsylvania, and received his law degree from the Hebrew University, after moving to Israel in 1992.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Appeals against decisions of the regional labour courts are usually heard by the National Labour Court of Israel. In some cases, in which a novel or important issue is addressed, appeals against decisions of the National Labour Court may be brought before the Supreme Court of Israel.



**Shira Lahat**

Yigal Arnon & Co.  
Azrieli Center 5  
Tel Aviv 67025  
Israel

Tel: +972 3 608 7835  
Fax: +972 3 608 7716  
Email: [shiral@amon.co.il](mailto:shiral@amon.co.il)  
URL: [www.arnon.co.il](http://www.arnon.co.il)

Shira Lahat specialises in all aspects of labour and employment law. She represents employers in day-to-day employment issues as well as in complex and sensitive events and transactions. Shira provides on-going legal advice to corporations and individuals and represents the firm's clients in court in all forms of labour dispute. Shira advises clients as to labour law ramifications in complicated commercial reorganisations, mergers and acquisitions as well as negotiating other matters relating to employee equity-based incentive plans and executive compensation.

Shira regularly appears before various judicial instances including all labour court instances as well as different governmental authorities. Shira is a member of the labour law committee in the Israel Bar, and a member of the Israeli Society for Labour Law and Social Security. Shira received her LLB from The Interdisciplinary Center, Herzlia, Israel (1999), and her LLM from Tel-Aviv University, Israel (2005). She was admitted to the Israel Bar in 2000.

## YIGAL ARNON & CO.

LAW FIRM

Yigal Arnon & Co. is one of the largest and most dynamic law firms in Israel, and has a proven track record of innovation and quality in meeting our clients' needs. For nearly fifty years we have provided a full range of legal services to a wide-ranging client base, including major international ("Fortune 500") companies, emerging growth companies, investor groups and individuals.

Our diverse client base reflects our capacity to tailor work to specific client needs. Throughout our history, a full spectrum of clients has turned to Yigal Arnon & Co. when seeking professionalism, service and integrity in helping them to resolve their complex and challenging legal problems.

Clients select us and stay with us for our comprehensive legal skills. We recruit first rate lawyers, many of whom have the highest academic credentials and join us after gaining invaluable experience with prominent firms overseas. We have a highly integrated work approach, and complement the expertise of our specialists with the pooled talents of the whole firm. Our reputation for achieving results has attracted and retained high-profile clients, demanding cases and exceptional lawyers.

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# Italy

Vittorio Moresco



Fabrizio Grillo



## Hogan Lovells

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main source of employment law is legislation, followed by National Collective Labour Agreements (“*Contratti Collettivi Nazionali di Lavoro*” - “NCLAs”). NCLAs regulate in detail a number of matters that are dealt with by legislation in general terms only.

Further rights can be agreed at individual level on condition that they are more favourable to the employee than those granted by law or by the NCLAs.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The law distinguishes between subordinate employees and self-employees: the two categories are subject to different protection.

Employees have the most extensive rights while the self-employed benefit from less extensive protection.

Employees are hired under an employment contract and, therefore, they are inserted in the company’s structure, receive orders and/or directives as to the performance of their working activity, they are subject to disciplinary power, receive a minimum salary set forth by the NCLA, and are protected against dismissal.

On the other hand, the self-employed are individuals who are not steadily inserted in the company’s structure and who perform their working activity in full autonomy, without being subject to any reporting line and to any disciplinary power. As a consequence of this, they do not benefit from the same protection granted to employees (i.e. they are not entitled to any minimum salary and they do not have any remedy against termination).

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Contracts of employment do not have to be in writing.

However, at the beginning of the employment relationship, employees must be provided with a written statement of particulars including: the name of the employer and of the employee; the place of work; the start date; the duration (if any); the job title; the level assigned; and the duties to be performed.

Specific covenants, such as “trial period” or “non-compete” must be made in writing.

#### 1.4 Are any terms implied into contracts of employment?

There are a number of terms implied into employment contracts, such as:

- (a) the duty of mutual trust and loyalty (i.e. the Parties shall act in good faith. None of the Parties shall damage the loyalty relationship with the other);
- (b) the duty to act with due diligence and care (i.e. the employee must perform his duties with the diligence and care requested by his role); and
- (c) the duty to comply with the provisions of the law and of the NCLAs (i.e. neither the employer nor the employee shall act in breach of the law).

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

There are a number of minimum employment terms, set down by the law or by the NCLAs, which employers must mandatorily observe, such as:

- (a) Minimum salary.
- (b) Notice period.
- (c) Working hours and vacation.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The majority of the terms and conditions of employment are set down (or are further specified) by NCLAs.

In Italy, the application of NCLAs is mandatory only for those employers registered with the employers’ associations executing the NCLA.

If the employer is not registered with any employers’ association, there is no obligation to apply a NCLA.

However the majority of the employers operating within the Italian territory do apply a NCLA.

If the employer is not bound by any NCLA, he could individually negotiate with the involved employee the provisions regulating the employment relationship (provided that the minimum standards set forth by the Law are applied).

NCLAs are executed at national level, between the employers’ trade unions and the employees’ trade unions of each market sector (commerce, manufacturing, tourism, etc.). Further agreements can be executed at company level, the so-called “second level agreements” (“*contrattazione collettiva di secondo livello*”).

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

Employees' right to constitute Trade Unions is primarily provided by the Italian Constitution which provides a general 'freedom of Trade Union organisation' with the only obligation being one of registration for Trade Unions.

Such provision, as for the registration procedure of Trade Unions, has never received any further detailed regulation by any other legal provision. Therefore, since such registration is not possible, Trade Unions are currently considered as organisations 'by way of fact' and not as legally recognised entities.

### 2.2 What rights do trade unions have?

Trade Unions and/or works councils have the right to be involved and/or consulted in several circumstances (such as: transfer of business; collective dismissal; second level agreements; reorganisation; and/or restructuring, implementation of measures to control the premises/goods kept in warehouse, health and safety matters etc.) as well as to exercise the typical Unions' right (calling strikes, scheduling assembly, etc.).

### 2.3 Are there any rules governing a trade union's right to take industrial action?

A Trade Union's right to take industrial action (substantially, right of strike) is primarily provided by the Italian Constitution. Such right is generally considered in its widest sense, with the only limit being avoiding those actions that may cause a permanent damage to the Company's productive ability.

A more detailed regulation is provided in essential public services, in which the right to take industrial action is subject to some conditions. In particular, the applicable law provisions provide that (i) a procedure of conciliation shall be completed before starting the action; (ii) a notice period of at least 10 days shall be respected; (iii) adequate information to the public shall be provided; and (iv) the level of services that are considered necessary shall be granted.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Work councils may be implemented upon employees' initiative in each productive unit of the Company, employing more than 15 employees, by Trade Unions which signed a NCLA. Representatives are chosen by employees.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

In most of the cases, the law provides only a consultation right for work councils while no co-determination right applies. Therefore, the employer is allowed to proceed, notwithstanding the opinion of the works councils.

### 2.6 How do the rights of trade unions and works councils interact?

Work councils shall be considered as a representation of Trade Unions within the Company.

### 2.7 Are employees entitled to representation at board level?

No, they are not.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. There are several provisions, including Law no. 300/1970 (so-called '*Statuto dei Lavoratori*'), which protect employees against discrimination.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Discrimination is prohibited on the following grounds: age; disability; pregnancy; race; religion or belief; and sex or sexual orientation. Discrimination is prohibited at any time of the employment relationship: before the beginning of the employment relationship (i.e. non discrimination in hiring procedures), during its course (i.e. selection of employees to be transferred/granting of bonuses or benefits) and on the occasion of termination (i.e. grounds for dismissal).

### 3.3 Are there any defences to a discrimination claim?

Whenever an employee challenges a discriminatory decision before a Labour Court, the employee shall prove the existence of the discriminatory reason.

The employer, from his side, shall give evidence of the fact that no discrimination occurred (i.e. by demonstrating that other employees were treated like the claimant), that the employee's claims are not sufficient to prove the existence of a discrimination and that, in any case, the employer's decision (i.e. to dismiss or to transfer the employee) was grounded on legitimate business needs.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees may enforce their discrimination rights by suing the employer in court. Any kind of dispute can be settled before as well as during the course of the judicial proceeding.

### 3.5 What remedies are available to employees in successful discrimination claims?

Employees who have been discriminated against typically ask for the removal of the discriminatory situation as well as for compensation. A dismissal based on discriminatory reasons is null and void and, accordingly, the employment relationship is regarded as being never interrupted.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

According to Italian law, female employees are entitled to a mandatory period of absence for maternity leave (so-called “*astensione obbligatoria*”) equal to 5 months which can be divided as follows:

- (a) 2 months of absence before the child’s birth and 3 months of absence after the child’s birth; or
- (b) upon the employee’s request (which must be supported by the approval of the employee’s doctor who assesses that the employee can continue to work) 1 month of absence before the child’s birth and 4 months of absence after the child’s birth.

Female employees are entitled to benefit of an additional optional period of absence of 10 months within the first 8 years of the child’s life (so-called “*astensione facoltativa*”). This period of absence can be taken by either parent within the aggregate maximum duration of 10 months.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

During the period of mandatory absence for maternity leave (5 months as indicated in question 4.1) employees are paid an indemnity by the National Institute for Social Security (“*Istituto Nazionale Previdenza Sociale*” also known as “*INPS*”) equal to 80% of their base salary and an integration by the employers in order to achieve 100% of their base salary.

During the first 6-month period of additional period of absence, employees are paid an indemnity by INPS equal to 30% of their base salary. The remaining 4-month period of absence is paid by INPS only if the employee’s income falls beyond some thresholds which are fixed annually by INPS (e.g. in the event of low income).

Female employees cannot be terminated starting from the beginning of the pregnancy up to the first birthday of the child unless there is a just cause for dismissal, the relationship terminates on expiry of an agreed fixed term period, or the business or department in which the employee works is shut down and the employee cannot be relocated.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

A woman returning to work from maternity leave is entitled to:

- (a) return to the job in which she was employed before her maternity leave on the same terms and conditions and to remain there up to the first birthday of the child; and
- (b) have 2 hours of paid time off per day for the child’s feeding.

Additional periods of paid leave before or after the child’s birth are granted upon occurrence of exceptional events such as: pregnancy at risk; child’s sickness; and multiple births.

### 4.4 Do fathers have the right to take paternity leave?

The period of mandatory absence after the child’s birth can be taken by the father upon the occurrence of certain events (death of the mother, serious sickness of the mother or abandonment of the child by the mother).

### 4.5 Are there any other parental leave rights that employers have to observe?

Italian law allows employees to benefit from paid time off to provide care and support to a family member who suffers from a serious disability and who is not hospitalised. The disability must be assessed by the public health authority (“*Azienda Sanitaria Locale*”). The amount of time off depends on the age of the disabled person and the closeness of the relationship, but could be an extension of the parental leave period, 2 hours time off each day, or up to three days off per month.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Upon the occurrence of certain conditions, such employees can benefit from paid leave or a right not to be transferred or a right to ask to be transferred to a location closest to the place of residence of the dependents.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Employees do not automatically transfer to the buyer in case of share sale (i.e. share sale does not amount to a transfer of business).

Employees automatically transfer in case of asset transfer determining a transfer of business (i.e. when the ownership of an organised economic entity, whether profit-making or not, which produces or exchanges goods or services, is transferred to another business entity).

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

In case of a mere share sale, no employee rights transfer to the buyer.

In the context of an asset transfer, the employment relationships continue on the same terms and conditions in force at the date of transfer (NCLA provisions included) and the transferor and the transferee are jointly liable for any credits accrued by employees transferred at the moment of the transfer.

The NCLA applied by the transferee does not apply anymore if the transferee applies a different NCLA.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

In case of transfer of business, if the transfer concerns a company where more than 15 employees are employed (such number to be considered in aggregate and not only in the business branch to be transferred) the transferor and the transferee must follow a preliminary consultation procedure with works councils/Trade Unions.

The consultation procedure must begin at least 25 days before the document giving rise to the transfer is executed, or before the date on which the parties reach any other binding agreement relating to the transfer, if prior to this date.



A failure to inform and consult work councils/Trade Unions does not affect the validity of the transfer but may result in an anti-Union behaviour allowing the Unions to ask the Labour Court to order the employer to fulfil the consultation procedure and to suspend the effects of the transfer as long as the consultation procedure has not been fulfilled.

#### 5.4 Can employees be dismissed in connection with a business sale?

A business sale is not a valid ground for dismissal. The transfer of business in itself does not constitute a valid reason for dismissal. Dismissals may be adopted only if there are other reasons, rather than the mere transfer, which allow them.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

No, employment terms and conditions can only be changed within the limits set out under question 5.2.

## 6 Termination of Employment

#### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Employees have to be given notice of termination, unless they are dismissed for just cause (*giusta causa*, i.e. a gross misconduct).

The notice period is set forth in the NCLA or – if no NCLA applies – in the Law (or by the individual contract) and it varies in accordance with the employee's level of classification and length of service.

#### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

In Italy there is no provision regulating garden leave.

However, the employer can request the employee not to work during the notice period and decide to pay instead the relevant indemnity in lieu of notice.

#### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employees shall issue a preliminary challenge in writing to the lawfulness of the dismissal by the 60th day from the dismissal notice and then can sue the employer in court.

An employee is treated as being dismissed whenever the employment relationship is interrupted by the employer expressly (in writing) or implicitly.

No consent from third parties is required for dismissals.

#### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Yes, for instance pregnant employees, female employees after their wedding, work councils' representatives.

#### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

1) An employer is entitled to dismiss, for reasons related to the individual, an employee when a "just cause" (*"giusta causa"*) or "subjective justified reason" (*"giustificato motivo soggettivo"*) occurs.

A just cause is an event which makes the continuation of the employment relationship impossible. Examples of just cause are cases of gross misconduct as well as any other circumstance which does not allow the continuation of the working relationship (not even during the notice period). If a just cause exists, the employee may be dismissed immediately without any notice or indemnity in lieu of notice. The existence of just cause is verified on a case-by-case basis.

A subjective justified reason is a breach of the contract by the employee (i.e. negligence) which does not amount to a just cause.

2) An employer is entitled to dismiss an employee for business related reasons grounded on productivity, organisation of the work, including, but not limited to the elimination of the job position.

The compensation due to the employees in case of unjustified dismissal is set out under question 6.7 below.

#### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

In case of dismissal for "just cause" or "justified subjective reasons" the employer can dismiss the employee only at the end of a specific disciplinary procedure.

Dismissal for "objective reasons" shall only be communicated in writing. The relevant employee may ask the reason for the dismissal in the following 15 days. The employer shall communicate those reasons within 7 days from the employees' request.

#### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee may challenge the dismissal by claiming the lack of either *giusta causa* or *giustificato motivo* or the violation of the disciplinary procedure.

If the Court ascertains that no *giusta causa* and no *giustificato motivo* for dismissal existed, the employer must:

- (a) If it has more than 15 employees within the same Municipality or more than 60 employees within the Italian territory: reinstate the employee in her/his job and pay an indemnity which amount ranges between a minimum of 5 monthly salaries and a maximum equivalent to all the salary accrued from the date of dismissal to the date of reinstatement in her/his job position, plus any damages that the employee may actually prove s/he has suffered as a consequence of the unlawful dismissal. The employee can refuse to be reinstated and ask for the payment of an indemnity in lieu of the reinstatement equal to 15 monthly salary payments. The employer cannot object to the employee's request for an indemnity;
- (b) If it has 15 employees or less: the employer can choose to rehire the employee or to pay the employee an indemnity ranging from 2.5 to 6 months of employee's last salary. The amount of the indemnity depends on the number of employees, the size of the company, the length of the employment period and the parties' behaviour.

The burden of proof of the lawfulness of the dismissal is on the employer.

### 6.8 Can employers settle claims before or after they are initiated?

Such disputes can always be settled with an agreement before or during the beginning of the relevant lawsuit.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

The dismissal of five or more employees in the same business unit, by a company employing more than 15 employees, within a period of 120 days, due to a reduction/reorganisation/shut down of the company's business, amounts to a collective dismissal. The collective dismissal can be lawfully implemented only once an appropriate procedure has been properly fulfilled (the "Procedure").

The Procedure begins with the employer submitting a written notice (the "Notice") to the works councils (if any) or to the Trade Unions to inform them of its intention to carry out a collective dismissal.

After the receipt of the Notice, the works councils/Trade Unions may ask for a joint examination of the planned redundancies. The first phase of negotiations may last up to 45 days starting from the day on which the Notice has been received by the works councils/Trade Unions.

If, following the first phase of joint examination, an agreement with the work councils/Trade Unions is reached, the employer can deliver the individual letters of dismissal in compliance with the agreed selection criteria. If no agreement is reached, a further phase of negotiations, whose maximum duration is 30 days, follows.

Regardless of whether an agreement with the Unions has been reached, at the end of the second phase of negotiations, the employer can dismiss the redundant employees.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees may challenge at court the dismissal for lack of application of the Procedure and/or violation of the selection criteria. In such occurrence, the consequences mentioned under question 6.7 (a) apply.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Parties can usually enter into a non-compete covenant, in order to prevent the employee from working for a competitor and/or acting in competition to the employer for a certain period of time following the termination of the employment relationship.

### 7.2 When are restrictive covenants enforceable and for what period?

Non-compete covenants can be enforced on condition that they comply with the mandatory requirements set forth by the law. They must be limited in scope, in territory and in time and must provide an adequate compensation.

Non-compete covenants are enforceable for a period of 3 years (increased to 5 years in case of executives).

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Yes. Compensation is a requirement of validity for non-compete covenants.

### 7.4 How are restrictive covenants enforced?

The employer may sue the relevant employee before the court in order to make him/her stop the competitive activity and/or claim for damages.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Court which has jurisdiction to hear employment-related complaints is the Labour Court of the place in which the employment relationship started or in which the employee currently works or worked at the time of employment termination. The Labour Court is composed by a single judge.

Decisions of the Labour Court can be appealed before the Court of Appeal, which is composed of a panel of three judges.

The judgment of the Labour Court of Appeal can be appealed before the *Corte di Cassazione*.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

A special procedure different from normal civil procedures is applicable to employment lawsuits.

From 24 November 2010, a conciliation procedure is no longer mandatory before starting a lawsuit at court. Parties can either bring a claim before the Labour Court or request a conciliation procedure before the Labour Office.

### 8.3 How long do employment-related complaints typically take to be decided?

It depends on which matter the lawsuit involves and/or if an urgency procedure has been requested by the employee. Normally an employment lawsuit may last from a minimum of 6-7 months to a maximum of 3/4 years for the proceeding before the Labour Court, 2/3 years for the appeal and 2/3 years for the proceeding before *Corte di Cassazione*.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes, please refer to the answer under question 8.3 for other details.

#### Note

This chapter was contributed by Hogan Lovells Studio Legale.

**Vittorio Moresco**

Hogan Lovells Studio Legale  
Piazza Venezia, 11  
00187, Roma  
Italy

*Tel:* +39 06 6758 231  
*Fax:* +39 06 6758 2323  
*Email:* [vittorio.moresco@hoganlovells.com](mailto:vittorio.moresco@hoganlovells.com)  
*URL:* [www.hoganlovells.com](http://www.hoganlovells.com)

Vittorio graduated in law at the University of Rome ("La Sapienza") in December 1993. He was admitted to the bar in October 1997. He then joined Hogan Lovells, in the position of head of the employment practice area, in January 2005, after spending 10 years in one of the most famous employment law boutiques in Italy.

**Fabrizio Grillo**

Hogan Lovells Studio Legale  
Piazza Venezia, 11  
00187, Roma  
Italy

*Tel:* +39 06 6758 231  
*Fax:* +39 06 6758 2323  
*Email:* [fabrizio.grillo@hoganlovells.com](mailto:fabrizio.grillo@hoganlovells.com)  
*URL:* [www.hoganlovells.com](http://www.hoganlovells.com)

Fabrizio graduated from the law faculty at LUISS (Rome) in 2004. He joined Hogan Lovells' employment department in 2008, after a period with a civil, labour law and litigation practice.



In today's world, the ability to work swiftly and effectively across borders and in a variety of languages and cultures, is invaluable. This is something that the Hogan Lovells employment team does as a matter of course.

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Hogan Lovells assist clients in resolving their employment challenges creatively, strategically and cost-effectively.

# Japan

Nobuhito Sawasaki



Sayaka Ohashi



## Anderson Mori & Tomotsune

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main sources of employment law which govern individual labour relationships are the Labor Contract Law (“LCL”) and the rules established by court precedents, which serve as the basic rules which employment contracts must follow. The Labor Standards Act (“LSA”) also regulates employment contracts by providing minimum standards for the conditions of employment.

On the other hand, the main source of the employment law which governs collective labour relationships is the Labor Union Act (“LUA”).

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The workers protected by employment law are “employees” as defined under the LCL and the LSA. A worker is judged to fall under the category of “employee” on the basis of the actual conditions of his or her work, taking into account whether: (i) he or she is under the basic control (instruction and order) of the employer; and (ii) his or her wages are paid by the employer.

Employees are classified into the following categories:

- i) indefinite term contract employee;
- ii) fixed term contract employee, whose term of employment is 3 years (or 5 years in extraordinary cases stipulated under the LSA) at most; and
- iii) part-time employee, whose prescribed working hours are shorter than the regular employees.

Indefinite term contract employees enjoy the overall protections of the employment law. Fixed term contract employees and part-time employees also enjoy almost the same protection as indefinite term contract employees. In addition, certain employment laws may not be applicable to part-time employees due to their shorter working hours than regular employees.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

No. An employment contract may come into effect either by an oral or a written agreement. However, upon entering into an employment contract, an employer is required to expressly specify certain employment terms and conditions. Among such terms and conditions, the employer is required under the LSA to provide the

following to an employee in writing:

- i) matters pertaining to the duration of an employment contract;
- ii) matters pertaining to the workplace and work contents;
- iii) matters pertaining to the start time and end time for working hours, break time etc.;
- iv) matters pertaining to wages; and
- v) matters pertaining to termination of employment, retirement and dismissal (including grounds thereof).

#### 1.4 Are any terms implied into contracts of employment?

Yes. If a certain term between an employer and employee is treated the same way repeatedly and continuously for a long period of time, that term may be implied into employment contracts as “common labour practice” or as an “implied agreement”.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. Minimum work conditions are established under the LSA and ancillary laws:

- i) The statutory working hours are 40 hours per week and 8 hours per day, in principle.
- ii) Break times shall be given during working hours for at least 45 minutes or 1 hour, depending on the length of working hours.
- iii) At least one day off must be given to employees per week.
- iv) Minimum increased wage rates are stipulated for overtime work, work on days off and night work.
- v) Minimum number of days of annual paid leave to be granted in accordance with the length of service of an employee is stipulated.

In addition, the minimum wage per hour for each district (or for certain industries) is determined in accordance with the Minimum Wage Act.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Parties are free to agree on any terms and conditions of employment at a collective bargaining session, so long as the employer (a party to the collective bargaining session) has the authority to agree on the subject terms and conditions. Generally, the terms and conditions that are agreed at a collective bargaining session relate to major employment conditions.

Collective bargaining sessions usually take place at the company or business place level, although they also exist at the industry level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

In order to qualify as a “labour union” under the LUA, a labour union has to submit evidence to the Labor Relations Commission and demonstrate that all the requirements as described below have been satisfied.

The requirements regarding the substance of a labour union are:

- i) it is mainly composed of workers;
- ii) it is formed and operated independent of management control;
- iii) there is no member who represents the interest of management;
- iv) it receives no financial support from the employer for defraying or operation;
- v) its main purpose is to maintain or improve the conditions of employment or the financial situation of workers; and
- vi) it is the association of 2 or more members who have a constitution and an organisation necessary for operating such association (or a federation of such associations).

A labour union, which is not qualified as a “labour union” under the LUA as it lacks the above-mentioned requirements, would still enjoy the rights granted under the Constitution of Japan (“Constitution”) (see question 2.2). An exception to this is where a labour union lacks requirement ii) above, in which case it does not enjoy the rights under the Constitution.

### 2.2 What rights do trade unions have?

Workers enjoy the constitutional guarantee of the right to organise, based on which they organise labour unions.

A labour union can request an employer to hold a collective bargaining session on any issue, provided that such issue relates to the labour union itself or the economic status of a worker who is a union member. The employer is required to accept such request and faithfully negotiate with the labour union. In relation to certain matters such as the establishment of or a change to the employment rules, an employer is required to hear the opinion of the labour union organised by a majority of the workplace concerned.

Further, a labour union is guaranteed the right to act collectively, which is centred around labour dispute actions such as strikes. A worker will not bear any civil or criminal liability with respect to his or her justifiable labour dispute action.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

Yes. Industrial actions should be taken after collective bargaining session(s) are held, since industrial actions that are taken without holding any collective bargaining session in advance may be determined to be illegitimate. No notification to the employer is statutorily required prior to the commencement of industrial actions. However, procedures stipulated in the union charter must be followed.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There is no system of works councils in Japan.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

See question 2.4.

### 2.6 How do the rights of trade unions and works councils interact?

See question 2.4.

### 2.7 Are employees entitled to representation at board level?

No. Employees are not statutorily entitled to representation at board level.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. The Constitution sets down the principle of equality with respect to the relationship between the state and its citizens. In accordance with this principle of equality, the LSA establishes a similar principle for certain limited terms and in respect of the relationship between employers and employees. The terms listed under the LSA as those based on which an employer is prohibited from engaging in discriminatory treatment of employees are nationality (which includes race), creed, social status and sex.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Under the LSA, discriminatory treatment based on nationality, creed or social status of an employee which is related to his or her employment conditions is considered unlawful, if conducted against him or her after hiring him or her. Discriminatory treatment pertaining to the conditions of dismissal of an employee is also prohibited. In addition to the above-mentioned prohibition of discriminatory treatment, the LSA sets forth the principle of equal wages for men and women (“Principle of Equal Wages”).

Under the Employment Security Law, it is prohibited to discriminate against a person in employment placement, vocational guidance or the like by reason of any previous profession or membership in a labour union, as well as by reason of race, nationality, creed, sex, social status and family origin.

Further, the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (“Equal Opportunity Treatment Act”) prohibits discriminatory treatment based on sex in relation to the following matters:

- i) discrimination at the recruitment and hiring stage;
- ii) assignment, promotion, demotion and training of employees;
- iii) loans for housing and certain other similar fringe benefits;

- iv) change in job type and employment status of employees; and
- v) encouragement of retirement, mandatory retirement age, dismissal, and renewal of the employment contract.

It is also explicitly prohibited to treat female employees disadvantageously by reason of marriage, pregnancy and childbirth. Moreover, an employer is also prohibited from taking certain measures on the basis of conditions other than sex, if such measures are effectively discriminatory by reason of a person's sex, taking into consideration the proportion of men and women who satisfy the criterion and other matters (such as including certain physical size conditions in applications for recruiting and hiring).

### 3.3 Are there any defences to a discrimination claim?

Yes. If an employer can substantiate that the alleged discriminatory treatment is based on a justifiable reason, it may be considered non-discriminatory. With respect to some measures taken by employers, guidelines have been issued which exemplify the measures that will and will not be considered as reasonable differentiation. In such case, employers may have a strong case, if they can substantiate that they have followed those guidelines.

In addition, an employer may not be liable for discriminatory conduct of one of its employees against another employee if the employer can substantiate that it has taken all possible measures to prevent such discriminatory conduct from occurring.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Methods available to employees to enforce their civil rights are case dependent. For example, in a case of a discriminatory dismissal, an employee may bring an action to claim that the dismissal is null and void, requesting the employer to reinstate him or her to his or her original position, as well as to provide him or her with back pay and compensate him or her for the damage which he or she suffered due to the dismissal.

Employers can settle claims at any time before or after they are initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

Remedies available to employees in discrimination cases vary depending on the case. For example, a discriminatory dismissal, assignment or disciplinary action against an employee by an employer will become null and void. As a result, the subject employee will be reinstated to his or her original position or state. An employee may also be entitled to receive compensation for the damage which he or she has suffered. (See also question 3.4.)

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

If a female employee who is to give birth within 6 weeks makes a request not to work, her employer may not require her to work. In addition, an employer is prohibited from allowing a female employee to return to work within 8 weeks after giving birth, even if she wishes to do so (Maternity Leave, "ML").

An employee who is raising a child is entitled to apply for full-time leave to look after his or her child until the child turns 1 year old. Eligible employees may apply for extension of full-time leave to look after the child until the child turns 14 months old or 18 months old (Childcare Leave, "CCL").

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

An employer is not required to pay an employee's salary during the ML or CCL of an employee, unless otherwise stipulated in employment contract or the employment rules. However, a female employee is entitled to receive the following amount of money:

- i) under the Health Insurance Act, a certain amount of maternity allowance which corresponds to the amount of her standard remuneration for a certain period; and
- ii) under the Employment Insurance Act, a certain amount of childcare leave benefit after the lapse of 8 weeks from the birth date of a child until the day before the child's first birthday.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

It is prohibited to treat female employees detrimentally due to the reasons that they have taken ML or CCL. Therefore, it is generally required to enable female employees to return to their original work after their ML or CCL. Treatment, such as assignment of female employees to a different position or reduction of their wages due to their taking ML or CCL, is also considered unlawful, if there is no justifiable reason.

### 4.4 Do fathers have the right to take paternity leave?

CCL may also be taken by male employees as well as female employees. Principally, CCL may only be taken once. However, an employee is entitled to take a second CCL, if the first CCL of such employee ended within 8 weeks from the birth date of the employee's child. This entitlement is established for the purpose of encouraging male employees to take the CCL.

### 4.5 Are there any other parental leave rights that employers have to observe?

An employee who raises a child under elementary school age is entitled to take unpaid Nursing Care Leave ("NCL") of up to 5 days per year, in order to take care of his or her sick or injured child or accompany their child for medical checkup or vaccination. If he or she raises 2 or more children under elementary school age, he or she is entitled to take NCL of up to 10 days per year.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

When a male or female employee: i) who does not take CCL and who lives with and raises a child less than 3 years old; and ii) whose normal working hours per day are more than 6 hours, so requests, the employer must principally shorten his or her normal working hour to 6 hours per day.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In an asset transfer, which amounts to the transfer of business (hereinafter the same in this legal guide), employees do not automatically transfer to the assignee entity. In principle, if either the assignee entity or an employee refuses to give consent to the transfer of employment, then the employment between the assignor entity and the relevant employee will not be succeeded to the assignee entity.

In a share sale, the identity of the employer remains the same before and after the sale.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

1. In an asset transfer, there are 2 ways by which an employment will be transferred to the buyer, namely:
  - i) transfer of position as an employer (“Case 1”); or
  - ii) resignation of employees from the seller followed by a new employment of the same employees by the buyer (“Case 2”).

In Case 1, the employment conditions of employees which the seller has applied will be transferred to the buyer as is, unless otherwise agreed between the buyer and the employees. In Case 2, the employment conditions of the buyer will apply, unless otherwise agreed. Collective labour agreements will not be transferred, unless otherwise agreed in the business transfer agreement.

2. In a share sale, there is no change in the conditions of employment of the employees.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Employees do not have any specific information and consultation rights on a business sale. However, in order to obtain the employees’ consent for the transfer of employment (in the case of business transfer), the employer would normally be required to provide sufficient information and faithfully consult with the employees. The time required for the process varies depending on each case.

### 5.4 Can employees be dismissed in connection with a business sale?

A business sale in itself will not justify the dismissal of employees. Therefore, normal protections apply to the employees with respect to dismissals upon a business sale. (See question 6.3 for the employees’ protection against dismissals.)

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

1. In Case 1 of business transfer or a share sale

A business transfer or a share sale in itself would not justify an employer to freely change the employment conditions of employees. Therefore, if the employer desires to change them to

the disadvantage of the employees, justifiable reasons are required, unless individual consent is obtained from the employees.

2. In Case 2 of business transfer

Due to the reason that the employees will be subject to the employment conditions of the buyer, employees may be subject to employment conditions that are different from those of the seller. The seller employer should fully familiarise its employees with the new employment conditions and obtain their consent.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Yes. Employers are required to give at least 30 days’ advance notice, or pay the average wages for a period of not less than 30 days in lieu of notice. The advance notice period of 30 days may be reduced, if the employers pay the average wage for each day by which the period is reduced (“Payment in lieu of Notice”).

The exceptions to the above rule are as follows:

- i) in the event that the continuance of the business of the employer has been made impossible due to a natural disaster or other unavoidable reasons;
- ii) in the event that the employee is dismissed for reasons attributable to him or her; or
- iii) in the event that the employee is dismissed during his or her probationary period and within 14 days from the employment date.

In order for the exception i) or ii) to apply, the approval of the head of the relevant Labor Standards Inspection Office is required.

### 6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

Yes. An employer can require its employees to serve “garden leave”, provided that wages must be paid to the subject employee during such period.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

An employee may only be dismissed when there is an objectively justifiable reason and it is appropriate in general social terms. Objectively justifiable reasons are as follows:

- i) incapacity (due to health or performance related reasons) and lack of qualification;
- ii) misconduct;
- iii) operational necessity; and
- iv) request from a labour union based on a union-shop agreement.

Generally, a court would only consider a dismissal to be “appropriate in general social terms” if the degree of the cause of dismissal is significant, while there is no other way to avoid the dismissal and there is almost no circumstance on the side of the employee which could be taken into consideration in favor of the employee. Employees may bring an action to dispute the validity of dismissal, and the court strictly examines the validity thereof, based on the above-mentioned criteria.

If an employee does not dispute the validity of dismissal, the state of dismissal of the employee will effectively become fixed. On the contrary, if an employee disputes the validity of dismissal, he or she would ultimately be considered to have been duly dismissed if it is judged by the court that the above-mentioned criteria have been met.

If a collective labour agreement has a provision which obligates an employer to obtain consent from a labour union upon dismissal of employees, a dismissal without such consent will be considered null and void.

#### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Yes. An employer may not dismiss the following categories of workers:

- i) a worker during a period of absence from work for medical treatment with respect to injuries or illnesses suffered in the course of employment or within 30 days thereafter;
- ii) a female worker during a period of absence from work before and after childbirth which is taken in accordance the Labor Standards Act or within 30 days thereafter;
- iii) a worker due to the reason of nationality, creed or social status of the worker;
- iv) a worker due to the reason that he or she is a labour union member or has performed justifiable acts of a labour union and the like;
- v) a worker due to the reason of sex, and of a female worker's marriage, pregnancy, childbirth or having taken absence from work before and after the childbirth;
- vi) a worker due to the reason of his or her having exercised rights granted with respect to the childcare or family care under the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave;
- vii) a part-time worker who is considered to be equivalent to ordinary workers, only due to the reason that he or she is a part-time worker;
- viii) a worker due to the reason that he or she has reported the employer's breaches of certain employment protection laws to the relevant government agencies;
- ix) a worker due to the reason that he or she has sought advice of or filed an application for mediation by the head of the Prefectural Labor Offices; and
- x) a worker due to the reason that he or she has reported a violation in accordance with the Whistle-Blower Protection Act.

#### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

See questions 6.3 and 6.9.

Employees are not entitled to compensation on dismissal. However, an employer is principally required to make Payment in Lieu of Notice (see question 6.1). In addition, since the validity of dismissal is strictly examined by the courts if disputed, employers often provide a severance payment to employees in order to facilitate their voluntary resignation. The amount of severance pay varies significantly depending on each company; however, in many cases, it is calculated based on the employees' length of service.

#### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Advance notice of termination (see question 6.1) is required in principle. In addition, any termination procedures stipulated under the employment rules or collective labour agreement must be followed.

In addition, it is desirable to notify the subject employee of the reasons of dismissal and provide the opportunity for self-vindication.

Further, an employer is required to provide an employee with a certificate without delay, if requested by the employee, which certifies the period of employment, the type of work of the employee, the employee's position, the wages or the cause of retirement (if the cause for retirement is dismissal, the reason of the dismissal must also be provided), as requested by the employee.

#### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee can bring a claim against his or her employer for declaratory judgment or a decision to confirm his or her position as an employee by filing a labour trial, preliminary disposition or litigation.

When the decision is made by the court (in the case of preliminary disposition or litigation) or the Employment Tribunal Court (in the case of labour trial) that a dismissal is null and void, the employer must reinstate the employee and pay the employee's wages or salary since the date of dismissal with applicable interest. In principle, if the dismissal is determined to be invalid, the employee cannot claim damages. However, a claim for damages may be admitted, if any communication or action by the employer against the employee in relation to the dismissal is considered to be a tortious act.

#### 6.8 Can employers settle claims before or after they are initiated?

Claims can be settled at any time before or after they are initiated.

#### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes. In the event that 30 or more employees (or 5 or more employees who are aged 45 years or older) are dismissed or cease to be employed within 1 month, notification regarding such dismissal or cessation should be made to the head of the competent public employment security office.

In addition, as described in question 6.3, the dismissal of an employee must be based on objectively justifiable reasons and be appropriate in general social terms. The court strictly examines the validity of a dismissal due to redundancy of employees based on the following 4 criteria:

- i) whether the redundancy is necessary and the reasons therefor;
- ii) whether every reasonable effort to avoid the redundancy was made;
- iii) whether the selection of the workers for dismissal is fair and reasonable; and
- iv) whether the employer observed "due process" (i.e. proper explanation and appropriate discussions).

Although additional obligations are not imposed on an employer



(except as described in the first paragraph), an employer is effectively required to take measures in line with the 4 criteria, in order for the dismissal to be judged valid.

#### **6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

Employees can dispute the validity of the dismissal at an ordinary court or the Employment Trial Committee. If the 4 criteria (see question 6.9) are not satisfied, the dismissal will be considered null and void, in which case the employer will be required to reinstate the dismissed employee and provide back pay.

### **7 Protecting Business Interests Following Termination**

#### **7.1 What types of restrictive covenants are recognised?**

Restrictive covenants typically include a covenant not to compete with, not to solicit the employees of, and not to disclose confidential information of a former employer.

#### **7.2 When are restrictive covenants enforceable and for what period?**

A non-competition obligation imposed on an employee after his or her retirement directly restricts the constitutional right of workers to choose their occupation. Therefore, there must be an express agreement with an employee or a provision in the employment rules to allow an employer to make such a restriction. The validity of this agreement or provision will be judged taking into consideration various factors such as the position of the employee (seniority), the purpose of the non-competition obligation, the degree of restriction on the occupation, the period and area, payment of compensation in exchange for the restriction and the like. The period of restriction normally may last for up to 3 years at most.

With respect to a non-solicitation obligation, in principle, employees would not be restricted to solicit their former employer's employees, since their duty of loyalty would basically cease to exist after their retirement. However, a former employee's solicitation of his or her former employer's existing employees may constitute an action in tort, if, for example, the employer's business is seriously impacted due to such solicitation.

A confidentiality obligation will be considered valid if there is an agreement with an employee or a provision in the employment rules, which is not against public order and morality in respect of the necessity and reasonableness thereof. The period of restriction would normally last for up to 3 years at the longest. In addition, under the Unfair Competition Prevention Act ("UCPA"), an employer may file an injunction against an employee during and after the period of his or her employment with respect to his or her unlawful use or disclosure of a trade secret acquired from or disclosed by the employer.

#### **7.3 Do employees have to be provided with financial compensation in return for covenants?**

Financial compensation is not statutorily required. However, the provision of financial compensation is one of the important factors to be taken into account, upon judgment of the validity of the covenants.

#### **7.4 How are restrictive covenants enforced?**

Covenants are enforced through a provisional injunction against the subject employee. With respect to a covenant of confidentiality, under the UCPA, employers may also enforce the covenant by seeking destruction of the articles that constituted the infringement, removal of the equipment used for the act of infringement, as well as seeking restoration of the business reputation.

An employer may also claim for damages arising from the former employee's conduct. As a means of securing compensation for damages, an employer may reduce or request the return of the retirement allowance of the former employee, provided that it is expressly stipulated in the employment rules or rules concerning the retirement allowance of the employer that such reduction or return can be enforced.

Seeking punishment through a criminal complaint against the former employee may also be effective in certain cases. Crimes such as breach of trust or embezzlement under the Penal Code and the penal provisions under the UCPA may apply.

### **8 Court Practice and Procedure**

#### **8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?**

i) Ordinary courts composed of 1 to 3 qualified judges or ii) Employment Trial Committees composed of 1 qualified judge and 2 layperson committee members, who have specialised experience with respect to labour relations, have jurisdiction to hear employment-related complaints.

#### **8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?**

At an ordinary court, once an action is brought, it will go through oral proceedings and examination of evidence. Conciliation is not mandatory before a complaint can proceed.

The Employment Trial Committee will hold up to 3 hearings to hear allegations of both parties and examine evidence. Conciliation is mandatory before a decision is rendered, if there is a possibility for the case to be resolved by settlement.

#### **8.3 How long do employment-related complaints typically take to be decided?**

An employment-related complaint brought into an ordinary court would undergo an average deliberation of approximately 12 months at the court of first instance before being resolved. If a complaint is brought into the Employment Trial Committee, the average number of days for deliberation is approximately 75 days.

#### **8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?**

Yes. Both decisions by an ordinary court of first instance and the Employment Trial Committee can be appealed. If a case which was pending at the Employment Trial Committee is appealed, it will automatically move to the ordinary court. The average deliberation period at the appellate court is approximately 6 months.

**Nobuhito Sawasaki**

Anderson Mori & Tomotsune  
1-6-1, Roppongi, Minato-ku  
Tokyo  
Japan

Tel: +81 3 6888 1102  
Fax: +81 3 6888 3102  
Email: [nobuhito.sawasaki@amt-law.com](mailto:nobuhito.sawasaki@amt-law.com)  
URL: [www.amt-law.com](http://www.amt-law.com)

Nobuhito Sawasaki is a partner at Anderson Mori & Tomotsune. Mr. Sawasaki has been engaged in a wide range of practice areas since he joined the firm in 2001. He has advised domestic and foreign clients on labour law, pension law, mergers and acquisitions, corporate law, the Private Information Protection Act and financial regulations.

Recently, Mr. Sawasaki has been advising domestic and foreign clients on compliance with labour and employment laws, the Private Information Protection Act and business licensing issues. He has also assisted domestic and foreign clients with numerous of labour disputes and other labour-related matters such as the redundancy process, formulation of working rules and reformation of employee benefits schemes. Further, Mr. Sawasaki contributes practical advice to domestic and foreign clients which handle personal information and proprietary information in the course of their business.

**Sayaka Ohashi**

Anderson Mori & Tomotsune  
1-6-1, Roppongi, Minato-ku  
Tokyo  
Japan

Tel: +81 3 6888 5805  
Fax: +81 3 6888 6805  
Email: [sayaka.ohashi@amt-law.com](mailto:sayaka.ohashi@amt-law.com)  
URL: [www.amt-law.com](http://www.amt-law.com)

Sayaka Ohashi is an associate at Anderson Mori & Tomotsune. She has provided advice to domestic and foreign clients focused on employment and labour-related law, such as human resources and labour management, labour litigation and other employment/labour dispute.

She has also engaged in practices related to environment law, which includes the Air Pollution Control Act, Soil Contamination Countermeasures Act, Water Pollution Prevention Law, Act on Asbestos Health Damage Relief, Act on the Evaluation of Chemical Substances and Regulation of Their Manufacture, etc., Energy Conservation Law.

## ANDERSON MŌRI & TOMOTSUNE

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# Korea



Young-Seok Ki



John M. Kim

Shin & Kim

## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The main legislation which governs the employer-employee relationship in Korea is the Labor Standards Act (“LSA”). The LSA prescribes minimum standards of working conditions for employees as well as specific requirements for employers in relation to various labour matters. In addition to the LSA, there are numerous other statutes that apply to specific labour-related matters. For example, the Minimum Wage Act prescribes minimum wages for workers, and the Act on Gender Equality Employment and Reconciliation of Work and Family prohibits various forms of gender-based discrimination by employers.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Basically, employment law in Korea protects “employees” as defined in the LSA. An employee means a person who offers service to a business for the purpose of earning wages, regardless of the kind of job he or she is engaged in. The key test is whether the worker provides his or her services under the instruction and control of the employer. In this regard, independent contractors are not employees under the LSA because they perform their job independently of the supervision and control of the principal.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

In general, written employment contracts are not required. However, certain employment terms such as workplace, responsibilities, wage, working hours, weekly holiday, annual paid leave, severance pay, discipline, etc. must be specified in writing.

### 1.4 Are any terms implied into contracts of employment?

Certain terms may be implied into an employment contract depending on the totality of circumstances. For example, duty of loyalty may be implied on the basis of the general principle of good faith and the nature of the employment relationship.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Many provisions in the relevant employment laws prescribe minimum standards of working conditions for employees. Any provisions in the employment contract which fail to meet the minimum requirements prescribed under the employment laws are generally void and unenforceable.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Theoretically, all of the terms and conditions of employment which are generally applicable to employees may be agreed through collective bargaining. So far, collective bargaining at the company level is more common than bargaining at the industry level in Korea.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The law prescribes the requirements and procedures for the establishment of trade unions. The trade unions are required to prepare bylaws of the trade union and report the establishment of the trade union to government agencies.

### 2.2 What rights do trade unions have?

A trade union which is established pursuant to the law has various rights, among others, as follows:

- a. the right for collective bargaining and industrial action;
- b. immunities from civil and criminal liabilities arising from justifiable industrial action;
- c. the right to request the Labour Relations Commission to mediate a labour dispute; and
- d. the right to file a petition with the LRC for the remedy of an unfair labour practice.

### 2.3 Are there any rules governing a trade union’s right to take industrial action?

The law prescribes the requirements and procedures for an industrial action. A trade union may take industrial action for the

purpose of improving working conditions of the employees and promote their social and economic status. The industrial action must be approved by the majority of union members in a direct, secret and anonymous ballot. In addition, the trade union cannot take industrial action unless it has gone through the mediation at the LRC. The industrial action cannot be conducted by way of violence or destruction of company properties.

#### **2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?**

The Labour-Management Council (i.e. work council) should be established in each business or workplace employing 30 or more workers. Although the Labour-Management Council is not a legal entity, the council may consult, resolve and receive reports on certain matters as provided under the law.

Certain specific matters must be consulted at the Labour-Management Council such as recruitment, placement and training of employees, treatment of employees' grievances, improvement of working environment and employees' health, general principle of manpower restructuring, improvement of wage system, instalment of devices monitoring employees in the workplace, improvement of employees' welfare and other matters regarding cooperation between employer and employees. The employer is required to obtain a resolution at the Labour-Management Council with respect to the establishment and management of welfare facilities, establishment of employee welfare fund, establishment of labour management committee, etc. The employer and employee should implement any resolution in good faith that the Labour-Management Council passes. Furthermore, the employer has an obligation to report or explain to the Labour-Management Council certain matters such as economic and financial status of the company.

The Labour-Management Council must be composed of an equal number of employee's representatives and employer's representatives, with between 3 to 10 members respectively. Members representing employees must be elected by employees; provided that if a majority of the employees are members of a trade union, the representative of the trade union and workers designated by the trade union will be appointed as the employees' representatives. The employees' council members in a business or workplace where there is no trade union comprising a majority of employees must be elected in a direct, secret and anonymous vote by employees.

#### **2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?**

The employer must consult or agree with the employee's representative on certain specific matters at the Labour-Management Council. Please refer to question 2.4. Meetings of the council can be held by the presence of a majority of the employee members and employer members, respectively. A resolution requires an affirmative vote of not less than two-thirds of the members present to be adopted.

#### **2.6 How do the rights of trade unions and works councils interact?**

The purpose of the Labour-Management Council is to promote

cooperation between the employer and employees and thereby maximise the interests of both employers and employees, while the purpose of a trade union is to improve working conditions and enhance employees' social status. In addition, the Labour-Management Council is different from the trade union in its composition, authority and activity. Therefore, theoretically, the activity of a trade union will not be affected by the Labour-Management Council.

However, union activities may overlap with those of the Labour-Management Council since matters subject to consultation or resolution at the Labour-Management Council contain items related to the working conditions of employees. Furthermore, as described in question 2.4, the representative of the trade union and workers designated by the trade union will be appointed as the employees' representatives at the Labour-Management Council if a majority of the employees are members of a trade union.

#### **2.7 Are employees entitled to representation at board level?**

The trade union has no statutory right to have representation at the board level. It is very rare for an employer to appoint employee directors.

### **3 Discrimination**

#### **3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?**

Employees are protected against discrimination on the basis of general principles of equal treatment and prohibition against unreasonable discriminatory treatment in employment. The grounds on which discrimination is prohibited may include any characteristic of employees such as gender, religion, social status, race, disability, nationality and age. In addition, certain types of discrimination are prohibited by specific statutes. For example, the Act on Gender Equality Employment and Reconciliation of Work and Family bans an employer from discriminating employees based on gender with respect to employment. The employer may not discriminate against an employee on the basis of the employee's union membership. Discrimination between regular employees and non-regular employees (i.e., fixed term, part-timer, dispatched employees) is also regulated by the relevant law.

#### **3.2 What types of discrimination are unlawful and in what circumstances?**

In principle, it is prohibited to discriminate against employees 'without reasonable grounds'. Therefore, if there is reasonable cause for discrimination of employees, such discrimination is not prohibited. For example, a full-time employee may be paid more salary than part-timers on the basis of his or her responsibilities, skill, experience and expertise, which would constitute reasonable grounds for discrimination.

#### **3.3 Are there any defences to a discrimination claim?**

'Reasonable grounds' can be a general defence against a discrimination claim because discrimination is not prohibited if it has reasonable cause. The court will take into consideration the totality of circumstances and determine on a case-by-case basis whether the discrimination is with or without reasonable grounds.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Discrimination claims may be brought before the court. The employee also may file a petition with the Labour Relations Commission. The Labour Relations Commission is not a court but an administrative body attached to the Ministry of Employment and Labour. In addition, the employee may report illegal discrimination to the labour office.

The employer and the employee may enter into an agreement to settle disputes before legal proceedings are concluded.

### 3.5 What remedies are available to employees in successful discrimination claims?

The Labour Relations Commission, if it judges that the treatment of non-regular employees is discriminatory, will issue a redress order to the employer in writing which will specify a deadline for compliance. If the court or the Labour Relations Commission determines that dismissal of an employee constitutes illegitimate discrimination and dismissal is invalid, the employee may be reinstated and paid compensation for the loss of earnings. Further, the employee may claim damages for mental suffering.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Pregnant employees are entitled to a period of 90 days of maternity leave. At least 45 days of leave must be taken after the child's birth.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

The employee is entitled to her usual rate of pay for the first 60 days of the maternity leave.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

After the end of maternity leave, the employer must have the female employee return to the same work or another position where she will be paid the same level of pay as before the maternity leave. The employer cannot dismiss an employee during maternity leave and for 30 days thereafter.

### 4.4 Do fathers have the right to take paternity leave?

Fathers are entitled to 3 days' paternity leave. However, fathers may not take paternity leave after 30 days from the date of childbirth. The employer is not required to pay the fathers during paternity leave.

### 4.5 Are there any other parental leave rights that employers have to observe?

An employee with a child who is six years' old or less is entitled to take childcare leave up to 1 year. The employer is not required to pay any remuneration during the childcare leave.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

An employee who is eligible for childcare leave may apply for a reduced number of work hours during the childcare period (i.e., up to 1 year). If the employer allows the employee to work less hours, the employee may work between 15 and 30 hours a week.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

If a company transfers its business to an acquiring company through a merger, the employment relationship between the target company and its employees are also transferred to the acquiring company on the same terms and conditions that the employees had with the target company. In case of a business transfer where the business is transferred as a unit, the employment relationship is also transferred to the acquiring company on the same terms and conditions that the employees had with the transferring company. The employee relationship is not affected by the transfer of controlling shares and change of management because the employee contract between the company and the employee is not changed by the share transfer or change of management. However, in case of an asset transfer where the assets are transferred individually and does not maintain unity of a business, the employment relationship is not transferred to the buyer.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

In general, the employment relationship is transferred to the acquiring company on the same terms and conditions that the employees had with the transferring company. It is not clear whether collective agreements also are transferred in case of a business sale. However, it is the prevailing view that the collective agreements on the terms and conditions of employment which are generally applicable to employees are transferred when a business is transferred.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

There are no statutes or court precedents that impose information and consultation obligation on employers with respect to a business sale. However, each employee may choose to remain in the transferring company and refuse to be transferred to the buyer.

### 5.4 Can employees be dismissed in connection with a business sale?

In general, the employer cannot dismiss employees in connection with the business sale. Even if an employee refuses to be transferred to the purchaser, the employer must maintain the employment relationship and relocate the employee to another position within the company.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

In case of a business transfer, the employment relationship is

transferred to the acquiring employer on the same terms and conditions that the employees had with the transferring employer. In addition, the employer cannot change terms and conditions of employment unfavourably to employees without consent from employees.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Under the LSA, an employer must give written notice to the employee to be dismissed stating the effective date and the reason for dismissal. In general, an employer must give 30 days' prior notice or pay 30 days' wage in lieu of such advance notice to an employee. However, in certain cases, the 30 days' prior notice is not required. For example, the employer is not required to give 30 days' prior notice to a probationary employee if the dismissal is made within 3 months from the commencement of work. If it is impossible to continue business due to natural disasters, calamities or other inevitable reasons, or an employee intentionally caused considerable hindrance or damage to the business as specified in the law, the employer may dismiss the employee on summary notice with immediate effect.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Korean law does not recognise "garden leave". When an employer intends to dismiss an employee, the employer must provide at least 30 days' prior notice, or pay 30 days' ordinary wages in lieu of the mandatory notice period. The employee is still subject to the obligation to attend work during such notice period unless the employer exempts the employee from such obligation.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Dismissal means a unilateral termination of employment by the employer. If employees are forced by their employer to retire against their will, this may be classified as a dismissal depending on circumstances. Under the LSA, an employer is prohibited from dismissing an employee without 'just cause' (see question 6.5). In addition, under the LSA, an employer must give 30 days' prior notice to the employee in writing stating the effective date and the reason for dismissal. If the rules of employment or collective agreements stipulate the procedures of dismissal, the employer must follow such procedures. In general the company is not required to obtain consent from third party, unless the rules of employment or collective bargaining agreement prescribe otherwise.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

The employer may not dismiss an employee during a maternity leave period and for 30 days thereafter, during a childcare leave period, or during a leave of absence due to occupational injury or disease and for 30 days thereafter.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Employers must show that they have 'just cause' for dismissal. Although there is no clear definition of 'just cause' in the LSA, the courts have found 'just cause' in many cases where the employer dismisses an employee based on a material fault attributable to the employee such that the employer is not bound to continue its employment relationship based on the social notion. Misconduct and illegality (criminal offence such as theft, fraud, use of violence against colleagues and superiors) of the employee may constitute just cause.

In addition, the employer may lay off employees based on urgent business necessity. In such case, the following requirements must be satisfied:

- a. there is an urgent business necessity;
- b. the employer has exerted its best efforts to avoid the lay-off;
- c. the employees to be laid off are selected based on fair and reasonable selection criteria; and
- d. the employer must give 50 days' prior notice to and consult in good faith with its trade union or the employees' representative (in case of absence of such union) with respect to the methods to avoid the lay-off and the selection criteria.

An employer must pay statutory severance upon termination of employment for any reason if an employee has served for at least one consecutive year. The amount of the severance payment is equal to 30 days' average wage of the employee per year of service. The average wage of an employee is calculated by averaging the total wages paid to the employee for the last three months prior to the date of termination of employment. However, severance pay is not a special compensation for dismissal.

### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

As described in question 6.1, in general, an employer must give 30 days' prior written notice to an employee stating the effect date of and reasons for the dismissal. If the rules of employment or collective agreements stipulate the procedures of dismissal, the employer must follow such procedures.

### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee seeking a remedy for unfair dismissal may file a petition with the Labour Relations Commission. An employee may file a lawsuit before the Court directly without seeking a remedy at the Labour Relations Commission. Employees may choose whether to proceed in the district court or to file a claim with the Labour Relations Commission.

The employee must file a claim with the Labour Relations Commission within 3 months from the alleged unfair dismissal. There is no specific statutory limitation for a claim of unfair dismissal before the Court.

If the claim succeeds, the employer must reinstate the dismissed employee to his or her pre-dismissal position or equivalent position. In addition, the employer must pay the amount of wages the employee could have received during the dismissal period if the employee had not been dismissed.

### 6.8 Can employers settle claims before or after they are initiated?

The employer and the employee may enter into an agreement to settle employment disputes before legal proceedings are concluded.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

If an employer intends to lay off more than the prescribed limit of employees based on the number of employees hired by company during a period of one month, the employer must file a report with the Minister of Employment and Labor 30 days in advance of the first day of the lay-off.

In addition, the restructuring plan should be discussed at the Labour-Management Council.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

If an employer fails to comply with the requirements for lay-off based on urgent business necessity, dismissal will be invalid. In this case, the laid off employees may file a petition with the LRC or the Court to seek a remedy for unfair dismissal. Please refer to the question 6.7.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Generally, restrictive covenants, such as confidentiality, non-compete and non-solicitation clauses, may be recognised under Korean law.

### 7.2 When are restrictive covenants enforceable and for what period?

The restrictive covenants will be valid and enforceable to the reasonable extent that they do not violate 'good moral and social order' under the Korean Civil Code. The court will determine enforceability of the restrictive covenant on a case-by-case basis by considering the totality of circumstances, including the employer's interest to be protected, the position held by the employee, the duration of the restrictive covenant, the territorial limit of the restrictive covenant, the restricted activity, payment of compensation for the restrictive covenant, history of the termination of employment and the relevant public interest.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

There are no specific statutes or rules requiring the employer to provide employees with financial compensation in return for the restrictive covenants. However, in determining the enforceability of the restrictive covenants, the court will take into consideration whether the employer pays financial compensation in consideration for imposing the covenants on retiring employees.

### 7.4 How are restrictive covenants enforced?

In the event that an employee breaches a restrictive covenant, an employer may seek damages and/or injunctive relief to restrain the employee from continuing to breach the covenant.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Employment-related disputes may be brought before the district court. Further, in certain cases such as unfair dismissal and unfair labour practices, the employee may file a petition with the Labour Relations Commission.

The court is composed of 1 or 3 judges, the number of which is determined depending on nature and amount of the claim. The Labour Relations Commission is composed of members representing employees, employers and the public interest. In general, each panel in the Labour Relations Commission consists of three members.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

There is no special forum or procedure which specifically applies to employment-related complaints before the courts. The procedures of general civil cases apply to employment-related claims. The law provides for separate rules on proceedings before the Labour Relations Commission, which are thought to be more convenient, faster and more flexible than those before the courts. Conciliation is voluntary.

### 8.3 How long do employment-related complaints typically take to be decided?

It typically takes 2-3 months for the Labour Relations Commission to give a ruling on the employment-related complaints. On the other hand, it usually takes 3-6 months for the district court to make a decision on an employment-related claim. However, it is not uncommon for district court procedures to be extended for more than 1 year.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

If an employee files a petition with the local Labour Relations Commission, the party who desires to challenge an order of the local Labour Relations Commission must make an application for review to the national Labour Relations Commission within 10 days of receipt of the decision. Any of the parties concerned may initiate an administrative lawsuit against a decision made by the national Labour Relations Commission within fifteen days from the date of receipt of the decision.

A disgruntled party to the case before the district court may appeal to the appellate court. Appeal to the higher court must be filed within 2 weeks from the date of delivery of the decision. The procedures in the higher courts usually take more time than in the district court.

**Young-Seok Ki**

Shin & Kim  
6th Floor, Ace Tower, 1-170 Soonhwa-dong  
Jung-gu, Seoul 100-712  
Korea

*Tel:* +82 2 316 4021  
*Fax:* +82 2 756 6226  
*Email:* [ysgi@shinkim.com](mailto:ysgi@shinkim.com)  
*URL:* [www.shinkim.com](http://www.shinkim.com)

Young-Seok Ki is a partner at Shin & Kim. He has been admitted to the Korean Bar Association since 2001 and received a LLM degree from the University of Washington School of Law. Mr. Ki is the head of the firm's Labour Practice Group and focuses on all aspects of labour and employment related matters (e.g., advice on employment contracts/handbooks, bonus schemes, severance pay, layoffs and workforce restructuring, industrial relations, etc.).

**John M. Kim**

Shin & Kim  
6th Floor, Ace Tower, 1-170 Soonhwa-dong  
Jung-gu, Seoul 100-712  
Korea

*Tel:* +82 2 316 4680  
*Fax:* +82 2 756 6226  
*Email:* [jmkim@shinkim.com](mailto:jmkim@shinkim.com)  
*URL:* [www.shinkim.com](http://www.shinkim.com)

John M. Kim is a senior foreign legal consultant at Shin & Kim. He has been a member of the New York State Bar Association since 2000. Mr. Kim focuses primarily on labour related matters in the context of M&A transactions as well as labour and employment related work for multinational corporations in Korea.

## SHIN&KIM

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# Kosovo

KALO & ASSOCIATES

Atdhe Dika



Vegim Kraja



## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The right to work and follow a profession is provided in article 49 (1, 2) of the Constitution of Republic of Kosovo dated 15.06.2008, which expressly states that the right to work is guaranteed and each person is free to choose his/her profession and occupation. Employment relationships are governed by the recently approved Law no. 03/L-212 dated 18.11.2010 “On Labour” (LoL). Employees are also entitled to occupational safety, protection of health and an appropriate labour environment in compliance with the LoL and Law no. 2003/19 dated 06.11.2003 “On Occupational Safety, Health and Working Environment”. In regards to discrimination, employees, aside from being protected by the provisions of the LoL, they are also protected by Law no. 2004/3 dated 20.08.2004 “On Anti-Discrimination”. Another legal source covering employment issues in Kosovo is the Comprehensive Proposal for the Kosovo Status Settlement Date (Ahtisaari Plan).

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The recently approved LoL regulates the rights and obligations deriving from the employment relationship for employees and employers in the private and public sector in the Republic of Kosovo. Based on the LoL, the public sector only includes the education and health sector as well as publicly-owned enterprises by the Republic of Kosovo or any other municipality of the Republic of Kosovo. Nevertheless, the status of Civil Servants is governed by the special Law no. 03/L-149 dated 13.05.2010. “On the Civil Service of the Republic of Kosovo” which regulates the terms and conditions of the employment relationship with institutions of the central and municipal administrations. However, provisions of the LoL are applicable also to employees and employers, whose employment relationship is regulated by special law, when such special law does not provide any solution for certain issues deriving from the employment relationship. Foreign citizenship employees are also subject to provisions of the LoL after they are equipped with a Work Permit required by Law no. 2009/03-L-136 dated 17.07.2009 “On Granting the Permit for Work and Employment of Foreign Citizens in Republic of Kosovo” and with a Residence Permit required by Law no. 2008/03-L0126 dated 30.12.2008 “On Foreigners”.

The LoL distinguishes the following categories of employees: (i) foreign and stateless citizen employees; (ii) interns; (iii) under-age employees (youths); (iv) women (pregnant, breastfeeding and

women with a child under 3 (three) years); and (v) persons with disabilities.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

The LoL expressly recognises only the written form of an employment contract, signed by the employer and the employee which shall contain the minimum rights for the employee stipulated by the LoL. An employment contract shall include the minimum elements as follows: (i) data on the employer (designation, residence and business registration number); (ii) data on the employee (name, surname, qualification and dwelling); (iii) designation, nature and the form of labour and/or services and the job description; (iv) the place of work or a statement that work is performed at various locations; (v) working hours and working schedule; (vi) the date of commencement of work; (vii) the duration of the employment contract; (viii) the basic salary and any other allowance or income; (ix) the period of vacations; (x) terms for the termination of the employment relationship; and (xi) any other data that the employer and employee deem important for the regulation of the employment relationship. An employment contract may include other rights and duties provided for by the LoL.

### 1.4 Are any terms implied into contracts of employment?

The legal obligations for the payment of taxes, pension schemes and other contributions provided by any other special applicable law are usually implied terms in employment contracts. Also the LoL determines that the rights and duties not defined in the employment contract shall be regulated by the provisions of the LoL, Collective Contract and Employer’s Internal Act. According to article 4 of the LoL, the LoL has supremacy over the provisions of the collective contract and employment contract in cases of conflict between them.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The minimum employment terms set forth by law which are required to be considered by employers before concluding employment relationships with employees are: (i) a minimum age of 18 (eighteen) years. However, in this respect when an employee is employed for easy labour which does not present a risk to either health or development and such a work is not prohibited by any law or sub legal acts, the LoL allows an employment relationship with

persons older than 15 (fifteen) years' old; (ii) a minimum wage which will be defined annually by the Government of Kosovo based on the proposal of the Social-Economic Council; (iii) an obligation to report employees to the Kosovo Tax Administration (KTA), and to other authorised institutions for managing and administering obligatory pension schemes; and (iv) safety measures.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The terms and conditions of collective bargaining shall not limit the rights of employees recognised by the LoL. The collective bargaining can be concluded on the following levels: (i) at the state level; (ii) at the branch level; and (iii) at the enterprise level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The freedom for establishing trade unions with the intent of protecting interests is provided for in article 44 (2) of the Constitution of the Republic of Kosovo. Such a right may be limited by law for specific categories of employees. Freedom of Trade Union Organisations is also recognised by the LoL without undue interference from any other organisation or public authority. Currently, Kosovo does not have a special law that regulates the rights, freedoms and obligations of trade unions. According to the Kosovo Parliament Legislative Strategy, the Law on Trade Union Organisations will be approved during this legislative year.

### 2.2 What rights do trade unions have?

As abovementioned in the response to question 2.1 above, Kosovo does not have a special law that governs the activity of trade unions and other labour organisations. But, taking into consideration applicable Labour Legislation, trade unions are entitled to lawful strikes and the right to be engaged in social dialogue including the right to negotiate the collective contract(s).

### 2.3 Are there any rules governing a trade union's right to take industrial action?

The Law on Strikes does not expressly recognise the trade union's right to take "industrial action" as a specific legal category, nevertheless, after careful reading of the Law on Strikes, we conclude that the definition of 'strike' in the Law on Strikes includes the right of employees to take industrial action aiming to settle the disputes with their own employer.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Employers are not required to set up work councils.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable in Kosovo.

### 2.6 How do the rights of trade unions and works councils interact?

This is not applicable in Kosovo.

### 2.7 Are employees entitled to representation at board level?

No, they are not.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Every form of discrimination is prohibited by the Constitution of the Republic of Kosovo. The LoL prohibits all forms of discrimination in employment and occupation. Provisions of Law no. 2004/3 dated 20.08.2004 "On Anti-Discrimination" shall be directly applicable in regards to an employment relationship. Even though Kosovo is not a signatory party to the following international agreements and instruments granted with the Constitution of the Republic of Kosovo: (i) Convention on the Elimination of All Forms of Racial Discrimination; and (ii) Convention on the Elimination of All Forms of Discrimination against Women, they are directly applicable in Kosovo.

### 3.2 What types of discrimination are unlawful and in what circumstances?

The terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and the terms and conditions of employment. The term discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, age, family status, political opinion, national extraction or social origin, sexual orientation, language or union membership which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

### 3.3 Are there any defences to a discrimination claim?

In the cases of discrimination, an employee is protected by Law no. 2004/3 dated 20.08.2004 "On Anti-Discrimination" (LAD) which expressly provides procedures for discrimination in employment relationships. Any claim of discrimination shall be decided or adjudicated in compliance with the LAD by administrative authorities and the competent court.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Successful enforcement of employees' rights in respect to discrimination may commence by exhausting all possibilities with the administrative authorities and then, upon completion of the

administrative procedure related to a claim of discrimination in accordance with the applicable law on general administrative procedure, when a claimant is unsatisfied that a claim can be filed at the competent court. Such a claim shall be in compliance with Law no. 03/L-202 dated 06.10.2010 "On Administrative Conflicts". To avoid the court expenses, it is more favourable for an employer to settle a claim before the initiation of the procedure in court. Otherwise, it is not prohibited to settle a claim in any existing stage of the case.

### 3.5 What remedies are available to employees in successful discrimination claims?

Except for the remedies mentioned in questions 3.3 and 3.4, mediation or conciliation procedures are also available. However, the use of mediation or conciliation procedures does not preclude an employee from filing a claim with the appropriate administrative authority or at the competent court.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

An employed women is entitled to up to 12 (twelve) months of maternity leave.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Women are entitled to commence maternity leave up to 45 (forty five) days before the expected day of birth. Within the period of 28 (twenty eight) days before the childbirth is expected, the employer, with the woman's consent may request that she begins maternity leave when she is not able to perform her duties. During the period of the first 6 (six) months of maternity leave, the payment shall be paid by the employer in the amount of 70% (seventy percent) of the basic salary. During the following three (3) months (i.e. months 7, 8, 9), the maternity leave will be paid by the Government of Kosovo in the amount of 50% (fifty percent) of the average salary in Kosovo. On the basis of the LoL, the employed woman has the right to extend her maternity leave for another three (3) months (i.e. months 10, 11, 12) without payment. If a woman does not want to use the right of maternity leave for the last 6 (six) months, she shall notify the employer at least 15 (fifteen) days before the end of first 6 (six) months of maternity leave. Except in cases of collective dismissal, an employer cannot terminate the employment contract with a female employee during her pregnancy or maternity leave.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

A woman upon her return to work from maternity leave shall not be obliged to work longer than full-time working hours and during night shifts. Such a right lasts until her child reaches 3 (three) years' old. Breastfeeding women are protected from work which is classified as harmful for the health of the mother or the child. Based on the LoL, breastfeeding women are prohibited from work involving hard physical labour, or work exposed to biological, chemical or physical factors that may risk the reproductive health as well in other specific cases. Please note that the sublegal acts for implementation of the LoL shall be approved by the Ministry of Labour and Social Welfare (Ministry) within a period of one (1)

year from the date of entering into force of such LoL which was approved very recently.

### 4.4 Do fathers have the right to take paternity leave?

In the cases of the sickness of the mother, the abandonment of the child or the death of the mother, the rights defined in our response to question 4.2 above for maternity leave may also be used by the father of the child. However, maternity leave rights for the last 6 (six) months may also be conveyed to the father of the child in agreement with the mother. The father of the child is entitled to: (i) two days' paid leave at the birth/adoption of the child; and (ii) two weeks' unpaid leave after the birth/adoption of the child until the child reaches 3 (three) years' old. An employer must be informed 10 days in advance if the father (employee) intends to use such a leave/right.

### 4.5 Are there any other parental leave rights that employers have to observe?

If an employed woman gives birth to a dead infant or if the child dies before the expiry of maternity leave, with the doctor's recommendation she is entitled to maternity leave until the recovery from birth and the psychological condition caused with the loss of the infant for no less than forty-five (45) days, during which period she shall be entitled to all entitlements under the maternity leave. Parents are also entitled to a paid absence from work with the compensation of salary for up to three (3) days for the birth of child.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

According to the LoL, a single parent with a child under three (3) years' old or with serious disabilities are exempt from working longer than full-time working hours and during night shifts. However, as abovementioned in response to question 4.3, this right is also granted to a mother with a child under three (3) years' old.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In the case of a business transfer, which entails the change of the employer, the regulation is found in Law no. 03/L-212 "On Labour", effective as of January 1st, 2011. When the employer is changed as result of a business transfer, the new employer shall take over all the obligations of the former employer based on the individual employment agreement and collective agreement. In transactions involving the acquisition of a publicly-owned company through a concession agreement, the contracting state authority may impose limitations with respect to redundancies and employment conditions of the existing employees of the company in the transaction agreement.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

When a business sale occurs, the transfer incorporates all employee rights in compliance with a collective agreement and an individual employment contact. However, after mutual consent between the new employer and its employees for modifications in a collective

agreement within an organisation, the collective agreement can be amended and supplemented, but always within the limits provided for by the LoL.

**5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?**

In the case of a business sale, the previous employer is obliged to inform properly and entirely the next employer of the rights and obligations deriving from any collective agreement and individual employment contract. Before the transfer takes place, the previous employer is obliged to inform all of its employees in writing with respect to the transfer of their rights and obligations.

**5.4 Can employees be dismissed in connection with a business sale?**

When an employee opposes his/her transfer to the new employer or does not express his/her decision in this regard within 5 (five) days from the notification day, then the previous employer is entitled to dismiss the employee.

**5.5 Are employers free to change terms and conditions of employment in connection with a business sale?**

In the case of a sale transaction, the LoL does not envisage any specific provision which limits employers to change terms and conditions of employment after taking over obligations as cited above in response to question 5.1. However, in the case of changing the terms and conditions of an employment relationship, the employer shall take into account compulsory provisions stipulated by the LoL for the employment contracts.

## 6 Termination of Employment

**6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?**

Employment contracts in Kosovo may be concluded for: (i) an unspecified period; (ii) a specified period; and (iii) specific tasks. A contract for a specified task may not be longer than 120 (one hundred and twenty) days within a year. The period for giving notice to an employee by the employer for termination of an employment relationship depends on the duration of the contract. When an employment contract is concluded for an unspecified period, in the case of the termination of the contract by the employer, the following periods of prior notice shall be taken into consideration:

- (i) From 6 (six) months up to 2 (two) years of employment: 30 (thirty) calendar days.
- (ii) From 2 (two) up to 10 (ten) years of employment: 45 (forty-five) calendar days.
- (iii) Above 10 (ten) years of employment: 60 (sixty) calendar days.

In the cases when the employment contract is concluded for a specified period, for the prior notice for termination of employment relationships, the employer shall give the employee prior notice of at least 30 (thirty) calendar days. The decision for termination of an employment relationship by the employer is mandatory to be issued in written form and to contain also the grounds for the termination.

**6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?**

The LoL expressly allows the possibility of "garden leave". The employer is entitled to deny an employee access to the enterprise premises during the termination notice period, namely prior to terminating the employment contract.

**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

An employee who considers that his rights arising from an employment relationship are violated can exercise his right of protection through: (i) the court; (ii) mediation; and/or (iii) the labour inspectorate. The consent of any third party in case of dismissal is not requested.

**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

The employer is prohibited from dismissing a woman during her pregnancy and maternity leave.

**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

An employer is entitled to dismiss an employee individually in the cases of serious misconduct and unsatisfactory performance. Reasons of dismissal related to business shall be justified with economic, technical or organisational reasons. An employer is obliged to pay the full salary and other allowances up to the day of the termination of the employment relationship. In the case of collective dismissals, the severance payment for employees with an employment contract for an unspecified period is calculated as follows: (i) from 2 (two) to 4 (four) years of service: 1 (one) monthly salary; (ii) from 5 (five) to 9 (nine) years of service: 2 (two) monthly salaries; (iii) from 10 (ten) to 19 (nineteen) years of service: 3 (three) monthly salaries; (iv) from 20 (twenty) to 29 (twenty-nine) years of service: 6 (six) monthly salaries; and (v) from 30 (thirty) years of service or more: 7 (seven) monthly salaries.

**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

The only procedure that ought to be followed by an employer in respect to individual dismissals is prior written notice by respecting the terms and conditions as determined by the individual employment contract and by the LoL, and to provide an employee with a single severance payment.

**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

An employee is entitled to claim for the cancellation of a decision for dismissal, return to the workplace, and demand compensation. If conciliation between the employer and employee fails, the employee is entitled to seek his rights through the competent courts.

### 6.8 Can employers settle claims before or after they are initiated?

A claim between the employer and employee can be settled at any stage, including before or after the initiation of claim.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

If a number of dismissed employees does not exceed at least 10% (ten percent), but not less than 20% (twenty percent) employees within a period of 6 (six) months, an employer does not have any additional obligation, except prior notice for the termination of the employment relationship and compensation up to the last day of work. Except for the payments mentioned in *supra* question 6.5, if it is necessary for an employer to hire employees within a period of 1 (one) year from the termination of the employment contract with the same qualifications, then he/she is obliged not to hire another person before offering to hire an employee whose contract has been terminated.

These rules are not applicable for employees who are discharged as result of bankruptcy and reorganisation administered by a court.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employee's rights in respect to mass dismissals depend on the good will of the employer if the latter expresses his will to pay the severance payment. Employees can enforce their rights in this respect through courts and mediation. However, if an employer fails to fulfil his obligations in respect to mass dismissals, then the consequences for the employer are a fine and other payable amounts, which shall be set by sub-legal acts approved by the Ministry.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

The LoL does not recognise restrictive covenants expressly, but parties to an employment contract are free to agree on restrictive covenants, such as preservation of industrial secrets and other personal data sensitive for employer.

### 7.2 When are restrictive covenants enforceable and for what period?

Parties are free to agree on the terms of covenants for an unlimited period as legislation in force does not envisage anything to the contrary.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

This is not applicable in Kosovo.

### 7.4 How are restrictive covenants enforced?

This is not applicable in Kosovo.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

According to ex-Yugoslavian Law "On Courts" (in force in Kosovo until January 2013), the competent court to judge employment-related complaints are municipal courts, based on their territorial competence.

Regarding disputes arising from employment relationships, the court in the first instance is composed of a sole judge. On the other hand, the competent court for reviewing the first instance court decision is the District Court which is composed of 3 (three) judges (one professional judge and two lay judges).

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

For employment-related complaints in court procedure, the Law "On Contested Procedure" is applicable. However, the LoL recognises mediation as an alternative means for the settlement of disputes arising from an employment relationship, based on Mediation Law. The procedure of conciliation is not mandatory for contestants, but the court during the entire procedure, especially during the preparatory procedure, may try to resolve the dispute through the conciliation without putting its impartiality at stake.

### 8.3 How long do employment-related complaints typically take to be decided?

On the basis of the Law on Contested Procedure, the courts shall act quickly, especially in setting the deadlines and court hearings, taking into account that these cases need to be solved as soon as possible. Although disputes related to employment may take at least one 1 (one) year (in the two instances) to be solved, taking into consideration the large number of outstanding cases and the absence of specialised courts or departments that tries employment matters, such employment cases may last longer.

### 8.4 Is it possible to appeal against a first instance decision and if so how long such do appeals usually take?

It is possible to appeal a first instance decision with regular and extraordinary remedies of attack. The duration of appeal will depend on the means of attack, and as described in our response to question 8.3 above, for the same reasons, the decision could take longer than one year.

**Atdhe Dika**

KALO & ASSOCIATES  
Pejton, Str. Mujo Ulqinaku 5/1  
1000, Pristina  
Kosovo

Tel: +38 138 609 181  
Fax: +38 138 225 798  
Email: [a.dika@kalo-attorneys.com](mailto:a.dika@kalo-attorneys.com)  
URL: [www.kalo-attorneys.com](http://www.kalo-attorneys.com)

Mr. Atdhe Dika is an experienced lawyer, who graduated from the Tetovo Faculty of Law. After his experience as a lawyer in the insurance sector, Mr. Dika joined KALO & ASSOCIATES office in Pristina as an associate dealing primarily with legal advice in the field of M&A, employment, public procurement & concessions. Mr. Dika has gained broad expertise since then by serving as a team member in important projects of the law firm related to employment, concessions & privatisations, public private partnerships and the acquisitions of Kosovo companies.

**Vegim Kraja**

KALO & ASSOCIATES  
Pejton, Str. Mujo Ulqinaku 5/1  
1000, Pristina  
Kosovo

Tel: +38 138 609 181  
Fax: +38 138 225 798  
Email: [v.kraja@kalo-attorneys.com](mailto:v.kraja@kalo-attorneys.com)  
URL: [www.kalo-attorneys.com](http://www.kalo-attorneys.com)

Mr. Vegim Kraja is a lawyer who graduated from Pristina University in Kosovo, and is currently following his post graduate studies in International Law. He joined the office of KALO & ASSOCIATES in Kosovo last year and since then has been advising clients of the firm in various fields such as corporate law, employment and media. He has been dealing with M&A legal advice mostly in the framework of privatisations and public private partnerships undertaken by the Kosovo Government.



Established in 1994, KALO & ASSOCIATES is recognised as a leading law firm in Albania and Kosovo. As a full service law firm, it specialises in a broad spectrum of areas of commercial law and as a first class legal counsel acts for the most prominent foreign and multinational companies, providing high-quality, efficient and cost-effective legal services.

Consistently ranked as a top tier law firm in the country by reputable legal rating agencies, the likes of IFLR1000 describes the firm as having "a practice that is consistent with what you would expect from a top Washington law firm". Chambers & Partners quotes the confidence expressed by clients in the "unshakeable integrity" of this "thoroughly reputable group that always leaves you completely satisfied".

The Employment Team advises on all aspects of Labour law and Residency issues having represented many domestic and international clients on matters ranging from the drafting of employment contracts, negotiating settlements, advising on re-structuring and reorganisation, employee share scheme, social security and related tax issues and more.

# Luxembourg

Guy Castegnaro



Ariane Clavier



## CASTEGNARO

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The relevant statutes and regulations applicable in Luxembourg are:

- the Labour Code;
- Grand-Ducal Regulations;
- agreements resulting from multi-industry social dialogue declared generally binding by Grand-Ducal Regulations; and
- collective bargaining agreements (CBA) (industry or company-level agreements). Some collective agreements are declared generally binding by a Grand-Ducal Regulation, others are not.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

All types of workers are protected by employment law (blue collar workers as well as white collar workers, without distinction). However, civil servants are excluded from the scope of application of the Labour Code. Apprentices have no employment contract with the company, but some of the provisions of the Labour Code apply to them.

Pregnant women, women on maternity leave, employees on parental leave, staff delegates, members of the joint works council, victims of - or witnesses of - sexual harassment, sick employees and redeployed employees enjoy greater protection.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

An employment contract shall be executed if one person – the employee – commits to perform work or provide services on account of and under the direction and control of another person – the employer – on a regular basis and in exchange for compensation.

All employment contracts shall be evidenced in writing and shall contain the following essential terms:

- a names of the parties;
- b date of the beginning of the employment relationship;
- c place of employment (or employer’s address if there are various places of employment);
- d nature of the employment (description of the tasks if necessary);

- e employee’s daily or weekly standard working hours;
- f standard working schedule;
- g employee’s basic remuneration and any additional elements of remuneration above the basic remuneration of the employee;
- h length of paid holiday or method for determining it;
- i length of notice period in the case of contract termination or method for determining it;
- j length of probationary period;
- k any complementary provisions;
- l any collective bargaining agreement governing the employee’s working conditions; and
- m any supplementary pension scheme.

Additional terms should be added based on the specific type of employment contract involved (i.e., fixed-term employment contracts, part-time employment contracts and employment contracts for students).

In the absence of a written employment contract, the existence of the latter may be proven by the employee by any other means of evidence, whereas the employer may only prove it through limited means of evidence.

In the absence of a written employment contract, the contract will be exclusively considered as being an open-ended employment contract, provided that the existence of the employment relationship is proven. The same principle applies with respect to part-time employment contracts and employment contracts for students.

In addition, some provisions must be expressly provided in writing in order to be applicable (e.g., probationary period, non-compete provisions).

#### 1.4 Are any terms implied into contracts of employment?

It is implied in employment contracts that they must be performed in good faith, in accordance with Article 1134 § 3 of the Civil Code.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The minimum terms and conditions set down by law can be summarised as follows:

<b>Duration of work</b>	<ul style="list-style-type: none"> <li>• Full time: 40h / semaine</li> <li>• Part-time: possible</li> <li>• Overtime: 2h/day – 48h/week max.</li> <li>• Flexible working time: possible</li> </ul>
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<b>Minimum monthly salary (index 719.84)</b> (18 years and up)	<ul style="list-style-type: none"> <li>• Unskilled worker €1,757.56</li> <li>• Skilled worker €2,109.07</li> </ul>
<b>Annual leave</b>	• 25 days a year
<b>Public holidays</b>	• 10

**1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?**

Collective bargaining is possible, but only to grant more advantages to the employees than the ones provided for by law. There are different categories of collective agreement: at company level or group of companies; and industry-level conventions. Where a collective agreement applies to a group or set of companies or employers in a sector or industry, contracting parties may decide to confer the status of a framework convention and refer the settlement of certain subjects to collective bargaining agreements at lower levels. Some collective agreements are declared generally binding by a Grand-Ducal Regulation, others are not. There are currently 24 industry-level collective agreements, of which 13 have been declared generally binding.

**2 Employee Representation and Industrial Relations**

**2.1 What are the rules relating to trade union recognition?**

Article 11, paragraph 4, of the Luxembourg Constitution establishes the “trade union freedom” (i.e., the right to constitute employees’ organisations) whereas article 26 of the Luxembourg Constitution provides the right to associate. A law of 11 May 1936 guarantees the freedom of association in every domain. All these provisions imply, under Luxembourg law, the free choice to create a trade union as well as to join or refrain from joining a trade union.

Trade unions must be independent from the employers which results from organisational capacity and independence as well as financial capacity and autonomy.

**2.2 What rights do trade unions have?**

The general mission of the trade unions is to save and defend the professional interests and to ensure the collective representation of their members, as well as the improvement of their life and working conditions. Trade unions’ main rights are the conclusion of CBAs, organisation of industrial action and, in undertakings bound by a CBA, negotiation of implementation of tools to avoid massive layoffs in case of threats on employment (i.e. negotiation of a social plan in case of collective dismissal or discussion of an Employment Safeguard Plan).

**2.3 Are there any rules governing a trade union’s right to take industrial action?**

The Luxembourg Labour Code contains a social peace obligation that the parties shall respect before beginning any strikes or collective actions. Then, when all possibilities of conciliation have been exhausted, the parties have to refer the dispute to the Government’s National Conciliation Office before any strike of a

collective nature regarding working conditions; otherwise this collective action is illegal.

The Government’s National Conciliation Office must also certify that conciliation efforts have ended for a strike to be legal. The conciliation procedure is compulsory and a person who provokes a strike without having gone through the conciliation procedure is liable to a fine.

Other procedural rules for strike and industrial action are also contained in some union by-laws. For example, the Independent Union Confederation of Luxembourg (OGB-L) by-laws provide that a strike can only be commenced with the authorisation of the OGB-L National Committee. More than 75% of the union members have to give their approval through a secret ballot. In the case of a strike, a strike committee has to be immediately elected to supervise the strike organisation.

The law on CBAs also obliges all the parties to abstain from compromising the agreement’s execution, including any threat or execution of strike or lockout.

**2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?**

In companies regularly employing at least 15 employees, a staff delegation must be set up. The members of the staff delegation are elected by the employees of the company concerned. All employees, regardless of gender and nationality, aged 18 or over, under employment contract or apprenticeship for at least 6 months at the date of the election may vote.

The general mission of the staff delegation is to save and defend the interests of the employees concerning their working conditions, the security at work and the social situation of the employees, as far as it does not fall under the joint works council’s field of competence.

In some matters the staff delegation must be informed and consulted by the management prior to any decision (e.g. prior to any decision likely to lead to substantial changes in work organisation or in contractual changes, including those covered by the legislation on collective redundancies and acquired rights of employees in case of transfer of undertakings) and in other matters, the management must ask the staff delegation’s opinion (e.g. creation of part-time jobs; implementation of temporary staff leasing, etc.). In case of collective dismissals, and prior to any dismissal, the employer has to negotiate among others with the staff delegation the conclusion of a social plan.

In addition to the staff delegation, all private organisations employing usually at least 150 employees within the last three years must establish a joint works council (“JWC”). The JWC is composed of an equal number of employer and employee representatives.

The employee representatives of the JWC are elected by the staff delegation among the staff members, whereas the employer representatives are appointed by the employer.

The JWC must be informed and consulted in some matters (e.g. questions relating to facilities, work equipments; economic or financial decisions that could have a decisive impact on the structure of the company or on the level of employment) and it has a power of decision in other matters (e.g. as regards the introduction or application of technical installations aiming at controlling the employees’ behaviour and performances). In case of collective dismissals, and prior to any dismissal, the employer has to negotiate among others with the JWC, if any, the conclusion of a social plan.

Employees may elect their representatives in the staff delegation in



principle every 5 years through an election process referred to as the “social elections”. The election of the JWC takes place before the end of the month following the publishing of the result of the staff delegation’s election.

### **2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?**

Amongst its attributions, the JWC is vested with a power of decision in very limited areas mainly defined by article L.423-1 of the Labour Code.

As a result, in the defined areas, the decision unilaterally taken by the employer is deprived of effect as long as the JWC does not take a decision.

The main matters of the JWC’s power of decision relate to technical installations aiming at controlling behaviour and performances of employees, to measures relating to health and safety of employees as well as prevention of professional illnesses, to general criteria of personal selection (hiring, appraisal) or to the establishment or modification of internal regulations or CBAs.

### **2.6 How do the rights of trade unions and works councils interact?**

The rights of trade unions and works councils are independent from each other.

In some areas, both trade unions and works councils are competent.

### **2.7 Are employees entitled to representation at board level?**

Public limited companies employing over 1,000 workers for the last three years must set up employees’ representation in their board of directors and supervising committee.

## **3 Discrimination**

### **3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?**

Employees are protected by the Penal Code against discrimination on origin, skin colour, gender, sexual orientation, family status, age, state of health, disability, moral, political or philosophical opinions, trade union activities, actual or supposed membership of an ethnic group, a race or a particular religion, membership or non-membership of a group or a community.

The Labour Code also protects them against any direct or indirect discrimination on the grounds of gender, religion or belief, incapacity, age, sexual orientation, or actual or supposed membership or non-membership of an ethnic group or a race.

These prohibitions apply to all employees and employers at every stage of the employment relationship, including, notably, recruitment, remuneration and termination of employment.

### **3.2 What types of discrimination are unlawful and in what circumstances?**

Direct discrimination occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the aforementioned grounds. It

may be justified on grounds of legal requirements or by an objective, reasonable and legitimate aim.

Indirect discrimination occurs when an apparently neutral provision, criterion or practice puts persons having a particular religion or belief, a particular disability, a particular age, a particular sexual orientation, a particular actual or supposed membership or non-membership of an ethnic group or a race, at a particular disadvantage compared with other persons unless this provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving this aim are appropriate and necessary.

Without prejudice to specific provisions on sexual harassment and on moral harassment at the place of work, harassment shall be deemed to be a form of discrimination when unwanted conduct related to any of the aforementioned grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

### **3.3 Are there any defences to a discrimination claim?**

In case of discrimination claim, the employer shall demonstrate that no discrimination has taken place or that he has taken all reasonable steps to prevent the discrimination occurring and to be carried on.

### **3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?**

Employees may enforce their discrimination rights before the Labour Court and employers may try to settle claims at any time before and during the legal procedure.

### **3.5 What remedies are available to employees in successful discrimination claims?**

Whoever commits or instigates an act of discrimination may be held liable for such discrimination before the Criminal Court. The accused individual may be condemned to pay damages to the victim if losses or damages have resulted from the offence. The victim will also be compensated for his or her moral damage.

As regards possible civil sanctions, the employee-victim can obtain damages directly from the tormentor by filing a civil claim based on the contractual liability against the employer, or based on the tortious liability against the colleague or the superior.

## **4 Maternity and Family Leave Rights**

### **4.1 How long does maternity leave last?**

Maternity leave is divided into two periods: prenatal leave; and post-natal leave.

The prenatal leave starts 8 weeks before the expected date of birth fixed by a medical certificate. In the event that childbirth occurs during the period of prenatal leave, the remaining part of the leave is added to the post-natal leave. If the childbirth occurs after the prenatal leave, the prohibition to work is extended to the day of birth without reducing the duration of the post-natal leave.

The post-natal leave lasts 8 weeks and follows the childbirth.

In the event of premature or multiple birth, and in the event of a mother breastfeeding her child, the duration of post-natal leave is extended to 12 weeks.

#### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

During maternity leave, the employee is entitled to maternity payments from the National Health Insurance Fund that are equivalent to the payments during sickness leave, provided that she has been affiliated to the social security system for at least 6 months during the year preceding the beginning of the maternity leave.

The period of maternity leave is considered as working time, which entitles the woman to annual leave. It is also taken into account when determining rights related to seniority within the company. In addition, the employee is entitled to all the advantages she acquired before the beginning of the maternity leave.

The employer may not dismiss an employee during the maternity leave and during the 12-week period following the childbirth.

#### 4.3 What rights does a woman have upon her return to work from maternity leave?

Upon the return of the woman from maternity leave, the employer is obliged to reinstate her to her previous job, or if not possible, to provide her with a similar job corresponding to her qualifications and with a remuneration at a level at least equivalent to her former remuneration.

The employee is also given the option to resign without notice or penalty in order to raise her child. In this case, the employee retains the option, during a period of one year, to reapply for a similar job within the employer's business in the event of a suitable vacancy.

#### 4.4 Do fathers have the right to take paternity leave?

Fathers have the right to an extraordinary paid leave of two days for the birth of a legitimate or recognised natural child.

In addition, both parents are entitled to take a parental leave to educate their child. It lasts for 6 months on a full-time basis or 12 months on a part-time basis. Full-time parental leave may not be taken at the same time by both parents. The employer may accept or refuse a request for part-time parental leave but may not refuse the first full-time parental leave.

One of the parents must take a parental leave as soon as the mother's maternity leave comes to an end, provided that it has been requested to the employer by registered letter 2 months before the start date of the maternity leave. The other parent may take parental leave at any time up to the child's fifth birthday and shall advise his employer of it not less than 6 months before the proposed start of the leave, by registered letter. The employer is bound to grant the second parental leave but may postpone the beginning of the leave under specific circumstances.

#### 4.5 Are there any other parental leave rights that employers have to observe?

From the last day of the deadline for notice of the parental leave application (2 or 6 months) and for the duration of the leave, the employer is not allowed to notify the employee of the termination of his contract or, where applicable, the invitation to the preliminary meeting, except in case of gross misconduct.

At the start of the full-time parental leave the employer stops paying the salary and benefits of the employee and the employee is paid by the National Family Benefits Fund. In case of part-time parental leave where the employee's working time has been reduced at least by 50%, the employer continues to pay on a monthly basis to the

employee 50% of his former salary whereas the *Caisse Nationale de prestations familiales* pays to the employee a gross amount of currently €889.15 per month.

No holiday entitlement is accrued during this period. However, seniority is retained and continues to accrue. The employer is obliged to keep the employee's job open, or if this is not possible, a similar post corresponding to the employee's qualifications and with an equivalent remuneration.

#### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Employees may request a reduction of their contractual working time. However, employers remain free to consent or refuse such reduction of working time, unless otherwise provided by a collective work agreement.

## 5 Business Sales

#### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Employees automatically transfer to the buyer in case of a business sale only if the latter qualifies a "transfer of undertaking".

A transfer of undertaking is defined as a transfer of an economic entity that retains its identity, and constitutes an organised grouping of resources having the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

However, a share sale does not qualify a transfer of undertaking since the identity of the employer remains the same.

#### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

In case of a transfer of undertaking, all the rights and obligations resulting from the employment relationship are transferred to the transferee.

Under article L.127-3 (3) of the Labour Code, the transferee is required to maintain all the conditions that result from a CBA concluded by the transferor until the expiry date or the termination date of the agreement or until the entry into force or the application of another CBA.

#### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

During a procedure of transfer of undertaking, employees' representative bodies are informed and/or consulted at two levels: before; and after the decision to transfer is made.

First, the employees' representatives bodies must be informed and consulted about the transfer of an undertaking (or part thereof) prior to the decision to transfer being made. Second, the staff delegation must also be informed after the decision of transferring but prior to the effective execution of the transfer. In lack of staff delegation, the employees are directly informed.

After the decision to transfer is made, but prior to the effective execution of the transfer, the transferor and the transferee must disclose the following information to the staff delegation (or directly to the employees):

- the fixed or proposed date for the transfer;
- the reasons of the transfer;
- the legal, economic and social consequences of the transfer for the employees; and
- the envisaged measures towards the employees.

The Labour Code does not provide for a specific time scale. Thus, the process may vary from two weeks to one month.

In case of non-compliance of the employer with these information and consultation obligations, criminal sanctions for “*délit d’entrave*” may occur if the employer intentionally hinders the regular functioning of the employees’ representatives bodies: e.g. a fine from between €251 and €15,000.

#### 5.4 Can employees be dismissed in connection with a business sale?

In case of a transfer of undertaking, this transfer is not in itself a valid reason for a dismissal by both the transferor and the transferee. However, the transferor and the transferee keep their right to terminate the employment contract at any time for other reasons.

Some CBAs provide for restrictions of the right to dismiss. Thus, the CBA for bank employees prohibits any termination on grounds of reorganisation or rationalisation and any substantial modification to the detriment of employees during two years after the transfer unless the staff delegation has given its agreement.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

An employer can always amend an employment contract to the benefit of an employee.

Nevertheless, the transferor and the transferee cannot ground the modification of a substantial provision of the employment contract which is detrimental to the employee on the transfer itself.

If the contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for the termination of the contract of employment or of the employment relationship.

Consequently, the employment contract is only terminated if the employee refuses the substantial modification and effectively ends the employment relationship. Such termination will be construed as a dismissal which enables the employee to bring a claim before the Labour Court for unfair dismissal. The Labour Court will have to determine if the transfer of the employment contract effectively led to a substantial modification of the working conditions to the detriment of the employee. If so, the dismissal will be ruled as unfair and the employee will receive a financial compensation for the losses suffered due to the dismissal.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Except in relation to fixed term contracts, in case of dismissal with notice – i.e. in the absence of a gross misconduct justifying a dismissal with immediate effect – the employer has to respect a notice period which depends on the length of services of the concerned employee, without interruption, in the undertaking or in

the same group of undertaking of the employer (less than 5 years = 2 months; 5 to 9 years = 4 months; 10 years and more = 6 months). Notice takes effect on the first or the fifteenth day of the month: notice given before the fifteenth of the month will take effect on the fifteenth and notice given after the fourteenth day will take effect on the first day of the following month.

### 6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

The employer may discharge the employee from his obligation to work during the notice period or a part of it while however continuing to pay on a monthly-basis his full salary as well as to provide all the benefits that constitute the global remuneration for the work performed by the employee. The Luxembourg Labour Code does not provide for a lump-sum payment, i.e. for a payment in lieu of notice.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

An employer has to have serious reasons to dismiss an employee. These reasons must be supported by demonstrable and explicit facts. If not, any dismissed employee may initiate legal proceedings against his former employer in order to claim material and moral damages on the basis of wrongful or unfair dismissal.

Any employee is treated as being dismissed if his employer terminates his non-fixed-term employment contract by a dismissal letter (with notice or with immediate effect). Besides, a resignation becomes a dismissal when the employee resigns because the employer decided to modify substantially, and to the detriment, the terms and conditions of his employment contract without his consent.

Any consent from a third party is not necessary to dismiss an employee (except in the case of a staff representative or a pregnant woman or a woman on maternity leave, for them, in case of gross misconduct, the employer has to ask the court to terminate the employment contract, see question 6.4).

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

The employees who have duly informed their employer of their sickness leave (i.e. information the 1st day of the absence plus receipt by the employer of the medical certificate within 3 days) are protected against dismissal during a maximum of 26 continuous weeks.

Moreover, some categories of employees are protected against dismissal and their dismissal may therefore be declared void:

- dismissal with notice of a staff representative or of a member of a European Works Council (nevertheless, in case of gross misconduct, the employer can suspend the employee with immediate effect and ask the court to terminate the contract);
- dismissal of a pregnant woman and dismissal during the maternity leave (in case of gross misconduct, the employer can suspend the employee who is pregnant or on maternity leave with immediate effect and ask the court to terminate the employment contract);
- dismissal based on the wedding of the female employee;

- dismissal during the parental leave (in case of part-time parental leave, a dismissal with immediate effect for gross misconduct remains possible);
- dismissal during the protection period of the employee declared disabled for his last work (a dismissal with immediate effect for gross misconduct remains possible);
- dismissal of the victim and/or the witness of a sexual harassment; or
- dismissal as a reaction of the employer to a complaint of an employee regarding sex discrimination.

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**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

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An employer has to have serious reasons to dismiss an employee like the employee's misconduct at work, the employee's poor standard at work, or serious economic difficulties. These reasons must be supported by demonstrable and explicit facts.

The Luxembourg Labour Code does not provide for "compensation on dismissal". Nevertheless, any dismissed employee, except for gross misconduct, is entitled to a legal departure allowance after at least 5 years of seniority within the undertaking. Besides, the employer and the employee can reach a settlement agreement which will provide for the payment of an extra indemnity freely decided by them.

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**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

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If an employer employs 150 or more persons, he has to convene the employee that he is contemplating to dismiss (with or without notice) to a meeting prior to the notification of the dismissal. The employee has to be invited to attend this preliminary meeting in writing by registered letter or by means of a letter for which he must sign to acknowledge receipt. A copy of this invitation must be sent to the staff delegation, or, if there is no staff delegation, to the Labour and Mines Inspectorate.

Then, the dismissal must be sent by registered letter or by means of a letter for which the employee must sign to acknowledge receipt, under penalty of invalidity.

If the dismissal is not related to the employee's conduct at work, and if the employer employs at least 15 employees, the employer must inform the "*Comité de conjoncture*" about the dismissal at the latest when notice of dismissal is served.

Concerning dismissals with notice, the employer will provide the employee with a motivation letter which must clearly and very precisely specify the reasons for termination. This motivation letter has to be sent by the employer by registered letter within the month following the request of the employee.

In the event that the employer does not provide an adequately detailed explanation for the termination in the letter to the employee, the dismissal will be considered as unfair by the court.

Concerning dismissals with immediate effect, the reasons have to already be mentioned in the dismissal letter.

The employee must be notified of dismissal within one month after the employer becomes aware of conduct that constitutes gross misconduct. This deadline shall not apply if the gross misconduct is the subject of a criminal lawsuit within the month following the misconduct or if a previous gross misconduct is indicated in order to back up a new misconduct.

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**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

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Any dismissed employee who disagrees with the grounds of the dismissal may initiate legal proceedings against his former employer in order to claim material and moral damages on the basis of wrongful or unfair dismissal.

The legal proceedings must be initiated within a three-month-period following the date the reasons for dismissal were notified to the employee. Such period is extended to one year if, during the same period of three months, the employee challenges by registered letter sent to the employer the reasons given by the latter in support of the termination of the employment contract.

It must be pointed out that the appraisal of the seriousness of the reasons exclusively lies with the court.

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**6.8 Can employers settle claims before or after they are initiated?**

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Employers can in principle settle claims after the employees have challenged the reasons of their dismissal. Nevertheless, it is not necessary that the employee sues the company in order to reach a settlement agreement. Indeed, the challenging of the dismissal is already sufficient to prove the dispute between the employer and the employee.

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**6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?**

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A specific procedure applies if the employer contemplates within 30 days to dismiss at least 7 employees or within 90 days at least 15 employees for a reason that is unrelated to the employees' conduct at work, i.e., for an economic reason. Indeed, a social plan must be negotiated.

The employer is obliged to inform and consult the staff delegation on the decision regarding collective dismissal. The JWC, if any, must also be informed and consulted about (and before) any decision of economic and financial nature which might have a determining impact on the structure of the company or the level of employment.

The employer must enter into negotiations with the employee representatives on several issues determined by article L.166-2 of the Labour Code in order to reach an agreement, called a social plan, stating measures to try to reduce the number of employees being made redundant and to lessen their consequences.

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**6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

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The social plan mentioned in question 6.9 should include measures to enable employees to be reinstated into the workforce, the minimum compensation to be paid to the redundant employees and a record of their notice periods (which will at least either be those set out in law, in the employment contract or in a CBA, but will however be a minimum of 75 days).

If the employer carries out the dismissals prior to the signing of a social plan or before the production of a failure report of the National Conciliation Office or before the establishment of a staff delegation or a works council, where necessary, such dismissals will be null and void. Any employee dismissed in such circumstances will be entitled to bring a claim for reinstatement

before the Labour Court within a 15-day period following the dismissal.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

The Labour Code only sets up the conditions of non-competition clauses after the termination of the employment contract. The most common restrictive covenants are a non-compete clause, a non-solicitation clause and a clause of confidentiality.

### 7.2 When are restrictive covenants enforceable and for what period?

Any employment contract must be performed by both parties faithfully. Thus, the employee is bound by an obligation of loyalty towards his employer.

The obligation of loyalty requires that the employee not perform any activity competing with that of his employer on his own behalf or on the behalf of a third person.

The obligation of loyalty resulting from the employment contract itself does not need to be expressly stated in the contract.

After the termination of the employment contract, the employee recovers his freedom to perform any competing activity.

The parties may, however, agree in the employment contract on a non-compete provision preventing the employee from performing similar activities by running his own company after the termination of the employment contract. Thus, the employee cannot be prevented from performing similar professional activities as an employee of a new employer.

Among the conditions of validity defined by article L.125-8 of the Labour Code, a non-compete provision must be in writing, must refer to a specific professional sector as well as to professional activities that are similar to those performed for the former employer, must be limited to 12 months, which begins to run the day the employment contract ends, and must be limited geographically without exceeding the national territory.

Finally, a non-compete provision may only apply to employees, whose annual salary is at least €49,072 (current value based on index 719.84) on the day the employee leaves the company.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

The Labour Code does not impose such financial compensation. However, in practice, employees are provided with financial compensation if the modalities of the restrictive covenant are less favourable to the employee than what is provided for by law.

### 7.4 How are restrictive covenants enforced?

Non-compete clauses are strictly supervised by the legislation. Indeed, article L.125-8 of the Labour Code provides for the following conditions of validity of non-compete clauses:

1. The non-compete clause has to be in writing and included in the employment contract or in a subsequent amendment of the employment contract.
2. The non-compete clause is only applicable to employees running their own company after having left their employer.

3. The employee signing the employment contract or its modification containing the non-compete clause has to be at least 18 years' old.
4. The annual salary of the employee concerned has to be at least €49,072 (current value based on the index 719.84) on the date of the termination of the contract.
5. The non-compete clause has to refer to a specific professional sector as well as to professional activities which are similar to those performed in the former company.
6. The non-compete clause has to be limited to a 12-month period after the termination of the employment contract.
7. The non-compete clause has to be limited geographically without exceeding the national territory.

Finally, it shall be noted that the non-compete clause will only be applicable if the legal proceedings to terminate the employment contract have been respected by the employer.

As regards non-compete clauses, if a court decides that the above-mentioned conditions (2), (5), (6), or (7) have not been respected, the non-compete clause will still be valid but will not be enforceable as regards the elements that are contrary to the law.

Now, if a court decides that conditions (1), (3) or (4) have not been respected, the non-compete clause will be null and void.

Finally, if the employer did not respect the legal procedure to terminate the employment contract, the non-compete clause is not applicable at all.

The form and the content of non-solicitation clauses and confidentiality clauses are not expressly dealt with by the Luxembourg legislation. The consequences of a possible unlawfulness of such restrictive covenants may only be determined on a case-by-case basis by courts.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Labour Courts are divided into two levels. The first instance is a Labour Tribunal. The composition is the following: one judge; and two assessors (one who represents the employees and the second who represents the employers).

Then, in case of appeal, the Court of Appeal has two chambers which are in charge of labour matters. These Chambers are composed of three judges.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The legal proceedings must be initiated within a three-month period following the date the reasons for dismissal were notified to the employee. Such period is extended to one year if, during the same period of three months, the employee challenges by registered letter sent to the employer the reasons given by the latter in support of the termination of the employment contract.

The procedure is orally before the Labour Tribunal, then written before the Labour Court.

Conciliation is possible but not mandatory. This is very uncommon.

**8.3 How long do employment-related complaints typically take to be decided?**

It depends of each case. In principle, a first judgment can generally be rendered within a period from 6 months to one year.

The employee or the employer has 40 days from the notification by the clerk of the tribunal to decide to lodge an appeal. If the employee lives in another country, like Germany or France, he will benefit from an extra delay and will have 55 days to lodge an appeal.

Appeals usually take one year.

**8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?**

As described in question 8.1, there are two Chambers in the court who are in charge of the appeals against judgments rendered by the Labour Tribunal.



**Guy Castegnaro**

CASTEGNARO  
33, Allée Scheffer  
L-2520 Luxembourg  
Luxembourg

Tel: +352 26 86 82 1  
Fax: +352 26 86 82 82  
Email: [guy.castegnaro@castegnaro.lu](mailto:guy.castegnaro@castegnaro.lu)  
URL: [www.castegnaro.lu](http://www.castegnaro.lu)

Mr Castegnaro is the founder of CASTEGNARO, the only employment law niche firm in Luxembourg and founding member of the alliance Ius Laboris, Global Human Resources Lawyers. He is a speaker and a chairman at various conferences on employment law topics as well as teacher of Luxembourg social security law at the University of Luxembourg.



**Ariane Claverie**

CASTEGNARO  
33, Allée Scheffer  
L-2520 Luxembourg  
Luxembourg

Tel: +352 26 86 82 1  
Fax: +352 26 86 82 1  
Email: [ariane.claverie@castegnaro.lu](mailto:ariane.claverie@castegnaro.lu)  
URL: [www.castegnaro.lu](http://www.castegnaro.lu)

Mrs Claverie assisted Mr Castegnaro in establishing the Luxembourg labour code. She is a speaker at conferences and author of articles on employment law matters. Mrs Claverie manages know-how within the office.



Traditional labour law consists of the laws governing individual and collective labour relations. The firm naturally deals with all traditional aspects of labour law: individual and collective dismissals; company work rules; organisation of working hours; safety at work; temporary work; cross-border employment and international secondment, wages and related aspects (tax law, stock options, compensation and benefits, etc.).

# Namibia

Hugo Meyer van den Berg



Stephen Vlieghe



Koep & Partners

## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

Labour law in Namibia is regulated by various instruments. The most important legislative instrument is the Labour Act 11 of 2007 (“the Labour Act”). The Labour Act came into operation on 1 December 2008. It deals with the fundamental rights and protections of employees, basic conditions of employment, health, safety and welfare of employees, unfair labour practices, trade unions and employers’ organisations, collective agreements, strikes and lockouts, prevention and resolution of disputes and labour institutions. Other important national legislative measures include:

- the regulations passed in terms of the Labour Act (“the Regulations”), which include the rule for the conduct of conciliation and arbitration proceedings;
- the regulations relating to health and safety of employees passed in terms of the repealed Labour Act of 1991, which remains in operation;
- the Rules of the Labour Court of 2008, passed in terms of the Labour Act;
- the Social Security Act 34 of 1994;
- the Employee’s Compensation Act 30 of 1941;
- the Affirmative Action (Employment) Act 29 of 1998; and
- the Public Service Act 13 of 1995.

Certain aspects of labour law are also dealt with in terms of the Common Law of Namibia. However, the common law relating to labour matters is repealed to the extent that it is inconsistent with legislation. Some aspects of the common law are still important, especially the common law duties of employers and employees. These duties are the *naturalia* of a labour contract and exist by operation of the law.

Namibia is also a signatory to various Conventions and Recommendations of the International Labour Organisation.

Finally, employment and labour law in Namibia is subject to the Constitution of the Republic of Namibia (“the Constitution”). All labour legislation and labour practices must be in line with the Constitution. Of particular importance in the Constitution is Chapter 3, the Bill of Rights. The most relevant articles are article 10 (equality), article 9 (prohibition of forced slavery), article 15 (prohibition of child labour), article 17 (administrative justice) and article 21 (fundamental freedoms).

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

“Employer” and “employee” are defined in section 1 of the Labour Act. “**Employee**” means an individual, other than an independent contractor, who works for another person and who receives, or is entitled to receive, remuneration for that work; or in any manner assists in carrying on or conducting the business of an employer. “**Employer**” means any person, including the State, who employs or provides work for an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual, or permits an individual to assist that person in any manner in the carrying on, conducting that person’s business.

The Labour Act is only applicable to instances where an employer and employee are involved. Independent contractors are thus excluded from the Act. Section 2(1) states that section 5 of the Labour Act, dealing with the prohibition of discrimination and sexual harassment in employment, applies to all employers and employees. Disputes based on this section can be referred to the Labour Commissioner. Section 2(2) states that all other sections of the Labour Act apply to all employers and employees, except members of the:

- a. Namibian Defence Force.
- b. Namibian Police Force.
- c. Municipal Police Service.
- d. Namibian Central Intelligence Service.
- e. Prison Service.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

It is not necessary for employment contracts to be in writing. Employees also do not have to be provided with any specific information in writing. The answer to question 1.4 explains what the implied terms of every contract of employment are.

### 1.4 Are any terms implied into contracts of employment?

The basic conditions of employment contained in Chapter 3 of the Labour Act cannot be relaxed by agreement. In other words, one cannot contract out of the basic conditions of employment. In terms of section 9 of the Labour Act these conditions necessarily form part of any contract of employment and are therefore built into it by operation of law, save for where the employee is afforded more favourable rights than those provided for in Chapter 3, in which

case the more favourable rights form part of the contract of employment. The Chapter 3 rights are essentially the “sub-minimum rights” an employer is required to afford to his/her/its employee/s.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The basic conditions of employment contained in Chapter 3 of the Labour Act have to be observed. These relate to remuneration, hours of work, leave, accommodation and termination of employment.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining does come into play often during negotiations over matters of interest between employers and trade unions. Employees in industries or sectors are typically represented by one trade union, which may act as the exclusive bargaining agent of the employees in that industry or sector if the union applies in accordance with the Labour Act to be recognised as such.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

Section 53 of the Labour Act prescribes in detail the requirements that a trade union or employers’ organisation constitution must comply with. In terms of section 57(1), any trade union or employers’ organisation that has adopted a constitution that complies with section 53 may apply to the Labour Commissioner for registration, by submitting to the Labour Commissioner:

- the form prescribed by Regulation 8(1) (Form LC 6) duly completed; and
- three copies of its constitution, each duly certified by its chairperson and secretary as a true and correct copy of the constitution.

The Labour Commissioner may require further information in support of an application. The Labour Commissioner must consider the application and any further information supplied by the applicant and, if the constitution of the applicant meets the requirements for registration set out in the Labour Act, must register the applicant by issuing the prescribed certificate of registration.

In terms of Regulation 8(2), if the Labour Commissioner decides to register a trade union or employers’ organisation, the Commissioner must issue a certificate of registration on Form LC 7. If the Labour Commissioner refuses to register the applicant, the Labour Commissioner must give written notice of that decision and the reasons for the refusal.

### 2.2 What rights do trade unions have?

In terms of section 58(1) of the Labour Act, a registered trade union or employers’ organisation is a juristic person, which implies that it has all the rights and duties attached to juristic persons, including no personal liability for members, office bearers and other officials. Section 59(1) of the Labour Act sets out the other rights of registered trade unions. In terms of this section, and subject to any provision of the Labour Act to the contrary, a registered trade union

has the right:

- (a) to bring a case on behalf of its members and to represent its members in any proceedings brought in terms of this Act;
- (b) of access to an employer’s premises;
- (c) to have union fees deducted on its behalf;
- (d) to form federations with other registered trade unions;
- (e) to affiliate to and participate in the activities of federations formed with other trade unions;
- (f) to affiliate to and participate in the activities of any international workers’ organisation and, subject to any laws governing exchange control, to make contributions to such an organisation and to receive financial assistance from such an organisation;
- (g) in the case of a trade union recognised as an exclusive bargaining agent in terms of the Labour Act, to negotiate the terms of, and enter into, a collective agreement with an employer or a registered employers’ organisation; and
- (h) to report to the Labour Commissioner any dispute which has arisen between any employer and that employer’s employees who are members of the trade union.

### 2.3 Are there any rules governing a trade union’s right to take industrial action?

Any “party” to a dispute of interest may engage in industrial action if the prescribed formalities in terms of the Labour Act are followed, save for those parties engaged in “essential services” as defined. The term “party” is not defined in the Labour Act. The term would definitely refer to any employee who is a member of a trade union. Therefore, trade union members would have to comply with these formalities.

In brief, the formalities prescribe that the dispute must first be referred to conciliation and must thereafter remain unresolved for a period of 30 days, with the qualification that if the party that did not refer the dispute to conciliation does not attend the conciliation proceedings, the other party may strike immediately. The party intending to strike must thereafter provide 48 hours’ notice of the strike.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen / appointed?

Employers are not required to set up works councils. In fact, this is not provided for at all in the Labour Act or Regulations.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

See question 2.4 above.

### 2.6 How do the rights of trade unions and works councils interact?

See question 2.4 above.

### 2.7 Are employees entitled to representation at board level?

This depends on the employer. There are no prohibitions in the Labour Act prohibiting such representation.



### 3 Discrimination

#### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The Labour Act prohibits unfair discrimination. Grounds of unfair discrimination are:

- (a) race, colour, or ethnic origin;
- (b) sex, marital status or family responsibilities;
- (c) religion, creed or political opinion;
- (d) social or economic status;
- (e) degree of physical or mental disability;
- (f) AIDS or HIV status; or
- (g) previous, current or future pregnancy.

Furthermore, article 10(2) of the Constitution states that no person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

#### 3.2 What types of discrimination are unlawful and in what circumstances?

In terms of section 5(2) of the Labour Act, no person may discriminate in any employment decision directly or indirectly, or adopt any requirement or engage in any practice which has the effect of discrimination against any individual on one or more of the grounds mentioned in question 3.1 above. The Labour Act specifically states that it is discrimination on grounds of sex to differentiate without justification in any employment decision between employees of the opposite sex who do work of equal value, or between applicants for employment who seek work of equal value.

In terms of section 5(4), the following are not regarded as discrimination:

- to take any affirmative action measure to ensure that racially disadvantaged persons, women or persons with disabilities enjoy employment opportunities at all levels of employment that are at least equal to those enjoyed by other employees of the same employer and are equitably represented in the workforce of an employer;
- to select any person for purposes of employment or occupation according to reasonable criteria, including but not limited to, the ability, capacity, productivity and conduct of that person or in respect of the operational requirements and needs of the particular work or occupation in the industry in question;
- to distinguish, exclude or prefer any individual on the basis of an inherent requirement of a job;
- to take any measure that has been approved by the Employment Equity Commission in terms of the Affirmative Action (Employment) Act 29 of 1998;
- in the case of a female employee who is pregnant, to temporarily reassign her duties or functions, other than her normal duties or functions, which are suitable to her pregnant condition, provided that the reassignment does not lead to a reduction in remuneration or any other benefits; or
- in the case of a person with a disability, that person is, in consequence of the disability, incapable of performing the duties or functions connected to the employment or occupation in question or is so prohibited by law.

#### 3.3 Are there any defences to a discrimination claim?

See question 3.2 above. Furthermore, discrimination must be unfair. The employer must satisfy the onus of establishing that the discrimination was not unfair.

#### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Any party to a dispute concerning discrimination may refer the dispute in writing to the Labour Commissioner (section 7(1) of the Labour Act). In terms of section 7(3) of the Labour Act, if the dispute involves alleged discrimination, the Labour Commissioner may first designate a conciliator to attempt to resolve the dispute through conciliation. If the dispute remains unresolved after it has been referred to conciliation, the Labour Commissioner may refer the dispute to an arbitrator.

Importantly, notwithstanding the foregoing, a person who alleges that a fundamental right and protection, which includes the right not to be discriminated against, has been infringed or is threatened, may approach the Labour Court directly for enforcement of that right or protection or any other appropriate relief (section 7(5) of the Labour Act).

Claims may be settled at any stage.

#### 3.5 What remedies are available to employees in successful discrimination claims?

Remedies include an award for compensation, an interdict or reinstatement (if applicable).

## 4 Maternity and Family Leave Rights

#### 4.1 How long does maternity leave last?

Section 26 of the Labour Act deals with maternity leave. In terms of this section, a female employee who has completed six months' continuous service in the employment of an employer is, with a view to her confinement, entitled to not less than 12 weeks' maternity leave, calculated as follows:

- (a) before her actual date of confinement, she is entitled to commence maternity leave four weeks before her expected date of confinement, as certified by her medical practitioner, and she is entitled to maternity leave for the entire time from the commencement of her maternity leave until her actual date of confinement.
- (b) after her date of confinement, she is entitled to eight weeks of maternity leave in every case. In the case of an employee whose date of confinement occurred less than four weeks after the commencement of her maternity leave, the employee is entitled to the amount of additional time required to bring her total maternity leave to 12 weeks.

#### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

During any period of maternity leave, the provisions of the contract of employment remain in force, and the employer must, during the period of maternity leave, pay to the employee the remuneration payable to that employee, save for the basic wage component thereof. The Social Security Commission pays the remaining basic wage component.

An employer may not dismiss an employee during her maternity leave or at the expiry of that leave on any grounds relating to collective termination or redundancy or any grounds arising from her pregnancy, delivery or her resulting family status or responsibility.

#### 4.3 What rights does a woman have upon her return to work from maternity leave?

See question 4.2 above.

#### 4.4 Do fathers have the right to take paternity leave?

No, they do not.

#### 4.5 Are there any other parental leave rights that employers have to observe?

No, there are not.

#### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

This will depend on the agreement between the employer and employee. The employee, however, does not have an automatic right to work flexibly if they have responsibility for caring for dependents.

## 5 Business Sales

#### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Employees do not automatically transfer to the buyer. This is usually provided for in the sale agreement.

#### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

This will depend on the arrangement between the buyer and the seller.

#### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

See question 5.4 below.

#### 5.4 Can employees be dismissed in connection with a business sale?

The Labour Act, section 34, deals in detail with dismissal arising from collective termination or redundancy. The grounds for collective termination are listed as re-organisation or transfer of the business or the discontinuance or reduction of the business for economic or technological reasons. The focus of collective dismissal is on the needs of the employer.

When an employer intends to collectively dismiss a group of employees on one of the grounds stated above, the employer needs to inform the Labour Commissioner and any trade union recognised

as the exclusive bargaining agent in respect of the employees or the workplace representative of the following:

- (a) The intended dismissal.
- (b) The reasons for the reduction in the workforce.
- (c) The number and categories of employees affected.
- (d) The date of the dismissal.

The employer needs to inform the Labour Commissioner and the trade union at least four weeks before the intended dismissal. If it is not practical to do it at least four weeks before dismissal, the employer may give less than four weeks' notice.

The Labour Act also placed an obligation upon the employer to negotiate in good faith with the trade union or workplace union representatives on issues such as alternatives to dismissal, the criteria for selecting the employees for dismissal, how to minimise the dismissal, the conditions on which the dismissals are to take place and how to avert the adverse effects of the dismissals. The employees selected for dismissal must be selected according to the selection criteria agreed upon or, if no criteria were agreed upon, fair and objective criteria. Negotiations should take place before the date that the Notice of Redundancy takes effect. Points that can be negotiated include no overtime, job-sharing, time to look for another job, training, re-call rights etc.

The employer must disclose all relevant information to the trade union or the workplace representatives in order for the trade union or workplace representatives to engage effectively in such negotiations. Notwithstanding this provision, an employer cannot be obliged to disclose information if it is legally privileged information, if the disclosure of such information is prohibited by law or confidential information if the disclosure of it might cause substantial harm to the employer.

If no agreement can be reached in the abovementioned negotiations, either party may, within one week, refer the matter to the Labour Commissioner to appoint a conciliator. The conciliator must, as soon as reasonably possible, convene a meeting of all interested parties and may convene additional meetings as may be necessary. During the period of negotiation or the period of conciliation, the employer is still obliged to disclose necessary information and may not dismiss the employees during this period.

Where an employer who runs or operates any business alleges to have gone out of business or to have discontinued all or part of its business operations, when in fact those operations are continued under another name, or form or carried out at another location, without the employer disclosing the full facts to the affected employees or their collective bargaining agent, the employees who are to be dismissed or were dismissed, or the collective bargaining agents of such employees, may apply to the Labour Commissioner for the appropriate relief. The appropriate relief includes an order for reinstatement, an order directing the restoration of the operation or an award for lost and future earnings.

Contravention of any of the above provisions relating to collective termination by an employer amounts to an offence and the employer is liable to a fine not exceeding N\$10,000.00, or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.

Nothing mentioned above prevents an employee from referring a dispute of unfair dismissal or failure to bargain in good faith to the Labour Commissioner in respect of the employee's dismissal.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

See question 5.4 above.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Yes, employees must be given notice of termination of their employment. In terms of section 30 of the Labour Act, the period of termination may not be less than:

- one day, if the employee has been employed for four weeks or less;
- one week, if the employee has been employed for more than four weeks but not more than one year; or
- one month, if the employee has been employed for more than one year.

Instead of giving an employee notice, an employer may pay the employee the remuneration the employee would have received, if the employee had worked during the period of notice (section 31 of the Labour Act).

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

This is only permitted if it was the employee that gave the notice.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

In terms of section 33(1) of the Labour Act, dismissal must be procedurally fair and substantially fair. Section 33(2) of the Labour Act lists some of the grounds for unfair dismissal. These include dismissing the employee if he or she:

- discloses information that the employee is entitled or required to disclose;
- belongs to a trade union;
- takes part in the formation of a trade union; or
- participates in the lawful activities of a trade union.

It is also unfair to dismiss an employee because of such employee's sex, race, colour, ethnic origin, religion, creed or social or economic status, political opinion or marital status.

It is also possible to constructively dismiss an employee. This happens when the employer creates employment circumstances that are so intolerable that the employee is forced to resign due to those circumstances.

There is no requirement that consent from a third party must be obtained before an employer may dismiss an employee.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

No, there are not. All employees are treated equally.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

There are three types of individual dismissal: (1) dismissal based on

conduct; (2) dismissal based on incapacity; and (3) dismissal based on poor workmanship.

Dismissal based on business related reasons is dealt with in question 5.4 above.

Compensation for dismissal is decided by the arbitrator after taking into account a number of factors such as age of the employee, date from dismissal to granting of the award, whether the employee has established that they are unable to find alternative employment, etc. There is no closed list of such factors.

### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

The employer must follow a fair procedure. The elements of fair procedure are as follows:

- Investigation by an independent person.
- Employee must be given notice.
- Employee must be given time.
- Employee has a right to representation.
- Employee has a right to witnesses.
- Employee has a right to confrontation.
- If the employer has a certain procedure in place, the employee has a right to have that procedure followed.

### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

If an employee was dismissed unfairly, the arbitrator can either order reinstatement or compensate the employee for his loss, or both. An order for back pay can also be made.

### 6.8 Can employers settle claims before or after they are initiated?

Yes, settlement can occur at any stage before a decision is made by a judicial body.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

If it is collective termination as a result of re-organisation or transfer of the business or the discontinuance or reduction of the business for economic or technological reasons, then the procedure in section 34 of the Labour Act must be followed. See question 5.4 above. For dismissal for any other reason, the dismissal must be procedurally and substantially fair, regardless of the number of employees that are being dismissed.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

The same requirements for individual dismissals apply for mass dismissals.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Namibian Common Law does recognise restraints of trade as long as the restraint is reasonable and not against public policy.

### 7.2 When are restrictive covenants enforceable and for what period?

See question 7.1 above. The period depends on a host of factors, such as the locality of the employer's business in relation to its competitors and the trade secrets or confidential information possessed by the employee by virtue of his employment with the employer.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

No, they do not.

### 7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced by way of an application to court for enforcement or an action for damages due to loss of income.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The conciliation and arbitration tribunals established in terms of the Labour Act are assigned with jurisdiction. These tribunals comprise of individual conciliator/arbitrators who hear complaints. The office of the Labour Commissioner is the governing body of the tribunals. Appeals or reviews of an arbitration award are heard by the Labour Court, which acts as a division of the High Court of Namibia.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Conciliation and then arbitration (in that order) apply to employment-related complaints. Yes, conciliation is mandatory.

### 8.3 How long do employment-related complaints typically take to be decided?

It takes approximately two to three months from the date of filing of the dispute until the date of the judgment. The Labour Act prescribes a period of one month from the date of conciliation within which the arbitrator is afforded to deliver his award.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes. The appeal typically takes around one year to be heard by the Labour Court, depending on how long the office of the Labour Commissioner takes to release the record of the arbitration proceedings.

**Hugo Meyer van den Berg**

Koep & Partners  
33 Schanzen Road  
Windhoek  
Namibia

*Tel:* +264 61 382 800  
*Fax:* +264 61 382 888  
*Email:* meyer@koep.com.na  
*URL:* www.koep.com.na

Mr van den Berg commenced his articles of clerkship with Koep & Partners in January 2009 under the supervision of Peter Frank Koep. He was admitted as Legal Practitioner on the 4th of June 2010. He concentrates primarily on mining, corporate and commercial work, as well as litigation and trademarks.

Meyer van den Berg has contributed to publications on various topics, including Anti-Corruption, Merger Control, Mining and Oil and Gas. He is also a member of the Land Law Watch, hosted by the University of Cape Town and has delivered a few papers to this group on mineral law, real rights and foreign ownership of land in South Africa. He is currently attending the University of Cape Town where he is reading for his PhD in mineral and petroleum law.

**Stephen Vlieghe**

Koep & Partners  
33 Schanzen Road  
Windhoek  
Namibia

*Tel:* +264 61 382 800  
*Fax:* +264 61 382 888  
*Email:* stephen@koep.com.na  
*URL:* www.koep.com.na

Mr Vlieghe commenced his articles of clerkship with Koep & Partners in January 2009 under the supervision of Richard Mueller. He was admitted as Legal Practitioner on the 4th of June 2010. He concentrates primarily on labour/employment law, divorce law, defamation, immigration law, general corporate and commercial work and litigation.



The Firm was established in 1982 by senior partner Peter Frank Koep. It currently has six partners and three associates who are all qualified attorneys of the High Court of Namibia.

Our success and growth over the last years is evidence of our ability to deliver quality service in time. For thirty-two years our senior partner Peter Frank Koep and the rest of the team have provided expert advice and managed the African legal affairs of some of the world's largest internationally listed commercial, corporate and mining companies. Amongst these interests were investments, mergers, acquisitions, due diligence, investigations and litigation.

We have provided ongoing support and advice to our clients based on trust and excellent professional integrity. This, and our well established and respected working relationships with various law firms and bodies around the world, has placed us at the forefront of our field and has fully equipped us to handle any business challenges that might arrive from your expansion into Africa or derive from your current interests in Africa.

# Netherlands



Anita de Jong



Gerben Roffel

Hogan Lovells

## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The primary source is Dutch legislation. Other important sources are: international treaties and conventions; collective labour agreements; individual employment agreements; internal regulations; and case law.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Employment law applies primarily to those working in the Netherlands on the basis of an employment agreement. Dutch law distinguishes employment agreements for a definite and indefinite period of time. Dutch dismissal law is protective, but it allows flexibility with respect to agreements for a definite period of time. Within a period of three years an employee may enter into a maximum of three successive employment agreements for a definite period of time, which all end by operation of law. If more than three employment agreements for a definite period of time have been concluded between the same parties, with interruptions that do not exceed three months, or if the total duration of such employment agreement is more than three years, the new employment agreement will be for an indefinite period of time.

A number of regulations of Dutch labour law also apply to other types of workers, for instance temporary agency workers and self employed independent contractors with less than three principals.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

An employment agreement can be agreed upon orally or in writing. Certain provisions can only be validly agreed upon in writing and certain employment conditions must be confirmed in writing.

### 1.4 Are any terms implied into contracts of employment?

Both the employer and employee have the obligation to act as a diligent employer/employee respectively.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

All employees are entitled to a minimum wage and a minimum

holiday allowance. The statutory minimum holidays in case of a full time employment (40 hours a week) is 20 days per year.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective Labour Agreements can be negotiated on a company or industry-wide level, the latter being more common. The majority of employees fall under the scope of a Collective Labour Agreement.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The freedom to unionise is based on Article 8 of the Constitution, which recognises and guarantees the freedom of association. The Netherlands has also signed a number of international treaties recognising trade union freedom.

### 2.2 What rights do trade unions have?

Trade unions have a variety of rights, including the right to conclude Collective Labour Agreements under certain formal requirements.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

Dutch law does not provide for any specific provisions on strikes. The court adjudicates how parties conduct themselves in conflict situations and will examine the conflict on the basis of the European Social Charter.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Every enterprise that employs at least 50 employees must set up its own Works Council. The Dutch Works Council Act also provides for the possibility of setting up a Central or Group Works Council. Setting up a Central or a Group Works Council is usually applied if

an entrepreneur maintains two or more enterprises having certain common economic and organisational interests. The Central Works Council is authorised only in joint matters regarding the enterprises in question. Unless agreed otherwise in internal rules and regulations between the entrepreneur, the Central Works Council and the separate Works Councils, in matters where the Central Works Council has authority to advise on or approve of certain matters, the separate Works Council will no longer have such authority.

The most important powers of a Works Council include the right to information, the right of approval, advisory powers, the right to make recommendations and the right of approval in certain circumstances. Works Council members are chosen through election.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

In a number of cases the Works Council has the right of approval of certain decisions, particularly decisions to adopt, withdraw or amend: (a) pension insurance schemes, profit-sharing schemes or saving schemes; (b) arrangements on working hours or holidays; (c) remuneration or job assessment schemes; (d) regulations relating to health, safety and welfare; (e) regulations relating to appointment, dismissal or promotion policies; (f) regulations relating to staff training and assessment; (g) regulations relating to work consultation; (h) regulations relating to handling of complaints; (i) regulations relating to the registration and protection of personal data of employees; and (j) regulations relating to the supervision and monitoring of employees.

### 2.6 How do the rights of trade unions and works councils interact?

Pursuant to Article 27 paragraph 3 of the Dutch Works Council Act, the works council does not have the right of approval for matters that are governed by a Collective Labour Agreement.

In many cases, a trade union is the advisor of the Works Council when negotiating with the employer on labour conditions and other subjects regarding the employment agreement. Additionally, in relation to collective dismissals, the trade union and the Works Council each have their own role to play.

### 2.7 Are employees entitled to representation at board level?

For those companies applying the structure company regime (a two-tier board structure) the Works Council has a special right of recommendation for one-third of the members of the Supervisory Board according to article 2:268, paragraph 5, of the Dutch Civil Code. The Supervisory Board however may reject the recommendation of the Works Council on grounds specified in Dutch law. If the Works Council and the Supervisory Board cannot come to an agreement on the recommendation, the Enterprise Chamber of the Amsterdam Court of Appeal will make a decision at the request of the Supervisory Board.

A company that meets the following three criteria will have to apply for the structure company regime: (i) the issued share capital of the company increased by the reserves according to its balance sheet amounting to at least EUR 16 million; (ii) a Works Council has been instituted by virtue of a statutory obligation either with the company itself or with a dependent company; and (iii) the company and its

dependent companies employ at least 100 employees in the Netherlands.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Discrimination on any ground is prohibited by Article 1 of the Constitution. This general prohibition is implemented in specific laws, such as the Equal Treatment Act ("*Algemene Wet Gelijke Behandeling*"), the Equal Opportunities Act ("*Algemene Wet Gelijke Behandeling Mannen en Vrouwen*"), the Act on Equal Treatment on the grounds of Handicap or Chronic Illness ("*Wet gelijke behandeling op grond van handicap of chronische ziekte*") and the Equal Treatment Act on the basis of Age with respect to Employment ("*Wet gelijke behandeling op grond van leeftijd bij de arbeid*"). In addition, pursuant to articles 7:646 - 7:649 of the Dutch Civil Code, unequal treatment of men and women in the workplace is not allowed, nor is unequal treatment on the basis of working hours and on the basis of temporary and permanent contracts.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Direct and indirect discrimination on the grounds of gender, age, colour, race, ethnic origin, disability or chronic illness, marital status, trade union membership, sexual preference or religious belief, nationality, creed, political convictions, type of employment contract (permanent or temporary) or employment hours (full time or part time) is prohibited. Direct discrimination, being unequal treatment based directly on one of these grounds of discrimination is in principle forbidden. Indirect discrimination is only allowed when the employer can prove an objective justification for the difference in treatment. Indirect discrimination occurs when a regulation seems neutral, but indirectly leads to discrimination on one of the discrimination grounds.

### 3.3 Are there any defences to a discrimination claim?

Direct discrimination is unlawful. In case of indirect discrimination it will depend whether the employer has an objective justification for the difference in treatment.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Regulations in individual employment contracts or in Collective Labour Agreements that are not in compliance with the legislation against discrimination are null and void. However, a discriminatory notice is voidable. The employee will have to invoke the voidability within two months after the notice has been given.

Furthermore, if an employee is of the opinion that the employer has acted in breach of the ban on discrimination of men and women, and the employee substantiates this allegation with facts, this allegation is deemed to be true, unless the employer can prove otherwise. The burden of proof therefore lies with the employer.

Employees can submit a claim to the Equal Treatment Commission. This is a specialised commission for the enforcement of the prohibition of discrimination. This Commission is competent to

inquire into conduct that violates the articles of the Equal Opportunities Act, the Equal Treatment Act and the Dutch civil code. Furthermore the Dutch Court is competent to inquire into all the other cases and even in the cases in which the Equal Treatment commission is competent, so that the claimant can choose where to bring a complaint.

Claims of employees regarding discrimination can be settled before or after they are initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

The decisions of Dutch Equal Treatment Commission are non-binding. Employees can instead request the competent District Court, Cantonal Department to decide on a possible discriminatory situation which can grant compensation to the employee.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

All female employees are entitled to a total of 16 weeks' maternity leave. Of these 16 weeks, four to six weeks can be taken prior to the expected date of childbirth ("*zwangerschapsverlof*") and the remaining weeks are considered to be childbirth leave ("*bevallingsverlof*") once the child has been born. After childbirth the employee is entitled to at least another 10 weeks of leave. If the period of leave before the date of the birth of the child was less than 6 weeks, the difference will be added to the 10 weeks. The total period can be longer than 16 weeks if the actual date of birth is later than the expected date of birth.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Employees are legally entitled to payment of their full salary during maternity leave, provided the salary does not exceed the maximum salary under the social insurances of €187.77 gross per day (as per 1 July 2010). In practice, most employers continue to pay full salary, also when the salary exceeds this daily maximum. If timely requested, ultimately 2 weeks before the start date of the maternity leave, the employee is entitled to social insurance benefits paid by the national Employee Insurance Implementing Body ("*UWV*"), responsible for the employed person's insurance schemes. The benefits, to which the employee is entitled but which are paid to the employer, will cover the employee's salary during maternity leave, to the aforementioned daily maximum.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

A female employee returning to work from maternity leave is entitled to return to the job in which she was employed before her maternity leave on the same terms and conditions.

### 4.4 Do fathers have the right to take paternity leave?

The husband (or registered partner or person who is living together with the mother) of the woman who gave birth has the right to two days' paid leave, to be taken during the period of the first four weeks after the date of birth.

### 4.5 Are there any other parental leave rights that employers have to observe?

An employee who has a child (or adopted child) aged below eight and who has been employed by the company for at least one year is entitled to parental leave during a maximum period of six months. The same applies to an employee (foster parent/guardian or spouse/partner of any of the same) who is living at the same address as a child below eight years of age, and has taken on the (parental) responsibility for care and upbringing of this child on a long term basis. Parental leave is generally unpaid leave, unless (partial) payment has been agreed in an applicable Collective Labour Agreement or company regulation.

Furthermore, there are special unpaid leave arrangements for employees who have adopted a child or taken into their home a foster child for long-term care and upbringing, for a period of four weeks, to be taken within 18 weeks.

### 4.6 Are employees entitled to work flexibly if they have responsibility for carers for dependants?

Employees are entitled to short-term and long-term care leave to take care of their child or other dependants in case of an emergency. The time of the short-term and long-term care leave depends on the circumstances of the case, although there are certain limits.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

An asset sale could qualify as a transfer of undertaking ("*TUPE*") within the meaning of the Acquired Rights Directive, if an economic entity that is transferred (as a consequence of an agreement, a merger or a split) retains its identity. In order to determine whether there is a TUPE, all aspects of the case have to be investigated. If TUPE applies, only dedicated employees will transfer to the acquirer.

In a share sale there is no change in the identity of the employer and therefore the employees are not affected by such transfer.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

If TUPE applies, all dedicated employees will transfer to the acquirer by operation of law. In that case they will be entitled to keep their existing employment conditions (with the exception of pension rights, if the acquirer before the transfer date offers its own existing pension scheme to the transferred employees). In principle also the rights following a Collective Labour Agreement will transfer fixed as per the date of the transfer (i.e. not bound by any future Collective Labour Agreement applicable to the seller). A distinction should be made between Collective Labour Agreements that are declared generally binding by the Minister of Social Affairs and Collective Labour Agreements that are directly binding to the employee, because the Collective Labour Agreement was entered into by the employer or an employer's association on behalf of the employer. Conflicting Collective Labour Agreements will require specific attention.

Upon a share sale, employees continue to be employed on their existing terms and conditions.



### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The employer of the acquirer and seller will need the advice of the Works Council (if any). The request for advice (if required) should be sought at such a moment that the advice can still have impact on the decision making process. In general, at least two to three months may pass between submitting the request for advice to the Works Council and receiving the Works Council's advice. Should the decision of the entrepreneur deviate from the Works Council's advice, the implementation of the decision must be suspended for a period of one month, unless the Works Council waives that obligation. Within this one month period the Works Council may lodge an appeal against the decision with the Enterprise Chamber of the Amsterdam Court of Appeal.

If no Works Council has been established, the employer has to inform the employees (in case of a TUPE) in a timely manner of, for instance, but not limited to, the contemplated decision to transfer the employees and the proposed date of transfer.

Furthermore, if the business sale involves a seller or an acquirer who, on a regular basis employs more than 50 employees in the Netherlands or either of them belong to a group of companies that regularly employs more than 50 employees in the Netherlands, it is likely that also the Dutch Merger Code shall apply, although there are exceptions in case the business sale does not primarily relate to the Dutch legal scope. Application of the Dutch Merger Code can also follow from an applicable Collective Labour Agreement. If the Dutch Merger Code applies there is an obligation to timely inform the trade unions involved.

### 5.4 Can employees be dismissed in connection with a business sale?

An employment agreement may in principle not be terminated due to or in the view of a business sale that qualifies as a TUPE. However, in a TUPE situation the employment agreement may still be terminated for economical, technical or organisational reasons.

No special rules apply to dismissals in connection with a share sale.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

If there is a TUPE a number of employees may not be interested in a transfer to the acquirer and request the court to terminate their employment agreement. Article 7:665 Dutch Civil Code explicitly provides that in case as a result of a TUPE the employment conditions are changed to the detriment of an employee, such termination cannot be blamed on the employee who, in that case, will be entitled to a reasonable compensation.

No specific rules apply to changes to terms and conditions in connection with a share sale.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

An employment agreement entered into for an indefinite period of time can, in principle, only be terminated by the giving of notice by the employer, after prior receipt of permission of the UWV-

*Werkbedrijf*, unless the interests related to the Dutch labour market are not involved.

The statutory notice period for the employer is one month for every five years of service or less, up to a maximum of four months in case of 15 years of service or more. For the employee, the statutory notice period is in principle one month, but this can be deviated from in writing. In case of extension, the notice period for the employee cannot be longer than six months, and for the employer not shorter than double the notice period of the employee. The employer's double term can be reduced pursuant to a Collective Labour Agreement, provided it is not shorter than the employee's term.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

An employer can send employees on "garden leave". But the employee can start proceedings to be reinstated, if the employer does not act as a diligent employer should act. However, employees are usually not reinstated in case of a disturbed employment relationship.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Notice of termination of an employment agreement without the required prior permission of the UWV-*Werkbedrijf* is voidable. The employee can invoke such unlawful dismissal during a period of six months after termination. If notice was not given in a valid manner, the employee can continue to claim his salary if he holds himself available for his duties.

An employee is treated as dismissed if his employment agreement is (legally) terminated.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

There are various categories of employees for which the court must grant prior permission before the employer can give notice of termination (for instance Works Council members). An employment agreement may also not be terminated by giving notice based on marriage, childbirth or during pregnancy, maternity leave or military service, or during illness unless the disability has lasted at least two years or only started after the employer requested permission by the UWV-*Werkbedrijf*.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Employers must show that there is a valid reason for a dismissal, for instance business reasons such as reorganisation, as a consequence whereof the function of the employee became redundant, or a disturbed employment relationship or underperformance or misconduct by the employee.

Dutch law does not provide for statutory legislation for calculating reasonable severance, however the Circle of Cantonal Court Judges have provided Recommendations for the calculation of a reasonable compensation in case of a termination of an employment agreement by court's decision.

## 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

An employment agreement entered into for an indefinite period of time can, in principle, be terminated by: (i) the giving of notice by the employer after receipt of prior approval of the UWV-*Werkbedrijf*; (ii) by court's decision; or (iii) by mutual consent. Furthermore, the employment agreement can be terminated during the probationary period or instantly on urgent grounds.

## 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

Notice of termination of an employment agreement without the required prior permission of the UWV-*Werkbedrijf* is voidable. Reference is made to question 6.3 above. If the employer obtained the permission of the UWV-*Werkbedrijf* and legally gave notice, the employee may apply to the District Court to claim compensation to be paid by the employer on the ground that the dismissal was "manifestly unreasonable". This may be the case if no reason, or a mere pretext, is given for the termination or if the financial effects of the termination are too harsh on the employee in comparison with the interests of the employer. Only if the termination is deemed manifestly unreasonable can the court award a higher compensation. Parties often agree upon a settlement or the employer provides for a social plan, in which case the employees have less or no grounds to start proceedings.

If the employer requests the court to terminate the employment agreement the employee can challenge whether there is a weighty reason for such termination. Subsequently the employee could request the court to reject the employer's termination request and/or to award a reasonable severance as a condition for such termination.

## 6.8 Can employers settle claims before or after they are initiated?

Claims can be settled before or after they are initiated.

## 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

If the employer intends to dismiss more than 20 employees within a period of three months (collective dismissal) the Act on Reporting of Collective Dismissals will be applicable. On the basis of this act the employer is obliged to report the collective dismissal to the UWV-*Werkbedrijf*, giving the grounds for the dismissal. Furthermore, the trade unions will have to be informed by sending them a copy of the written request to the UWV-*Werkbedrijf*, provided that a Collective Labour Agreement (if any) does not oblige the employer to inform the trade unions at an earlier stage. Furthermore, the employer must seek the prior advice of the Works Council (if any) regarding the proposed redundancies.

## 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

In case of an infringement of the Act on the Reporting of Collective Dismissals, i.e. not reporting the collective dismissal to the UWV-*Werkbedrijf*, the UWV-*Werkbedrijf* will not handle the request of the employer to grant a permission to give notice.

If the employer fails to request the advice of the Works Council, the

Works Council may lodge an appeal against the decision regarding a collective dismissal.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Covenants typically prevent an employee from competing with, dealing with customers of, or soliciting the customers or staff of a former employer.

### 7.2 When are restrictive covenants enforceable and for what period?

Non-compete clauses need to be agreed upon in writing and it is advisable to renew them if the employee is promoted. In principle a non-compete clause is binding, however now that a non-compete clause restricts an employee's freedom to choose employment, the Dutch Civil Code includes certain provisions protecting the employee, for instance the possibility to mitigate or even nullify the non-compete clause.

The duration of restrictive covenants should be agreed upon between an employer and employee. In general a period of one year following termination of the employment agreement is not uncommon, but courts may limit this period.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

There is no obligation to provide the employee with a financial compensation. However, an employee may request a court to annul a non-compete clause, either completely or partially (even during the term of the employment), whenever an employee is unfairly prejudiced by the clause in relation to the interest which the employer intends to protect. If, because of the interests of the employer, the non-compete clause remains completely or partially intact, but the employee is seriously restricted from accepting employment elsewhere, or if the employee is forced to settle for a lesser paying job, the court may decide to award reasonable compensation to the employee.

### 7.4 How are restrictive covenants enforced?

If a former employee is acting in breach of an agreed restrictive covenant, an employer can apply to the court for an injunction to prevent further breaches. Furthermore, restrictive covenants often include a penalty clause, providing that a fine must be paid by the employee upon the breach of the restrictive covenant.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

In principle the Cantonal Court has jurisdiction regarding all claims related to or arising from an employment or Collective Labour Agreement, although there are some exceptions. For instance, the District Court is the competent court to handle any dispute between an employee who is also a statutory director and his/her employer. Such proceedings are heard by a legally qualified Judge.

## 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Cases are initiated by a writ of summons or a petition. Subsequently, usually documents are exchanged, after which a court hearing will be held and several weeks or months later a decision is rendered.

Conciliation is in principle not mandatory, although this could follow from a Collective Labour Agreement or specific employment rules, such as the Works Councils Act.

## 8.3 How long do employment-related complaints typically take to be decided?

In case of a request to terminate the employment agreement by court's decision, it takes usually approximately 2 to 3 months

before a decision is rendered. Procedures on the merits may take a year. However, interlocutory proceedings usually do not take more than 4 to 6 weeks.

## 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

In case of a termination of an employment agreement by court's decision, such decision is in principle final and no appeal is possible. In other employment-related cases it is often possible to appeal. Depending on the circumstances of the case, such appeal may take approximately a year, after which parties could lodge an appeal in cassation which may take a year or even more.

### Note

This chapter was contributed by Hogan Lovells International LLP.



**Anita de Jong**

Hogan Lovells International LLP  
Keizersgracht 555  
1017 DR Amsterdam  
The Netherlands

Tel: +20 55 33 685  
Fax: +20 55 33 783  
Email: [anita.dejong@hoganlovells.com](mailto:anita.dejong@hoganlovells.com)  
URL: [www.hoganlovells.com](http://www.hoganlovells.com)

Anita de Jong started to work as a lawyer in 1985 and has headed the Employment practice of Hogan Lovells in the Netherlands since 1 July 2004.

Anita initially practiced company law, but in the 1990s she gradually shifted her focus to employment law. She is particularly interested in issues where employment law and company law overlap.

She focuses on the employment-law consequences of takeovers and outsourcing (including harmonisation of employment conditions), dismissal law, collective bargaining agreements and privacy in the workplace. Furthermore, she handles major litigation cases.

Anita is named as a leading individual in the *European Legal 500* and *Chambers*. She is also named as an expert on the field of outsourcing in *PLC Which Lawyer*.

Anita de Jong regularly publishes articles in specialist and scientific journals and contributes to textbooks on employment-law related subjects. In addition, she speaks at national and international conferences. Anita is a member of the HR Expert Committee of *Platform Outsourcing Nederland*.



**Gerben Roffel**

Hogan Lovells International LLP  
Keizersgracht 555  
1017 DR Amsterdam  
The Netherlands

Tel: +20 55 33 659  
Fax: +20 55 33 783  
Email: [gerben.roffel@hoganlovells.com](mailto:gerben.roffel@hoganlovells.com)  
URL: [www.hoganlovells.com](http://www.hoganlovells.com)

Gerben Roffel is an associate in the Hogan Lovells' employment team. He focuses (*inter alia*) on the employment-law consequences of takeovers, reorganisations and outsourcings, including works council related issues in this respect. He also focuses on non-compete and pension issues. Gerben has completed a post-doctoraal pension programme at the University of Amsterdam and gained the degree certified pension lawyer. Together with colleagues, he regularly holds client seminars on i.e. the subject of Dutch dismissal law. In addition, Gerben advises on the whole range of employment law matters for national as well as international clients across various sectors.

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Hogan Lovells' award-winning employment law team has extensive experience in advising clients on the full spectrum of employment matters - from workplace policies and practices, developing comprehensive risk avoidance strategies, advocating for clients in litigation and arbitration, to negotiating with unions and other employee representatives and helping them to implement their strategic domestic and international initiatives.

Hogan Lovells assist clients in resolving their employment challenges creatively, strategically and cost-effectively.

# New Zealand

Phillipa Muir



Carl Blake



Simpson Grierson

## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

New Zealand's employment laws are regulated by a combination of statute and common law. The emphasis in New Zealand legislation is on freedom of contract, with employees being protected by a "minimum floor" of statutory rights.

The key employment-related statutes are:

- (a) Employment Relations Act 2000 (**ERA**).
- (b) Holidays Act 2003 (**HA**).
- (c) Health and Safety in Employment Act 1992 (**HSEA**).
- (d) Human Rights Act 1993 (**HRA**).
- (e) Privacy Act 1993 (**PA**).
- (f) Accident Compensation Act 2001 (**ACA**).
- (g) Minimum Wage Act 1983 (**MWA**).
- (h) Parental Leave and Employment Protection Act 1992 (**PLEPA**).
- (i) KiwiSaver Act 2006 (**KA**).

These statutes cannot be contracted out of to an employee's detriment, even by agreement between the parties.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Except for very limited exceptions, only "employees" are provided with the protections and entitlements detailed within the statutes referred to in question 1.1 above.

An "employee" is defined in the ERA as "*any person of any age employed by an employer to do any work for hire or reward under a contract of service*".

The definition of employee includes a person intending to work (meaning a person who has been offered and accepted work as an employee) and a homeworker.

The definition of employee excludes independent contractors, volunteers and any person engaged in film production work. Independent contractors are not protected and/or covered by the employment-related statutes referred to in question 1.1 above (except for the discrimination provisions of the HRA).

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Under the ERA, all individual employment agreements must be in writing, but may contain whatever terms the parties agree to, provided their agreement expressly includes:

- (a) the names of the employee and the employer;
- (b) a description of the work to be performed by the employee;
- (c) an indication of where the work is to be performed;
- (d) an indication of the arrangements relating to the times the employee is to work;
- (e) the wages or salary payable to the employee, including the method and frequency of payment and whether payment is in arrears or in advance;
- (f) a plain language explanation of the services available for the resolution of employment relationship problems, including reference to the period of 90 days in which a personal grievance must be raised;
- (g) an employee protection provision (**EPP**). An EPP is designed to offer protection to employees in situations where the employing entity changes (for example, sale or transfer of an employer's business, which is defined as a "restructuring"). In essence, the EPP must prescriptively deal with the process that must be followed by the employer in negotiating with any new employer about a restructuring, matters that will be negotiated (such as terms and conditions of employment with the new employer), and the process to be followed for determining any entitlements for non-transferring employees; and
- (h) from 1 April 2011, an employer must provide employees with a copy of a signed employment agreement or, where it has not been signed, an unsigned copy of that agreement.

For a fixed-term agreement to be effective, the ERA requires that, amongst other things, the employment agreement must state the way the employment will end and the reasons for ending the employment in that way.

Under the HA, an employment agreement must include a provision that confirms the employee's right to be paid time and a half for working on a public holiday, and also an explanation of the entitlements under the HA.

### 1.4 Are any terms implied into contracts of employment?

The common law exists as a background to the statutory law of employment in New Zealand, providing a series of principles, obligations and duties forming implied terms in all employment agreements.

The key implied terms for employees are the duty:

- (a) of mutual trust and confidence;
- (b) of loyalty and fidelity; and
- (c) to exercise reasonable skill and care and to obey reasonable instructions.

The key implied terms for employers are the duty:

- (a) to provide work and pay wages; and
- (b) to provide a safe workplace.

Terms can also potentially be implied into an employee's employment agreement by custom and practice where an employer invariably follows a particular practice over an extended period of time.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The various employment law statutes detailed in question 1.1 above provide a "minimum floor" of statutory rights. These include:

- (a) **Employment Relations Act:**
  - (i) the ERA is the key statute regulating employment law in New Zealand. It governs the employment relationship between employers and employees, and covers collective, individual and fixed-term employment agreements, collective bargaining and union-related issues, flexible working arrangements, and personal grievances; and
  - (ii) employees are entitled to defined paid rest breaks and unpaid meal breaks.
- (b) **Holidays Act:**
  - (i) this provides minimum entitlements to annual leave (four weeks per annum), sick leave (five days per annum), bereavement leave (three days for close family members and one day for other bereavements) and public holidays (including the right to payment of time and a half); and
  - (ii) there is no statutory provision for long-service leave, although employers often include it in employment agreements.
- (c) **Minimum Wage Act:**
  - (i) As of March 2011, the adult minimum wage rate will be NZ\$13.00 (gross) per hour.
- (d) **Parental Leave and Employment Protection Act:**
  - (i) The PLEPA covers employees with at least six months' continuous service and provides various rights to paid and unpaid parental leave. Various additional rights are available to employees with 12 months' service. Further details are set out in section 4 below.
- (e) **KiwiSaver Act:**
  - (i) participation in superannuation schemes is not compulsory in New Zealand. Employees are eligible to participate in KiwiSaver, which is a voluntary, work-based retirement savings initiative (governed by the KA); and
  - (ii) participants in KiwiSaver must contribute a minimum of 2% of their gross salary or wages to a superannuation scheme of their choice, and employers must make a minimum contribution of 2% on behalf of all participating employees.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

A key objective of the ERA is to promote unions and collective bargaining.

Bargaining primarily takes place at a company level. However, multi-employer collective agreements and multi-union collective

agreements allow more than one employer or union within the same industry to negotiate collective agreements covering multiple employers/unions.

In 2010, approximately 17.5% of New Zealand employees were covered by a collective employment agreement (59.2% of public sector employees and 8.3% of private sector employees).

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The key objective of the ERA is to build productive employment relationships through the promotion of good faith. This is recognised, in part, under the ERA, by the promotion of collective bargaining. The ERA specifically recognises unions as the only lawful representative of employees' collective interests.

A collective agreement can only be concluded by unions and employers. While union membership is voluntary, if an employee wants to be covered by a collective agreement and to bargain collectively, he or she must be a member of a union.

The ERA entitles unions to represent their members regarding any matter that involves their members' collective interests, and it allows unions (and other representatives) to represent employees with respect to their individual rights (e.g. at mediation and in court actions), provided that they have employees' authorisation.

### 2.2 What rights do trade unions have?

Unions have various rights under the ERA, including:

- (a) to request the disclosure of information (including financial) during collective bargaining;
- (b) to be informed and consulted prior to any decisions being made that could impact on the continued employment of their members;
- (c) access to workplaces for purposes relating to their "members' employment" and "union business". Note: from 1 April 2011, rules on union access to workplaces will tighten, so that any access will require the consent of the employer. That consent cannot be unreasonably withheld; and
- (d) to meet with members in paid union meetings (of up to two hours' duration) at least twice each year, provided that certain notification and procedural criteria are followed.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

The ERA contains comprehensive provisions governing strikes and lockouts, and a union may take lawful industrial action in certain circumstances.

A strike must relate only to the bargaining for a new collective agreement, or for reasons of health and safety. It cannot relate to a personal grievance, contractual dispute, or freedom of association issue, or take place in an essential service, unless certain notice requirements are met.

Participation in a strike will be unlawful if it occurs while a collective agreement is in force that binds the employees who are participating in the strike. A strike cannot lawfully occur during bargaining until the parties have been negotiating for a new collective agreement for at least 40 days.

**2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?**

There are no works councils in New Zealand.

**2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?**

This is not applicable in New Zealand law.

**2.6 How do the rights of trade unions and works councils interact?**

This is not applicable in New Zealand law.

**2.7 Are employees entitled to representation at board level?**

There is no statutory entitlement for employees in New Zealand to have representation on their employer's board.

### 3 Discrimination

**3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?**

Discrimination is prohibited by both the ERA and the HRA. Employers must not discriminate against employees (including independent contractors) on any of the unlawful "grounds" of discrimination. The HRA applies to all aspects of the employment relationship (and independent contractors), including hiring, whereas the ERA applies to employees only.

The unlawful grounds of discrimination in the HRA are: sex; marital status; family status; religious or ethical belief; colour; race and ethnic or national origins; disability; age; political opinion; employment status; and sexual orientation.

In addition to the ERA, two additional prohibited grounds of discrimination under the ERA are: involvement in the activities of a union; and an employee's refusal to work, pursuant to the HSEA provisions.

**3.2 What types of discrimination are unlawful and in what circumstances?**

There are two types of discrimination under the HRA:

- (a) direct discrimination occurs where an individual is treated differently or less favourably "*by reason of*" a prohibited ground of discrimination (for example, age or sex); and
- (b) indirect discrimination occurs where a requirement or condition established and enforced by the employer does not directly discriminate, but imposes a more onerous obligation, penalty, or disadvantage on an individual or group because of their age, sex, political opinion or any other of the prohibited grounds of discrimination.

In addition to the various grounds of discrimination, sexual and racial harassment are also explicitly prohibited by the HRA and the ERA. It is also unlawful to victimise a person for exercising their rights under the HRA.

**3.3 Are there any defences to a discrimination claim?**

There are various exceptions to the discrimination provisions of the HRA. An employer is able to afford a person different treatment based on their sex or age where being a particular sex or age is a "*genuine occupational qualification*" for the position.

The HRA also allows different treatment based on disability where:

- (a) a person could perform the duties of a position satisfactorily only with the aid of special services or facilities, and it is not reasonable to expect the employer to provide those services or facilities; or
- (b) the environment in which the duties of the position are to be performed or the nature of those duties is such that the person could perform those duties only with the risk of harm, and it is not reasonable to take that risk (provided that the employer could not, without unreasonable disruption, take reasonable measures to reduce the risk to an acceptable level).

It is open to an employer to seek to justify a practice that is indirectly discriminatory on the basis that there is "*good reason*" for the particular conduct, practice, requirement or condition in question. No such defence exists for claims of direct discrimination.

The HRA reflects the principle of vicarious liability, and provides that anything done by an employee shall be treated as done or omitted by the employer, whether or not it was done with the employer's knowledge or approval. An employer is able to rely on a defence to such liability if it can establish that it took such steps as were reasonably practicable to prevent the employee from engaging in the behaviour that is in breach of the HRA.

**3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?**

Where an individual believes that they have been discriminated against, they can make a complaint to the Human Rights Commission under the HRA or raise a personal grievance under the ERA.

Regardless of the jurisdiction in which the individual raises a complaint, there is scope for the employer to seek to resolve/settle the claim at any stage. Such settlements can be achieved either informally between the parties, or with the assistance of conciliation services (provided by the Human Rights Commission) or mediation services (provided by the Department of Labour).

If an individual's claim is not settled/resolved, they have the option of either:

- (a) seeking to have the Director of Proceedings of the Human Rights Commission commence proceedings in the Human Rights Review Tribunal on their behalf; or
- (b) pursuing a personal grievance claim in the Employment Relations Authority (**Authority**).

**3.5 What remedies are available to employees in successful discrimination claims?**

If an employee is successful in pursuing a personal grievance claim under the ERA in the Authority, or a discrimination claim in the Human Rights Review Tribunal, they may be awarded various remedies, including:

- (a) compensation for humiliation, loss of dignity and injury to feelings (to a maximum of NZ\$200,000, although awards higher than \$20,000 are rare);
- (b) loss of any benefit (money or non-monetary);

- (c) compensation for lost wages; and
- (d) a contribution towards legal costs.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

There are two types of minimum entitlements to parental leave:

- (a) paid parental leave of up to 14 weeks (which is funded by the government, although many employers elect to provide additional paid parental leave); and
- (b) unpaid parental leave (provided by the employer) which includes maternity leave of up to 14 weeks, and extended leave of up to 52 weeks.

#### Paid Parental Leave

Under the PLEPA, a female employee who has been employed with the same employer for an average of at least 10 hours per week during the immediately preceding six months is entitled to 13 weeks of paid parental leave (provided by the government, not employers). If the employee has been employed during the preceding 12 months, she is entitled to 14 weeks of paid leave. As at 1 July 2010, the maximum paid parental leave entitlement is \$441.62 (gross) per week.

Many employers provide additional paid leave in employees' employment agreements.

#### Maternity Leave

An eligible female employee is entitled to up to 14 weeks of maternity leave. The employee can commence maternity leave up to six weeks prior to the expected date of delivery or adoption. Taking maternity leave prior to the birth of a child reduces the period of leave available after the birth. However, if a period of longer than six weeks is taken on a doctor's recommendation or the employer's discretion, an employee will still be able to take at least a further eight weeks' maternity leave following the birth or adoption.

#### Extended Leave

Extended leave is a period of parental leave of up to 52 weeks. One spouse/partner can take the whole 52-week extended leave or the spouses can share it. The 52-week period of extended leave includes the period taken as maternity leave (but not partner's/paternity leave). However, if maternity leave commences more than six weeks out from the expected date of delivery or adoption, that extra time is not deducted from the total extended leave entitlement and at least eight weeks will be counted as maternity leave following the birth or adoption.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Aside from the entitlement to paid parental leave (see question 4.1), employees are not required by the PLEPA to be provided with any form of other payment of salary, wages or any other benefits during a period of parental leave. Any such entitlement is a matter for negotiation and will depend on what is agreed between the parties.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

Where an employee takes a period of parental leave which exceeds four weeks, the employee's position must be kept open unless the employer establishes that the employee's position cannot be kept

open because a temporary replacement is not reasonably practicable due to the key nature of the position, or because of a genuine redundancy situation.

### 4.4 Do fathers have the right to take paternity leave?

The partner of a pregnant employee may take up to one week of unpaid leave, starting on or before the date of delivery, provided they have worked for the same employer for an average of at least 10 hours per week over the period of six months. If the partner has been employed over the period of 12 months with the same employer, they may take two weeks of unpaid leave. A partner may also take or share an entitlement to extended leave (see question 4.1).

### 4.5 Are there any other parental leave rights that employers have to observe?

Adoptive parents have similar rights under the PLEPA, although different procedural requirements apply. Where the placement of a child is approved by a social worker, notice must be provided to the employer within 14 days of the employee learning that a child will be placed in their care within the following three months.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

The ERA contains provisions for employees who have a minimum of six months' service and have "*the care of any person*" to request part-time and flexible hours.

An employer can refuse a request for flexible working only if it cannot "*reasonably*" be accommodated.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

#### Asset Sale

Except for "*vulnerable employees*" (discussed below), New Zealand law does not provide for the transfer or assignment of an employment relationship to a new employer, even if the new employing entity is within the same wider group. As such, New Zealand law requires that the vendor terminate the employment of its employees (following consultation) and that the purchaser make fresh offers of employment (which need to be accepted) in order to effect the "transfer" of employees.

The term "*technical redundancy*" refers to a situation where the assets of a business or part of it are sold or transferred and the employees are offered employment on the same or similar terms of employment. Upon the sale, the employees are "*technically redundant*" to the vendor. The rationale behind this principle is that as an employment agreement is personal between an employer and employee, an employer has no right to unilaterally "transfer" an employee to the employment of another employer, i.e. the purchaser. So in reality two transactions occur – first, the employer declares the employees redundant on the grounds that it has, or it will, transfer its business (or part of it) to a new entity which will become in its own right an employer; and secondly, the employees are offered employment by the purchaser, as their new employer.

Many employment agreements contain a specific clause clearly stating that employees are not entitled to redundancy compensation

if they are offered employment with the purchaser on “no less favourable” terms and conditions. This is known as a “technical redundancy” clause. Where such a clause is not in an employment agreement, it is arguable that the employee may be entitled to take up a comparable job with the purchaser and also claim any contractual redundancy compensation entitlements from the vendor.

Except for “vulnerable employees”, the purchaser in such a transaction has the ability to choose which employees it wishes to offer employment to, and on what terms, subject to negotiations with the vendor.

Under the ERA, “vulnerable employees” (which include employees who provide cleaning services or food catering services) may, prior to the date the sale takes effect, “elect to transfer” to the purchaser on the same terms and conditions of employment. There is also a right to negotiate redundancy compensation entitlements.

#### Share Sale

In a share sale, the purchaser will acquire all of the business arrangements of the vendor (including its employees) as a going concern. Issues of technical redundancy will not arise because the employer does not change with the sale of shares. The current employment agreements will remain in place and will not terminate upon the sale.

## 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Only “vulnerable employees” (see question 5.1) are provided with special protection in the event of an asset sale of their employing entity. Vulnerable employees can elect to transfer to the new employer on the same terms and conditions of employment.

Non-vulnerable employees impacted on by an asset sale do not have the ability to simply elect to transfer to the new employer. For non-vulnerable employees, it is a matter within a purchaser’s discretion as to which employees it offers employment to (if any) and on what terms.

Where a vendor has a collective employment agreement in place covering employees who are affected by a sale, the employment relationship cannot simply be transferred or assigned to a new employer. It is, however, common for all parties to agree to vary an existing collective employment agreement to provide that the purchaser will become a party to it from the date of the closing of the sale.

The above issues do not arise in the event of a share sale because the employer remains the same both before and after the transaction has been completed. As a result, the employment agreements governing the terms and conditions of the employment relationship continue to apply and there is no break in the continuity of employment.

## 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

#### Asset Sale

The ERA requires that where an employer proposes to make a decision that will, or is likely to, have any adverse effect on the continuation of employees’ employment, the employer must provide the affected employees and the union(s) with access to information, relevant to the continuation of their employment, about the decision, and an opportunity to comment on the information before the decision is made.

Under the ERA, consultation is therefore a preliminary requirement where a vendor employer is proposing to sell its business. When a vendor gets to the point where it is seriously considering selling its business, it should notify potentially affected employees and any union(s) of the proposal, and seek their feedback before making any final decisions.

Vendors must also comply with the EPPs in the employment agreements of affected employees (see question 1.3(g)). To ensure strict compliance with the ERA, if suitable EPP clauses are not present in affected employees’ employment agreements, the vendor should amend all such agreements to include an EPP before a sale occurs.

There are no specific requirements as to the period over which consultation with affected employees must take place in the event of an asset sale. Typically, these processes take up to four weeks (or potentially longer depending upon the size and/or complexity of the sale and its impact).

#### Share Sale

Subject to any specific obligations in affected employees’ employment agreements that prescribe consultation processes/entitlements in the event of a share sale, there are no statutory consultation obligations on employers in the event of a share sale.

However, even if a proposed share sale will not have an adverse effect on employees, an employer should still advise its employees (and union(s)) of the proposed sale and its impact (if any). The ERA specifically requires employers and employees to deal with each other in good faith and be “active and constructive” and “responsive and communicative” towards each other.

This obligation generally falls short of “consultation” about the proposed sale, and amounts merely to notifying the employees (and union(s)) of the proposal, providing them with relevant information (subject to commercial sensitivity) and answering any questions they may have.

There are no specific requirements as to when employees (and union(s)) need to be advised of a share sale. Ideally, to avoid claims of lack of notice, surprise or grievance on the part of the employees, they should be advised of the sale prior to the signing of the share transfer (subject to commercial sensitivities).

#### Sanctions

Should employees and/or union(s) take issue with a lack of suitable EPP clauses and/or consultation over an asset sale, there is the potential for claims to be raised for a breach of the ERA (including the good faith requirements). This has the potential (albeit slim) to delay the sale process and to result in claims for damages/penalties.

## 5.4 Can employees be dismissed in connection with a business sale?

In an asset sale, all employees of the vendor will be “technically redundant” upon the transfer of the business to the purchaser. As such, all employees will have their employment terminated by operation of law, with effect from the closing of the sale.

In a share sale, the current employment agreements will remain in place and will be unaffected by the sale of shares. They do not terminate upon the sale. There is no ability for the purchaser to elect which employees it wishes to offer employment to. The sale of an employer’s shares will not, of itself, justify a dismissal of employees by the vendor or the purchaser.



## 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

### Asset Sale

Only “vulnerable employees” have the ability to elect to transfer to the new employer. For non-vulnerable employees, a purchaser may offer the same or different terms of employment, and it is purely a matter within a purchaser’s discretion as to which employees it offers employment to (if any) and on what terms.

### Share Sale

There is no ability for the purchaser to elect which employees it wishes to offer employment to, or to unilaterally change terms of employment. Should the purchaser seek to vary terms and conditions of employment, this cannot be done unilaterally and/or without the consent of employees.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

There is no minimum statutory period of notice required for termination of an employee’s employment.

Employers must give the notice period stipulated in the written employment agreement when terminating an employee’s employment (other than summary dismissal for serious misconduct). Where no notice period is specified (which is uncommon because the ERA requires all employment agreements to be in writing), then “reasonable” notice must be given (usually a minimum of about four weeks).

In instances of serious misconduct (or any other cause justifying summary dismissal), an employer may terminate an employee’s employment without notice.

### 6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

This is a matter for negotiation between the parties. Commonly, employment agreements provide that an employer may require an employee to undertake reduced or alternative duties, or require that they do not attend the workplace, during their notice period. Provided such provisions exist in an employee’s written employment agreement, an employer may exercise its rights under such a clause in appropriate circumstances.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

An employee (who is outside of a trial period, discussed below) can bring a personal grievance claim if he or she has been unjustifiably dismissed or disadvantaged in his or her employment. A personal grievance must be “raised” within 90 days of the cause of action unless there are “exceptional circumstances”. An overall limitation period of three years applies to raising personal grievances, which is less than the six-year period under the New Zealand Limitation Act 1950.

There is no ability to bring common law claims for wrongful dismissal. Claims for unjustified dismissal must be brought under the ERA.

As a general rule, employment may only be terminated for cause in New Zealand. There is no concept of termination “at will”. Cause for terminating an employee’s employment would include:

- poor performance (with notice, after a satisfactory warning and performance management process);
- repeated misconduct (with notice);
- serious misconduct (without notice);
- redundancy (with notice);
- medical incapacity (with notice);
- incompatibility (with notice); and
- frustration of contract.

An employee may be treated as being dismissed if they have been given notice by their employer that their employment has been terminated. In some circumstances, an employer’s actions may repudiate the employment agreement such that the employee may treat his or her employment as being terminated.

No consents from a third party are required before an employer may dismiss an employee.

### Trial Periods

Until 1 April 2011, employers with fewer than 20 employees may seek to include trial periods of up to 90 days in their employment agreements. During this period, where an employee is dismissed they may not bring a personal grievance claim in relation to their dismissal.

From 1 April 2011, the 90-day trial period for new employees covers all employers, instead of just those with fewer than 20 employees.

Employees are still able to bring a claim for sexual or racial harassment, discrimination, an unjustified action causing a disadvantage to their employment, duress and a failure to comply with the provisions for employees in a business transfer if dismissed during a trial period.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Except for “vulnerable employees” (in the context of an asset sale), there are no categories of employees who enjoy special protection against dismissal.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

An employer is able to dismiss an employee for their actions in circumstances including where the employee:

- has engaged in serious misconduct in the workplace (for example, theft, violence or fraud etc.);
- has, following the required prior formal warnings, engaged in general misconduct (for example failure to follow reasonable instructions, repeated lateness/absenteeism);
- has, following the required prior formal warnings, failed to meet the performance standards required of them; or
- is unable to perform the requirements of their position by reason of illness or incapacity.

An employer is able to dismiss an employee for business-related reasons in circumstances including where:

- the employer is selling, transferring or contracting out its business (or a part of it); or
- the employee’s position is genuinely surplus to its requirements (i.e. in a redundancy situation).

There is no statutory entitlement to severance pay in New Zealand. However, parties to an employment agreement may negotiate severance payment terms, which are then usually set out in the employment agreement.

#### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

The standards with regard to terminating an employee's employment are the same for all employers, regardless of industry and an employee's seniority or salary level. In any termination for cause in New Zealand, there are two considerations:

- (a) Is the termination substantively justified?
- (b) Is the termination procedurally fair?

There is a strong emphasis on procedure in New Zealand, which reflects the principles of natural justice. In all cases (whether disciplinary, poor performance or redundancy) any allegations, concerns or proposals must be put to the employee involved, and the employee must be given full opportunity to answer the concerns or provide feedback, before any final decisions are made. Employees should be advised by their employer of their right to have a representative/support person present at all meetings.

#### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

If an employee (outside of a trial period) disputes a dismissal he or she may lodge a dispute, personal grievance or a claim for breach of contract in the Authority. This could include a claim for:

- (a) unjustified disadvantage; and/or
- (b) unjustified dismissal.

In case of an unjustified dismissal, in most instances the remedies available in the Employment Relations Authority or the Employment Court are:

- (a) reinstatement;
- (b) compensation for humiliation, loss of dignity and injury to feelings;
- (c) loss of any benefit (money or non-monetary) that the employee might reasonably have been expected to obtain had he or she not been unjustifiably dismissed;
- (d) compensation for lost wages; and
- (e) a contribution towards legal costs.

Statistics published by the New Zealand Department of Labour for the period of 1 January 2010 to 30 June 2010 indicated that the most common awards for compensation (for humiliation, loss of dignity and injury to feelings) were between NZ\$2,000 to NZ\$6,000 in the Authority and between NZ\$8,000 and NZ\$11,000 in the Employment Court.

#### 6.8 Can employers settle claims before or after they are initiated?

It is common for claims in New Zealand to be resolved by way of negotiation between parties to a dispute or personal grievance claim, before proceeding to a hearing before the Authority (including with the assistance of mediation).

The New Zealand Department of Labour provides mediation services to employers and employees free of charge. These services can be accessed with the consent of both parties at any stage during an employment relationship, or after its termination.

See question 8.2 for the Authority's powers to direct parties to mediation.

#### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

There are no unique obligations that are explicitly triggered solely because of the number of employees being dismissed at the same time.

#### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees may elect to bring individual personal grievances and/or disputes, and there are no unique rights available to employees (or obligations on employers) in cases of mass dismissals. Employees (or union(s)) may bring a 'class action' (a combined claim) where there is a common set of facts giving rise to the grievances/dispute.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

In addition to the overarching obligations to protect confidential information (which are implied into all employment agreements), an employer may protect its proprietary interests by including a restraint of trade clause in its employment agreements. A restraint may contain prohibitions against either solicitation (of customers/clients/staff) or competition, or both.

### 7.2 When are restrictive covenants enforceable and for what period?

Restraints of trade should be used carefully as the New Zealand courts consider them to be inherently against the public interest and will only uphold them to the extent they are considered reasonable and necessary.

In most cases, a restraint against competition will only be reasonable for a period of three to six months. Non-solicitation restraints are commonly enforced for periods of up to 12 months.

The Authority or Employment Court may uphold or vary a restraint of trade clause, typically by reducing the period, scope or geographic extent of the restraint (pursuant to the New Zealand Illegal Contracts Act 1970).

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

At the outset of employment, the terms and conditions contained in the employment agreement will often be sufficient consideration for a restraint of trade.

In relation to existing employees with whom an employer wishes to negotiate restraints (or negotiate more onerous restraints), separate consideration is essential and is entirely a matter for negotiation.

### 7.4 How are restrictive covenants enforced?

A party seeking to enforce a restraint of trade covenant may commence injunctive proceedings in the Authority. If that party also seeks to join an employee's new employer as a defendant, it

must commence separate proceedings in the District or High Court, as the Authority has limited powers in respect of entities that are not a party to an employment relationship.

In addition to injunctive relief, a party may seek compensation for damages (including for an account of profits) and legal costs.

An employee who is subject to a restraint of trade covenant may also proactively seek a declaration from the Authority as to whether it is enforceable.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Authority is the primary entity to hear and determine employment relationship problems. The Authority is an investigative body that appoints an Authority member to establish the facts and make a determination according to the substantial merits of the case, without regard to technicalities.

Parties who are dissatisfied with the determination made by the Authority may “elect” to have the matter heard by the Employment Court. A party can decide whether it wants to have the hearing “*de novo*” (i.e., a full hearing of the case again, including calling witnesses) or as an appeal on a point of law.

Employment Court hearings are run by legally-qualified judges either sitting alone (which occurs most commonly) or as a “Full Court” (three judges) when hearing particularly complex cases or determining novel areas of the law.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The Authority aims to promote good faith behaviour, and is required to act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with the ERA or the relevant employment agreement.

Before proceeding to an investigation meeting, invariably the Authority will direct the parties to attend mediation (provided by the New Zealand Department of Labour). The vast majority of claims settle during the mediation process.

Should a matter not settle (at mediation or informally by negotiation between the parties), the process for resolving employment relationship problems is for the Authority to call together the parties at an investigation meeting and for the relevant witnesses on each side to make statements under oath. The Authority member will then question the witnesses. The only role of the lawyer or advocate present is to suggest lines of inquiry to the investigator and then to make any submissions on law at the end of the proceedings. From 1 April 2011, there will be a statutory right for the lawyer or advocate to cross-examine witnesses.

### 8.3 How long do employment-related complaints typically take to be decided?

Typically, the Authority or Employment Court issues a determination/judgment approximately up to six months after the hearing of a matter (sometimes longer). There are no statutory timeframes within which decisions must be issued, and the timeframe is influenced primarily by the Authority member’s or Judge’s workload.

More urgent determinations/judgments are made in cases where interim relief is sought (such as injunctions, applications for interim reinstatement or restraints of trade).

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Parties who are dissatisfied with the determination made by the Authority may “elect” to have the matter heard by the Employment Court. The party can decide whether it wants to have the hearing “*de novo*” (i.e. a full hearing of the case again, including calling witnesses) or as an appeal.

Parties who are then dissatisfied with a judgment of the Employment Court can, with the leave of the Court of Appeal, appeal to the Court of Appeal on a matter of law. The Court of Appeal may grant leave if, in the opinion of that court, the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

Similarly, parties who are dissatisfied with a judgment of the Court of Appeal can, with the leave of the Supreme Court (in limited circumstances), appeal to the Supreme Court on important questions of law.

Typically, it takes between six to twelve months from the date of an election to have the matter heard by the Employment Court, or an appeal to a higher court, before a hearing takes place. More urgent hearings are possible in cases where interim relief is sought (such as injunctions, applications for interim reinstatement or restraints of trade).

## Acknowledgment

This information is produced by Simpson Grierson. It is intended to provide general information in summary form. The contents do not constitute legal advice and should not be relied on as such. Specialist legal advice should be sought in particular matters.

**Phillipa Muir**

Simpson Grierson  
Lumley Centre, 88 Shortland Street  
Private Bag 92518  
Auckland 1141  
New Zealand

Tel: +64 9 977 5071  
Fax: +64 9 307 0331  
Email: [phillipa.muir@simpsongrierson.com](mailto:phillipa.muir@simpsongrierson.com)  
URL: [www.simpsongrierson.com](http://www.simpsongrierson.com)

Phillipa is a partner at Simpson Grierson and heads the employment law group. She acts for many of New Zealand's major corporations, tertiary institutions, and local government bodies.

Phillipa has successfully argued several leading cases in new areas of employment law. These include the first major damages claim brought by an employer against a union, the first successful stress damages case to go to the Court of Appeal, and the first employment law case to go to New Zealand's Supreme Court.

Phillipa is the co-author of leading employment law texts and a guest lecturer at the University of Auckland Faculty of Law.

- Asia Pacific Legal 500 Employment 2011 - Leading Lawyer.
- Chambers Global Employment 2011 - Leading Lawyer.
- PLC Which Lawyer? Labour & Employee Benefits 2010 - Leading Lawyer.
- The International Who's Who of Management Labour & Employment Lawyers 2010 - Leading Lawyer.
- AsiaLaw Leading Lawyers Guide 2009 - Leading Labour & Employment Lawyer.

**Carl Blake**

Simpson Grierson  
Lumley Centre, 88 Shortland Street  
Private Bag 92518  
Auckland 1141  
New Zealand

Tel: +64 9 977 5163  
Fax: +64 9 307 0331  
Email: [carl.blake@simpsongrierson.com](mailto:carl.blake@simpsongrierson.com)  
URL: [www.simpsongrierson.com](http://www.simpsongrierson.com)

Carl is a senior associate in the Simpson Grierson's employment law group. He provides strategic advice on all aspects of employment law, including corporate restructures, sales and purchases of businesses, personal grievances, employment agreements and policies, health and safety, human rights and privacy, accident compensation, and collective bargaining.

Carl regularly attends mediations on behalf of employers and has appeared before the Employment Relations Authority, Employment Court and Court of Appeal. His previous work experience at the Accident Compensation Corporation (ACC) and Human Rights Commission, gives Carl a broad understanding of ACC issues affecting employers and compliance issues with legislation, such as the Human Rights Act and Privacy Act.

Carl is a regular speaker at national employment law conferences and contributes regularly to leading business publications on employment law issues.



Simpson Grierson is one of New Zealand's leading full-service commercial law firms, providing expert, practical advice across all areas of commercial law. It has over 400 staff, including 48 partners, and more than 220 lawyers. Simpson Grierson has offices in Auckland, Wellington and Christchurch, and its large size means it can resource its teams with specialist lawyers in every commercial area.

Simpson Grierson is widely considered to have New Zealand's leading employment law practice. The Group's reputation extends globally and their diverse experience gives them the skills to handle every conceivable employment law issue.

Simpson Grierson's specialist employment law advice is called on by many of New Zealand's largest organisations in both the private and public sector (including many major government departments and local authorities). The firm's Employment Law Group also has a portfolio of major international corporate clients and regularly advises on cross-border employment transactions.

# Nigeria

Kunle Obebe



Dayo Adu



## Bloomfield-Advocates & Solicitors

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main sources of employment Law in Nigeria are (a) Nigerian legislation, i.e. the Labour Act (Cap. L1 L.F.N 2004), (b) received English law, and (c) Nigerian Case Law.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Ogundare JCA in NITEL v. Ikaro (1994) 1 NWLR (Pt. 320) 350 postulated that there are four types of workers protected by employment laws, these are: (1) manual and clerical staff (this class of workers do not have employment contracts); (2) employees with written contracts of employment; (3) public servants whose employment is provided for in a statute; and (4) public servants in the civil service. The first class is provided for by common law. The second class is governed by the terms of the contract, the third class is provided for by statute and the fourth class is guided by the Civil Service Rules.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Section 7 of the Labour Act provides that not later than three months after the beginning of a worker's period of employment, the employer shall give to the employee a written statement specifying the name of the employer and the undertaking by which he is employed, and setting out the terms and conditions.

Considering, however, that this Act does not apply to all groups of employees in Nigeria, it is possible, though not common, to find employment relationships that are entered into orally.

#### 1.4 Are any terms implied into contracts of employment?

Yes, there are terms that are implied into contracts of employment. These implied terms are derivable from statutes and judicial decisions. An example is a right to a minimum period of notice for termination of contracts. This is implied by the provisions of the Labour Act.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Subject to question 1.1 above, there are minimum employment terms and conditions regulating employers as provided for by relevant statutes, such as (a) termination by notice, (b) hours of work, (c) mode of payment as to wages, (d) holidays on certain days of the year, (e) collective agreements and (f) provision of transport allowance.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Terms and conditions of employment are agreed through collective bargaining to the extent that the employers are members of a Union. Trade Union membership in Nigeria is voluntary. Typically, bargaining takes place at the company level - in certain instances where there are employers' unions in certain industries, they engage the employee unions at an industry level.

### 2 Employee Representation and Industrial Relations

#### 2.1 What are the rules relating to trade union recognition?

Section 1(1) Trade Unions Act (Cap. T14 L.F.N 2004) provides that for a trade union to be recognised they must be registered, the law further provides that the trade union must have rules/constitution and their rules/constitution must be approved by the minister of labour.

#### 2.2 What rights do trade unions have?

The Trade Unions Act provides the following rights to employees: (a) the right to determine their membership; and (b) the right to a union office.

#### 2.3 Are there any rules governing a trade union's right to take industrial action?

Yes, Sections 3 and 5 of the Trade Dispute Act (Cap. T8 L.F.N 2004) provides the steps that have to be followed before an industrial action can hold.

**2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?**

No, work councils are not recognised in Nigeria.

**2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?**

Work councils are not recognised in Nigeria, therefore there is no requirement to obtain a works council agreement.

**2.6 How do the rights of trade unions and works councils interact?**

Work councils do not exist in Nigeria.

**2.7 Are employees entitled to representation at board level?**

No, employees are not entitled to representation at board level.

### 3 Discrimination

**3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?**

Yes, employees are protected against discrimination. There are no laws that specifically prohibit discrimination however the Constitution provides for freedom from discrimination regardless of sex, age, political affinity, religion, status, ethnic group or linguistic association or ties or circumstance of birth.

**3.2 What types of discrimination are unlawful and in what circumstances?**

The types of discrimination that are unlawful are discrimination against sex, age, ethnic group, political affinity, religion status, ethnic group or linguistic association or ties, circumstance of birth and, more recently, HIV status. Section 17 provides that all citizens, without discrimination, from any group whatsoever, have the opportunity for securing adequate means of livelihood as well as the adequate opportunity to secure suitable employment.

**3.3 Are there any defences to a discrimination claim?**

The courts have rarely been called upon to determine disputes in relation to discrimination claims with regards to employment. Therefore, there is a dearth of defences to discrimination claims.

**3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?**

Discrimination rights can be enforced via the relevant courts. Settlement can take place before or after the initiation of the claim.

**3.5 What remedies are available to employees in successful discrimination claims?**

The remedies available are: (a) reinstatement/promotion; (b) monetary damages; and/or (c) compensation.

## 4 Maternity and Family Leave Rights

**4.1 How long does maternity leave last?**

The Labour Act does not specifically provide for maternity leave, however, the leave is usually determined by the contract of employment. The practice is usually that the employee is granted a leave period of 3 months with or without pay depending on the contract of employment.

This clause must however be included in the contract of employment for it to be enforceable.

**4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?**

The rights are usually determined by the terms in the contract of employment.

**4.3 What rights does a woman have upon her return to work from maternity leave?**

The rights are usually determined by the terms in the contract of employment.

**4.4 Do fathers have the right to take paternity leave?**

The rights are usually determined by the terms in the contract of employment.

**4.5 Are there any other parental leave rights that employers have to observe?**

The rights are usually determined in the contract of employment.

**4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?**

Section 54(1) (d) of the Labour Act provides that nursing mothers shall be allowed half an hour twice a day during her working hours to attend to her baby. However, the employment contract may make provisions for work hour flexibility.

## 5 Business Sales

**5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?**

No, employees do not automatically transfer to the buyers.

**5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?**

Except where there is an agreement between the employer and the employee with regards to a business sale, no employee rights

transfer on a business sale. The new employer may decide to adopt the collective agreement from the previous employer or decide to negotiate a new collective agreement.

**5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?**

No, there are no information and consultation rights, however the purchaser of the business may decide to enter into consultation in order to enjoy a smooth transfer of the business. The time frame for the process would depend on the nature of the business to be transferred. There are no sanctions for failing to consult on a business sale except specifically provided for in a collective agreement.

**5.4 Can employees be dismissed in connection with a business sale?**

Yes, however the employer may need to pay compensation to the employees. This could be one month's wages or salary.

**5.5 Are employers free to change terms and conditions of employment in connection with a business sale?**

Yes, they are.

## 6 Termination of Employment

**6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?**

Yes, the notice period is determined by the terms of employment and the Labour Act.

**6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?**

"Garden leave" is not recognised under Nigerian law.

**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

The employee may file a civil action against the employer for wrongful dismissal and unless the employer has a reason for dismissal, the employee will be entitled to damages.

An employee is treated as being dismissed where he intentionally breaches fundamental terms of the agreement.

Consent from a third party is not required, however an employee has the right to contest the dismissal at the relevant court and employer must show that there was a fundamental breach.

**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

Yes, employment which is covered with statutory flavour enjoys special protection against dismissal.

**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

It is instructive to note that case law has differentiated between termination and dismissal of an employee.

In the case of termination, the employer does not need to give a reason for termination; however with regards to dismissal the employer must show that there was a fundamental breach of the employment contract.

Yes, compensation or damages are calculated as the sum of money the employee would have received if the employment was properly terminated which is usually one month's salary.

**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

The employer must give sufficient notice of termination or salary in lieu of notice.

However, if the employer dismisses the employee he must give reason for the dismissal. In the case of employment covered with statutory flavour, the procedure for dismissal as contained in the enabling law must be strictly adhered to.

**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

Employees can bring a claim for unlawful or wrongful dismissal. The remedies are (a) damages and/or (b) compensation.

**6.8 Can employers settle claims before or after they are initiated?**

Yes, employers can settle claims either before or after they are initiated.

**6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?**

No, it does not.

**6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

The employees may bring an action before the relevant court to enforce their rights; the employer may be liable to pay damages for the wrongful dismissal.

## 7 Protecting Business Interests Following Termination

**7.1 What types of restrictive covenants are recognised?**

The following types of restrictive covenants are recognised (a) non-competition and/or (b) restriction of use of confidential information.

## 7.2 When are restrictive covenants enforceable and for what period?

Restrictive contracts are enforceable if either party determines the contract; the duration wherein the restrictive covenant is enforceable is stated in the contract of employment.

## 7.3 Do employees have to be provided with financial compensation in return for covenants?

No, they do not.

## 7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced by the relevant courts.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The State high court, Federal high court and the National Industrial court have jurisdiction to hear employment-related complaints.

Each State of the federation has a State high court. The State high courts have unlimited jurisdiction. The Federal high court decides matters that affect Federal government agencies or parastatals. The National Industrial court determines issues relating to intra and inters union trade disputes, interpretation of collective agreements and awards of the industrial arbitration tribunal.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

No, conciliation is not mandatory before a complaint can proceed.

### 8.3 How long do employment-related complaints typically take to be decided?

There is no particular timeline for employment-related complaints to be decided.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

It is possible to appeal against a first instance decision; there is no specific time line for the appeals.



**Kunle Obebe**

Bloomfield-Advocates & Solicitors  
200 Muritala Mohammed Road  
Adekunle, Yaba, Lagos  
Nigeria

Tel: +234 1 738 8369  
Fax: +234 1 496 0466  
Email: [kunleobebe@bloomfield-law.com](mailto:kunleobebe@bloomfield-law.com)  
URL: [www.bloomfield-law.com](http://www.bloomfield-law.com)

Kunle is a Partner at Bloomfield-Advocate & Solicitors, a commercial law firm with offices in Lagos, Nigeria. Kunle is the head of the litigation and ADR practice group of the firm. He is a chartered company secretary and an associate member of the Chartered Institute of Arbitrators U.K.

He has written a number of published articles and books that shows his understanding of the intricacies of doing business in Nigeria. Kunle has consistently been nominated as one of the foremost lawyers in corporate immigration, regulatory compliance and employment law in Nigeria. He has successfully represented a number of employers of labour and employees before various courts in Nigeria.



**Dayo Adu**

Bloomfield-Advocates & Solicitors  
200 Muritala Mohammed Road  
Adekunle, Yaba, Lagos  
Nigeria

Tel: +234 1 738 8369  
Fax: +234 1 496 0466  
Email: [dayo.adu@bloomfield-law.com](mailto:dayo.adu@bloomfield-law.com)  
URL: [www.bloomfield-law.com](http://www.bloomfield-law.com)

Dayo is an associate at Bloomfield-Advocates and Solicitors, his practice areas are Civil Litigation and Employment law. He specialises in employment-related litigation and has defended a number of wrongful dismissal cases. He holds a law degree from Obafemi Awolowo University. He is also a professional negotiator and mediator.



Bloomfield is the foremost labour and employment law firm in Nigeria. The firm provides specialised employment advisory services to both local and multinational companies in Nigeria.

The firm provides advice to both employers of labour and employees. Our staff of Partners, Associates and Support Staff, provide professional service of the highest standard to our clients by combining awareness of the client's needs with a practical and constructive approach to legal issues. The ease of access to our Partners and accountability to our clients ensures that the firm is more client-focused, placing quality of service before growth.

The firm is presently advising a multinational mining company with regards to a review of its employee labour policies and ensuring compliance with Nigerian labour regulatory provisions. This advice is unique in the sense that the mining industry in Nigeria is a novel industry.



# Romania



Alina Deiac



Alexandru Lefter

## Pachiu & Associates

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main sources of employment law are the Labour Code (Law No. 53/2003), published with the Official Gazette No. 72/05.02.2003, as subsequently amended (the “**Labour Code**”) and the Collective Labour Agreement concluded at National Level (the “**CLA at national level**”) and the other collective labour agreements (“**CLA**”) concluded at industry and/or company level.

For all other labour-related matters, such as labour health and security, maternity leave, discrimination, trade unions, work conflicts, employment-related procedures, social security and so on, there are specific laws and regulations.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

There are two types of workers: (i) workers employed by private legal entities; and (ii) workers employed by institutions and authorities, therefore indirectly employed by the state.

The employment laws protect both categories of workers, but there are certain differences regarding the applicability of such legal provisions, as follows:

- The workers from the private system may negotiate details concerning their individual labour agreements (“**ILAs**”) within the limits set by applicable legal provisions, such as salary, holiday, work time etc. In this case, the general employment laws represent only the legal frame, whereas such workers may have a more flexible approach as regards the conditions of their specific labour positions.
- The labour relations applicable for the workers in the public system are ruled by special and derogatory legal provisions, solely concerning this category. Such workers may not negotiate and change the details regarding their employment; in other words, such employment is somewhat similar to an adhesion contract.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

The ILAs have to be concluded in writing in a standard form, in the Romanian language, based on the parties’ mutual consent prior to the commencement of the employment relations. The obligation to conclude the ILA in writing is incumbent to the employer.

Prior to the conclusion of ILA, the employer shall inform its

prospective employees of details in the ILA, such as job description, work place, salary or work time.

#### 1.4 Are any terms implied into contracts of employment?

The ILAs take a standard form that briefly includes the main and most important details regarding the employment.

The ILA shall provide for the most essential conditions of employment, such as (i) identification of the parties, (ii) position, (iii) work schedule, (iv) salary and other indemnifications, (v) details concerning holiday, (vi) trial period, (vii) notice period, and (viii) work place, as well as any other significant/special details.

If the parties agree upon different provisions from the minimum ones established by law, they must include such provisions within the ILA or within an addendum to the ILA, provided that the provisions are within legal limits.

Nonetheless, an employee may never waive his/her minimum legal rights as provided by labour legislation, not even in a direct and written form. If the ILA contains certain terms that are inconsistent with the minimum legal rights, such terms are deemed null and void, the minimum legal rights being applicable anyway.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The employers may negotiate with the employees the main details of the ILA but may not decide upon conditions less favourable than the ones set up by the law.

There are certain minimum terms and conditions that must be considered by the employers, such as salary, annual leave, minimum work conditions, maximum number of working hours per day/month, procedure in case of dismissal etc.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Minimum terms and conditions of employment are agreed within the CLA at national level which is applicable to all the employees. Further, the collective bargaining takes place also at industry levels and/or company level.

Within each company with at least 21 employees, the employer must initiate collective bargaining on a regular basis; however, the conclusion of a CLA is not mandatory.

During collective bargaining, the parties may agree upon certain terms and conditions of employment, but only if such terms and

conditions are more favourable to the employees than the ones established at a higher level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

Trade unions are independent legal entities, without a lucrative purpose, established for the protection and promotion of collective and individual rights of the employees that are trade union members.

Firstly, in order for a trade union to be recognised it must be registered with the territorial competent court of law. For such, at least 15 employees are required to sign the minutes of the organisation.

Secondly, to be considered representative and take part in the collective bargaining, certain requirements have to be fulfilled by the trade unions, these are:

- at company level, to be legally established and to include at least one third of the total number of employees;
- at group of companies level, to be a federation-type legally established trade union;
- at industry level, to be a representative organisation for that particular industry, including at least 7% of the number of employees in that respective industry; and
- at national level, to be a nationally representative trade union confederation that is (i) covering over 5% of the total number of the employees in the country; (ii) comprising of trade union federations' representatives in at least 25% of the economy; and (iii) comprising of its own trade union structures in more than half of the counties in Romania.

### 2.2 What rights do trade unions have?

Trade unions mainly have the following rights:

- to represent any employee in work conflicts arising with the employer, upon the employee's request. Even without an express mandate, trade unions have the right to undertake any action provided by law, including bringing to court an action on behalf of their members. However, the action may not be brought or continued by the trade union if the employee concerned opposes or waives the trial;
- to be consulted in case of collective dismissals and to receive relevant information on this matter. Moreover, it has the right to propose measures in order to avoid dismissals or to reduce the number of employees affected by collective dismissals;
- to be consulted by the employer regarding the preparation of the health and security measures and internal regulation;
- to assist an employee, who is a member of the trade union during the preliminary disciplinary inquiry;
- to negotiate and conclude collective labour agreements; and
- to declare a conflict of interest and strike and to participate in their solving.

Trade unions, in order to protect the interests of its members may use specific means, such as: negotiations; litigation solving procedures through mediation or conciliation; petitions; protests; meetings; demonstrations; and strikes.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

A trade union is entitled to take industrial action if it considers such measure to be in the best interest of the represented employees.

The main industrial action available to a trade union is the strike. A strike can be declared only if it was notified to the employer with at least 48 hours in advance. A court decision may suspend or revoke the strike.

There are 3 types of strikes: (i) warning strike; (ii) proper strike; and (iii) solidarity strike.

A proper strike represents the collective and voluntary cessation of work by employees of a company, or within a certain industry.

The warning strike cannot exceed 2 hours. At least 5 days must separate a warning strike and a proper strike. The solidarity strike cannot exceed 24 hours.

Certain rules are set for the energy and public sector's employees that must ensure 1/3 of activity in case of a strike. Also, certain categories of public personnel, such as prosecutors, judges and military personnel may not initiate strikes.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Works councils may be set up only following EU regulations regarding employers/groups of employers.

Such employers must offer the proper conditions for negotiation regarding the set up of the works councils or the set up of the information and consulting procedure.

Such negotiations may be initiated by the employer, or the employees may request the establishment of a works council. The request of the employees is to be addressed to the central management.

As regards work councils, Romanian legislation provides such entities with the sole purposes of informing and consulting employees.

The members of the works councils are employees appointed either by the representatives of the employees or elected directly by the employees, if there are no such representatives. The number of members must be between 3 and 30, with representatives of both genders, and should provide at least one representative of each European Member State where the employer has affiliates. According to the number of employees in a particular State, one or more additional representatives may also be appointed.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

The works councils must be informed regarding any measures that the company or group of companies intend to take, directly or indirectly affecting the interests of the employees.

The works councils do not have, according to the Romanian legislation, any co-determination rights regarding the measures to be taken by the employer.

### 2.6 How do the rights of trade unions and works councils interact?

The trade unions or the representatives of the employees are entitled to appoint the members of the works councils, in compliance with

the legal conditions regarding the number and capacity of such members.

After the set up of the works councils, such councils shall collaborate with the trade unions or the representatives of the employees in order to simplify the procedures of informing and consulting with the employees on any measures and/or issues pertaining to the employee's interests.

### 2.7 Are employees entitled to representation at board level?

The employer must invite the representatives of the employees to the Board of Directors' meetings when there are issues that may affect the employees, from a professional, economic, social, cultural or sportive point of view. However, such representatives do not have any decisional right as there is no obligation to appoint employees of the company as members of the Board of Directors.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The employer must comply with the principles of equal treatment, non-discrimination and equal opportunities for all its employees.

Direct or indirect discrimination towards an employee, based on criteria such as sex, sexual orientation, genetic characteristics, age, national origin, race, colour of skin, ethnic origin, religion, political orientation, social origin, disability, family conditions or responsibilities, trade union membership or activity is prohibited.

### 3.2 What types of discrimination are unlawful and in what circumstances?

The employer must observe and respect non-discrimination principles when concluding the ILA and for the entire term of the ILA, as well as when terminating the ILA. Any type of discrimination on the grounds mentioned hereinabove is considered unlawful and may be sanctioned by Romanian courts of law and by the National Council for Fighting Discrimination.

### 3.3 Are there any defences to a discrimination claim?

If a discrimination claim has been registered with the competent court of law, the sole defence for the employer is to prove, with testimonies, written documents and other accepted evidences, that no measures or actions were taken towards the employee based on discriminating views, but based on objective grounds related to his/her actions and/or activities within the company.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Provided an employee considers any discrimination is being exerted in his/her regard and informs the employer accordingly, the employer may settle such claim by taking the necessary measures to protect the employee from discrimination.

Further, if the employees consider that they have been discriminated, they are entitled to file a formal complaint with the National Council for Fighting Discrimination, within one year as of the date when the discriminatory action took place, or from the time he or she learned of such action.

If the employee is still not satisfied with the result of the complaint, he or she is entitled to file a discrimination claim to the competent court of law. The claim may be settled amicably by the parties, if they reach an agreement, even after the litigation is initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

An employee who has proven that he or she has been discriminated may request and obtain (i) special (moral) and/or compensatory damages, (ii) re-installment in the *statu quo ante* position, or (iii) cancellation of the discriminatory situation.

Further, in case of dismissal on discrimination grounds, the employee may request to be reinstated in his/her former position.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Maternity leave consists of 126 calendar days, usually 63 days before birth – pregnancy leave and 63 days after birth – nursing leave. Both nursing and pregnancy leaves may be compensated between each other, according to the doctor's order and the mother's option. Nonetheless, the nursing leave must not be less than 42 calendar days.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Employees who have fulfilled the minimum time of subscription to the Sole National Fund for Health Social Insurances may benefit from a maternity indemnity. The minimum time of subscription is for 12 months prior to the maternity leave.

As an exception, employees giving birth within 9 months since they ceased to be insured for reasons unrelated to their person are entitled to receive the maternity indemnity.

Also, the employee shall receive, for at least 6 months, compensation consisting of the difference between the individual base salary she is entitled to and the legal maternity indemnity, paid by the employer.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

For a period of a minimum of 6 months, as of the return of the employee from maternity leave, the employee may not be dismissed for being professionally unfit.

Pregnant employees or employees who have returned from nursing leave or who are breastfeeding and are working in hazardous conditions, are entitled to a relocation to a safer position, or the improvement of working conditions. If neither is possible, the employee is entitled to maternity risk leave for up to 120 days.

Women that have recently given birth or are breastfeeding may not be compelled to perform night work.

### 4.4 Do fathers have the right to take paternity leave?

Fathers are entitled to benefit from paternity leave, for 5 calendar days. The paternity leave shall be awarded upon request, within the first 8 weeks after the birth of the baby.

If the father has graduated from a course concerning the rearing of

children, he is entitled to additionally obtain 10 calendar days as paternity leave.

In the situation in which the mother dies at birth or during the nursing leave, the father is entitled to the rest of the mother's leave, receiving the correlative indemnity.

#### 4.5 Are there any other parental leave rights that employers have to observe?

Either the mother or the father may, upon request, benefit from child-caring leave, for a period of time until the child has reached the age of 1 or until the age of 2 but with a smaller indemnity.

Employees having a disabled child may benefit from child-caring leave until the child reaches the age of 3.

#### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Pregnant employees may benefit from a maximum number of 16 hours per month for pre-natal consultations.

Employees that are breastfeeding benefit from two work breaks, each of one hour, for breastfeeding, until the child reaches the age of 1. Such two hours may be granted as a shortening of the work programme upon employee's request.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Yes, Romanian legislation has transposed the Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employee's rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. Transposing was made by Law No. 67/2006 on the protection of employees' rights in case of transfer of business, units or parts thereof, published in the Official Gazette No. 276/28.03.2006 ("Law No. 67/2006").

According to Law No. 67/2006, a transfer of undertaking occurs if the ownership over a business or part of a business is transferred from a transferor company to a transferee company with the objective of keeping such undertaking in operation after the transfer. As a consequence of such transfer, the employees are automatically transferred to the buyer.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The transferee company has to takeover all individual and collective labour agreements concluded between the transferor company and its employees. The employees must enjoy the same rights they had prior to transfer, and the provisions of the ILAs concluded between the transferor company and the employees remain valid.

The transferee company has to observe that the transferred employees are not granted rights that are inferior to those they had under the ILAs and under the CLA concluded with the transferor company.

As regards the CLA, the transferee company may only renegotiate the transferor company's CLA after one year as of the takeover date.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The transferor has to inform the transferee of all the rights and obligations that are to be transferred.

Moreover, 30 days prior to the takeover date, the transferee and transferor must inform, in writing, their employees about: (i) the envisaged takeover date, including takeover reasons; (ii) the legal, economic and social consequences of the transfer; (iii) the decisions affecting the employees; and (iv) the working conditions to be provided upon takeover.

In case such transfer affects the employees, the employer has to consult the trade union/employees' representatives with a view to reaching an agreement at least 30 days prior to the transfer date.

The transfer of the employees takes a minimum period of 30 days, considering the information and consultation that have to be taken care of.

Further, non-compliance with the provisions regarding the transfer of an undertaking results in a fine of RON 1,500 up to RON 3,000 (approx. EUR 350 up to EUR 700).

### 5.4 Can employees be dismissed in connection with a business sale?

The business sale may not represent a dismissal reason. All the employees have to be transferred, and the transferee may not claim any individual or collective dismissal of the transferred employees based on the occurrence of the transfer.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

The employers may not change the labour conditions of the transferred employees, without the prior approval of the employees. Any amendments to the terms and conditions of employment have to be included in the ILA or in an additional act to the ILA.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

An ILA may be terminated: (i) by law; (ii) by mutual consent; (iii) upon the employees' initiative; or (iv) upon the employers' initiative.

As regards the employer's initiative, it is not allowed to dismiss an employee without a cause, even if the employee is granted compensation and an extended notice period. Considering such, an employee may be dismissed only in the following limited situations:

- i. employee's disciplinary misconduct;
- ii. employee's professional incapacity;
- iii. the closing of the employee's position;
- iv. employee's physical/mental incapacity; or
- v. if the employee is in police custody for more than 30 days.

In case of points ii – iv hereinabove, the employer has to give a notice of termination and grant to the employee a prior notice of at least 20 working days. The applicable CLA at industry and/or company level, as well as the ILA may provide for an extended notice period.

**6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?**

It is possible to serve a period of “garden leave” only if the employee agrees to such period. Otherwise, the employer may not limit the right of an employee to work, even during the notice period.

**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

The Labour Code expressly provides the situations in which an employee may be dismissed. In each case dismissal must be grounded under a dismissal decision and a formalistic procedure must be strictly observed.

Further, the employer has to sustain the necessity and grounds of dismissal in case of litigation. There is no need to obtain third party consent. However, in case of dismissal for disciplinary misconduct and professional incapacity, the employer has to establish a commission that should propose the dismissal.

Moreover, in case of dismissal for the employee’s physical/mental incapacity, a decision of the competent medical experts has to be taken.

**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

The Labour Code provides for situations in which the dismissal of an employee is not possible. According to such, it is not allowed to dismiss an employee:

- based on criteria such as gender, sexual orientation, genetic characteristics, age, national origin, race, colour of the skin, ethnic group, religion, political options, social origin, disability, family status or responsibility, trade union membership or activity; or
- for the exercise, under the law, of the right to strike and of the trade union rights.

Moreover, it is forbidden to dismiss an employee in the following cases:

- during illness leave, attested by a medical certificate;
- during quarantine leave;
- during the entire period when the employed woman is pregnant, provided that the employer found out about her pregnancy before the issuance of the dismissal decision;
- during maternity leave;
- during the leave for raising a child up to the age of 2 years’ old, or in the case of a disabled child, up to the age of 3 years’ old;
- during the leave for nursing a sick child up to 7 years’ old, or in the case of a disabled child, for undercurrent illnesses, until the child turns 18 years’ old;
- during military service;
- during the exercise of an elected position within a trade union body, except for the case when the dismissal is ordered for a serious disciplinary misconduct or repeated disciplinary misconducts; or
- during annual leave.

However, such interdictions are not applicable in case of dismissals due to the insolvency of the employer.

**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

Under labour law, the dismissal for (i) employee’s disciplinary misconduct, (ii) employee’s professional incapacity, (iii) employee’s physical/mental incapacity, and (iv) if the employee is in police custody for more than 30 days is considered to be related to the individual employee, whilst the dismissal due to the closing of the employee’s position has a business related reason.

The latter can be either individual or collective, if a certain number of dismissed employees is reached.

In case of dismissal due to (i) the employee’s professional incapacity, (ii) the employee’s physical/mental incapacity, and (iii) the closing of the employee’s position, the employer has to grant the dismissed employee a compensation of at least one month’s salary, according to the CLA at the national level.

The applicable CLA at industry and/or company level, as well as the ILA may provide for a larger amount of the compensation.

**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

In each dismissal case, the employer has to issue a dismissal decision, which has to be communicated to the employee and provide for certain mandatory elements, such as the dismissal reasons, the prior notice period etc.

Furthermore, in case of dismissal due to the employee’s disciplinary misconduct and the employee’s professional incapacity, the employer has to observe formalistic procedures provided by Labour Code and CLA at national level.

In the first case mentioned in the above paragraph, the employer has to carry out a preliminary disciplinary inquiry, and in the latter, an evaluation of the employee has to be performed. Both, the preliminary disciplinary inquiry and the evaluation are performed by commissions established by the employer, for such purpose.

**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

Each employee has the right to challenge, before the courts of law, the dismissal decision issued by the employer. In case of litigation, the employer has to prove that the dismissal reasons existed and justified the dismissal of the employee. In case of an unfair dismissal, the court may impose the reinstatement of the employee to the position previously held prior to the dismissal and the payment of the salaries up to the date of reinstatement.

Moreover, if requested, the court may impose on the employer the payment of special (moral) / compensatory damages and/or court expenses.

**6.8 Can employers settle claims before or after they are initiated?**

Pecuniary claims may be settled before or after they are initiated. However, under the Labour Code, an employee may not waive the rights granted by law, one of the rights being the challenge of a dismissal decision issued by the employer. Any transaction by which the employee waives such rights is null and void.

Considering such, it is difficult to settle reinstatement claims before

or after they are initiated as such settlement would equal re-employment. However, courts of law allow the amiable settlement of claims.

#### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Collective labour dismissal requires a formalistic procedure and applies in the event of termination of the ILA by the employer, considering the closing of the employee's position, in a period of 30 days, of a minimum of:

- 10 employees in case the employer has between 20 and 100 employees;
- 10% of the employees, in case the employer has between 100 and 300 employees; or
- 30 employees, in case the employer has at least 300 employees.

In case of CLAs, the employer must consult the trade union/employees' representatives regarding the intended collective dismissal and notify the labour authorities of such dismissal.

#### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

In case of mass dismissal, as in the case of individual dismissal, if the employer fails to comply with its obligations, the dismissed employees have the right to challenge the dismissal decision in court as of 30 calendar days as of the communication of the dismissal decision. Further, in case the employer has failed to pay the mandatory compensation, the employees have the right in court to request the payment within 3 years as of the date when such payment was due.

### 7 Protecting Business Interests Following Termination

#### 7.1 What types of restrictive covenants are recognised?

Under Romanian Law, during the term of the ILA, an employee may undertake a fidelity obligation (not to work for a competitor of the employer) and after the termination of the ILA, a non-competing obligation. In the latter case, following termination of the ILA, the employee will be under an obligation not to undertake any activity in his/her own interest or in the interest of a third party, which may compete with the activity performed for the benefit of the former employer, nor to perform activities on behalf of the former employer's competitors.

#### 7.2 When are restrictive covenants enforceable and for what period?

The non-competing obligation undertaken by an employee is valid only after the termination of the ILA for a maximum period of two years. The fidelity obligation, if agreed, is valid for the entire duration of the ILA.

#### 7.3 Do employees have to be provided with financial compensation in return for covenants?

The non-competing clause is valid only if the former employer pays the former employee a non-competing indemnification. The non-competing indemnification must amount to at least 50% of the

average gross salaries of such employee for the last six months prior to the termination date of the ILA. Such indemnification shall be paid on a monthly basis, during the whole period of such covenant. There is no mandatory indemnification in case of the fidelity obligation.

#### 7.4 How are restrictive covenants enforced?

For the enforcement of a non-competing obligation, the parties must expressly provide in the ILA or in an addendum to the ILA certain elements stipulated by law, such as: (i) the prohibited activities; (ii) any third party in favour of whom the employee is restricted to perform such activities; (iii) the period of time for which the non-competing clause will produce effects; (iv) the amount of the non-competing monthly indemnification; and (v) the geographic area where the employee can be in real competition with the former employer.

### 8 Court Practice and Procedure

#### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Employment-related complaints are settled in first instance by the tribunal, competent within the range of the claimant's domicile/residence or headquarters, where special labour sections are established. In first instance, the cases are settled by a panel formed by a judge and two judicial assistants. In appeal, the case is heard by a panel of three judges.

#### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The employment-related complaints have to be settled in an emergency regime. The claims are exempted from the judicial stamp fee and a judicial stamp. Further, hearing terms cannot exceed 15 days. The employer has the burden of proof and the legal summoning procedure can be performed 24 hours prior to the hearing date. The evidence must be submitted to court before the first day of appearance in court of the parties.

The conciliation is not mandatory before a complaint can proceed. However, it is possible, with the agreement of the parties, for the complaint to be forwarded to mediation. If mediation fails, the case shall continue.

#### 8.3 How long do employment-related complaints typically take to be decided?

Even if the complaints have to be judged with urgency, a case may take up to two to three years, if a second appeal is filed. However, it is possible to have a complaint settled within a year, if no second appeal is filed.

#### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

The decisions of the tribunal can be appealed at the Court of Appeals, where special labour sections are also established. The decision of the Court of Appeals is final and usually takes a year to be settled. However, the appeal does not stay the enforcement of the first instance court decision.

**Alina Deiac**

Pachiu & Associates  
4-10 Muntii Tatra Street, 5th floor  
Bucharest 1, RO 011022  
Romania

Tel: +40 21 312 1008  
Fax: +40 21 312 1009  
Email: [alina.deiac@pachiu.com](mailto:alina.deiac@pachiu.com)  
URL: [www.pachiu.com](http://www.pachiu.com)

**Alina's** educational background includes a BA at the Law School of West University in Timisoara and a Master of Business Law at the Bucharest University, Faculty of Law.

Alina is a senior member of the Bucharest Bar Association and member of the National Romanian Bars Association.

Alina is currently a member of the Corporate and M&A and Labour Law Departments of the firm and provides legal assistance in various matters related to labour and corporate law, as well as related to merger & acquisitions' projects.

Her experience in labour law includes drafting and negotiation of individual labour agreements, management agreements, collective labour agreements, internal regulations and providing legal assistance related to the individual and collective dismissals of employees, as well as regarding the transfer of employees. Furthermore, she provides representation in employment related disputes before Romanian courts.

Alina is fluent in English and conversant in Spanish.

**Alexandru Lefter**

Pachiu & Associates  
4-10 Muntii Tatra Street, 5th floor  
Bucharest 1, RO 011022  
Romania

Tel: +40 21 312 1008  
Fax: +40 21 312 1009  
Email: [alexandru.lefter@pachiu.com](mailto:alexandru.lefter@pachiu.com)  
URL: [www.pachiu.com](http://www.pachiu.com)

**Alexandru** graduated from the Law School of the Bucharest University in 2004. He completed the Business Law Course of the French-Romanian Institute of Business Law and International Cooperation Nicolae Titulescu - Henri Capitant (which is a partnership between the Law School of Bucharest and University I - Pantheon Sorbonne) and is about to graduate with an LLM with from Suffolk University Boston.

Alexandru is a senior member of the Bucharest Bar Association and member of the National Romanian Bars Association.

Alexandru is a partner of the firm and is currently head of the Corporate/M&A, Competition and Labour Law Departments of the firm.

In the Labour Law field, Alexandru has acquired an extensive expertise in drafting individual labour agreements and addendums thereto, collective labour agreements, internal rules and legal opinions. Moreover, he assists in matters regarding collective or individual dismissals (disciplinary included) of employees or regarding the procedures to be followed in the event of a take-over of the employer's business or part thereof. Alexandru is fluent in English and conversant in French.

## PACHIU & ASSOCIATES

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Pachiu & Associates is a Bucharest-based business law firm established by Romanian attorneys that provides for a full range of commercial and corporate legal advice. The firm currently consists of 20 lawyers (including 5 partners), plus additional staff comprising paralegals, authorised translators and supportive staff. The lawyers of the firm are all graduates of leading universities in Romania or abroad. All the lawyers are members of the Bucharest Bar Association and of the National Romanian Bars Association. All lawyers are fluent in Romanian and English, and some are fluent in German, French, Italian or Spanish.

The firm has extensive expertise in matters related to mergers and acquisitions, corporate governance, corporate disputes, securities, insolvency, commercial contracts, offshore and tax structures, labour law, real estate, anti-trust law, intellectual property, banking and project financing, secured transactions, cross-border transactions, public acquisitions, procurement, and litigation. Apart from its consistent mergers & acquisitions and cross-border transactions practice, the firm has developed a strong practice in labour law and related issues, having a sound and highly effective team active both on consultancy and, when required, litigation.

The firm maintains a close relationship with some leading multinational law firms and other small and medium-sized law firms from abroad, so as to ensure efficient liaison with important foreign business centres and jurisdictions.

# Singapore

Khattar Wong

Deborah Evaline Barker



## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

There are two main sources of employment law, the common law (which was imported into Singapore in 1826) and various statutes which impact on the employment relationship and provide certain protections to employees, including the Employment Act, the Central Provident Fund Act, the Industrial Relations Act, the Trade Unions Act, the Trade Disputes Act, the Work Injury Compensation Act, the Workplace Safety and Health Act, the Children Development Co-Savings Act, the Employment of Foreign Manpower Act, and the Retirement Age Act.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The protections given by the Employment Act extend to those employed in non-managerial and non-executive positions only, with the exception that managers and executives receiving a salary not exceeding S\$2,500.00 per month are covered by only some of the provisions of this Act. In addition, Part IV of this Act contains minimum conditions for rest days, hours of work, overtime and other conditions of service which apply only to workmen receiving a salary not exceeding S\$4,500.00 a month and other employees receiving a salary not exceeding S\$2,000.00.

Under the Industrial Relations Act a distinction is also made between persons in managerial or executive positions and other employees. A trade union of employees, the majority of whose membership comprises employees in non-managerial or non-executive positions, is not entitled to seek recognition in respect of employees in managerial or executive positions and may not serve a notice for collective bargaining in respect of the latter class of employees. A recognised trade union whose membership comprises a majority of employees in non-managerial and non-executive positions may represent employees in executive or managerial positions individually and not as a class for certain specified purposes only. In addition the classes of employees protected include older workers (who cannot be retired below the age of 62) employees who are officers or members of a trade union (who are protected from dismissal in certain circumstances) and female employees (who are accorded maternity protection and benefits under the Employment Act).

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Contracts of employment do not have to be in writing. There is no requirement for employees to be provided with specific information in writing.

### 1.4 Are any terms implied into contracts of employment?

There are various implied terms. It is an implied term that either party may terminate the contract by giving reasonable notice, in the absence of express provisions for termination by notice or a fixed period of employment or provisions to the contrary. The employee is subject to an implied duty of good faith or fidelity which includes a duty not to disclose or make use of the employers' trade secrets or confidential information. An employer has a duty to pay the employee's salary and provide a safe working environment. It is also arguable that the implied term of mutual trust and confidence developed by the English courts is applicable in Singapore.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

There are various minimum terms and conditions applicable to employees in non-managerial or non-executive positions imposed by the Employment Act. These include minimum periods of notice of termination, automatic transfer of employment upon the transfer of an undertaking, various minimum standards regards the payment of salary, including the time within which salary and overtime must be paid during employment and on dismissal, a prohibition against making deductions from salary other than those permitted under the Employment Act, child care leave, rest days and sick leave entitlement. In addition, for employees coming under Part IV of the Employment Act there are rules on minimum rest days and maximum hours of work, overtime and annual leave.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Under the Industrial Relations Act, provision is made for unions of employees to be given recognition by employers and a recognised trade union to initiate negotiations for a collective agreement. Collective bargaining usually takes place where the employer is a large company or organisation (e.g. a bank, an airline or manufacturing facility) and the majority of its employees are



unionised. Collective bargaining more commonly takes place at the company level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

In order to gain recognition, the trade union must serve a claim in the prescribed form. If the employer refuses to recognise the trade union, the Commissioner for Labour may elect to take a secret ballot to determine whether the trade union represents a majority of the employees employed at the date of the claim for recognition. If the secret ballot shows that a majority of employees are members of a particular trade union, the employer must give recognition to that trade union within 3 days of the result. When a secret ballot has been conducted, no further claim for recognition can be served within 6 months.

### 2.2 What rights do trade unions have?

Trade unions have the right to serve a notice to initiate collective bargaining to procure a collective agreement. A trade union also has the right to initiate arbitration of a trade dispute by the Industrial Arbitration Court. A trade union may also act on behalf of executive employees individually and not as a class for specific purposes including negotiating with the employer to resolve issues relating to retrenchment benefits or a breach of contract. A trade union may also initiate tri-partite mediation (i.e. a special mediation process) on behalf of an executive or manager earning less than S\$4,500.00 per month who is a member of a trade union which has not been recognised. A trade union can also initiate industrial action by its members in limited circumstances.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

A trade union's right to take industrial action (including any strike or lock out) is governed by the Trade Disputes Act. It is illegal for a trade union or its members to take industrial action if: (a) it is for a purpose other than the furtherance of a trade dispute within the trade or industry in which the participants are engaged; (b) the trade dispute has already been submitted to the Industrial Arbitration Court has cognisance over the dispute; or (c) industrial action is designed to coerce the government by inflicting hardship on the community. A person who engages in or instigates illegal industrial action will be guilty of an offence, the penalty for which is a fine or imprisonment.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There are no statutory provisions requiring employers to set up works councils.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable in Singapore.

### 2.6 How do the rights of trade unions and works councils interact?

This is not applicable in Singapore.

### 2.7 Are employees entitled to representation at board level?

No, they are not.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

As stated above, there are statutory provisions which provide limited protection to employees against discrimination on the ground of age (the Retirement Age Act), participation in trade union activities (Industrial Relations Act) and pregnancy (the Employment Act and the Children Co-Development Savings Act). There are no statutory provisions protecting employees as a class against discrimination. However, the constitution of Singapore provides protection to Singapore citizens against discrimination on the grounds of religion, race, descent or place of birth.

### 3.2 What types of discrimination are unlawful and in what circumstances?

It is an offence for an employer to dismiss an employee on the ground of age before the prescribed retirement age, to dismiss or threaten to dismiss an employee on the basis of his membership of a trade union or his lawful trade union activities or to dismiss a female employee on maternity leave. Article 12 of the Constitution provides that there shall be no discrimination against Singapore citizens on the grounds of religion, race, descent or place of birth in any law, in the appointment to any office or employment under public authority, in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

### 3.3 Are there any defences to a discrimination claim?

The employer may resist liability for the offences referred to above or defend a civil claim based on discrimination by proving that he has not been guilty of the conduct complained of. To resist a civil claim for discrimination, the employer could also defend on the basis that he has not breached any express or implied obligation of the employment contract or any duty owed to the employee.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

There is no special procedure available to employees to enforce discrimination claims. An aggrieved employee who is not a manager or executive may lodge a complaint with the Ministry of Manpower, which will usually require an explanation from the employer although it has no right to impose any sanctions. Unionised employees may refer such a complaint to their trade unions. An employee who wishes to make a claim based on discrimination may institute legal proceedings for breach of contract on the ground that the employer had breached its express or implied terms of the employment contract. Discrimination

claims by employees are not common in Singapore. The employer is free to settle any such claims before or after they are initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

If legal proceedings are commenced, the remedy available is damages i.e. compensation for any losses which the employee can prove were caused by the employer's wrongful conduct.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

For employees covered by the Employment Act, there is provision for 12 weeks' maternity leave. A longer period of 16 weeks' maternity leave is made available under the Children Development Co-Savings Act to all employees who meet certain criteria, including the requirement that the child born is a Singapore citizen.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A female employee coming under the Employment Act is entitled to be paid salary for 8 weeks of her maternity leave, provided she meets certain conditions. Under the Children Development Co-Savings Act, a female employee who meets certain criteria is entitled to payment of her salary for a period of 16 weeks' maternity leave (and the employer can seek reimbursement from the Government of part of the amount paid). If a woman works on any day during her maternity leave, she is entitled to payment for the day worked or an additional day of maternity leave. It is unlawful for an employer to dismiss a woman during her maternity leave. A notice of dismissal given without sufficient cause during the period of 6 months preceding the date of confinement or her estimated delivery date will not deprive a female employee of any maternity benefit under the Employment Act or the Children Development Co-Savings Act. Similarly, a notice of dismissal by the employer on the ground of redundancy during the period of 3 months preceding her confinement or estimated delivery date will not deprive a female employee of her maternity benefits.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

After maternity leave, a woman will return to her job on the same terms and conditions. She does not have any special rights, apart from the rights to childcare and infant care leave described below.

### 4.4 Do fathers have the right to take paternity leave?

There is no provision for paternity leave but an employee who has worked for not less than 3 months and has a child below the age of 7 is entitled under the Employment Act to paid childcare leave of 2 days per year capped at 14 days of childcare leave per child. The Children Development Co-Savings Act provides for enhanced childcare leave. Where certain criteria are met, paid childcare leave of 6 days per year for each child below the age of 7 capped at 42 days is available (and the employer can claim reimbursement from the Government for half of the amount paid). In addition, the Children Development Co-Savings Act makes provision for up to 6 days unpaid infant care leave for children below the age of 2 years where certain criteria are met, up

to a maximum of 12 days for each qualifying child. Childcare leave and unpaid infant care leave are available to both parents.

### 4.5 Are there any other parental leave rights that employers have to observe?

The parental leave rights available are maternity leave, childcare leave and unpaid infant care leave.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

There is no such right. An employee must negotiate this with his employer.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

The employment contracts of all employees in non-managerial and non-executive positions will be automatically transferred to the transferee upon a transfer of an undertaking (i.e. any trade or business). This will usually occur where there is a sale of a business as a going concern or an amalgamation, merger or reconstruction of companies. A share sale, however, will not involve the transfer of an undertaking.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The Employment Act provides that upon a transfer of an undertaking the contracts of employees in non-managerial or non-executive positions will continue as if originally made between the employee and the transferee, and any period of employment with the transferor will be treated as period of employment with the transferee. All the transferor's right, powers and duties and liabilities under the employment agreement will be automatically transferred to the transferee and any act or omission by the transferor shall be deemed to have been done by the transferee. Any applicable collective agreement will not be affected, as the transferor's obligations thereunder will automatically be transferred to the transferee. Further any trade union recognised by the transferor will be deemed to be recognised by the transferee. On a share sale, however, there will be no transfer of employees' rights.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

If a transfer of an undertaking is projected, the transferor has an obligation to provide specific information to the affected employees and their trade union/s as soon as it is reasonable and before the transfer takes place. The information to be provided includes the fact that the transfer is to take place, the approximate date and the reasons for it; the implications of the transfer and whether any measures will be taken by the transferor or the transferee. The transferor has an obligation to provide information to the transferee to enable it to fulfil its obligation. These obligations to inform do not apply to a share sale.

The transfer of an undertaking may take anywhere between a few months to a year. If either the transferor or the transferee has been guilty of inordinate delay in providing the prescribed information

the Commissioner of Labour can direct the transferor or the transferee to do so within a specified period. A breach by the transferor or transferee in complying with its obligations to provide information will constitute a breach of the Employment Act for which a fine of S\$5,000.00 may be imposed.

#### 5.4 Can employees be dismissed in connection with a business sale?

Managerial or executive employees may be dismissed in connection with the transfer of an undertaking. As for non-managerial and non-executive employees, they may be dismissed by the transferor before the transfer of the undertaking or by the transferee after the same. However, a dismissal which is too close to the date of transfer may be challenged. (There is no restriction on dismissals in connection with a share sale.) If any dismissals constitute retrenchment, the employees will be entitled to receive such retrenchment benefits as may be provided for under their employment contracts or any applicable collective agreement.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Managerial or executive employees are not automatically transferred in the event there is a transfer of undertaking. Their employment by the transferee is a matter to be negotiated by employee and new employer. Non-managerial or non-executive employees will be automatically transferred by a transfer of undertaking on the same terms and conditions as applied previously and employers are not free to change the terms and conditions of the employment. Any change after a transfer must be negotiated by the employer with the employees. In the event of a share sale, employment contracts will not be affected and any changes will have to be negotiated.

## 6 Termination of Employment

#### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

An employee has to be given notice of termination, unless he is dismissed for gross misconduct or a serious breach of a condition of his employment contract or if his contract is terminated in accordance with its terms or if he is paid salary in lieu of notice.

The period of notice may be specified in the contract and if not specified, a reasonable period of notice must be given. What constitutes a reasonable period of notice depends on the circumstances, including the seniority of the employee's position and his length of service. For employees under the Employment Act, minimum periods of notice must be given, running from 1 day's notice for those employed for less than 26 weeks to 4 weeks' notice for those employed for 5 years or more.

#### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

There is no statutory prohibition against employers requiring employees to serve a period of "garden leave". Whether or not the employer may require an employee to go on "garden leave" depends upon the terms and conditions of employment.

#### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

If an employee under the Employment Act considers that he has been dismissed without just cause or excuse he may within 1 month of dismissal make representations to the Minister of Manpower for reinstatement. Under the Industrial Relations Act, an employee has a similar right to make representations through his trade union. The Minister in both situations has the power to direct the employer to reinstate the employee and/or pay the employee an amount equivalent to any wages lost. There are no statutory provisions stipulating when an employee is to be treated as dismissed or prohibiting unfair dismissal. Generally, an employee is said to have been dismissed when his employment is terminated with immediate effect on the ground of breaches on his part or misconduct. The term "dismissal" is, however, sometimes used loosely to cover termination by notice. Consent by a third party is not required before an employee can be dismissed.

#### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

The categories of employees who enjoy special protection against dismissal include women on maternity leave (who cannot be dismissed during that period) members or officers of trade union (who cannot be dismissed on the ground of participation in union activities) and elderly employees (who cannot be dismissed on the ground of age before the prescribed retirement age of 62).

#### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Under the Employment Act, it is expressly provided that either party to a contract of service may terminate the contract without notice in the event of a wilful breach by the other of a condition of service. In addition, it is expressly provided that an employer may dismiss any employee without notice on the ground of misconduct inconsistent within the fulfilment of the express or implied conditions of service. Employees not governed by the Act may be dismissed in the manner specified in the employment contract or for repudiatory conduct, i.e. breach of a condition of the contract, including gross misconduct.

An employer who wishes to terminate employees' contracts for business related reasons is free to do so. The employer would either have to serve the employees with the periods of notice prescribed in their contracts or pay them salary in lieu of notice. In addition, the employer would have to pay such redundancy benefits as are specified under the contracts or under any applicable collective agreement. In the absence of provisions in the employment agreement or collective agreement for payment of retrenchment benefits, there is no statutory obligation on the part of the employer to pay retrenchment benefits. However, in the Tripartite Guidelines on Managing Excess Manpower, jointly issued by the Ministry of Manpower, National Trade Union Congress and Singapore National Employer's Federation (which are not legally binding), employers are advised to serve the requisite notice and are encouraged to pay retrenchment benefits to employees with 3 years service or more in accordance with the prevailing norm. The prevailing norm is stated to be 1 month's salary for each year of service for unionised companies with collective agreements, and for other companies, 2 weeks to 1 month salary for each year of service.

## 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

The Employment Act requires an employer who dismisses his employee on the ground of misconduct to do so only after “due inquiry”. This obviously necessitates an investigation. There is authority, however, that a formal inquiry is not necessary. For employees not governed by the Employment Act there are no specific procedures that must be followed with respect to an individual dismissal apart for any specific procedures provided for in the employment contract.

## 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee who is dismissed can bring a claim for wrongful dismissal. The usual remedy will be damages. The damages will be equivalent to the amount the employee would have earned up to the time the employer could lawfully have terminated the contract, less the amount he could reasonably be expected to earn in other employment. As contracts of employment are usually terminable by notice, in most cases the damages will be equivalent to the salary and other benefits which the employee would have earned during the applicable notice period. Reinstatement may be sought by an employee holding a public office or statutory position who is unfairly dismissed. Subject to this and to the Minister of Manpower’s right to direct reinstatement in the circumstances described under question 6.3 above, the remedy of reinstatement is not usually available for wrongful dismissal.

## 6.8 Can employers settle claims before or after they are initiated?

Employers are free to settle claims before or after they are initiated.

## 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

The employer does not have any additional legal obligations when dismissing a number of employees at the same time. However, the Tripartite Guidelines abovementioned recommend that where retrenchment is unavoidable, there should be early notification of the Ministry of Manpower, consultation with the union and advance notice to affected workers.

## 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

An employee involved in a mass dismissal who is a member of a recognised trade union may seek the assistance of his trade union to ensure that he receives such retrenchment benefits as may be due to him. He could also make a complaint to the Ministry of Manpower in the event the employer fails to fulfil his obligations. Under the Industrial Relations Act, a recognised trade union may represent an executive employee individually to negotiate with the employer with a view to resolving any dispute relating to retrenchment benefits. Apart from this, an executive employee who is paid a salary not exceeding S\$4,500.00 a month and who is a member of a trade union which has not been recognised, may refer a dispute relating to retrenchment benefit to his trade union who may initiate a tripartite mediation. An employee may also commence legal proceedings against the employer in the Courts in the event the

employer fails to comply with its obligations.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

The clauses recognised include clauses restricting an employee within a specified period from being employed by or involved in any business competing with the former employer’s business, or soliciting or approaching customers of the former employer or soliciting or employing employees of the former employer whether on his behalf or on behalf of any other party. There is no limitation as to the nature of restrictive covenants, save that they must meet the criteria set out below for enforcement.

### 7.2 When are restrictive covenants enforceable and for what period?

A restrictive covenant is enforceable only if it protects a legitimate business interest, and is reasonable in the interests of the employee, the employer and the public. The scope of a restrictive covenant both as to geographical area, time and or other respects must be reasonable. Whether or not the scope of restriction is reasonable depends on the circumstances. It is not possible to stipulate what period is enforceable in all cases. A period of 3 to 18 months is likely to be reasonable in most situations.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Employees do not have to be provided with financial compensation in return for such covenants.

### 7.4 How are restrictive covenants enforced?

The most effective method of enforcing restrictive covenants is to obtain injunctive relief. An employer who can prove a breach of an enforceable restrictive covenant may also be entitled to damages.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

There are no special courts or tribunals set up to hear employment-related complaints, apart from the Industrial Arbitration Courts. An Industrial Arbitration Court may be set up to deal with trade disputes. Employers and trade unions can initiate arbitration by this tribunal, but an individual employee has no right to do so. Where his trade union does not or cannot submit a dispute to an Industrial Arbitration Court, an individual employee with a claim against the employer would have to resort to the normal Court system.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The procedure followed by an Industrial Arbitration Court is within its discretion and it is not bound to act formally. Conciliation is not

mandatory before a trade dispute can be referred to an Industrial Arbitration Court, but may well predate the submission of a trade dispute to this body. There is provision in the Industrial Relations Act for conciliation when negotiations for a collective agreement are not successful, and for submission of the trade dispute to an Industrial Arbitration Court in the event conciliation fails. For other employment-related complaints, there is no special procedure; the employee must file his claim in either the Subordinate Courts or the High Court, and there is no requirement for conciliation. Claims filed in the Subordinate Courts (i.e. claims of S\$250,000.00 and below) may be referred to court dispute resolution, a voluntary procedure aimed at procuring settlement.

### 8.3 How long do employment-related complaints typically take to be decided?

A trade dispute submitted to an Industrial Arbitration Court will usually come up for hearing in a matter of months. Claims filed in the Courts of Singapore will generally be decided within 12 to 18 months.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

An award by the Industrial Arbitration Court is final and binding and is not appealable, although the Industrial Arbitration Court may vary or set aside any term of the award to remove ambiguity or uncertainty. There is a right to appeal from a first instance decision in either the Subordinate Courts or the High Court. An appeal against a decision of a trial judge of the Subordinate Courts will normally come up for hearing within 1 to 3 months. An appeal against a decision at first instance in the High Court will come up for hearing in the Court of Appeal within 6 to 9 months.

#### Note

This chapter was contributed by KhattarWong.



#### Deborah Evaline Barker

KhattarWong  
No. 80 Raffles Place #25-01  
Job Plaza 1  
Singapore 048624

Tel: +65 6238 3308

Fax: +65 6438 8240

Email: [deborahbarker@khattarwong.com](mailto:deborahbarker@khattarwong.com)

URL: [www.khattarwong.com](http://www.khattarwong.com)

Deborah Barker SC is a partner in the firm of KhattarWong. She was appointed Senior Counsel in 2001 and heads the firm's Litigation & Dispute Resolution Department and Employment Law Practice Group. Her areas of practice include employment law and labour relations, civil and commercial litigation and arbitration. She has over 30 years of extensive experience in trial and appellate litigation and many of her cases have been reported in the Singapore Law Reports. Over the years, she has acted for banks, financial institutions, insurance companies and multi national Companies in a wide range of matters and has handled various complex corporate and trust claims, and cross-border disputes.

She has also acted in disputes and litigation in the area of employment, including claims by former employees for compensation, injunctions sought against former employees and issues involving the employee's duty of fidelity, directors' fiduciary duties, restraint of trade and confidential information. She has also regularly provided advice to institutional and corporate clients in Singapore and overseas on employment issues including advising on potential disputes, plans for restructuring, reviewing and advising on forms of contract, terms of employment, rules and regulations governing employees, international codes of conduct and negotiating and drafting employment and severance agreements.

She is the principal author of *A Guide To Termination of Employment* published by LexisNexis in 2003.

## KHATTARWONG

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# Spain



Luis Enrique de la Villa



Eva Ceca de las Heras

## Hogan Lovells

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

In accordance with Spanish employment law, the employment relationships between employers and employees are governed by (i) the Workers' Statute and the remaining state laws, which contain the minimum legal provisions regarding Labour law; (ii) the provisions established under the applicable Collective Bargaining Agreements (hereinafter "CBA"), which are applicable and binding depending on the employer's activity or business; and (iii) the clauses and conditions included in the individual employment contracts and agreements.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The law distinguishes between employees, public employees and self-employed.

Individuals are employees if their employment relationship is under the organisation and control of the employer and the risks and benefits of the business activity are assumed by the employer. Employees are the only class of workers protected by the Worker's Statute.

In addition, it should be noted that according to Spanish law, there are special employment relationships governed by specific regulations (i.e. senior management employees).

On the other hand, individuals are self-employed if they carry out an economic or professional activity. They typically have very limited protection and are governed by the Self-employed Statute.

Finally, public employees are individuals hired by the Public Administration whose employment relationship is governed by the Public Employee's Statute.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

In general, there are no specific requirements for the formation of an employment contract. Ordinary indefinite employment contracts can be made verbally or in writing.

However, some specific types of employment contracts should be in writing: fixed term employment contracts; contracts involving special employment relationships (i.e. senior management contracts); and others (i.e. part time employment contracts).

In addition, if the employment duration is longer than four months,

the essential terms and conditions shall be communicated in writing to the employee if they are not specified in a written contract. The mentioned terms and conditions are: parties' identification; start date of employment; employer address; professional category; wage; working time; holidays; notice periods; and the applicable CBA. Moreover, any modification in the terms and conditions of employment should be notified in writing except if the changes result from changes to a law referred to in the contract.

#### 1.4 Are any terms implied into contracts of employment?

Many terms are implied into employment contracts, including the implied duty of mutual trust and confidence and the duty of loyalty and fidelity, which prohibit the employee from competing with his employer and disclosing confidential information during the employment relationship.

In addition, the contracts of employment should comply with the minimum requirements established in the employment legislation and the CBA.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Employees have many minimum rights established in the employment law and the CBA including mandatory holidays, minimum daily and weekly rest periods, maximum working hours, minimum wages, and mandatory severances in case of dismissal.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

In Spain, around 80 percent of the workforce is covered by CBA.

Collective bargaining can take place at company or industry level. Although more than 75 percent of CBAs are signed at a company level only around 10 percent of the workforce are covered by such agreements. The other 70 percent are covered by industry level agreements.

### 2 Employee Representation and Industrial Relations

#### 2.1 What are the rules relating to trade union recognition?

Individuals have the right to form trade unions without prior

authorisation. In order to acquire legal personality, trade unions should deposit their articles of association in the corresponding public office.

Those trade unions qualified as “most representative” trade unions (i.e. when they obtain certain percentages of the representatives in elections for employees’ representatives) are entitled to special rights including representative functions, negotiating collective agreements binding on all the employees under their scope (national or regional), participation in employment conflict resolutions and promotion of the elections for employees’ representatives.

## 2.2 What rights do trade unions have?

Trade unions are entitled to a variety of rights including collective bargaining, the promotion of elections of employees’ representatives, trade unions’ meetings and the distribution of information to the employees.

## 2.3 Are there any rules governing a trade union’s right to take industrial action?

The main industrial action in Spain is to go on strike. The decision should be communicated to the employer with a prior notice of five days or 10 days in the case of public services.

It should be noted that those strikes based on grounds beyond the employment interests of employees are illegal (political and secondary solidarity strikes) as well as strikes whose aim is to modify the provisions established in a CBA in force.

## 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There are no specific requirements for employers to set up Works Councils. However, employees are entitled to choose their representatives in the company. In this sense, there are two types of employees’ representation in Spain: staff delegates; and Works Council.

Staff delegates are individuals who represent by common consent the collective interests of their represented employees. They are elected in workplaces with more than 10 employees and less than 50.

Works Councils are collegiate bodies with a general sphere of action which are elected in those workplaces with 50 or more employees.

Staff delegates and Works Councils are entitled, among other things, to be informed and consulted about certain issues, to reach agreements with the company, to control the compliance of employment rules, to participate in the company’s activity and to inform the employees about employment matters.

The staff delegates and the Works Council will be elected by all the employees of the company or the workplace.

On the other hand, the group of employees in a company who are affiliated to the same trade union are entitled to constitute trade unions’ representatives. They only represent their affiliates.

## 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Work Councils do not have co-determination rights. However, an

employer should meet the information and consultation requirements to properly carry out certain actions.

## 2.6 How do the rights of trade unions and works councils interact?

Trade unions represented in the company and works councils are entitled to common rights, including collective bargaining, consultation and information rights.

## 2.7 Are employees entitled to representation at board level?

There is no statutory right to representation at board level.

# 3 Discrimination

## 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected against discrimination because of age, race, religion or belief, gender, maternity, or any other personal or social circumstance.

## 3.2 What types of discrimination are unlawful and in what circumstances?

In general terms, any type of discrimination is unlawful. However, legal provisions are very protective regarding certain employees in special situations (i.e. maternity). Moreover, legislation requires positive discrimination imposing a necessary percentage of disabled employees (two percent) in companies with more than 50 employees.

## 3.3 Are there any defences to a discrimination claim?

Regarding a discrimination claim, the employer could allege that any decision was based on fair grounds.

On the other hand, an employer is liable for the discriminatory acts of its employees. In this sense, the employer could avoid this liability if it can show that it has taken all reasonable steps to prevent discrimination.

## 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can bring discrimination claims in the Social Courts. Parties can settle claims before or after they are initiated.

## 3.5 What remedies are available to employees in successful discrimination claims?

Regarding a discriminatory dismissal, the termination is null and void and the employee should be reemployed.

In relation to other discriminatory actions (i.e. mobbing), the aggression should cease.

In addition, the employee could be entitled to receive damages in both cases. The quantity of damages depends substantially on the type of discrimination, the duration of the discrimination, the employee’s wage, the moral harm produced to the employee and the rest of the special circumstances of the case.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Employees are entitled to a period of 16 weeks of maternity leave. At least six consecutive weeks must be taken after the child's birth or two more weeks per child in case of multiple births or a child's disability.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

The employment contract is suspended during maternity leave. Therefore, employers are exonerated from paying wages and remuneration is replaced by Social Security, which pays 100 percent of normal salary.

Regarding multiple births and multiple adoption or fostering, employees are entitled to a special benefit from Social Security for each child.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

A woman returning to work from maternity leave is entitled to return to the job in which she was employed before maternity on the same terms and conditions. In addition, a dismissal carried out in the period of 9 months following the return is considered null and void unless the company proves fair reasons to dismiss the employee (e.g. disciplinary causes or business-related causes).

### 4.4 Do fathers have the right to take paternity leave?

Fathers are entitled to thirteen consecutive days of paternity leave or two more days in case of multiple births, adoption or fostering.

In addition, if both parents are employed, mothers can decide at the beginning of maternity leave that the other parent enjoys a certain uninterrupted period of the maternity leave, provided that six weeks must be taken by the mother after the child's birth.

### 4.5 Are there any other parental leave rights that employers have to observe?

In case of adoption or fostering, parents are entitled to 16 consecutive weeks to take care of a child under the age of six, a disabled child under the legal age or a child under special conditions which make social insertion difficult (e.g. foreign children).

Moreover, employment legislation establishes a paid leave of two days due to a child's birth or four days if travel is necessary for these purposes.

Furthermore, women are entitled to one hour per day as breastfeeding leave, which could be changed by a reduction in the working day of up to half an hour.

Finally, employees are entitled to an extended leave of absence up to three years to take care of a child.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Employees are entitled to a reduction in working hours with a proportional decrease in wage to take care of a child younger than eight years or a disabled dependent who does not carry out a remunerated activity.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

On an asset transfer (hereafter "business sale"), employees are transferred to the purchaser if there is a transmission of a group of organised resources to carry out an economic activity which maintains its identity after the business sale. A share sale does not have an impact on the employees from an employment law perspective as the employer remains the same.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

On a business sale, employees transfer to the buyer on the same terms and conditions including pension commitments and any other obligations previously assumed by the seller.

The employment relationship of the employees affected by the business sale continues being governed by the CBA in force at the date of acquisition, unless otherwise agreed between the employees' representatives and the purchaser of the business.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Employees' representatives should be informed about the business sale. If the business sale involves the implementation of any employment measures, the seller and the purchaser should initiate a consultation period with the employees' representatives.

The consultation period should not exceed 15 days in case that there is a modification of the essential employment terms and conditions or staff relocation. For failing to inform and consult, administrative fines up to €6,250 can be imposed and the nullity of the process can be declared.

### 5.4 Can employees be dismissed in connection with a business sale?

With regard to dismissals in connection with a business sale, they will be qualified as unfair dismissals unless the company could justify that there are business-related reasons which lead to the employment terminations.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

As aforementioned in questions 5.2 and 5.3, employers are not free to change the terms and conditions of employment in connection with a business sale.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

If fixed term employment contracts have a duration of more than one year, the contract may be validly terminated at the end of the agreed term at the initiative of either of the two parties with a prior



notice of 15 days.

In case of individual termination based on objective grounds (i.e. employee's incompetence or redundancy), employers should notify the termination of the employment contract with a prior notice of 15 days.

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**6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?**

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"Garden leave" is not established in Spanish law. It could be qualified as a breach of the employee's rights. In order to avoid this situation, "garden leave" should be agreed with the employee.

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**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

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Employment law establishes formal legal requirements (i.e. prior notices) in some cases and special procedures (i.e. collective dismissal).

An employee is considered to be dismissed in the case of employment terminations based on objective grounds (i.e. business-related causes, which pursuant to Spanish law can be economic, organisational, productive or technical causes) or on a serious and culpable breach of the employment contract by the employee (disciplinary dismissals).

In general, consent of a third party is not required. However, in the case of a collective dismissal, if the employer does not reach an agreement with the Works Council, the Labour Authority will pronounce a resolution authorising totally or denying the restructuring.

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**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

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Dismissals related to pregnancy, maternity or family leave as well as any other discriminatory dismissals are null and void.

In cases of restructuring, employees' representatives benefit from a higher level of protection against termination of their employment contract: they have priority to stay in the company over the rest of the employees.

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**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

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Employees should have a fair reason for dismissal:

- 1) Disciplinary dismissal: serious and culpable breach of the employment contract by the employee (i.e. drug addiction, lack of discipline or repeated unjustified absences). If the dismissal is considered unfair employees are entitled to a severance payment of 45 days' salary per year of service up to 42 monthly installments.
- 2) Business-related reasons: economical, organisational, technical or productive causes. Employees are entitled to a severance payment of 20 days' salary per year of service capped at 12 monthly salary installments.

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**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

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With regard to disciplinary dismissals based on a serious and fraudulent breach of the employment agreement, the dismissal should be communicated in writing to the employee specifying (i) the date and a description detailed enough of the facts which justify the dismissal and (ii) the effective date of the dismissal.

In relation to individual dismissals based on business-related reasons, a written communication to the employee is necessary, stating the causes. Prior notice of 15 days is required, as well as the simultaneous payment of the severance of 20 days' salary per year of service capped at 12 monthly salary installments.

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**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

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The employee can lodge a claim with the Social Court due to null or unfair dismissal. If the dismissal is qualified as null and void, the employee should be reemployed. On the other hand, if the dismissal is considered unfair the employer can choose between reemploying the employee or paying the severance of 45 days' salary per year of service up to 42 monthly installments.

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**6.8 Can employers settle claims before or after they are initiated?**

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An administrative conciliatory meeting prior to the trial is required in order to settle claims. In addition, parties are entitled to reach an agreement at any moment until the trial is initiated.

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**6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?**

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In this respect, employment terminations are qualified as collective dismissal procedure when the termination of employment affects:

- (a) 10 employees in companies of less than 100 workers;
- (b) 10% of the total staff in companies which employ between 100 and 300 employees; and,
- (c) 30 workers in companies which employ 300 or more employees.

If all the employees of a company with more than five employees are affected by employment terminations due to the total cessation of the business activities, these terminations are also considered as a collective dismissal.

It should be noted that collective dismissals require a special procedure. Employers should request approval of the employment terminations from the Labour Authorities and initiate a consultation period with the Works Council. Consultations should last not more than 30 days in companies with more than 50 employees or 15 calendar days if the company has less than 50 employees.

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**6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

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If an employer carries out individual terminations of contracts in a number below the limits established in successive periods of 90 days in order to avoid the application of the collective dismissals procedure, and without there being any new reasons which justify such action, these terminations shall be declared null and void.

In addition, in a situation where the employer is not able to create a strong business case to justify the terminations, it will be forced to enter into an agreement with the employee's representatives. In the absence of strong objective reasons, the severance payment agreed during the consultation period with employees' representatives tends to be near the mandatory severance compensation in case of unfair termination (please see question 6.5).

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Employment law recognises covenants which prevent the employee from competing with the employer as well as those that establish the obligation to stay in the company.

### 7.2 When are restrictive covenants enforceable and for what period?

Covenants which prevent the employee from competing after the termination of the employment contract should have a legitimate business interest to protect. These covenants are enforceable for a maximum period of six months (non-qualified employees) or two years (qualified employees).

With regard to covenants which oblige the employee to stay in the company, they are enforceable if the employee has received special training paid by the employer to carry out certain projects or specific works. The duration of these covenants should not exceed two years.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Employees have to be provided with financial compensation in return for covenants which prevent them from competing after the termination of the employment contract. On the contrary, employees do not have to be provided with any payment in relation to covenants which establish the obligation to stay in the company.

### 7.4 How are restrictive covenants enforced?

The employer can bring a lawsuit seeking damages against the employee for the infringement of the covenant.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Social Courts and the Social Divisions of Spanish Tribunals have jurisdiction to hear employment-related complaints. Their composition depends on the type of court. For instance, Social Courts are unipersonal bodies with a sole judge whereas the High Court of Justice of a certain Autonomous Region ("*Comunidad Autónoma*") is a collegiate body composed of a President and a variable number of judges.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Pursuant to Spanish law, an administrative conciliation meeting before judicial proceedings is mandatory in most employment-related complaints.

Claims must usually be lodged with the Social Court within the relevant time limit for the matter complained of: one year in the case of claims related to the employment contract or three years regarding change of employer and Social Security benefits. However, there are special time-frames in relation to specific employment matters (i.e. 20 days from the effective date of termination in the case of dismissal claims).

It should be noted that it is not possible to submit a written answer to a complaint. The employer's defence should be formulated orally in the trial.

Trial should be preceded by conciliation (different from the administrative conciliation referred to above) before the judge. If the parties reach an agreement, the court prepares a deed describing the settlement. If conciliation is not reached, there is a hearing to decide the complaint.

### 8.3 How long do employment-related complaints typically take to be decided?

The duration of procedure depends on the type of claim. Generally, employment-related complaints take around three to four months to be decided in first instance.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Social Court decisions can be appealed before the High Court of Justice based on: (i) nullity of proceedings due to a lack of proper defence; (ii) review of the facts included in the Social Court decision; or (iii) breach of material regulations or case law. It typically takes eight or 10 months.

#### Note

This chapter was contributed by Hogan Lovells International LLP.

**Luis Enrique de la Villa**

Hogan Lovells International LLP  
Paseo de la Castellana, 51  
Madrid, 28046  
Spain

*Tel:* +34 91 349 82 89  
*Fax:* +34 91 349 82 04  
*Email:* [luisenrique.delavilla@hoganlovells.com](mailto:luisenrique.delavilla@hoganlovells.com)  
*URL:* [www.hoganlovells.com](http://www.hoganlovells.com)

Luis Enrique de la Villa is a Partner in Hogan Lovells' employment practice. He has extensive experience in judicial defence before employment tribunals, collective redundancy processes or international employment advice. In addition, he is co-author of different books regarding employment and Social Security issues and has developed several training courses and workshops.

**Eva Ceca de las Heras**

Hogan Lovells International LLP  
Paseo de la Castellana, 51  
Madrid, 28046  
Spain

*Tel:* +34 91 349 81 85  
*Fax:* +34 91 349 82 04  
*Email:* [eva.ceca@hoganlovells.com](mailto:eva.ceca@hoganlovells.com)  
*URL:* [www.hoganlovells.com](http://www.hoganlovells.com)

Eva Ceca is a lawyer in Hogan Lovells' employment practice. She provides general labour advice to international companies and advice on tribunal cases before the labour jurisdiction.



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Hogan Lovells' award-winning employment law team has extensive experience in advising clients on the full spectrum of employment matters - from workplace policies and practices, developing comprehensive risk avoidance strategies, advocating for clients in litigation and arbitration, to negotiating with unions and other employee representatives and helping them to implement their strategic domestic and international initiatives.

Hogan Lovells assist clients in resolving their employment challenges creatively, strategically and cost-effectively.

# Switzerland



Dr. Balz Gross



Dr. Roger Zuber

## Homburger

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The main sources of employment law in Switzerland are the Code of Obligations, the Labour Act and the terms agreed in the contract of employment. In some industries, mandatory collective bargaining agreements will apply.

Additional legislation includes specific rights or obligations, e.g. the Participation Act, the Act on Equal Treatment of Women and Men, the Data Protection Act or the Merger Act.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Swiss employment law does not distinguish between different types of workers, i.e. the same rules apply for all employees. There are some additional provisions for specific types of employees, e.g. for pregnant women. Further, statutory rules regarding overtime will not apply for members of the senior management.

Only self-employed persons are not subject to employment law. Not the wording of the contract, but whether an individual is in fact running an own business or not is relevant to determine if an individual is considered as self-employed. If a person works under the instructions of the employer and/or with the employer's means of work, he/she will be considered to be an employee.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Contracts of employment do not have to be in writing. However, certain terms need to be in writing and duly executed by both parties to be valid and binding, in particular if they deviate from the statutory default rules (e.g. terms regarding notice periods, overtime, probationary periods, post-contractual non-compete obligations).

Moreover, the employee must be provided with the following particulars in writing: names of employer and employee, starting date of employment, function, compensation and weekly hours of work.

#### 1.4 Are any terms implied into contracts of employment?

There are various implied terms which govern the employment relationship. Most of them are outlined in the Code of Obligations. Some terms are mandatory; others will only apply if the parties do not agree otherwise.

Terms might be implied based on past practice. For example, if a bonus has been paid for years, an employee might have a contractual entitlement to such payments.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

There are statutory minimum employment terms and conditions, e.g. at least four weeks' holiday a year and a notice period of not less than one month.

There is no statutory minimum salary. However, mandatory collective bargaining agreements provide for a minimal pay in certain industries.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

There are collective bargaining agreements in certain industries, e.g. construction, hotels/restaurants, pharmaceutical industry. Some collective agreements were declared mandatory for the entire industry by the government.

Bargaining usually takes place at industry level.

### 2 Employee Representation and Industrial Relations

#### 2.1 What are the rules relating to trade union recognition?

There is no statutory recognition process as in other jurisdictions. In general, trade unions have to be separate legal entities with the main aim to improve conditions of employment, and they have to be independent from employers and other third parties and the membership has to be voluntarily.

#### 2.2 What rights do trade unions have?

There are no specific statutory rights that employers have to be aware of.

Collective bargaining agreements might provide for some rights of trade unions. In particular, to enforce the terms of collective bargaining agreements, e.g. minimal pay, joint commissions (consisting of trade unions' members and employers' representatives) might be established. Such commissions are entitled to get access to certain documents like payroll data.

Further, there are joint commissions consisting of trade union members, employers' representatives and governmental authorities which shall ensure that employment terms will not unduly worsen in certain industries. These official joint commissions have the right to review employment conditions and they might recommend the government to declare existing collective bargaining agreement compulsory for the whole industry or to issue minimal terms for certain functions (such minimal terms currently apply for domestic work only on a national level).

### 2.3 Are there any rules governing a trade union's right to take industrial action?

There is a constitutional right to take industrial action, but there are no statutory rules. Precedents suggest that a strike should be considered as an action of last resort. Collective bargaining agreements will usually restrict the right to strike. It is discussed whether further conditions apply, in particular that strikes need to be supported by a trade union and that the strike has to aim at a matter that can be dealt with in a collective bargaining agreement.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

All businesses with more than 50 employees have to set up a works council on the request of the employees. A fifth of the workforce (or hundred employees) can ask for a vote; if the majority of the voting employees support the request, elections have to take place. The election will be organised by the employer and employees jointly.

Only a few companies have set up a works council in Switzerland.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Works councils only have information rights and they have to be consulted before certain decisions (regarding work safety, mass dismissals, transfer of a business or pension plans) are taken.

### 2.6 How do the rights of trade unions and works councils interact?

There is no established way of interaction. In any event, only few companies have works councils.

### 2.7 Are employees entitled to representation at board level?

No, they are not.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The protection against discrimination is based on the general duty of the employer to protect the employee's rights of personality. The employer must not discriminate against an individual employee without objective reasons. Employees are only protected against

discrimination by employers, however, if such discrimination resulted in a violation of their rights of personality. Within that limited scope, the employees are protected against discrimination regardless of the basis of the discrimination, i.e. age, disability, race, political belief, religion or otherwise.

The Federal Disabled Equality Act directly protects only 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.

There is a broader protection against discrimination because of gender. A Federal Gender Equality Act provides for detailed substantive and procedural rules that shall protect employees against discrimination because of their gender.

### 3.2 What types of discrimination are unlawful and in what circumstances?

The law protects against any sort of direct or indirect discrimination. Discrimination is defined as treating an employee worse than others. There is no protection against the (arbitrary) better treatment of other employees. In addition, even arbitrary discrimination by the employer may be tolerated unless the discrimination results in the violation of the employee's rights of personality, in particular because the discrimination reflects a disregard of the employee's personality.

The Gender Equality Act protects employees against any kind of direct or indirect discrimination based on gender, including discrimination because of civil status, family situation and pregnancy. The protection exists for the entire employment relationship, from the negotiations on a new employment to retirement (and retirement benefits) and termination. It includes protection against unfavourable working conditions, lower salary, and sexual harassment.

Increased rights to equal treatment also exist based on international agreements, in particular between Switzerland and the European Union.

### 3.3 Are there any defences to a discrimination claim?

There is no unlawful discrimination if employers are able to establish that the unequal treatment does not result in the violation of the employee's right of personality, e.g. that there are valid reasons to treat one individual employee different or that rather some employees are treated better than others (and not individual employees discriminated) or that the different treatment is so minor that it does not result in a violation of the rights of personality.

The Gender Equality Act sets much more stringent standards, and any discrimination that is based on gender, whether directly nor indirectly, is generally prohibited.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

A violation of the prohibition against discrimination is a violation of statutory employment law and the employment contract. Employees have to file a lawsuit with the courts that have jurisdiction for employment matters; a mandatory conciliation proceeding is part of the proceeding. Employees can freely dispose of the claims made in discrimination proceedings, and claims are frequently settled before or after proceedings are initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

The main remedy in discrimination proceedings is monetary compensation. Employees also have a right to an order of the court prohibiting continuation of discrimination, or prevent a threatened discrimination.

In gender discrimination cases in connection with an alleged discriminatory dismissal, the court can order the provisional re-employment of an employee and eventually cancel the termination and order the definitive re-employment. This is not possible in all other discrimination cases in connection with alleged discriminatory dismissal, where the only available remedy is monetary compensation.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

A female employee is generally entitled to fourteen weeks of paid maternity leave following the child's birth.

In addition to the provisions on maternity leave, there are other rules on pregnancy and status following birth. These rules provide, in particular, that an employer shall not terminate the employment relationship during pregnancy and during a period of sixteen weeks following birth. In addition, an employee must not work during a period of eight weeks following birth, and she is only required to work during an additional period of eight weeks if she agrees to do so. Similarly, the employee is only required to work during pregnancy and during the nursing period if she agrees to do so.

Moreover, collective bargaining agreements and the individual employment agreements often contain additional rules which further improve the position of the employee during pregnancy and following birth.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

During the fourteen weeks' statutory maternity leave, the contractually agreed remuneration is replaced by a compensation of 80% of the last average remuneration. The compensation is presently (2011) capped at CHF 196 per day and the employer can recover the payments from a social security fund. It is unclear whether employers have to top-up payments to a certain extent.

The rules on maternity leave do not cover the issue whether an employee continues receiving the contractually agreed salary if she is not working during pregnancy and following birth (but for the period of fourteen weeks covered by the maternity leave rules). The right to remuneration will depend on the duration of the employment and the contractual agreement in the employment contract. In addition, employers regularly are insured against the risk of employees not working during pregnancy and following birth. To the extent insurance coverage exists and reaches a statutory limit, the insurance's payments replace the claim to remuneration.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

Maternity leave does not change the terms of employment relationship. Hence, the employee will have the same rights and obligations upon her return to work as before the maternity leave. She will regularly have to continue the same job as before birth, unless otherwise agreed with the employer.

### 4.4 Do fathers have the right to take paternity leave?

There are no statutory rights to paternity leave, but some collective bargaining agreements and individual agreements provide for a right to take paternity leave.

### 4.5 Are there any other parental leave rights that employers have to observe?

Parents have a statutory right to stay away from work for three days to take care of sick family members.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

No, they are not.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

If a business unit is transferred in an asset deal, the contracts of employment assigned to this business will automatically transfer from seller to buyer. Employees can object to the transfer. An objection results in a termination of the employment relationship after the expiry of the statutory notice period.

A share sale does not affect the employment agreements, because the identity of the employer will not be altered. Hence, employees will still be employed by the same company under the same contracts.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Employees will work for a different employer after the transfer, but under the same employment contract. Hence, all current terms of the employment contracts will transfer with the employees.

The buyer has to comply with collective bargaining agreements during one year after the transfer, unless such agreements will expire or be terminated earlier. In some industries, mandatory collective bargaining agreements apply.

A share sale does not trigger a transfer.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Employees (or the works council, if there is one) have to be informed about the reasons for the transfer and its legal, economical and social implications for the employees. If measures that might affect employees are considered (e.g. dismissals, change of terms and conditions of employment agreements), consultation is required. The consultation period should not be less than two weeks (longer periods might be required in certain circumstances), and few additional days will be needed to prepare proper information and to consider any proposals made during the consultation.

The law does not provide for specific sanctions for failing to inform and consult in case of an asset deal. However, if the Merger Act

applies, employees have the right to block the commercial register if the employer failed to duly inform/consult. This can delay the closing of the transaction.

No specific information or consultation rights apply in case of a share sale.

#### 5.4 Can employees be dismissed in connection with a business sale?

Yes. Consultation is required before notice is given. Mass dismissals will trigger further consultation rights and notification obligations.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Employees have to be consulted regarding changes of terms and conditions in connections with a business sale (see question 5.2 above). There are no further specific restrictions. Hence, the same rules apply as for an amendment of employment agreements that is not in connection with a business sale: employers can unilaterally change terms and conditions, but they have to take the applicable notice periods into account, i.e. no employee has to accept new terms before the contractual notice period expired. After the expiry of the notice period, the employee can either continue to work under the new conditions, or quit the employment.

Amendments to the detriment of employees only (e.g. cuts of base salaries, increase of working hours) might be deemed to be abusive if the employer is unable to provide objective reasons for the change. Employees who will not accept the new conditions and therefore quit the employment after the notice period might be able to claim for an indemnity of up to six months' salary (see question 6.3).

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

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.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Yes, and it is general practice to put employees on garden leave during their notice period in certain industries, such as the financial service industry and for senior managers.

A 'right to work' which excludes the employers right to put an employee on garden leave only exists under very special circumstances, in particular for jobs that require the employee to continuously work in order to keep certain qualifications (pilots who may lose their licence, artists, etc.).

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

An employee is treated as being dismissed if either party to the employment contract has given notice of termination. No third party consents are required for a dismissal.

Employees are protected against abusive dismissal. Such abuse exists, for example, if notice of termination is given because the employee raises a *bona fide* claim arising out of the employment agreement, because the employee exercises a constitutional right, because notice is only given to prevent the coming into existence of a claim arising out of the contract, or because notice is given for a reason that is inherent to the personality of the other party (gender, race, origin, nationality, age, etc.). An abusive dismissal will be effective, but the employee is entitled to compensation (see below, question 6.5).

In addition, the employer shall not give notice of termination during protected periods. Such protection against dismissal exists while the employee is on military or civil service or a foreign aid project, while the employee is totally or partially incapacitated to work because of sickness or accident (the latter protection period is limited to 30 to 180 days, depending on years of service). In addition, protection against dismissal exists during pregnancy and for a period of sixteen weeks following birth. A notice of termination given during such a protected period is null and void.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Whilst employees are all treated alike, certain rules will only protect specific categories of employees (e.g. pregnant women, etc.). Further, there is a (dischargeable) presumption that a dismissal of a member of the works council is abusive.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Swiss law is governed by the principle that both employer and employee have the right to give notice of termination for any reason. No special reason is required. The dismissal must not be abusive, though (see above question 6.3).

Employees are generally not entitled to compensation on dismissal. A rule on mandatory severance payments for employees who are more than fifty years of age and have worked more than twenty years for the same employer has become practically defunct because payments made by the employer to the pension plan can be regularly deducted from the severance payment.

The employee is entitled to a compensation for up to six monthly salaries if the dismissal was abusive.

### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

No. Collective bargaining agreements or individual agreements frequently state that the notice must be in writing or must even be served by registered mail.

### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

All claims regularly arising out of the employment contract become due upon termination of the employment relationship. It is disputed whether employer and employee can agree that certain claims (in particular claims arising out of deferred bonus schemes) only become due a certain period after termination.

Apart from claims arising because a dismissal is abusive (see above, question 6.5), there are no other claims.

### 6.8 Can employers settle claims before or after they are initiated?

In case of a true settlement: yes. However, the employee may not waive mandatory claims arising out of the employment relationship during the employment and before one month after the end of the employment.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

The employer must consult with the employees before a final decision on the dismissals is taken if the dismissal is considered a 'mass dismissal' (i.e. dismissal within a period of thirty days of ten employees [for businesses with twenty to ninety-nine employees], or ten percent of the employees [for businesses with one hundred to two hundred and ninety-nine employees] or more than thirty employees [for larger businesses]). In addition, the local labour office must be informed of the dismissals.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

The mass dismissal will be considered abusive if the employer has not properly consulted with the employees. The employees have a claim for payment of a penalty of up to two monthly salaries. If the employer fails to inform the local labour office, the dismissal will not become effective.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Non-compete covenants are recognised by the law. All types of post-employment restrictions on the employee are regularly considered non-compete covenants and their enforceability is tested according to the rules established for non-compete covenants.

### 7.2 When are restrictive covenants enforceable and for what period?

The non-compete covenants must be agreed in writing. The covenant is only enforceable if the employee had access to information on the employer's customers or to business secrets. In addition, the covenant is only binding if the use of the information obtained by the employee could seriously harm the employer. Finally, the covenant must be reasonably limited with regard to its duration, the place where it should apply and the type of operation covered.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Payment of financial compensation is not a requirement, but considerably increases the chances that a covenant can be enforced.

### 7.4 How are restrictive covenants enforced?

In case of a violation of the covenant, the employer can ask for financial compensation for the loss suffered. The contractual clauses often provide for a liquidated damages clause. In addition, the employer can ask for a court order to prohibit the employee to continue the competing activity if the non-compete covenant expressly mentions such a right of the employer. The courts weigh the interests of the employer and the employee, and may order the employee to stop the competing activity if the non-compete covenant is found enforceable.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The 26 cantons are responsible to organise the court system. Hence, depending on the place of jurisdiction, either a labour court or an ordinary district court will hear employment-related complaints.

Labour courts will often be composed of a legally qualified district judge and two lay judges, one elected on behalf of employees/trade unions and the other on behalf of employers. If there is no labour court, one or a panel of three (usually) legally qualified judges will hear the case.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

There is a mandatory conciliation hearing before a claim can be filed. Thereafter, the proceedings start with an exchange of briefs, unless the amount in dispute is below CHF 30,000 and it is decided that proceedings should be oral only.

Courts are usually prepared to outline their preliminary view of the case during the first hearing. The majority of cases are settled based on such preliminary assessments.

### 8.3 How long do employment-related complaints typically take to be decided?

The conciliation proceeding should take a few weeks only. Thereafter, a straightforward claim in an expedited oral proceeding (i.e. the amount in dispute is below CHF 30,000) should take less than six months. Other cases might be pending for one to two years.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

There is a right to appeal within 30 days after the judgement has been handed down. In most cantons, a panel of three judges of the court of appeal will usually hear the appeal.

The Swiss Supreme Court will review decisions of courts of appeals in employment matters if the amount in dispute exceeds CHF 15,000. Appeals are limited to points of law.



**Dr. iur. Balz Gross, LL.M.**

Homburger AG  
Weinbergstrasse 56 / 58  
P.O. Box 194, CH-8042 Zurich  
Switzerland

*Tel:* +41 43 222 10 00  
*Fax:* +41 43 222 15 00  
*Email:* balz.gross@homburger.ch  
*URL:* www.homburger.ch

Balz Gross (born 1964) is a partner with Homburger and the deputy head of Homburger's Litigation | Arbitration Practice Team and co-head of the Employment Law Group.

His practice focuses on international commercial arbitration and litigation, including employment related disputes, in particular regarding bonus schemes and manager compensation.

Balz Gross is a Co-Author of the Commentary on the Statute on Place of Jurisdiction in Civil Matters (section on contract law), and of the Commentary on Cartel Law (section on procedure), and the Commentary on the new Federal Civil Procedure Code.

From 1989 to 1992, he was a scientific assistant for contract and private international law at University of Zurich, in 1993 District Court Clerk, admitted to the bar in 1994 and joined Homburger in 1995.

Education: lic.iur./Dr. iur. Zurich, 1989/1996 (summa cum laude); LL.M., Harvard, 1995.

**Dr. Roger Zuber, MJur**

Homburger AG  
Weinbergstrasse 56 / 58  
P.O. Box 194, CH-8042 Zurich  
Switzerland

*Tel:* +41 43 222 10 00  
*Fax:* +41 43 222 15 00  
*Email:* roger.zuber@homburger.ch  
*URL:* www.homburger.ch

Roger Zuber (born 1973) is a Senior Associate in Homburger's Litigation | Arbitration Practice Team and a member of the Employment Law Group. He frequently represents clients in employment disputes before Swiss courts. He also advises clients with respect to all areas of employment law, in particular with respect to the enforceability of bonus/incentive plans and regarding the termination of employment relationships. His work also includes assistance to implement new employment terms and to transfer employment agreements in connection with transactions. He is co-author of a Commentary on the new Federal Civil Procedure Code.

He was admitted to bar in 2000, worked for a leading business law firm in Berne from 2001 to 2004 and joined Homburger in 2005.

Education: lic. iur./Dr. iur. Berne, 1998/2004; MJur, Oxford, 2005

## HOMBURGER

Homburger is a premier Swiss business law firm with more than 100 lawyers representing and advising major international and Swiss clients.

The members of Homburger's employment law group are drawn from Homburger lawyers in the various specialist teams, in particular from the internationally leading Litigation, M&A, Tax and Social Security Practice Teams.

Homburger represents its clients before Swiss courts and arbitration tribunals in employment related matters and advises on all employment law issues, in particular on:

- employment contracts for executives, including compensation packages, non-compete covenants and "golden parachutes";
- standard employment contracts and customized employment concepts (contracts, regulations, employee handbooks);
- employee participation plans and variable compensation schemes (e.g. long-term incentive schemes, management participation on acquisitions, stock option plans, bonus and gratification schemes);
- transfer of business units and outsourcing;
- business restructuring (staff reduction, collective dismissals), contract and gardening leave;
- data protection;
- posting of employees and work permit applications.

Homburger's employment lawyers are in regular contact with distinguished employment experts in other jurisdictions.

# United Arab Emirates

Afridi & Angell

Charles Laubach



Omar H. Ayad



## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

Employment relationships in the United Arab Emirates (“U.A.E.”) are governed by U.A.E. Federal Law No. 8 of 1980 on Labor and Employees, as amended (the “Labor Law”), together with regulations promulgated pursuant to the Labor Law.

The provisions of the Labor Law are matters of public order; any provision in an employment contract which contravenes the Labor Law is considered null and void, unless it is more advantageous to the employee. Any provision deemed null and void is severable from the remainder of the employment contract, the remaining terms and conditions of which continue to be valid.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The Labor Law applies to all employees working in the U.A.E., whether national or non-national, with the exception of the following categories: (i) officials and staff employed by the federal government, government departments of the member Emirates, municipalities, public bodies, federal and local public institutions, and those working in federal and local governmental projects; (ii) members of the armed forces, police and security units; (iii) domestic servants; and (iv) agricultural workers and persons engaged in animal husbandry (other than persons employed in corporations processing agricultural products or permanently engaged in the operation or repair of machines required for agriculture).

Employees who are based in the many Free Zones of the U.A.E. are often subject to labour regulations that are specific to the relevant Free Zone. This article generally refrains from discussing the employment regulations of the Free Zones.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

According to the Labor Law, employment contracts and all amendments made thereto are required to be in writing and approved by, and registered with, the U.A.E. Federal Ministry of Labor (the “Ministry”). Notwithstanding the foregoing, the terms and conditions of employment may be proven by any means of proof admissible by law.

Employment contracts for foreign nationals must be in writing in

the format approved by the Ministry, although employment contracts for U.A.E. nationals need not be in writing.

### 1.4 Are any terms implied into contracts of employment?

An employment contract must include the following information: (i) amount of salary; (ii) date on which the employment contract was signed; (iii) employment commencement date; (iv) duration of the employment contract (if it is a specified term contract); and (v) nature and location of the workplace.

The Labor Law applies to any matters not addressed in the employment contract. For instance, if the employment contract were silent on the subject of annual leave, then the employee (if his service exceeds one year) would be entitled to the 30 days of annual leave set forth in the Labor Law.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

There is no minimum wage in the U.A.E. However, the Labor Law contains detailed rules on working hours, annual leave, severance pay, and other mandatory benefits, as discussed in other sections of this article.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

There are no labour unions or collective bargaining in the U.A.E.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

There are no labour unions or works councils in the U.A.E. The authority that is primarily responsible for the protection of the rights of employees in the U.A.E. is the Ministry.

### 2.2 What rights do trade unions have?

Not applicable in the U.A.E. – please see question 2.1.

**2.3 Are there any rules governing a trade union's right to take industrial action?**

Not applicable in the U.A.E. – please see question 2.1.

**2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?**

Not applicable in the U.A.E. – please see question 2.1.

**2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?**

Not applicable in the U.A.E. – please see question 2.1.

**2.6 How do the rights of trade unions and works councils interact?**

Not applicable in the U.A.E. – please see question 2.1.

**2.7 Are employees entitled to representation at board level?**

Not applicable in the U.A.E. – please see question 2.1.

**3 Discrimination****3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?**

The Labor Law does not address workplace discrimination as a specific type of wrongdoing. However, a decision to terminate services for discriminatory reasons may be viewed under the Labor Law as arbitrary dismissal, exposing the employer to a claim for compensation (see question 6.7). In such a case, the court shall establish the compensation according to the nature of the job, the damage caused to the employee, the employee's service period and the employee's work conditions. However, this compensation shall in all circumstances not exceed the employee's wages for a period of three months.

Employers may settle such claims before or after they are initiated, but the employee can potentially challenge the settlement later and assert his/her original claim. This subsequent action by the employee is precluded only by the passing of the one year time bar set out under the Labor Law.

**3.2 What types of discrimination are unlawful and in what circumstances?**

Please see question 3.1.

**3.3 Are there any defences to a discrimination claim?**

Please see question 3.1.

**3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?**

Please see question 3.1.

**3.5 What remedies are available to employees in successful discrimination claims?**

Please see question 3.1.

**4 Maternity and Family Leave Rights****4.1 How long does maternity leave last?**

An employee is entitled to maternity leave with full salary for a period of 45 days, including the period preceding and following delivery, provided that she has been in her employer's service for a continuous period of not less than one year. If her employment with the employer has been for less than one year, she is entitled to such maternity leave with half salary.

**4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?**

An employee is entitled to full salary while on maternity leave.

**4.3 What rights does a woman have upon her return to work from maternity leave?**

Following her maternity leave, a female employee can be absent from work without a salary for a maximum period of 100 days (consecutive or otherwise), if that absence is due to an illness resulting from pregnancy or delivery that prevents her from resuming her work. The illness must be confirmed by a certified government physician licensed by the competent health authority.

During the first 18 months after delivery, an employee nursing her infant is entitled, in addition to her normal break periods, to two additional breaks each day, neither of which may exceed one half hour. Such additional break periods are considered as part of the employee's normal work hours and may not result in any reduction in her salary.

**4.4 Do fathers have the right to take paternity leave?**

There are no rights granted for paternity leave.

**4.5 Are there any other parental leave rights that employers have to observe?**

There are no rights granted to adoptive parents or carers.

**4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?**

The Labor Law does not make provision for any rights pertaining to a flexible work schedule.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

If the business transfer takes the form of a share sale, in which the shareholders of the employer change while the employer itself continues to exist, then the employees will remain with the employer.

If the transfer takes the form of an asset sale, in which the corporate identity of the employer will change, then the transfer process will not be automatic but will have to be implemented after the transfer takes effect. New labour permits and employment contracts for the employees are required, and the consent of each employee is required for that employee's transfer.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

In the event that a change occurs in the form or legal status of the employer, employment contracts that are valid at the time of such change remain valid with the new employer, and the employees' services are deemed to be continuous.

Both the previous employer and the new employer are jointly liable for a period of six months for the fulfilment of all obligations in the employment contracts, after which time the new employer bears sole liability.

There are no collective bargaining agreements in the U.A.E.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Employees do not have a right to be consulted in connection with a business sale.

### 5.4 Can employees be dismissed in connection with a business sale?

There are no special rules on protection from dismissal arising from a business sale. However, the same general rules governing termination of employment contracts apply (see section 6). A business sale would normally be viewed as a legitimate reason to terminate an unspecified-term employment contract.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

If an employee's terms and conditions of employment are made less favourable, then that employee's consent is required for the new terms and conditions to take effect.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

If the employment contract is for an unspecified term, with the exception of employees who are employed on a daily basis, either party may terminate it for a legitimate reason with 30 days' prior written notice.

In the case of employees working on a daily basis, the period of notice is calculated as follows: (i) one week, if the employee has been employed for more than six months but less than one year; (ii) two weeks, if the employee has been employed for not less than one year; (iii) one month, if the employee has been employed for not less than five years.

The validity of the employment contract continues throughout the notice period. The employee is entitled to full salary calculated on the basis of the employee's last salary and is required to work throughout such period, unless the employer determines that the employee should not be required to work throughout the notice period. This latter circumstance is equivalent to pay in lieu of notice.

The Labor Law provides that the notice requirement cannot be reduced or dispensed with, but may only be increased. In the event that proper notice is not provided prior to the termination of the contract of employment, the party having such obligation must provide compensation in lieu thereof equal to the employee's last salary for the time period by which proper notice was reduced.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

An employer is free to order an employee to serve a period of "garden leave" during the notice periods provided above. However, an employee on such "garden leave" is entitled to full salary and his/her employment contract remains valid throughout the prescribed notice period.

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Pursuant to the Labor Law, a contract of employment may terminate in any of the following ways: (i) upon mutual agreement by the parties, provided that the employee's agreement to such termination is made in writing; (ii) in the event that the employment contract is for a specified term and the specified duration has expired, unless the contract has been expressly or implicitly extended by the parties; or (iii) in the event that the employment contract is for an unspecified duration, and the parties have expressed an intention to terminate the contract, subject to the appropriate notice period having been provided by one party to the other and provided that the contract is not terminated for arbitrary reasons.

There are various instances where an employer is prohibited from dismissing an employee, for example: (1) during the employee's annual leave; (2) based on health reasons if the employee is on sick leave; or (3) prior to the employee having exhausted the periods of sick leave to which he or she is entitled under the Labor Law. Any agreement to the contrary is null and void.

An employer is prohibited from terminating an unspecified-term employment contract for arbitrary reasons without providing compensation to the employee (see question 7.8). If the employment contract is for a specified term and the employer terminates it before the end of its term for any reason other than those under Article 120 of the Labor Law (see question 7.5), unless the employment contract provides otherwise, the employer is obligated to compensate the employee in the amount equal to the lesser of three months' salary, or the salary for the remaining period of the contract.

Termination of an employee becomes effective upon cancellation of the employee's labour permit and residence visa that the employer sponsored.

If an employer dismisses a U.A.E. national, the employer must inform the Ministry 30 days prior to the dismissal and/or otherwise comply with the Ministry's instructions. Otherwise, an employer need not obtain the consent of a third party before terminating an employee.

#### **6.4 Are there any categories of employees who enjoy special protection against dismissal?**

There are restrictions on the dismissal of U.A.E. national employees. As provided by Ministerial Resolution No. 176 of 2009 "Restricting the Dismissal of U.A.E. National Employees" ("Resolution No. 176"), the dismissal of a U.A.E. national is regarded as unlawful in any of the following four circumstances: (i) the U.A.E. national is dismissed for reasons other than those mentioned in Article 120 of the Labor Law (see question 6.5); (ii) it is proven that the employer retains a non-U.A.E. national who is performing work similar to that performed by the dismissed U.A.E. national; (iii) the employer fails to inform the Ministry 30 days prior to the dismissal or fails to comply with the Ministry's instructions within the designated times; (iv) it is proven that the U.A.E. national was not paid the full compensation and full retirement specified in either the Labor Law and its implementing regulations, or the contract of employment or any other contractually binding document.

Resolution No. 176 also sets out the consequences of improper dismissal of a U.A.E. national employee. If the Ministry is not satisfied that the dismissal was legitimate, it will inform the employer. The employer has 15 days to resolve the dispute with the U.A.E. national employee according to the Ministry's directives. If the employer fails to resolve the dispute within this period, the matter is referred immediately to the relevant court and the Ministry will freeze the issuing of any new labour permits applied for by the employer until the court renders a final judgment in the matter.

#### **6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

As provided under Article 120 of the Labor Law, an employer may terminate a contract of employment without notice or compensation in the following circumstances: (i) during the employee's probation period; (ii) if the employee assumed a false identity or nationality, or otherwise submits false certificates or documents; (iii) if the employee has caused the employer to suffer a material loss (provided that the employer notified the Ministry within 48 hours of discovering such incident); (iv) if the employee fails to carry out instructions regarding industrial or workplace safety, provided that such instructions were in writing and posted in an accessible location or, if the employee is illiterate, he or she had been informed of them orally; (v) if the employee fails to perform his or her basic duties under the employment contract despite knowledge that he or she will be dismissed if such failure continues; (vi) if the employee reveals a "secret of the establishment"; (vii) if the employee is found guilty of an offence involving honour, honesty or public morals; (viii) if the employee is found, during working hours, in a state of drunkenness or under the influence of narcotic drugs; (ix) if the employee, during working hours, assaults his or her employer, manager or any colleagues; or (x) if the employee is absent from work, without valid reason, for more than 20 non-consecutive days

in one year or more than seven consecutive days.

There are no special rules for redundancies. If an employer needs to eliminate job positions for economic reasons, then the resulting terminations would usually be treated as being done for a legitimate reason. An unspecified-term contract can therefore be terminated with one month's advance notice, and with full payment of severance benefits (see question 6.6). If a specified-term contract were terminated for reasons of redundancy, then the employer would be required to pay compensation (see question 6.7).

Similarly, there are no special rules regarding dismissal arising from a business transfer. The same general rules governing termination of employment contracts apply. A business transfer would normally be viewed as a legitimate reason to terminate an unspecified-term contract, but in the case of specified term contracts, the employer would be required to pay compensation.

The Labor Law provides for an end of service gratuity for employees who have completed a period of at least one year of continuous service, which is calculated as follows: (i) 21 days' salary for each year of the first five years of employment; and (ii) 30 days' salary for each additional year of employment, provided that the aggregate amount thereof does not exceed two years' salary.

Salary for the purposes of calculating severance pay is the employee's base salary, and does not include overtime salary; in-kind payments; allowances, such as housing, transportation, travel, representation, currency, children's education, recreational or social allowances; or other allowances or increments.

#### **6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

If the employment contract is for a specified term, in the event that the employer terminates it for any reason other than those under Article 120 of the Labor Law (see question 6.5), unless the employment contract provides otherwise, the employer is obligated to compensate the employee in the amount equal to the lesser of: (1) three months' salary; or (2) salary for the remaining period of the contract.

#### **6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

The termination of an employment contract for arbitrary reasons provides the employee with a right to claim compensation. Termination of an employment contract is considered arbitrary and improper if: (i) the reason for the termination provided by the employer does not relate to the employee's work; or (ii) the employee has submitted a serious complaint to the competent authorities or instituted legal proceedings against the employer which were shown to be valid.

If the employer terminates an employee's services for an improper reason, and particularly if done in retaliation for the filing of a labour grievance by the employee, then the employer could be liable for damages for wrongful dismissal. The Labor Law provides for compensation to be paid to an employee who has been dismissed for arbitrary reasons and such damages could equal up to three months of the employee's salary.

#### **6.8 Can employers settle claims before or after they are initiated?**

Employers may settle claims before or after they are initiated, but the

employee can potentially challenge the settlement later and assert his/her original claim. This subsequent action by the employee is precluded only by the passing of the one year time bar set out under the Labor Law. For an employee who is not a U.A.E. national, the employer must ensure that the employee's labour permit and residence visa are cancelled after termination of services.

#### **6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?**

The Labor Law does not cover collective dismissals *per se*, but it does provide a procedure for collective work disputes (see question 8.2). Accordingly, this procedure is available when employees contest a collective dismissal.

#### **6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

Employees may attempt to contest mass dismissals through the collective work dispute procedure outlined under the Labor Law (see question 8.2). The employer is subject to the decisions reached by the relevant decision-maker at each stage in this process.

### **7 Protecting Business Interests Following Termination**

#### **7.1 What types of restrictive covenants are recognised?**

In the event that the nature of an employee's labour permits the employee to gain knowledge of the employer's clients or the secrets of its business, the employment contract may contain a non-competition clause (e.g., following termination of the employment contract, the employee is prohibited from competing with the employer or from taking part in any business competing with that of the employer).

In order for a non-competition clause to be valid, the employee must be at least 21 years of age at the time of signing the employment contract. In addition, the non-competition clause must be limited in time, place and nature to the extent necessary to safeguard the employer's business.

An employer may also include a provision relating to confidentiality in the employment contract registered with the Ministry to prevent the theft of its trade secrets, and/or require an employee to sign a confidentiality agreement as part of the employee's employment documentation.

#### **7.2 When are restrictive covenants enforceable and for what period?**

It is the general view that the non-competition clause described above, as well as confidentiality agreements, should remain in effect for, at most, one year.

#### **7.3 Do employees have to be provided with financial compensation in return for covenants?**

An employer does not have to pay its former employees remuneration while they are subject to post-termination restrictive covenants.

#### **7.4 How are restrictive covenants enforced?**

In the case an employee violates a restrictive covenant, an employer may attempt to obtain a six-month ban stamped in an employee's passport when the employer cancels the employee's labour permit and residence visa. However, the official policy on such bans change frequently. Also, an employee may have a ban removed.

If an employer discovers a former employee working in breach of a non-competition agreement, the employer may proceed to court and seek an order that the Ministry withdraw the employee's labour permit. However, these types of orders are rarely issued.

An employer may also attempt to bring a civil case against the new employer for "hiring away" the employee and thereby engaging in unfair competition, but again, these types of cases are difficult for an employer to win.

Finally, the employer may attempt to raise a case for monetary damages against the former employee.

Any of these actions could well result in proceedings which would take the employer beyond the term of the non-competition clause, thereby significantly diminishing the value of the victory even if achieved.

### **8 Court Practice and Procedure**

#### **8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?**

Employees may refer employment-related complaints to the Ministry.

In the case of collective work disputes, the matter is initially sent to the relevant Ministry department. If this Ministry department does not resolve the dispute, then it may be forwarded to a "Conciliation Committee", whose formation is determined by the Minister of Labor and Social Affairs.

The parties to the dispute may then appeal to the "Supreme Committee of Conciliation". The Supreme Committee of Conciliation is established in the Ministry of Labor and Social Affairs and formed as follows: (i) the Minister of Labor and Social Affairs as chairman, and he may delegate the Under Secretary or the Director General of the Ministry to replace him in his absence; (ii) a judge from the Supreme Federal Court to be appointed by the Justice Minister at the nomination of the General Assembly of the Court; and (iii) a prominent person who is known to be impartial shall be appointed by the Minister of Labor and Social Affairs. Two reserve members may be appointed from the same categories as the original members to replace them in their absence. The reserve and original members shall be appointed for three years, renewable by the same authorities responsible for their appointment.

A single employee may also file a civil case in court.

#### **8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?**

A single employee with an employment-related complaint may file his/her grievance with the Ministry. The Ministry is directed to consider the matter during a two-week period, although in practice it may take longer. If the employee is not satisfied with the Ministry's resolution of the matter, the employee may file a civil case in court.

The Ministry grievance may be filed *pro se* and without any fee. The civil case may also be filed *pro se*, and the fee normally applicable to a civil complaint is waived if the plaintiff is an employee claiming employment entitlements. Once the civil case is filed, the courts are directed to proceed rapidly, and it is usually the case the Court of First Instance issues a judgment within a single year.

In the case of collective work disputes (when a dispute occurs between one or more employers and some or all of their employees), if the parties fail to settle it themselves, a party in the dispute may forward its complaint to the Ministry. The Ministry in turn, either on its own initiative or at the request of the parties, will attempt to mediate and reach a consensual settlement of the dispute.

If the Ministry does not settle the dispute within ten days from the date it became involved, it shall then submit the dispute to the Conciliation Committee, while notifying both parties in writing.

The Conciliation Committee shall announce a majority ruling within two weeks from the date of receiving the complaint. This decision is binding on both parties if they have agreed in writing to accept the Conciliation Committee's decision. Otherwise, each of the two parties may appeal to the "Supreme Committee of Conciliation" within 30 days from the date of the issuing of the decision, or else the Conciliation Committee's decision shall be final and obligatory.

The Supreme Committee of Conciliation shall render a final and definitive decision in all work disputes referred to it. Decisions of the Supreme Committee of Conciliation are reached through majority vote.

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### **8.3 How long do employment-related complaints typically take to be decided?**

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In the case of a single employee's employment-related complaint, the Ministry phase generally takes 2-4 weeks. If the employee files a case in court, the Court of First Instance generally takes one year. The employee may then appeal to the Court of Appeal and finally to the Court of Cassation, which may take a total two year period. The total time therefore to complete all stages will generally be three years and four weeks.

In the case of collective work disputes, in theory, this would be within the time frames set out under question 8.2 above. However, in practice, there is no track record, because the provisions in the Labor Law on collective disputes are never resorted to.

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### **8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?**

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The judgment of the Court of First Instance may be appealed to the Court of Appeal, and thereafter to the Court of Cassation. The appeal process in a labour matter typically lasts approximately two years.

**Charles S. Laubach**

Afridi & Angell  
Emirates Towers - Level 35  
Sheikh Zayed Road  
Dubai, United Arab Emirates

*Tel:* +971 4 330 3900  
*Fax:* +971 4 330 3800  
*Email:* [claubach@afриди-angell.com](mailto:claubach@afриди-angell.com)  
*URL:* [www.afриди-angell.com](http://www.afриди-angell.com)

Mr Laubach is a member of the Pennsylvania Bar and the District of Columbia Bar.

He advises on projects and project finance; defence, offsets and government contracting; anti-corruption and anti-boycott law; employment and human resources.

Mr Laubach's recent transactions include:

Advising multiple corporate clients on staff downsizing and compensation reduction in the wake of the recent financial crisis; and

Acting as local counsel on the Sharia-compliant Sun Finance Limited Sorouh securitisation, Abu Dhabi's first real estate asset-backed securitisation. Awarded Islamic Finance News UAE Deal of the Year and Structured Finance Deal of the Year.

Mr Laubach was a panel member at IBA conference, The New World Economy: Key Labour, Employment and Human Resources Challenges faced by Business with a Global Workforce in February 2010.

Mr Laubach was a panel member at the Annual Meeting of the Association of Corporate Counsel in San Antonio, Texas, in October 2010.

Mr Laubach was a co-host and a panel member at the Abu Dhabi Summit on Anti-Corruption Enforcement and Compliance, organised by the American Conference Institute, December 2010.

**Omar H. Ayad**

Afridi & Angell  
Emirates Towers - Level 35  
Sheikh Zayed Road  
Dubai, United Arab Emirates

*Tel:* +971 4 330 3900  
*Fax:* +971 4 330 3800  
*Email:* [oayad@afриди-angell.com](mailto:oayad@afриди-angell.com)  
*URL:* [www.afриди-angell.com](http://www.afриди-angell.com)

Mr Omar H. Ayad obtained a J.D. from Vanderbilt University Law School, U.S.A., 2008. He is admitted in the State of Maryland and the District of Columbia, U.S.A. His practice focuses on corporate and commercial, regulatory and dispute resolution.

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# United Kingdom

David Harper



Jo Broadbent



Hogan Lovells

## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The main source of employment law is legislation. Rights agreed at a European level are normally brought into force through national legislation. Other rights are included in contracts of employment.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The law distinguishes between employees, workers and the self-employed. Employees have the most extensive rights. Individuals are employees if: the employer has control over the work; there is mutuality of obligation (an obligation on the employer to offer and on the employee to perform work); and there is nothing inconsistent with an employment relationship.

Individuals are workers if they are obliged to perform services personally and do not carry on a business. Workers are not protected against unfair dismissal and are not entitled to receive redundancy payments.

The self-employed typically have very limited protection.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Contracts of employment do not have to be in writing. However, employees must be provided with a written statement of particulars including: the names of employer and employee; job title; when continuity of employment began; pay rates and payment intervals; place and hours of work; holiday entitlement; sick pay; disciplinary and grievance policies; notice provisions; and whether the terms of employment are governed by a collective agreement.

### 1.4 Are any terms implied into contracts of employment?

Various terms are implied into employment contracts. The duty of mutual trust and confidence is particularly important: employers and employees should not behave in a way that is calculated or likely to destroy or damage the relationship of confidence and trust between them.

The implied duty of loyalty and fidelity prevents an employee from competing with his employer while he remains in employment and from disclosing confidential information. Employees are under an implied obligation to exercise reasonable skill and care and to obey

reasonable instructions. Employers have a duty to pay wages and to provide a suitable and, so far as practicable, safe environment.

Terms can also be implied by custom and practice if an employer invariably follows a particular practice over a period of time.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Employees have certain minimum legal rights, including the right to receive a week's notice per year of service to a maximum of 12 weeks.

A national minimum wage of £5.93 per hour and a maximum average working week of 48 hours apply to all workers. Workers can "opt out" of the maximum working week.

Workers are entitled to minimum daily and weekly rest periods and to 5.6 weeks' holiday each year.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

In 2009 around a third of the total UK workforce but only one fifth of private sector employees were covered by collective agreements. Collective bargaining takes place almost exclusively at company or workplace level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

Trade unions can gain recognition through agreement with an employer, or under the statutory recognition process. Under the statutory process, unions are entitled to apply to the Central Arbitration Committee (CAC) for recognition if the employer, in conjunction with any associated employer, has 21 or more employees and at least 10% of employees are trade union members. The application will succeed if it is supported by a majority of workers, demonstrated by trade union membership or employee surveys. The CAC may arrange a ballot to check support. The trade union must secure the votes of the majority of workers voting and at least 40% of the total workers constituting the bargaining unit. If successful, the trade union will be entitled to collective bargaining on pay, hours and holidays.

## 2.2 What rights do trade unions have?

Recognised trade unions have a variety of rights, including the disclosure of information for collective bargaining, to be informed and consulted in relation to collective redundancies and transfers of undertakings, pension matters and training, and given information on health and safety issues.

## 2.3 Are there any rules governing a trade union's right to take industrial action?

Complex rules govern a trade union's right to take industrial action. A union must obtain support for industrial action from members in a secret ballot and must provide the employer with details of the ballot and its result. If the union fails to comply with the requirements employers can obtain an injunction to prevent the action.

## 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Employers are not obliged to set up works councils in the UK unless they have 50 or more employees and a request is made by at least 10% of the workforce. Such requests are unusual.

If a request is made and a works council is set up, its rights and responsibilities will be a matter for agreement. In the absence of agreement default rules require representatives to be elected and to be informed and consulted about the economic situation, threats to employment, and substantial changes in work organisation.

## 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Works councils do not have co-determination rights.

## 2.6 How do the rights of trade unions and works councils interact?

Trade union rights generally take precedence over those of a works council. If collective redundancies or a transfer of an undertaking is proposed, an employer must consult with a recognised trade union and (if the default rules apply) must notify, but does not have to consult, the works council.

## 2.7 Are employees entitled to representation at board level?

There is no statutory right to representation at board level. It is very rare for an employer to appoint employee directors voluntarily.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees and workers are protected against discrimination because of age, disability, gender reassignment, pregnancy, race, religion or belief, sex or sexual orientation ("protected characteristics"). They are also protected against discrimination

because someone with whom they are associated has a protected characteristic.

Discrimination is prohibited at every stage of the employment relationship, including recruitment and after termination.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Direct discrimination occurs if an employee is less favourably treated because of a protected characteristic. Only direct age discrimination can be justified.

Indirect discrimination occurs where an employer adopts a "provision, criterion or practice" which puts people who share a protected characteristic at a particular disadvantage. For example, requiring all employees to work full time might be indirect sex discrimination because it places women (who are more likely to have child care responsibilities) at a particular disadvantage. If employers can justify the "pcp" by showing it is a proportionate means of achieving a legitimate aim, the treatment is not unlawful.

Harassment is conduct related to a protected characteristic which has the purpose or effect of violating an employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

It is unlawful to victimise an employee because they have taken action to enforce their right not to be discriminated against, or because they have made or supported someone else's allegations of discrimination.

Disabled employees have a right not to be treated unfavourably for a reason arising from a disability and to have reasonable adjustments made for them if they are put at a disadvantage by a provision, criterion or practice adopted by the employer or by a physical feature of an employer's premises.

### 3.3 Are there any defences to a discrimination claim?

An employer is vicariously liable for the acts of its employees, so is liable if one employee discriminates against another. The employer will be able to avoid liability if it can show that it has taken all reasonable steps to prevent the discrimination occurring.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can bring discrimination claims before the Employment Tribunal.

Claims can be settled before or after they are initiated if a compromise agreement is entered into which complies with various formalities. For example, the employee must have received independent legal advice on the terms and implications of the agreement. Claims can also be conciliated by the Advisory, Conciliation and Arbitration Service (ACAS) and any settlement will be binding.

### 3.5 What remedies are available to employees in successful discrimination claims?

Compensation is the main remedy in discrimination claims, comprising an injury to feelings award and a loss of earnings award. Injury to feelings awards range between £600 and £30,000 depending on how serious the discrimination was and how long it lasted. A loss of earnings award compensates the employee for the financial loss they have suffered because of the employer's

discrimination. There is no limit on compensation in a discrimination claim.

Employment Tribunals can make recommendations requiring an employer to take steps to reduce the impact of the discrimination.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Employees are entitled to a period of six months' ordinary maternity leave (OML) and six months' additional maternity leave (AML). At least two weeks' leave must be taken after a child's birth (compulsory maternity leave).

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A woman's usual terms and conditions of employment continue throughout OML and AML, except remuneration. Remuneration is replaced by Statutory Maternity Pay which is currently paid at a rate of 90% of normal pay for the first six weeks, followed by a flat rate of £124.88 a week (£128.73 from April 2011) (or normal weekly pay if lower) for a further 33 weeks. Some employers offer enhanced contractual maternity pay.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

A woman returning to work from OML is entitled to return to the job in which she was employed before her maternity leave on the same terms and conditions, and with the benefit of any general improvement in terms and conditions. A woman returning to work from AML has the same right, unless it is not reasonably practicable for her to return to the old job, in which case she is entitled to return to a job which is suitable and appropriate and on no less favourable terms and conditions.

### 4.4 Do fathers have the right to take paternity leave?

Eligible fathers are entitled to one or two weeks' paternity leave, which is paid at a rate of £124.88 per week (£128.73 from April 2011). Some employers offer enhanced contractual paternity pay.

A right to additional paternity leave comes into force in April 2011, which will give fathers whose partners have returned to work the right to take between 2 and 26 weeks' extra leave before a child's first birthday. The father may be entitled to take the balance of the mother's SMP entitlement.

### 4.5 Are there any other parental leave rights that employers have to observe?

Adoptive parents enjoy rights to ordinary and additional adoption leave which are broadly similar to maternity leave rights. Parents have the right to 13 weeks' unpaid leave to care for a child under the age of five, although a maximum of four weeks' leave is generally permitted each year. Employees have the right to take unpaid time off work to deal with family emergencies.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

Employees with at least 26 weeks' service are entitled to request

flexible working to allow them to care for child or adult dependants. There is a specific procedure which the employer must follow when dealing with such a request. There is no right to have a request granted. The penalty for failing to follow the correct procedure is fairly low (a maximum of £3,200) but the employer could also face indirect discrimination claims if a request is refused.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

An asset sale will generally amount to a transfer of an undertaking if tangible and intangible assets are transferred and the business continues as a going concern. The contracts of employment of employees employed by the seller and assigned to the business will automatically transfer to the buyer. In the UK, an outsourcing will usually amount to a transfer of an undertaking.

In a share sale there is no change in the identity of the employer.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Employees transfer to the buyer on their existing terms and conditions and with their continuity of employment preserved. The buyer must observe those terms following the transfer. Most pension benefits do not transfer. Collective agreements are treated as having been made with the buyer, so their terms continue in force.

On a share sale, employees continue to be employed on their existing terms and conditions.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Representatives of affected employees (trade union representatives or in their absence elected representatives) must be informed and may need to be consulted on an asset transfer. They must be told about the fact of the transfer, when it is likely to take place, the reasons for it, the implications for the employees, and whether any measures are proposed by the buyer or seller. If measures are proposed the employee representatives should be informed long enough before the transfer to allow consultation to take place. A failure to inform and consult can result in a protective award of up to 13 weeks' pay per employee.

Unless the company has an information and consultation agreement (which is still unusual) there should be no information and consultation obligations on a share sale.

### 5.4 Can employees be dismissed in connection with a business sale?

Transfer related dismissals are effective but automatically unfair unless the employer can point to an "economic, technical or organisational" reason entailing changes in the workforce, such as a genuine redundancy situation. Dismissals that are not automatically unfair may be unfair on normal principles.

No special rules apply to dismissals in connection with a share sale.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Transfer-related changes to terms and conditions are only allowed if the buyer can point to an “economic, technical or organisational” reason entailing changes in the workforce. This is difficult to show.

No special rules apply to changes to terms and conditions in connection with a share sale.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Employees have to be given notice of termination unless they are dismissed for gross misconduct. The length of the notice period is set down in an employee’s contract of employment, subject to the statutory minimum (see question 1.5).

### 6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

An employer can require employees to serve a period of “garden leave” if this is permitted under the employee’s contract. Garden leave may also be permitted if the employee has indicated that he does not intend to be bound by the terms of the contract (for example he has sought to misuse confidential information).

### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employees with more than a year’s service are protected against unfair dismissal. An employee is treated as dismissed if his employer terminates his contract (with or without notice), if he is employed on a fixed term contract which expires, or if he resigns in response to a fundamental breach of contract by the employer. Consent from a third party is not required before a dismissal takes place.

### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

It is automatically unfair to dismiss an employee for a variety of reasons. These include: reasons related to pregnancy or maternity or family leave; health and safety; for acting as an employee representative or taking part in trade union activities or protected industrial action; for making a protected disclosure; for making a flexible working request; or for working as a part time or fixed term employee.

### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Employers must show that they have a potentially fair reason for dismissal. The potentially fair reasons are misconduct, capability (health or performance), illegality, redundancy or “some other substantial reason”.

Employees are entitled to receive a statutory redundancy payment if they are dismissed for redundancy. This is calculated as a week’s pay (capped at £400) for each year of service, with certain age related discounts and uplifts. The maximum statutory redundancy payment is £12,000. Employees dismissed for a reason other than redundancy are not entitled to receive a statutory payment.

### 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Employers must follow a fair procedure to avoid a finding of unfair dismissal. What amounts to a fair procedure depends on the reason for the dismissal, but will generally involve warning the employee that he is at risk of dismissal, giving him a chance to comment on the employer’s reasons for wanting to dismiss and a chance to appeal against a decision to dismiss. It is unlikely to be fair to dismiss on capability grounds unless the employee has been given a reasonable opportunity to meet the required standard of performance or attendance, and in this case the process can take a number of months. Medical evidence about an employee’s condition might also be required in a capability dismissal.

### 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee with more than a year’s service can bring an unfair dismissal claim in the Employment Tribunal. If the claim succeeds, the employee would be entitled to a basic award (a week’s pay capped at £400 per year of service, with permitted age-related discounts and uplifts, to a maximum of £12,000). The employee would also be entitled to a compensatory award, to reflect the financial loss caused by the dismissal. The maximum compensatory award is currently £68,400.

There is no qualifying period of service for a claim of automatic unfair dismissal (see question 6.4).

Employees can also bring a discrimination claim if they believe their dismissal was because of a protected characteristic. There is no qualifying period of service for discrimination claims and no cap on compensation. There is also no cap on compensation for a claim that an employee was dismissed for making a protected disclosure. In practice, many claims for unfair dismissal are accompanied by one or more claims of discrimination and/or dismissal for making a protected disclosure.

### 6.8 Can employers settle claims before or after they are initiated?

Unfair dismissal claims can be settled in the same way as discrimination claims (see question 3.4).

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

If an employer has proposals to dismiss 20 or more employees at one establishment as redundant within a period of 90 days, it must consult with trade union representatives or employee representatives before any final decisions are taken. Consultation must last at least 30 days if between 20 and 99 dismissals are proposed and at least 90 days if 100 or more dismissals are proposed. Consultation must take place about avoiding dismissals, minimising the number of dismissals and mitigating the consequences of dismissals.

## 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

If an employer fails to inform and consult on a collective redundancy, employees can bring a claim for a protective award in the Employment Tribunal. If the claim is successful, the tribunal can order the employer to pay a protective award of up to 90 days' pay per affected employee.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Covenants typically prevent an employee from competing with, dealing with customers of, or soliciting the customers or staff of a former employer.

### 7.2 When are restrictive covenants enforceable and for what period?

Employers will only be able to enforce covenants if they can show that they have a legitimate business interest to protect (such as confidential information or customer connections) and that the covenant goes no further than reasonably necessary to protect that interest. If the covenant is too wide in its scope or duration it will not be enforceable. Restrictions usually last between three and twelve months, depending on the seniority of the employee and the nature of the interest to be protected.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Employees do not have to be given financial compensation in return for covenants. If a covenant is not justified or it is too wide in scope or duration a court is unlikely to enforce it, even if the employer makes an offer of financial compensation.

### 7.4 How are restrictive covenants enforced?

If a former employee is acting in breach of his covenants, an employer can apply to the court for an injunction to prevent further breaches. The employer may also be entitled to recover damages to compensate for any loss caused by the employee's breaches.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Employment Tribunals have jurisdiction to hear most employment-related complaints. They are composed of an Employment Judge (who is legally qualified) and two lay representatives, who usually have relevant experience as trade unionists or HR professionals.

### 8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Claims must usually be lodged with the Employment Tribunal within three months of the matter complained of. The complaint is sent to the employer for a response. The parties must exchange documents and witness statements and then there is a hearing to decide the complaint. There are no fees for using the Employment Tribunal and it is rare for either party to be ordered to pay the other's costs.

Details of complaints are automatically referred to ACAS, which conciliates between the parties to a claim. Conciliation is purely voluntary.

### 8.3 How long do employment-related complaints typically take to be decided?

A case generally takes around six months from being lodged until it is heard by the Tribunal. Cases are currently taking longer, because of a large increase in the number of claims.

### 8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Employment Tribunal decisions can be appealed on a point of law. The Employment Appeals Tribunal, a specialist appeal tribunal comprised of a judge and two lay members with practical experience of employment relations, hears appeals. These typically take nine to twelve months.

### Note

This chapter was contributed by Hogan Lovells International LLP.

**David Harper**

Hogan Lovells International LLP  
Atlantic House, Holborn Viaduct  
London EC1A 2FG  
United Kingdom

*Tel:* +44 20 7296 2359  
*Fax:* +44 20 7296 2001  
*Email:* david.harper@hoganlovells.com  
*URL:* www.hoganlovells.com

David is a partner in Hogan Lovells' London office. He is a member of the Litigation Arbitration and Employment practice. He has more than 30 years' experience of employment and labour law, 24 of them as a partner. He has extensive experience of employment litigation and also restructuring and national and international corporate transactions. His transactional work has included privatisations, PPP projects and takeovers. In recent years he has devoted substantial time to the growth of the Pan-European practice. He regularly cooperates with lawyers in Europe providing multi-jurisdiction advice to clients.

**Jo Broadbent**

Hogan Lovells International LLP  
Atlantic House, Holborn Viaduct  
London EC1A 2FG  
United Kingdom

*Tel:* +44 20 7296 2026  
*Fax:* +44 20 7296 2001  
*Email:* jo.broadbent@hoganlovells.com  
*URL:* www.hoganlovells.com

Jo Broadbent is Of Counsel and a professional support lawyer in the Hogan Lovells' employment team. In addition to keeping clients and the team up to date with legal developments, she has extensive experience of developing and presenting internal and external client training courses and workshops. She recently presented a webinar on workplace bullying and harassment for a leading provider of employment law training. Jo is a co-author of the book "Informing and Consulting Employees: the New Law" and frequently writes articles for the HR and legal press.



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# USA

William C. Martucci



Carrie A. McAtee



## Shook, Hardy & Bacon L.L.P.

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

Employment issues are governed by a host of federal, state, and local laws that vary depending upon jurisdiction. The primary sources of federal employment law include the Age Discrimination in Employment Act (ADEA); Americans with Disabilities Act (ADA); Civil Rights Acts of 1866 (Section 1981); Equal Pay Act (EPA); Fair Labor Standards Act (FLSA); Family and Medical Leave Act (FMLA); Title II of the Genetic Information Nondiscrimination Act (GINA); National Labor Relations Act (NLRA); Occupational Safety and Health Administration Act (OSHA); Title VII of the Civil Rights Act of 1964 (Title VII); Uniformed Services Employment and Reemployment Rights Act (USERRA), and Worker Adjustment and Retraining Notification Act (WARN).

Employers are generally prohibited from retaliating against employees for exercising rights under these laws. There are also a myriad of other federal laws that protect whistleblowers who raise complaints that those laws have been violated.

Each state and some localities have their own set of employment laws that often offer protections similar to, or even greater than, those afforded by federal law. State law also governs the areas of unemployment compensation, workers' compensation for on-the-job injuries, employment contract, covenant, and tort matters, as well as wrongful discharge based on public policy considerations.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Coverage of the employment laws is generally determined by the number of employees working for the employer. While many of the federal employment laws do not apply to small employers, the various state employment laws may cover those employers.

Employees are often distinguished based on whether they are "at-will" or subject to a collective bargaining or other employment contract. Under the "at-will" employment doctrine, the employee or the employer can end the employment relationship at any time. In contrast, employees subject to a contract may be protected by a "just cause" requirement or other terms and conditions of employment to which they would not ordinarily be entitled. Employees are also distinguished based on whether they work in the private or public sector, as different sets of employment laws often apply depending on this factor.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

No. Employment is generally assumed to be at-will, meaning either the employee or the employer can end the employment relationship at any time. For those employment relationships that are under contract, most are in writing. But, depending on applicable state law, the employment contract need not be in writing to be enforceable.

There is no federal law that requires employers to provide specific written information to employees at the time of hire, but some states require employers to disclose information such as the employee's wage or regular payday at the outset of employment.

#### 1.4 Are any terms implied into contracts of employment?

While employment is generally assumed to be at-will, almost every state recognises various exceptions to this rule. Depending on the jurisdiction, such exceptions may include: 1) an express or implied contract; 2) an implied covenant of good faith and fair dealing; or 3) an exception prohibiting discharge if it would violate the state's public policy. The law surrounding these exceptions varies widely by state.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. Minimum terms and conditions of employment are imposed by federal and state laws that require most employers to pay a minimum wage. These laws also require most employers to pay overtime — time and one half the employee's regular rate — for each hour worked over forty hours per week, unless the employee is statutorily exempt. Some states expand these minimum terms and conditions to also include mandatory breaks, overtime in excess of eight hours in a day, or overtime for work performed on weekends.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The National Labor Relations Act (NLRA) protects employees' rights to organise a union. While more than one-third of U.S. employees belonged to unions in the 1940s, union employees now represent a shrinking segment of the U.S. workforce. In fact, the use of collective bargaining in the private sector has decreased in recent years to a rate below 10%.

For workforces that are organised, bargaining typically takes place at the company level. Some large unions do coordinate bargaining within an industry. But, they still have to come to independent agreements with each company.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The NLRB gives most private sector employees rights to organise a union in the workplace, and prohibits employers from interfering with, restraining, or coercing employees in the exercise of these rights. Employees generally decide on whether they desire union representation through a formal election decided by a majority of votes cast.

### 2.2 What rights do trade unions have?

When employees choose a union to represent them, the employer and the union are required to meet at reasonable times to bargain in good faith to reach a binding agreement setting out terms and conditions of employment. The employer does not have to adopt any proposal by a union but is required to bargain in good faith.

If no agreement can be reached, the employer may declare an impasse. However, the union may appeal to the National Labor Relations Board (NLRB) if it feels that the employer has not conferred in good faith, and the NLRB can order the employer back to the bargaining table.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

Yes. The NLRB protects activities such as strikes and picketing, so long as they are done in a lawful manner. The NLRB governs acceptable purposes and timing of strikes as well as the conduct of workers involved in a strike or picketing.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

No. In the United States, the union is the form through which employee representation occurs.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable.

### 2.6 How do the rights of trade unions and works councils interact?

This is not applicable.

### 2.7 Are employees entitled to representation at board level?

No, they are not.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. Employment discrimination is prohibited by a variety of federal, state, and local laws. Federal law prohibits employment discrimination based on the protected characteristics of race, color, national origin, sex, pregnancy, religion, age, disability, citizenship status, genetic information, military affiliation, and also prohibits retaliation against employees who oppose or participate in proceedings challenging unlawful discrimination.

Most state and some local laws contain analogous prohibitions, with certain jurisdictions expanding the list of protected categories to include such characteristics as marital and/or familial status, sexual orientation, gender identity, political affiliation, language abilities, use of tobacco products, public assistance status, height, weight, and personal appearance.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Prohibited discriminatory practices generally include bias in all terms, conditions and privileges of employment, including hiring, promotion, evaluation, training, discipline, compensation, classification, transfer, assignment, layoff, and discharge. These activities are often referred to as "adverse actions". To demonstrate discrimination, an employee must establish a connection between the protected characteristic and the adverse action or condition.

Workplace harassment is also unlawful. While most harassment cases involve allegations of sexual harassment, harassment based on other protected categories is also actionable. Employer liability in harassment cases depends on who engaged in the harassment, whether the harassment resulted in a tangible employment action, and the employer's response to the harassment.

Finally, it is unlawful to retaliate against employees who raise concerns about unlawful discrimination or harassment. An employee need not prove that discrimination occurred in order to prove that the employer's response to the employee's complaints constituted unlawful retaliation. Rather, an employee simply needs to prove a causal connection between the complaints and the adverse action.

### 3.3 Are there any defences to a discrimination claim?

Yes. The primary defence to a discrimination claim is establishing that the adverse action was taken for a legitimate, nondiscriminatory reason. There are also affirmative defences to discrimination claims that may apply in limited circumstances and depending on the nature of the claim. For example, employers are generally allowed to discriminate on the basis of sex, age, religion, or national origin because of a *bona fide* occupational qualification (BFOQ). A BFOQ exists when a specific characteristic is necessary for the performance of the job. For example, gender may be a relevant factor in job performance for a model of women's clothing. The BFOQ defence is very narrowly restricted to limited instances and should not be relied in most situations.



### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees enforce their discrimination rights by filing a charge of discrimination with the applicable government agency and/or a civil lawsuit. Federal and state fair employment agencies enforce most laws prohibiting employment discrimination, and often serve as gateways for employees seeking to enforce their discrimination rights. For most types of discrimination, an employee must file a claim with the applicable agency before filing any private lawsuit in court.

Employers can settle discrimination claims either before or after they are initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

Remedies available for discrimination claims depend on the law under which those claims are asserted, but generally include some combination of back pay, lost benefits, front pay, liquidated damages, compensatory damages (which include emotional distress damages), punitive damages, and attorneys' fees and costs, as well as equitable relief such as reinstatement.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

There is no nationwide law mandating paid maternity leave. U.S. law does require unpaid maternity leave for some employees, but not all. The federal Family and Medical Leave Act (FMLA) provides for 12 weeks of unpaid maternity leave, but it only covers eligible employees who work for companies with 50 or more employees. To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months for at least 1,250 hours in the 12 months prior to the first day of leave.

A number of states have enacted their own family leave statutes that similarly afford unpaid maternity leave, some of which expand employee rights by covering smaller employers and extending the time for unpaid leave up to 16 weeks.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Under the FMLA, an eligible employee is entitled to: 1) up to 12 weeks of unpaid maternity leave per year; 2) continuing health insurance benefits during the leave (if already provided by the employer); and 3) job protection (an employee is guaranteed to return to the same job or its equivalent).

Some state family leave laws provide more generous leave benefits than the FMLA by covering smaller employers, extending the time for unpaid leave for up to 16 weeks, and permitting intermittent maternity leave.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

An employee must be restored to the same position or its equivalent with equivalent pay, benefits, and other terms and conditions of employment upon her return from maternity leave. The FMLA also prohibits employers from interfering with employees' FMLA rights

and from retaliating against employees for having requested FMLA leave or otherwise exercised FMLA rights.

### 4.4 Do fathers have the right to take paternity leave?

The FMLA enables both eligible mothers and fathers to take up to 12 weeks of unpaid paternal leave, but it only covers eligible employees who work for companies with 50 or more employees. If the mother and father work for the same employer, the employer may limit their combined FMLA paternal leave to a total of 12 weeks.

### 4.5 Are there any other parental leave rights that employers have to observe?

Under the FMLA, eligible employees are also entitled up to 12 weeks of unpaid parental leave to care for the employee's child who has a serious health condition. Additionally, the FMLA affords up to 12 weeks of unpaid parental leave for any qualifying exigency arising out of the fact that the employee's son or daughter is a military member on active duty, and up to 26 weeks of unpaid leave to care for a military service member with a serious injury or illness who is the employee's son or daughter.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Yes. The FMLA permits eligible employees to take up to 12 weeks of unpaid leave to care for a covered family member who has a serious health condition. This leave may be taken intermittently or in the form of reduced schedule leave when medically necessary.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

The type of sale may affect the status of the seller's employees: a sale of ownership shares generally does very little to change the business, while a sale of assets extinguishes the former business. When the sale of the business is an asset sale, the employment relationship ends and the buyer generally has no duty to retain the former employees, but may elect to do so.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Generally, the buyer has the right to set the initial terms and conditions of employment under which it will hire employees. A union that asserts its rights can then require the employer to bargain collectively after the initial establishment of terms.

There are at three common ways that a collective bargaining agreement would transfer to the buyer. First, since a collective bargaining agreement is a contract, general U.S. contract law principles apply. The buyer can agree to the collective bargaining agreement as part of the terms of sale; can adopt it by express agreement or can impliedly adopt it by continuing to follow its terms and otherwise showing consent to it. Second, the buyer may be obligated to bargain with the union upon consideration of several factors, including whether: (a) the seller's employees represent a majority of the buyer's employees; and (b) the identity of the employing enterprise remains substantially intact in structure and business purpose. Third, the NLRB could determine that the buyer

intends to retain the seller's employees and has led them to believe they would be retained without changes to their conditions of employment.

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**5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?**

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No, unless the business sale results in a plant closing or mass layoff, in which case the employees may be entitled to 60 days' notice of the layoff under the federal Worker Adjustment and Retraining Notification Act (WARN) or an applicable state law counterpart.

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**5.4 Can employees be dismissed in connection with a business sale?**

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Yes. An employee who was at-will with the seller retains this at-will status when the ownership of a business transfers. If the sale is an asset sale, the employer must decide whether to retain each employee and is generally free to choose not to hire any of the former employees.

Any layoff of the employees pursuant to the sale must generally be done in accordance with WARN or an applicable state law equivalent. These laws generally require 60 days' notice of a plant closing or mass layoff.

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**5.5 Are employers free to change terms and conditions of employment in connection with a business sale?**

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Generally, an employee who was at-will with the seller would retain the at-will status when the ownership of a business transfers. As a result, the buyer—just like the seller—could require that the employee's terms of employment change if the employee wants to stay employed. There are no particular protections for employees in this instance.

## 6 Termination of Employment

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**6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?**

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No, except in some circumstances involving a plant closing or mass layoff, in which case the employees may be entitled to 60 days' notice of the layoff under WARN or an applicable state law equivalent. Some of these analogous state laws are more expansive in terms of coverage and employee rights.

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**6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?**

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While employers may utilise a "garden leave" arrangement with employees, this is not common in the United States.

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**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

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Employment is generally assumed to be at-will, meaning either the

employee or the employer can end the employment relationship at any time for good reason, bad reason, or no reason at all. There are four major exceptions to this employment at-will doctrine: 1) dismissal due to discrimination or retaliation in violation of a federal, state, or local statute; 2) an express or implied contract, including a collective bargaining agreement; 3) an implied covenant of good faith and fair dealing; and 4) a public policy exception prohibiting discharge if it would violate the state's public policy. The law surrounding these exceptions varies considerably by state.

There are two basic types of involuntary termination, known often as being "terminated" and being "laid off". Termination is the employer's choice to end the employment relationship, generally for reasons relating to the performance or conduct of the employee. A layoff is usually not strictly related to an employee's performance, but instead due to the elimination of jobs for economic reasons or the employer's business need to restructure.

Consent from a third party is not required before dismissal, unless such a provision exists in an applicable collective bargaining agreement or other employment contract.

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**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

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Employees subject to a collective bargaining or employment contract may enjoy special protection against dismissal depending on the terms of the contract. At-will employees are generally protected from dismissals that are discriminatory, retaliatory, or in violation of a state's public policy.

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**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

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Employers are entitled to dismiss for reasons related to the individual employee or business related reasons, so long as those reasons do not violate: 1) an applicable employment contract; 2) the employee's right to protected family, medical, or military leave; or 3) the laws prohibiting discrimination, retaliation, or wrongful termination in violation of public policy.

Employees are generally not entitled to compensation on dismissal beyond their final pay and any other business expenses owed to them at the time of dismissal.

Depending on the law of the state in which the employee works, an employee may be entitled to receive temporary and partial wage replacement called "unemployment compensation", which is generated by the state government from a special tax paid by employers.

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**6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

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No, unless otherwise required by contract, collective bargaining agreement, or, in some cases, if the employee works in the public sector.

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**6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

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The types of claim an employee can bring vary depending on jurisdiction. Employees can bring a variety of claims under federal, state, and local law, including discrimination; breach of express or

implied contract; breach of the implied covenant of good faith and fair dealing; violation of the statutes guaranteeing family, medical, and military leaves; tort claims, such as infliction of emotional distress, negligent hiring, supervision or retention, invasion of privacy, or defamation; wrongful termination, including wrongful termination in violation of public policy and retaliation for having raised a workers' compensation claim; and retaliation for exercising rights under the various employment statutes.

Remedies available for these employment claims vary considerably depending on the law under which the claims are asserted and the jurisdiction. Such remedies generally include some combination of back pay, lost benefits, front pay, liquidated damages, compensatory damages (which include emotional distress damages), punitive damages, and equitable relief such as reinstatement, as well as attorneys' fees and costs under some employment statutes.

### 6.8 Can employers settle claims before or after they are initiated?

Employers can settle the majority of employment claims either before or after they are initiated. However, special rules exist for employers seeking to settle claims based on violations of the Fair Labor Standards Act (FLSA), which requires minimum wage and overtime pay for most employees. Individual employees cannot consent to work for less than what is prescribed by the FLSA and, therefore, cannot waive their rights under the FLSA by settlement unless the settlement is approved by either the Department of Labor or a federal court. Similarly, employment class action settlements require court approval to ensure they are fair, adequate, and reasonable.

Federal law also contains special procedures that must be followed when settling age discrimination claims, but resolution of these claims does not require court approval.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes. In some cases involving a plant closing or mass layoff, employees may be entitled to advance notice of the layoff under the federal WARN Act or an applicable state law equivalent.

Also, the federal age discrimination law requires an employer to make certain disclosures to employees being dismissed as part of an exit incentive programme or other employment termination programme, if the employer offers them consideration in exchange for signing a waiver of rights under that law. Any such waiver must include certain mandatory provisions to be valid.

An employer may have additional obligations when dismissing a group of employees as required by an applicable collective bargaining agreement, or, in some cases, if the employee works in the public sector.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

While a group of at-will employees may generally be dismissed by an employer at any time, the federal WARN Act and its state equivalents require some employers to provide employees advance notice of a layoff or plant closing. An employer who violates the WARN provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the

period of violation, up to 60 days, as well as civil penalties for each day of violation. Some state laws equivalent to WARN have even harsher penalties for violations. Employees enforce their WARN rights by filing a civil lawsuit.

To the extent employees believe the mass dismissal violated other employment laws, such as those prohibiting discrimination, the employees can file individual or class action claims with the appropriate employment agency and/or in court.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

The laws governing enforceability of restrictive covenants vary considerably by state, and a covenant that is enforceable in one state may well be unenforceable in another. Most states recognise restrictive covenants regarding noncompetition, nonsolicitation, and nondisclosure of confidential business information. These covenants are generally enforceable if they are reasonable and do no more to limit the employee's ability to compete than is necessary to protect the employer's legitimate interests.

Some states have substantially limited the circumstances under which covenants are enforceable. In California, for example, noncompetition covenants are invalid unless otherwise covered by an express statutory exception.

### 7.2 When are restrictive covenants enforceable and for what period?

Most states follow the general rule that restrictive covenants are enforceable, provided they are necessary to protect a legitimate interest of the employer and are reasonably limited in duration, geographic scope, and the restrictions they place on the employee in pursuing his or her profession. The minority position—held most notably by California—prohibits the use of restrictive covenants in virtually all circumstances.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

No. But since employment is a contractual relationship, some consideration must be given. In many states, continued employment is sufficient consideration for the imposition of a restrictive covenant.

### 7.4 How are restrictive covenants enforced?

An employer can enforce a restrictive covenant by filing a civil lawsuit seeking an injunction to prevent the employee from violating the covenant or damages to compensate the employer for the violation.

## 8 Court Practice and Procedure

### 8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Federal courts have jurisdiction to hear cases arising out of the federal employment laws, employment cases in which the United

States is a party, and employment cases between citizens of different states when there is more than \$75,000 in controversy. The federal court system is comprised of 12 judicial circuits that are geographically divided across the country. Each circuit is divided into a number of geographic districts, with a trial court in each district. Decisions of these trial courts may be appealed to the district's corresponding circuit court of appeals, and ultimately to the Supreme Court. State courts have jurisdiction to hear cases arising out of state employment laws. Each state has a court system that is comprised of trial courts, courts of appeals, and a state supreme court.

Federal employment agencies such as the EEOC and DOL have authority to investigate certain employment claims and even litigate those claims in federal court on behalf of employees. These agencies also have authority to hear such employment claims through an administrative law judge.

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### **8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?**

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The applicable procedure depends on the forum in which the employment claim is brought. Employment lawsuits pending in federal courts are governed by the Federal Rules of Civil Procedure, and each state has its own civil procedure rules that apply to employment lawsuits pending in its courts. Likewise, each administrative agency with jurisdiction to investigate or hear employment claims is governed by statute or procedural regulations that apply to such claims.

The EEOC is statutorily required to engage in conciliation before it is permitted to file a lawsuit against an employer on an employee's behalf. Otherwise, conciliation is not mandatory before a complaint can proceed, absent a contract or collective bargaining agreement to the contrary.

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### **8.3 How long do employment-related complaints typically take to be decided?**

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Courts have substantial discretion to determine the length of time afforded for each employment case and will take into account the complexity of the litigation and the claims asserted. For employment cases that are decided at trial, it is rare for an employment claim to be tried in less than a year from the filing date of the case. More complex individual or class cases are often litigated for several years before being tried.

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### **8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?**

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Yes. Interlocutory appeals are only permitted in limited circumstances, but it is possible to appeal a lower court's final judgment. Depending on the jurisdiction and complexity of the litigation, an appeal can take anywhere from six months on the short end to a few years in more complex cases.

**William C. Martucci**

Shook, Hardy & Bacon L.L.P.  
1155 F Street, N.W., Suite 200  
Washington, D.C. 20004-1305  
USA

Tel: +1 202 783 8400  
Fax: +1 202 783 4211  
Email: [wmartucci@shb.com](mailto:wmartucci@shb.com)  
URL: [www.shb.com](http://www.shb.com)

Bill practices nationally in complex class action (employment discrimination and wage & hour) and EEOC litigation, and holds an LL.M. in Employment Law from Georgetown University in Washington, D.C. *Chambers* notes, "Bill Martucci is worth having on any dream team for employment litigation and policy issues". His jury work has been featured in *The National Law Journal*. He is listed in the *EuroMoney Guide to the World's Leading Labour and Employment Lawyers* and *The Best Lawyers in America for Employment and Business Litigation*. *Lawdragon* and *Human Resource Executive* have recognised Bill as one of America's Most Powerful Employment Lawyers. He teaches Multinational Business Policy and Global Employment Law at Georgetown. Bill is the practice leader of SHB's National Employment Litigation & Policy Practice.

**Carrie A. McAtee**

Shook, Hardy & Bacon L.L.P.  
2555 Grand Boulevard  
Kansas City, Missouri 64108-2613  
USA

Tel: +1 816 474 6550  
Fax: +1 816 421 5547  
Email: [cmcafee@shb.com](mailto:cmcafee@shb.com)  
URL: [www.shb.com](http://www.shb.com)

Carrie is a partner in SHB's National Employment Litigation & Policy Practice, representing corporate employers exclusively. She has litigated a broad range of federal claims in the employment discrimination and harassment context, including age, disability, race and sex discrimination, as well as sexual and other forms of harassment, and retaliation. In addition, Carrie has broad experience dealing with the Equal Employment Opportunity Commission (EEOC), and guides clients through the administrative charge process and litigating with the EEOC in numerous jurisdictions. She also specialises in litigation matters involving federal wage and hour and FMLA claims. Carrie has successfully tried multi-party EEOC cases before juries across the United States and has written and lectured widely on different aspects of EEOC litigation and administrative processes.



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**For more information, contact:**

William C. Martucci  
Partner, Shook, Hardy & Bacon L.L.P.  
1155 F Street, N.W., Suite 200, Washington, D.C. 20004-1305  
Tel: +1 202 783 8400  
Fax: +1 202 783 4211  
Email: [wmartucci@shb.com](mailto:wmartucci@shb.com)  
URL: [www.shb.com](http://www.shb.com)

# Vietnam



Konrad Hull



Nguyen Thi Xuan Trinh

## VNA Legal

### 1 Terms and Conditions of Employment

#### 1.1 What are the main sources of employment law?

The Labour Code of Vietnam, issued by the National Assembly on 23 June 1994 (as amended 2 April 2002, 29 November 2006, and 2 April 2007) together with its implementing legislation. Please note that the Labour Code is due for amendment later this year.

#### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The Labour Code is stated to apply to all workers, and organisations or individuals utilising labour on the basis of a labour contract in any sector of the economy and in any form of ownership. The law also applies to trade apprentices, domestic servants and various other forms of labour stipulated in the Labour Code. Specifically, in relation to foreign investment and foreigners, Vietnamese citizens who work in an enterprise with foreign-owned capital in Vietnam or in a foreign or international organisation operating in the territory of Vietnam, and a foreigner who works in an enterprise or organisation or for a Vietnamese individual operating in the territory of Vietnam, are subject to Labour Code, except where the provisions of an international treaty to which Vietnam is a signatory provide otherwise. Certain State employees and officials are governed by other legislation and only certain provisions of the Labour Code apply to them.

There are three forms of labour contract governed by the Labour Code: (i) an indefinite term labour contract – where the parties do not determine the term and the time for termination of the contract; (ii) a definite term labour contract – where the parties determine the term and the time for termination of the contract as a period of between twelve to thirty six months; and (iii) a labour contract for a specific or seasonal job with a duration of less than twelve months.

#### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Pursuant to the Labour Code, a labour contract has to be entered in writing in duplicate with each party retaining one original. However, an oral contract may be entered into in respect of certain temporary jobs which have duration of less than three months and in respect of domestic helpers. In the case of oral agreements, the parties must still comply with the provisions of the Labour Code.

#### 1.4 Are any terms implied into contracts of employment?

A labour contract must contain the following main provisions: work to be performed; working hours and rest breaks; wages; location of job; duration of contract; conditions on occupational safety and hygiene; and social insurance for employees. Additionally, the Labour Code and its implementing legislation set minimum employee rights in many areas, including working hours, rest breaks, overtime, annual leave, personal leave, maternity leave, termination etc. and such rights cannot be contracted out of. Where the whole or part of a labour contract provides to the employee less rights than those stipulated in the laws on labour, in any collective labour agreement or the existing internal labour regulations of the enterprise, or limits other rights of an employee, the whole contract or relevant parts must be amended or added to accordingly.

#### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The Labour Code sets down numerous minimum terms and conditions that an employer must observe, including but not limited to working hours, rest breaks, overtime, annual leave, personal leave, maternity leave, termination etc. Additionally, minimum salaries are also set by law, which salaries vary from locality to locality and also whether or not the employer is a Vietnamese or foreign enterprise.

#### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The Labour Code allows collective labour agreements to be entered into between a labour collective and the employer in respect of working conditions and utilisation of labour and the rights and obligations of both parties in respect of labour relations. A collective labour agreement is negotiated and signed by the representative of the labour collective (i.e. the representative of the executive committee of the trade union of the enterprise or a temporary trade union organisation) and the employer but the terms and conditions of the collective labour agreement must not be inconsistent with the Labour Code and other legislation.

A collective labour agreement can only be signed if the negotiated content of such agreement is approved by more than fifty percent of the members of the labour collective in the enterprise.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

It is the responsibility of the local trade union and industry trade union to establish trade unions at enterprises and employers are responsible for facilitating the establishment of such trade unions. Any act which obstructs the establishment and activities of a trade union at an enterprise is strictly prohibited. In practice, many organisations do not have a trade union established, although certain sectors (i.e. the manufacturing sector) often do.

### 2.2 What rights do trade unions have?

Pursuant to law, trade unions look after and protect the rights of employees, and inspect and supervise the implementation of the provisions of the laws on labour such as inspecting the observance of the law on labour contracts, recruitment, wages, labour safety, social insurance and policies in relation to the rights, obligations and interests of the employees. Depending on the form of disciplinary action being taken against an employee, an enterprises' trade union should be represented at relevant disciplinary meetings and detailed provisions governing labour discipline and the role of the trade unions are set out in law. The law does not adequately deal with the situation where an enterprise does not have a trade union and how disciplinary procedures should be conducted in such circumstances.

Additionally, the trade union of an enterprise represents the employees in signing collective labour agreements with the employer and a representative of the trade union should attend and state his/her opinions where a labour dispute is resolved by an authority or heard by the court.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

The rights of a trade union to take industrial action are governed by the Labour Code. Pursuant to the Labour Code, a trade union or labour collective representative can issue a written decision on a strike and prepare written demands when there is agreement from more than fifty percent of the total number of employees in the case of an enterprise or section of an enterprise with less than 300 employees, or above seventy five percent of the total number of people from whom opinions were taken in the case of an enterprise or section of an enterprise with three hundred or more employees (i.e. where an enterprise has three hundred or more employees, opinions are not taken directly from employees but from members of the executive committee of the trade union of the enterprise, from the leader of the union group and from the leader of the manufacturing group; where there is no trade union, opinions are taken from the leader and deputy leader of the manufacturing group).

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

A labour conciliation council of an enterprise shall be established in enterprises which have a trade union or a provisional executive committee of a trade union. A labour conciliation council of an enterprise shall conduct conciliation of labour disputes including

individual labour disputes between an employee and the employer and a collective labour dispute between a labour collective and the employer.

The membership of the labour conciliation council shall consist of an equal number of representatives of the employees and of the employer. The two parties may agree on a selection of additional members of the council. The labour conciliation council shall work on the basis of the principle of reaching a unanimous agreement.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Labour conciliation councils are established to conduct conciliation of labour disputes only.

### 2.6 How do the rights of trade unions and works councils interact?

As noted above, labour conciliation councils are established to conduct conciliation of labour disputes only; the rights of trade unions and work councils are separate.

### 2.7 Are employees entitled to representation at board level?

No, they are not.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The Labour Code specifies that every person shall have the right to work, to choose freely the type of work or trade, to learn a trade and to improve his/her professional skill without being discriminated against on the basis of gender, race, social class, beliefs or religion. Additionally, the Labour Code sets out specific rights for female employees. Specifically, the Labour Code provides that the State shall ensure that the right to work for a woman is equal in all aspects with that of men. Additionally, employers are strictly prohibited from conduct which is discriminatory towards a female employee and employers must implement the principle of equality of males and females in respect of recruitment, utilisation, wage increases and wages. Employers must give preference to a female who satisfies all recruitment criteria for a vacant position which is suitable to both males and females in an enterprise. An employer is prohibited from dismissing a female employee or unilaterally terminating the labour contract of a female employee for reason of marriage, pregnancy, taking maternity leave or raising a child under twelve months' old, except where the enterprise ceases operation. During pregnancy, maternity leave or raising a child under twelve months, a female employee is entitled to postponement of unilateral termination of her labour contract or to extension of the period of consideration for labour discipline, except where the enterprise ceases operation.

Pursuant to the Labour Code, employers are prohibited from prejudicing employees because the employee has formed, joined or participated in the activities of a trade union.

Additionally, pursuant to the Labour Code, the State will protect the right to work of the disabled and encourage the recruitment of and creation of jobs for the disabled. Tax incentives and other

preferential treatment may apply to enterprises that employ disabled persons.

### 3.2 What types of discrimination are unlawful and in what circumstances?

Please see question 3.1 above.

### 3.3 Are there any defences to a discrimination claim?

No specific defences are specified under Vietnamese law.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

A discrimination complaint could be made to the Department of Labour, War Invalids and Social Affairs (“DOLISA”), the Ministry of Labour, War Invalids and Social Affairs (“MOLISA”) or to the Vietnamese courts. Employees can settle claims before they are initiated and parties to all forms of dispute are actively encouraged to settle claims.

### 3.5 What remedies are available to employees in successful discrimination claims?

Remedies will depend on the nature of the discrimination and could include re-instatement, where an employee is terminated for discriminatory reasons, as well as monetary compensation. Additionally, the acts of discrimination must cease and the infringing party may be forced to make a public apology and restore the honour and all material interests of the employee.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Female employees are entitled to 4 months’ maternity leave when they perform jobs under normal working conditions, 5 months’ leave if they perform heavy hazardous or dangerous jobs (as prescribed by MOLISA and the Ministry of Health) and 6 months’ leave for disabled employees according to the provisions of law on disabled persons. Where a female employee gives birth to twins or more, she shall be entitled to an additional 30 days’ leave for each additional child.

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

As with sick leave, maternity leave entitlements are paid from the social insurance fund and not by the employer, although, in practice, they are usually paid by the employer and then reimbursed by the social insurance fund to the employer. Employees are entitled to full maternity leave from the first day of employment and there is no minimum period they must have worked. On maternity leave, employees are paid 100% of their average salary of the preceding six (6) months.

### 4.3 What rights does a woman have upon her return to work from maternity leave?

Parents are entitled to take paid leave for a sick child in accordance

with the following (i) up to 20 days for a child below 3 years of age; or (ii) up to 15 days for a child between 3 to 7 years of age. When both the mother and father are participating in the social insurance regime, if their child is still sick after either of them has spent their entire entitlement, the other parent is entitled to the said regime. Parents will be entitled to 75% of their monthly salary from the social insurance fund.

### 4.4 Do fathers have the right to take paternity leave?

In case of the mother’s death, the father or person directly nursing the child is entitled to the maternity regime.

### 4.5 Are there any other parental leave rights that employers have to observe?

Pursuant to law, when taking a leave of absence: to attend a pregnancy examination; to carry out family planning programmes or to have medical treatment for miscarriage; to attend to a sick child under seven years of age; or to adopt a newborn baby, a female employee is entitled to social insurance benefits or to be paid by the employer a sum equal to the amount of social insurance benefits. The duration of the leave of absence is determined by the government. By implication, female employees are therefore entitled to take leave for such periods.

### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

As noted above, employees are entitled to take paid leave (paid from the social insurance fund) where they need to attend to a sick child under seven years of age but there is no general entitlement to work flexibly, except by agreement of the parties.

## 5 Business Sales

### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Pursuant to the Labour Code, where an enterprise merges, consolidates, divides, separates or transfers ownership of, right to manage, or right to use assets of the enterprise, the succeeding employer shall be responsible to continue performance of the labour contracts of the employees and the succeeding employer shall be responsible for payment of wages and other benefits to the employees transferred. Where all available employees are unable to be utilised, there must be a plan for labour usage in accordance with law. Further, an employee whose labour contract is terminated as a result of the above, shall be entitled to termination allowances for an organisational restructuring (i.e. one month’s salary for each year of employment, but not less than two months’ salary, subject to our comments at question 6.5 below on the unemployment insurance regime). Additional provisions are provided under the Law on Enterprises and its implementing legislation in relation to divisions, separations, consolidations, mergers and conversions of companies.

### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

All rights of a transferring employee under their labour contract transfer on a business sale unless their employment is terminated. In cases where an enterprise merges, consolidates, divides,



separates, transfers ownership of, right to manage, or right to use the assets of the enterprise, the employer and the executive committee of the trade union of the enterprise shall, based on the labour usage plan, consider the continuance of performance of, amendment of or addition to the collective labour agreement, or entering into a new one.

### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

In cases where an enterprise merges, consolidates, divides, separates, transfers ownership of, right to manage, or right to use the assets of the enterprise, and all of the current employees are unable to be utilised, there must be a plan for labour usage containing the following basic principles:

- (i) the number of employees who will continue to be employees;
- (ii) the number of employees who will be re-trained in order that they are able to continue employment;
- (iii) the number of employees who will retire;
- (iv) the number of employees whose labour contracts will be terminated; and
- (v) the former employer and the new employer are responsible to resolve the rights of employees, including specifying responsibility for funding for training and for funding for loss of work allowances for employees whose labour contracts will be terminated.

The trade union of an enterprise must participate in preparation of the plan for labour usage, and when the plan is implemented, it must be notified to the State administrative body for labour at the provincial level.

Timing varies depending on the industry and the number of employees involved and whether or not the enterprise has a trade union and the law does not adequately deal with the situation where the enterprise does not have a trade union.

A fine of between fifteen to thirty million Vietnamese dong may apply for failure to comply with the above procedures.

### 5.4 Can employees be dismissed in connection with a business sale?

Yes, please see question 5.1 above.

### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

For transferring employees, the succeeding employer is responsible for continuing performance of the labour contracts and is responsible for the payment of wages and other benefits to the employees transferred. Conditions of employment pursuant to such labour contract could only be changed by agreement of the parties. However, conditions of employment of any collective labour agreement could be changed (please see question 5.2 above) following relevant procedures.

## 6 Termination of Employment

### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Yes, employees have to give notice of termination of their

employment and the period and rights to terminate depend on the type (i.e. term) of contract. Employees under a definite term labour contract (i.e. with a term of between 12 to 36 months) or a seasonal or specific job with a duration under 12 months can only terminate their labour contract under the following circumstances set out in the Labour Code:

- (a) the employee is not assigned to the correct job or work place or ensured the work conditions as agreed in the contract – in which case they must provide at least 3 working days' written notice;
- (b) the employee is not paid in full or in time the wages due as agreed in the contract – in which case they must provide at least 3 working days' written notice;
- (c) the employee is maltreated or is subject to forced labour – in which case they must provide at least 3 working days' written notice;
- (d) due to real personal or family difficulties (as detailed in law), the employee is unable to continue performing the contract – in which case they must provide at least 30 working days' written notice in the case of a definite term labour contract, or at least 3 days' written notice in the case of a seasonal or specific job with a duration of less than 12 months;
- (e) the employee is elected to full-time duties in a public office or is appointed to a position in a State body – in which case they must provide at least 30 working days' written notice in the case of a definite term labour contract, or at least 3 days' written notice in the case of a seasonal or specific job with a duration of less than 12 months;
- (f) a female employee is pregnant and must cease working on the advice of a doctor – by written notice, with the period of notice depending on the period determined by the doctor; and/or
- (g) where an employee suffers illness or injury and remains unable to work after having received treatment for a period of three consecutive months in the case of a definite term labour contract (with a duration of 12 to 36 months) or for a quarter of the duration of the contract in the case of a labour contract for a specific or seasonal job with a duration of less than 12 months – in which case they must provide at least 3 working days' written notice.

An employee under an indefinite term labour contract has the right to terminate the contract provided that he/she gives the employer at least 45 days' written notice or, where the employee has suffered illness or injury and has received treatment for a period of 6 consecutive months, such employee can terminate on at least 3 days' written notice.

### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Vietnamese law is silent on this issue but provided the employee is still employed and paid then this would not be contrary to law. However, as noted above, an employee can unilaterally terminate a definite term labour contract on three days' notice where they are not assigned to the correct job or work place or ensured the work conditions as agreed in the contract (which could arguably be used to terminate a contract in such circumstance depending on how the provision was drafted) or on 45 days' notice for an indefinite term contract (i.e. at any time during the "garden leave", the employee could choose to terminate the contract earlier). It would be unlikely that Vietnamese courts would enforce any provision that circumvented such rights even if agreed to by the parties.

**6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

An employer has the right to unilaterally terminate a labour contract only in the following circumstances:

- (a) The employee repeatedly fails to perform the work in accordance with the terms of the contract.
- (b) An employee is disciplined in the form of dismissal where an employee: (i) commits an act of theft, embezzlement, disclosure of business or technology secrets, or other conduct which is seriously detrimental to the assets or well-being of the enterprise (which conduct and the consequences for such conduct need to be spelt out either in the employee's labour contract or the employer's internal labour regulations); (ii) is disciplined by extension of the period of wage increase or transfer to another position, re-commits an offence during the period when he is on trial or re-commits an offence after he is disciplined in the form of removal from office; and/or (iii) takes an aggregate of 5 days off in one month or an aggregate of 20 days off in one year of his own will without proper cause.
- (c) Where an employee suffers illness and remains unable to work after having received treatment for a period of 12 consecutive months in the case of an indefinite term labour contract, or six consecutive months in the case of a definite term contract with a duration of 12 to 36 months, or more than half the duration of the contract in the case of a contract for a specific or seasonal job.
- (d) The employer is forced to reduce production and employment after trying all measures to recover from a natural disaster, a fire or another event of *force majeure* as stipulated by the government.
- (e) The enterprise, body or organisation ceases operation.

Relevant notice periods, as noted in question 6.1 above, must be given.

In addition to the methods of termination noted above an employer can terminate a labour contract as a result of an organisational restructuring or technological changes. Specifically, the law provides that where as a result of organisational restructuring or technological changes an employee who has been employed in a business for a period of 12 months or more will become unemployed, the employer has an obligation to try to retrain and assign the employee to a new job but, if a new job cannot be created, the employer can terminate the employee's employment.

Where an employer unlawfully terminates a labour contract, the employer must re-employ the employee for the position stipulated in the contract and pay compensation equal to the amount of wages and wage allowances (if any) for the period the employee was not allowed to work, plus at least two months' wages and wage allowances (if any). Where the employee does not wish to return to work, the employee shall be paid the compensation noted above and any termination allowances that may apply under law. Where the employer does not wish to re-employ the employee and the employee so agrees, in addition to the compensation noted above and any termination allowances that may apply under law, the two parties must agree on an additional amount of compensation for the employee.

Consent from a third party is not required before an employer can dismiss but extensive procedures specified in the law must be followed and the law predicates the relevant trade union representative being present at disciplinary meetings. The law is silent on what happens where the enterprise does not have a trade union established and therefore the procedures cannot be followed

to the letter of the law where there is no trade union, which is a well noted shortcoming in the law.

**6.4 Are there any categories of employees who enjoy special protection against dismissal?**

An employer is not permitted to unilaterally terminate a labour contract in any of the following circumstances:

- (a) The employee is suffering from an illness or injury caused by a work-related accident or occupational disease and is being treated or nursed on the advice of a doctor other than in the circumstances specified in question 6.3(c) and (d).
- (b) The employee is on annual leave, personal leave of absence, or any other type of leave permitted by the employer.
- (c) The employee is female and for reasons of marriage, pregnancy, taking maternity leave or raising a child under 12 months' old, except where the enterprise ceases its operation.

**6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

Please see question 6.3 above for the various grounds for unilateral termination by an employer.

The severance allowance payable under Vietnamese law depends on the specific circumstances pursuant to which the employee's employment has been terminated. However, generally speaking, where an employee resigns in accordance with the law or is terminated in accordance with the law and the employee has been working for the employer for twelve months or more, the employer will be obligated (subject to our comments on unemployment insurance below) to pay the employee a termination allowance equal to the aggregate amount of half of one month's salary for each year of employment, except if the employer has contracted for additional benefits, in which case the employer will have to pay the amount contracted. "Salary" for the purpose of calculating termination allowances is calculated based on the average salary (including seniority and position allowances but excluding other allowances) earned in the six months immediately preceding termination. In cases where an employee has worked more than 6 months in any one year, the number of years of service must be rounded up. Probationary periods, annual leave, public holidays and training courses must be taken into account in determining the period of employment. Please note that for the purpose of determining termination allowances, the term "Salary" does not include social and health insurance payments, bonuses or clothing allowances. However, if the employee has not resigned in accordance with law (i.e. the employee has not given the requisite notice period), no severance allowances will be payable. As well as severance allowances, an employee will also be entitled to be paid any unpaid accrued wages and untaken accrued annual leave. Additional entitlements could also be specified in the relevant labour documentation and different payments apply for termination due to an organisational restructuring.

From 1 January 2009, Vietnam introduced a form of unemployment insurance, which replaces termination allowances specified in the Labour Code in certain circumstances. Where employees are covered under the unemployment insurance regime they will receive unemployment insurance from the social insurance fund (at the rates specified by law) for the period that they have been making contributions thereto (and will not be entitled to termination allowances for that period) but for periods prior to the introduction

of the insurance regime, they will receive termination allowances from the employer. Those employees not covered under the unemployment insurance regime will still be entitled to termination allowances. Employers required to participate in the unemployment insurance regime (with contributions thereto being made by both the employer and employee) are those employers who employ ten or more employees and sign labour contracts with such employees (other than labour contracts with less than a twelve-month term). Employers employing less than ten employees are not required to participate in the unemployment insurance regime or make contributions thereto and termination allowances will be payable for employees working for such employers.

#### **6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

Yes. The Labour Code and its implementing legislation set out extensive procedures that must be followed for all forms of disciplinary action including dismissal.

#### **6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

Please see question 6.3 above.

#### **6.8 Can employers settle claims before or after they are initiated?**

Yes, employers can settle claims before and after they are initiated and are encouraged by dispute resolution procedures and the courts to do so. Employers are recommended to seek legal advice before terminating any employee and are generally encouraged to negotiate a termination as opposed to following the termination procedures due to the limited grounds for termination provided under law and the difficulties in practice in enforcing these rights.

#### **6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?**

Please see question 6.3 above for the various grounds for unilateral termination by an employer and for termination due to an organisational restructuring or technological changes.

In the circumstances of an organisational restructuring or technological changes, which could impact on a number of employees, the employer is under an obligation to try to retrain employees and to create a new job for employees who have been employed in the business for a period of twelve (12) months or more, although they can dismiss such employees where they are unable to do so.

#### **6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?**

Employees generally enforce their rights through the courts, although they could seek the assistance of relevant Vietnamese authorities such as DOLISA or MOLISA. Pursuant to the law, the remedy for unfair dismissal is re-instatement with relevant compensation (see question 6.3 above).

## **7 Protecting Business Interests Following Termination**

### **7.1 What types of restrictive covenants are recognised?**

Whilst there is nothing legally to prevent the parties from agreeing restrictive covenants, in practice these will almost always be unenforceable where they extend beyond the term of employment. Whilst there is no legal basis for this, the labour authorities view a labour contract as only being able to deal with matters during the term of employment and the courts generally view disputes in favour of employees and are likely to take a similar approach. Whilst they may not be able to be enforced in practice, restrictive covenants are common and still recommended as they alert employees to expectations and may be able to be enforced in some circumstances. However, employers should be aware of their limitations.

### **7.2 When are restrictive covenants enforceable and for what period?**

Generally restrictive covenants relating to confidentiality issues will be enforceable during the term of the labour contract but may not be enforceable thereafter. Restraints on secondary employment whilst the employee is working for the employer will not be enforceable and neither will restrictions on employees seeking employment (whether or not limited in time, geography or industry etc.) after termination of employment.

### **7.3 Do employees have to be provided with financial compensation in return for covenants?**

No, they do not.

### **7.4 How are restrictive covenants enforced?**

Restrictive covenants during the term of the employment could be enforced through disciplinary procedures under Vietnamese law and in accordance with the employee's labour contract and the employer's internal labour regulations or through the courts. After termination of employment, enforcement would need to be sought through the courts.

## **8 Court Practice and Procedure**

### **8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?**

The District People's Courts have first instance jurisdiction to resolve individual labour disputes between an employee and an employer in cases provided by the Civil Proceedings Code. The Labour Court of the Provincial People's Courts have first instance jurisdiction to resolve collective labour disputes between a labour collective and an employer in cases provided by the Civil Proceedings Code.

The Labour Court of the Provincial People's Court rehears cases in which the judgment of the District People's Court of first instance is being appealed against. The Appellate Court of the Supreme People's Court rehears cases in which the judgment of the Provincial People's Court of first instance is being appealed against.

Composition of a council of adjudicators with first instance jurisdiction comprises of one judge and two people's jurors. In special cases, the council of adjudicators with first instance jurisdiction may comprise of two judges and three people's jurors.

Composition of a council of adjudicators with appellate jurisdiction comprises of three judges.

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## **8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?**

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Individual labour disputes between an employee and an employer (except for: disputes relating to disciplinary actions in the form of dismissal or disputes which arise from the unilateral termination of a labour contract; disputes relating to payment of compensation for loss between an employee and employer; disputes relating to payment allowances upon termination of a labour contract; and disputes relating to social insurance stipulated by the laws on labour) should go through reconciliation by the labour conciliatory council of an enterprise or a labour conciliator of the body in charge of the State administration of labour in a district, town, or provincial city before proceeding to the courts. Collective labour disputes between a labour collective and employer should be resolved by the labour arbitration council in a province and city under a central authority before proceeding to court.

Disputes relating to disciplinary actions in the form of dismissal or disputes which arise from the unilateral termination of a labour contract or disputes relating to payment of compensation for loss between an employee and employer, payment allowances upon termination of a labour contract or disputes relating to social insurance stipulated by the laws on labour may be taken straight to court.

In order to commence proceedings at court, the applicant must lodge an application and enclose documents and evidence to the competent court for settlement of the case. Within five working days from the date of receipt of the application, the court shall consider to carry out the procedures for acceptance of the case or

not. Upon receipt of an application and the enclosed documents and evidence, the court shall immediately notify the applicant to come to the court to carry out the procedures for payment of a court fee deposit in the case where applicable. Within a period of fifteen (15) days from the date of receipt of the notification note on payment of a court fee deposit from the court, the applicant must pay the court fee deposit. The court shall accept the case when the applicant submits a receipt for the payment of a court fee deposit.

During the period of preparation for trial at first instance, the court shall carry out conciliation to enable the parties to reach an agreement on settlement of the case, except for certain cases for which conciliation is not permitted or is unable to be carried out as stipulated by law (such as claims for compensation causing damage to State property, a defendant who has been properly summonsed by the court intentionally fails to appear twice or any concerned party cannot participate in the conciliation due to proper reasons).

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## **8.3 How long do employment-related complaints typically take to be decided?**

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The maximum time-limit of preparation for trial is stated by law to be five months from the date of acceptance of the case. Although in certain cases this can be extended and, in practice, often is.

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## **8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?**

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Yes, it is possible to appeal a first instance decision.

An appeal application can be lodged within the time-limit of fifteen days from the date of pronouncement of the judgment. If the concerned parties are absent from the trial, the time-limit is calculated from the date a copy of judgment is delivered to them or from the date the judgment is displayed.

The maximum time-limit of preparation for an appeal hearing is five months from the date of acceptance of the case.



### Konrad Hull

VNA Legal  
Tenth Floor, Bitexco Office Building  
19-25 Nguyen Hue Street  
District 1, Ho Chi Minh City  
Vietnam

Tel: +84 8 3914 0074  
Fax: +84 8 3914 3820  
Email: [konrad.hull@vnalegal.com](mailto:konrad.hull@vnalegal.com)  
URL: [www.vnalegal.com](http://www.vnalegal.com)

Konrad is admitted as a Barrister and Solicitor of the Supreme Court of Western Australia and is a Partner of VNA Legal and based in Ho Chi Minh City. He has extensive international and local experience and has been practicing law for approximately 14 years, with almost 9 years in Vietnam, where Konrad was previously a partner in LWA Vietnam (formerly Lucy Wayne & Associates) and head of the HCMC Legal practice of DFDL Mekong.

Before coming to Vietnam, Konrad worked in the corporate/commercial and M&A practices with Minter & Ellison in Australia and Simmons & Simmons in Hong Kong. Since moving to Vietnam, Konrad has gained a vast amount of foreign direct investment experience, regularly advising clients on structuring both direct and indirect investments into Vietnam and has an extensive employment law practice.



### Nguyen Thi Xuan Trinh

VNA Legal  
Tenth Floor, Bitexco Office Building, 19-25  
Nguyen Hue Street  
District 1, Ho Chi Minh City  
Vietnam

Tel: +84 8 3914 0074  
Fax: +84 8 3914 3820  
Email: [trinh.nguyen@vnalegal.com](mailto:trinh.nguyen@vnalegal.com)  
URL: [www.vnalegal.com](http://www.vnalegal.com)

Trinh is a Vietnamese qualified lawyer and partner of VNA Legal, based in Ho Chi Minh City. Prior to establishing VNA Legal, Trinh was a partner of LWA Vietnam (formerly Lucy Wayne & Associates) and has more than 12 years' experience practicing law and providing legal services to foreign clients. She was trained in the UK for legal practice from 2002 to 2005. In addition to a law degree and legal practice degree, she has also obtained a finance-banking degree, completed the Vietnamese securities course and international contract course in Bangkok.

Trinh advises on a broad range of direct and indirect foreign investment in Vietnam and has considerable experience in investment structuring and re-structuring as well as general corporate, oil and gas, infrastructure, maritime, construction, real estate, M&A, employment, litigation, IP, commercial, taxation, banking, project financing and securities.

**Languages:** Vietnamese (native) and English (fluent).



VNA Legal has two Vietnam-based partners (1 Australian and 1 Vietnamese). The partners lead a team of foreign lawyers, foreign-trained lawyers, Vietnamese lawyers, law trainees, experienced legal translators and administrators. The firm also works with Vietnamese lawyers from associated Vietnamese law firms, as required.

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